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The Legal Fragmentation of Migrant Smuggling

A study on the compatibility between two legal regimes on migrant smuggling

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Abstract

Migrant smuggling has resulted in unprecedented levels of peacetime defensive actions. This is because migrant smuggling is generally considered both the cause and consequence of grave human rights violations. Another reason can be found in the right of States to determine who their residents and future citizens are, and the threat migrant smuggling is to that right. Migrant smuggling has therefore gained attention on international, regional, and national levels in attempts to prevent and combat it. However, such a multi-level approach opens up for different perspectives and understandings on how to deal with and prevent migrant smuggling through legal measures. This means that there is a possibility of the fragmentation of law. Within the social complex of the international community, a plurality of legal regimes that focus on migrant smuggling exist. While these are operating with the same focus, they are not necessarily structurally coupled with each other. Such an observation shows that there is a possible collision between the legal regimes, which in turn might lead to a fragmentation of the system. Thus, the aim of this thesis is to compare two legal regimes, the UN Migrant Smuggling Protocol and the Renewed EU Action Plan, to examine whether their measures are compatible with each other and whether their differences have any consequences in responding to the issue of migrant smuggling. This is done through the employment of functional comparative law, which opens up for the comparison of the two legal regimes that focus on migrant smuggling. Through such an analysis, the findings reveal that there are certain aspects of the two legal regimes that collide with each other and cause fragmentation of the system.

Key words: migrant smuggling, legal fragmentation, United Nations, European Union

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Abbreviations

EU:	European Union
Europol:	the European Union Agency for Law Enforcement Cooperation
Frontex:	the European Border and Coast Guard Agency
IMO:	International Maritime Organization
Interpol:	the International Criminal Police Organization
UN:	United Nations

1 Introduction

1.1 Starting Point: Problem Statement

Migrant smuggling is the unauthorized movement of individuals across borders for the benefit of the smuggler.[1] It is 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'.[2] This is not a new phenomenon; however, it is still an issue that has resulted in unprecedented levels of peacetime defensive actions to prevent it.[3] This is because migrant smuggling is generally considered as both the cause and consequence of grave human rights violations.[4] Additionally, prevention of migrant smuggling is a customary prerogative of sovereign states which reflects their right to determine who their residents and future citizens are.[5] Thus, attempts to prevent the smuggling of migrants include strengthened border controls and enforced powers regarding inspection and seizure of vessels allegedly involved in migrant smuggling.[6] Examples of such actions can be found in both international and European contexts, such as the United Nations (UN) Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol or Smuggling Protocol) and the Renewed EU Action Plan against migrant smuggling for the period of 2021 – 2025 (the Renewed EU Action Plan or Renewed Action Plan). These claim that the measures deal with and prevent the issue of migrant smuggling, as well as protect the rights of smuggled migrants.[7]

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[1] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 1.

[2] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, Treaty Series, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).

[3] Francesca Mussi, 'Countering migrant smuggling in the Mediterranean Sea under the mandate of the UN Security Council: what protection for the fundamental rights of migrants?' (2018) 22(4) The International Journal of Human Rights 488.

[4] European Commission, 'Migrant smuggling' (European Commission) <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/migrant-smuggling_en> accessed 8 November 2021.

[5] Francesca Mussi, 'Countering migrant smuggling in the Mediterranean Sea under the mandate of the UN Security Council: what protection for the fundamental rights of migrants?' (2018) 22(4) The International Journal of Human Rights 488.

[6] *Ibid,* 488.

[7] European Commission, 'Migrant smuggling' (*European Commission*) <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/migrant-smuggling_en> accessed 8 November 2021.

However, it is questionable whether this in practice can offer effective solutions in preventing migrant smuggling whilst ensuring human rights guarantees.[8] This can be seen with difference in of how migrant smuggling is interpreted and understood. From the perspective of the UN Smuggling Protocol, it is made clear that States party to the treaty must prohibit migrant smuggling whilst ensuring the human rights of those that have been smuggled.[9] While there is a focus on the 'crime' aspect of migrant smuggling, the protection of migrants is also an important element considering the obligation to criminalise smuggling must be done in a way that is compatible with the protection of the rights of the migrants.[10] On the other hand, migrant smuggling from the perspective of the Renewed EU Action Plan is portrayed as a lucrative business which is operated by powerful criminal networks and exploiting migrants.[11] Although the exploitation of migrants is highlighted and consequently the importance of the protection of migrants, there is a greater focus on the 'crime' of migrant smuggling which allows for a justification of strengthened border control.[12] Thus, it is apparent that there are differences in the objectives of two different legal regimes whose aim is the same. This raises the question whether these two legal regimes are compatible with each other and whether their differences have any consequences in dealing with migrant smuggling. This is what this thesis will examine.

1.2 Guiding Questions and Objectives

Based on the topic and its aim to examine the compatibility between two legal regimes that operate within the same social field, this research will investigate the question "does the new EU policy on migrant smuggling collide with the objectives of the UN Smuggling Protocol?" Therefore, this thesis will describe and analyse the purpose, major provisions, and the application of those two legal regimes. A focus will be on the obligations of states under the UN Smuggling Protocol and the obligations of EU states under the Renewed EU Action Plan

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[8] Francesca Mussi, 'Countering migrant smuggling in the Mediterranean Sea under the mandate of the UN Security Council: what protection for the fundamental rights of migrants?' (2018) 22(4) The International Journal of Human Rights 488.

[9] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, Treaty Series, Vol. 2241, p. 507, Doc. A/55/383, Art. 2.

[10] *Ibid*.

[11] European Commission, 'Migrant smuggling' (*European Commission*) <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/migrant-smuggling_en> accessed 8 November 2021.

[12] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 12.

and they will therefore both be examined. With this, this research will also look at these different research objectives:

- Identify the objectives of the UN Smuggling Protocol.
- Identify the objectives of the Renewed EU Action Plan.
- Examine the compatibility of the objectives of different legal regimes.
- Examine the consequences of a possible incompatibility between different legal regimes.
- Propose possible solution(s) for legal regime collision based on outcome of analysis.

This will be examined to identify whether the two legal regimes are compatible with each other, or even support each other, to make the overall system more effective, or if they negatively impact each other in a way that affect their ability to work properly alongside each other.

1.3 State of Current Research

This issue has not been sufficiently investigated because legal writings on migrant smuggling have tended to focus solely on aspects of the UN Smuggling Protocol and EU policies, or links between migrant smuggling and international human rights, refugee and humanitarian law. Brolan (2002)[13] provides an analysis of the UN Smuggling Protocol from a refugee perspective in which it is held that the Protocol has the potential to help combat the phenomenon of migrant smuggling. This is because it aims to not criminalise migrants themselves, as well as demands refugee protection for the migrants.[14] Mussi (2018)[15] contributes that from a human rights perspective, the appropriate response to migrant smuggling is to implement preventative measures that is aimed at the root of the problem, alongside measures aimed at protecting the smuggled migrants.[16] Gallagher and David (2014)[17] clarifies the legal obligations of states in relation to migrant smuggling to remove the

[13] Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective' (2002) 14 Int'l J Refugee L 561.
[14] *Ibid,* 561.
[15] Francesca Mussi, 'Countering migrant smuggling in the Mediterranean Sea under the mandate of the UN Security Council: what protection for the fundamental rights of migrants?' (2018) 22(4) The International Journal of Human Rights 488.
[16] *Ibid,* 488.
[17] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 12.

uncertainty and disagreement of exactly what is required of states.[18] Here it is explained how the specific legal obligations of states to criminalize migrant smuggling is dictated by parameters of other areas of international law, such as human rights, refugee law and law of the sea.[19] These literatures highlight the importance of and focus on the protection of smuggled migrants through international law. On the other hand, literature on older EU policies against migrant smuggling show different priorities. Carrera, Mitsilegas, Allsopp and Vosyliūtė (2019)[20] argue that the EU's anti-smuggling policies' focus on how criminalisation affect migrant's mobility and fundamental rights.[21] Ilse van Liempt (2014)[22] add to this that while EU's strengthened border control can be very effective in tackling migrant smuggling, there is a necessity for a wider common EU immigration policy that is targeted at protecting the migrants because failure to do so cause grave human rights abuses.[23] Moreover, Strauch (2017)[24] argues that previous EU actions and policies risk circumventing international human rights law due to being able to operate in a grey area where the European Court of Human Rights may not apply.[25] This demonstrates that while there is literature on the different legal regimes by themselves, there is limited literature available on how these legal regimes work together and their compatibility with each other. Such a study can identify the limitations of the current system and thus the weaknesses in the criminal justice response to migrant smuggling. Additionally, the Renewed EU Action Plan is a new action by the EU who claim that it will strengthen the implementation of EU's legal framework on migrant smuggling.[26] Thus, this research will be beneficial to examine whether this actually is in line with the UN Smuggling Protocol and if there is any incompatibility between the different legal regimes and the possible consequences of such incompatibly. This is in order to identify how to proportionally criminalise migrant smuggling, whilst also effectively addressing and protecting the rights of smuggled migrants.

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[18] *Ibid*.
[19] *Ibid,* 736.
[20] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 182.
[21] *Ibid.*
[22] Ilse van Liempt, 'A Critical Insight into Europe's Criminalisation of Human Smuggling' (2016) 2016:3 European Policy Analysis.
[23] *Ibid,* 8.
[24] Paul Strauch, 'When Stopping the Smuggler Means Repelling the Refugee: International Human Rights Law and the European Union's Operation to Combat Smuggling in Libya's Territorial Sea' (2017) 126 Yale L J 2421.
[25] *Ibid,* 2422.
[26] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 2.

1.4 Theories and Method

This research starts with the observation of the issue of migrant smuggling from a legal pluralistic approach by using system theory.[27] Within the social complex of the international community, a plurality of legal regimes that focus on migrant smuggling exist. While these are operating with the same focus, they are not necessarily structurally coupled with each other. Such an observation shows that there is a possible collision between the legal regimes, which in turn might lead to a fragmentation of the system.[28] The theory of the fragmentation of the law suggests that several international norms co-exist in a relationship of interpretation and conflict.[29] With these observations, the necessity to examine the plurality of legal regimes is highlighted. This is because it is important to analyse its possible conflicts and collisions to discuss a possible pluralistic, holistic multi-level approach to the issue of migrant smuggling. Therefore, to analyse this, an abstract meta-structure and the method of functional comparative law will be employed to compare two legal regimes: the UN Smuggling Protocol and the Renewed EU Action Plan. The method of functional comparative law 'combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society.' [30] Thus, law and society are thought of as separate, but related. [31] Consequently, the functional comparison functions as a *tertium comparationis*.[32] With this understanding, the employment of functional comparative law in this thesis opens up for the comparison of the two chosen legal regimes that focus on migrant smuggling. This means that the legal regimes must be analysed and understood in light of their functional relation to society, and thus the issue of migrant smuggling. As such, the different regimes will be described and analysed, and their design and function will be brought into relation to each other. This is necessary for the comparative analysis.

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[27] Niklas Luhmann, *Law as a Social System* (OUP 2005); Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (1st edn, Routledge 2009); Gunther Teubner, *Law as an Autopoietic System* (Blackwell Publishers 1993).

[28] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, 10.

[29] *Ibid.*

[30] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 342.

[31] *Ibid.*

[32] *Ibid.*

1.5 Relevance to Peace and Conflict Studies

This issue is of relevance to the field of peace and conflict because it can contribute towards changing a system of violence. Peace and conflict studies has been defined as "an academic field which identifies and analyses the violent and nonviolent behaviours as well as the structural mechanisms attending social conflicts with a view towards understanding those processes which lead to a more desirable human condition."[33] As such, peace and conflict studies is not restricted to issues of war and peace, but extends to issues of justice, development, and human rights. It is neither limited to issues between states solely but extends to other issues that impacts behaviours and structures which can cause, predict and emanate from social conflict.[34] 'It seeks to understand both short-term and long-term strategies for the avoidance of large-scale violence.'[35] 'In other words, peace and conflict studies includes, within its scope, both peacekeeping and peacemaking - both conflict resolution and nonviolent action; both efforts to minimize violence or improve a party's situation and efforts to change a system to which violence, physical and/or structural, is endemic.' [36] With such an understanding of peace and conflict studies, it is apparent that the issue of migrant smuggling is relevant to the field of peace and conflict because an understanding of the legal regimes protecting migrants and criminalising actions that infringe on their fundamental rights is an issue of justice and human rights and contributes towards changing a system of violence. Moreover, an understanding of the compatibilities and incompatibilities between the different legal regimes can gain an understanding of how to proportionally change a legal system that, at the moment, is not sufficiently protecting individuals from abuse and suffering. This is important to challenge a system where violence is endemic.

1.6 Structure of the Work

This thesis is structured in the following way:

Chapter 1 introduced the research topic, through its questions, objectives, relevance, and outlining how the remainder of the thesis is organised.

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[33] Maire A. Dugan, 'Peace Studies at the Graduate Level' (1989) 504 Annals Am Acad Pol & Soc Sci 72, 74.
[34] *Ibid*.
[35] *Ibid.*
[36] *Ibid*.

Chapter 2 will present the theoretical framework which the research operates under. Systems theory will be presented here first, followed by the theory of legal pluralism and legal fragmentation.

