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The 'humanitarian smuggling' of refugees

Criminal offence or moral obligation?

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Abbreviations

EP	European Parliament
EU	European Union
EU Facilitation Directive	Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence
European Council	Council of the European Union
FRA	Fundamental Rights Agency
ICRC	International Committee for the Red Cross
Model Law	Model Law against the Smuggling of Migrants
NATO	North Atlantic Treaty Organisation
Refugee Convention	1951 Convention Relating to the Status of Refugees
UN Smuggling Protocol	2000 United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air
Travaux Préparatoires	Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention Against Transnational Organised Crime and the Protocols thereto
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention Against Transnational Organised Crime

1 Introduction[1]

In the middle of one night in January 2016, Salam Aldeen received what had now become a routine call regarding boats in distress off the coast of Greece. Since co-founding Team Humanity, a volunteer rescue organisation, in September 2015, Aldeen had responded to distress calls from approximately 200 boats with a total of approximately 10,000 refugees on board.[2] As per protocol, Aldeen informed the Greek coastguard that he was going out in search of the boats. Yet on this particular evening, Aldeen and the four other volunteer lifeguards with him never reached the refugees in need of rescue.[3]

When a military ship came threateningly close to their small rescue boat, they altered course and headed back to shore. Before they reached land, two military vessels and the Greek coastguard surrounded them, ultimately arresting them and confiscating their boat. Their alleged crime: human smuggling (The Observatory 2016).[4] Their actions: attempting to fulfil the widely acknowledged duty to rescue at sea. Despite allegations by Greek authorities that they helped to escort a boat back to shore, as Aldeen told an NPR reporter in an interview, '[t]he problem [was] there [was] no boat. Nobody found a boat' (Kakisis 2016).[5] Aldeen was released from prison after paying a significant fee, but is unable to leave Greece and is required to check in weekly with the Greek authorities. He awaits trial and faces up to ten years in prison.

The arrest of Aldeen and the four volunteers on charges of human smuggling is far from unique. In the current 'refugee crisis', the European Union (EU) and its Member States are targeting individuals and organisations that assist refugees to reach or traverse Europe, from reckless organised smuggling operations to humanitarian organisations to private citizens. Take, as a second example, the recent case of a 49-year-old British man, ex-solider, and owner of a modest

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[1] This working paper is a revised version of my dissertation submitted in June 2016 for the MSc in Refugee and Forced Migration Studies at the University of Oxford. I am immensely grateful to my MSc supervisor, Dr Cathryn Costello, for her guidance, mentorship, and invaluable insights throughout this project. I would also like to thank Dr Roger Zetter for his support, as well as Dr Alexander Betts, Dr Jeff Crisp, Joshua Aiken, and Sarah Landry for their feedback at various stages of the research and writing process.

[2] I employ a basic rights definition of refugee, which takes a more inclusive approach than that of the 1951 Refugee Convention Relating to the Status of Refugees. I borrow Gibney's definition, which focuses on rights deprivations: a refugee is 'someone who requires the substitute protection of a new state because their fundamental human rights cannot or will not be protected by their state' (Gibney 2015: 6). For scholarship on the boundaries of the refugee definition, see: Shacknove (1985); Gibney (2004); Betts (2011); Carens (2013). While others may use the terms irregular or mixed migration to describe the individuals coming to Europe, according to the United Nations High Commissioner for Refugees (UNHCR), the majority are indeed refugees; around 84% of arrivals in 2015 came from the top ten refugee-producing countries in the world (Clayton and Holland 2015). As refugee status is declaratory rather than constitutive, an individual is a refugee as soon as she satisfies the conditions of a refugee, not when she is formally recognised following a status determination process. Finally, it is worth noting that the smuggler assisting an individual to cross a border would have no way of determining if she is a bona fide refugee.

[3] One of the volunteers was affiliated with Team Humanity and the other three with another humanitarian organisation, Proem-Aid.

[4] There are conflicting reports as to whether Aldeen and the other volunteers have been charged with human smuggling or trafficking. As quoted in The Observatory (2016), the accusations include: 'felony of illegal transport from abroad to Greece of third country nationals, who do not have a right to enter the Greek territory.' They are also accused of 'carrying an illegal weapon,' as rescue equipment includes a small knife.

[5] For more reporting on this case, see: Kakissis (2016); Leivada (2016); The Observatory (2016); Safdar (2016); Wilding (2016).

carpet cleaning business, Rob Lawrie. In October 2015, moved by the pleas of a desperate father, Lawrie, a father-of-four himself, attempted to smuggle a four-year-old Afghan girl from the abhorrent conditions of a makeshift refugee camp, known as the 'Calais Jungle', to the home of her relatives in the United Kingdom (UK). Apprehended by the French authorities, Lawrie was charged with human smuggling and faced up to five years in prison (Lusher 2016). While ultimately cleared of the charge due to the humanitarian nature of his act, the threat of criminalisation and trial alone destroyed his life, leading to a divorce from his wife, immense regret over his compassionate act, and attempted suicide (Wilsher 2016).[6]

Deeply entangled within the EU's robust fight against human smuggling are those individuals and organisations who are engaging in a range of humanitarian acts, from removing a young refugee from dire conditions to rescuing thousands in peril at sea. In January 2016, the Council of the European Union (European Council) released 'Draft conclusions on migrant smuggling,' detailing a multi-pronged approach to address 'all forms of migrant smuggling' (European Council 2016: 2). As Statewatch Director Tony Bunyan commented, calling for opposition to the draft conclusions: '[t]he Council proposals would criminalise NGOs, local people, and volunteers who have worked heroically to welcome refugees when the EU institutions did nothing' (Statewatch 2016a). The draft conclusions coincided with EU plans to require individuals and independent organisations working with refugees to 'register' with the state; such measures would likely supress much-needed humanitarian work. It is perhaps no coincidence that Aldeen's arrest took place shortly after Greece introduced its pilot registration program at the behest of the EU.[7]

Human smuggling does not, and should not, immediately bring to mind the images of blameless, if not praiseworthy, individuals like Aldeen and Lawrie. Rather, it conjures images of those smugglers whose actions are in large part responsible for the deaths of over 3,700 individuals in the Mediterranean in 2015 and over 3,500 dead or missing thus far in 2016 (Clayton and Holland 2015; UNHCR 2016). Human smuggling is associated with deliberately taking advantage of the distress of refugees, cramming them onto unseaworthy vessels, and putting them in imminent danger in order to trigger search and rescue operations like those carried out by Aldeen.

Paradoxically, combatting reckless human smuggling and suppressing humanitarian acts are in service of the same goal: to deter irregular migration to and across Europe. According to the May 2015 'EU Action Plan on migrant smuggling (2015-2020)', the aim of combatting migrant smuggling is largely to 'reduce incentives to irregular migration' (European Commission 2015: 1). The June 2016 European Commission communication 'on establishing a new Partnership Framework with third countries under the European Agenda on Migration' reiterated the need 'to target the criminal networks involved in smuggling and trafficking in order to prevent irregular flows' (European Commission 2016: 6). The EU is employing all possible tactics to deter and stop refugees from reaching its borders irregularly – from the October 2015 United Nations (UN) Security Council Resolution permitting EU security forces to intercept and inspect vessels suspected of human smuggling off the coast of Libya (on the grounds that they might be a 'threat to international peace and security'), to the February 2016 deployment of North Atlantic Treaty Organisation (NATO) warships in the Aegean Sea, to the EU-Turkey deal to send those arriving irregularly in the EU back to Turkey.[8]

[6] Lawrie was, however, found guilty of a lesser allegation of child endangerment. He was ordered to pay a suspended fine, which may be dropped after five years provided that he commits no further offences.

[7] For more information on the Greek program, see: Statewatch (2016a, 2016b).

[8] See, respectively: United Nations (2015); NATO (2016); Collett (2016).

Without the services of human smugglers, many of the more than one million refugees seeking relative safety in the EU in 2015 would have been unable to do so. Moreover, without rescue operations, thousands more refugees would have perished at sea; or, as politicians have argued, refugees would have decided against embarking on such a dangerous journey in the first place. The European Commission (2015) recognises that safe and legal channels to the EU would indeed reduce the need for refugees to take perilous routes, thereby diminishing the demand for smuggling services. Its focus nevertheless remains on combatting human smuggling and all actions that might be construed as such.

The European Commission is scheduled to release a proposal by the end of 2016 to 'improve the existing EU legal framework to tackle migrant smuggling' (European Commission 2015: 3). As such, it has been reviewing Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (EU Facilitation Directive), legislation that governs human smuggling in addition to other acts facilitating the transit and stay of irregular migrants. The Facilitation Directive sanctions a wide range of acts of assistance with irregular migrants with only an optional safeguard in place for those whose assistance of entry or transit is humanitarian in nature. This safeguard, known as the 'humanitarian clause', provides EU Member States with the possibility to exempt those like Lawrie and Aldeen from criminalisation, an option that has been taken up by a minority of states. The European Commission has rhetorically acknowledged the need to '[avoid] risks of criminalisation of those who provide humanitarian assistance to migrants in distress,' yet the actions coinciding with this review suggest otherwise (European Commission 2015: 3).

Given the fact that the Facilitation Directive is under review and criminalising human smuggling is Europe's stated top priority, it is an opportune moment to step back and ask not how the law should be interpreted, but rather what conduct the law *ought* to prohibit and permit. Embedded within the legal and political disputes over what does or does not constitute a criminal act of smuggling under current laws are deeper normative questions about the nature of smuggling itself. If smugglers are offering a means for refugees to reach the safety of a European state, at a time when it is nearly impossible to do so through legal channels, should these individuals be brought to justice or are they bringing about justice? What is the range of morally permissible actions that might be considered 'humanitarian smuggling'? How should blameworthy acts of smuggling be distinguished from blameless, if not praiseworthy, ones? These normative questions are both timely and practically important.

