A review of the new Facilitation EU Directive Proposal in light of the unique Belgian approach to deal with migrant smuggling: a good opportunity to re-conceptualise smuggled individuals from a protective lens?

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Article

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A good opportunity to re-conceptualise smuggled individuals from a protective lens?

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1. Introduction

In November 2023, the European Commission issued a Directive proposal to deal with migrant smuggling in the European Union (hereinafter: EU). The Directive aims to 'modernize' the existing legal framework dating back from 2002 (the so-called Facilitators Package composed of Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA) to, *inter alia*, be better equipped to deal with the new modus operandi currently used by migrant smugglers.[1] A significant change brought forward by the proposal is the introduction of a new constituent element of the facilitation offence, namely the financial or material benefit. This clarifies the type of conduct that needs to be criminalised and should align the EU legal framework to the UN Smuggling Protocol.[2] This addition seems to respond to the most recurrent and consistent criticism voiced by scholars, civil society actors and practitioners since the inception of the Facilitators Package. The latter allowed the Member States to criminalise actions falling under what can be described as humanitarian assistance and led henceforth to infamous so-called 'solidarity trials' throughout the EU.[3] While the Directive only sets minimum standards and per se wouldn't prevent the Member States from criminalizing humanitarian aid, the Commission clearly expresses that such actions would not be covered by the offence of facilitation on the EU level. This addition strengthens clarity and legal certainty, particularly for actions carried out by civil society actors, and should be welcomed. However, an important criticism surrounding this recent proposal resonating with former scholarly opinions on the Facilitator's Package remains. The European Commission continues to convey a simplistic and monolithic image of all migrant smugglers as ruthless criminals undermining migrants' fundamental rights, placing their lives at risk in their

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1 Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, p. 2-3.

2 European Commission Proposal, 2023, p. 3; See also V. Mitsilegas, 'The normative foundations of the criminalization of human smuggling: exploring the fault lines between European and international law', *New Journal of European Criminal Law* 2019/1, p. 69. For the other significant changes planned in the proposal, notably on police cooperation and rules of jurisdictions see T. Wahl, 'Commission presents package to prevent and fight migrant smuggling', *Blog entry*, 2023 https://eucrim.eu/news/commission-presents-package-to-prevent-and-fight-migrant-smuggling/#:~:text=On%2028%20November%202023%2C%20the,COM(2023)%20755%20final)%3B.

3 S. Carrera, G. Sanchez, L. Vosyliute, S. Smialowski, & J. Allsopp, J. *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update*. 2018. European Parliament, Policy Department of Citizens' Rights and Constitutional Affairs, Study for the PETI committee. Migration Policy Centre; M. Tazzioli & W. Walters, 'Migration, solidarity and the limits of Europe. Global Discourse', *Global Discourse* 2019/9, p. 175-190.

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quest for high profit and forming part of an organised and hierarchical 'network'. While the existence of such networks and the violent and abusive encounters which can be experienced by smuggled individuals is undeniable, this reductive portrayal is problematic. It seems to perpetuate the inability of the European Commission to acknowledge the complex dynamics involved in facilitation practices which often entail small-scale, community-embedded, and harmless processes which have been (empirically) underlined in the scholarship throughout the years.[4]

Moreover, the depiction of smugglers as ruthless criminals abusing the vulnerability of migrants warranting the strengthening of the penal framework at the EU level creates a conceptual ambiguity[5] on the status of those who are directly impacted by these behaviours, the smuggled individuals. Besides countering irregular immigration in the EU, one of the claimed rationales behind the fight against migrant smuggling is to dismantle criminal networks 'that can cause human rights violations and death'. This reasoning could or arguably *should* (emphasis added) call for a protective dimension supplementing the dominating law-enforcement centric approach which, at this stage, remains solely focused on investigation, prosecution, and sanctioning.[6] Indeed, the proposal specifically introduces an aggravated criminal offence coupled with higher penalties when the offence 'causes serious harm, endangers the life or health or cause death' of the smuggled individual.[7] Surprisingly, and in spite of the propensity for the violation of fundamental rights of smuggled individuals by smugglers mentioned in the text, the word 'victim' is fully absent from the document. The only call that is made in the proposal is to *not* criminalise third-country nationals for the mere fact of being smuggled,[8] which arguably cannot equate to a protective measure. This brings the unique yet relatively unknown Belgian legal framework to deal with 'aggravated forms' of migrant smuggling to the forefront. The latter carries the potential to solve this conceptual ambiguity as it acknowledges the potential for (criminal) victimization involved in some cases of migrant smuggling and, unlike the Commission's proposal, entails the corresponding protective measure for *victims* (emphasis added) of aggravated forms of smuggling.[9]