Chapter 3 will present the methodological framework which is used for this research. First, the Functional Method of Comparative Law is explained, to demonstrate how it is relevant for this thesis. Followed by this will be a discussion on the limitations of the method. Next, it is explained how the sources of law are to be used and understood. Finally, the research design is presented to show how the specific methodological framework is employed here.

Chapter 4 presents the key findings and analysis of the research done on the two legal regimes compared in this research. First, the UN Smuggling Protocol is analysed, providing an understanding of what migrant smuggling is from the perspective of UN, and what the purpose and major provisions are. Next, this is similarly done for the Renewed EU Action Plan. Following this, there will be an analysis on where these two legal frameworks converge, and (or if) they diverge from each other.

Chapter 5 will present the discussion on the similarities and differences found in chapter 4. Here the main research question will be answered on whether the differences have any consequences in dealing with the issue of migrant smuggling.

The thesis will be concluded in chapter 6 by summarising the entire research, restating the key findings of the analysis, as well as providing final comments on the work.

2 Theoretical Framework

This research starts with the observation of the issue of migrant smuggling from a legal pluralistic approach by using system theory. According to Franz von Benda-Beckmann, if there is interest in legal pluralism in society, 'one wants to explore the emergence and change of plural legal conditions, the dynamics of the interrelationships of their elements, and their significance in social, political and economic life.'[37] However, if one wants to 'study law and legal pluralism in society and relate law to social practices and its social significance, law as objectified meaning must be conceptually divorced from the human activities which generate

[37] Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34(47) The Journal of Legal Pluralism and Unofficial Law 37, 65.

it, use it, and maintain it through time.'[38] Therefore, as this research seeks to determine whether a plurality of legal regimes focused on the issue of migrant smuggling causes any problems in dealing with the issue, it is necessary to remove human activities from the objectified meaning of the legal system. Therefore, observing the international community through system theory can be helpful. With such an observation, it is possible to determine that a plurality of legal regimes that focus on migrant smuggling exist. While these are operating with the same focus, they are not necessarily structurally coupled with each other. Such an observation shows that there is a possible collision between the legal regimes, which in turn might lead to a fragmentation of the system. The theory of the fragmentation of the law suggests that several international norms co-exist in a relationship of interpretation and conflict.[39] With these observations, the necessity to examine the plurality of legal regimes is highlighted. The introduction of these theories and concepts will lay the foundation to examine the issue this research seeks to examine, namely whether two legal regimes focusing on migrant smuggling are compatible with each other and whether their differences have any consequences in dealing with migrant smuggling.

2.1 Systems Theory

According to Luhmann's systems theory, society is based on communication as 'the unity of utterance, information and understanding'.[40] Luhmann abandons the thought that the human society is shaped and guided by human beings.[41] Rather, society is formed by contingent communications.[42] This means that society is not made up of interactions and behavioural dispositions, but instead self-producing social systems.[43] This is helpful when looking at the UN Smuggling Protocol and the Renewed EU Action Plan because understanding both legal regimes as self-producing systems is beneficial in gaining a better understanding why they might face issues because one must look within the legal regime to understand it, not outside of it. The self-producing social systems are then divided into different categories or subsystems

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[38] *Ibid.*
[39] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, 10.
[40] Gunther Teubner, 'Introduction to Autopoietic Law' in Teubner, G. (ed), *Autopoietic Law: A New Approach to Law and Society* (De Gruyter, Inc. 1987) 3.
[41] Michael King and Chris Thornhill, 'Introduction' in King, M., and Thornhill, C. (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart Publishing 2006) 8.
[42] *Ibid.*
[43] *Ibid.*

of communications, such as the economic system, the legal system, political system, the educational system, science, mass media, and so on.[44] These subsystems primary form of differentiation is functional.[45] Here, the communication of each subsystem apply a unique code to their system.[46] In the legal system, the code applied is legal/illegal; in the economic system the code is profit/no-profit; in the scientific system it is true/false; and so on.[47] Consequently, the legal system functions according to its own logic by applying the code legal/illegal, meaning that something is either legal or illegal.[48] Communication using this legal code of legal/illegal is what distinguishes the legal system and its environment.[49] What is decided to be deemed legal and illegal is in theory decided independently of the communication of other subsystem.[50] Similarly, in the scientific system, what is true or false is decided is decided regardless of what political support there is for any such statement.[51] The systems are able to steer and direct themselves.[52] Such an understanding of social systems shows that each system is autopoietic.[53] This means that the systems are producing and forming their own elements from itself according to their own unique codes.[54] 'In this way systems are operating autonomously.'[55] However, autonomy and autopoiesis does not mean causal independence from the environment of the subsystems.[56] It only refers to the circularity in which the subsystems produces its communication.[57] Each subsystem can thus be influenced by the other subsystems and is therefore also dependent on contributions from them.[58] This is applicable to the UN Smuggling

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[44] Richard Nobles and David Schiff, 'Using Systems Theory to Study Legal Pluralism: What Could Be Gained' (2012) 46 Law & Soc'y Rev 265, 270.
[45] Simon Calmar Andersen, 'How to Improve the Outcome of State Welfare Services. Governance in A Systems-Theoretical Perspective' (2005) 83(4) Public Administration 891, 893.
[46] Richard Nobles and David Schiff, 'Using Systems Theory to Study Legal Pluralism: What Could Be Gained' (2012) 46 Law & Soc'y Rev 265, 270.
[47] *Ibid.*
[48] Simon Calmar Andersen, 'How to Improve the Outcome of State Welfare Services. Governance in A Systems-Theoretical Perspective' (2005) 83(4) Public Administration 891, 893.
[49] *Ibid.*
[50] *Ibid.*
[51] *Ibid.*
[52] Niklas Luhmann, *Introduction to Systems Theory* (translated by Peter Gilgen, Polity Press 2013) xi.
[53] Richard Nobles and David Schiff, *Observing Law through Systems Theory* (Hart Publishing 2013) 92.
[54] Niklas Luhmann, *Social Systems* (translated by John Bednarz Jr., with Dirk Baecker, Standford University Press 1995) xx.
[55] Simon Calmar Andersen, 'How to Improve the Outcome of State Welfare Services. Governance in A Systems-Theoretical Perspective' (2005) 83(4) Public Administration 891, 893.
[56] Gunther Teubner, *Law as an Autopoietic System* (translated by Anne Bankowska and Ruth Adler, Blackwell 1993) 35.
[57] *Ibid.*
[58] Simon Calmar Andersen, 'How to Improve the Outcome of State Welfare Services. Governance in A Systems-Theoretical Perspective' (2005) 83(4) Public Administration 891, 893.

Protocol and the Renewed EU Action Plan. They are both functioning by the code legal/illegal and are steered by this code, however, there is always some political influence in what to prioritise. Based on this understanding of Luhmann's systems theory, society is divided up into subsystems which do not view human interests, behaviour, or actions as the immediate or remote cause of social events, but rather perceives society to be stimulated by several different causes, and ultimately grounded on its own contingency.[59] Therefore, observing the international community through the lens of systems theory can be helpful for the analysis of the issue of migrant smuggling because the legal system responding to the issue is functionally different and operationally autonomous.[60] This creates a stability of the system, which, according to Luhmann, is based on a principle of variation.[61] With this principle there is a variation and transformation of existing legal rules.[62] This gives rise to the observation of the issue of migrant smuggling from a legal pluralistic approach.

2.2 Legal Pluralism

Understanding the legal system as a functionally different and operationally autonomous system where there is variation and transformation of existing legal rules means that law has many existences, and that the international community is thus filled with law-making bodies.[63] This means that the law on migrant smuggling also has many existences. This forms the idea of legal pluralism. Legal pluralism describes the several different forms that law can take within the same social field.[64] It holds that there are coexisting conceptions of permissible actions, transactions, ideas, and procedures that deal with the conflicts and issues in the same field.[65] These are usually organised around different conceptions of justice.[66] A vital concern this creates is the nature of interaction between legal spheres.[67] Both Merry and von Benda-Beckmann demonstrates how the most obvious form of legal pluralism are a product of

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[59] Michael King and Chris Thornhill, 'Introduction' in King, M., and Thornhill, C. (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart Publishing 2006) 8.
[60] Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' (2012) 4(2) GoJIL 625, 633.
[61] *Ibid.*
[62] *Ibid.*
[63] Keebet von Benda-Beckmann and Bertram Turner, 'Legal pluralism, social theory, and the state' (2018) 50(3) The Journal of Legal Pluralism and Unofficial Law 255, 265.
[64] Sally Engle Merry, 'An Anthropological Perspective on Legal Pluralism' in Berman, P. S. (ed) *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 171.
[65] Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) Law & Society Review 869, 870.
[66] Sally Engle Merry, 'Legal Pluralism and Legal Culture' in Tamanaha, B. Z., Sage, C., and Woolcock, M. (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 67.
[67] *Ibid.*

colonialism.[68] At the time, colonial powers would add new layers of law and conceptions of justice over already existing ones.[69] On other occasions, the colonial powers world incorporate earlier legal systems, for example the British Empire incorporating Hindu, Muslim, and Christian personal law into the administration of the Indian Empire.[70] Such incorporation often lead to incompatible understanding, standards, and procedures which may force individuals to choose which to apply and follow, often termed forum shopping.[71] Despite this, some of the first work on legal pluralism found that only relative separate legal systems coexisted, meaning that there was not much focus on the parallel or duplicatory nature of legal pluralism.[72] This was somewhat challenged by Sally Falk Moore's notion of 'semi-autonomous social field' which argued that regulatory subgroups exists.[73] Instead of seeing plural legal systems as restricted and closed, they are rather semiautonomous by operating within other social fields but not governed by them.[74] Building on this, research on legal pluralism 'explored both the nature of each legal system and its intersections with others.'[75] This drew attention to the fact that the same issue, and by default, the same people, can be the subject of or confronted with more than one legal system.[76] The actions of people may not simply be dealt with under 'their' law.[77] There are different levels of legal systems, such as global, regional, national, and local.[78] Consequently, an issue may be addressed by all these levels through international law, EU law, national law, and local law.[79] This is the case with migrant smuggling. The ability of an issue, such as migrant smuggling, being addressed by several legal systems means that there is some

[68] *Ibid;* Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34(47) The Journal of Legal Pluralism and Unofficial Law 37, 60.
[69] Sally Engle Merry, 'Legal Pluralism and Legal Culture' in Tamanaha, B. Z., Sage, C., and Woolcock, M. (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 67.
[70] *Ibid.*
[71] Keebet von Benda-Beckmann, 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra' (1981) 13(19) The Journal of Legal Pluralism and Unofficial Law 117, 117.
[72] Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34(47) The Journal of Legal Pluralism and Unofficial Law 37, 60.
[73] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) Law and Society Review 719, 722.
[74] Sally Engle Merry, 'Legal Pluralism and Legal Culture' in Tamanaha, B. Z., Sage, C., and Woolcock, M. (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 67.
[75] *Ibid.*
[76] Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 34(47) The Journal of Legal Pluralism and Unofficial Law 37, 60.
[77] *Ibid.*
[78] Sally Engle Merry, 'Legal Pluralism and Legal Culture' in Tamanaha, B. Z., Sage, C., and Woolcock, M. (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 67.
[79] *Ibid.*

interaction and overlapping in certain ways simply because they address the same issue.[80] This phenomenon has been strengthened in the postcolonial era when emerging democracies have borrowed from foreign legal systems.[81] Constitutions, legal codes and discrete legal systems have been the subject of adoption from one country to another.[82] Moreover, there has been an expansion in international law into regulating the relation between individuals and their states, economic relationships, cultural integrity, and the protection of vulnerable groups.[83] The development of human rights law means that the legal systems have expanded into new domains of social life.[84] The result is that the contemporary international community holds a 'rich diversity of coexisting, overlapping, contradictory, and complementary systems of law at the local, national, and international levels.'[85] These diverse and sometimes fragmented regimes make up the system of international law and is described as global legal pluralism.[86] Therefore, through the concept of legal pluralism, it can be determined that a plurality of legal systems that focus on migrant smuggling exist. This allows for a discussion on how the UN and EU deal with the same issue. However, while these are operating with the same focus, it remains an issue that such laws may coexist in contradiction with each other. This observation demonstrates that there might be a conflict between the two systems, which in turn might lead to the fragmentation of the system.