Methods and methodology

Answering these questions ultimately requires a multi-disciplinary approach, drawing upon principles of legality, moral theory, and principles of humanitarianism. It is rooted in the fundamental belief that morals should precede the law, rather than the law dictating what is moral. I am thus first and foremost concerned with clarifying the norms – the 'principles that serve to guide, control or regulate proper and acceptable behaviour' – by which the law should abide (Weiner 1998: 434). In order to do so, this research develops a framework for understanding the moral distinctions between blameworthy criminal smuggling and blameless 'humanitarian smuggling' – acts that are ethically defensible and should not be criminalised. At the same time, my research adheres to what Carens refers to as a 'realistic' approach to morality, seeking to 'avoid too large a gap between the ought and the is' (Carens 1996: 156).

This realistic approach involves taking 'the existing international order as a given', even if this is a non-ideal order (Carens 2013: 10). I thus take as a premise that some borders are legitimate and some border controls defensible. Equally, liberal democratic states have a duty to admit refugees, at least some of the time. I also stipulate that in liberal democratic states, criminal law should only be

used with good reason and that criminal law ought not be used to suppress moral actions or imperatives.

My research is divided into three parts: 1) legal analysis, 2) moral inquiry, and 3) practical recommendations. The first part asks: what behaviours do existing smuggling prohibitions criminalise? It analyses two distinct legal approaches to define the range of acts that constitute human smuggling and warrant criminalisation. It turns first to the widely ratified 2000 United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol), against which the EU Facilitation Directive is often critiqued, and then to the Facilitation Directive itself. Through legal doctrinal analysis and drawing upon principles of legality, I argue that both smuggling prohibitions, albeit in different ways and to different degrees, are vague and overbroad. As a result, they fail to enable subjects of the law to orientate their behaviour accordingly and risk criminalising morally defensible acts.

With an understanding of the expansive range of acts that might be considered criminal under current smuggling protocols, the second part turns to a normative question. It asks what acts of smuggling *ought not* to be criminalised. For the purposes of exposition, I outline three possible normative thresholds, each of which delineates where the boundaries between humanitarian and criminal smuggling might be drawn. I begin with a narrow minimum standard and move to a more liberal approach. Through historical and contemporary examples, I tease out the moral complexities embedded within blameless acts of smuggling and illustrate the historical continuity of the humanitarian smuggling phenomenon. As Carens states, '[w]e gain our most important moral insights not from theory but from experience' (Carens 2013: 194). The spectrum of actions that are blameless, if not morally obligatory, clarifies the misplaced boundaries and over-breadth of smuggling prohibitions.

The third and final part questions how it might be possible to close the gap between what is and what should be legal, considering three ways in which smuggling prohibitions might be drafted such that 'humanitarian smugglers' do not risk criminalisation. Consideration is given in particular to the recent recommendations from the 2016 European Parliament (EP)-commissioned report, 'Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants' (Carrera et al. 2016), as well as to the ruling in the landmark 2015 case from the Supreme Court of Canada, *R v. Appulonappa*. I argue that humanitarian exemptions are an insufficient remedy to decriminalise 'humanitarian smuggling'. Rather, at a minimum, smuggling prohibitions should be more narrowly drafted to eliminate legal uncertainties and over-breadth. I further suggest that the harms resulting from smuggling may be more appropriately punished under existing criminal offences.

Terminology

'Humanitarian smuggling' refers to acts facilitating the irregular entry of an individual to cross a national border that are not only morally permissible, but should also fall outside of scope of punishable offences under smuggling prohibitions. The use of the qualifying adjective 'humanitarian' represents a choice to work within the existing terminology set out in legal frameworks and analysis. As will be discussed in detail in chapter 2, the Facilitation Directive's optional safeguard against prosecution is referred to as a '*humanitarian* clause' and some scholars argue that the Smuggling Protocol contains an 'implicit *humanitarian* exemption'. As will be discussed in chapter 3, the concept of humanitarianism itself is far from straightforward and the boundaries of what constitutes a humanitarian act are deeply contested. I thus endeavour not to narrowly and definitively define the term 'humanitarian smuggling', but rather to begin to outline the range of possible acts that might fall within it.

The phrase 'humanitarian smuggling' is intended to jar. Influenced by the work of Zetter (1991) on labelling refugees, I aim to apply a similar logic to the labelling of 'humanitarian smugglers'. Recognising that labels are not purely definitional but rather 'conceptual metaphor[s]' laden with ascribed meanings, the use of the term 'humanitarian smuggling' is intended to challenge the purely negative 'stereotyped identities' of smugglers (Zetter 1991: 39-40). It is an effort to more accurately and fairly label those who have come to fall under the seemingly boundless and politically stigmatised category of criminal smugglers. 'Humanitarian smuggling' is thus a re-appropriation of the term smuggling from its abuse in the political sphere – where it serves to advance a larger project of migration control – entering it instead into a more fitting conversation with morality and the rule of law.

William Lacey Swing, Director General of the International Organisation for Migration, habitually refers to smugglers as 'the travel agents of death' (Inskeep and Montagne 2015). My use of the term smuggler (without any qualifying adjective) is to be read void of such value judgements. While some smugglers are unquestionably 'travel agents of death', others are more accurately described simply as 'travel agents'.[9]

Literature review

There are robust bodies of literature on existing smuggling prohibitions and on the criminalisation of humanitarian assistance with irregular migrants. Hathaway (2008) offers a noteworthy critique of both the UN trafficking and smuggling protocols, upon which this research relies. Despite the fact that the UN produced legally distinct frameworks on smuggling and trafficking, Hathaway's insights illuminate the interconnectedness between the two, and in so doing demonstrate the Smuggling Protocol's deficiencies.[10] Hathaway not only acknowledges that smuggling 'is regrettably essential to the ability of most refugees to claim their right under the Refugee Convention,' but also that its criminalisation likely promulgates, rather than mitigates, harm to refugees (Hathaway 2008: 39). As he suggests and as the current crisis has rendered irrefutable: 'the criminalisation of smuggling may actually increase the risk of human trafficking',' creating greater possibilities for human rights abuses than it prohibits (Hathaway 2008: 5).

Weber and Grewcock, in the context of Australia, offer similar critiques, challenging the implicit assumption that international cooperation against smuggling prevents harm and instead suggesting that it may in fact 'globalis[e] harm' (Weber and Grewock 2012: 379). Bhaba (2005), Obokata (2005), Baird (2013), and Crepeau (2013) equally provide analyses on human smuggling from a human rights perspective and in the context of containment policies. By contrast, Gallagher (2009) offers a defence of both the UN smuggling and trafficking prohibitions, in direct opposition to Hathaway (2008). She argues that 'there is as yet no evidence that the development of an international legal response to trafficking and migrant smuggling has resulted in a worsening of the already dire plight of asylum seekers and refugees' (Gallagher 2009: 845). This research will demonstrate, in line with Hathaway and in contrast to Gallagher, that vague and overbroad smuggling prohibitions risk suppressing humanitarian assistance for refugees.

In regards to the EU Facilitation Directive, Peers (2012) offers a classic legal analysis, critiquing not only the fact that the Directive risks criminalising those whose acts are purely humanitarian in nature, but also the fact that the directive 'will impact negatively upon refugees and asylum seekers' (Peers 2012: 538). There has also been a recent burgeoning of literature addressing the Directive

[9] I thank Dr Cathryn Costello for bringing this comment to my attention.

[10] Where smuggling rests on a voluntary agreement between the individual and the smuggler, trafficking involves the threat or use of force, coercion or the abuse of power, in addition to exploitation (United Nations 2002b: Article 3(a)).

and the extent to which it criminalises assistance (Provera 2015; Carrera et al. 2016; Carrera and Guild 2016). The above-mentioned EP-commissioned report provides an important critique of the Directive, seeking to better understand the immensely understudied effects of its implementation (Carrera et al. 2016). The report ultimately concludes that there is indeed evidence to suggest that the Facilitation Directive contributes to the suppression of humanitarian acts and offers recommendations to amend the Directive, which this research will assess in its final part.

Scholars like Webber (2006a, 2006b, 2008), Provera (2015), and Watson (2015) locate the criminalisation of assistance with irregular migrants within the larger body of literature on the criminalisation of migration itself. Webber, for example, argues that governments 'bulldoze any humanitarian effort' that interferes with deterring asylum claims and deporting asylum seekers (2006a: 11). Webber also importantly weaves together a historical narrative of the criminalisation of acts of assistance with asylum seekers. Several scholars have drawn upon the notion of solidarity as a theoretical frame for explaining these acts of assistance with irregular migrants (Webber 2006a and 2006b; Fekete 2009; Allsopp 2011; Provera 2015; Ryngbeck 2015).

The work of Basaran (2014a, 2014b, 2015), like this research, is concerned with clarifying the relationship between law and morality as it pertains to suppressing humanitarian acts. Basaran's work focuses on the ways in which smuggling prohibitions undermine the duty to rescue at sea in the larger context of a shrinking humanitarian space in liberal democratic societies. Basaran argues that the failure to engage in the duty to rescue at borders is not a result of 'individual immoral behaviour', but rather the product of 'collective indifference', in which 'human beings are encouraged to look away and even to let people die at borders in the name of security' (Basaran 2015: 1).

My research seeks to bring the legal critiques of smuggling prohibitions in conversation with an inquiry into the moral quality of human smuggling. While much of the literature recognises that smuggling prohibitions risk criminalising 'humanitarian acts', insufficient attention has been given to where the boundary between blameless and blameworthy acts should be drawn. Moreover, the literature lacks an inquiry into the morally defensible spectrum of acts, which should be considered humanitarian. My contribution to the literature is thus to map the moral terrain of ethically defensible smuggling, drawing upon principles of legality, practical ethics, and humanitarian principles. In building a normative framework with which to distinguish blameless from blameworthy smuggling, my research ultimately challenges both the legal purpose and moral permissibility of smuggling prohibitions.

