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Do European Union measures against people smuggling constitute non-entry and
within this context violate refugee's rights?

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Berlin, 11 February 2024

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Abbreviations

1951 Convention	Convention Relating to the Status of Refugees
Art.	Article
CISA	Convention implementing the Schengen Agreement
Council Directive	Council Directive 2002/90/EC
ECFR	European Charter of Fundamental Rights
EU	European Union
EUTF	European Union Emergency Trust Fund for Stability
FRA	EU Fundamental Rights Agency
Framework Decision	Framework Decision 2002/946/JHA
p.	Page
Renewed Action Plan	Renewed EU Action Plan Against Migrant Smuggling (2021-2025)
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UN Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea, and Air
UNTOC	United Nations Convention against Transnational Organized Crime

Abstract

This dissertation critically examines the intersection of the European Union's measures against people smuggling and the protection of refugee rights. Against the backdrop of a global refugee crisis, the European Union's migration policies and border control strategies have come under scrutiny.

The European Union's commitment to human dignity, freedom, democracy, and human rights is foundational, yet criticism persists regarding its approach to refugees and migrants. The emphasis on border control and the closing of loopholes has led to a race between border authorities and migrant smugglers, with each party adapting to the evolving strategies of the other. A fundamental challenge arises from the divide between individuals entitled to international protection and those left unprotected. Refugees, who are able to seek refuge without prior permission, present a unique challenge to migration control efforts. In order to avoid having to grant protection to such individuals, developed states employ so called non-entrée policies, preventing refugees from entering their territories while ostensibly upholding international principles. Such non-entry policies are often connected to anti-smuggling measures, so that the interplay between the two will serve as a focal point for the analysis conducted in this research. The dissertation delves into the human rights aspects of people smuggling, examining the potential disparity between anti-smuggling efforts and the rights of asylum seekers in the light of non-entrée policies.

Through this comprehensive analysis, the dissertation aims to provide recommendations for enhancing the compatibility between the European Union's fight against people smuggling and the protection of refugee rights in the ongoing global refugee crisis.

“It is critical to preserve the integrity of the Asylum System, protect our common values. Providing asylum to those in need, but actively discouraging asylum shopping, while continue fighting against smuggling networks. [...] Smuggling networks today, get to decide who enters Europe.”¹ - Notis Mitarachi

I. Introduction

1. Research Question and its Relevance

The European Union (EU) is founded on respect for human dignity, freedom, democracy, equality, the rule of law, and the protection of human rights.² While this is given sufficient consideration in many areas, there is still much criticism of the EU's migration and refugee policies, which attempt to isolate Europe from the rest of the world in many respects.³

Mainly due to ongoing war and ethnic, tribal, and religious violence, many people worldwide continue to seek asylum away from their home countries.⁴ In an unprecedented occurrence, by the end of 2022, the global count of individuals who had been forcibly displaced had reached 108.4 million, with more than 35.3 million being classified as refugees.⁵ This marks the highest recorded figures in history.⁶ Three countries, namely the Syrian Arab Republic, Ukraine, and Afghanistan, accounted for 52 percent of all refugees and individuals requiring international protection.⁷ For some of those people, staying within or reaching the EU to apply for asylum there is the goal.

Many of the asylum seekers and refugees irregularly pursue this goal by embarking on their journey without a visa or any other authorization, to then cross the borders into the EU.⁸ While a large number of asylum seekers opt for land routes via the Western Balkan, most

¹ Speech by the Greek Minister of Migration and Asylum, Mr. Notis Mitarachi, at the 73rd Session of the Executive Committee of the United Nations High Commissioner for Refugees, <https://migration.gov.gr/n-mitarachi-smuggling-networks-today-get-to-decide-who-enters-europe-greece-is-committed-to-protecting-its-borders/>.

² Treaty on European Union (1992) Official Journal of the European Union, Art. 2

³ *Amnesty International*, *The Human Cost of Fortress Europe, Human Rights Violations against Migrants and Refugees at Europe's Borders*, p. 5.

⁴ *UNHCR*, *What is a Refugee?*, <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>

⁵ *UNHCR*, *Global Trends Report, Forced Displacement in 2022*, p. 2.

⁶ *UNHCR*, *Global Report 2022*, p. 4.

⁷ *UNHCR* (fn. 5), p. 3

⁸ *Frontex*, *EU's external borders in 2022: Number of irregular border crossings highest since 2016*, <https://www.frontex.europa.eu/media-centre/news/news-release/eu-s-external-borders-in-2022-number-of-irregular-border-crossings-highest-since-2016-YsAZ29, 2023>

asylum seekers take the route towards Europe through the Mediterranean Sea.⁹ Particularly via the Central Mediterranean Route, numerous asylum seekers cross the sea in their quest to reach Europe.¹⁰

To prevent people from crossing borders, the issue of border control has become a prominent concern for wealthier states and Europe in particular, leading them to invest significant financial resources in fortifying their external borders.¹¹ These states have developed a discerning approach towards individuals seeking entry by carefully selecting who they deem desirable, for example, tourists and skilled workers,¹² while categorically excluding unskilled individuals, which includes refugees who often do not have formal qualifications.¹³ This selective stance on migration has created a perpetual race between border authorities and migrant smugglers: with each loophole closed by border control measures, smugglers become more innovative in finding new ways to facilitate the entry of refugees and migrants into the country.¹⁴

Amidst this ongoing struggle, a fundamental challenge arises: the divide between individuals who possess the right to protection under international treaties signed by states and those who do not. Refugees hold a “trump card” in the realm of migration control, as they are entitled to seek refuge without seeking prior permission and are entitled to be protected.¹⁵ This particular circumstance poses a unique predicament for migration control efforts, as refugee status is not contingent upon formalities but rather on the actual situation faced by asylum seekers.¹⁶

Prior to being formally granted asylum, certain principles and rights must be upheld, including the principle of non-refoulement and the Right to Leave. The non-refoulement principle prohibits sending individuals back to situations where they could be subjected to

⁹ Bruno Umersbach, Number of illegal border crossings into the EU by refugees according to migration routes in the period up to April 2023., 2023.

¹⁰ *ibid.* (fn. 9)

¹¹ C. Jones/Kilpatrick/Maccanico, At What Cost? Funding the EU’s security, defence, and border policies 2021-2027, A guide for civil society on how EU budgets work, p. 12-16.

¹² see e.g. Directive (EU) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC v. 28.10.2021 Official Journal of the European Union 2021.

¹³ E.g. Kristina Stoeve, Education level of refugees: Education and training in the main countries of origin, (in Germany), p. 10.

¹⁴ Gammeltoft-Hansen/Hathaway Colum. J. Transnat’l L. 53, no. 2 (2015), 235 (p. 2).

¹⁵ *ibid.* (fn. 14), p. 237

¹⁶ *ibid.* (fn. 14), p. 237

persecution, even prior to the commencement of formal asylum procedures,¹⁷ while the Right to Leave affirms individuals' entitlement to exit a country.

To navigate this complex dilemma, developed states have embraced policies of non-entrée,¹⁸ employing various measures aimed at preventing refugees from entering their territories.¹⁹ The supposed beauty of non-entrée policies lies in their ability to insulate developed countries from the obligations of non-refoulement while outwardly maintaining their commitment to these international principles.²⁰ This approach can be seen as somewhat hypocritical, as developed states emphasize non-refoulement as an important matter for the international community while evading the burdens it entails.²¹

The implementation of refugee protection should ideally be a collective responsibility upheld in good faith by all nations.²² However, by adopting such practices as non-entrée, developed states inadvertently contribute to the disproportionate burden placed on low- and middle-income countries, which host the majority of the world's refugees.²³ This behaviour not only undermines the spirit of shared responsibility but also hampers efforts to address the global refugee crisis effectively.

One specific measure implemented by the EU that warrants further examination in this context are its efforts to combat people smuggling. While these measures are ostensibly carried out under the pretext of fighting crime, it is essential to consider their impact on asylum seekers and their rights. Many asylum seekers heavily rely on the services of people smugglers for their journey²⁴ and stopping them from doing so could potentially constitute non-entry. One of the primary arguments put forth by the EU in their fight against people smuggling is that traveling with smugglers, apart from smuggling being considered a criminal act, poses significant risks to migrants and refugees.²⁵ Particularly during sea crossings, the boats provided by smugglers are often unsafe, overcrowded, and disregard the fact that

¹⁷ FRA – European Union Agency for Fundamental Rights, *Scope of the principle of "non-refoulement" in contemporary border management*, Evolving areas of law, Dignity TK-01-16-875-EN-C, 2016, p. 14.

¹⁸ *also*: non-entry or non-arrival

¹⁹ Orchard, *A Right to flee*, p. 206.

²⁰ Gammeltoft-Hansen/Hathaway (fn. 14), p. 5-6

²¹ Gammeltoft-Hansen/Hathaway (fn. 14), p. 5-6

²² UNHCR, *Burdens and Responsibility Sharing*, Global Refugee Forum Fact Sheet, p. 2.

²³ UNHCR, *Classifying refugee host countries by income level*, <https://www.unhcr.org/refugee-statistics/insights/explainers/refugee-host-countries-income-level.html>.

²⁴ UNHCR, *UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 2000, para. 2.

²⁵ *European Commission, A Renewed EU Action Plan Against Migrant Smuggling (2021-2025)*, 2021, p. 1.

many individuals on board lack swimming skills.²⁶ Time and again, reports of asylum seekers and migrants losing their lives at sea while en route to Europe either capture headlines or, sadly, fail to garner attention due to the distressing regularity of such incidents. While crossing the Mediterranean more than 27.000 people lost their lives or have gone missing since 2014.²⁷

A dilemma arises: while refugees rely on the services of smugglers, the use of these services often simultaneously is their doom. This prompts the question: What measures are in place to safeguard these asylum seekers and migrants, and how are they treated by the EU in general? Additionally, does the EU have an obligation to protect them, and is it bound by international law beyond its territorial borders?

While various mechanisms are in place to counter people smuggling, their emphasis primarily centres on the fight against this activity and its criminalization, rather than on the protection of refugees themselves.²⁸ This dissertation aims to shed light on the human rights aspects of people smuggling, given its ongoing relevance. The focus will primarily be on whether the combat against people smuggling constitutes non-entry and if the EU's modus operandi compatible with asylum seeker's and refugee's rights. Are the measures in place protecting refugees or are they working against them?

Especially considered will be the potential disparity between efforts to combat people smuggling and the rights of asylum seekers. Despite measures taken to prevent people smuggling, a significant number of asylum seekers continue to rely on this means of transportation. This raises the question of whether the rights of asylum seekers are adequately addressed and protected in the face of intensified efforts against people smuggling.

Therefore, the **research question** will be: Do European Union Measures against People Smuggling constitute Non-Entry and within this context violate Refugee's Rights?

The answer to this research question will be approached through several sub-questions, which are as follows:

²⁶ *Anti- Human Trafficking and Migrant Smuggling Unit*, Issue Paper: Smuggling of Migrants by Sea, 2011, p. 33-34.

²⁷ *Missing Migrants Project*, Migration within the Mediterranean, <https://missingmigrants.iom.int/region/mediterranean>, 2023.

²⁸ *Arrouche/Fallone/Vosyliute*, Between Politics and inconvenient Evidence, Assessing the Renewed EU Action Plan against migrant smuggling, No 2021-01, 2021, p. 13.

1. What is people smuggling and what are the main objectives and strategies of the EU in combatting it?
2. What legal frameworks and international obligations guide the EU's approach to refugee protection?
3. What is non-entry?
4. Do EU measures against people smuggling constitute non-entry and the EU potentially violate refugee's rights in the context of non-entry?
5. Based on the analysis, what are the recommendations for improving the compatibility between the EU's combat against people smuggling and refugee protection?

2. Synopsis of Chapters

In **Chapter II**, the focus will lie on explaining the concept of people smuggling, providing a comprehensive definition, and distinguishing it from human trafficking. Based on this foundation, a detailed examination of the strategies and main objectives of the EU in combating human smuggling will be undertaken. Special attention will be given to the analysis of the Renewed EU Action Plan Against Migrant Smuggling (2021-2025) (Renewed Action Plan),²⁹ critically assessing its provisions and effectiveness. Moreover, Chapter II will explore the legal frameworks and international obligations that guide the EU's approach to refugee protection, shedding light on the relevant legal background.

Chapter III will subsequently delve into the exploration of non-entry in both its classical and cooperative forms. It will provide definitions for each, examine various subgroups within these categories and analyse whether such strategies are applied by the EU to combat people smuggling. To illustrate these concepts, the chapter will utilize examples of EU measures implemented in cooperation with Libya and Niger, especially in the context of the Renewed Action Plan.

In **Chapter IV** will then continue to identify refugee's rights potentially violated by the EU's actions regarding people smuggling. A comprehensive analysis will be conducted to understand their respective scopes and limitations, also within an extraterritorial context. Additionally, it will focus on their interrelation as well as the question whether there is a likelihood of their violation.

Finally, in **Chapter V**, a conclusion will be drawn, synthesizing the key findings from the previous chapters. The research will aim to propose possible solutions that align with

²⁹ Renewed Action Plan (fn. 25)

international refugee protection standards. Recommendations and strategies that reconcile the EU's efforts to combat human smuggling while upholding the rights and well-being of refugees will be presented. The chapter will serve as a culmination of the research, contributing to the ongoing discourse on this complex and important issue.

3. Current State of Research

The EU's refugee and asylum policies have repeatedly been subject to academic debates and analyses. For this dissertation, it is crucial to distinguish between different research domains. Firstly, the exploration of the legal framework surrounding people smuggling within the EU and in a broader international context. Secondly, the investigation into the potential infringements on the rights of refugees concerning non-entrée. In addition to the aforementioned objectives, an integral component of this dissertation involves a comprehensive examination of the existing interconnection and interplay between the research fields.

a) Current State of Research on the Legal Framework

The current state of research on the legal framework against people smuggling in the EU regarding refugees has been an active area of study. Researchers have focused on various aspects, including the examination of EU legislation, policies, and international legal instruments related to combating people smuggling and ensuring refugee protection.³⁰

The EU itself is highly committed to emphasizing the criminality of people smuggling, the violation of rights that potentially come with it, and addressing the associated need for combating it.³¹ Its focus lies on protecting its borders and cooperating with other countries to achieve this goal.³² On the other hand, scholars are already questioning whether people smuggling represents a serious form of criminality.³³ The assertion that facilitating irregular migration as well as migrant smuggling is exclusively controlled by mafias and transnational criminal organizations is being increasingly contested by academics.³⁴ Some go so far as to claim that the main effect of the criminalization of people smuggling is to legitimize law enforcement operations aimed at preventing refugees from pursuing protection according

³⁰ e.g. *Arrouche/Fallone/Vosyliute*, *Between Politics and inconvenient Evidence, Assessing the Renewed EU Action Plan against migrant smuggling*, No 2021-01, 2021.

³¹ *Renewed Action Plan* (fn. 25), p. 1

³² *Renewed Action Plan* (fn. 25), p. 1

³³ e.g. *Gerver* *Moral Philosophy and Politics* 8 (2021), 131.

³⁴ *Arrouche/Fallone/Vosyliute* (fn. 28), p. 1

to their own terms.³⁵ Studies have further explored the implementation and effectiveness of the EU's legal framework against people smuggling, examining its strengths, weaknesses, and gaps in this context.³⁶ Efforts have been made to assess the effectiveness of joint operations, information-sharing mechanisms, and capacity-building initiatives aimed at addressing the smuggling of migrants. Criticism has been directed towards the effectiveness, particularly in light of the persistently high numbers of smuggled migrants and asylum seekers, as well as the alarming rate of fatalities among them.³⁷

Furthermore, research has been conducted in a broader international context of people smuggling, which can contribute to enhancing our understanding of European regulations. Because many EU Member States are party to the UN Conventions in question,³⁸ such as the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol),³⁹ they also affect European Law. Especially due to Art. 78 (1) Treaty on the Functioning of the European Union (TFEU),⁴⁰ which determines that asylum policies must be in line with the Convention Relating to the Status of Refugees (1951 Convention)⁴¹ as well as other relevant treaties.⁴² Refugee protection in Europe therefore needs to be measured up against international protection standards.

While the trafficking of humans has predominantly been viewed as a concern of human rights, the focus on the human rights dimensions of smuggling which is often perceived as the facilitation of illegal migration, has been limited.⁴³ While human rights aspects and the protection of refugees are indeed part of the law and research in the field of human smuggling, the international legal focus, as the EU's, primarily also lies on the criminalization of smugglers.⁴⁴ This becomes particularly evident when examining the Protocol against the

³⁵ *Grewcock* Human Rights Defender December 2010, p. 14 ff. (16).