2.3 Legal Fragmentation

The possibility of the fragmentation of the system introduces the theory of the fragmentation of the law, which suggests that several international norms co-exist in a relationship of interpretation and conflict.[87] Wilfred Jenks was the first to raise awareness to the phenomenon of fragmentation.[88] He noted that 'law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other

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[80] Ralf Michaels, 'Global Legal Pluralism and Conflict of Laws' in Berman, P. S. (ed) *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020) 629.
[81] Sally Engle Merry, 'Legal Pluralism and Legal Culture' in Tamanaha, B. Z., Sage, C., and Woolcock, M. (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 68.
[82] *Ibid.*
[83] *Ibid.*
[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*
[87] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006.
[88] *Ibid,* 10.

and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.'[89] At some point, these will inevitably react to each other and their coexistence will accordingly cause problems, which Jenks describes as the conflict of law-making treaties.[90] This concept has gained legal significance because of the emergence of specialised and autonomous rules, legal institutions and spheres of legal practice.[91] What was once governed by general international law has now turned into a field of specialist systems, such as trade law, human rights law, environmental law, European law, law of the sea, and even more specialised fields such as international refugee law and law governing migrant smuggling.[92] The problem is that these specialised systems of law tends to be formed with relative ignorance of legislative and institutional activities in adjoining fields, and without attention to general principles and practices of international law.[93] This results in possible conflicts between rules or systems of law, the possibility of deviating from institutional practices, and the danger of losing an overall perspective of law.[94] While the concept of this remains important in terms of legislative and intuitional form, there is division between international lawyers in their assessment on the phenomenon itself.[95] Some have found the phenomenon highly troubling, perceiving it as the gradual destruction of general international law, the emergence of conflicting jurisprudence, forum shopping, as well as the loss of legal security.[96] Others have found legal fragmentation to merely be a technical problem that has naturally emerged with the expansion of international law and legal activity, and can simply be controlled through the use of technical streamlining and coordination.[97] Still, even with the different perception of the severity of legal fragmentation, there seems to be consensus on its existence and possible challenges.[98] Fragmentation 'creates a danger of conflicting and incompatible rules, principles, rule systems

[89] C. Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1853) 30 Brit YB Int'l L 401, 403.
[90] *Ibid.*
[91] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Mich J Int'l L 999, 1006.
[92] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, 10.
[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] *Ibid.*
[98] C. Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1853) 30 Brit YB Int'l L 401, 403.

and institutional practices.'[99] This issue has developed due to the growing number of closely related set of rules of international law that pertains to particular social fields.[100] Consequently, the fragmentation can challenge the coherence of the legal system and may affect how it can properly respond to issues such as migrant smuggling.[101]

2.4 Summary

By observing the issue of migrant smuggling from a legal pluralistic approach by using system theory, it is possible to understand the international community as being divided up into subsystems which do not view human interests, behaviour, or actions as the immediate or remote cause of social events, but rather perceives society to be stimulated by several different causes, and ultimately grounded on its own contingency.[102] Within this social complex of the international community, a plurality of legal regimes that focus on migrant smuggling exists. Such an observation shows that there is a possible collision between the legal regimes, which in turn might lead to a fragmentation of the system.[103] The theory of the fragmentation of the law suggests that several international norms co-exist in a relationship of interpretation and conflict.[104] With these observations, the necessity to examine the plurality of legal regimes on migrant smuggling is highlighted because there is a danger that the legal fragmentation of migrant smuggling may challenge the coherence of the system.

3 Methodological Framework

As was highlighted in the theoretical chapter, by observing the issue of migrant smuggling from a legal pluralistic approach by using system theory, there is a possible collision between the legal regimes, which in turn might lead to a fragmentation of the system.[105] This theory of fragmentation of law suggests that several international norms co-exist in a relationship of

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[99] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, 11.
[100] *Ibid,* 10.
[101] *Ibid.*
[102] Michael King and Chris Thornhill, 'Introduction' in King, M., and Thornhill, C. (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart Publishing 2006) 8.
[103] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006.
[104] *Ibid,* 10.
[105] *Ibid*.

interpretation and conflict.[106] With these observations, the necessity to examine the plurality of legal regimes is highlighted. This is because it is important to analyse its possible conflicts and collisions to discuss a possible pluralistic, holistic multi-level approach to the issue of migrant smuggling. To achieve this, it is necessary to employ the right method. Oppenheim argued that the right method in international law is the method that secures the best results based on the research topic and the research itself.[107] Considering the basis of this topic is to examine the plurality of legal regimes, it is arguable that the right method is comparative legal research. This is because the aim of comparative legal research is to identify modern trends and searching for convergences and divergences between different legal systems.[108] Palmer suggests that the search of convergences and divergences, from an abstract point of view, is the only method of comparative legal research.[109] However, in practice, he argues that comparative legal research is identified based on the techniques by which the comparison is carried.[110] These techniques have then acquired status as separate principles of the method, and it includes functional, historical, evolutionary, thematic, empirical, statistical, and structural comparisons.[111] Out of these, the 'functional' method of comparative has become the mantra of comparative legal research and is the most suitable method for the purposes of this research.[112] According to general understanding of the functional method of comparative law, this method finds that different legal regimes are responding to similar problems.[113] Instead of merely addressing the rules and institutions in different legal regimes, this method approaches the rules and institutions as a response to certain issues.[114] This is suitable for this research because the purpose of this research is to examine whether the response to the issue of migrant smuggling by different legal regimes might cause legal fragmentation. Thus, the method of functional comparative law will be employed to answer whether the UN Smuggling Protocol and the

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[106] *Ibid*.
[107] L. Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2(2) The American Journal of International Law 313, 327.
[108] Emmanouil Billis, 'On the methodology of comparative criminal research: Paradigmatic approaches to the research method of functional comparison and the heuristic device of ideal types' (2017) 24(6) Maastricht Journal of European and Comparative Law 864.
[109] Vernon Valentine Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53(1) The American Journal of Comparative Law 261, 262.
[110] *Ibid,* 263.
[111] *Ibid,* 263.
[112] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 340.
[113] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 10.
[114] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74(2) The Rabel Journal of Comparative and International Private Law 318, 323.

Renewed EU Action Plan are compatible with each other, and whether their differences have any consequences in dealing with migrant smuggling.

3.1 The Functional Method of Comparative Law

Ernst Rabel was one of the first comparatists to formulate and state the principle of 'functionalism' as a methodological principle in the comparative study of law.[115] Rabel's core idea on this method was described by David J. Gerber as 'looking at how a problem is solved in two or more legal systems and exploring the differences and similarities in the respective treatments of the problem.'[116] Originally, it appears that functionalism in comparative legal research was not designed to be applied further.[117] However, over time, this idea of functionalism in comparative law was expanded and twisted by several authors to include assumptions that go further than Rabel's first core idea.[118] Konrad Zweigert and Hein Kötz are often considering to be two of those who significantly further developed and promoted this method.[119] They followed along the lines of Rebel by stating that the 'basic methodological principle of comparative law is that of functionality.'[120] According to them 'in law the only things which are comparable are those which fulfil the same function.'[121] However, Zweigert and Kötz's assumptions goes further. At the heart of their approach is the attempt to find norms that serve a certain social function.[122] In a functional sense, rules and institutions should be part of a greater cultural, social, economic and ideological whole.[123] Based on this, Zweigert and Kötz holds that the point of departure for functional comparison in law should not be the written rule or statutory law, but rather the socio-legal function.[124] It is argued that this is necessary to avoid the issue of perceiving the foreign system mainly through the understanding of one's own legal system.[125] Mark Van Hoecke and Mark Warrington supported this understanding of the method of comparative law, and stated that that Zweigert and Kötz offered the most advanced

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[115] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 10.
[116] David J. Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in Annelise Riles (eds) *Rethinking the Masters of Comparative Law* (Hart Publishing, 2001) 190 – 208, 199.
[117] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 12.
[118] *Ibid,* 12-13.
[119] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74(2) The Rabel Journal of Comparative and International Private Law 318, 321.
[120] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (translated by Tony Weir, 3rd edn, 1998) 34.
[121] Ibid, 34.
[122] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 14
[123] *Ibid*, 14.
[124] *Ibid,* 14.
[125] *Ibid*, 14.

approach to traditional comparative law and attempted to solve some of the pre-existing issues and deficiencies.[126] The issue nevertheless remains that the rest of Zweigert and Kötz's book does not meet the standards they presented in the theoretical part of the book.[127] Rather, they seem to venture further than their functionalist method suggests in terms of comparing legal systems and not just legal rules by being more explicit about the context which the comparatist should take into account.[128] Based on this, several authors have advocated for an even broader approach to the functional method of comparative law.[129] Here, there has been an attempt to move beyond the perception of 'law as rules' by employing words such as 'tradition' and 'culture'.[130] Such an approach argue that law and the understanding of the legal system is much more than merely reading statutory rules and judicial decisions.[131] Rather, understanding the law requires placing it in a broader context, such as a historical, socio-economic, psychological and ideological context.[132] Such an understanding of the functional method of comparative law is offered by Ralf Michaels.

Michaels attempts to reconstruct and evaluate the method by placing it within a larger framework of other disciplines.[133] In doing so, he identifies some important elements. Firstly, the functional method of comparative law is factual, meaning that it does not focus on rules, but rather on their effects, not on doctrinal structures and arguments, but on events.[134] Consequently, the objects of the method are often judicial decisions as responses to real life decisions, and legal systems are compared by considering several different judicial responses to similar situations.[135] By virtue of this, the factual element of this method aims to explain the effects of legal regimes as functions by also examining the non-legal responses to societal requisites.[136] This means that the functional method of comparative law asks the researcher to understand legal regimes as societal responses to issues, not as isolated instances, but rather

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[126] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 Int'l & Comp LQ 495.
[127] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 16.
[128] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 Int'l & Comp LQ 495, 496.
[129] *Ibid,* 496.
[130] *Ibid,* 496.
[131] *Ibid,* 496.
[132] *Ibid,* 496.
[133] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 342.
[134] *Ibid,* 342.
[135] *Ibid,* 342.
[136] *Ibid,* 364.

their relation to the whole legal system, as well as the whole society.[137] In terms of applying this method to this research, 'functionalists explicitly ask that comparatists look not only at legal rules ('law in books'), nor only at the results of their application ('law in action'), but even beyond at non-legal answers to societal needs.'[138] The second element is that the method combines this 'factual approach with the theory that its objects must be understood in the light of their functional relation to society.'[139] Thus, law and society are found to be separate, but related.[140] Subsequently, the third element builds on this and argues that the functional comparison functions as a *tertium comparationis*.[141] This means that 'institutions, both legal and non-legal, and even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems.[142]

The understanding of the functional method of comparative law above and the broadening of the approach as presented by Michal Ralf opens up for the comparison of the two chosen legal regimes that focus on migrant smuggling. This means that the legal regimes must be analysed and understood in light of their functional relation to society, and thus the issue of migrant smuggling.

3.2 Limits of the Functional Method of Comparative Law

Despite the value the method of functional method of comparative law offers through its elements for this research, it is necessary to examine the limits of the method highlighted through the criticism to assure that the method is the best one to secure sufficient and neutral results. A relevant point of criticism to assess here is in relation to a point already made regarding neutrality. Husa argued that, based on Zweigert and Kötz's assertation that the point of departure for functional comparison in law should be the socio-legal function, was necessary in order to avoid the issue of perceiving the foreign system mainly through the understanding of one's own legal system.[143] Based on this, there is an underlying idea that by researching legal regimes as part of a larger socio-legal context and by placing them in an external comparative framework, there is an attempt to counterbalance one's own legal-cultural prejudices.[144] This

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[137] *Ibid,* 364.
[138] *Ibid,* 364.
[139] *Ibid,* 342.
[140] *Ibid,* 342.
[141] *Ibid,* 342.
[142] *Ibid,* 342.
[143] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 14.
[144] *Ibid*.

'requires a comparatist to be detached from their own legal preconceptions and to discover a more neutral (or at least less biased) concepts which make it possible to describe legal problems in a comparative framework.'[145] This suggestion of neutrality and objectivity is met with harsh criticism because preconceptions are inevitably implicated in the process of comparison.[146] There is a risk that the application of socio-legal function leads to the presumption of neutrality.[147] This can cause an insufficient awareness of unavoidably bias and unwarranted faith in objectivity and might allow for culturally biased perspectives to be presented as neutral.[148] This in turn entails the risk of creating misapprehensions and a distorted picture of one of the legal regimes, upon which the comparatists is simply projecting their own perceptions and perspectives.[149] There is argument that it is better advised to abandon the quest for objectivity and rather accept that comparatists will always belong to a particular culture and subsequently address and deal with the preconceptions.[150] For the purposes of this particular research in this thesis, any preconceptions towards any of the two legal regimes begin examined here should be discussed. While the author of this paper has completed undergraduate studies in Law with Human Rights, which focused both on domestic, regional, and international law, there was certainly a greater focus on human rights law through the UN system as compared to EU law and human rights law through the EU system. This does raise the concern that the personal background of the author will cause there to be an assumption that the UN system is the better legal system as compared to the EU system and thus be biased when making comparisons on any issues arising and present the findings in favour of the UN system. However, considering that the aim of the paper is to examine the compatibility between two legal regimes on the issue migrant smuggling, not making an evaluation on which is the better law, diminishes some of the issues that the personal background of the author might cause. Additionally, being aware that this might be an issue does mean that there is an awareness of it and does allow for a less biased stance. Furthermore, the issue of neutrality and objectivity seems to be a greater concern when the comparatist compares their own national legal system to another national legal system. This is not the case in this research because there is an international legal system and a regional legal system being compared, meaning that there is an

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[145] *Ibid, 14.*
[146] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74(2) The Rabel Journal of Comparative and International Private Law 318, 328.
[147] *Ibid*, 328.
[148] *Ibid,* 328.
[149] *Ibid.* 328.
[150] *Ibid,* 329.

inherent objectivity because neither of the legal systems is directly applicable to me as a citizen of a country. Based on this, the issue of neutrality and objectivity is not necessarily an issue that will have a great impact upon the outcome of this research.