2 Legal uncertainties

There is widespread agreement amongst legal theorists regarding the ideal rule of law that 'laws must be open, clear, coherent, prospective, and stable' (Endicott 1999: 1-2). The law should seek to avoid arbitrary governmental discretion and 'must be capable of guiding the behaviour of its subjects' (Raz 1979, quoted in Endicott 1999: 2). Offences should be drafted such that they orientate 'right' (non-criminal) actions from 'wrong' (criminal) ones. Moreover, criminal law should not criminalise ethically defensible behaviours. Maximum certainty, a recognised general principle of international and EU law, is intended to enable those who are subject to the law to appropriately regulate their conduct with stability and predictability, clearly distinguishing between legal and illegal acts (Ashworth and Horder 2013).

There are debates concerning the degree to which maximum certainty and the elimination of vagueness are possible and even always desirable, ranging from the argument that 'vagueness has no function in the law' (Sorenson 2001) to the argument that the 'law is necessarily vague' (Endicott 1999).[11] Yet, the principle of maximum certainty implicitly acknowledges that some vagueness is inevitable. As Ashworth and Horder point out, the principle of maximum certainty would otherwise be more appropriately termed 'absolute certainty' (Ashworth and Horder 2013: 65). Rather than 'dictate an outcome in every possible solution', I take as a largely incontestable premise that the law should be sufficiently clear and narrow so as to serve as a 'guide' to orientate general behaviour (Endicott 1999: 18).

Legal doctrinal analysis, drawing upon these principles of legality and orthodox treaty interpretation (in accordance with standard international and EU interpretive rules), demonstrates that the thresholds determining what constitutes an act of smuggling warranting criminalisation in both the Smuggling Protocol and the Facilitation Directive are too vague; they fail to clearly distinguish actions that would lead to criminalisation and those that would not. Additionally, both smuggling prohibitions are overbroad; they risk criminalising those individuals whose acts either fall outside the law's stated purpose or are ethically defensible, if not obligatory. The boundaries of the law are not just blurred; they are also misplaced. These deficiencies at the regional and international levels ultimately permit the promulgation of similar uncertainties and expansive tendencies across EU Member States and signatories to the UN Smuggling Protocol.

UN Smuggling Protocol

The Preamble to the Smuggling Protocol rhetorically portrays the Protocol to be the response to two primary concerns: (1) 'the significant increase in the activities of organised criminal groups in smuggling…which brings great harm to the States concerned', and (2) 'the need to provide migrants with humane treatment and full protection of their rights' (United Nations 2000: 1). Smuggling is firstly depicted as a threat to states and secondarily as a potential threat to migrants. The perpetrators of the criminal act of smuggling are identified as organised criminal groups.[12] The very fact that the Smuggling Protocol is a supplement to the United Nations Convention Against Transnational Organised Crime (UNTOC) and is overseen by the United Nations Office on Drugs and Crime (UNODC) is telling of the types of behaviours that should theoretically be targeted by the Smuggling Protocol.

Despite the Smuggling Protocol's stated concerns in the Preamble to combat transnational organised crime and to give due consideration to migrants' rights, the content of the Smuggling Protocol and the guidelines for its transposition into national law indicate that it addresses a different – and even contrasting – set of concerns. As Hathaway argues, the recognition of migrants' human rights (see articles 5 and 6.3) was merely a 'concession' to migrant-producing states: 'human rights issues were viewed simply as constraints to be dealt with' (Hathaway 2008: 28).[13] The Smuggling Protocol's stated focus on transnational organised crime is questionable in practice. As will be analysed further, its transposition at the national level permits the criminalisation of a far broader range of individuals than those affiliated with organised crime.

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[11] For more information on these debates, see: Raz (1979); Endicott (1999); Schiffer (2001); Sorensen (2001); Poscher (2012); Ashworth and Horder (2013).

[12] Article 2a of the UNTOC defines organised criminal groups as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit' (United Nations 2004: 5).

[13] For a contrasting viewpoint, see: Gallagher (2009).

The Smuggling Protocol establishes the threshold for what constitutes criminal smuggling based upon the element of gain. As Article 3 states:

> *"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* (United Nations 2000: 2).

The fact that the prohibition of smuggling relies on the receipt of gain, whether financial or material, implies that acts facilitating irregular entry that involve some form of gain are implicitly 'wrong' or criminal. Conversely, those acts facilitating irregular entry absent of gain are necessarily 'right' or non-criminal. While this distinction is not expressly defined as one between criminal and humanitarian acts in the Protocol itself, the 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention Against Transnational Organised Crime and the Protocols thereto' (Travaux Préparatoires) clarify that this was indeed the intent.[14] The Travaux Préparatoires explain that the 'financial or material benefit threshold' was:

> *included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties* (UNODC 2006: 469).[15]

Two main conclusions can be drawn from this excerpt in the Travaux Préparatoires. First, it reinforces the Protocol's concern with organised criminal groups. Second, the gain threshold operates on the assumption of a for-profit/humanitarian binary, whereby actions for profit and those for humanitarian reasons are mutually exclusive. Basaran thus refers to this gain threshold as an 'implicit protection of humanitarian acts' (Basaran 2014a: 382). While 'humanitarian reasons' are not defined, the Travaux Préparatoires indicate that 'support groups such as religious or non-governmental organisations' would likely carry out such humanitarian acts (UNODC 2006: 469). They remain silent, however, on whether or not acts driven by humanitarian reason could be carried out by private individuals.

This for-profit/humanitarian binary is problematic, as it rests on the premises that acts for gain cannot be humanitarian and acts not for gain cannot be criminal.[16] Based on the threshold of gain as an implicit humanitarian exemption, the aforementioned work of Team Humanity to rescue refugees would fall clearly outside of the Protocol's prohibitions. Team Humanity is an established non-governmental humanitarian organisation that relies on the work of volunteers. Likewise, the smuggling rings operating off the coasts of Turkey and Libya, which charge exorbitant fees for their services – ---not to mention their implication in the deaths of thousands of refugees – fit squarely within the Protocol's smuggling definition. The legal uncertainty lies with those cases that fall in a grey area. An organisation could conceivably act based on 'humanitarian reason' but also be compensated for doing so. If the Team Humanity volunteers, for example, earned a fair salary they could be understood to fall within the scope of the Smuggling Protocol.

[14] As per Article 32, 'Supplementary Means of Interpretation' of the Vienna Convention on the Law of the Treaty, '[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31' (United Nations 1969: 340).

[15] See also: UNODC (2006: 486, 489). For additional analysis on the gain threshold, see: McAdam and Baumeister (2010).

[16] This critique is furthered by Basaran (2014a); Watson (2015); Carrera et al. (2016).

In theory, the implicit humanitarian exemption should be reinforced by the Smuggling Protocol's emphasis on transnational organised crime. Team Humanity, whether operating for gain or not, is without question *not* a transnational organised criminal group. This aim is reinforced in Article 4, the Scope of Application, which states that the scope is limited to offences that are 'transnational in nature and involve an organised criminal group' (United Nations 2000: 3). Yet, contrary to the Protocol's primary purpose, the inclusion of the 'transnational' and 'organised crime' elements are optional in the Protocol's transposition into national law. As indicated in the commentary of the 'Model Law against the Smuggling of Migrants' (Model Law):[17]

> *[t]he Model Law does not distinguish between provisions that require the elements of transnationality and organised crime and provisions that do not, in order to ensure equal treatment by national authorities of all cases of smuggling of migrants within their territory* (UNODC 2010: 8).

In addition, the 'Legislative Guide for the implementation of the Smuggling Protocol' states that '[i]n the case of smuggling of migrants, domestic offences should apply even where transnationality and the involvement of organised criminal groups *does not exist or cannot be proved*' (UNODC 2004: 333, emphasis added). The discretion given to states in transposing the Protocol into national legislation permits the creation of overbroad laws that risk criminalising those individuals who are not part of transnational organised groups, in direct opposition to the main objective of the Protocol. At the national level, the criminalisation of a wide range of acts could thus be permissible, even blameless humanitarian acts involving modest compensation.

Even though the Smuggling Protocol may seem to have an implicit, even if vague, humanitarian exemption, it rests on an inaccurate for-profit/humanitarian binary that fails to enable individuals to properly orientate their behaviour. Moreover, the fact that the definition of smuggling can be expanded beyond organised criminal groups at the national level permits criminalising those individuals whose acts are morally defensible. Nevertheless, these apparent failures of the Smuggling Protocol to abide by principles of legality are likely deliberate, ultimately furthering a broader agenda of deterrence and migration control. Enabling the criminalisation of a wider range of acts ultimately serves, as Hathaway articulates, 'broadly based efforts to prevent the arrival or entry of unauthorised non-citizens' (Hathaway 2008: 6).

EU Facilitation Directive

The prohibition of smuggling in the EU Facilitation Directive takes a starkly different approach from that of the UN Smuggling Protocol. The suppression of smuggling and its penalisation, along with other acts of facilitation, are outlined in two documents, known together as the 'Facilitator's Package': (1) the Facilitation Directive and (2) the Council Framework Decision of 28 November 2002 on strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. All EU Member States were required to transpose the terms of the Facilitator's Package by 2004.