³⁶ *Arrouche/Fallone/Vosyliute*, Between Politics and inconvenient Evidence, Assessing the Renewed EU Action Plan against migrant smuggling, No 2021-01, 2021; *Fallone*, Understanding the future of European Union counter-smuggling policy : the renewed EU action plan against migrant smuggling (2021-2025); *Perkowski/Squire*, The anti-policy of European anti-smuggling as a site of contestation in the Mediterranean migration 'crisis', Nr. 12.

³⁷ *ibid.* (fn. 36)

³⁸ *UNODC*, Status Table of the UN Protocol against Migrant Smuggling, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en.

³⁹ UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime v. 12. December 2000.

⁴⁰ Treaty on the Functioning of the European Union (2012).

⁴¹ United Nations, Convention relating to the Status of Refugees. (1951).

⁴² Art. 78 (1) TFEU (fn. 40)

⁴³ *Obokata*, Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law, Nr. 2, p. 394.

⁴⁴ *ibid.* (fn. 43), p. 394

and the UN Model Law against the Smuggling of Migrants.⁴⁵ However, research has shown that the smuggling of human beings also gives rise to significant human rights concerns.⁴⁶

b) Current State of Research on non-entrée and the possibly violated rights and principles

Research on the specific principles and rights that are of concern in this context has also been conducted. Non-entrée has been the focus of different scholarly work. Among others, especially T. Gammeltoft-Hansen and J.C. Hathaway have conducted extensive research in the field which, amongst other work, will provide the base for this research. According to them, it is essential to differentiate between traditional non-entry policies and a new generation of non-entrée policies. Traditional non-entrée can be defined as “*comprising efforts by powerful states to prevent refugees from ever reaching their jurisdiction at which point they become entitled to the benefit of the duty of non-refoulement and other core rights set by the Refugee Convention*”.⁴⁷ They argue that as traditional methods of non-entrée have become less effective, influential nations have adopted a new wave of deterrent systems designed to address the limitations of previous practices.⁴⁸ These innovative approaches rely on international collaboration, implementing deterrence measures within the home country or a transit nation's territory or jurisdiction.⁴⁹ While the EU is aware of the ambiguity surrounding the issue, it justifies its actions as lawful under the guise of protecting human rights and combating crime.⁵⁰ Furthermore, numerous scholars have conducted extensive research on the externalization of European border controls and the cooperation with third countries, approaching it from various angles and looking at the legal effect it has in different regions and contexts.⁵¹

Because the EU's anti-smuggling measures take effect especially before its external borders, the question arises in relation to different rights and principles, such as non-refoulement, as to which extent this principle can be applied extraterritorially. The question has sparked significant controversy before the courts⁵² as well as scholarly discussion.

⁴⁵ UNODC, Model Law against the Smuggling of Migrants, 2010.

⁴⁶ Obokata (fn. 43), p. 394

⁴⁷ Gammeltoft-Hansen/Hathaway (fn. 14), p. 244

⁴⁸ Gammeltoft-Hansen/Hathaway (fn. 14), p. 248

⁴⁹ Gammeltoft-Hansen/Hathaway (fn. 14), p. 248

⁵⁰ See Renewed Action Plan (fn. 25)

⁵¹ e.g.: Blasis/Pitzalis J. Mod. Afr. Stud. 2023, 1; Gammeltoft-Hansen/Tan Journal on Migration and Human Security Volume 5 Number 1 (2017), 28.

⁵² e.g. Hirsi Jamaa and Others v. Italy, Application no. 27765/09, European Court of Human Rights, 2012.

Because non-entrée is not a right refugees can refer to per se but rather a term that is used to describe different kinds of measures applied by states the inquiry into potentially violated rights becomes essential. Research, particularly within the context of the EU's measures aimed at deterring refugees, has explored this topic.⁵³ The principle of non-entrée moves within a rather grey area legally. While the EU capitalizes on the fact that the entire subject operates in a somewhat ambiguous legal realm, others have expressed their unequivocal stance on the matter.

c) Connecting them both

Not a lot of research is to be found on the question of whether the EU anti-smuggling measures and the Renewed Action Plan specifically can be considered as a violation of the non-entrée principle and the different rights that stand behind it. While the Renewed Action Plan has been subject to criticism in various aspects,⁵⁴ an in-depth analysis of the violation of the non-entrée in this context has not yet been conducted. To bring the two research fields together and conduct an in-depth analysis therefore is the goal of this dissertation.

4. Methodology

This research will primarily employ a literature review and desktop research methodology. It will involve a comprehensive examination and analysis of existing literature to identify gaps, establish contextual understanding, and develop a solid theoretical framework for the study. The literature review will encompass the aforementioned sources as well as supplementary scholarly insights and primary resources, including relevant documents provided by the EU and the UN. By thoroughly analysing these sources, the aim is to generate a comprehensive and well-informed response to the research question.

This approach ensures that the study benefits from a broad range of perspectives, theories, and empirical evidence available in the literature. It allows for a systematic exploration of the topic and facilitates the identification of key themes, trends, and potential areas for further investigation. By synthesizing and critically evaluating the relevant literature and primary resources, this research aims to contribute to the existing knowledge base and provide valuable insights into the topic at hand.

⁵³ e.g. *Markard* EJILAW 27 (2016), 591.

⁵⁴ e.g. *Carrera/Guild/Aliverti* Fit for purpose? The facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants.

II. Normative Framework

To be able to fully comprehend measures against people smuggling, a definition must be established. As a starting point, the definition used in international law will be examined and later compared to the counterpart in European law.

1. Definitions

a) People Smuggling

Art. 3a) UN Smuggling Protocol determines that

*“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.*⁵⁵

Three significant elements are included in this definition: firstly, the presence of a smuggler or intermediary who facilitates the cross-border movement is required.⁵⁶ The suggestion to include procurement of illegal residence within the definition did not withstand the negotiation process,⁵⁷ is however mentioned in Art. 6 (1c).⁵⁸

Secondly, it involves, possibly amongst other things, the migrant or someone on their behalf making a payment to the smuggler.⁵⁹ The exact meaning of *“financial or other material benefit”* is not explicitly outlined in the Protocol. It is however clear that the intention extends beyond simple monetary transactions.⁶⁰ This concept is clarified in the accompanying Interpretative Note to the mentioned provision within the context of the definition of an *“organized criminal group”*.⁶¹ The note emphasizes that the phrase *“in order to obtain, directly or indirectly, a financial or other material benefit”* should be interpreted broadly, encompassing various scenarios, including crimes motivated by sexual

⁵⁵ Art. 3a) Protocol against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organized Crime v. 12. December 2000 2000.

⁵⁶ *Ilse van Liempt*, A Critical Insight into Europe’s Criminalisation of Human Smuggling, January, Issue 2016:3epa, p. 3.

⁵⁷ *United Nations Office on Drugs and Crime*, Travaux Préparatoires, of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, p. 464 ff.

⁵⁸ Art. 6 (1c) UN Smuggling Protocol (fn. 39): *“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit: Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.”*

⁵⁹ van Liempt (fn. 56), p. 3

⁶⁰ *Gallagher/David*, The international law of migrant smuggling, p. 46.

⁶¹ UNODC (fn. 57), Notes by the Secretariat, p. 15

gratification.⁶² The inclusion of the term "*financial or other material benefit*" in the definition was deliberate, aiming to exclude the actions of individuals offering assistance to migrants due to humanitarian motives or familial bonds from falling under the Protocol's jurisdiction; the intention was not to classify the actions of family members or support groups as criminal.⁶³

The third and last part of the definition is that the migrant's participation in the transaction is voluntary, indicating a choice made willingly.⁶⁴

b) Human Trafficking

In addition to addressing people smuggling, the global community is actively working to combat human trafficking. Due to frequent confusion, particularly in the media, between the terms "people smuggling" and "human trafficking," it is important to establish a clear distinction. The UN defines Human Trafficking as the "*recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*"⁶⁵

One key difference between people smuggling and human trafficking is the aspect of transnationality. While smuggling typically occurs across international borders, trafficking can occur within the confines of a country's borders.⁶⁶ Furthermore, a differentiation can be made regarding consent. People smuggling focuses on facilitating the transportation of individuals across borders and doesn't necessarily involve force or coercion, deception, or abuse of power while victims of trafficking on the other hand have not consented.⁶⁷

Furthermore, trafficking relies on the continued exploitation of the victims to secure profits while people smuggling generates profit through the act of bringing another person across the border.⁶⁸ In the international context, the element of exploitation was explicitly

⁶² UNODC (fn. 57), Notes by the Secretariat, p. 15

⁶³ UNODC (fn. 57), p. 469

⁶⁴ van Liempt (fn. 56), p. 3

⁶⁵ *United Nations*, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, 2000, Art. 3 (a).

⁶⁶ *Inter-Agency Coordination Group*, ICAT Issue Brief, People Smuggling and Human Trafficking, p. 1.

⁶⁷ *ibid.* (fn. 66), p. 2

⁶⁸ Carrera/Guild/Aliverti et.al. (fn. 54), p. 22

removed from the definition to focus more on migrant smuggling as an action rather than the impact it has on the people smuggled.⁶⁹

However, there is a partial association drawn between the two, as people smuggling and human trafficking are frequently interconnected, with smuggled individuals potentially falling victim to human traffickers for various forms of exploitation.⁷⁰ Moreover, both trafficked persons and smuggled migrants often fall victim to additional crimes, such as assault, abuse, violence, or other human rights violations.⁷¹ These vulnerable individuals remain at risk of further exploitation and mistreatment during their journey or within their destination countries.⁷² Understanding these differences and commonalities is essential for effective response strategies, policy development, and the protection of the rights and well-being of those impacted by these illicit activities. Even though they are both classified as crimes, people smuggling is often perceived as less severe because it serves the interests of individuals seeking entry into Europe. Especially because people smuggling enables refugees to exercise their right to seek asylum, there is a more extensive ongoing debate between activists' advocacy for refugee rights and political perspectives on people smuggling. Therefore, this work will also centre on the topic of people smuggling.

2. History

To gain a more profound comprehension of the evolution of the regime against people smuggling and consequently enhance our understanding of its current form, we will briefly explore the historical backdrop of this phenomenon, tracing its development over time and examine how it has culminated in its present state.

Even though states have always maintained and safeguarded their sovereign authority to decide who is permitted to access their territory,⁷³ until very recently, illegally facilitated migration, though considered a criminal offense in many countries, lacked international legal regulation. It was not until the 1990s that the global community, with the guidance of the UN, united to formulate a shared comprehension of migrant smuggling and implement a treaty-based collaboration framework for a cohesive response.⁷⁴ But despite the relatively recent legislation addressing people smuggling, the act itself has been in existence for a

⁶⁹ Gallagher/David (fn. 60), p. 44

⁷⁰ Renewed Action Plan (fn. 25), p. 2

⁷¹ UNODC, *Accessing Justice: Challenges faced by trafficked persons and smuggled migrants*, Policy Brief, 2023, p. 4.

⁷² *Ibid.* (fn. 71), p. 4

⁷³ *Dandurand/Jahn* in Winterdyk/J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, 783 (p. 785).

⁷⁴ Gallagher/David (fn. 60), p. 1

much longer period so that in essence, people smuggling is not a new phenomenon but rather a recently labelled term for an age-old practice.⁷⁵ Through various examples, such as the Nazi era in Germany, the Cold War, or the wars in Indochina, it became evident that people smuggling played a significant role even before international agreements were established.⁷⁶

The driving force behind the development of a legal regulation was the noticeable surge in irregular migration to key destination countries, notably the US and some European countries, during the 1980s and 1990s.⁷⁷ As demand for such migration increased rapidly, professionalization of migrant smuggling became prevalent, given the tighter immigration controls imposed by preferred destinations.⁷⁸

Due to these recurring circumstances, the international community made the decision to become active. Initially, the UN's response was limited to adopting a resolution by the UN Economic and Social Council in 1994.⁷⁹ However, subsequent drafts of more comprehensive legislation, put forth by Italy and Austria, led to the creation of the UN Smuggling Protocol.⁸⁰

Recognizing the necessity for a holistic approach to address the matter, destination states emphasized the significance of targeting facilitators of irregular migration, in addition to addressing the migrants themselves.⁸¹ Consequently, the outcome of this collaborative effort was the formulation of a specialized legal regime, consisting of the UN Smuggling Protocol and its parent instrument, the United Nations Convention against Transnational Organized Crime (UNTOC).⁸² Beyond defining smuggling, it outlined various obligations for States, ranging from criminalizing migrant smuggling and related offenses to fostering cooperation in exchanging information, evidence, and intelligence.⁸³ This approach aimed to establish a more coordinated and effective response to confront the growing challenge of migrant smuggling. Furthermore, in contrast to earlier drafts that solely centred on criminalization and international cooperation without addressing the protection of

⁷⁵ *Schloenhardt* in *Boister/Gless/Jeßberger* (eds.), *Histories of Transnational Criminal Law* (p. 162).

⁷⁶ *ibid.* (fn. 74), p. 163 ff.

⁷⁷ *Gallagher/David* (fn. 60), p. 1

⁷⁸ *Gallagher/David* (fn. 60), p. 1

⁷⁹ UN Economic and Social Council, *Criminal justice action to combat the organized smuggling of illegal migrants across national boundaries*, UN Doc E/1994/14 (25 July 1994).

⁸⁰ *Schloenhardt* (fn. 75), p. 168 f.

⁸¹ *Gallagher/David* (fn. 60), p. 1

⁸² *United Nations Convention against Transnational Organized Crime*, 2225 UNTS 209, done Nov. 15, 2000, entered into force Sept. 29, 2003.

⁸³ *Gallagher/David* (fn. 60), p. 2

smuggled migrants, the UN Smuggling Protocol now, to some extent, acknowledged the rights of the migrants involved.⁸⁴

In the wake of these developments, the EU implemented specific measures against people smuggling. At present, the EU has implemented the only legally binding regional measures concerning the smuggling of migrants, which were established in the early 2000s.⁸⁵ Integral to a comprehensive framework aimed at harmonizing asylum and immigration policies among Member States, these measures also address criminal activities and the misuse of asylum systems linked to immigration.⁸⁶

The origins of an offense resembling the smuggling of migrants in Europe can be traced back to art. 27(1) of the Convention implementing the Schengen Agreement (CISA)⁸⁷ in 1985⁸⁸ which required state parties to impose appropriate penalties on any person who, for financial gain, assists or attempts to assist an alien in breaching the laws on entry and residence of aliens within the territory of one of the Contracting Parties.⁸⁹

In November 2002, the Council of the European Union adopted the so-called Facilitator's Package, consisting of Directive 2002/90/EC⁹⁰ and Framework Decision 2002/946/JHA.⁹¹ Directive 2002/946/JHA, which replaced Art. 27 CISA,⁹² with the aim of preventing the smuggling of migrants.

3. International Law and People Smuggling

To understand the standards at an international level better and to put the European legal framework into perspective later on, we are first going to take a look at the international regulations regarding people smuggling. The UNTOC is the core of the legal framework addressing transnational organized crime. It is a legally binding document that commits ratifying States to implement a range of actions to counter transnational organized crime

⁸⁴ see UN Smuggling Protocol (fn. 39), Art. 2

⁸⁵ Schloenhardt (fn. 75), p. 173

⁸⁶ *Mallia*, Migrant Smuggling by Sea, p. 22.

⁸⁷ Convention implementing the Schengen Agreement. (1985, July 14). Official Journal of the European Communities, C 239, 1-19.

⁸⁸ Schloenhardt (fn. 75), p. 173

⁸⁹ CISA (fn. 87), Art. 27 (1)

⁹⁰ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit, and residence v. 05.12.2022 Official Journal of the European Communities 2022.

⁹¹ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence Official Journal of the European Communities.

⁹² Council Directive (fn. 90), Art. 5

and is supplemented by three protocols: the Trafficking Protocol,⁹³ the Firearms Protocol,⁹⁴ and for this research most importantly the Smuggling Protocol.⁹⁵ The Smuggling Protocol was adopted by the UN General Assembly on 15 November 2000, was made available for signatories at the Signing Conference held in Palermo in December 2000, and officially came into effect on 28 January 2004.⁹⁶ Presently, it has 151 State Parties and has been ratified by the entire EU as well as all EU Member States except Ireland.⁹⁷

a) Content and Aim

Art. 31 of the UNTOC outlines a series of actions that states should implement to prevent various crimes, including migrant smuggling.⁹⁸ In addition, the Protocol emphasizes the need for comprehensive measures to prevent migrant smuggling.

While the UN Smuggling Protocol does not aim to establish a novel legal framework for smuggling by sea, but its pertinent clauses rather reaffirm fundamental principles of international maritime law enshrined in the United Nations Convention on the Law of the Sea,⁹⁹ its objectives are more specific.