Drawing from my doctoral research,[10] which focused *inter alia* on the unique Belgian legal framework, also from an empirical perspective, this paper seeks to address this conceptual contradiction visible in the European Commission's proposal. More specifically, the paper identifies some of the (conceptual and/or legal) ambiguities present in both the proposed EU legal framework that will be negotiated later this year as well as in the current Belgian legal framework and argues that some of them can potentially be resolved through mutual inspiration. Indeed, the Belgian model appears to be more coherent on its conceptualisation of victimhood and rightfully incorporates corresponding protective measures for aggravated smuggled victims in place, whilst still having the need for efficient judicial and law enforcement investigation in mind, which appears to be the European Commission's main concern.

The paper will start by roughly delineating the distinctive legal framework established in Belgium, a jurisdiction of transit significantly impacted by the smuggling phenomenon due to its central geographic location within the EU and its proximity to the United Kingdom. Subsequently, the paper will underline the potential for improvement brought forward by the Commission's proposal for the Belgian framework (and presumably for other Member States), notably surrounding the difficult notion of 'patrimonial and material benefit'[11] and the clear-cut exclusion of humanitarian assistance from the scope of criminalisation. In its current form, the European Commission's proposal represents a missed opportunity to tackle the multi-faceted and highly complex phenomenon of migrant smuggling, particularly considering the stark domination of the criminal/law enforcement centric approach. Calls will henceforth be made for the Commission to approach the migrant smuggling phenomenon in a more holistic manner, which notably involves looking into its root causes which have to go beyond 'fighting the evil smuggler'.

2. A unique and protective legal framework as a source of inspiration

The Belgian legal framework distinguishes between two criminal offences related to migrant smuggling: migrant smuggling *stricto sensu* (article 77*bis* of the Law on Foreigners of 15 December 1980 – hereinafter: LoF) which will be discussed focusing specifically on cases in which the crime is committed with aggravating circumstances

4 F. Alagna & G. Sanchez, 'The persisting challenges of the new European Commission's smuggling directive proposal', *Blog Entry*, 2024: https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2024/01/persisting-challenges-new-european-commissions.

5 On the need to reconceptualise migrant smuggling as a crime having the capacity of causing harm/victimization, see R. de Massol de Rebetz & P.F. Ölçer, 'Aggravated migrant smuggling in a transit migration context, criminal victimization under ECtHR positive obligations case law', *Annales de la Faculté de Droit d'Istanbul*, 2022/71, p. 413-480.

6 See European Commission Proposal, 2023, p. 2-3.

7 Article 4 of the European Commission Proposal.

8 Article 3 of the European Commission Proposal.

9 De Massol de Rebetz & Ölçer 2022.

10 R. de Massol de Rebetz, *Beyond the dichotomy between migrant smuggling and human trafficking: a Belgian case study on the governance of migrants in transit* (diss. Leiden University), Leiden 2023.

11 The notion of 'avantage patrimoniale' in French or 'vermogensvoordeel' in Flemish used in the Belgian legislation does not have a direct English translation. On the difficulties surrounding the interpretation given to the notion, see section 3 of this article.