The Facilitation Directive is explicitly concerned, first and foremost, with deterring irregular migration. As the first paragraph of the Directive states: '[o]ne of the objectives of the European Union is the gradual creation of an area of freedom, security, and justice, which means, *inter alia*, that illegal immigration must be combatted' (European Council 2002: 17). Prohibiting irregular entry is merely one means to do so, but as the title of the Directive indicates, it expands beyond

[17] The Model Law is a guide to help states to 'become party to and implement the UNTOC and its protocols', as required by Article 6 of the Protocol. The Model Law 'contains all the provisions that the Protocol requires or recommends that States introduce in their domestic legislation. The Commentary to the Model Law indicates which provisions are mandatory and which are optional' (UNODC 2010: 1).

facilitation of irregular border crossings to also punish activities falling under the categories of facilitating transit and residence. As Spena argues, '[p]aradoxical as it may seem, in the Facilitation Directive's approach, smuggling, as a form of facilitation, is only wrongful in an ancillary way, as if it was only a form of *complicity* in the *real* wrong which is the wrong of irregular migration' (Spena 2016: 35; emphasis original). The focus on deterring irregular migration produces a disregard for the smuggled migrants themselves, highlighted by the fact that the Directive does not define its relationship to international human rights or refugee law (Peers 2012).

The infringements set out in the Facilitation Directive mirror its expansive intent to sanction, most regularly through criminal law, a wide range of activities that may support irregular migration. Article 1.1a stipulates that Member States:

> *shall adopt appropriate sanctions on: any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens* (European Council 2002: 17).

The threshold of financial gain is notably absent from the definition of facilitating irregular entry or transit. The choice not to include the same threshold of gain as the Smuggling Protocol is deliberate, as Article 1.1b on the facilitation of irregular residence notably includes this implicit, albeit flawed, humanitarian safeguard.

Article 1.2 does, however, include an *optional* 'humanitarian clause', which applies *only* to Article 1.1a such that '[a]ny Member State may decide not to impose sanctions…where the aim of the behaviour is to provide humanitarian assistance to the person concerned' (European Council 2002: 17). Theoretically, the absence of a financial gain element in regards to defining the facilitation of irregular entry and the transposition of a humanitarian exemption could eliminate the legal uncertainty for those whose actions may be both humanitarian and for gain, unlike the Smuggling Protocol. In reality, the majority of Member States have transposed Article 1.1a expansively, permitting the criminalisation of a broad range of individuals facilitating irregular entry – from members of smuggling rings putting refugees in deliberate danger to volunteer lifeguards rescuing refugees in peril at sea.

The decision to include an optional 'humanitarian clause' was not without contention. Its wording is ultimately the product of compromise amongst the drafters put forth by the Swedish presidency (European Council 2001a). For example, Austria was entirely opposed to Article 1.2 and the UK also submitted reservations (European Council 2001c and 2001a). By contrast, Germany proposed that the humanitarian clause should be 'compulsory' and Greece acknowledged that it 'did not disagree with the substance of the provision' (European Council 2001b: 2 and 2001c: 2). Whilst the product of compromise, the optional humanitarian exemption ultimately permits the criminalisation of what seems to be a limitless spectrum of activity at the national level, failing to enable subjects to orientate their behaviour accordingly and even prohibiting ethically defensible acts. This expansive objective, however, serves the larger object and purpose of the Facilitation Directive to combat irregular migration.

At the national level, all 28 Member States sanction the facilitation of irregular entry to some degree, according to a 2014 report by the Fundamental Rights Agency (FRA). Only four Member States – Germany, Ireland, Luxembourg, and Portugal – require there to be an element of gain (FRA 2014a: 9). At the time the FRA's research was conducted, the optional 'humanitarian clause' had been explicitly transposed in a variety of forms at the national level in only eight Member States. The range of the exemption includes prohibiting the punishment of assistance to family members in Austria, to preventing sanctions against those who act on behalf of a volunteer

organisation dedicated to assisting asylum seekers in the UK and Ireland, to not punishing assistance arising out of unforeseen circumstances, like emergency or rescue, in Lithuania (FRA 2014a: 10).[18]

Recent recommendations to amend the Facilitation Directive have suggested that, at a minimum, it should be revised to more closely resemble the UN Smuggling Protocol, through the incorporation of a gain element (although, aptly an *excessive* gain element). The authors of the EP-commissioned report, among others, have argued that the Facilitation Directive suffers from an 'implementation gap', in regards to the threshold of what constitutes an act of smuggling, the possibility of a humanitarian defence, and the level of protections in place for the smuggled migrants (Carrera et al. 2016: 10; Allsopp and Manieri 2016: 85). More so than an 'implementation gap', however, the Facilitation Directive is more appropriately described as a *tacit expansion* of the already misguided Smuggling Protocol. The Facilitation Directive covers a wider range of acts making it difficult for humanitarian agencies to appropriately orientate their behaviour according to the law. Moreover, with only an optional humanitarian exemption transposed in a minority of Member States, the Facilitation Directive renders permissible the transformation of what I will argue are morally defensible acts into criminal wrongs.

The UN Smuggling Protocol and the EU Facilitation Directive take distinct approaches both to target and to rationalise targeting smuggling. Yet, the fact that they are both vague and overbroad is evidence of the fact that both prohibitions are in service of the same goal – whether implicit or explicit – to deter irregular migration, even at the expense of suppressing humanitarian acts. This conclusion ultimately raises normative questions about what the purposes of prohibiting smuggling *should* be and where the line between blameworthy and blameless acts of assistance should be drawn.

3 Toward a moral consensus

This chapter turns to practical ethics to begin to map the moral terrain of what might be considered 'humanitarian smuggling', asking not what the law does and does not criminalise, but what it *ought not* to criminalise. Despite the fact that 'laws govern human conduct by promoting acceptable behaviour and by providing visions of norms and normality', legally established norms and indicators of normality do not necessarily coincide with moral norms and what should be considered 'normal' (Basaran 2015: 5). In the case of smuggling prohibitions, the law risks treating morally permissible, if not praiseworthy, acts as criminal. Given the fact that existing legislation fails to establish clear or appropriate boundaries around blameworthy acts, it is imperative to consider what acts of smuggling are morally defensible and should not be criminalised. Criminal law, after all, is intended not only to establish what actions constitute a crime, but also to protect blameless actions from criminal punishment. The question of what ought not to be criminalised is of particular importance due to the structure of the Facilitation Directive to include an optional 'humanitarian exemption' and due to the implicit premise in the Smuggling Protocol that humanitarian acts are by definition not for gain.

[18] Since 2014, there may have been changes to legislation that are not taken into account. In the current crisis, for example, Greece has repeatedly amended its legislation. For more information on the transposition of the Directive into national law, see: the European Commission and European Migration Network Ad Hoc Query (2012); FRA Annex (2014b).

Drawing on the basic pillars of legal moralism, I take as a point of departure the largely noncontroversial premise that some moral acts should never be crimes and that the moral quality of an act is critical to the question of whether or not the act should be criminal.[19] There are morally blameless acts that ought not to be criminalised. This is notably not to suggest that conversely *all* moral wrongs should be criminal (although some certainly should be) or that the moral quality of an act is the only indicator of behaviours that should be criminalised. Nevertheless, in the case of smuggling prohibitions, I argue that the law risks establishing acts as criminal wrongs that are not only *not* immoral, but also possibly morally compulsory.

For the purposes of exposition, this chapter outlines three thresholds to demonstrate where the line might be drawn between blameless and blameworthy smuggling, distinguished by the degree of harm facing the individual. The three thresholds are not intended to declare where distinctions should be definitively drawn, but rather to illustrate the wide spectrum of morally permissible, if not morally obligatory, acts that constitute 'humanitarian smuggling'. The gravity of harm facing the smuggled individual offers a useful distinction for two main reasons. First, harm – while a 'morally loaded (and essentially contested) concept' itself – is one of the core elements to be considered in the drafting of criminal offences according to basic principles of criminal law (MacCormick 1982, quoted in Ashworth and Horder 2013: 28). Actions that serve to remove subjects from harm are equally critical to considering those acts that should be exempt from criminalisation. Second, I define harm in terms of various degrees of rights deprivations – from the right to life to non-derogable rights to other human rights. While certainly not the only means to distinguish amongst degrees of harm, this approach largely parallels the standards to which presumptive refugees are held.

Safeguards to refugees for irregular entry

Under certain circumstances, Article 31 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) provides that presumptive refugees may cross borders irregularly and nevertheless be exempt from punishment. The drafters of the Refugee Convention recognised that given the unique and vulnerable predicament of refugees, a refugee may have no choice but to cross borders without permission in order to escape a threat to her 'life or freedom'. As stated in Article 31.1 of the Refugee Convention:

> *[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence* (UNGA 1951: 174).

The irregular entry of a refugee is to have no bearing on the credibility of a refugee claim under Article 31. Moreover, according to Goodwin-Gill, '[a]lthough expressed in terms of the "refugees", this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum seekers…to "presumptive refugees"' (Goodwin-Gill 2001: 8).[20] The threshold to which a

[19] There are extensive debates within legal moralism over whether or not the immorality of an act is a necessary or sufficient condition for criminalisation. Negative moralists, like Duff, argue that when considering criminal responsibility, '[w]e can begin with the familiar, intuitively, plausible thought that crimes should be moral wrongs' (Duff 2007: 81). The immorality of an act is necessary, but need not be sufficient for criminalisation. Positive legal moralists, like Feinberg (1988), however, argue that moral wrongs might be a satisfactory reason to criminalise conduct, but it need not be necessary.

[20] These protections would only extend to presumptive refugees until status determination; only those deemed to be Convention refugees would be exempt from punishment (and not those under the wider

presumptive refugee is held to determine the permissibility of her irregular entry is whether or not she faces a threat to her life or freedom based on the grounds of the Refugee Convention as stated in Article 1. This threshold can be satisfied not only through a well-founded fear of the threat to one's life or a violation of non-derogable rights, but equally in many circumstances through a well-founded fear of the violation of other fundamental human rights (Goodwin-Gill and McAdam 2007).