3.3 Sources of Law and Interpretation

It is appropriate here to explain how the various sources of law are dealt with and understood in this research. In any discussion on the sources of international law, the starting point is usually Article 38 of the Statute of International Court of Justice, which sets out a list of sources which are to be used in its decision making.[151] According to this, sources of international law include international treaties and conventions, customary law, general principles of law, and judicial decisions and the work of scholars.[152] However, according to Charlesworth, this list can also be a trap because 'it allows international lawyers to side-step complex debates about the functions of international law and about the relative legitimacies of State consent.'[153] The formal nature of Article 38 of the Statute of International Court of Justice 'obscures the fact that international law is generated by a multi-layered process of interactions, instruments, pressures, and principles.'[154] The specialised fields of international law, such as human rights law, refugee law, and indeed migrant smuggling, differ in 'the priority that they accord to different sources and the approaches that they take to them.'[155] With this is mind, this research intends to follow Gallagher's understanding of what law is, which is based on 'a considered understanding of what States have sought to create and recognise as law.'[156] This is in line with modern, positivist approaches to international law where the concept of consent holds a central role in the formation and acceptance of international law.[157] This means that States choose to be bound by international law because they consent to it.[158] Subsequently, respect for international law is a result of the principle *pacta sunct servanda*, meaning that

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[151] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 23.
[152] United Nations (1946), 'Statute of the International Court of Justice', 18 April 1946, Article. 38.
[153] Hilary Charlesworth, Law-Making and Sources' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 189.
[154] *Ibid.*
[155] *Ibid.*
[156] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 24.
[157] *Ibid,*
[158] Hugh Thirlway, *Sources of International Law* (Oxford University Press 2014) 97.

agreements must be respected.[159] Thereby, consent 'legitimises a rule as a rule.'[160] Such a consent is most clearly and unambiguously the case when a State ratifies and enters into a treaty.[161] However, other sources of law identified in Article 38 of the Statute of International Court of Justice, such as customary law and general principles of law, are similarly dependent on a State making some sort of commitment or agreement that expresses its willingness to comply with it.[162] While non-State actors may also shape international law, Gallagher argues that 'the task of identifying the source and nature of specific legal obligations is (…) best served by an approach that accepts that international law is made, or recognised or accepted, through the will of States, and that nothing becomes law for the international system from any other source.'[163] Thus, while recognising the need to understand international law as a normative system and process, not merely a collection of rules, this research will follow the understanding of Gallagher on what sources of international law are, namely rules that States have consented to.[164] Therefore, this research will primarily focus on specific sources of international law that relate to the issue of migrant smuggling and the response of States to that issue. More specifically, the focus will be on the UN Smuggling Protocol and the Renewed EU Action Plan against Migrant Smuggling, in which both can be understood as sources of international law because States have consented to the legal obligations contained in both documents. The EU, which are the States of concern here, acceded to the UN Smuggling Protocol in 2006 and all EU Member States, except Ireland, have ratified it.[165] Similarly, the renewed EU Action Plan against Migrant Smuggling is 'a comprehensive and multidisciplinary policy framework to address migrant smuggling' that is agreed upon by the EU Member States.[166]

3.4 Research Design

Having addressed both the strengths and weaknesses of the functional method of comparative law, and having explained how to tackle the weakness and how to understand sources of law, it is necessary to outline how the method will be carried out throughout the

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[159] *Ibid,* 96.
[160] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 24.
[161] *Ibid.*
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] European Commission, 'Information from European Union Institutions, Bodies, Offices and Agencies: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence' [2020] OJ C323/1, 2.
[166] *Ibid.* 1.

research. This will be done by following a mix of the methodological blueprints of Reitz[167] and Orucu[168] that has been developed based on the understanding of the functional method of comparative law presented earlier.

The first step of the comparison is the descriptive phase.[169] This involves introducing the law of the different legal systems because all comparative law must start at this point to have something to compare.[170] Orucu clarifies that this may take the form of a description of the norm, concepts and institutions of the relevant systems.[171] It may also be relevant to include an examination of the socio-economic problems and solutions offered by the legal systems in question.[172] Further, it is offered that the observation is the key tool in this phase.[173] Based on this, the first step of the comparison will include the observation of norms, recommendations, and concepts presented under the UN Smuggling Protocol and the Renewed EU Action Plan separately to clarify what is being compared and for what reason.

The second step is the identification phase.[174] This phase is concerned with the identification of convergences and divergences between the issue that is being examined on the basis of collected data.[175] From this, Orucu explains that the obvious first task is that of comparing.[176] 'Comparable concepts and rules are first to be described and then juxtaposed.'[177] From the point of view of the empirical school, this suggests that 'the appropriate method begins with facts, the problem, rather than with hypotheses, and ends in description.'[178] This way, similarities and differences are highlighted due to the juxtaposing.[179] With this, this thesis will use the observations made in step one to identify what is comparable and then make use of description to make this clear. This will further be juxtaposed to make clear the similarities and differences between the two legal regimes.

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[167] John C. Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617.
[168] Esin Orucu, 'Methodological Aspects of Comparative Law' (2006) 8 Eur JL Reform 29.
[169] John C. Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617, 618-619.
[170] *Ibid,* 619.
[171] Esin Orucu, 'Methodological Aspects of Comparative Law' (2006) 8 Eur JL Reform 29, 38.
[172] *Ibid,* 38.
[173] *Ibid,* 38.
[174] John C. Reitz, 'How to Do Comparative Law' (1998) 46 Am J Comp L 617, 618.
[175] Esin Orucu, 'Methodological Aspects of Comparative Law' (2006) 8 Eur JL Reform 29, 38.
[176] *Ibid,* 38.
[177] *Ibid,* 38.
[178] *Ibid,* 38.
[179] *Ibid,* 38.

However, it is argued that legal comparison should not end in description, but rather 'move on into explanation where the real comparison starts, and on into confirmation of findings.'[180] This gives rise to the need for hypotheses.[181] Because of this, the directly comparative phase of the methodology makes up the third step, also often referred to as the explanatory phase.[182] In this phase, the divergences and convergences between the different legal systems must be accounted for and explained.[183] For this to be accurate, a socio-legal overview is vital because a comparison simply concentrated on textual or formal rules can lead to an incomplete or distorted picture.[184] Moreover, it is essential that the comparison is placed in the context of the entire legal system in this phase.[185] Based on this, the third phase entails the presentation of hypotheses regarding the similarities and differences highlighted in the second phase. Furthermore, this must be presented and explained in such a manner in the context of migrant smuggling as an international legal issue. This extends into the last step, which entails the confirmation of any hypotheses and cumulative 'acceptance' of different basic propositions.[186] This phase where the theory is tested and will lead to the arrival at a set of final statements.[187]

All of these steps and phases allows for a comparatist to collect and describe data based on carefully constructed classificatory schemes, discover and describe convergences and divergences on the basis of the collected data, formulate interrelationships between elements of the process and other social phenomena as tentative hypotheses, and subsequently verify these hypotheses.[188]

3.5 Summary

The method of functional comparison is employed because this method can secure the best results based on the research topic and the research itself.[189] The general understanding of this method is that different legal regimes respond to similar problems.[190] Instead of merely

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[180] *Ibid,* 39.
[181] *Ibid,* 39.
[182] *Ibid,* 39.
[183] *Ibid,* 39.
[184] *Ibid,* 39.
[185] *Ibid,* 39.
[186] *Ibid,* 39.
[187] *Ibid,* 39.
[188] *Ibid,* 39.
[189] L. Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2(2) The American Journal of International Law 313, 327.
[190] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 10.

addressing the rules and institutions in different legal regimes, this method approaches the rules and institutions as a response to certain issues.[191] The method looks at how a problem is solved in two or more legal systems and explore the differences and similarities in how the respective problems are treated.[192] This idea has been broadened and explored further by attempting to find norms that serve a certain social function.[193] Thus, a vital part of this method is that rules and institutions should be part of a greater cultural, social, economic and ideological whole.[194] The important point here becomes the socio-legal function of the method.[195] While this understanding of the functional method of comparative law does seem suitable for this research because the point of this research is to examine whether the response to the issue of migrant smuggling by different legal regimes might cause legal fragmentation, there is the issue that there are still limits and shortcomings with such an approach.[196] This lead to introducing a broader understanding of the method through Ralf Michael, who attempts to reconstruct and evaluate the method by placing it within a larger framework of other disciplines.[197] In doing so, several elements were identified as suitable for this research. The method of functional comparative law 'combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society.'[198] Thus, law and society are thought of as separate, but related.[199] Consequently, the functional comparison functions as a *tertium comparationis*.[200] With this understanding, the employment of functional comparative law opens up for the comparison of the two chosen legal regimes that focus on migrant smuggling. This means that the legal regimes must be analysed and understood in light of their functional relation to society, and thus the issue of migrant smuggling. As such, the different regimes will be described and analysed, and their design and function will be brought into relation to each other. This is necessary for the comparative analysis.

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[191] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74(2) The Rabel Journal of Comparative and International Private Law 318, 323.
[192] David J. Gerber, 'Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language' in Annelise Riles (eds) *Rethinking the Masters of Comparative Law* (Hart Publishing, 2001) 190 – 208, 199.
[193] Jaakko Husa, 'Functional Method in Comparative Law – Much Ado about Nothing?' (2013) 2 EPLJ 4, 14
[194] *Ibid*, 14.
[195] *Ibid,* 14.
[196] Mark Van Hoecke and Mark Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 Int'l & Comp LQ 495, 496.
[197] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 342.
[198] *Ibid,* 342.
[199] *Ibid,* 342.
[200] *Ibid*, 342.

Despite this value, there is an issue of suggested neutrality and objectivity. This suggestion is met with harsh criticism because preconceptions are inevitably implicated in the process of comparison.[201] This lead to being unaware of unavoidably bias and unwarranted faith in objectivity and might allow for culturally biased perspectives to be presented as neutral.[202] This in turn entails the risk of creating misapprehensions and a distorted picture of one of the legal regimes, upon which the comparatists is simply projecting their own perceptions and perspectives.[203] Still, by being aware of this as an issue and by addressing it properly, it seems better advised to abandon the quest for objectivity and rather accept that comparatists will always belong to a particular culture and subsequently address and deal with the preconceptions.[204]

Through this assessment of the functional method of comparative law, this method seems the most suitable for this research because the point of this research is to examine whether the response to the issue of migrant smuggling by different legal regimes might cause legal fragmentation. Thus, the functional method of comparative law will be employed to answer whether the UN Smuggling Protocol and the Renewed EU Action Plan are compatible with each other, and whether their differences have any consequences in dealing with migrant smuggling.

4 Key Findings and Analysis

Having introduced the issue of migrant smuggling from the perspective of the legal system, placing it within a theoretical framework and explained the methodology, this chapter will present the analysis of chosen legal regimes, as well as the key findings from this analysis. The analysis of the legal regimes will be done separately to clearly explain what each of them find legal/illegal by understanding them to operate in a self-producing system.[205] Consequently, the UN Smuggling Protocol will be presented first in section 4.1, where the definition of migrant smuggling according to this provision is explained, and its structure, and major provisions are accounted for. The same will subsequently be done for the Renewed EU Action Plan Against

[201] Julie De Coninck, 'The Functional Method of Comparative Law: "Quo Vadis"?' (2010) 74(2) The Rabel Journal of Comparative and International Private Law 318, 328.
[202] *Ibid,* 328.
[203] *Ibid.* 328.
[204] *Ibid,* 329.
[205] Michael King and Chris Thornhill, 'Introduction' in King, M., and Thornhill, C. (eds), *Luhmann on Law and Politics: Critical Appraisals and Applications* (Hart Publishing 2006) 8.

Migrant Smuggling in 4.2. By doing this, it will be possible to find and thus discuss the similarities and differences, which will be discussed in section 4.3.