It explicitly aims to achieve three objectives: 1) combat the smuggling of migrants, 2) promote international cooperation, and 3) protect the rights of smuggled migrants.¹⁰⁰ The Protocol's primary approach for achieving these objectives is by criminalizing specific behaviours, *“serving not only to provide for the deterrence and punishment of the smuggling of migrants, but as the basis for the numerous forms of prevention, international cooperation, technical assistance and other measures set out in the instruments.”*¹⁰¹ Furthermore, the Protocol particularly emphasizes strengthening border controls as a

⁹³ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319, done Nov. 15, 2000, entered into force Dec. 25, 2003 [Trafficking Protocol].

⁹⁴ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, 2326 UNTS 208, done May 31, 2001, entered into force July 3, 2005 [Firearms Protocol].

⁹⁵ see fn. 54

⁹⁶ see Preamble and Art. 21 Smuggling Protocol (fn. 39)

⁹⁷ Status of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime; https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-12-b&chapter=18&clang=_en.

⁹⁸ Art. 31 UNTOC (fn. 82)

⁹⁹ Gallagher/David (fn. 60), p. 55-56

¹⁰⁰ Smuggling Protocol (fn. 39), Art. 2

¹⁰¹ *UNODC, Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea And Air, supplementing the UNTOC, Part Three, p. 349, para. 55.*

significant prevention measure.¹⁰² However, official records of the preparatory negotiations for the creation of the Convention and its Protocols reveal a consensus that regarded migrants as victims and thus should not be criminalized.¹⁰³

On the other hand, the aspect of prevention involving the mitigation of incentives or pressures driving individuals to engage with migrant smugglers receives limited consideration.¹⁰⁴ Instead of a specific and robust requirement, States Parties are presented with a broad and less stringent obligation to enhance or support "development programmes and cooperation" aimed at addressing the underlying socio-economic factors that contribute to migrant smuggling, such as poverty and underdevelopment.¹⁰⁵

b) Implementation

In response to the General Assembly's request to the Secretary-General, the United Nations Office on Drugs and Crime (UNODC) developed the UN Model Law against Migrant Smuggling.¹⁰⁶ This initiative aimed to assist and promote the efforts of Member States in ratifying and enacting the UNTOC and its associated Protocols.¹⁰⁷ The primary objective of this model law was to offer guidance to nations, particularly in adhering to the provisions outlined in the UN Smuggling Protocol.¹⁰⁸

However, the implementation of the global legal framework concerning migrant smuggling and human trafficking has faced challenges, progressing slowly and often encountering difficulties¹⁰⁹ so its full implementation remains pending.¹¹⁰

c) Effect and Criticism

The international legal framework regarding people smuggling has faced criticism since its establishment. Particularly in recent years, with people smuggling continuously being a lucrative enterprise, concerns have arisen about whether the criminalization approach of

¹⁰² UN Smuggling Protocol (fn. 39), Art. 11

¹⁰³ UNODC, *Travaux Préparatoires* (fn. 57), p. 483, Notes by the Secretariat

¹⁰⁴ Gallagher/David (fn. 60), p. 61

¹⁰⁵ Art. 15(3) UN Smuggling Protocol (fn. 39)

¹⁰⁶ UNODC, *Model Law against the Smuggling of Migrants*, 2010, p. 1.

¹⁰⁷ *ibid.* (fn. 106), Art. 1

¹⁰⁸ *ibid.* (fn. 106), p. 1

¹⁰⁹ *Dandurand/Chin* in Boister/Currie (eds.), *Routledge handbook of transnational criminal law*, 437 (p. 440 ff.).

¹¹⁰ *Dandurand/Jahn* in Winterdyk/J. Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, 783 (p. 790).

the international community is the most effective strategy for addressing the situation.¹¹¹ Smuggling flourishes due to the urgent demand for legal pathways for movement, constrained by limited options, mobility obstacles, and interception tactics that exacerbate the issue.¹¹² This phenomenon traces back to restrictive migration policies, compelling migrants to resort to covert means despite significant risks, while intensified border security paradoxically strengthens smugglers' influence and profits.¹¹³ Yet, relying solely on criminal justice to combat smuggling inadvertently reinforces the industry it aims to dismantle.¹¹⁴ Treating all smugglers as criminals and attributing migration-related tragedies oversimplifies the intricate issue, masking states' role in the trade's growth.¹¹⁵ While the global narrative emphasizes criminal aspects, practical realities often reveal smugglers as vital for vulnerable refugees hindered by barriers.¹¹⁶ Research even suggests irregular migration may not solely involve organized crime but rather reflect longstanding social connections and migration traditions, characterized by solidarity and reciprocity.¹¹⁷

States harnessed criminal justice for border control and immigration, but this at times shifted to targeting immigrants, covering their bias through border security.¹¹⁸ Migrant smuggling intertwined with human trafficking has led to various forms of discrimination based on gender, race, or ethnicity.¹¹⁹

Further challenges arise in maintaining a clear divide between refugee and immigration law, with resistance from states seeking control over refugee movements which often leads to criminalizing asylum-seeking, conflicting with criminal law principles.¹²⁰ The extensive criminalization of smuggling, encompassing numerous facilitation offenses, frequently results in the criminalization of humanitarian assistance for refugees and those fleeing crises, thereby worsening the vulnerability of migrants and refugees.¹²¹

¹¹¹ *ibid.* (fn. 110), p. 789

¹¹² *ibid.* (fn. 110), p. 789

¹¹³ *Reitano*, The role of smugglers in protection for the people they move, Presentation to the UNHCR Annual Consultations with NGOs 2017, 2017.

¹¹⁴ *ibid.* (fn. 113)

¹¹⁵ *Tinti/Reitano*, Migrant, refugee, smuggler, savior.

¹¹⁶ *Reitano* (fn. 113)

¹¹⁷ *Sanchez* Journal on Migration and Human Security (p. 11).

¹¹⁸ *Dandurand/Jahn* (fn. 110), p. 792

¹¹⁹ *Andrijasevic* in *Carrera/Guild/Ruete* (eds.), Irregular migration, trafficking and smuggling of human beings, pp. 58-64 (p. 58 ff.).

¹²⁰ *Dauvergne* in *Aas/Bosworth* (eds.), The Borders of Punishment, 76 (p. 76).

¹²¹ *Dandurand/Jahn* (fn. 110), p. 793

Therefore, while the attempt to regulate people smuggling on an international level is commendable, a lot is yet to be done when it comes to the international legal framework and its implementation.

4. European Law and People Smuggling

As we have seen, Europe provides different regulations regarding people smuggling. Especially since the Tampere European Council of 1999, one crucial aspect of the EU's unified policy on migration and asylum has been to combat irregular migration, emphasizing the prevention of such migration and placing significant importance on the "fight against human smuggling" as a fundamental objective within the EU's Area of Freedom, Security, and Justice.¹²²

Known as the Facilitators' Package Council Directive 2002/90/EC (Council Directive) and Framework Decision 2002/946/JHA (Framework Decision) are the two main legal instruments adopted by the EU to address the issue of migrant smuggling. The Council Directive defines the facilitation of unauthorized entry, transit, and residence¹²³ while the Framework Decision focuses on strengthening the penal framework to prevent the facilitation of unauthorized entry, transit, and residence.¹²⁴

a) Definition of People Smuggling in European Law

While a definition for people smuggling in the international context has already been established the question remains how it is defined in the European context. According to the Council Directive, people smuggling is defined as the facilitation of the unauthorized entry, transit, or the facilitation, for financial gain, of the residence of a person in a Member State, in breach of that state's immigration laws.¹²⁵

It immediately catches the eye that on one hand, the requirement to act for "financial gain" is omitted, at least with regard to entry and transit, while on the other hand, enabling residence is explicitly included in the European definition.

¹²² European Council, Presidency Conclusions, Tampere European Council, 15-16 October, 1999, point 3 and point 24.

¹²³ Council Directive (fn. 90), Art. 1 ff.

¹²⁴ Framework Decision (fn. 91), Art. 1 ff.

¹²⁵ Council Directive (fn. 90), Art. 1(1)

b) Content and Aim

The primary emphasis within the European legal framework on people smuggling revolves around the Facilitator's Package, as mentioned earlier. Nevertheless, the (Renewed) Action Plan against Migrant Smuggling also holds importance in determining additional measures the EU intends to pursue in this context and will therefore be explored further in the following.

(1) Facilitator's Package

The Facilitators Package was developed and approved to address irregular migration, including unauthorized border crossings and the activities of networks that exploit human beings.¹²⁶ Its objective is to enhance the legal structure related to aiding unauthorized entry into the EU's external borders and to deem unlawful the deliberate support given to individuals who are not citizens of a Member State, enabling them to breach the entry or transit regulations of a Member State.¹²⁷

The main focus of the legislation lies on the penalization of the facilitation of irregular migration, which involves third-country nationals entering, transiting, or residing irregularly within a Member State's territory.¹²⁸ While irregular entry and transition into a Member State are straightforward in the sense that they involve migrants crossing borders into the Member State without the required permits, the reasons that may lead migrants to fall into irregularity while residing in a Member State vary and include examples such as the refusal of asylum, or being born in the EU to undocumented parents.¹²⁹

The Council Directive aims to prevent irregular migration and combat human smuggling by providing a precise definition of the offenses subject to penalties under the Framework Decision.¹³⁰ According to the Council Directive and the accompanying Framework Decision, EU Member States must implement legislation that introduces criminal sanctions against the facilitation of irregular entry, transit, and residence so that any individuals who assist, support, or facilitate irregular migration in any way may face criminal penalties.¹³¹ Such criminal penalties should be effective, proportionate, dissuasive and may be accompanied

¹²⁶ *Minetti* New Journal of European Criminal Law 11 (2020), 335 (p. 336).

¹²⁷ *Carrera/Guild/Aliverti et.al.* (fn. 54), p. 10

¹²⁸ Council Directive (fn. 90), Art. 1

¹²⁹ *Carrera/Guild/Aliverti et.al.* (fn. 54), p. 24

¹³⁰ Council Directive (fn. 90), Art. 1

¹³¹ Council Directive (fn. 90), Art. 1

by supplementary measures, such as confiscation of means of transport, prohibition from practicing certain occupations, or deportation of offenders.¹³²

The Council Directive's definition of facilitation includes two different types of behaviour in its Art. 1(1). Either intentionally assisting a person who is not a national of a Member State to **enter, or transit** across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens or intentionally assisting 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 **for financial gain**.¹³³ It therefore includes the assistance to enter, transit, or reside in a Member State in violation of that Member State's law. It is important to point out, that opposite to the assistance for entry or transit, the assistance to residence has the additional requirement of doing so for financial gain.

The definition formerly provided by Art. 27(1) CISA, required imposing "*appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens.*"¹³⁴ Here, the inclusion of the requirement for "financial gain" was extended to all variants of assistance.¹³⁵

The Framework Decision further complements the Council Directive¹³⁶ and focuses on strengthening the penal framework to prevent the facilitation of unauthorized entry, transit, and residence within the EU.¹³⁷ It sets out minimum rules for penalties, liability of legal persons, and jurisdiction for offenses related to migrant smuggling.¹³⁸ It stipulates that violations committed for financial gain can lead to custodial sentences with a maximum duration of not less than eight years.¹³⁹ This applies when these violations are carried out as part of activities conducted by a criminal organization, defined as a structured association of more than two persons established over time, or when the lives of the victims are

¹³² Council Directive (fn. 90), Art. 3

¹³³ Highlighted by the editor

¹³⁴ CISA (fn. 87), Art. 27 (1)

¹³⁵ Carrera/Guild/Aliverti et.al. (fn. 54), p. 25

¹³⁶ Council Directive (fn. 90), Point 3; Framework Decision (fn. 91), Point 3

¹³⁷ European Commission, Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, COM/2006/0770 final, Brussels, 6 December 2006, para. 2.2.

¹³⁸ Framework Decision (fn. 91), Art. 1-4

¹³⁹ Framework Decision (fn. 91), Art. 1(3)

endangered.¹⁴⁰ Moreover, the Framework Decision includes some limited safeguards for refugees and asylum seekers who become victims of smuggling. It emphasizes the importance of applying anti-smuggling provisions while adhering to the principle of non-refoulement, in compliance with the 1951 Refugee Convention and the Protocol Relating to the Status of Refugees (the 'New York Protocol') of 1967.¹⁴¹

The European approach to tackling the facilitation of illegal entry stands out from others due to its emphasis on *preventing* irregular arrivals and addressing the crime of illegal entry facilitation.¹⁴² Notably, the Framework Decision specifically targets this criminal offense, which deals with the establishment and reinforcement of the penal framework surrounding illegal entry facilitation even though the provision is part of the developing field of EU criminal law and should therefore ideally have a rehabilitative function.¹⁴³

But even with this legal framework in place to counteract people smuggling, people smuggling continued to grow over the years and there were repeated incidents of fatalities, especially in the Mediterranean region, involving people attempting the journey to Europe.¹⁴⁴ These repeated boat accidents in the Mediterranean exerted pressure on European politicians to take action.

The prevailing response has been to increase efforts in combating smuggling, leading to a rise in maritime border patrolling, with the EU, its institutions, and Member States launching various operations over the years to prevent people smuggling,¹⁴⁵ especially in cooperation with third countries as we will see in the next chapter.

(2) Action Plan against Migrant Smuggling

The EU Action Plan against Migrant Smuggling (2015-2020) was formulated following the adoption of the European Agenda on Migration and the European Agenda on Security in 2015. Both agendas prioritized combatting migrant smuggling to prevent exploitation by criminal networks and reduce incentives for irregular migration while the EU Action Plan outlined specific actions required to implement these agendas, incorporating key measures identified in them.¹⁴⁶ The EU Action Plan against Migrant Smuggling is a political initiative

¹⁴⁰ *European Union*, Joint Action 98-733-JHA, OJ L 351, 29.12.1998, p. 1., Art. 1.

¹⁴¹ Framework Decision (fn. 91), Art. 6

¹⁴² Minetti (fn. 126), p. 336

¹⁴³ Minetti (fn. 126), p. 336

¹⁴⁴ *Shelly*, Human Smuggling and Trafficking into Europe - a comparative perspective, 2014, p. 2; *UNODC*, Global Study on the Smuggling of Migrants, 2018, p. 150, 157.

¹⁴⁵ Van Liempt (fn. 5), p. 4

¹⁴⁶ Arrouche/Fallone/Vosyliute (fn. 28), p. 2 ff.

and comprehensive set of measures aimed at combating migrant smuggling and improving the situation of victims. It further complements the Facilitator's Package, working together to develop a comprehensive strategy against migrant smuggling, and offers political guidelines and measures to raise awareness, combat smuggling networks, protect victims, and strengthen criminal prosecution.

Stressing the ruthlessness of criminals providing smuggling services and the profits that go hand in hand with the business, the EU Action Plan against Migrant Smuggling focused on cooperative measures on EU level through enhanced police and judicial response, improved gathering and sharing of information, enhanced prevention of smuggling and assistance to vulnerable migrants as well as stronger cooperation with third countries.¹⁴⁷ With its expiration in 2020, the Renewed Action Plan came into effect, which serves as the successor to the previous EU Action Plan against Migrant Smuggling and incorporates the points mentioned therein which was priorly hinted already.¹⁴⁸ The narrative adapted for the EU Action Plan against Migrant Smuggling as well as the Renewed Action Plan relies on the portrayal of migrant smugglers as organized, oftentimes violent criminals, driven by profit and controlled by transnational networks while the people making use of the smuggling services are portrayed as illegitimate asylum seekers.¹⁴⁹ This then laid the groundwork for the justification of actions against anyone helping migrants on their journey to the EU.¹⁵⁰

Furthermore, the Renewed Action Plan encompasses various key components strategically designed to adapt to evolving challenges and provide a comprehensive framework to combat migrant smuggling. It emphasizes enhanced operational measures, border control, disrupting smuggling networks, and strengthening information-sharing among EU Member States.¹⁵¹ The plan also focuses on preventing irregular migration by raising public awareness¹⁵² and addressing root causes.¹⁵³

Cooperation plays a central role, both within the EU and with third countries, recognizing the global nature of the issue.¹⁵⁴ Victim protection is said to be a priority, providing

¹⁴⁷ Arrouche/Fallone/Vosyliute (fn. 28), p. 3

¹⁴⁸ Johansson, Y. (2021), 'Fighting Migrant Smugglers: Have Your Say!', Blog Post, European Commission, 20 March, https://commissioners.ec.europa.eu/news/fighting-migrant-smugglers-have-your-say-2021-03-20_en.

¹⁴⁹ Arrouche/Fallone/Vosyliute (fn. 28), p. 2

¹⁵⁰ *Sajjad Global Studies Quarterly* 2 (2022) (p. 5).