In light of the expansive scope of smuggling prohibitions, it might be surprising that the drafters of the Refugee Convention acknowledged that the services of smugglers were often a necessary reality and that it would be contradictory to provide safeguards to refugees, while punishing their rescuers. In fact, the drafters considered whether or not Article 31 should provide safeguards, not only to the refugees themselves, but also to those assisting them for humanitarian reasons. The Swiss representative expressed concerns about the criminalisation of those providing humanitarian assistance to refugees, explaining that 'the Swiss federal laws did not regard any person assisting him [a refugee] as liable to punishment, provided his motives were above board'. The French representative agreed, stating that such assistance was 'an obvious humanitarian duty'. The French government was nevertheless opposed to modifying the language of Article 31, fearing it would encourage refugee organisations to become 'organisations for the illegal crossing of frontiers'. Similarly, the United States representative acknowledged that the failure to include a safeguard for those proving humanitarian assistance might be 'a possible oversight in the drafting of the article'. Yet, the United States government was not in support of including protections for those providing assistance (UN Ad Hoc Committee 1950).

There is ultimately no safeguard for 'humanitarian smugglers' in the Refugee Convention, and the Swiss government's concerns were simply noted for the records. Yet, it is clear from these remarks that there was an assumption that governments should not, and would not, criminalise those assisting refugees provided that they had not 'acted in an exploitative way, or otherwise in bad faith' (Hathaway 2005: 405). It is questionable whether such a safeguard would have been anything more than rhetorically significant. As Hathaway concludes in the case of Article 31, the 'binding guarantee is of little practical value when migration control efforts are implemented in an indiscriminate way' (Hathaway 2008: 5-6). Nevertheless, the drafters' assumptions that governments would not criminalise humanitarian acts of the facilitation of irregular entry do not hold today.

Thresholds of 'humanitarian smuggling'

Fatal harm and the right to life

The duty to rescue from immediate harm – a situation where an individual's right to life is threatened – is a widely accepted humanitarian act and framework through which to establish 'one fixed point on our moral compass' (Carens 2013: 194). The duty to rescue is the core ethic of humanitarianism. While humanitarianism is a deeply contested concept, at a minimum, humanitarians agree that 'the essence of humanitarianism is to save lives at risk' (Barnett and Weiss 2008: 11). Humanitarianism is first and foremost about life-saving work operating impartially, purely on the basis of need. This duty extends beyond the work of humanitarian organisations; it is also an individual moral responsibility. Rescuing a stranger from immediate harm is not considered to be a choice, nor a mere compassionate act, but rather an ethical obligation.

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definition of refugees upon which this paper is premised). While this distinction is worthy of its own critique, it is beyond this paper's scope.

As Singer articulates this idea, in the context of the classic example of saving a drowning child, 'if it is in our power to prevent something very bad happening, without thereby sacrificing anything of comparable moral significance, we ought to do it' (Singer 1979: 199). Singer's particular interpretation of the duty to rescue lacks practical application in all circumstances (and would ultimately lead to the immensely demanding standards of effective altruism). Yet, the duty to rescue does have moral consensus when it comes to rescuing a stranger from a life-or-death situation, whom one happens to confront for no other reason than proximity and circumstance.

The failure to engage in the duty to rescue is an example of *malum in se*; the omission of the act is widely considered wrong in and of itself, regardless of the law. The duty to rescue also often has positive grounding in law, most clearly as it pertains to the duty to rescue at sea, where the failure to rescue is considered wrongful omission.[21] Acts are often criminalised based on the harm that they cause or would likely cause; paradoxically, in the case of a rescue scenario, inaction would promulgate harm. The very same act of rescue that is a moral imperative and risks criminal liability for failure to act, equally risks suppression, if not criminalisation, under smuggling prohibitions. The duty to rescue wholly embodies the right to life and the threat to this duty underscores the extent to which our 'moral compass' is broken.

At its narrowest, the threshold for what constitutes 'humanitarian smuggling' should thus include those acts of the facilitation of irregular entry, where the smuggler assists the individual to cross a border irregularly to remove the individual from harm, where the harm threatens the individual's fundamental right to life. Aiding those in life-or-death circumstances is indeed that which humanitarians are first and foremost concerned with. Inaction, or even delayed action, would have fatal outcomes.

Perhaps the most well-known contemporary case to illustrate this threshold of the duty to rescue is that of Cap Anamur (2009).[22] In June 2004, Cap Anamur – a humanitarian organisation dedicated to helping refugees with a ship of the same name – encountered an unseaworthy vessel, en route from Libya to Italy, with 37 African refugees on board. The crew rescued the refugees, bringing them aboard the Cap Anamur, ultimately saving their lives. The objective certainty of the consequences of inaction in a situation like a boat in distress does not permit inaction. Moreover, the performance of the act itself implies a purity of intention; the act is solely about upholding the right to life. *Whose* lives are being saved is ultimately of no consequence. The rescue is not a means to an end but the end itself. The irregular crossing of a border is the means to achieve the rescue – a by-product of the act itself.

Yet, when the Cap Anamur sought permission to dock at the nearest port in Sicily, Italy, its request was denied. The Cap Anamur stayed at sea for 12 days until finally due to distress on board, the captain landed and disembarked without permission. The captain, the director of the organisation, and the first officer were immediately detained on charges of assisting irregular entry. Yet inaction, with near certainty that these refugees would have drowned, would have been morally abhorrent and even warrant criminalisation. While the accused in Cap Anamur were ultimately acquitted, as will be discussed in the following chapter, the threat of criminalisation alone was sufficient punishment and likely deterred future humanitarian acts of rescue (Basaran 2015).

[21] For international legal obligations, see: SAR (1979). On the contestation of the duty to rescue at borders, see: Spijkerboer (2013); Basaran (2014a, 2014b, 2015). For critiques of the duty to rescue, see: Ripstein (2000); Miller (2015).

[22] For a detailed analysis of Cap Anamur and another similar case, see: Basaran (2015).

Under this narrow definition of 'humanitarian smuggling' based upon upholding the right to life, there would be maximum certainty that the individuals involved in the Cap Anamur case could not be criminalised as blameworthy smugglers. The aforementioned rescue operations of Team Humanity would equally fall under such a threshold. As Aldeen himself articulated: '[i]f I see right now a child in the water is drowning, I don't care about nothing. I will go in and help them' (Kakissis 2016).

Severe harm and other non-derogable rights

Defining harm in terms of a threat to life draws a deliberately narrow threshold to establish the largest possible consensus. Most refugees, who themselves should be exempt under Article 31 of the Refugee Convention, however, are not fleeing immediate life-or-death circumstances but rather the deprivation or threat of deprivation of other serious rights, as indicated in the phrase 'threat to life or freedom'. It is thus conceivable to broaden the notion of harm under this second threshold to include not only the threat to the right to life, but also the threat to other non-derogable rights. Non-derogable rights are those that must never be derogated from, even in times of emergency, as enshrined in Article 15 of the 1950 European Convention on Human Rights and Article 4 of the 1966 International Covenant on Civil and Political Rights. In addition to the right to life, non-derogable rights include the prohibition of torture, prohibition of slavery, and no punishment without law.

Slightly broadened, a second threshold of 'humanitarian smuggling' could include those acts of the facilitation of entry where the smuggler assists the individual to cross a border irregularly to remove the individual from severe, and arguably irreparable, harm. The historical example of the rescue of the Danish Jews from impending deportation to concentration camp clarifies, with the benefit of hindsight, the ways in which an individual may have a duty to rescue an individual from an imminent, even if not immediate, violation of her right to life or other non-derogable rights.

In 1943, 95% of the Jewish population in Denmark was able to escape deportation to concentration camps, in large part due to the collective action of fellow citizens and the Danish resistance movement. When the Nazi regime formalised the order to deport Danish Jews to concentration camps in September 1943, within two weeks Danes mobilised to successfully smuggle more than 7,200 Danish Jews and 680 non-Jewish family members to safety in Sweden, predominantly by way of Danish fishermen (Holocaust Memorial Museum). While the Danish Jews were not facing immediate harm in the same way that those on an unseaworthy vessel might be, humanitarian acts also extend to those for whom 'harm lurks in the future' (Barnett and Weiss 2008: 11). The harm to the Danish Jews was not of immediate life-or-death consequence. Yet, given the order to deport all Danish Jews, the harm was nevertheless of objective imminence. The gravity of harm facing the Danish Jews was also not as clear as that which one might face in a rescue-at-sea situation. Imminent death was not certain, but there was undeniably certain violation of inhumane or degrading treatment or punishment, if not torture, beginning with the forcible deportation to the concentration camps. Because of these efforts and the efforts of those who hid Danish Jews in Denmark, fewer than 500 Danish Jews were deported to concentration camps (Otzen 2013).

The rescue of the Danish Jews was largely an exception during the Holocaust. Those individuals who effectively evacuated almost the entire Jewish population out of Denmark not only made an assessment of the likely consequences and certainty of the impending harm for the Danish Jews if they did not act, but also accepted significant risks to their own lives as a result of their actions. First, the journey by sea to Sweden was often dangerous; some of the fishermen had never sailed such distances away from the coast and lacked adequate navigation skills. Second, and more critically, those who aided and abetted Jews faced tremendous risks and possibly execution, if caught by the Nazis. To return to Singer's definition of the duty to rescue, there is only such a duty

if the action can be performed 'without thereby sacrificing anything of comparable moral significance' (Singer 1979: 199). The acts of the Danish fishermen were above and beyond the call of duty. In this sense, their acts were supererogatory and thus morally praiseworthy, but equally not obligatory. The fishermen who rescued the Danish Jews are by definition both heroes and smugglers.