4.1 The UN Migrant Smuggling Protocol

The UN Migrant Smuggling Protocol is arguably the main international treaty responding to and dealing with the smuggling of migrants.[206] Still, this protocol is a fairly recent emergence considering the issue of migrant smuggling did not become the subject of official international discussions until the early 1990s.[207] At national level, there was little interest in the phenomenon with the exception of the United States, who was concerned with facilitated irregular migration from Mexico and other near neighbours following the expiration of a guest worker programme between the countries in 1964.[208] A similar kind of concern about migrant smuggling was much slower to emerge in Europe, which some argue can be explained by differences in economics as well as history.[209] For example, a high demand for migrant labour in France and West Germany meant that concerns over 'illegals' was easier to overlook.[210] However, in 1993 the issue of migrant smuggling was brought up to international attention following the events where a 'Chinese vessel, the *Golden Venture*, was deliberately run aground off the coast of New York.'[211] The incident saw nearly 300 Chinese migrants who had paid $30,000 each, were 'crammed like animals', and told to jump into the sea and swim ashore due to lack of planning when it came to 'landing its human cargo'.[212] Ten drowned or died of hypothermia, while most of the survivors were deported back to China.[213] This incident demonstrated the growing phenomenon of organised movement among migrants and subsequently caused unease among States who began advocating for greater international legal

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[206] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 44.
[207] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 151.
[208] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 25.
[209] *Ibid.*
[210] *Ibid.*
[211] *Ibid,* 27.
[212] Joseph P. Fried, 'Mastermind of Golden Venture Smuggling Ship Gets 20 Years' (*The New York Times*, 2 December 1998) <https://www.nytimes.com/1998/12/02/nyregion/mastermind-of-golden-venture-smuggling-ship-gets-20-years.html> accecssed 1 February 2023.
[213] Andrew J. Sein, 'The Prosecution of Chinese Organized Crime Groups: The Sister Ping Case and Its Lessons' (2008) 11 Trends Org Crime 157, 163.

cooperation.[214] There were also growing amount of incidents involving organised and sophisticated criminal groups who were able to exploit the weaknesses in the legislative, policy, and law enforcement field to facilitate the movement of irregular migrants.[215] Moreover, there were no universal definition of the migrant smuggling, no obligation to criminalise it, and no obligation to prosecute the perpetrators.[216] These deficiencies of international law were found to be both acute and detrimental, resulting in a 'legal lacuna under international law [that was] increasingly perceived as an obstacle to the effort of the international community to cope, in an efficient manner, with the phenomenon of smuggling of illegal migrants for criminal purposes.'[217] In response to this, Italy approached the International Maritime Organisation (IMO) with a proposed draft Convention regarding the issue of trafficking of migrants and how to combat illegal migration.[218] This initiative with the IMO occurred at the same time as discussions within the UN were being held on how to combat transnational organised crime.[219] Austria was also actively engaging with the issue around the same time, and suggested the adoption of a new Convention to deal with the smuggling of illegal migrants in a letter to the UN Secretary General.[220] These efforts combined eventually led to the establishment of the Ad Hoc Committee by the UN General Assembly to elaborate on the international instruments addressing transnational organised crime, and the trafficking and smuggling of migrants.[221] Following multiple sessions between January 1999 and July 2000, 'the Ad Hoc Committee finalised these instruments, which were formally adopted by the UN General Assembly in

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[214] David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007) 22 – 24.
[215] UNGA 'Measures to combat alien-smuggling : report of the Secretary-General' 49th Session (1994) UN Doc A/49/350, 4 – 5.
[216] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 28.
[217] UNGA '"Letter dated 16 September, 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General' 52nd Session (1997) UN Doc A/52/357, 2.
[218] Claire Brolan, 'An Analysis of the Human Smuggling Trade and the Protocol against the Smuggling of Migrants by Land, Air and Sea (2000) from a Refugee Protection Perspective' (2002) 14 Int'l J Refugee L 561, 581 – 582.
[219] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 151.
[220] David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007) 21.
[221] UNGA 'Transnational organized crime: resolution/adopted by the General Assembly' 53rd Session (1999) UN Doc A/RES/53/111, 3.

November 2000.[222] The result was the Convention Against Transnational Organized Crime, which is often considered the 'parent' agreement to three additional protocol.[223] These additional protocols are the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.[224] This means that States must ratify the 'parent' agreement before being able to ratify any of the protocols.[225] While this is important to note when analysing the UN Migrant Smuggling Protocol, what follows in this section is the examination of key parts of the protocol itself.

4.1.1 Definition of Migrant Smuggling

When the international community came together to take action against what is now known as migrant smuggling, there was a great amount of confusion between the terms being used to describe the issue.[226] The terms 'smuggling' and 'trafficking' were being used interchangeably without any clear distinction.[227] Others terms such as 'clandestine illegal migration', 'alien smuggling', and 'trafficking of aliens' were also applied as a description.[228] However, with the adoption of the Transnational Organized Crime Convention and its Protocols the terms have firmed up and it is now clear that there are several differences.[229] According to Article 3 of the Smuggling Protocol, migrant smuggling is defined as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a

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[222] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 152.
[223] Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Hum Rts Q 975, 977 – 978.
[224] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) United Nations, Treaty Series, vol. 2225, p. 209, Doc A/55/383.
[225] Anne Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23 Hum Rts Q 975, 978.
[226] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 44.
[227] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 153.
[228] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 44.
[229] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 153.

person into a State Party of which the person is not a national or a permanent resident.'[230] In contrast, the Trafficking Protocol clarifies that trafficking in persons 'shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.'[231] These two definitions clarifies what constitutes migrant smuggling and what does not and there are four main points to explain. Firstly, trafficking takes place when there is use of threat, force, coercion, abduction, fraud, or deception, whereas migrant smuggling is merely procurement.[232] This indicates that migrant smuggling is a voluntary act by the smuggled migrants.[233] Secondly, migrant smuggling ends with the illegal entry of a person into another State, while trafficking require the subsequent exploitation.[234] Thirdly, international movement is necessary to qualify as migrant smuggling because the person must enter into a State of which the person is not a resident of.[235] The Trafficking Protocol does not require this, meaning that trafficking can take place both internally and externally.[236] Lastly, migrant smuggling is characterised by the illegal entry into another State, whereas such entry can be both legal and illegal in the case of trafficking.[237] This makes clear that migrant smuggling

[230] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[231] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383, Art 3(a).
[232] *Ibid;* Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[233] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 153.
[234] *Ibid.*
[235] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[236] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 153.
[237] *Ibid.*

according to the UN Migrant Smuggling Protocol is about the 'facilitation of illegal migration of people.'[238]

While the definition of migrant smuggling is concerned with the facilitation of illegal migration, another important element of the definition is the reference to the term 'financial or other material benefit.'[239] This term is not defined in the Smuggling Protocol itself, however relevant clarification can be found in the Convention Against Transnational Organized Crime's definition of organised criminal group, which also makes references to the same term.[240] Here it is made clear that there is an intention for the references to go beyond mere payment of money.[241] According to the interpretive note to Article 2 of the Convention Against Transnational Organized Crime the term 'should be understood broadly, to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings.'[242] Therefore, other actions than the payment of money can be found to constitute 'financial or other material benefit.'[243] Additionally, the reference to this term was included to ensure that the actions of supporting and helping migrants on humanitarian grounds or on the basis of family ties do not fall under the scope of the Migrant Protocol.[244] The relevant interpretive note to the Protocol states that it was 'not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.'[245] With this understanding, non-financial benefits could, for example, include receiving a free plane or train ticket, or given a free passage on a smuggling vessel.[246] It should, however, be noted that making any such distinction between what constitutes 'financial or other material benefit' can

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[238] *Ibid.*
[239] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[240] United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) United Nations, Treaty Series, vol. 2225, p. 209, Doc A/55/383, Art. 2(a).
[241] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 46.
[242] UNODC, 'Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto' (United Nations, New York, 2004) para. 20.
[243] *Ibid.*
[244] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 46.
[245] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 469.
[246] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 46 – 47.

be difficult to establish in practice.[247] A possible difficult distinction to make is whether a financial or material benefit include a migrant smuggling situation where no money is exchanged, but another benefit is accrued, such as a parent enabling their child to enter another country where they have a greater prospect of acquiring well-paid employment. [248] Nevertheless, it is made clear that under the UN Migrant Smuggling Protocol, migrant smuggling is concerned with facilitation of illegal migration of people and that the focus is firmly on those who facilitate or procure the smuggling of migrants.[249]

4.1.2 Purpose and Major Provisions

The Migrant Smuggling Protocol is the principal international instrument that represents a criminal justice response to the issue of migrant smuggling.[250] The stated purpose of the Protocol is to prevent and combat migrant smuggling, to promote cooperation amongst States to that end, and to protect the rights smuggled migrants.[251] Significantly, the reference to the protection of smuggled migrants was not introduced in the Protocol until later in the negotiations.[252] At this point there was also agreement on replacing the term 'victim of migrant smuggling' with 'smuggled migrant'.[253] The reason for this change is not explained in the *Travaux Préparatoires* (the official records of the negotiation process of for the Convention and all three instruments) of the Protocol, but instead it is noted that the notion of victim as incorporated in the corresponding article of the Trafficking Protocol, was not appropriate in the context of the article in the Smuggling Protocol.[254] Despite the lack of explanation, the UNODC Model Law on Migrant Smuggling offer a perspective on this. The main reasoning seems to be that a person generally consents to being smuggled.[255] It is however noted that while a person is not a victim of migrant smuggling, they can be victims of different crimes that is a result of

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[247] *Ibid,* 47.
[248] *Ibid.*
[249] *Ibid;* Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 153.
[250] *Ibid.*
[251] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[252] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 459.
[253] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 48.
[254] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 461.
[255] UNODC, 'Model Law against the Smuggling of Migrants (United Nations, New York, 2010) 19.

being smuggled.[256] Nevertheless, this change shifted the focus and tone of the UN Migrant Smuggling Protocol from the substantial victim protection and assistance provisions found in the 'parent' agreement, the Convention Against Transnational Organized Crime, to dealing with the crime of migrant smuggling.[257]

Despite this shift in the focus of the Smuggling Protocol from protection to criminalisation, it does offer some protection to smuggled migrants. There was a general consensus that the Protocol should not be used to punish smuggled migrants.[258] Still, the precise wording of the relevant provision caused debate considering some delegates were apprehensive of the potential of the Protocol being used to grant immunity to irregular migrants who may have smuggled other irregular migrants.[259] Therefore, the final text confirms that migrants are not liable to criminal prosecution 'for the fact of having been the object' of criminal offenses established by the Smuggling Protocol.[260] The Legislative Guide for the Smuggling Protocol further explains that the 'mere illegal entry may be a crime in some countries, but it is not recognised as a form of organised crime and is hence beyond the scope of the Convention and its Protocols.'[261] In practice however, the impact of this non-criminalisation provision is neutered by Article 6(4) which provides that nothing in the Smuggling Protocol should prevent a State from taking measures against a person whose actions constitute a criminal offence under domestic law.[262] This means that a State can prosecute smuggled migrants for breaching various immigration and criminal laws during their journey.[263] Still, a person should not be prosecuted

[256] *Ibid,* 20.
[257] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 48.
[258] *Ibid,* 49.
[259] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 483.
[260] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 5.
[261] UNODC, 'Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto' (United Nations, New York, 2004) para. 28.
[262] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 6(4).
[263] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 156.

for merely being a smuggled migrant.[264] Another provision that is of relevance for the protection of smuggled migrants is Article 16 of the Smuggling Protocol, which is entitled 'Protection and Assistance Measures'.[265] Here States are obligated to take appropriate measures to preserve and protect the rights of migrants who have been subject of smuggling.[266] Particularly the right to life and the prohibition on torture and other cruel, inhumane or degrading treatment or punishment is noted.[267] Additionally, States must take into account the special needs of women and children.[268] Finally, in the case of a migrant being detained, the Smuggling Protocol holds that States must provide him or her with consular assistance.[269] These provisions in the UN Migrant Smuggling Protocol maintains that smuggled migrants have a right to protection and their human rights shall be respected.

Still, even with this right to protection established, criminalisation is at the heart of the Smuggling Protocol.[270] The requirement of criminalisation serves not only to provide for 'the deterrence and punishment of the smuggling of migrants, but as the basis for the numerous forms of prevention, international cooperation, technical assistance and other measures.'[271] Consequently, the core obligation of the Smuggling Protocol is to criminalise migrant smuggling when it is committed intentionally.[272] In relation to this, the Protocol also obliges States to criminalise related activities when enabling the smuggling of migrants, such as producing, procuring, providing, or possessing fraudulent travel or identity documents, or facilitating overstaying.[273] Moreover, an obligation is established for States to criminalise inchoate offences and secondary participation (accomplice or organising and directing other persons).[274] Further, Article 6(3) of the Smuggling Protocol require States to recognise

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[264] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 5.
[265] *Ibid,* Art. 16.
[266] *Ibid,* Art. 16(1).
[267] *Ibid.*
[268] *Ibid,* Art. 16(4)
[269] *Ibid,* Art. 16(5).
[270] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 50.
[271] UNODC, 'Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto' (United Nations, New York, 2004) para. 55.
[272] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 6(1)(a).
[273] *Ibid,* Art. 6(1)(b).
[274] *Ibid,* Art. 6(2).

aggravating circumstances as those that endanger the lives of migrants or entail inhumane and degrading treatment, and adopt necessary measures to establish these as aggravating circumstances.[275] These provisions are straightforward obligations and require States party to the UN Smuggling Protocol to criminalise the act of migrant smuggling as described in the Protocol.