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(article 77*quater* LoF) and the broader facilitation offence (article 77 LoF) which will be unpacked in the following section. What sets the two offences apart is a subjective element of the smuggling offence, namely the intention of obtaining a patrimonial benefit (see section 3). Like in many other European jurisdictions, migrant smuggling and human trafficking are considered fully separate criminal offences since the legislative reform of 2005. However, the Belgian legislature crafted a distinctive protective approach to address aggravated instances of migrant smuggling cases, granting its victims the opportunity, under strict conditions, to attain protective status typically reserved exclusively for victims of human trafficking.[12]

Acknowledging the potential for criminal victimization faced by smuggled individuals by emphasizing the 'dramatic consequences' of both offences and to maintain legislative 'consistency' and 'coherence', the decision was made to harmonise the aggravating circumstances for both crimes.[13] The law mentions the following non-exhaustive list of situations which constitute aggravating circumstances and can lead to protective rights for trafficking and smuggled victims alike:

- when the offence was committed against a minor (article 77*quater*, 1° LoF);
- when the offence was committed by abusing of the vulnerable situation of an individual (notably resulting from its illegal or precarious social and/or administrative situation) such that the person has made no real and acceptable alternative but to submit to the abuse (article 77*quater*, 2° LoF);
- when the offence was committed by making use, directly or indirectly, of fraud, violence, threats or any form of coercion (article 77*quater*, 3° LoF);
- when the victim's life was endangered (deliberately or through gross negligence) (article 77*quater*, 4° LoF).[14]

A brief examination of this exemplative listing makes it clear that many smuggled individuals could, at least in theory, qualify to initiate the procedure leading to protective rights such as the granting of a reflection period, shelter, legal/psychological/medical assistance, short/long term residence and work permit, etc.[15] It is essential to note that official (policy) documents (e.g., Ministerial Circular organising the procedure,[16] National Action Plan against Migrant Smuggling[17]) and decisions by Belgian Courts[18] unequivocally designate (aggravated) smuggled migrants as *victims* rather than *objects* which may be perceived as deviating from both the UN Smuggling Protocol, the Facilitators Package and the current European Commission's proposal (see introduction).

The dominant narrative currently used by the European Commission emphasises the (human) rights abuses faced by smuggled individuals to justify and uses them to rationalize in an instrumental manner its hard stance against so-called 'ruthless' smugglers.[19] This argumentation makes the sheer absence of any corresponding protective measures for smuggled individuals puzzling, if not hypocritical. Beyond resolving this apparent conceptual ambiguity, drawing inspiration from the unique Belgian model would also be in line with the dominant law-enforcement/criminal centric approach deployed by the Commission. The Belgian legal framework does not fully stem from a human/victim rights or humanitarian approach, but is on the contrary also driven by the necessity of conducting efficient investigations. Indeed, the protective rights are *inter alia* dependent on the willingness of the victim to collaborate with the authorities by means of at least making relevant declarations. The notion of 'relevant declaration' is broad and does not equate to the lodging of an official complaint by the victim (the latter is nonetheless welcomed yet not made mandatory). The collaboration with the authorities should, in theory, increase the probability of a successful prosecution of the smuggler.

However, as explained in detail in my doctoral dissertation, the procedure is scarcely used in practice. To take a statistical example from 2022 from the most recent report of the National Rapporteur (known as *Myria*), out of 325 migrant smuggling cases entering the country's Public Prosecutor Offices, only 11 victims of aggravated forms of smuggling made use of the protective procedure. It must be noted that among the 325 cases, 222 cases were closed without further action, mainly for reasons of expediency, insufficient evidence(s) or due to the impossibility to identify the perpetrator(s), hence the potential usefulness of having the victim's collabo-

12 On the rights and conditions to start the procedure and the protective rights attached to the specific status see Circular COL 5/2017 of 23 December 2016 implementing a multidisciplinary cooperation in respect of victims of human trafficking and/or certain aggravated forms of human smuggling. Available at www.om-mp.com). For more explanation on the status, see the detailed reports of the Group of Experts on Action against Human Trafficking: www.coe.int/en/web/anti-human-trafficking/belgium1.

13 Belgian House of Representative. Projet de loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains. *Doc. Parl*., Chambre, Session 2004-2005, 10 August 2005, Doc. 51, p. 11.