¹⁵¹ Renewed Action Plan (fn. 14), p. 6

¹⁵² Renewed Action Plan (fn. 14), p. 9

¹⁵³ Renewed Action Plan (fn. 14), p. 11

¹⁵⁴ Renewed Action Plan (fn. 14), p. 11

comprehensive support to those affected by smuggling.¹⁵⁵ Legal measures enhance prosecution and capacity building supports Member States in combating smuggling effectively. The plan includes mechanisms for monitoring and evaluation to ensure accountability.¹⁵⁶

In essence, the Renewed Action Plan offers a multifaceted strategy to counter the challenge of people smuggling, spanning prevention, cooperation, victim protection, legal measures, and capacity building.

(3) New Pact on Migration and Asylum

Furthermore, the New Pact on Migration and Asylum is in the making.¹⁵⁷ Proposed in September 2020, it outlines a comprehensive framework of regulations and strategies aimed at establishing a more equitable, effective, and sustainable migration and asylum system within the EU.¹⁵⁸ This initiative envisions the management and regularization of migration over the long run, ensuring predictability, transparency, and humane treatment for individuals entering the EU.¹⁵⁹ Moreover, the Pact strives to foster a unified approach to migration and asylum, grounded in principles of solidarity, accountability, and the safeguarding of human rights.¹⁶⁰

A joint declaration was endorsed by the European Parliament and the five Council Presidencies, outlining a coordinated schedule for the preparation, organization, and endorsement of propositions within the scope of the Common European Asylum System and the New Pact.¹⁶¹ This collective effort aims to finalize negotiations by February 2024, aligning with the conclusion of this legislative term.¹⁶²

The recently concluded proposal for a regulation concerning the management of asylum and migration, finalized in June 2023, indicates the inclusion of efforts to counter migrant smuggling within the framework of the New Pact.¹⁶³ Even though smuggling does not hold

¹⁵⁵ Renewed Action Plan (fn. 14), p. 20

¹⁵⁶ Renewed Action Plan (fn. 14), p. 18

¹⁵⁷ *Council of the EU*, Migration policy: Council reaches agreement on key asylum and migration laws, <https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/>, 2023.

¹⁵⁸ *ibid.* (fn. 157)

¹⁵⁹ *ibid.* (fn. 157)

¹⁶⁰ *ibid.* (fn. 157)

¹⁶¹ *ibid.* (fn. 157)

¹⁶² *ibid.* (fn. 157)

¹⁶³ *General Secretariat of the Council*, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the

a prominent position within this pact, it is referenced at several points throughout. Member States should work towards the “*effective [...] prevention of irregular migration and combatting of migrant smuggling and trafficking in human beings while ensuring the right to apply for international protection*”¹⁶⁴ and “*take all measures necessary and proportionate to prevent and reduce [...] irregular migration to the territories of the Member States, in close cooperation and partnership with relevant third countries, including as regards the prevention and fight against migrant smuggling*”.¹⁶⁵

As this is not yet passed, the focus in the following will therefore be kept on the Facilitator’s Package as well as the Renewed Action Plan.

(4) Implementation

Following the enactment of the Council Directive, EU Member States were obliged to establish penalties that were “*effective, proportionate, and dissuasive*” for these transgressions.¹⁶⁶ While the first offense involving humanitarian assistance allows some leniency, the absence of a formal humanitarian exemption in EU law has resulted in varied interpretations during its incorporation into national legal systems. Currently, all 28 EU Member States criminalize aiding irregular entry. Nonetheless, a report by the EU Fundamental Rights Agency (FRA) highlights that only a quarter of these nations include provisions allowing for exemption from penalties when irregular entry is driven by humanitarian motives.¹⁶⁷ The report further emphasized that more than a quarter of Member States omitted provisions exempting non-profit or humanitarian actions from regulations surrounding facilitation of stay.¹⁶⁸

Additionally, in September 2020, the European Commission introduced its “Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit, and residence”¹⁶⁹ which part of the New Pact on Migration and Asylum aims to embody in soft law “saving lives at sea is not optional,” and to address a 2018 Resolution

proposed Regulation (EU) XXX/XXX Asylum and Migration Fund], Interinstitutional File: 2020/0279(COD), 2023.

¹⁶⁴ *ibid.* (fn. 163), Art. 3(d)

¹⁶⁵ *ibid.* (fn. 163), Art. 5(b)

¹⁶⁶ Council Directive (fn. 90), Art. 3

¹⁶⁷ *Allsopp* in Carrera/Guild/Ruete (eds.), *Irregular migration, trafficking and smuggling of human beings*, p. 48

¹⁶⁸ *ibid.* (fn. 167), p. 48

¹⁶⁹ *European Commission*, Communication from the Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 2020/C323/01, 2020.

of the European Parliament urging the establishment of guidelines to prevent the criminalization of humanitarian assistance.¹⁷⁰ While it has been praised as a valuable reminder of the legal principles governing humanitarian aid, it has at the same time been criticised for the Commission not yet utilizing its legislative authority to harmonize the EU legal framework with international law and the Charter of Fundamental Rights.¹⁷¹

(5) Effect and Criticism

The EU legislation against Migrant Smuggling has been subject to a lot of criticism in the literature, by NGOs and others. The main focus of this criticism has been that it may lead to the criminalization of humanitarian aid as just stated. The reason for this mainly lies in the use of the words "*financial benefits*" which are excluded as a requirement for the transit and entry and only required for the facilitation of residence, as mentioned before. Through the exclusion of this requirement, a wider range of behaviours can be interpreted and understood as people smuggling and therefore be criminalized.¹⁷²

Moreover, refugees may find their rights restricted due to stringent regulations surrounding people smuggling. Despite Art. 6 of the Framework Decision explicitly stipulating that it "*shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights*",¹⁷³ concerns have been raised that anti-smuggling measures impede asylum seekers from reaching their intended safe destinations. This is particularly problematic given that the sea route is the predominant means of reaching Europe, often obstructing their access to European territories and the right to seek asylum.

Also, both the original and the Renewed Action Plan construct a narrative that artificially associates migrant smuggling with various other criminal activities, including human trafficking for sexual and labour exploitation, illicit drug and arms trade, and even terrorism.¹⁷⁴

¹⁷⁰ Marletta, The Commission 'Guidance' on facilitation and humanitarian assistance to migrants, <http://eulawanalysis.blogspot.com/2020/09/the-commission-guidance-on-facilitation.html>, 2020.

¹⁷¹ Ibid. (fn. 180)

¹⁷² Arrouche/Fallone/Vosyliute (fn. 28), p. 5

¹⁷³ Framework Decision (fn. 91), Art. 6

¹⁷⁴ Arrouche/Fallone/Vosyliute (fn. 28), p. 3

5. Effect on/Interrelation with European Law

The Facilitator's Package sets itself apart from the UN Protocol in three significant ways: i) the extent to which the element of "financial gain" is incorporated and defined within the context of facilitating irregular entry, transit, and stay; ii) the integration of an exemption from punishment for individuals providing humanitarian assistance; and iii) the inclusion of specific safeguards for victims of smuggling.¹⁷⁵ However, the discretionary powers afforded to Member States in implementing the Facilitators' Package have led to variations in how laws are enacted within the national legislations of specific Member States, resulting in legal ambiguity and inconsistency that ultimately impacts the overall effectiveness of the legislation.¹⁷⁶

The interpretation of "facilitation" in the Facilitation Directive differs from the definition of "smuggling" outlined in the UN Smuggling Protocol, which requires the inclusion of a financial or other material benefit as a prerequisite for criminalization.¹⁷⁷ The UN Smuggling Protocol aims to exempt family members or support groups, such as religious or non-governmental organizations, by emphasizing the necessity of a financial or other material benefit for the perpetrator.¹⁷⁸

Much of the discussion revolves around the concept of "financial gain".¹⁷⁹ The Framework Decision stipulates that violations undertaken for financial gain can result in custodial sentences with a maximum duration of no less than eight years when such violations are conducted within the activities of a criminal organization or when the lives of the victims are endangered.¹⁸⁰ These two elements are also emphasized in the UN Smuggling Protocol.¹⁸¹

III. Analysis of the Non-Entry Regime

Having examined various frameworks addressing people smuggling, this chapter will now undertake an analysis of the principle of non-entry. The focus will be on its correlation with European anti-smuggling measures and the implications arising from this connection. The European legal framework aimed at combating people smuggling carries the potential to

¹⁷⁵ Carrera/Guild/Aliverti et. al. (fn. 54), p. 10-11

¹⁷⁶ Carrera/Guild/Aliverti et. al. (fn. 54), p. 21

¹⁷⁷ UN Smuggling Protocol (fn. 39), Art. 3a

¹⁷⁸ UNODC, Travaux Préparatoires (fn. 56), p. 469

¹⁷⁹ See above, p. 26 f.

¹⁸⁰ Framework Decision (fn. 91), Art. 1 para. 3

¹⁸¹ UN Smuggling Protocol (fn. 39), Art. 6 para. 3

violate a wide range of rights and principles. Particularly, due to the EU's well-known efforts to prevent asylum seekers from reaching its external borders, several human rights violations may be at play. This forthcoming chapter will shed light on the concept of classical non-entry and next-generation non-entry, exploring its various forms using examples in the context of people smuggling.

A variety of countries for potential cooperation in the combat against people smuggling is mentioned in the Renewed EU-Action Plan. Of particular significance are the EU's three external borders: the Sahel, the Mediterranean Sea, and the North African Coastline, prompting a closer examination of certain countries within these regions. Belonging to those regions are Niger and Libya which continuously play a role in the context of European measures against people smuggling and will therefore be used as examples in the following.

Niger is mentioned various times throughout the Renewed Action Plan.¹⁸² Especially because of its central location on the continent, it is deemed as an important country migrants and asylum seekers pass through on their way to Europe.¹⁸³ Although there is evidence indicating that only a small number of migrants passing through Niger proceed to European shores, the EU has committed to combatting irregular migration in the country using its comprehensive external action tools.¹⁸⁴ Migration in the area has historically been circular and regional and remains to be so, with individuals from sub-Saharan Africa traveling through the Sahel and North Africa region to work or study and subsequently returning home.¹⁸⁵ This pattern is particularly notable among Nigeriens, who "systematically" return home following their regional migration.¹⁸⁶

Also, Libya is mentioned in the Renewed Action Plan numerous times.¹⁸⁷ It is also considered important by the EU in the context of migration due to its strategic placement on the Northern African coast which allows a transition by boat to Europe. In 2021, approximately 32,400 refugees and migrants made the sea journey from Libya to Europe (Italy and Malta).¹⁸⁸ This figure represents more than double the number recorded in 2020 but is

¹⁸² Renewed Action Plan (fn. 25), p. 8-10

¹⁸³ *Arhin-Sam/Lambert*, Country Brief on EU-Migration Partnerships with third Countries, Niger - The Gate to the Sahel, 2023, p. 1.

¹⁸⁴ *Fakhry* in EuroMeSCo (eds.), *Beyond Networks, Militias and Tribes: Rethinking EU Counter-Smuggling Policy and Responses*, pp. 52-74 (p. 55).

¹⁸⁵ *Ibid.* (fn. 184), p. 60

¹⁸⁶ *Ibid.* (fn. 184), p. 60

¹⁸⁷ Renewed Action Plan (fn. 25), p. 4, 8, 10, 17

¹⁸⁸ *Regional Bureau for Europe*, *Arrivals in Europe from Libya*, 2021, p. 1.

considerably lower than the figures reported in preceding years, notably between 2014 and 2017.¹⁸⁹

The analysis will centre on the definition of non-entry, its potential manifestations, and its specific impact on refugees and asylum seekers using the examples of Niger and Libya.

1. Introduction

It is a prevalent practice among states to employ so-called non-entry policies aimed at preventing the arrival of refugees.¹⁹⁰ This term was coined by James C. Hathaway in 1992¹⁹¹ and describes mechanisms that seek to enforce legal regulations that obstruct refugees from reaching the stage where they can present their case for asylum to the authorities of the host state rather than sending them away when they have already reached the state's territory.¹⁹² Already in 1992, Hathaway argued that non-entry was gradually supplanting non-refoulement as the fundamental principle in contemporary international refugee law.¹⁹³ This shift was attributed to the state's point of view that it allowed them to control refugee movements without the accompanying responsibility for their welfare, which would be implied by their inclusion in the state's community.¹⁹⁴

Different types of non-entry measures can be distinguished. Firstly, there is the traditional or classical form of non-entry, which often revolves around the imposition of visa requirements on individuals from countries known to produce refugees.¹⁹⁵ Also, the establishment of international zones and deterrence on high seas can be seen as traditional forms of non-entrée.¹⁹⁶ Other forms of non-entrée include rules on the first country of arrival as well as safe third country rules that set in motion deportation chains and the designation of some countries or populations as not at risk and therefore unworthy to be seriously considered for refugee status.¹⁹⁷

¹⁸⁹ Ibid. (fn. 188), p. 1

¹⁹⁰ Hathaway, *The rights of refugees under international law*, p. 291.

¹⁹¹ Hathaway *Refugees* 1992, p. 40-41.

¹⁹² Hathaway (fn. 190), p. 291

¹⁹³ Hathaway (fn. 191), p. 41

¹⁹⁴ Hathaway (fn. 191), p. 41

¹⁹⁵ Hathaway (fn. 190), p. 291

¹⁹⁶ Gammeltoft-Hansen/Hathaway (fn. 14), p. 12-13

¹⁹⁷ Hathaway (fn. 190), p. 291 ff.

Secondly, a new generation of non-entry is gradually emerging: the next-generation or cooperation-driven non-entry, which can be further categorized into various groups we will take a look at later on.

2. Traditional Non-Entrée

Different forms of traditional non-entry can be distinguished.

a) Visa requirements

A variant of this approach involves the imposition of visa requirements,¹⁹⁸ which is particularly significant given that many countries from which refugees originate are listed among the EU's visa-restricted nations,¹⁹⁹ meaning that their citizens are required to obtain a visa for traveling to Europe. These measures have immediate implications for asylum seekers in their home country or country of current residence due to the fact that securing a visa often requires meeting strict criteria, which can pose significant challenges for individuals from regions affected by conflict or political instability. Moreover, because of the need to be in another country to be able to apply for asylum and not in their home country, those who cannot leave due to visa restrictions are effectively prevented from seeking asylum through regular visa processes. As a result, these regulations have a negative impact on their options to leave the country²⁰⁰ and therefore on their Right to Leave, which we will take a look at shortly.

Visa requirements are often enforced through carrier sanctions imposed on those who transport individuals without the required visa.²⁰¹ Within the European context, the requirement to hold carriers accountable is even outlined as a requirement in Art. 26 of the Schengen Convention²⁰² as well as stated in Directive 2001/51/EC supplementing Art. 26 of

¹⁹⁸ Gammeltoft-Hansen/Hathaway (fn. 14), p. 10

¹⁹⁹ *European Council on Refugees and Exiles*, Protection in Europe: Safe and Legal Access Channels, ECRE's Vision of Europe's Role in the Global Refugee Protection Regime: Policy Paper 1, 2017, p. 7; *European Commission*, Who must apply for a Schengen Visa?, https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/visa-policy/who-must-apply-schengen-visa_en.

²⁰⁰ *Morrison/Crosland*, The trafficking and smuggling of refugees: the end game in European asylum policy?, Working Paper No. 39, 2001, p. 32.

²⁰¹ Hathaway (fn. 190), p. 291

²⁰² The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Official Journal L 239 , 22/09/2000 P. 0019 - 0062, Art. 26

the Schengen Convention.²⁰³ Even though a safeguard for refugees is included,²⁰⁴ their rights do not seem to be specifically looked out for in practice.

While historically, there is a suggested association between implemented non-entry policies such as the visa requirements and a decrease in asylum claims in Europe,²⁰⁵ nowadays visa requirements have little capacity to deter asylum seekers from pursuing their journey to reach Europe.²⁰⁶ As previously explained, a significant portion of asylum seekers relies on the services of smugglers to depart their home country and reach their desired destination so that visa requirements are circumvented and do not pose a major obstacle. While carrier sanctions have indeed proven effective in deterring migrants, asylum seekers, and refugees from utilizing *conventional* modes of transportation, it seems they have not led to a significant decrease in the overall volume of *irregular* migration to the EU, consequently promoting the use of unauthorized border crossings and therefore smuggling.²⁰⁷

The visa and carrier sanction regulations of the EU consequently result in the absence of a legal avenue for seeking protection.²⁰⁸ Criticism regarding these measures already emerged a long time ago, primarily due to their emphasis on comprehensive border control measures targeting irregular migration and information-gathering aimed at bolstering strategic anti-trafficking initiatives, with insufficient consideration for refugee protection and broader human rights concerns.²⁰⁹ It is however essential to clarify that the ineffectiveness and criticism surrounding visa requirements and carrier sanctions do not automatically render them unlawful. In principle, states have sovereignty over their territory and, consequently, the right to decide who may enter it and who is excluded from doing so.²¹⁰ Though limited by refugee law and international human rights law, the argued restrictions on these powers are considered rather minimal.²¹¹

²⁰³ Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, Official Journal L 187 , 10/07/2001 P. 0045 - 0046.