Other general obligations found in the Smuggling Protocol are preventative in nature.[276] This obligation is grounded on the principle of cooperation between countries on the issue of migrant smuggling, and this is accordingly integrated into a range of provisions, including those relating to the sharing of information.[277] Article 10 orders States to exchange intelligence as appropriate with their domestic, legal, and administrative systems.[278] The information that is of interest to exchange includes embarkation points, routes, carriers, and means of transportation that is known to be used by migrant smugglers and organised criminal groups, travel documents, identity and methods of organised criminal groups, means and methods of concealment of migrants, and good practice that relates to law enforcement.[279] These interest points of information exchange highlights the importance of intelligence-led law enforcement, which is an important element for the prevention of serious crimes that is often associated with migrant smuggling and organised crime.[280] Other Articles under the prevention obligation takes note of the training of immigration officials and other relevant law enforcement, the prevention of unlawful production of fraudulent travel and identity documents, and the increase of awareness and support to States of origin to combat root causes of migrant smuggling, such as poverty and underdevelopment. [281] The inclusion of these provisions demonstrates the importance of cooperation to deal with the issue of migrant smuggling and should, in the long

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[275] *Ibid,* Art. 6(3).
[276] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 154.
[277] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 61.
[278] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 10.
[279] *Ibid,* Art. 10(1)(a).
[280] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 154.
[281] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 14, 12, 15.

run, help reduce the need to implement immigration and border control measures in destination States.[282]

The Smuggling Protocol does however have one provision that is relevant to immigration control.[283] According to Article 11 on 'Border Measures', States must, to the extent possible, strengthen border controls in ways that are necessary to prevent and detect migrant smuggling, including preventing means of transport from being used in the commission of migrant smuggling.[284] Considering the UN Migrant Smuggling Protocol applies to the smuggling of migrants by land, sea, and air, the term 'means of transport' also includes vessels at sea.[285] In relation to this, the Smuggling Protocol imposes carrier sanctions, where appropriate, where States will sanction the commercial carriers that transport migrants without valid travel documents.[286] Through this, commercial carriers are given an obligation to ascertain that all of their passengers have valid travel documents that are necessary for entry into the destination State, otherwise they can be sanctioned.[287] However, with the inclusion of the words 'where appropriate' this Article has some weaknesses as it does not require States to impose such liability on commercial carriers who are involved in transporting migrants without relevant, valid documents.[288] The Interpretative Note on this specific provisions confirms this limitation and subsequently maintains the general international legal obligations of States, including those that relates to refugees.[289]

In addition to this, the UN Migrant Smuggling Protocol also includes a broad savings clause upholding existing rights, obligations, and responsibilities of States under international

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[282] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 155.
[283] *Ibid.*
[284] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 11.
[285] Tom Obokata, 'The Legal Framework Concerning the Smuggling of Migrants at Sea under the UN Protocol on the Smuggling of Migrants by Land, Sea and Air' in Ryan, B. and Mitsilegas, V. (eds) *Extraterritorial Immigration Control: Legal Challenges* (BRILL 2010) 155.
[286] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 11(3) and 11(4).
[287] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 60.
[288] *Ibid.*
[289] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 521.

law.[290] Nothing in the Smuggling Protocol is to affect any of this, especially noting the importance to respect international humanitarian law, international human rights law, and, in particular, refugee law and the principle of non-refoulment.[291] Through this savings clause, it is further required to interpret and apply the UN Migrant Smuggling Protocol in a way that is not discriminatory to smuggled migrants and in a way that is 'consistent with internationally recognised principles of non-discrimination'.[292] While there is a possibility of collision of norms where the obligation to criminalise the act of migrant smuggling might collide with the obligation to ensure the rights of asylum-seekers and refugees, this provisions is highly significant.[293] This is because the correct outcome of any such collision has been clearly articulated: 'a State that acts against the letter or spirit of international law, including international refugee law, in implementing its obligations under the Migrant Smuggling Protocol is in violation of one of its central provisions.'[294] Therefore, while the core obligation of the UN Migrant Smuggling Protocol is to criminalise the act of migrant smuggling, there are certain rights of the smuggled migrants that must be respected and protected.

A final matter to explain in regard to the UN Smuggling Protocol is related to the return of smuggled migrants. During the drafting process of the Protocol, it was quickly confirmed that States party to the Protocol would not be required to consider the possibility of allowing smuggled migrants to remain in their territories temporarily nor permanently.[295] Proposals for the inclusion of language that would have ensured only a voluntary return, and a return with full protection of their due rights, was quickly rejected.[296] However, even with such rejection during the drafting process the Protocol does not require the return of a smuggled migrant.[297]

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[290] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 19.
[291] *Ibid.*
[292] *Ibid,* 19(2).
[293] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 65.
[294] *Ibid.*
[295] *Ibid.*
[296] *Ibid:* UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 548 – 549.
[297] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 65.

Rather, the provision is directed at States of origin.[298] States of origin are to facilitate and accept the return of their smuggled nationals and who have the right of permanent residence within their territories without any delay.[299] With this obligation, States may request each other to verify the nationality or right of permanent residence of a smuggled migrant, and in turn, a requested State is required to provide such verification without delay.[300] With the request of verification, the requested State is also required to issue any travel documents and authorisations that the smuggled migrant needs to enter its territory.[301] The safety of any such return is also briefly mentioned by providing that States returning a smuggled migrant must 'take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.'[302] It should be notated that this reference to safety and dignity is only during the process of the return, not the eventual fate of the smuggled migrant.[303] In contrast, the rights under the savings clause in the Smuggling Protocol is still upheld, and so, the obligations under international law owed to smuggled migrants, such as the principle of non-refoulment, are still preserved.[304]

With this, it is clear that the UN Migrant Smuggling Protocol is one of the principal international instruments that represent a criminal justice response to the issue of migrant smuggling.[305] The purpose is to prevent and combat migrant smuggling, to promote cooperation amongst States to that end, and to protect the rights of smuggled migrants.[306] While all of this is touched upon, the core obligation is to criminalise migrant smuggling, however, it is made clear that this must be done with regard to the rights of the smuggled migrants.

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[298] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 18(1).
[299] *Ibid.*
[300] *Ibid,* Art. 18(3).
[301] *Ibid,* Art. 18(4).
[302] *Ibid,* Art. 18(5)
[303] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 66.
[304] *Ibid.*
[305] *Ibid,* 47.
[306] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).

4.2 The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)

Dealing with the issue of migrant smuggling is considered to be one of the top priorities for the EU following a European humanitarian refugee crisis that emerged in 2015.[307] This period saw conflict and violence in North Africa and the Middle East, and as a consequence, the number of asylum-seekers and applications rose dramatically from around 530,000 in 2014 to 1.2 million in 2015.[308] This phenomenon in Europe became known as 'the European migration management crisis', or the 'crisis of the EU's values and solidarity.'[309] Along with this dramatic rise of asylum applications, the European Union Agency for Law Enforcement Cooperation (Europol) found, in general, that 'more than 90% of the irregular migrants that reach the EU make use of smugglers, either during parts of all of their journey.'[310] This is because a rising number in asylum-seekers, migrants, and refugees means that there are less options for them to reach places of safety, meaning they have no other option than to relay on migrant smugglers.[311] Additionally, it has been found that two thirds of them will eventually be returned to their State of origin or a State where they have permanent residence because they do not meet the criteria for being granted international protection.[312] In response to this, the 2015 European Agenda on Migration found that a policy intervention that targets the criminal networks of smugglers was a key area to focus on.[313] Subsequently, various EU policies, laws, and agencies were redesigned and tailored with the purpose of preventing, investigating, and prosecuting migrant smugglers.[314] An immediate result was the 2015 EU Action Plan against migrant smuggling, which set out the specific actions found necessary to deal with the issue.[315] For the first time in the EU, a comprehensive and multidisciplinary approach to deal with the

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[307] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 1.
[308] *Ibid;* Eurostat: Statistics Explained, 'Annual asylum statistics' (*Eurostat*) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844> accessed 27 April 2023.
[309] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 1.
[310] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 2.
[311] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, December 2021) 2.
[312] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 2.
[313] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 1.
[314] *Ibid.*
[315] European Commission (2015), 'EU Action Plan against migrant smuggling (2015-2020)', COM(2015) 285 final, 1.

issue of migrant smuggling was presented.[316] Its aim was to transform migrant smuggling networks from 'low risk, high return' operations into 'high-risk, low return' ones, while also ensuring the protection and respect of the rights of the smuggled migrants.[317] It presented four main areas of action: improving law enforcement and judicial response to migrant smuggling; gathering and sharing information; improving the prevention of migrant smuggling; and reinforcing cooperation.[318] The EU found that progress had been made in all four areas, however, there are new and evolving realities and practices that are emerging, meaning a renewed action plan was necessary in 2020 when the first one was no longer in action.[319] Therefore, building on and promoting the continued implementation of the EU Action Plan (2015 – 2020), the Renewed EU Action Plan against Migrant Smuggling (2021 – 2025) was launched.[320] This is the latest action taken by the EU concerning migrant smuggling and therefore has the most updated policies, approaches, and understanding of what migrant smuggling is and how to deal with it.

4.2.1 Definition of Migrant Smuggling

The facilitation of migrant smuggling has consistently been portrayed as a profit-motivated, often dangerous and violent, sophisticated form of organised crime by transnational networks by the EU and European Commission.[321] This is certainly the case in the Renewed EU Action Plan who relies on this narrative when explaining what migrant smuggling is. More specifically, the Renewed EU Action Plan holds that migrant smuggling is a 'cross-border criminal activity that puts the lives of migrants at risk, showing disrespect for human life and dignity in the pursuit of profit, and undermines the migration management objectives of the EU and the fundamental rights of the people concerned.'[322] Such a perception on migrant smuggling results arguably in the characterisation of migrants as agency-less victims with a dichotomy where good state policies should be implemented in order to save the migrants from

[316] *Ibid.*
[317] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 6.
[318] *Ibid.*
[319] *Ibid.*
[320] *Ibid,* 2.
[321] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, December 2021) 2.
[322] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final*,* 1.

bad smugglers.[323] In addition to this narrative of migrant smuggling, the Renewed EU Action Plan makes reference to EU's Facilitation Directive and clarifies that within the EU, this is where the criminal offence of facilitation of unauthorised entry, transit, or residence is defined.[324] This can provide an understanding of what constitutes migrant smuggling under EU law. Article 1 of Facilitation Directive 2002/90/EC defines migrant smuggling in two ways: (1) '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 entry or transit of aliens; and (2) 'any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.'[325] Furthermore, Article 1(2) of the directive makes clear that providing humanitarian assistance can fall outside the scope of migrant smuggling, however, this is to be decided by the Member States themselves.[326] This definition clarifies that the crime of migrant smuggling is the facilitation of unauthorised entry or residence in an EU Member States territory. With this, there are two important aspects of the definition. Firstly, the act of migrant smuggling can take place by a person by merely assisting a migrant with entering a territory.[327] Any reference to financial gain is only made when concerned with assisting a migrant to reside unlawfully in a Member State territory.[328] Therefore, material gain is not a necessary element of the crime of migrant smuggling.[329] Secondly, the exemption of humanitarian assistance is not mandatory.[330] Consequently, the scope of the definition means that activities carried out for humanitarian reasons or by members of civil society can constitute a crime of migrant smuggling.[331] The Renewed EU Action Plan notes, however, that the 2017 evaluation of the Facilitation Directive, and thus this definition

[323] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, December 2021) 2.
[324] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 17.
[325] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1.
[326] *Ibid,* Art. 1(2).
[327] *Ibid,* Art. 1(1).
[328] *Ibid.*
[329] Federico Alagna, 'So much promise, so little delivery: evidence-based policy-making in the EU approach to migrant smuggling' 45(2) Journal of European Integration 309, 311.
[330] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1(2).
[331] Marta Minetti, 'The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy' 11(3) New Journal of European Criminal Law 335, 339.

of migrant smuggling, was found to only be partially effective in reaching its objectives.[332] More specifically, it was considered that certain aspects of the Facilitation Directive should be clarified, such as the definition of the offence to provide more legal certainty between the distinction between migrant smuggling and humanitarian assistance.[333] Still, it continues to be referred to as defining the criminal offence in EU and by the Renewed EU Action Plan, meaning it is these elements that potential situations of migrant smuggling is evaluated on. This means that by EU law standards, any intentional assistance for any person enters an EU Member States' territory can be criminalised as migrant smuggling.[334]

4.2.2 Purpose and Major Provisions

The Renewed EU Action Plan is the latest attempt by the EU to take action against migrant smuggling and deal with the issue.[335] The stated purpose of the Action Plan is to counter and prevent migrant smuggling, whilst also ensuring that the fundamental rights if the smuggled migrants are protected.[336] To do this, its aim is to strengthen the implementation of EU's legal framework that are focused on countering migrant smuggling, such as the Facilitation Directive.[337] Along with this, the action plan also explains what the EU understands to be the main causes that sustains the demand for the services of migrant smugglers.[338] The continued demand of migrant smuggling is, according to the EU, grounded in disinformation and false narratives of smuggling, combined with socio-economic differences in the international community and the perception of better opportunities in the EU.[339] Its aim is therefore to strengthen information exchange and international cooperation to investigate and prosecute migrant smuggling networks.[340] Based on this, the Renewed Action Plan identifies

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[332] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 17.
[333] *Ibid.*
[334] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 16.
[335] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 11.
[336] *Ibid,* 2.
[337] EU Red Cross Office, 'EU Action Plan on Migrant Smuggling: A missed opportunity to uphold the protection of humanitarian space' (*EU Red Cross Office*, 18 November 2021) <https://redcross.eu/latest-news/eu-action-plan-on-migrant-smuggling-a-missed-opportunity-to-uphold-the-protection-of-humanitarian-space> accessed 12 April 2023.
[338] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 3.
[339] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 3.
[340] *Ibid,* 2.

five main areas of action: (1) reinforced cooperation with partner countries and international organisation; (2) sanctioning smugglers; (3) preventing the exploitation of migrants and ensuring their protection; (4) supporting the work of law enforcement and the judiciary; and (5) improving the knowledge on how smugglers work.[341]

The importance of cooperation is highlighted as one of the most crucial points of action in the Renewed EU Action Plan. This is because cooperation can help develop 'comprehensive, balancing, tailor-made and mutually beneficial migration partnerships', which can address common challenges and allow for shared opportunities in dealing with migrant smuggling.[342] Such cooperation should be tailored to improve migration governance and management, supporting refugees and host communities, addressing the root cause of migration, building economic opportunities, and increasing cooperation on return, readmission, and reintegration of irregular migrants.[343] While it is mentioned that the EU has already established such cooperation frameworks with partner States and therefore contributing to the fight against migrant smuggling, efforts and actions are still fragmented.[344] Therefore, a more coordinated and structured approach is necessary to increase synergies and maximise the effectiveness of existing tools to ensure effective enforcement and criminalisation of migrant smuggling.[345] In line with the, the Renewed Action Plan seeks to build on the 'existing cooperation frameworks and develop dedicated and tailor-made Anti-Smuggling Operational Partnerships with third countries or regions along migratory routes towards the EU.'[346] With this partnership, the Renewed Action Plan recommends strengthening legal, policy, operational, and strategic frameworks based on evidence, which in turn can increase the impact, ownership, and sustainability of efforts to deal with migrant smuggling.[347] Moreover, in the pursuit of cooperation, it advised that the EU should maintain active engagement with the UN, and other international and regional organisations, such as Interpol.[348] A cooperation of this kind with the UN and specialised agencies on migrant smuggling can contribute towards a stronger legal framework under which migrant smuggling can be deterred and prosecuted.[349] By assisting in

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[341] *Ibid.*
[342] *Ibid,* 11.
[343] *Ibid.*
[344] *Ibid.*
[345] *Ibid.*
[346] *Ibid.*
[347] *Ibid,* 12.
[348] *Ibid*.
[349] *Ibid.*

the reinforcement of the UN Smuggling Protocol, the EU can urge and support their own partner States who are not yet party to the Smuggling Protocol to ratify it.[350] This creates a stronger united front. Such an approach is seen as vital because partnerships with States of origin and transit, as well as cooperation with international and regional organisations can be helpful in breaking the business model of migrant smugglers due to 'a whole-of-route approach', instead of merely focusing on border control in the destination State.[351] It is argued that finding common ground in tackling migrant smuggling is essential to ensure that the smugglers cannot operate in grey zones due to ineffective legal action.[352] Therefore, ensuring optimal cooperation is a key action of the Renewed EU Action Plan.