14 For more information as to how these aggravating circumstances are interpreted by Belgian Courts, particularly on what constitutes an abuse of a situation of vulnerability, see De Massol de Rebetz (n10 – dissertation), p. 67-69; see also C-E. Clesse, *La traite des êtres humains. Droit belge éclairé des législations française, luxembourgeoise et suisse*. Bruxelles: Larcier 2013.

15 For a thorough explanation behind the scarcity of use of this procedure by smuggled victims in practice, and on the difference between the 'law in the books' and the 'law in action', see De Massol de Rebetz 2023, p. 103-152.

16 See Circular mentioned in footnote 12.

17 Service de Politique Criminelle. Plan d'Action Trafic des Etres Humains 2021- 2025: www.dsb-spc.be/web/index.php?option=com_content&task=view&id=172&Itemid.

18 Direct mentions of the term 'victim' are indeed present in Belgian case law regarding migrant smuggling. For instance, consider: Correctional Tribunal of Termonde, 3 November 2017); Correctional Tribunal of Gent, 16 October 2017; Correctional Tribunal of Brussels, 27 June 2012.

19 N. Perkowski & V. Squire, 'The anti-policy of European anti-smuggling as a site of contestation in the Mediterranean migration 'crisis''. *JEMS*, 2019/45, p. 2167-2184.

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ration.[20] Even if at first glance this unique approach does not appear to be successful, a reductive yet common explanation for this underutilization can be summarized as follow: migrants are simply not interested in starting the procedure because they only transit through Belgium, they have no incentive to turn against their smugglers (condition in the procedure) as they simply want to reach the United Kingdom. As highlighted in the doctoral dissertation, the reality shows a much more convoluted picture, where, for instance, the lack of training/sensibilisation of first line implementers as well as structural and institutional issues of (police) capacity leads regularly to a sheer lack of information of possible victims about the protective procedure in place.[21] Therefore, although not as successful as it could be in its current form, the potential of this unique model deserves to be highlighted, not only because it resolves the conceptual ambiguity surrounding the notion of victimhood (see above) but also because, if implemented correctly, the system could be prove to be highly effective for the (police and judicial) authorities.

3. A reflection on the financial/material benefit as a constituent element and the clearcut exclusion of the humanitarian assistance from the scope of criminalisation. A good opportunity to resolve current (legal) unclarities?

As mentioned in section 2, the Belgian legislature does not solely sanction the act of contributing (directly or indirectly) to the irregular entry, transit or stay of third country nationals made in view of obtaining (directly or indirectly) a 'patrimonial benefit' (article 77*bis* LoF) but also sanctions any type of assistance to the irregular entry, transit or stay of a third country national that is not provided for 'mainly humanitarian reasons' (article 77 LoF). Both notions of 'patrimonial benefit' as well as 'mainly humanitarian reasons' created interpretative difficulties and ambiguities with regards to the (broad) scope of criminalisation enshrined in the Belgian legislation. In that regard, the forthcoming EU discussions on the current Commission's proposal which plans to unequivocally exclude humanitarian assistance from its scope and add the 'financial and material benefit' as a constituent element of the facilitation offence could be beneficial to resolve current debates and confusions.