One of the forgotten details of the rescue of the Danish Jews is that some of the fishermen charged monetary fees for the journey from Denmark to Sweden. As Otzen (2013) reported on the 70th anniversary of the rescue: '[t]o even secure a place on one of the small fishing boats being used to ferry the Jews across could cost as much as £5,000 ($9,000) a head in today's money.' It is not surprising that this detail is long forgotten because of the moral praiseworthiness of the fishermen's actions. It is possible that the fishermen would have been unable to provide transport if it were not for receipt of gain to cover the costs of the journey or to make up for losses from time away from their trade. The element of financial compensation may blur, if not undermine to some degree, the moral quality of the fishermen's actions. Nevertheless, the sheer element of gain does not transform their actions from morally praiseworthy to blameworthy ones. Today, the fact that these fishermen would likely fall under the Smuggling Protocol's definition of smugglers – for their receipt of gain and because they could even possibly be construed as an organised criminal group – illustrates the potentially absurd and overbroad outcomes of the Protocol's for-profit/humanitarian binary.[23]

Other serious harm and human rights

The first two thresholds of 'humanitarian smuggling' considered acts of rescue removing individuals from immediate or imminent threats to their lives or other non-derogable rights – acts that should be exempt from criminalisation because they are either demanded by practical ethics or are morally praiseworthy, if not heroic. The third possible threshold takes a wider approach, while staying within the bounds set by the Refugee Convention, to include individuals who cross borders to escape other serious harms, which threaten their fundamental human rights (e.g. right to respect for private and family life, right to liberty and security, and right to a fair trial). There are acts of smuggling for which individuals may not have a duty to engage but are nevertheless blameless. Humanitarian acts begin with saving lives in immediate or imminent danger, yet they need not end there.

If the essence of humanitarianism is saving lives at risk, its core principle is humanity.[24] The International Committee for the Red Cross (ICRC), widely recognised as the first international humanitarian institution, envisions that humanity embodies a richer concept of humankind that moves beyond immediate life-saving work. According to the ICRC's definition, acting in the name of humanity implies a desire 'to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to *ensure respect for the human being*. It promotes mutual understanding, friendship, cooperation and lasting peace among all peoples' (Pictet 1979, emphasis added). Notably, as Slim argues, the ICRC's foundational and widely employed definition of humanity is one that 'embodies a sense of humanity in all its fullness' (Slim 1997: 345). The classical principle of humanity critically aspires to respectful transactions amongst human beings.

[23] This conclusion is mirrored by the realities of humanitarianism. While humanitarians were once expected to operate on a voluntary basis, today humanitarians are considered no less humanitarian for earning a fair salary. As Barnett and Weiss argue, what is important is 'not whether an individual is paid but rather whether economic compensation is a primary or secondary motivation' (Barnett and Weiss 2008: 12).

[24] For more information and debates on the classic humanitarian principles, see: Pictet (1979); Slim (1997); Rieff (2001); Vaux (2001); Barnett and Weiss (2008); Calhoun (2010); Barnett (2011); Fassin (2012).

The principle of humanity thus conceivably extends humanitarian acts beyond a duty to rescue from fatal harm and to engage in immediate life-saving work. It expands beyond minimalist accounts of humanitarian duty, like that of Rieff, who suggests that humanitarians should offer no more than 'a bed for the night' (Rieff 2002). Humanity is not limited to 'materialistic concern for physical welfare,' but aspires to a 'more extensive and dignified' understanding of humanitarian action (Slim 1997: 346). As Vaux argues, '[t]he suffering of the body and the mind cannot be distinguished from each other' (Vaux 2001: 7). Calhoun takes the argument even further, suggesting that concern for the 'biological minimum is, perhaps, below the real minimum of the truly human' (Calhoun 2010: 34).

With this rich notion of humanity, humanitarian acts of smuggling can be more broadly conceived of as those acts that assist an individual to cross a border in order to remove the individual from a threat to her fundamental rights. These acts may not be morally obligatory, but they equally do not warrant criminalisation as wrongful smuggling. Take for example, the recent May 2016 case of a 70-year-old woman, Lise Ramslog, from a town in southern Denmark where hundreds of 'exhausted' asylum seekers found themselves after taking a ferry from Germany, 'stranded' and 'without access to public transportation' (Witte 2016). Ramslog is one of hundreds of Danes who has been convicted of human smuggling or facilitating irregular stay. Her crime as it was reported by the *Washington Post* was 'giving two young couples, a small child and a newborn baby a 120-mile ride in her cramped sedan to their destination in Sweden' (Witte 2016).

Ramslog certainly did not have a duty to stop. She could have driven past these exhausted refugees, whom she only encountered by chance, with relative assurance that they would not have faced imminent harm. They would have likely reached their destination on their own, but with far greater undue peril. While Ramslog does not have to serve a prison sentence for her criminal conviction because she is a pensioner, she was nevertheless required to pay a reduced fine.

The degree of peril and risk to a fundamental human right that a refugee faces in such circumstances requires a subjective calculation and lacks the same moral urgency as immediate or imminent fatal or severe harm. Critics of this third threshold may argue that refugees who have reached Europe could – and should – claim asylum in the first country in which they arrive and that to journey onward is to subject oneself to avoidable risk. They may suggest that the refugees Ramslog smuggled to Sweden should have claimed asylum in Denmark, if not Germany or their first country of arrival. The same could also be said of the aforementioned young Afghan refugee whom Lawrie sought to smuggle to the UK out of the abhorrent conditions in Calais; both the young refugee and her father could have claimed asylum in France and subsequently sought transfer to the UK on grounds of family reunification.

Such claims, however, fundamentally misunderstand the predicament of the refugee and the role of the 'humanitarian smuggler'. First, for most presumptive refugees, the choice between the fear of serious deprivations of human rights or transgressing a border is hardly a choice at all. The decision to transgress a border is likely not dependent on a chance encounter with a compassionate individual willing to assist the refugee. As the current crisis has proven, millions are risking fatal journeys by way of smugglers because that is the least dangerous option they have. Moreover, refugees pursuing secondary movement will likely not be dissuaded by the possible risks involved and instead choose to claim asylum in the first country of arrival. In the summer of 2015, for example, at the same time that Hungarian taxi drivers were smuggling refugees across the border from Bulgaria through relatively safe means and for a standard fare, 71 refugees – among them a baby girl and three young boys – suffocated in a 7.5 tonne vehicle along the route from Hungary to Germany (Harding 2015; Huggler and Nolan 2015).

If the Danish woman had not stopped to pick up the refugees, she could not be entirely certain that they would have made it to their destination safely. It is also safe to assume that these refugees would have tried to reach Sweden even without Ramslog's help. Similarly, if Lawrie had not sought to help the four-year-old Afghan refugee, her father could have sought a more dangerous alternative. Moreover, if they chose to seek asylum in France, they may have languished in Calais for years before a decision was reached. As the January 2016 case concerning unaccompanied minors in the Calais Jungle acknowledged, for the asylum cases in question '[a] best case scenario was that it would take one year for a decision to be reached' (Yeo 2016). The lack of safe alternatives does not deter movement but rather promulgates dangerous movement.

Refugees may not necessarily have the right to choose their country of refuge; yet, as Gibney argues, 'the view that the only morally relevant dimension of a refugee's plight is her lack of physical protection is dubious' (Gibney 2015: 12).[25] Secondary movement was indeed envisioned in the Refugee Convention as permissible under certain circumstances. Hathaway and Foster interpret the text of the Refugee Convention, 'coming directly from a territory where their [the refugees'] life or freedom was threatened,' as permitting secondary movement in certain circumstances: '[a]rrival is to be deemed "direct" even if the refugee has passed through, or spent time in, one or more non-persecutory states so long as the refugee provides a plausible explanation for not having sought protection in such states' (Hathaway and Foster 2014: 29n.75).

Even the United Nations High Commissioner for Refugees, Van Heuven Goedhart, at the time of the drafting of the Refugee Convention, acknowledged that transiting multiple countries, possibly by way of smugglers, was a necessary reality.[26] Gooodwin-Gill recounts that in 1944 the High Commissioner himself fled the Netherlands, traversed several countries by way of the help of the French Resistance and recognised that '[i]t would be unfortunate…if refugees in similar circumstances were penalised for not having proceeded directly to the final country of asylum' (Goodwin-Gill 2001: 192). To posit seeking asylum in the country of first asylum or transit as reasonable alternatives to transgressing another border irregularly is to assume that the asylum system works properly in the country of first asylum or that the refugee does not have a 'plausible explanation' for moving onward.

Moreover, the 'humanitarian smuggler' who seeks to uphold the fundamental human rights of the refugee is neither the appropriate person to assess the predicament of the presumptive refugee nor to offer legal counsel. A refugee who concludes that crossing a border is the necessary action to improve her predicament will likely do so with or without safe means. While there may not necessarily be moral obligation to help refugees in all circumstances, the actions of individuals who do so are morally blameless.

As the above thresholds illustrate, the acts that constitute 'humanitarian smuggling' span a wide spectrum, from blameless good deeds to heroic acts to moral obligations. Whether assisting a refugee to escape from life-or-death circumstances, an imminent threat to non-derogable rights or other fundamental human rights, these actions are ethically defensible and should not be criminalised under smuggling prohibitions. As envisioned by some of the drafters of the Refugee Convention, it is not only refugees who should be exempt from sanctions for irregular border crossings, but also those individuals whose humanitarian actions help to remove refugees from harm. The outlined thresholds only begin to chart the moral complexities inherent within acts of 'humanitarian smuggling'. Ultimately, this complicated spectrum of morally permissible

[25] For debates on a refugee's right to chose where she seeks asylum, see: Carens (2013); Gibney (2015).
[26] I thank Dr Thomas Spijkerboer for bringing this to my attention.

behaviours is evidence of the fact that a vague and broad humanitarian exemption – whether implicit or explicit, optional or mandatory – is an inadequate means to decriminalise defensible, if not dutiful, actions.