Together with cooperation, the importance of an optimal implementation of methods to sanction those facilitating migrant smuggling is highlighted as a necessary action in the Renewed EU Action Plan.[353] Especially sanctioning those actions that lead to criminal networks is a priority.[354] Examples of such sanctions are offered and can take the form of a travel ban, freeze on financial assets, or a prohibition on the availability of funds or other economic resources.[355] To successfully do this, the implementation of legal regimes by Member States and other partner States based on the UN Smuggling Protocol is advised, subsequently supplementing the UN Convention against Transnational Organized Crime, and the Facilitation Directive within the EU.[356] By doing so, the possibility to sanction those responsible for migrant smuggling can be based on the criminal offence established in several different legal regimes. For example, when responding to a situation found to come under the offence of migrant smuggling, either the 'UN sanctions or autonomous sanctions by the EU can provide a tool to impose sanctions on responsible individuals or entities.'[357] Also, it is possible to transpose the measures of an UN sanction into EU law, while also making use of the autonomous tools at its own disposal whenever appropriate.[358] While this provides EU with various ways of implementing methods of sanction, the obligation to sanction under EU's

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[350] *Ibid.*
[351] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 10 – 11.
[352] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 16.
[353] *Ibid*.
[354] *Ibid.*
[355] *Ibid,* 17.
[356] *Ibid,* 16.
[357] *Ibid,* 17.
[358] *Ibid.*

Facilitation Directive is noted in the Renewed EU Action Plan.[359] Here, Member States are required to appropriately sanction anyone who intentionally assists a third-country national to enter or transit through a Member State, or for financial gain, to reside there.[360] The primary aim of this is to sanction criminal networks that are responsible for migrant smuggling.[361] This has been made clear by a Guidance on implementing the Facilitation Directive where it is recognised that the UN Smuggling Protocol does not intend to criminalise the acts of humanitarian assistance or those of family members.'[362] However, this is only a 'Commission Guidance' and is therefore not legally binding on Member States.[363] Moreover, the Facilitation Directive provides a possibility to exempt humanitarian assistance.[364] Still, this is only an opportunity for Member States, not a mandatory requirement.[365] This means that the EU and its Member States can impose sanctions based on a broad understanding of what can be criminalised as migrant smuggled. In response to this, the Renewed EU Action Plan calls for the monitoring and the implementation of EU Law 'to ensure that appropriate, effective and dissuasive criminal sanctions are in place while avoiding the risk of criminalisation of those who provide humanitarian assistance to migrants in distress.[366] In addition, the European Commission is ordered to collect information regarding this in the EU, which indicates a willingness to change EU law to ensure appropriate criminal sanction if found necessary.[367] Nevertheless, the implementation of sanctions is an important element of the Renewed EU Action Plan in fighting against migrant smuggling because it can deter migrant smugglers and disrupt their business model.[368]

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[359] *Ibid.*
[360] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1.
[361] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 17.
[362] European Commission (2020), 'Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence', C/2020/6470 final, section 4.
[363] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, December 2021) 5.
[364] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1(2).
[365] *Ibid.*
[366] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 18.
[367] *Ibid.*
[368] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 10 – 11.

Alongside the action of sanctioning those smuggling migrants, the Renewed EU Action Plans also has focus on the protection of the smuggled migrants. It is found that smuggled migrants are at great risk of experiencing grave human rights violations during their journey due to abuse or exploitation.[369] It is therefore considered to be of high importance to provide protection and assistance to the smuggled migrants, especially women and children.[370] This protection and assistance is provided in the framework of the EU strategies on victims' rights 2020 – 2025 and on Combatting Trafficking in Human Beings 2021 – 2025, as well as the EU Strategy on the rights of the child.[371] There are especially a few certain points of protection and assistance highlighted in the Renewed EU Action Plan. During police and judicial proceedings, the fundamental rights of smuggled migrants should be protected, with specific attention on the cases where the smuggled migrants have become victims of human trafficking.[372] Moreover, the separation of families during migratory journeys should be prevented and it is advised to develop search mechanisms for missing migrants.[373] Additionally, migrants with special needs should be identified as a priority and be given adequate support by appropriate entities upon their arrival in a EU territory.[374] These points are concerned with the protection of smuggled migrants upon their arrival in EU territory. There is also a reference to taking action to protect the rights of the migrants by preventing the crime itself. It does so by explaining that reception centres for asylum seekers are often a targeted by smugglers, where people willing to engage in the unauthorised movement within the EU are recruited.[375] Thus, the EU sees it as necessary to prevent this by increasing monitoring activities around and within reception centres.[376] With this, there is a strong focus on the protection of smuggled migrants in the Renewed EU Action Plan.

Another focus point in the Renewed EU Action Plan is supporting the work of law enforcement and the judiciary.[377] The reasoning behind this is that migrant smugglers have adapted quickly to changing circumstances, which was seen during the COVID-19 pandemic

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[369] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 18.
[370] *Ibid.*
[371] *Ibid.*
[372] *Ibid,* 18 – 19.
[373] *Ibid,* 19.
[374] *Ibid.*
[375] *Ibid.*
[376] *Ibid.*
[377] *Ibid.*

when migrant smuggling became more complex with the involvement of criminal networks, higher prices, and subsequently higher profits.[378] Due to this, it is seen as necessary to ensure that law enforcement and the judiciary are equally able to adapt to the changing circumstances[379] Therefore, it is advised to reinforce operational cooperation and exchange information.[380] In terms of law enforcement, it is recommended that investigations should go beyond the arrest of low-level criminals, to the dismantling of organised crime structures.[381] This means that an increased number of investigations, prosecutions, and convictions should be expected because targeting those groups pose a higher risk to Europe's security and those in a higher rank in the criminal organisations increases the chances of dismantling organised crime structures.[382] For this to be successful, Member States should make use of specialised services, for example, Europol's European Migrant Smuggling Centre and share information with their partners from immigration liaison officers and common operational partnerships to avoid a fragmented approach to criminalisation of migrant smuggling.[383] Furthermore, to disrupt the networks smuggling migrants and to be able to prosecute them, the Renewed EU Action Plans calls upon judicial authorities to be more involved in the cases concerned with migrant smuggling at an early stage of investigation.[384] Achieving this requires strong cooperation between judicial authorities where case-related information can be exchanged through coordination meetings and coordination centres set up by Joint Investigation Teams.[385] Thus, information regarding challenges, trends, misuse of administrative procedures, and possible solutions can be shared amongst the practitioners and contribute towards a united approach when investigating and prosecuting migrant smugglers.[386] Additionally, a new challenge in migrant smuggling involves the role of modern technology and social media, termed by the Renewed EU Action Plan as 'digital smuggling'.[387] This is identified as the use of 'social media and mobile applications for recruitment, communication and money transfers, pick-ups and handover of migrants, providing route guidance, sharing pictures and videos of documents and

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[378] *Ibid,* 21.
[379] *Ibid.*
[380] *Ibid.*
[381] *Ibid.*
[382] *Ibid,* 22.
[383] *Ibid.*
[384] Ibid.
[385] *Ibid;* Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 7.
[386] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 23 – 24.
[387] *Ibid.*

tickets, and even monitoring law enforcement activities.'[388] To disrupt networks involved in this it, the Renewed EU Action Plan advises law enforcement and the judiciary to target their online presence and expand their social media monitoring capacity.[389] By being informed by such social media monitoring, the Renewed Action Plan calls upon law enforcement and the judiciary to develop new target actions, some which should include campaigns raising awareness and providing information in key partner States, and to inform migrants about the risk of smuggling.[390] This will contribute towards the fight against migrant smuggling and has the potential of disrupting the business model of migrant smugglers.[391]

In addition to this, the Renewed EU Action Plan outlines the importance of research and data collection to increase their knowledge base concerning migrant smuggling.[392] This research and data collection should include trends in migrant, migrant smuggling activities in local communities, the nature and span of criminal networks that are involved in migrant smuggling, impact of anti-smuggling policies, and links between migrant smuggling and other criminal activities, such as human trafficking and terrorism.[393] The gathering of such data should turn it into actionable information that can disrupt the strategies of migrant smugglers.[394] Specific actions are suggested by the Renewed Action Plan and includes making use of a research and innovation framework in the EU called Horizon Europe to identify research needs and themes relevant for the prevention and fight against migrant smuggling.[395] Further it is recommended that Europol and Frontex should be participating in the development and management of research activities.[396] Member States should also use sectors beyond EU agencies, and thus step up their cooperation with the private sector to gain information regarding the banking sector, rental sector, parcel services, travel agencies, and money-transferring companies to detect any trends here regarding migrant smuggling and creating a

[388] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 7.
[389] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 24.
[390] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 7.
[391] *Ibid,* 10 – 11.
[392] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 27.
[393] *Ibid.*
[394] *Ibid,* 28.
[395] *Ibid.*
[396] *Ibid.*

stronger possible to target the smugglers.[397] A last recommendation is that the EU should provide regular repost on migrant smuggling based on this research and data collection to see the impact of migrant smuggling policies and identify if it is necessary to change their response.[398] This will contribute towards the fight against migrant smuggling and has the potential of disrupting the business model of migrant smugglers.[399]

Through these areas of focus presented by the Renewed EU Action Plan it is clear that the aim is to prevent and fight migrant smuggling.[400] This is promoted through the strengthening of information exchange and international cooperation to investigate and prosecute migrant smuggling networks.[401] While this has a great focus, there it is also advised that the rights of the smuggled migrants must be protected.[402] All of these actions will, according to the Renewed EU Action plan ensure a comprehensive approach towards creating a criminal justice response where migrant smuggling is prevented and combatted.

4.3 Similarities and Differences between the UN Migrant Smuggling Protocol and the Renewed EU Action Plan Against Migrant Smuggling

Through the observation of the UN Smuggling Protocol and the Renewed EU Action Plan from a legal pluralistic approach by using system theory, it is clear that these two legal regimes are operating in the same social field because they are responding to the same social issue, and they are operating by using the same code of legal/illegal in response to the issue because they both find migrant smuggling to be illegal.[403] It is therefore established that a plurality of legal regimes that focus on migrant smuggling exist. There is a possibility of a collision between the two which should be examined. By looking at the structure and major provisions of both the UN Smuggling Protocol and the Renewed EU Action Plan, there seems to be similarities between the two. The Smuggling Protocol obligates States party to it to prevent and combat migrant smuggling, to promote cooperation amongst States to that end, and

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[397] *Ibid.*
[398] *Ibid.*
[399] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 10 – 11.
[400] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 28.
[401] *Ibid,* 2.
[402] *Ibid*, 18.
[403] Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' (2012) 4(2) GoJIL 625, 633.

to protect the rights of smuggled migrants.[404] The Renewed EU Action Plan seems to have embodied these obligations and created more specific actions based on these obligations set forth in the Protocol for their Member States. This can be seen through the provisions and areas of focus of the two legal regimes.