The notion of (direct or indirect) patrimonial benefit encompasses the 'financial or material benefit' or the 'for profit' intent highlighted since the beginning in the UN Smuggling Protocol and constitutes the mental element (*mens rea*) of the migrant smuggling offence. At first glance, the term could seem to be synonymous with the notion of 'lucrative goal', which denotes a financial gain in international instruments. Yet, the notion of patrimonial benefit is in fact broader and lacks legal definition.[22] In Belgian case law, the term is understood more broadly than lucrative goal and, following the definition provided in the context of money laundering, covers any economic profit from criminal activity.[23] Despite the legal ambiguity, the reference to an economic advantage remains evident, requiring the courts to proof the smugglers' intent to profit at the expense of the victim or the victim's family.[24] A teleological interpretation of the offence would suggest that an assistance merely for a reasonable compensation without the intent to harm falls outside the scope of criminalisation. Indeed, and resonating with common (policy) description of the phenomenon, the preparatory documents describe migrant smuggling as a matter of 'organised criminal groups' which are hierarchical in nature and exploit human misery to generate substantial profit whilst jeopardizing the safety and security of migrants during clandestine transportation.[25] Nonetheless, as the notion of patrimonial benefit remains undefined, judges are left with substantial discretionary space to interpret it in the light of the circumstances of a case, which, according to the scholarship, is not always in line with the main *ratio legis* thought by the legislature, as clearly visible in the abovementioned *travaux préparatoires*. Quoting Clesse, a leading Belgian legal scholar, the aim of the legislation was always 'to penalize migrant smuggling and not only the help to illegal immigration'.[26]

A recent mediatic case, known as the 'solidarity trial' or the 'hosts trial', which will also be discussed further below, serves as an interesting illustration of this conceptual ambiguity.[27] The case went to the Brussels Court of Appeal and was based on the indictment of four Belgian residents, including two journalists, who hosted migrants and lent them money and their cell phones together with seven migrants for migrant smuggling. In

20 Myria, 'Jaarverslag mensenhandel en mensensmokkel 2022: Gebonden door schuld', 2022, p. 122-127. www.myria.be/nl/publicaties/jaarverslag-mensenhandel-en-mensensmokkel-2022.
21 For the complete explanation, see De Massol de Rebetz 2023, p. 103-155.
22 P. Delgrange & O. Stein, 'L'incrimination du trafic des êtres humains et de l'aide à l'entrée et au séjour: protection des victimes ou lutte contre l'immigration irrégulière? Le point sur le cadre légal', *R.D.D.E.*, 2018, p. 496.
23 M. Hardt, 'Le procès dit "de la solidarité" comme révélateur des faiblesses du cadre légal en matière de lutte contre l'aide à l'immigration irrégulière', 2019, *Cahiers de l'EDEM*, p. 26-36.
24 Delgrange & Stein 2018; Clesse 2013.
25 Belgian House of Representatives (footnote 12), p. 7.
26 Clesse 2013, p. 186. See also G. Vermeulen, 'Matroesjka's: tien jaar later. Repressie en controle als speerpunten van het vernieuwde mensenhandelbeleid?', *Panopticon*, 2005/10, p. 1-10.
27 C. Macq, 'Procès des hébergeurs: hébergeurs acquittés, migrants condamnés', 2019, *Justice en Ligne*. www.justice-en-ligne.be/Proces-des-hebergeurs-hebergeurs; Hardt 2019.

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the first trial which took place in 2018, the prosecution claimed that 'justice needs to publicly set benchmarks/limits to the assistance given to migrants'. In the first instance, the Correctional Court acquitted the four 'hosts' (see below on the humanitarian assistance) but still convicted the seven migrants and sentenced them to 12 to 40 months of imprisonment.[28] The Court considered that the seven migrants who were involved in the smuggling processes to finance their future travel to the UK had the intention to gain a patrimonial benefit. In that regard, my doctoral research demonstrated that the involvement of migrants themselves in low-level yet visible tasks of the smuggling process in exchange for either (modest) compensation or in exchange of a 'free' attempt to cross the border in the future is common practice.[29] Several scholars described this judicial decision as problematic, as migrants in transit in precarious socio-economic situations are more likely to be criminalized compared to migrants 'simply' found in lorries who might be considered victims (see status above). In 2021, the Brussels Appeal Court substantially reduced the sentences of the seven migrants by highlighting that even though they were involved in the smuggling processes, they were also victims of migrant smugglers.[30] While this decision further clarifies the narrow scope of the facilitation offence concerning humanitarian assistance, the confirmed conviction of the seven migrants raises questions regarding the *ratio legis* of the smuggling offence, which as explained above, aims to target organised smuggling networks.