²⁰⁴ Art. 26 (1) Schengen Convention (fn. 201) and No. (3) of the Introduction of Directive 2001/51/EC (fn. 203)

²⁰⁵ *Kjærum*, Refugee Protection between State Interests and Human Rights: Where Is Europe Heading?, Human Rights Quarterly, Vol. 24, No. 2 (May, 2002), pp. 513-536, p. 515.

²⁰⁶ Gammeltoft-Hansen/Hathaway (fn. 14), p. 13-14

²⁰⁷ ECRE (fn. 198), p. 9

²⁰⁸ *Mouzourakis*, Human Rights Violations to Deflect Refugees, 2023.

²⁰⁹ Morrison/Crosland (fn. 200), p. 32

²¹⁰ *Schindlmayr* International Migration Vol. 41 (2) (2003), pp. 109-123 (p. 110).

²¹¹ *Dauvergne*, Challenges to sovereignty: migration laws for the 21 st century, Working Paper No. 92, 2003, p. 4 f.

b) International Zones

In addition to visa regulations states have attempted to circumvent their obligations with regard to refugees by establishing so-called international zones.²¹² Often found at airports, such zones supposedly enable states to assert that some or all of their legal responsibilities do not extend within that zone.²¹³ One of the most prominent examples in this context is the *Amuur v. France* case.²¹⁴ In this case, four Somali nationals, who had fled Somalia due to fear for their lives, entered France by air and applied for asylum.²¹⁵ Despite their applications, they were denied entry and held within an area referred to as the international zone at the airport, a location that supposedly placed them outside French territory.²¹⁶ Consequently, French authorities viewed themselves as not legally obligated to process their requests in the same manner as they would if the requests were made by individuals already within French territory.²¹⁷

Already in the judgement, it was noted that the international zone lacks a legal foundation and should be regarded as a mechanism designed to evade certain responsibilities.²¹⁸ Both national and regional legal precedents have unequivocally determined that states cannot arbitrarily define the geographical extent of their international legal obligations by excluding portions of their territory or labelling them as international zones.²¹⁹ Refugee rights should apply throughout an entire state's territory, and creating such exceptional zones does not align with fulfilling that obligation fairly. In addition to any limitations on freedom of movement relevant in this context, a specific question that emerges within the framework of refugee rights is the extent to which the principle of non-refoulement is adequately considered when establishing these international zones.

In the realm of human smuggling, these international zones especially gain significance when migrants manage to enter a country using fraudulent documents supplied by their smugglers. However, following the cases of international zones at airports, their relevance diminished. Now, numerous European States have implemented detention-like zones at their airports to assess the legitimacy of asylum claims before granting entry to the

²¹² Gammeltoft-Hansen/Hathaway (fn. 14), p. 12

²¹³ Gammeltoft-Hansen/Hathaway (fn. 14), p. 12

²¹⁴ *Amuur v. France*, [1996] ECHR 25 (ECHR, June 25, 1996).

²¹⁵ *ibid.* (fn. 214), p. 3, para. 7

²¹⁶ *ibid.* (fn. 214), p. 15, para. 26

²¹⁷ *ibid.* (fn. 214), p. 15, para. 26

²¹⁸ *ibid.* (fn. 214), p. 15, para. 26

²¹⁹ *Gammeltoft-Hansen/Tan* *Journal on Migration and Human Security* Volume 5 Number 1 (2017), 28 (p. 33).

individuals.²²⁰ While this approach may be scrutinized concerning other refugee rights, it no longer strictly falls into the category of non-entry.²²¹

c) Deterrence on the High Seas

A third and important form of traditional non-entrée in the context of people smuggling is the deterrence of asylum seekers on the high seas.²²²

As previously mentioned, a significant portion of smuggled asylum seekers reaching Europe arrives by sea.²²³ To prevent this, their vessels are frequently intercepted on the high seas.²²⁴ In the European context, so-called pushbacks and pullbacks have made the news more than once in the past decade.²²⁵ Pushbacks, while not constituting a distinct legal concept, encompass a diverse range of measures applied at both land and sea borders.²²⁶ The term is used broadly to encompass instances where human rights obligations related to denying entry to individuals seeking protection, returning especially those already on the territory, conducting screenings, and other actions aimed at preventing entry into European countries at land and sea borders are not respected.²²⁷ Usually, the migrants have already crossed a border and find themselves in the jurisdiction of their destination state.²²⁸ However, pushback operations can and often do happen outside a state's territory as well, for example on the high sea.²²⁹

While generally states have the sovereignty to decide who enters their state, this sovereignty is limited in the case of people entering the state in the search for international protection.²³⁰ Once they have entered, the principle of non-refoulement states that they

²²⁰ *European Asylum Support Office*, Border procedures for asylum applications in EU+ countries, p. 9 ff.

²²¹ e.g. in Spain: *Asylum Information Database/European Council on Refugees and Exiles*, Conditions in detention facilities - Spain, <https://asylumineurope.org/reports/country/spain/detention-asylum-seekers/detention-conditions/conditions-detention-facilities/>, 2023.

²²² Gammeltoft-Hansen/Hathaway (fn. 14), p. 13

²²³ See fn. 9 and fn. 10

²²⁴ *Solomon* *Netherlands Quarterly of Human Rights* 37 (2019), 36 (p. 36).

²²⁵ e.g. *ANSA*, New report reveals further pushbacks and violations at Europe's borders, <https://www.infomigrants.net/en/post/52535/new-report-reveals-further-pushbacks-and-violations-at-europes-borders>, 2023; *Felden/Werkhäuser*, European refugee policy: Are pushbacks at sea legal?, <https://www.dw.com/en/european-refugee-policy-are-pushbacks-at-sea-legal/a-54080544>, 2020; *The Guardian*, EU calls for independent inquiry into Greece 'pushback' of asylum seekers, <https://www.theguardian.com/world/2023/may/22/eu-calls-for-independent-inquiry-greece-pushback-asylum-seekers>, 2023.

²²⁶ *Council of Europe Commissioner for Human Rights*, Pushed beyond the limits, Four areas for urgent action to end human rights violations at Europe's borders, 2022, p. 15.

²²⁷ *Strik*, Pushback policies and practice in Council of Europe member States, Doc. 14909, 2019, para. 13.

²²⁸ *Stojić Mitrović/Hameršak*, Pullback, <https://e-erim.ief.hr/pojam/p-pulbek-p?locale=en>.

²²⁹ *Budelmann/Graf*, A pushback against international law?, 2020.

²³⁰ See fn. 209 and 210

cannot be forced back out of the territory.²³¹ The focus of pushbacks lies precisely there: in the return of refugees, asylum seekers, and migrants by states without adhering to the essential safeguards of human rights.²³² However, in several Member States, pushing back refugees, asylum seekers, and migrants has become an official policy, sometimes even enshrined in domestic laws, while in others, despite official denials, there is consistent and credible evidence of widespread pushback practices.²³³

Pushback practices are also associated with "pullback" arrangements, which involve agreements between states designed to keep migrants on one side of a border in exchange for financial or economic benefits.²³⁴ Pullbacks have been defined as operations that are aimed at physically hindering migrants from departing the territory of their State of origin or a transit State, or to compel their return to that territory, preventing them from reaching the jurisdiction of their intended destination State.²³⁵ Pullbacks can for example take place in the territory of other states or on the high seas.

It is noteworthy in this context that the high seas, in general, do not fall within a state's territory or its jurisdiction.²³⁶ The sea is categorized into different zones, ranging from internal waters to the high seas, and can be divided into two main groups: marine spaces under national jurisdiction and spaces beyond national jurisdiction.²³⁷ Only zones falling into the first category, like internal waters or territorial seas, are considered within a state's jurisdiction, whereas those in the latter group, which includes the High Seas and the Area, typically do not come under a state's jurisdiction.²³⁸ One might assume that, as a result, states bear no responsibilities on the high seas. However, operations carried out beyond a nation's territory, such as high-seas interceptions, may still constitute the exercise of jurisdiction by the state if they have established effective control over people who are

²³¹ Art. 33 1951 Convention (fn. 41)

²³² *Council of Europe Commissioner for Human Rights, Pushed beyond the limits, Four areas for urgent action to end human rights violations at Europe's borders, 2022, p. 7.*

²³³ *ibid.* (fn. 232), p. 7

²³⁴ *Parliamentary Assembly, Pushbacks on land and sea: illegal measures of migration management, Resolution 2462 (2022), para. 1.*

²³⁵ *OHCHR, "Lethal Disregard" Search and rescue and the protection of migrants in the central Mediterranean Sea, 2021, fn. 88.*

²³⁶ *Tanaka, The international law of the sea, p. 186.*

²³⁷ *ibid.* (fn. 236), p. 7-8

²³⁸ *ibid.* (fn. 236), p. 7

seeking asylum or when the asylum seekers are directly affected by the state's actions.²³⁹ This applies especially in the context of non-refoulement, which we will take a look at later.

While the issue of pushbacks has received extensive attention in scholarly works, legal proceedings, and within the EU itself, leading to a near-consensus that these actions contravene various human rights standards,²⁴⁰ with pullbacks it is not as clear. In the quest of finding a solution that does not violate refugee's rights, pullbacks were adopted and framed as a compatible with refugee rights standards by the EU.²⁴¹ By supporting other countries to carry out the pullbacks at sea the EU especially tries to evade extraterritorial jurisdiction.²⁴² The Renewed Action Plan contends that smugglers alone violate the fundamental rights of refugees and other migrants, overlooking the contribution of state-perpetrated pushbacks and pullbacks in exposing them to risk.²⁴³ Various rights however can potentially be violated by such measures such as the Right to Asylum,²⁴⁴ or the Right to Leave depending on the treatment in the country the refugee's and asylum seekers are pulled back into.²⁴⁵

d) Safe Third Country Rules

Another category that has been considered in the realm of non-entry measures includes rules based on the concept of "safe third country" or "country of first arrival."²⁴⁶

The concept of a "safe third country" was introduced to address the issue of people moving between countries for asylum purposes.²⁴⁷ It originated as the "country of first asylum" concept in the legal frameworks of Scandinavian nations in the mid-1980s and has subsequently been adopted in various regions worldwide and incorporated into numerous bilateral and multilateral agreements.²⁴⁸ In the European context, the concept of a "safe third country" is used to deem applications as inadmissible, preventing applicants from

²³⁹ *UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol**, 2007; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, European Court of Human Rights, 2012.

²⁴⁰ Budelmann/Graf (fn. 229)

²⁴¹ *Barnes Rev. Int. Stud.* 48 (2022), 441 (p. 452).

²⁴² *Ibid.* (fn. 241), p. 453

²⁴³ *Arrouche/Fallone/Vosyliute* (fn. 28), p. 2

²⁴⁴ *Amnesty International, Libya's dark Web of Collusion, Abuses against Europe-bound refugees and migrants*, 2017.

²⁴⁵ *Riemer, From push-backs to pull-backs: The EU's new deterrence strategy faces legal challenge*, 2018.

²⁴⁶ *Hathaway* (fn. 190), p. 291 ff.; *Gammeltoft-Hansen/Tan* (fn. 219), p. 34; *Orchard* (fn. 19), p. 226

²⁴⁷ *Moreno-Lax* in *Goodwin-Gill/Weckel* (eds.), *Protection des migrants et des réfugiés au XXIe siècle, aspects de droit international | Migration and Refugee Protection in the 21st Century, International Legal Aspects*, 663 (p. 664).

²⁴⁸ *ibid.* (fn. 247), p. 664

undergoing a comprehensive assessment of their claims.²⁴⁹ This is analogous to the concept of a "first country of asylum," which pertains to refugees who have previously obtained and can once more access protection in another country.²⁵⁰ Within EU law, there are four concepts related to safe countries: safe country of origin, safe third country, first country of asylum, and European safe third country, all of which are governed by the recast Asylum Procedures Directive.²⁵¹

While regulations may be justified in certain instances, particularly when managing the large influx of irregular migrants, there are cases where the principle of non-refoulement is violated, and access to asylum can be compromised in others.²⁵² Even though the EU has regulated the concept of safe third countries and for example requires the principle of non-refoulement not to be violated in theory²⁵³ in practice the EU's behaviour in this regard has been criticised. Furthermore, the United Nations High Commissioner for Refugees (UNHCR) as well as numerous legal scholars disagree with this perspective, contending that the third State must provide comprehensive protection to the returned refugees, extending beyond the principle of non-refoulement alone.²⁵⁴

While some scholars interpret the 1951 Convention's omission of explicit provisions regarding refugees' right to choose their destination country as implying that states have a general prerogative to transfer asylum seekers to secure third countries, others raise concerns about the legality of such regulations. They argue that such practices may not align with the concept of burden sharing outlined in the 1951 Convention and could potentially infringe upon rights like the principle of non-refoulement as well as the right to seek asylum.²⁵⁵

Attempts to limit access to asylum using concepts such as "safe third countries" have not completely disappeared but legal interventions have pressured several states to ease the implementation of these policies.²⁵⁶

²⁴⁹ Cortinovis, *Asylum - The Role and Limits of the Safe Third Country Concept in EU Asylum*, Discussion Brief, 2018, p. 3.

²⁵⁰ *ibid.* (fn. 250), p. 3

²⁵¹ Directive 2013/32/EU of the European and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Official Journal of the European Union.

²⁵² Gammeltoft-Hansen/Tan (fn. 219), p. 34

²⁵³ Directive 2013/32/EU (fn. 251), Art. 38 para. 1 c

²⁵⁴ *Ossso International Journal of Refugee Law* 2023 (p. 31).

²⁵⁵ Gammeltoft-Hansen/Tan (fn. 219), p. 34; Moreno-Lax (fn. 247), p. 665

²⁵⁶ Gammeltoft-Hansen/Tan (fn. 219), p. 33

Smuggling in this context can become relevant when refugees are transported through a third country deemed safe and are subsequently returned there. Generally, a refugee can be transferred to a third country if they have a genuine connection to that country and should have applied for international protection there.²⁵⁷ A transit or temporary stay is frequently regarded as a substantial connection, even when an individual was merely transported through and had no prior knowledge of the country.²⁵⁸ In addition to the challenge that there may be no link to that particular country, EU Member States have the discretion to determine what qualifies as a safe third country,²⁵⁹ often holding a considerably broad interpretation of the concept.²⁶⁰

e) Interim Findings

While certain aspects of traditional entry concepts have been challenged by scholars and in legal jurisdiction, others persist and may potentially infringe upon refugee rights. The concept of deterrence on the high seas is particularly noteworthy in the context of EU measures against people smuggling, and it may potentially violate the refugee's right to seek asylum and the principle of non-refoulement, which we will examine in more detail later on.

IV. Cooperation-Based non-entry

Because many of the traditional non-entry practices have been challenged legally, new ideas and approaches on how to keep asylum seekers from entering countries have emerged. Termed as the “next generation” of non-entrée in academic literature, those approaches focus on cooperation-based strategies, with deterrence taking place externally, within the territory or jurisdiction of the asylum seeker's home country or transit nation.²⁶¹ Externalization, in this context, refers to the process where destination countries encourage, support, delegate, impose, or directly engage in activities related to migration and border management outside their borders to deter undesired arrivals at their territorial borders.²⁶² Cooperation-based or new-generation non-entry can be seen as one such form of externalization.

²⁵⁷ *European Union Agency for Asylum*, Asylum Report 2023, Section 4.3.2 Safe country concepts.

²⁵⁸ E.g.: *Hungarian Helsinki Committee*, Country report: Safe third country, Asylum Information Database; European Council on Refugees and Exiles (ECRE), Hungary, 2023.

²⁵⁹ Directive 2013/32/EU (fn. 251), Art. 37 para. 1

²⁶⁰ *Pro Asyl*, Das Ende vom Flüchtlingsschutz in Europa? Die Gefahr von »sicheren Drittstaaten«, 2023.

²⁶¹ Gammeltoft-Hansen/Hathaway (fn. 14), p. 248

²⁶² *Cuttitta* Population Space and Place 26 (2020) (p. 2).

1. Intro

The EU has various agreements with different countries to combat people smuggling. The mentioned legal frameworks (Council Directive, Framework Decision, and Renewed Action Plan) all focus on the combat against people smuggling and will therefore be the base for the following analysis.

a) Facilitators Package

The Council Directive focuses on sanctioning persons who assist other persons when entering or transiting across the territory of a Member State in breach of their laws.²⁶³ While it only obligates states to adopt “appropriate measures”, the approach mainly taken by European countries is the sanctioning of smuggling by imprisonment.²⁶⁴ The Framework Decision similarly focuses on sanctions and measures they should be accompanied by to guarantee their effectiveness.²⁶⁵ However, in the context of this study the question arises whether that is enough to constitute non-entry.