4 Decriminalising 'humanitarian smugglers'

This final chapter is concerned with how to close the gap between the wide range of acts that could be considered criminal under existing smuggling prohibitions and the far narrower range of acts that ought to be criminal according to principles of legality and practical ethics. Legal doctrinal analysis of the UN Smuggling Protocol and the EU Facilitation Directive, in combination with an examination of the spectrum of acts that might constitute ethically defensible smuggling, demonstrate that not only do smuggling prohibitions lack legal certainty but that they are also overbroad. Such deficiencies in existing smuggling prohibitions ultimately undermine the moral imperatives and complexities that constitute the act of the facilitation of irregular entry.

I analyse three means to decriminalise 'humanitarian smugglers'. The first two recommendations, drawing upon those put forth by the recent EP-commissioned report, rely upon a humanitarian exemption, both as a defence against and as a bar to prosecution (Carrera et al. 2016). I ultimately demonstrate that a humanitarian exemption is insufficient. I thus consider the possibility of a more narrowly drafted smuggling prohibition such that 'humanitarian smugglers' would fall clearly and unambiguously outside its terms. Moving outside the smuggling paradigm entirely, I propose that smugglers whose actions warrant criminalisation may be more appropriately and effectively punished under existing criminal offences.

A mandatory humanitarian exemption

Exemption as a defence

A common recommendation to prevent the criminalisation of 'humanitarian smugglers' is to make the humanitarian exemption in the EU Facilitation Directive mandatory. The 2016 EP-commissioned report urges that the EU legal framework should be revised '[t]o make mandatory upon EU Member States the exemption of humanitarian assistance from criminalisation in cases of entry, transit, and residence' (Carrera et al. 2016: 64). The FRA has made a similar proposal, suggesting that the Facilitation Directive should be reworded to 'explicitly exclude punishment for humanitarian assistance at entry' (FRA 2014a: 16).

The Facilitation Directive, with its optional humanitarian exemption, does not guarantee a successful defence against prosecution. The Facilitation Directive, as transposed into Danish law, for example, permitted the criminalisation of a 70-year-old woman for offering a ride to refugees. A mandatory exemption would only allow for such a successful defence if properly drafted and without leaving a breadth of discretion up to individual Member States. As the previous chapter argued, there is a large spectrum of acts that should fall under a humanitarian exemption and simply rendering the current and vague optional exemption mandatory would be inadequate.

Even if a humanitarian exemption ensured a successful defence, it is ultimately insufficient. First, the process of being charged with smuggling and threatened with prosecution is itself punishment for the individuals involved, essentially acting as *de facto* criminalisation. Allsopp and Manieri explain that:

> *[i]t is misleading to regard a criminal conviction as the only index of punitiveness. Being arrested, interrogated, detained and prosecuted for a crime can have punitive effects on those subject to state intervention, even where those interventions do not eventually result in a conviction and the imposition of a sanction* (Allsopp and Manieri 2016: 87).

Notably, in the cases of Cap Anamur and Rob Lawrie, the accused were acquitted from smuggling charges. Yet, as Basaran explains in regards to Cap Anamur, the 'defendants were nonetheless severely punished in their encounter with the law': '[c]osts imposed by criminal procedures included detention, financial costs of the trial, loss of income in terms of time and due to the confiscation of boats, and psychological costs of the trial' (Basaran 2015: 8). For Lawrie, his wife divorced him (at least in part) due to his act of 'humanitarian smuggling', and the pressure of the trial led him to attempt suicide.

Second, the threat of prosecution reaches far beyond the accused and has a tremendous chilling effect on future humanitarian acts. As Basaran demonstrates in the case of the duty to rescue at sea: '[i]t is not simply the outcome of the trial that determines conduct, but the ominous threat of prosecution is in itself sufficient to subvert a positive duty, a demand to act rather than to refrain from action' (Basaran 2015: 8). Beyond rescue at sea, where failure to rescue leads to a mounting death toll, it is challenging to quantify the extent to which the threat of prosecution suppresses humanitarian action. Carrera et al. (2016) and Allsopp and Manieri (2016) nevertheless find that the threat of prosecution does indeed supress action to some degree, even if actual sanctions may be rare. Fekete even suggests that suppressing assistance may be the primary aim of criminalisation or the threat thereof: '[t]he intention seems to be not so much to prosecute more people but to warn those in civil society and public office that the threat of prosecution is real and imminent' (Fekete 2009: 84). A successful defence against prosecution is thus an inappropriate remedy to counter the suppression of blameless, if not morally obligatory, actions.

Exemption as a bar to prosecution

Given the shortcomings of a humanitarian exemption as a defence, the EP-commissioned report ultimately concludes that the exemption should be a bar to prosecution. The report suggests that a bar would 'ensure that no investigation is opened and no prosecution is pursued against private individuals and civil society organisations assisting migrants for humanitarian reasons' (Carrera et al. 2016: 64). Basaran, while recognising that such steps may be insufficient, makes a similar argument that 'all humanitarian acts need to be legally exempted from criminal and administrative sanctions in letter an[d] in practice' (Basaran 2014b: 386). A bar to prosecution would theoretically protect all individuals who provide humanitarian assistance from having the prosecutorial services bring cases against them. If properly drafted, all those providing humanitarian assistance would have a protected status.

In practice, however, a bar to prosecution is only effective where it is possible to clearly define the category protected by the status. While it would be possible for this category to include family members of refugees or individuals working for humanitarian organisations, it would be more challenging to protect such a broad category as 'private individuals'. Yet, as the aforementioned examples have made clear, it is not only volunteers affiliated with humanitarian organisations who engage in humanitarian acts. It would pose a challenge to define and identify a category of private individuals operating out of humanitarian motives, no matter how clearly the prohibition defines 'humanitarian acts'.

Moreover, even if the group with protected status was clearly and unambiguously defined, there is no guarantee that it would operate effectively in practice. Article 31 of the Refugee Convention commits not to punish presumptive refugees, yet in reality asylum seekers are still prosecuted for

illegal entry (Hathaway 2008).[27] Ultimately, whether the humanitarian exemptions acts as a bar to prosecution or a defence against prosecution, the deficiency of such solutions is that they create an exemption from criminalisation of morally defensible acts, which are at a minimum blameless humanitarian actions, if not humanitarian duties.

A narrower smuggling offence

The EP-commissioned report proposed that in addition to a humanitarian exemption as a bar to prosecution, the Facilitation Directive should amend the definition of facilitation of irregular entry and transit to incorporate a financial gain element in line with the UN Smuggling Protocol. The report furthered that this gain element, 'should be qualified to encompass only "unjust enrichment" or "unjust profit"', notably limiting this qualification to 'bona fide shopkeepers, landlords and businesses' (Carrera et al. 2016: 64). There is no question that if the Facilitation Directive were revised to incorporate a mandatory humanitarian exemption (in spite of the above-mentioned deficiencies), in addition to adding the financial threshold, this element of gain should apply narrowly to excessive gain.

As demonstrated, however, the UN Smuggling Protocol's *implicit* humanitarian exemption rests on a false for-profit/humanitarian binary, which risks criminalising those individuals whose behaviours are humanitarian in nature yet equally involve the receipt of gain, like those of the Danish fishermen rescuing the Danish Jews from certain deportation to Nazi concentration camps or the Hungarian taxi drivers offering rides to refugees at standard fares. The excessive/standard gain distinction is not without legal precedent. In September 2015, the Austrian Supreme Court ruled that licensed taxi drivers who assisted refugees to cross the border from Hungary to Austria could not be convicted of human smuggling if the fare did not surmount typical standard fees for the journey (Schloenhardt 2016a; *11Os125/15i*). Although this threshold only applies to licensed taxi drivers, it nevertheless rightly nuances the for-profit/humanitarian binary.[28]

The recommendations in the EP-commissioned report would undoubtedly narrow the gap between what is and what ought to be criminal; they would do so, perhaps, in the most politically feasible way. A more comprehensive solution would be a far narrower definition of blameworthy smuggling in line with principles of legality. This definition should provide maximum certainty that those fulfilling a humanitarian duty to rescue, or even engaging in a morally blameless act of smuggling, are not simply exempt from criminal prosecution, but have no possibility of being construed as blameworthy smugglers warranting criminalisation.

The November 2015 Supreme Court of Canada case, *R v. Appulonappa*, sets a legal precedent for a narrower smuggling prohibition. The Supreme Court ruled that its law criminalising smuggling, S. 117, was overbroad and should be 'read down…as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members)' (*R v. Appulonappa* 2015: para. 86). S. 117 is not dissimilar to Article 1.1 of the EU Facilitation Directive in that it does not contain a gain threshold and theoretically criminalises anyone who facilitates irregular entry, regardless of motive or the means by which the act is carried out. The Supreme Court ruled that S. 117 was overbroad and exceeded its legislative intent of criminalising organised crime: '[a] broad punitive goal that would prosecute persons with no connection to and no furtherance of organised crime is not consistent with Parliament's purpose' (*R v. Appulonapa* 2015). While the legislature has yet to amend S. 117, it may serve as a model for a more narrowly drafted prohibition.

[27] See, for example: Aliverti (2013) on the criminalisation of asylum seekers in the UK.

[28] See the subsequent Austrian case: *14 Os 134/15k* (2015) and Schloenhardt (2016b).