Whereas the *mens rea* of the migrant smuggling offense includes gaining a patrimonial benefit, the broader facilitation offence (article 77 LoF) does not have the latter as a constituent element which considerably expands the scope of criminalisation of smuggling-related conduct. It covers any type of assistance which is not provided for 'mainly humanitarian reasons'. Nonetheless, the Belgian legislature consciously opted to exclude humanitarian assistance from the scope of the facilitation offense. Before 1996, the humanitarian clause applied solely when the 'helper' had 'purely' humanitarian reasons for assisting or attempting to assist in irregular border crossings. In 1996, due to restrictive interpretations given in Belgian case law, the term 'purely' was replaced with 'mainly' to align with the legislative intent and avoid contradictory interpretations.[31] The term 'mainly humanitarian' is currently understood as 'everything that has no criminal or economic purpose'.[32] Therefore, when there is no financial gain or material benefit involved, the magistrate should also consider the 'criminal/delictual' intent of the presumed perpetrator considering the factual circumstances of the case. The legislature indicated that these terms should be interpreted broadly, and that the humanitarian exoneration should also be applied when the 'helpers' received a secondary benefit for the help provided, such as assistance with household chores.[33] In its current form however, the legal provision still leaves room for ambiguity, and, as underlined above, akin to other Member States, there are still so-called 'solidarity trials' being held before Belgian courts.[34] In the 'host trial' mentioned above, the Correctional Court acquitted the four 'hosts', but the Public Prosecutor's Office decided to appeal the decision. The rationales for doing so were dual: on the one hand, to demonstrate that justice is not lax or lenient, and on the other hand, to send a deterrent message to prospective hosts.[35] The Brussels Appeal Court in the end firmly confirmed the acquittal of the four hosts. Still, it appears beneficial that the European Commission's proposal sends a clear signal regarding the scope of criminalisation with the outright exclusion of humanitarian assistance.

4. Concluding remarks

This article argued that the recent Facilitation EU Directive Proposal issued by the European Commission contains ambiguities with regards to the troublesome and monolithic conceptualisation of the crime of migrant smuggling. The inherent contradiction lies, on the one hand, in the depiction of frequent and grave violations of the (fundamental) rights of smuggled individuals by so-called organized smuggling networks. This description occurs, on the other hand, without incorporating any mention of victimhood and the necessary corresponding protective rights in the proposal, which is particularly problematic. More generally, one could argue that the European Commission instrumentally 'capitalizes' on the simplistic portrayal of the ruthless and organised smuggling networks to justify more restrictive immigration practices.[36] The main argument brought forward in the article was that the unique Belgian model allowing victims of aggravated forms of migrant smuggling to access the protective status exclusively reserved to human trafficking victims could serve as an inspiration for the future discussion held at the EU level to resolve this conceptual ambiguity. Implementing such an approach at the EU level could also be beneficial for (large-scale) investigation purposes as the protective rights are only granted (*inter alia*) if the victims show their willingness to collaborate with the authorities. The article nevertheless also shed light on the potential that the Commission's proposal carries for clarifying

28 A. Bastenier, 'La solidarité n'est pas un crime', *La Revue Nouvelle*, 2021/5, p. 9-12.
29 De Massol de Rebetz 2023, p. 135.
30 De Massol de Rebetz 2023, p. 65; Hardt 2019, p. 26-36.
31 See Clesse 2013, p. 187-190.
32 Clesse 2013, p. 188.
33 Commission Justice et Paix, 'Aider les sans-papiers, délit ou solidarité?', 2010: www.justicepaix.be/aider-les-sans-papiers-delit-ou-solidarite/.
34 For an overview of the situation in the EU see ReSoma, 'The criminalisation of solidarity in Europe', 2019: www.migpolgroup.com/wp-content/uploads/2020/03/ReSoma-criminalisation-.pdf.
35 Bastenier 2021, p. 9.
36 On this matter, see the most detailed argument of De Massol de Rebetz 2023, p. 92-99.