Smuggling is widely recognized as a crime by the international community supported by moral arguments that identify certain actions as morally wrong, deserving condemnation even if such condemnation does not necessarily enhance safety for victims.²⁶⁶ However, some advocate for decriminalizing smuggling due to perceived lack of justification, although it's acknowledged that smuggling involving fraud or coercion should unequivocally remain criminalized.²⁶⁷ Soley such smuggling that helps the refugee/does not put the refugee in danger is discussed to potentially be excluded from criminalisation.²⁶⁸

Even though it can be questioned whether sanctioning the smugglers is the right way to go, especially when looking at how effective it is, the imposition of such sanctions does not fall into any of the non-entry categories and human rights violations can also not be made out in this context.

²⁶³ Council Directive (fn. 90), Art. 1

²⁶⁴ E.g.: *Reuters*, German minister promises longer jail terms for people smugglers, <https://www.reuters.com/world/europe/german-minister-promises-longer-jail-terms-people-smugglers-2023-10-25/>, 2023; *Government of the Netherlands*, Combating people smuggling, <https://www.government.nl/topics/human-trafficking/combating-people-smuggling>; *Agencia Estatal Boletín Oficial del Estado*, Ley Orgánica 13/2007, de 19 de noviembre, para la persecución extraterritorial del tráfico ilegal o la inmigración clandestina de personas.

²⁶⁵ See Framework Decision (fn. 91)

²⁶⁶ Gerver (fn. 33), p. 4

²⁶⁷ Gerver (fn. 33), p. 2

²⁶⁸ Gerver (fn. 33), p. 2

b) Renewed Action Plan

The Renewal of the European fight against migrant smuggling according to the Renewed Action Plan consists of various actions and is structured around the following key areas of focus: (1) enhancing collaboration with partner countries and international organizations, (2) implementing legal frameworks and penalizing smugglers operating both within and outside the EU, (3) preventing exploitation and safeguarding the well-being of migrants, (4) strengthening cooperation and aiding law enforcement and the judiciary in addressing emerging challenges, and (5) enhancing understanding of the methods employed by smugglers.²⁶⁹

(1) Reinforced cooperation with partner countries and international organisations

This reinforcement of collaborations encompasses the establishment of specialized Anti-Smuggling Operational Partnerships with third countries or regions along migratory routes, active engagement with international organizations, and addressing the exploitation of irregular migration by state actors.²⁷⁰

Significant emphasis is placed on the need to strengthen cooperation in preventing and combating migrant smuggling with key third countries, including the establishment of an Anti-Smuggling Operational Partnership.²⁷¹ These collaborations are backed by EU agencies such as Frontex, Europol, Eurojust, and the European Union Agency for Law Enforcement Training, aligning with their mandates, and involve operational cooperation supported by EU financial assistance, in accordance with their respective roles.²⁷²

The EU places significant reliance on the International Organization for Migration, particularly, though not exclusively, in engaging with sending and transit states.²⁷³ This involves collaboration with their governments and other stakeholders, including NGOs and CSOs, to manage migration and externalize border control.²⁷⁴

²⁶⁹ Renewed Action Plan (fn. 25), p. 11

²⁷⁰ Renewed Action Plan (fn. 25), p. 12 ff.

²⁷¹ *European Commission*, Communication from the Commission to the European Parliament and the Council, COM(2023) 146 final, establishing the multiannual strategic policy for European integrated border management, para. 9.

²⁷² *Ibid.* (fn. 271), para. 9

²⁷³ *Blasis/Pitzalis* J. Mod. Afr. Stud. 2023, 1.

²⁷⁴ *Ibid.* (fn. 273)

(2) Sanctioning migrant smugglers and preventing the exploitation of migrants

Another emphasis is placed on the sanctioning of migrant smugglers along the migratory route as well as on the prevention of the exploitation of migrants.²⁷⁵ According to the Renewed Action Plan that calls for effectively addressing and improving the implementation of the applicable legal frameworks by Member States and partner countries based on the UN Smuggling Protocol and, within the EU, the Facilitators package.²⁷⁶ As explained before though, the sanctioning of smugglers does not lead to the constitution of non-entry and will therefore be left out of the following analysis.

(3) Reinforcing cooperation and supporting the work of law enforcement and the judiciary

Furthermore, the Renewed Action Plan includes enhancing collaboration among law enforcement for countering migrant smuggling, strengthening judicial cooperation against such activities, and addressing emerging challenges related to digital smuggling, financial investigations, and document fraud.²⁷⁷ Various measures are being planned to achieve this objective, including the continued support of capacity building and operational exchanges in collaboration with partner countries to counter migrant smuggling through the European network of immigration liaison officers, measures such as pre-entry screening of asylum seekers and Joint Investigation Teams.²⁷⁸ Again, organizations such as Frontex, Eurojust and Europol play an important role in the context of cooperation between third country and the EU, respectively the Member States.²⁷⁹

(4) Increased knowledge base

Lastly, the collection of research and data is underlined as an important step.²⁸⁰ Europol and Frontex should publish regular reports while also establishing a better connection to the private sector on the matter.²⁸¹ While the collection of research and data at a later stage

²⁷⁵ Renewed Action Plan (fn. 25), p. 16

²⁷⁶ Renewed Action Plan (fn. 25), p. 16

²⁷⁷ Renewed Action Plan (fn. 25), p. 21

²⁷⁸ Renewed Action Plan (fn. 25), p. 22 ff.

²⁷⁹ Renewed Action Plan (fn. 25), p. 27

²⁸⁰ Renewed Action Plan (fn. 25), p. 26

²⁸¹ Renewed Action Plan (fn. 25), p. 27

may lead to the adaption of new measures which could then could lead to non-entrée, in the first step of just collecting, non-entry is not constituted.

2. Interim Findings

As previously emphasized, collaboration holds particular significance in the realm of non-entry. Consequently, the cooperative aspects of the Renewed Action Plan (number (1) and (3)) will be specifically considered in the following analysis. The examination will delve into various forms of non-entry and scrutinize if EU anti-smuggling measures, whether derived from the prior Action Plan and reinforced by the Renewed Action Plan or developed under the new initiative, warrant closer inspection.

3. Concrete Measures

The Sahara has recently emerged as the third external border that the EU aims to regulate, following the Mediterranean Sea and the North African Coastline.²⁸² Countries that hold significance in the realm of migration movements due to their strategic geographical location include those situated centrally, such as Niger, through which many migrants and refugees must pass, and coastal nations close to Europe, like Libya, from where migrants and refugees embark on their journeys. Although not all of these measures are designed explicitly to prevent people smuggling, cooperation-based non-entry measures are frequently linked to efforts against people smuggling.

These agreements are often explicitly not legally binding and consist of various forms such as increased information exchange, training, technical advancements, and participation in border control operations.²⁸³ Usually, these agreements are not accessible to the public²⁸⁴ which also complicates their analysis.

However, they can be further elaborated with Gammeltoft-Hansen and Hathaway making distinctions between seven different approaches of next-generation non-entrée:

- (a) Diplomatic relations,
- (b) Monetary incentives provided directly,
- (c) Supplying equipment, machinery, and training for authorities in the collaborating nation,

²⁸² *van Dessel* *European Journal of Migration and Law* 2019 (21), 435 (p. 442).

²⁸³ Markard (fn. 53), p. 610

²⁸⁴ Markard (fn. 53), p. 610

- (d) Deployment or assignment of immigration officials of the destination country,
- (e) Collaborative enforcement efforts with the cooperating nation,
- (f) Direct involvement in migration control within the cooperating state's territory, and
- (g) tasking of international agencies.²⁸⁵

a) Diplomatic Relations

One form of next-generation non-entrée is the stopping of asylum seekers through diplomatic relations. Although the idea of regulating migration through diplomatic relations is not a completely new one²⁸⁶ the so-called topic of “migration diplomacy” has received relatively little attention in academic literature so far.²⁸⁷ While diplomatic efforts are mostly initiated by and focused on states, they can also be pursued by international alliances of states such as the EU.²⁸⁸ Migration diplomacy encompasses how states utilize cross-border population mobility management and diplomatic approaches to achieve their objectives in international relations, whether through strategic use of migration flows or diplomatic tactics regarding migration-related goals.²⁸⁹ Instances of such include intergovernmental pacts designed to either promote or restrict migration, the expansion of favourable privileges to specific foreign individuals, the establishment of guest-worker programs or other forms of temporary labour migration initiatives, the deportation or the looming prospect of deportation for foreign nationals, and more.²⁹⁰

The Renewed Action Plan acknowledges diplomacy as a crucial instrument, particularly in the context of irregular migration involving state actors, emphasizing its significance as a key tool.²⁹¹ An instance of migration diplomacy concerning the EU and people smuggling involves the association between the EU, particularly the Member State Italy, and Libya.²⁹² In response to the significant influx of migrants on Italian shores since 2015, negotiations between the parties aimed to address this issue through a specific strategy which involved assisting Libya in reclaiming full control of its sovereign prerogatives after years of civil unrest.²⁹³ The objective was to enhance the country's ability to manage its borders and

²⁸⁵ Gammeltoft-Hansen/Hathaway (fn. 14), p. 17 ff.

²⁸⁶ e.g. *Teitelbaum* International Organization Summer, 1984, pp. 429-450 (pp. 431 ff.).

²⁸⁷ *Adamson/Tsourapas* International Studies Perspectives 20 (2019), 113 (p. 115).

²⁸⁸ *Ibid.* (fn. 287), p. 116

²⁸⁹ *Ibid.* (fn. 287), p. 116-117

²⁹⁰ *Ibid.* (fn. 287), p. 115

²⁹¹ Renewed Action Plan (fn. 25), p. 15

²⁹² *Ceccorulli*, Triangular migration diplomacy: the case of EU–Italian cooperation with Libya, Nr. 3, p. 328.

²⁹³ *Ibid.* (fn. 292), p. 340

combat people smuggling, seen as a threat to Libya's unity, stability, security, and development.²⁹⁴ While Italy and the EU sought to alleviate migration pressures on European borders, collaboration for Libya represented an opportunity for international legitimacy, recognition, and support in restoring statehood so that migration served as both a means and an end for the diverse actors involved.²⁹⁵

Whether such negotiations and the usage of migration as a “bargain chip”²⁹⁶ are in violation of the refugee’s rights heavily depends on the particular case as well as the outcome of the same.

b) Monetary Incentives

An alternative strategy involves offering financial incentives directly to partner countries, both origin and transit nations, to encourage them to assume responsibilities related to controlling migration that are considered valuable.²⁹⁷

Not only within the particular context of people smuggling but as a general practice, the EU has various funds available for third countries in relation to migration and asylum matters.²⁹⁸ Such monetary incentives are a big part of the EU Action Plan as well. For example: to guarantee the effectiveness of Anti-smuggling Operational Partnerships, the EU sees a need to secure sufficient funding that aligns with, supports, and translates into tangible actions the aspirations and goals outlined in the updated EU action plan.²⁹⁹ Various financial instruments will contribute their support in a complementary fashion to implement different facets of the partnerships.³⁰⁰

A specific example is the European Union Emergency Trust Fund for Stability (EUTF). Through the EUTF 27.9 Million Euros were provided for setting up a network of Common Operational Partnerships in West and Central Africa in the context of the EU Action Plan.³⁰¹ It aims to tackle the underlying causes of irregular migration and displacement in Africa and was established to address the root causes of instability, forced displacement, and irregular

²⁹⁴ Ibid. (fn. 292), p. 340

²⁹⁵ Ibid. (fn. 292), p. 340

²⁹⁶ *Greenhill*, *Migration as a Weapon in Theory and in Practice*, 2016, p. 24.

²⁹⁷ Gammeltoft-Hansen/Hathaway (fn. 14), p. 20

²⁹⁸ *Woollard/Liebl/Davis* ia, *EU migration and asylum funds for third countries*.

²⁹⁹ Renewed Action Plan (fn. 25), p. 14

³⁰⁰ Renewed Action Plan (fn. 25), p. 14

³⁰¹ Renewed Action Plan (fn. 25), p. 10, fn. 35

migration while also contributing to improved migration management.³⁰² At the 2015 Valletta Summit on Migration, the EU affirmed counter-smuggling as a collective responsibility involving countries of origin, transit, and destination and established the EUTF, utilizing European development funds to tackle the "root causes of irregular migration."³⁰³ The overarching goal is to enhance migration management in the region, specifically addressing the smuggling of migrants within and originating from the Horn.³⁰⁴ Because addressing this issue solely on a national level is thought to potentially shift the existing routes of smuggling, the project aims to encompass the entire region, considering country-specific needs and challenges in its approach.³⁰⁵

A potential risk in this context is that the migration agenda of the countries supported by the EUTF is violating human rights, and therewithin refugee rights.³⁰⁶ Inter alia, the EUTF is providing direct funding and training to a coastguard authority accused of extensive human rights abuses, contravening the principle of non-refoulement, and facing allegations of involvement in trafficking which we will look into in the next paragraph.³⁰⁷

c) Supply of Equipment

A common form of exercising non-entrée is by providing equipment and training to third countries and their officials.³⁰⁸ This includes providing equipment such as patrol boats, helicopters, or airplanes, along with training for border control personnel in the third country regarding non-departure strategies or offering financial support for the enhancement of their border control capabilities.³⁰⁹ From an operational standpoint, the supply of equipment is especially important considering the limited resources available to certain third countries for border patrol and rescue operations.³¹⁰

³⁰² *European Union*, Emergency Trust Fund for Africa, https://trust-fund-for-africa.europa.eu/index_en.

³⁰³ *Fakhry* in EuroMeSCo (eds.), *Beyond Networks, Militias and Tribes: Rethinking EU Counter-Smuggling Policy and Responses*, pp. 52-74 (p. 53).

³⁰⁴ *European Union*, Emergency Trust Fund for Africa - Better Migration Management Programme, https://trust-fund-for-africa.europa.eu/our-programmes/better-migration-management-programme_en.

³⁰⁵ *Ibid.* (fn. 304)

³⁰⁶ *Boersma/Kroon/McDougal* *ua*, How does the European Union Trust Fund for Africa manage potential unintended effects of its programmes?, Working Paper no. 2020/16, Special Working Paper Series on 'Unintended Effects of International Cooperation', 2020, p. 11.

³⁰⁷ *Ibid.* (fn. 306), p. 15

³⁰⁸ Gammeltoft-Hansen/Hathaway (fn. 14), p. 21; Markard (fn. 53), p. 611

³⁰⁹ Gammeltoft-Hansen/Hathaway (fn. 14), p. 252

³¹⁰ *European Union Agency for Fundamental Rights*, *Fundamental rights at Europe's southern sea borders*, 2013, p. 44.

In the case of Libya, there is reason to believe that the EU and its Member States, either directly or indirectly, supplied financial aid, technical assistance, and equipment, including boats, to the Libyan Coast Guard and the Directorate for Combating Illegal Migration which were utilized in the interception and detention of migrants.³¹¹

In addition to the supplied equipment for Libya, the EU has implemented various programs and strategies to train the Libyan coastguard. One illustration is Operation Sophia, established by the EU in response to the migrant shipwrecks off the Libyan coast in April 2015, to neutralize established routes for refugee smuggling in the Mediterranean, inter alia by training the Libyan coastguard.³¹² Subsequently, Operation Sophia concluded and was succeeded by Operation Irini,³¹³ which has a distinct mandate compared to Operation Sophia, placing less emphasis on monitoring migration events in international waters and instead concentrating more on enforcing the United Nations arms embargo on Libya.³¹⁴ However, it does involve secondary tasks such as disrupting the business model of human smuggling and supporting the capacity building and training of the Libyan Coast Guard and Navy.³¹⁵ The implementation of these activities has been delayed though, due to political fragmentation in Libya.³¹⁶

A problem arising in this context is the participation of the Libyan coastguard in human trafficking and breaches of international law which are documented.³¹⁷ Libyan authorities are especially failing to adhere to the obligation of not returning individuals to locations where they encounter abuse, inhumane detention conditions, and a lack of access to international protection.³¹⁸ Migrants are frequently sent back to Libya, where they encounter systematic and widespread abuses, including torture, arbitrary detention, forced labour, and sexual assault.³¹⁹

³¹¹ *Human Rights Council*, Report of the Independent Fact-Finding Mission on Libya, A/HRC/52/83, Fifty-second session 27 February–31 March 2023, Agenda item 10 Technical assistance and capacity-building, 2023, p. 8-9.

³¹² *Mogherini*, EUNAVFOR MED operation Sophia, <https://www.operationsophia.eu/about-us/>, About us.