According to the basic principles of criminal law, criminal offences should consider three core elements: (1) harm, (2) wrongfulness, and (3) the public nature of the act[29] (Ashworth and Horder 2013). There are, of course, debates over the precise meaning of these three elements and the extent to which they are sufficient or necessary conditions for criminalisation. Following John Stuart Mill's (1959) harm principle, harm is the sole reason for criminalisation actions. For Feinberg (1984, 1988), harm alone is not sufficient to justify criminalisation, but rather the harm in question must be wrongfully caused, yet need not necessarily be a moral wrong. As Duff argues, 'the criminal law speaks not just of harms but of wrongs' (Duff 2006: 97) and Ashworth and Horder further that crimes should be harmful public wrongs (Ashworth and Horder 2013: 29).[30]

Following the established premise that those acts that remove refugees from wrongful harm should not be criminalised, I further that only those acts of smuggling which constitute wrongful harms or harmful wrongs should be criminalised. In the case of a properly defined offence of smuggling, the wrongfulness and the harm fit together to clarify the physical act of the crime (*actus reus*) and the mental intent to carry out the crime (*mens rea*). The wrongfulness is inextricably tied to the act of the facilitation of the irregular crossing of a border. While this act may not be considered morally wrong, it is wrong insofar as it violates the sovereignty of the territory of the state being transgressed. The harm has to do with the manner in which the border crossing is carried out, without proper regard for the safety of the person transported. Such harms would fall on a hierarchy of blameworthiness, from negligent to reckless to deliberate harm.

The risks of harm, and even death, associated with smuggling are high. In fact, risk to refugees is part of many smugglers' business models, deliberately inducing deadly situations by putting refugees onto unseaworthy vessels, to trigger the duty to rescue. It is the combination of the wrongful border crossing and the element of harm together that renders the action criminal. The act of facilitating the irregular border crossing of a presumptive refugee alone does not warrant criminalisation absent the element of harm, whether negligent or deliberate. Without harm or risk of harm, the irregular border crossing could conceivably be the means to achieve a dutiful rescue or to uphold the refugee's fundamental human rights.

Acts of smuggling warranting criminalisation should therefore only include acts of the facilitation of irregular entry, where the smuggler assists the individual to cross a border irregularly and in so doing brings harm or risk of harm to the individual. Notably, what is distinct about this proposed working definition of criminal acts of smuggling is the fact that in order for the facilitation of irregular entry to be a criminal wrong, there must be an element of harm. While the smuggling prohibitions do recognise the rights of the smuggled migrants themselves – albeit to differing degrees – the harm to the individual is of secondary importance to the irregular border crossing. It is ultimately the harm, in combination with the wrongfulness of the act of transgressing a border, which permits a much clearer distinction between a blameless 'humanitarian smuggler' and a blameworthy criminal smuggler.[31] Refugees themselves are exempt from the criminal prosecution for the wrongful transgression of a border (in the law, if not in practice) and so too should be those who assist refugees, and whose actions do not perpetrate harm but rather prevent it.

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[29] For the purposes of smuggling, which clearly falls into the domain of the public, debates over harm and wrongfulness are the focus. The essence of the public can be understood as the domain in which 'the State should protect and promote the basic value of security and freedom from physical attack by prosecuting assaults wherever they occur' (Ashworth and Horder 2013: 30).

[30] For more on the element of harm, see: Mill (1859); Feinberg (1984); Raz (1987); Feinberg (1988).

[31] This line may be blurred in a case where a 'humanitarian smuggler' unintentionally brings harm to the individual she is seeking to assist. In such a case, the smuggler could be found guilty of a lesser charge determined based upon a hierarchy of blameworthiness.

This working definition is a starting point for a more narrowly drafted prohibition; in reality, a smuggling prohibition with maximum certainty should carefully delineate between different degrees of moral culpability and seriousness. The above definition would almost always involve excessive gain or other material benefit, though it need not be necessary. Criminal law should – and typically does – draw minute and necessary distinctions among offences falling under the same broad category in line with the principles of fair labelling. Take, as an example, the UK's road traffic offences. Road traffic offences range from (but are not limited to) driving without reasonable consideration, driving without care and attention, wanton and furious driving, and dangerous driving, to causing death by dangerous driving, gross negligence manslaughter, manslaughter, and murder (The Crown Prosecution Service). In many respects, this hierarchy of blameworthiness that governs road traffic offences is not all that different from that which should be given consideration in regards to smuggling offences.

Working within the framework of existing smuggling prohibitions, a more narrowly drafted prohibition incorporating the elements of harm and wrongfulness would most effectively decriminalise 'humanitarian smugglers' and prevent the suppression of future humanitarian acts over a humanitarian exemption, either as a defence or as a bar to prosecution. Moving away from the smuggling paradigm – and thus admittedly further away from the realm of the realistic and politically tenable – it is worth considering that without the attempt to transgress a national border, the act in question would not be one of smuggling. Rather, the harm or wrong would likely fall under a pre-existing section of criminal law with clearly defined gradations of offences. From exploitation to operating an unlicensed or unseaworthy vessel to reckless endangerment to murder, blameworthy smugglers may ultimately be more effectively deterred and criminalised not as smugglers but for the true crimes that they commit under existing criminal law.

5 Conclusion

This research has demonstrated that smuggling prohibitions in both the UN Smuggling Protocol and the EU Facilitation Directive lack legal certainty, failing to properly enable subjects of the law to orientate their behaviour so as to stay within its bounds. Moreover, it has shown that the boundaries of the law are overbroad. The Smuggling Protocol rests on a false for-profit/humanitarian binary and it threatens to criminalise those individuals who fall outside its purpose of targeting transnational organised crime. The Facilitation Directive can be understood as a tacit expansion of the Smuggling Protocol, and as transposed at the national level, threatens to criminalise a seemingly boundless array of humanitarian acts of facilitation.

Given the failure of these smuggling prohibitions to abide by the principles of legality, this research turned to the normative task of outlining some of the acts that should not be criminalised under smuggling prohibitions. Through three normative thresholds drawing upon contemporary and historic examples, as well as the standards to which presumptive refugees themselves are held, I demonstrated that the behaviours that might constitute 'humanitarian smuggling' are vast and of varying moral qualities, ranging from morally blameless to morally obligatory to heroic acts.

With an understanding of the tremendous gap between what is and what ought to be criminal, this research lastly addressed how to minimise and even close this gap. I argued that a mandatory humanitarian exemption, either as a defence or a bar to prosecution, is an insufficient solution to ensure that those individuals, whose acts of smuggling are blameless if not praiseworthy, are not

criminalised and that future humanitarian duties are not suppressed. Given the breadth of acts that could be considered "humanitarian smuggling," simply rendering a humanitarian exemption mandatory would inevitably fail to capture with legal certainty and clarity the range and complexity of these ethically defensible acts.

I thus argued that a smuggling prohibition must be more narrowly drafted to contain the core elements of criminal offences and to clearly criminalise only those actions which are harmful wrongs and wrongfully harmful. I argued that there should be clear gradations of the offence of smuggling to more accurately account for the degrees of harm involved in the crime. Ultimately, I proposed that those acts of the facilitation of irregular entry, under this narrower definition, could be more effectively and appropriately criminalised under other elements of criminal law rather than through smuggling prohibitions.

The barrier to any of these recommendations lies with the fact that what the law's purpose *ought* to be and what the law's purpose *is* are often in opposition to one another. The influence of politics, power, and culture on what is criminal ultimately supersedes what should be criminal. As Ashworth and Horder articulate this notion, 'the main determinants of criminalisation continue to be political opportunism and power, both linked to the prevailing political culture of the country' (Ashworth and Horder 2013: 39). Given the fact that the primary purpose of smuggling prohibitions, whether explicit or implicit, is to deter irregular migration, it follows that eliminating legal uncertainties, vagueness, and over-breadth through any of the proposed recommendations would ultimately undermine this objective.

If the EU's apparent emphasis on combatting smuggling were indeed aimed, as it should be, at combatting abhorrent smugglers who endanger refugees, then smuggling networks would be repressed and blameworthy smugglers brought to justice, either through a more narrowly drafted smuggling prohibition or under offences already clearly outlined in criminal law. Yet, as Ruete aptly points out:

> *the effectiveness of the repression of smuggling networks is unconvincing. At present, the overall number of investigations and prosecutions leading to effective convictions across the entire European Union is low, compared to the estimated overall scale of the phenomenon* (Ruete 2016: iii).

What should and should not be criminal does not always serve the interests of the states who are responsible for deciding what is and is not criminal. The challenge to clearly distinguishing blameless 'humanitarian smugglers' from blameworthy criminal smugglers is thus greater than bringing smuggling prohibitions in accordance with the principles of legality and practical ethics. It is ultimately dependent upon altering the political priorities of states – priorities that often conflict with moral reason.

Smugglers – both those who are 'travel agents of death' and those who are simply 'travel agents' – have become Europe's scapegoat. Targeting human smuggling and suppressing humanitarian acts are in service of the larger agenda of deterrence and securitisation, for which extraordinary measures have been justified, like NATO military presence and UN resolutions invoking threats to international peace and security. With smuggling as Europe's scapegoat, Europe has effectively distorted the reality of the current 'crisis' – a crisis for which the true victim is not Europe, but rather the refugees forced to embark on dangerous journeys to reach Europe.

For thousands of refugees, the services of smugglers are ultimately 'the least bad of awful alternatives', to borrow the words of Sadaka Ogata, the former UN High Commissioner for

Refugees (quoted in Barnett 2011: 6).[32] There is no question that if refugees were presented with the choice between the journey to Europe by smugglers or a legal and safe passage to Europe, the need for smugglers would be dramatically diminished. In the clarifying words of a five-year-old Syrian refugee to her father as he sought the services of smugglers in Turkey to reach Europe: 'Daddy, why don't we just take the airplane?' (Stockmans 2016).

In the absence of safe and legal pathways, which could be as simple as a humanitarian visa program,[33] 'humanitarian smugglers' are assuming responsibility where the EU and its Member State governments have failed to do so. The fact that 'humanitarian smugglers' are engaging in ethically defensible, if not heroic, actions and ultimately risk criminalisation for doing so should not serve to suppress further humanitarian action but rather to provoke it. When there is such a moral distance between what is and what should be legal, rather than orientating one's behaviour to the law, one instead 'has a moral duty to disobey unjust laws' (King Jr. 1963).

[32] Ogata used this phrase in reference to the moral dilemmas humanitarian organisations face.
[33] See, for example: Betts (2015).

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