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and restricting the scope of criminalisation of national legislation touching upon smuggling-related conducts. In so doing, the article took the Belgian legislation as an illustration, which is not unique in the EU legal landscape regarding the existing ambivalence on the (broad) scope of criminalisation of smuggling(-related) offences. If adopted, the Commission's proposal could send a symbolic yet strong message to the Member States to refrain from punishing conduct that could be qualified as acts of humanitarian assistance.

The presented argument is that the offence and its application should remain aligned with the *ratio legis* of the legislation, or more specifically, with the ways in which migrant smuggling is problematized and conceptualized: namely, as an issue involving organised criminal groups abusing the vulnerable positions of migrants amidst their migration journeys. Therefore, the current and observable (drastic) punishment of low-level actions committed by vulnerable migrants (or those who assist them) seems at odds with the main rationale behind the offence thought through by the Belgian legislature. At the EU level however, a more nuanced conclusion should be reached regarding the apparent indifference to the vulnerable situation of migrants, the inexistent reference to the notion of potential 'victim' and the corresponding lack of (protective) measures in place. Whilst multi-faceted, the main rationale behind the facilitation offence is not to dismantle networks that are 'taking advantage of people's despair' and are placing 'people lives at risk' to maximize their profit.[37] Indeed, the document explicitly singles out the fight against irregular migration as a key aim of the Facilitation Directive. This could explain the visible lack of concern given to the situation of (vulnerable) migrants. Nonetheless, an important argument to bring forward is the contradiction (or arguably the hypocrisy) underlined in the article between on the one hand the portrayal of 'the ruthless smugglers' and, on the other hand, the corresponding protective measures adopted or the lack thereof. Repeating what has been singled out by other scholars when describing previous EU counter-smuggling policy documents and the former Facilitators Package, the reliance on the simplistic depiction of the need to fight violent and exploitative networks violating migrant's fundamental rights is used in an instrumental manner to justify restrictive EU border policies and practices.[38] This appears to remain the case when looking at the current proposal. If the need to fight the smuggler is also conceptualised to fight abusive and violent networks, then the corresponding protective rights for those subjected to this type of horrendous behaviour would need to be found as well.

To conclude, it is important to underline that the European Commission's proposal unfortunately misses the opportunity to address the complex and multi-faceted phenomenon of migrant smuggling in a holistic manner. Just like its predecessor, the Facilitator's Package of 2002, the current proposal does not address *at all* the root causes and/or the demand driving the phenomenon.[39] This decision appears understandable considering the sensitive and political nature of the topic which touches upon the thorny subject of irregular immigration in the EU. As many scholars underlined, addressing the root causes of the phenomenon would lead to complex discussions on, for instance, growing inequalities between the global North and global South but also and importantly, on the effect of restrictive border policies on the smuggling market.[40] Consequently, the (legal) response provided to deal with migrant smuggling will always and regrettably remain incomplete, if not counterproductive as crafting sustainable solutions hinges notably on diminishing the demand for migrant smuggling services.[41]

37 European Commission Proposal, 2023, p. 1.

38 G. Sanchez, K. Arrouche, M. Capasso, A. Dimitriadi, & A. Fakhri. 'Beyond networks, militias and tribes: Rethinking EU counter-smuggling policy and response', *Euromesco Policy Study*, 2021/19, p. 12-35; De Massol de Rebetz 2023, p. 92-96; Perkoswki & Squire 2019, p. 2167-2184; Alagna & Sanchez 2024.

39 The regulatory fitness and performance programme (REFIT) carried out in 2017 on the Facilitator's Package explicitly states that the legal instrument 'does not address the root causes of the demand for facilitation of irregular border crossing or residence in the EU (…)'. See REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), SWD (2017) 117 final, p. 4.

40 See *inter alia* Perkowski & Squire 2019; J. Carling, 'How should migrant smuggling be confronted?' *Migration Research Leaders' Syndicate*, 2017, p. 97-103; H. de Haas, 'Don't blame the smugglers: the real migration industry', 2015: https://heindehaas.blogspot.com/2015/09/dont-blame-smugglers-real-migration.html.

41 Carling 2017, p. 97.

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