³¹³ The Renewed Action Plan references Operation Irini's role in disrupting the business model of people smuggling and human trafficking, Renewed Action Plan (fn. 27), p. 8

³¹⁴ *Pricopi* Land Forces Academy Review 25 (2020), 302 (p. 302).

³¹⁵ *EUNAVFOR MED*, EUNAVFOR MED operation Irini, <https://www.operationirini.eu/about-us/>, About us.

³¹⁶ *Ibid.* (fn. 315)

³¹⁷ *Raty/Shilhav*, The EU Trust Fund for Africa - Trapped between aid policy and migration politics, Oxfam Briefing Paper, 2020, p. 24.

³¹⁸ *Salah*, Already Complicit in Libya Migrant Abuse, EU Doubles Down on Support, Handing Over of Search Boat Makes EU More Complicit in Abuses, 2023.

³¹⁹ *Ibid.* (fn. 318)

Frontex is frequently engaged in providing training and equipment, with the agency acknowledging its human rights responsibilities in the process of supplying such resources;³²⁰ nevertheless, there is no available information regarding whether the existing agreements guarantee that the equipment is employed in compliance with human rights standards,³²¹ and in fact, there is evidence suggesting the opposite.³²²

d) Immigration Officials

Gammeltoft-Hansen and Hathaway describe another form of cooperative deterrence as involving the deployment or assignment of immigration officials from the destination country to collaborate with authorities in the country of origin or transit.³²³ Referred to as "Liaison Officers" in the terminology of other scholars and the EU,³²⁴ these officials offer advice and support and thereby become engaged in the decisions made by third countries regarding actions such as pull-backs or measures to prevent departures.³²⁵

An example of such officials would be the Liaison Officers deployed to different countries by Frontex.³²⁶ Following the priorities outlined by the Frontex Management Board, the agency is establishing a network of Frontex Liaison Officers in non-EU countries and has, for instance, deployed liaison officers to Niamey in Niger.³²⁷ This deployment enables a more informal collaboration with Nigerien authorities on matters related to migration and security.³²⁸

The EU network of immigration liaison officers, while officially not engaging in tasks related to state sovereignty, practically provides advice and support to national border guards and airline officials, and in some instances, obtains extended access to foreign police and border records.³²⁹

³²⁰ *Cederbratt*, Frontex: human rights responsibilities, Doc. 13161, 2013, para. 10.

³²¹ FRA (fn. 310), p. 45

³²² FRA (fn. 310), p. 46

³²³ Gammeltoft-Hansen/Hathaway (fn. 14), p. 22

³²⁴ *ECORYS/ICMPD*, Evaluation of Council Regulation (EC) No 377/2004 on the creation of an immigration liaison officers network Final Report, 2017, para. 2.2.

³²⁵ Markard (fn. 53), p. 611

³²⁶ Renewed Action Plan (fn. 25), p. 14

³²⁷ *Frontex*, Beyond EU borders - Frontex Liaison Officers to non-EU countries, <https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/liaison-officers/>.

³²⁸ Arhin-Sam/Lambert (fn. 183), p. 3

³²⁹ *Gammeltoft-Hansen*, Access to Asylum, p. 126.

e) Collaborative Enforcement

An alternative form of next-generation non-entry involves the establishment of a cooperative enforcement program between the destination country and partner states of origin and/or transit.³³⁰

One of the main goals of the Renewed Action Plan is the reinforcement of collaborations with third countries which encompasses the establishment of specialized Anti-Smuggling Operational Partnerships with third countries or regions along migratory routes, active engagement with international organizations, and addressing the exploitation of irregular migration by state actors.³³¹ Significant emphasis is placed on the need to strengthen cooperation in preventing and combating migrant smuggling with key third countries, including the establishment of an Anti-Smuggling Operational Partnership.³³² These collaborations are backed by EU agencies such as Frontex, Europol, Eurojust, and the European Union Agency for Law Enforcement Training, aligning with their mandates, and involve operational cooperation supported by EU financial assistance, in accordance with their respective roles.³³³

In the case of Niger, this partnership between the EU and Niger is not outlined in a singular document but rather emerges from various forms of collaboration, including newly funded projects, high-level dialogues, liaison and mission offices, capacity-building, as well as direct and indirect interventions.³³⁴ Already in 2015, Niger emerged as a crucial partner for the EU, recognized as a pivotal transit country on the Central Mediterranean route for migrants from Western Africa,³³⁵ and has become a central player in the European Union's efforts to externalize its migration controls.³³⁶

³³⁰ Gammeltoft-Hansen/Hathaway (fn. 14), p. 23

³³¹ Renewed Action Plan (fn. 25), p. 11

³³² *European Commission*, Communication from the Commission to the European Parliament and the Council, COM(2023) 146 final, establishing the multiannual strategic policy for European integrated border management, para. 9.

³³³ *Ibid.* (fn. 332), para. 9

³³⁴ Arhin-Sam/Lambert (fn. 83), p. 3

³³⁵ *European Commission*, Communication from the Commission to the European Parliament, the European Council and the Council, First Progress Report on the Partnership Framework with third countries under the European Agenda on Migration, 2016, p. 5.

³³⁶ *statewatch*, EU: Commission halts migration cooperation with Niger, but for how long?, 2023, p. 2.

The EU-Niger Migration Partnership explicitly contains the operational partnership to tackle migrant smuggling which is based on the Renewed Action Plan.³³⁷ This includes several actions such as the boosting of the success of the Joint Investigation Team in Niger, where with financial support from the EU, personnel from law enforcement agencies from EU Member States and Niger collaborate closely to dismantle the operational structure of human smugglers and criminal networks.³³⁸ Also, information and awareness-raising campaigns are part of the cooperation.³³⁹ The Nigerien authorities will furthermore be supported with regard to integrated border management by strengthening risk management and assessment capabilities.³⁴⁰ However, after a coup in Niger in July of this year, the European Commission has put its migration and security projects in Niger “on hold for further assessment of their impact”.³⁴¹

f) Direct Involvement

In a more intrusive sixth form of non-entry, the destination country may assume a direct role in controlling migration from within the territory of the cooperating state.³⁴²

Agreements have been executed to permit authorities from third countries to conduct interceptions within the territorial waters of states like Libya aboard European ships.³⁴³ Despite explicit references in EU guidelines emphasizing the significance of upholding the duty of non-refoulement, individuals intercepted are frequently returned without a proper assessment of their protection needs in practice.³⁴⁴ A recent example of a similar incident is the legal action initiated on April 15, 2022, involving Naass and Sea Watch against Frontex, focusing on Frontex's denial to disclose specific documents.³⁴⁵ The applicants cite a pullback incident on July 30, 2021, witnessed by their rescue ship, alleging a violation of international law.³⁴⁶ In the Maltese search and rescue zone, a distressed boat with approximately 20 people was intercepted by the Libyan Coast Guard and returned to Libya.³⁴⁷ Especially

³³⁷ Joint press release: Strengthening cooperation in the fight against migrant smuggling: the European Union and Niger launch operational partnership to tackle migrant smuggling, 2022.

³³⁸ Ibid. (fn. 337), p. 1

³³⁹ Ibid. (fn. 337), p. 1

³⁴⁰ Ibid. (fn. 337), p. 1

³⁴¹ Statewatch (fn. 336), p. 2

³⁴² Gammeltoft-Hansen/Hathaway (fn. 14), p. 25

³⁴³ Gammeltoft-Hansen/Hathaway (fn. 14), p. 25

³⁴⁴ Gammeltoft-Hansen/Hathaway (fn. 14), p. 25

³⁴⁵ European Union General Court p. 1 – Action brought on 15 April 2022, Naass and Sea Watch v Frontex, Case T-205/22 (2022/C 244/52).

³⁴⁶ *Sea-Watch*, Sea-Watch vs. Frontex, <https://sea-watch.org/en/sea-watch-vs-frontex/>, 2023.

³⁴⁷ Ibid. (fn. 346)

interesting for this case is the claimed likelihood of Frontex facilitating this illegal interception.³⁴⁸ There is an assumption that Frontex employs planes and drones to identify individuals attempting to reach safety in Europe by crossing the Mediterranean, subsequently notifying the Libyan coastguards.³⁴⁹ In doing so, they actively contribute to the outcomes wherein refugees and migrants are consistently intercepted by the Libyan coastguards and forcibly returned to Libya, subjecting them to arbitrary detention and torture.³⁵⁰

g) International Agencies

Lastly, developed states assign international agencies the duty to intercept refugees and prospective migrants while they are still under the jurisdiction of countries of origin and transit.³⁵¹ In the European context, Frontex, known as the European Border and Coast Guard Agency, is such an agency.³⁵² It provides assistance to EU Member States and Schengen-associated nations in the management of the EU's external borders and the combat against transnational crime.³⁵³ Frontex serves as a hub of expertise for border control activities at the EU's external borders, facilitating the exchange of intelligence and knowledge among all Member States and neighbouring non-EU countries impacted by migration patterns and cross-border crime.³⁵⁴ Furthermore, Frontex has evolved into the EU's inaugural uniformed law enforcement service through the establishment of the standing corps and enhances its role as an operational branch of the EU.³⁵⁵

In its capacity as an agency, Frontex assumes numerous responsibilities related to border security and measures against people smuggling. As demonstrated earlier, it plays a role in various non-entry forms and is involved in the EU's engagements in third countries concerning people smuggling in general.

³⁴⁸ Ibid. (fn. 346)

³⁴⁹ *Amnesty International*, EU: Frontex's lack of transparency on Libyan cooperation to be heard in court, 2023.

³⁵⁰ Ibid. (fn. 349)

³⁵¹ Gammeltoft-Hansen/Hathaway (fn. 14), p. 26

³⁵² Gammeltoft-Hansen/Hathaway (fn. 14), p. 26

³⁵³ *Frontex*, Who we are, <https://www.frontex.europa.eu/about-frontex/who-we-are/tasks-mission/> (Stand: 10.02.2024).

³⁵⁴ Ibid. (fn. 353)

³⁵⁵ Ibid. (fn. 353)

h) Interim Findings

There are numerous cases and examples where the EU has taken non-entry measures in cooperation with third countries. In reference to some examples, the extent to which they may pose problems for human rights has already been mentioned above.

Particularly when cooperation against people smuggling occurs within the territory of the third country, refugees may consequently be deprived of their Right to Leave, as previously mentioned. The principle of non-refoulement might also be violated if refugees are returned to another country by the EU or the cooperating third country. Moreover, refugees and asylum seekers may find themselves stranded without the ability to seek asylum elsewhere, thus impacting their right to seek asylum, due to the measures and the absence of a legal route to reach their destination country. When a third country acts, especially within its territory, it is typically responsible for upholding human rights. However, due to the collaborative nature of their actions, this responsibility may also extend to the EU.

While this may not apply equally to all categories of non-entry, similar rights are often involved and will therefore be examined in the following chapter.

V. Rights potentially affected

As highlighted in the last chapter, the different forms of non-entrée have the potential to affect various rights and principles, with the broad scope of diverse concepts posing concerns about potential violations of rights. Notably, the Right to Leave, the Right to Asylum, and Non-Refoulement play pivotal roles in this context so that they will be examined more closely in the following. Additionally, it is crucial to examine the extent to which Europe is bound by refugee law beyond its borders.³⁵⁶

To determine whether these rights and principles are being infringed upon or upheld, it is crucial to comprehend their scope, a perspective that will be the central focus of this chapter, all viewed through the lens of the non-entry principle.

1. The Right to Leave

As previously stated, the different forms of non-entrée focus on different measures designed to create barriers to entering the host country. The starting point for many of the

³⁵⁶ *Strauch*, When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation To Combat Smuggling in Libya's Territorial Sea, p. 2421.

measures is often the asylum seekers' home country or a transit country, thus contributing to the possible obstruction of the enjoyment of their Right to Leave.

Policies specific to individual countries that prevent refugees from leaving their country of persecution or a transit country where they remain unsafe undermine the core principles of international refugee protection and have been termed “presumptive refoulement” by some scholars.³⁵⁷

European nations employ various strategies for migration control by engaging with countries of origin and transit, constituting a crucial element of the external dimension of EU migration policy.³⁵⁸ This containment approach is justified with the aim of protecting the lives of individuals seeking to depart and shielding them from human smuggling and trafficking,³⁵⁹ although the validity of these justifications can be subject to empirical questioning.³⁶⁰

a) Basics

To get to another country, the asylum seekers first must be able to leave their country. The Right to Leave, be it from one's country of origin or current residence, serves as an essential prerequisite for the exercise of several other human rights.³⁶¹ Particularly when states take measures in response to the influence of other states as part of their immigration and border control strategies, this right may be subject to limitations.³⁶² This is important because the recognition and protection of refugees can only occur after asylum seekers have departed from their country of origin.³⁶³

The starting point for the Right to Leave is Art. 13 (2) of the Universal Declaration of Human Rights (UDHR).³⁶⁴ “Everyone has the right to leave any country, including his own, and to return to his country.”³⁶⁵ While the UDHR is not inherently legally binding, its widely acknowledged that some clauses are considered part of customary international law, establishing them as universally binding.³⁶⁶ Regardless of the answer to the question of

³⁵⁷ Morrison/Crosland (fn. 200), p. 2

³⁵⁸ *Stoyanova* International Journal of Refugee Law 32 (2020), 403 (p. 403-404).

³⁵⁹ *Stoyanova* German Law Journal 21 (2020), 436 (p. 436).

³⁶⁰ *Stoyanova* (fn. 358), p. 403

³⁶¹ *Council of Europe Commissioner for Human Rights, The Right to Leave a Country, Issue Paper, 2013, p. 4.*

³⁶² *ibid.* (fn. 361), p. 4

³⁶³ *ibid.* (fn. 361), p. 10

³⁶⁴ (Universal Declaration of Human Rights 1948, UN Doc. A/810, 10 December 1948).

³⁶⁵ *ibid.* (fn. 364), Art. 13 (2)

³⁶⁶ *Hannum, The UDHR in National and International Law, Nr. 2, p. 145.*

whether Art. 13 (2) UDHR is one of these clauses, the Right to Leave is, in any case, established as legally binding in the International Covenant on Civil and Political Rights (ICCPR).³⁶⁷ Art. 12(2) of the ICCPR shares similar wording with the article in the UDHR and also served as a template for Art. 2(2) of Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³⁶⁸

Furthermore, several other international law instruments mention the Right to Leave.³⁶⁹ Due to their similar wording and limited relevance to this research, a detailed examination of these instruments will however not be conducted.

b) Scope and Limitations

The Right to Leave a Country entails leaving behind the jurisdiction of that state and its governing institutions, seeking refuge elsewhere where the assurance of those same human rights may or may not be given.³⁷⁰ Furthermore, the individual is entitled to choose the destination country within the scope of the Right to Leave.³⁷¹ However, this does not imply that the Right to Leave one country inherently includes the right to enter another. It has been clarified that an individual can indeed select a country but is only potentially eligible for admission to their chosen destination.³⁷² The destination country maintains sovereignty over its borders and the possibility of admitting individuals, making the right to leave only half a right and meaningful only when accompanied by the right to enter another country.³⁷³

An essential issue arising in this context is the question of whether the Right to Leave applies in terms of its territorial scope. When EU Member States implement measures, such as carrier sanctions and passport controls in foreign countries but also when they cooperate with third countries, they operate beyond their own territory. Initially, one might assume that the countries from which asylum seekers seek to depart are responsible for ensuring this right and therefore liable in case it is infringed. However, since the Right to Leave

³⁶⁷ International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

all European countries are party to the ICCPR, see ratification status for CCPR at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en

³⁶⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222.; Markard (fn. 53), p. 594

³⁶⁹ see Art. 5 1966 UN Convention on the Elimination of All Forms of Racial Discrimination; Art. 10 (2) 1990 UN Convention on the Rights of the Child; Art. 8 (1) 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

³⁷⁰ CECHR (fn. 361), p. 9

³⁷¹ *Office of the High Commissioner for Human Rights*, CCPR General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, 1999, para. 8.

³⁷² *Skribeland*, *Revisiting and Further Exploring the Human*, 2022.

³⁷³ *Juss International Journal of Refugee Law*, 289 (p. 293); Markard (fn. 53), p. 595

includes the ability to leave any country and a state's obligations can extend beyond its own borders to other states, it logically follows that states can potentially violate a person's Right to Leave by implementing control measures that prevent a non-national from departing another country.³⁷⁴

Beyond this, there are some limitations to the Right to Leave. Art. 12 (3) ICCPR states that: *"The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."*³⁷⁵ Art. 2(3) of Protocol No. 4 to the ECHR has a similar wording, including the option to limit this right for reasons related to public safety and the prevention of crime.³⁷⁶

The requirement for restrictions to be provided by law implies that any measure encroaching upon the right must have a clear legal foundation, and must not impair the essence of the right.³⁷⁷ Furthermore, the test of necessity as well as the requirements of proportionality must be met.³⁷⁸

c) Possible Violations

For example, visa regulations could be in violation of the Right to Leave. The General Comment on the ICCPR primarily addresses the actions taken by home states to prevent their citizens from departing their country but does not specifically reference visa requirements imposed by other countries.³⁷⁹ The Guide on Article 2 of Protocol No. 4 to the ECHR on the other hand explicitly states that requirements for fulfilling formalities like acquiring a valid travel document such as a passport and/or a visa as a condition for exercising this right are not prohibited.³⁸⁰ The Right to Leave does not inherently grant the right to select the destination country of one's choice.³⁸¹ Therefore, visa requirements or border controls do not automatically imply that these controls are violating the Right to

³⁷⁴ M. den Heijer, *Europe and extraterritorial asylum*, 2011, p. 157.

³⁷⁵ ICCPR (fn. 367), Art. 12 (3)

³⁷⁶ Protocol No. 4 to the ECHR (fn. 368), Art. 2(2)

³⁷⁷ GC No. 27 (fn. 371), para. 13

³⁷⁸ GC No. 27 (fn. 371), para. 16

³⁷⁹ GC No. 27 (fn. 371)

³⁸⁰ *Council of Europe/European Court of Human Rights, Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights, Freedom of Movement*, 2022, para. 113.

³⁸¹ *Ibid.* (fn. 380), para. 116

Leave; instead, any interference should be justified based on the specific circumstances of the situation.³⁸²

But also, many of the non-entry measures specifically aim to prevent refugees from embarking on their journey to Europe and leaving the country where they are currently located. Particularly in Libya, which is directly situated by the sea, as well as in the border region of Agadez in Niger, the fight against human smuggling aims to impede people from continuing their journey and therefore leaving the country as they choose to.

As we saw, the Right to Leave can be constrained, but such restriction needs legal provision. The informal nature of cooperation with third states, within which anti-smuggling and anti-trafficking measures are executed, appears to fall short of meeting this requirement.³⁸³ Consequently, based solely on this failure to comply, the measures could be deemed contrary to human rights law.³⁸⁴

2. Right to Seek and Enjoy Asylum

The Right to Leave is closely linked to the Right to seek Asylum as it is a necessary prerequisite to leave one's country before being able to enter another country and seek asylum there.³⁸⁵ After establishing that asylum seekers have the Right to Leave their country but that the Right to Leave does not necessarily imply that they have a right to choose their destination, the question arises as to whether they may have a right to travel to Europe within the context of the Right to Seek Asylum and be granted asylum there.

a) Basics

Art. 14 (1) UDHR states that "*Everyone has the right to seek and to enjoy in other countries asylum from persecution*".³⁸⁶ Following numerous discussions regarding the incorporation of the Right to be Granted Asylum, this is the phrasing that was ultimately agreed upon.³⁸⁷ However, it has faced criticism for its perceived lack of strength in terms of ensuring the granting of asylum, as there is ambiguity concerning the extent to which the enjoyment of asylum encompasses the actual granting of asylum.³⁸⁸ Also, there is no such right explicitly

³⁸² Heijer (fn. 374), p. 162

³⁸³ *Stoyanova*, Anti-smuggling and Anti-trafficking Measures, Are they compatible with the EU Charter of Fundamental Rights?, 2020:4, p. 2-3.

³⁸⁴ *Ibid.* (fn. 284), p. 3

³⁸⁵ Markard (fn. 53), p. 595

³⁸⁶ UDHR (fn. 364), Art. 14(1)

³⁸⁷ *Huskamp Peterson* in *The Universal Declaration of Human Rights: an archival commentary*, p. 36.

³⁸⁸ *Ibid.* (fn. 387), p. 36

outlined in UN Treaties.³⁸⁹ The main instrument in this context, the 1951 Convention, does not explicitly contain a Right to Seek Asylum. The foundation of the entire Convention however is the assumption that such a right exists, building upon Art. 14 UDHR.³⁹⁰

Art. 18 of the EU Charter of Fundamental Rights (ECFR) contains a Right to Asylum that “*shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.*”³⁹¹

While the wording may not be as explicit as in other regional human rights conventions, particularly with the reference to the 1951 Convention which lacks such a right, scholars³⁹² as well as jurisdiction³⁹³ have argued that Art. 18 ECFR does grant an individual right that extends beyond mere acts of state mercy.³⁹⁴

b) Scope and Limitations

That subsequently leads to the question of whether asylum seekers then are entitled to select the state in which they seek asylum. This question has sparked contentious debates.³⁹⁵ It has been argued that if States are unwilling to grant a refugee protection, they must either send the person to another country where they are not in danger of persecution on the grounds outlined in the 1951 Convention, or to a country from which there is no risk of being subsequently sent to such territory.³⁹⁶ This has also been backed by the UNHCR who stated that asylum seekers are not obligated to seek asylum in their first effective opportunity, but this also does not imply an unrestricted right to select their country of asylum.³⁹⁷ Their intentions should, however, be considered.³⁹⁸ Refugees may be repatriated

³⁸⁹ *Martin den Heijer* in Peers/Hervey/Kenner (eds.), *The EU charter of fundamental rights*, p. 553-572 (p. 555).

³⁹⁰ 1951 Convention (fn. 41), Introductory Note by the UNHCR, p. 2

³⁹¹ Charter of Fundamental Rights of the European Union (CFR), 2000/C 364/01, Art. 18

³⁹² *Musco Eklund* *Europarättslig tidskrift* 2020, pp. 135 ff. (p. 147); *Gil-Bazo* *Refugee Survey Quarterly* Asylum and the Universal Declaration of Human Rights (2008), pp. 33-53 (p. 52).

³⁹³ e.g. Case C-180/17 X and Y ECLI:EU:C:2018:775, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62017CJ0180>

³⁹⁴ *den Heijer* (fn. 290), p. 562

³⁹⁵ *Ovacik*, *The right to choose country of asylum: The 1951 Convention and the EU’s Temporary Protection Directive*, *Forum on the EU Temporary Protection Responses to the Ukraine War*, 2022.

³⁹⁶ *Kjærum* in Eide/Alfredsson/Swinehart (eds.), *The Universal Declaration of Human Rights* (p. 222).

³⁹⁷ *UNHCR*, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, 2013, para. 3(i).

³⁹⁸ *Ibid.* (fn. 397), para. 3(i)

or relocated to a country where they had already found, could have found, or can find international protection by a formal agreement.³⁹⁹

c) Potential Violations

Considering the controversies surrounding the Right to Seek Asylum it brings us to question the extent to which the denial of asylum can be justified. It has been argued that the EU's agreements with third states, aimed at preventing the arrival of migrants, undermine the Right to Asylum.⁴⁰⁰ Different bilateral agreements obstruct potential asylum-seekers from reaching the border.⁴⁰¹ This raises the dilemma of how one can exercise the EU Right to Asylum, as outlined in the Charter, without becoming part of the irregular migration the EU seeks to curb.⁴⁰²

3. Non-Refoulement

According to Hathaway the principle of non-refoulement lacks the capability to invalidate the traditional non-entry approach of visa controls.⁴⁰³ The extent to which other forms of non-entry can potentially violate the principle of non-entry will be examined in the following.

a) Basics

Non-refoulement is a principle that forbids states from transferring or removing individuals from their jurisdiction or effective control if there are significant reasons to believe that doing so would place the person at risk of irreparable harm upon return, including persecution, torture, ill-treatment, or other severe human rights violations.⁴⁰⁴

The principle was initially incorporated into international instruments under the League of Nations.⁴⁰⁵ The most comprehensive expression of this principle can be found in Art. 3 of

³⁹⁹ *UNHCR*, Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, 2018, para. 2.

⁴⁰⁰ Eklund (fn. 392), p. 147

⁴⁰¹ Eklund (fn. 392), p. 147

⁴⁰² Eklund (fn. 293), p. 147

⁴⁰³ Hathaway (fn. 190), p. 310

⁴⁰⁴ *OHCHR*, The principle of non-refoulement under international human rights law, <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>, 2022, p. 1.

⁴⁰⁵ *UNHCR*, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, para. 9.

the 1933 Convention relating to the International Status of Refugees.⁴⁰⁶ This tradition continued with the preparation of the 1951 Convention and the later incorporation into Art. 33 of the same.⁴⁰⁷ It can also be found in or interpreted into other treaties and conventions, such as the Convention against Torture (Art. 3)⁴⁰⁸ as well as the ICCPR (Art. 7).⁴⁰⁹ In the European context, non-refoulement is not mentioned in any of the legal instruments. However, Art. 3 of the ECHR prohibits torture and inhuman or degrading treatment, and the European Court of Human Rights has interpreted it to encompass the principle of non-refoulement.⁴¹⁰

b) Scope and Limitations

Worldwide, but especially within the European context, there have been extensive debates regarding the principle of non-refoulement and its scope, both in legal proceedings and in academic discourse.

Art. 33 1951 Convention reads as follows:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontier of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴¹¹

Contracting States are bound, while refugees are protected by the provision, which, however, does not require the refugee to be formally recognized as such.⁴¹² Furthermore, it is important to mention, that the principle not only applies to states but also to private actors or states who act on behalf of the states.⁴¹³ According to the Articles for State responsibilities, this requires actions of entities made available by one State to another,⁴¹⁴ individuals or groups acting under state direction or control,⁴¹⁵ situations where individuals

⁴⁰⁶ *ibid.* (fn. 405), para. 9

⁴⁰⁷ *ibid.* (fn. 296), para. 9

⁴⁰⁸ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984, United Nations Treaty Series vol. 1465, p. 85.

⁴⁰⁹ ICCPR (fn. 367), Art. 7

⁴¹⁰ *European Court of Human Rights, On-refoulement as a principle of international law and the role of the Judiciary in its implementation*, 2017, p. 2.

⁴¹¹ 1951 Convention (fn. 41), Art. 33

⁴¹² *Lauterpacht/Bethlehem, The Scope and Content of the Principle of Non-Refoulement: Opinion*, 2003, para. 89 ff., para. 57 ff.

⁴¹³ *ibid.* (fn. 412), para. 61

⁴¹⁴ *United Nations, Responsibility of States for Internationally Wrongful Acts*, 2001, Art. 6.

⁴¹⁵ *ibid.* (fn. 414), Art. 8

or groups assume governmental authority elements in the absence of official authorities,⁴¹⁶ and actions acknowledged and adopted by a State as its own.⁴¹⁷

The principle typically mandates States to conduct individual assessments of claims, although this approach may vary in situations of mass influx, which States also consider when implementing safe third country rules.⁴¹⁸

Another important question in this context is regarding the territorial scope of the principle. Generally, states are obliged to uphold human rights within their jurisdiction, territory, and areas under their effective control. Therefore, when asylum seekers have already entered their territory, it becomes obvious that the states have to abide by the principle of non-refoulement.⁴¹⁹ However, oftentimes states do not send asylum seekers away when they have already reached their territory but rather do so before the asylum seeker arrives on the territory or at the borders. However, it is now recognized, that when effective control is established there or when state's actions directly affect asylum seekers, non-refoulement also applies.⁴²⁰ This becomes particularly significant in instances of collaborative non-entry, where the EU seeks to circumvent this obligation by collaborating with third countries. However, depending on the circumstances, they may still exert effective control.

c) Potential Violations

As said before, when effective control is established, non-refoulement can apply even outside of a state's territory. States explicitly try to avoid the establishment of such control in order to evade the responsibility. While the European Court for Human Rights has already offered legal guidance for measures within the borders and under the control of European states (see above), there is a lack of such guidance for cooperation with third countries.⁴²¹

In the case of the above mentioned pullbacks for example, some even go as far as to say that any involvement, endorsement, or support for pullback operations, that expose individuals to the genuine risk of torture and ill-treatment is incompatible with a genuine interpretation

⁴¹⁶ *ibid.* (fn. 414), Art. 9

⁴¹⁷ *ibid.* (fn. 414), Art. 11

⁴¹⁸ Gammeltoft-Hansen/Tan (fn. 219), p. 34

⁴¹⁹ See various articles of the 1951 Convention (fn. 41), e.g. Art. 4, 10, 11, 14

⁴²⁰ UNHCR, (fn. 239), para. 35

⁴²¹ *Frei*, Circumventing Non-Refoulement or Fighting "Illegal Migration"?

and adherence to the prohibition of torture and ill-treatment, which includes the principle of non-refoulement.⁴²²

Also, EU Member States fund actions that, under European law, they cannot carry out themselves.⁴²³ The procedural aspect of the non-refoulement prohibition, implies that measures with third countries are lawful only if every person is registered, protected from refoulement, and has access to a comprehensive procedure, ensuring a full examination of international protection needs and rights as per the 1951 Convention and other legal instruments.⁴²⁴ Where Human Rights are violated by the third countries throughout actions that are financed by the EU, these violations should fall back on the EU itself as well.

4. Other Rights

Other rights, such as the Right to Leave by Sea, the Right to Life and the Prohibition of Torture or Inhuman or Degrading Treatment (Art. 2 and 3 ECHR) may potentially also be affected⁴²⁵ will however not form part of this analysis.

5. Interim Findings

As an interim result, it can be noted that non-entry manifests itself in various ways. However, it is important to understand that a violation of non-entry as such is not possible. Instead, it rather is a broad term that encompasses various actions by states that potentially or actually violate various rights of asylum seekers. While some of the rights violations are more obvious, others are harder to pin down as such or keep getting denied by states. Because of these possible violations, in the last years and decades, many of the traditional non-entry policies have been challenged. Instead of trying to find ways to obey their obligations, the EU keeps on trying to find new ways and forms of non-entry in order to try and evade their responsibilities.

VI. Conclusion & Recommendations

In conclusion, the current EU strategy against migrant smuggling constitutes various forms of non-entry and is questionable at best. It is partly proven in other parts likely to be in

⁴²² Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment, UN Doc A/HRC/37/50, February 2018, https://www.ohchr.org/Documents/Issues/Torture/A_HRC_37_50_EN.pdf, para. 57.

⁴²³ Frei (fn. 422)

⁴²⁴ Frei (fn. 422)

⁴²⁵ Markard (fn. 53), p. 603 ff.; Stoyanova (fn. 359), p. 436 ff.

violation of a number of refugee rights connected to non-entrée, especially the Right to Leave, the Right to Seek Asylum as well as the principle of Non-Refoulement. While certain measures undoubtedly operate within a legal grey area, prompting a critical reassessment of their effectiveness and the ethical justification for allocating resources, others violate refugee rights and require cessation. With top priority, it is therefore necessary to reconsider the specific measures and the underlying legal framework, making sure they are compliant with human rights.

Furthermore, critics argue that policies emphasizing the cessation of irregular migration and readmission requirements as prerequisites for collaboration in legal migration and migrant rights protection can have coercive effects on countries in the Global South, potentially compromising their sovereignty and leading to a trade-off between migration control and access to legal migration channels and development aid.⁴²⁶ The consequences and influence the EU measures have in different countries should therefore also be considered when entering a cooperation with third country.

Also, it is essential to recognize the broader systemic factors contributing to irregular migration and smuggling, including state actions that inadvertently fuel smuggling operations. Europe's obstruction of legal entry options inadvertently exacerbates the risks faced by asylum seekers, highlighting the need for more comprehensive and humane migration policies. Some argue that focusing solely on whether states are permitted to combat smuggling overlooks a broader issue. States often contribute to the conditions that fuel smuggling by supporting militias abroad and obstructing migrants' access to transportation, leading refugees to seek alternative routes.⁴²⁷ This inadvertently expands the market for smugglers, prompting states to respond with more aggressive measures, thus perpetuating a cycle of reliance on smugglers.⁴²⁸ Without these imposed regulations, there is a possibility that more individuals would attempt to reach Europe through legal channels to seek asylum, resulting in a less perilous journey for them. Hence, Europe's varied non-entry policies contribute to the risky behaviour of asylum seekers, who find themselves with no alternative routes. It is therefore vital to reassess all measures to evaluate their effectiveness and determine if the allocation of funds and resources can be justified,

⁴²⁶ *Ambrosini/Hajer, Irregular Migration*, p. 72.

⁴²⁷ Gerver (fn.), p. 4

⁴²⁸ Gerver (fn.), p. 4

particularly considering the potential for alternative investments in addressing underlying causes.

In light of these considerations, there is a pressing need for the EU to exhibit greater sensitivity to potential human rights violations and adopt a holistic approach that addresses root causes while ensuring the protection and dignity of migrants and refugees. Upon ratifying the 1951 Convention, states pledged to uphold the rights of refugees, and thus should honour that commitment rather than seeking novel and inventive methods to circumvent it.

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