A way these two frameworks converge is on the matter of Protection. The Smuggling Protocol offers some protection to smuggled migrants. Most notably, they are not to be held liable for the fact of having been smuggled.[405] Additionally, the Protocol entitles the smuggled migrants to protection and assistance, which ensures their human rights are being respected.[406] The special needs of women and children are also noted.[407] Through these provisions it is made clear that smuggled migrants have the right to be protected and that their human rights must be respected. This is similarly expressed in the Renewed EU Action Plan. With smuggled migrants being at a great risk of experiencing grave human rights violations during their journey, the Renewed Action Plan finds it of high importance to provide protection and assistance.[408] It is advised that this protection should take care during police and judicial proceedings to ensure that the rights of smuggled migrants are protected.[409] It also goes further to provide protection and assistance by recommending the development of mechanisms to avoid family separations.[410] Moreover, as in the Smuggling Protocol, there is special attention to the special needs of women and children.[411] However, it should be noted that the Renewed EU Action Plan does not explicitly offer the protection of smuggled migrants to not be held liable for the fact of having been smuggled. Moreover, the Smuggling Protocol has also included a broad savings clause where existing rights, obligations, and responsibilities under international law preserved.[412] This is to ensure that the fundamental rights of smuggled migrants are upheld and

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[404] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[405] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 5.
[406] *Ibid,* Art. 16(1)
[407] *Ibid,* Art. 16(4).
[408] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 19.
[409] *Ibid,* 18 – 19.
[410] *Ibid.*
[411] *Ibid,* 18.
[412] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 19.

to hold States accountable when they act against central provisions of international law, such as international refugee law.[413] Such a broad provision that protect the rights of smuggled migrants is not included in the Renewed EU Action Plan either. It can be argued that a reason for this is the fact that the EU has entered into force the European Convention on Human Rights in 1953, and the protection of human rights and political freedoms are well established in Europe.[414] However, this is also the case with the UN and the Universal Declaration of Human Rights[415] and they still included a broad savings clause. Therefore, it is noteworthy that that despite mentioning that migrant smuggling puts the lives of migrants at risk, showing disrespect for human life and dignity, and undermines the fundamental rights of people, there is no broad savings clause in the Renewed EU Action Plan.[416] By addressing this as concern and a reason why action is necessary against migrant smuggling, it is interesting that the protection of the smuggled migrants is not covered in more depth. Nevertheless, both legal regimes call upon the protection of smuggled migrants by making notice of their fundamental rights and human rights, as well as the special needs of women and children. The Renewed EU Action Plan provides Member States with specific scenarios where smuggled migrants are to be protected, such as in police and judicial proceedings.[417] However, it does not make an equally broad reference to the protection of smuggled migrants as the Smuggling Protocol. Therefore, there are similarities between the two when concerning the protection needed in cases of smuggled migrants, as well as some differences.

Another similarity found between the two is the how they highlight the importance of cooperation as a tool to prevent and combat migrant smuggling, as well as the exchange of information. The Smuggling Protocol creates an obligation to share intelligence, on the part of States, with domestic, legal, and administrative systems.[418] The intelligence of interest is explained to include embarkation points, routes, carriers, and means of transportation that

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[413] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 65.
[414] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).
[415] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).
[416] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 1.
[417] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 18 – 19.
[418] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 10.

migrant smugglers and organised criminal groups use, as well as travel documents, identity and methods used by migrant smugglers.[419] It is also encouraged to exchange information on good practice in terms of law enforcement.[420] This is an important step in reducing, combating, and preventing migrant smuggling because it increases the information available to law enforcement as a whole and thus their ability to respond accordingly to situations of migrant smuggling. This is also a crucial point of action in the Renewed EU Action Plan as they find cooperation as an important tool in developing migration partnerships between Member States and partner States where intelligence can be shared, and common challenges can be addressed.[421] This will, in the eyes of the Renewed Action Plan, improve migration governance and management.[422] A more coordinated and structured approach is encouraged because this can increase synergies and maximise the effectiveness of EU's already existing cooperation tools, which in turn can secure the effective enforcement and criminalisation of migrant smuggling.[423] Through this, it is suggested that the EU should develop an Anti-Smuggling Operational Partnerships where legal, policy, operational, and strategic frameworks are strengthened through this cooperation.[424] It is also advised to maintain and active engagement with international organisations, such as the UN, to contribute towards creating a stronger legal framework under which migrant smuggling can be deterred and prosecuted because working under the same legal standards creates a stronger united front with less ambiguity for migrant smugglers to escape prosecution through.[425] The Renewed EU Action Plan's take on cooperation seems to build upon the obligation presented by the UN Smuggling Protocol. Instead of simply encouraging the notion of sharing relevant information, which the Renewed EU Action Plan also does, it also provides specific actions that should be taken to increase cooperation, such as the development of migration partnerships and the engagement with international organisations. With this, the Renewed Action Plan does comply with the obligation of the Smuggling Protocol because they order their Member States to do so. The

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[419] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 10.
[420] *Ibid.*
[421] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 11.
[422] *Ibid.*
[423] *Ibid*.
[424] *Ibid.*
[425] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 10 – 11.

Renewed Action Plan explains how they are recommending the EU and its Member States should do this. Therefore, both legal regimes promote the use of cooperation in the fight against migrant smuggling because it can increase the exchange of information, which subsequently creates a stronger united front for States to prevent and combat migrant smuggling.

An additional factor of similarity is one concerned with sanctions. The Smuggling Protocol demands the strengthening of border controls to prevent and detect migrant smuggling.[426] This action is not given a great deal of attention in itself in the Renewed EU Action Plan. This might be because strong border controls are already in place in the EU following the refugee crisis Europe experienced in 2015 and there is consequently no need to recommend a change in their approach to this in this specific area.[427] The Smuggling Protocol does however make reference to carrier sanctions where States should sanction commercial carriers that transport migrants without any valid travel documents.[428] This is not an obligation from the UN, but rather a decision left to the discretion of each State.[429] This is an opportunity that the EU has taken considering the Renewed Action Plan has highlighted the importance of optimal implementation of methods to sanctioning those facilitating migrant smuggling and the actions that can lead to criminal networks.[430] The scope of who to sanction seems to be somewhat broader in the Renewed EU Action Plan than in the Smuggling Protocol because the Protocol makes specific reference to commercial carriers, while the Renewed Action Plan simply states that those who facilitate migrant smuggling should be sanctioned. Moreover, the Renewed EU Action Plan recommends the implementation of other legal frameworks, which creates several different methods of sanctions.[431] Still, it is the method of sanctions provided in the Facilitation Directive that is most prominently noted as the way to sanction migrant smugglers. Through this, Member States are required to sanction anyone who intentionally

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[426] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 11.
[427] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 2.
[428] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art 11(3) and 11(4).
[429] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 60.
[430] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 16.
[431] *Ibid,* 17.

assists with the entry or transit through a Member State, or for financial gain, to reside there.[432] As mentioned earlier, this also goes beyond what the Smuggling Protocol sees as appropriate by allowing for sanctioning anyone who intentionally assists.[433] This is an issue that the Renewed EU Action Plan has responded to, by noting that the primary aim is to sanction criminal networks that are responsible for migrant smuggling and not acts of humanitarian assistance or those of family members.[434] As this is only guidance and not legally binding, the Renewed Action Plan recommends the monitoring and implementation of EU law to ensure that such acts are not sanctioned.[435] However, even with this, the sanctions in the Renewed Action Plan goes beyond the Smuggling Protocol, who only gives an opportunity to sanction commercial carriers who transport smuggled migrants.[436] This discrepancy, however, does seem to stem from the way the crime of migrant smuggling is defined by the Renewed EU Action Plan, not the action of sanctioning itself. Nevertheless, both legal regimes introduce sanctions as a way to fight against migrant smuggling because it can act as a deterrence for migrant smugglers or those assisting in the smuggling of migrants, however the Renewed EU Action Plan goes beyond what is expected and recommended to sanction in the UN Migrant Smuggling Protocol.

The return of smuggled migrants is also an issue that the Smuggling Protocol tackles and directs the provision at States of origin who are to facilitate and accept the return of their smuggled nationals.[437] This is not something that is given an equal amount of attention in the Renewed EU Action Plan. Rather, it is mentioned that EU Member States should increase cooperation concerning the return of smuggled migrants, and that its actions to prevent and combat migrant smuggling as a whole should help reduce the attempts to reach the EU irregularly and facilitate voluntary return.[438] By mentioning it as an overall goal to facilitate the

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[432] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1.
[433] *Ibid.*
[434] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 17.
[435] *Ibid*, 18.
[436] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art 11(3) and 11(4).
[437] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 18(1).
[438] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 15.

voluntary return of smuggled migrants, and expressing that over two thirds of the irregular migrants entering the EU will eventually be returned, it is questionable why this is not given more attention in the Renewed EU Action Plan.

While there are both similarities and differences in the actions that the UN Smuggling Protocol and the Renewed EU Action Plan obligates and advises States to take in their fight to prevent and combat migrant smuggling, how they define the crime of migrant smuggling itself varies greatly. The UN standards reference 'financial or other material benefit' as a criterion to migrant smuggling to be considered a crime.[439] The inclusion of this was for the purpose of excluding family members or support groups such as religious or non-governmental organisations.[440] This is therefore a basic requirement for criminalising migrant smuggling.[441] In the Renewed EU Action Plan, EU's Facilitation Directive is referenced as defining the crime of migrant smuggling.[442] Here, EU's Member States must target 'any intentional assistance' of any undocumented person who is entering EU territory.[443] Article 1 of the Facilitation Directive provides two options for criminalisation: one where the intentional assistance of unfacilitated migration can be criminalised; and another where the intentional assistance of a person who is not a resident in a EU Member State to reside in EU territory for financial gain.[444] Clearly the clause which allows for the criminalisation of any intentional assistance is not consistent with the UN standards mentioned above. The Renewed EU Action Plan, through the definition provided in the Facilitation Directive, allows for the criminalisation of facilitation of entry, even when the person or smuggler does not receive any financial gain or other material benefit.[445] Financial or other material benefit is thus considered to only be an aggravating circumstance, not the actual proof of criminal intent to smuggle migrants.[446] Moreover, at the UN level,

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[439] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[440] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 469.
[441] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 16.
[442] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final*,* 17.
[443] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1.
[444] *Ibid,* Art. 1(1).
[445] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 16.
[446] *Ibid.*

migrant smuggling is defined quite differently from human trafficking by dividing the two crimes into two separate Protocols of the UN Transnational Organized Crime Convention.[447] According to the separate UN Trafficking Protocol, the crime established here requires a certain level of violence.[448] By this, trafficking makes the use of threat, force, coercion, abduction, fraud, or deception.[449] In contrast, the definition of migrant smuggling does not contain any of these violence elements, but rather simply requires that the migrant provides the smuggler with some financial or other material benefit.[450] In the Renewed EU Action Plan, this distinction is not made as clearly. It is acknowledged that migrant smuggling and human trafficking are two separate phenomena and crimes, but consistently refers to violence occurring in the events of migrant smuggling. This is seen in their narrative of migrant smuggling, by claiming it is often dangerous and violent, and put the lives of the migrants at risk.[451] This raises the question of why the Renewed EU Action Plan conflates the two different crimes, while UN standards and the Smuggling Protocol quite clearly state that migrant smuggling is a voluntary act based on an informal agreement between the migrant and their smuggler.[452] In the events where a migrant smuggler were to use threat, force, coercion, abduction, fraud, or deception, then the informal agreement between the migrant and the smuggler would, in theory, be violated because the migrant did not necessarily agree to those conditions.[453] Consequently, the situation could potentially qualify as an attempt at human trafficking in addition to migrant smuggling.[454] Instead of this, the Renewed EU Action Plan seems to continue to broaden the image of migrant smuggling as a violent crime with agency-less victims and bad smugglers.[455] Whereas there is no specific requirement to criminalise this itself, there mere involvement of intentional

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[447] *Ibid,* 17.
[448] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) United Nations, Treaty Series, vol. 2237, p. 319; Doc. A/55/383, Art 3(a).
[449] *Ibid.*
[450] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[451] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final*,* 1.
[452] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 17.
[453] *Ibid.*
[454] *Ibid.*
[455] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, December 2021) 2.

assistance allows for criminalisation.[456] The fact that assistance equals a crime from viewpoint of the Renewed EU Action Plan, is due to the lack of documentation on the side of migrants and asylum-seekers.[457] This shows that there are great discrepancies between what constitutes the crime of migrant smuggling from the viewpoints of the UN Migrant Smuggling Protocol and the Renewed EU Action Plan.

Based on this, there are both similarities and differences between the two legal regimes compared here. They both exist in a sub-system of communication where they operate with the code legal/illegal.[458] While they operate within the same system, they are functionally different and operationally autonomous when responding to the issue of migrant smuggling because they operate on different levels.[459] This confirms that a plurality of legal systems that focus on migrant smuggling exist, as is the case with the UN Migrant Smuggling Protocol and the Renewed EU Action Plan.[460] In regards to this, the Renewed EU Action Plan has adopted a great deal of the important provisions in the Migrant Smuggling Protocol by focusing on the element of cooperation, and to some extent protection and sanctions, as a way to combat and prevent migrant smuggling. However, there are a few instances of difference between the two legal regimes that are a cause for concern because it might lead to fragmentation of the system. Especially the fact that the crime itself is defined differently raises the question of whether both legal regimes intend to provide a criminal justice response to migrant smuggling by preventing and combatting it, not just criminalising it for the sake of border control.

5 Discussion: Pandora's Box

Having found that there are differences between the UN Migrant Smuggling Protocol and the Renewed EU Action Plan, there is a question of whether this causes a fragmentation of the legal system concerned with migrant smuggling, and what the consequences are of such fragmentation. There is a clear legal delineation in the definitions that clarifies the activities that constitute the crime of migrant smuggling amongst the two different legal regimes analysed

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[456] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 17.
[457] *Ibid.*
[458] Richard Nobles and David Schiff, 'Using Systems Theory to Study Legal Pluralism: What Could Be Gained' (2012) 46 Law & Soc'y Rev 265, 270.
[459] Clemens Mattheis, 'The System Theory of Niklas Luhmann and the Constitutionalization of the World Society' (2012) 4(2) GoJIL 625, 633.
[460] Sally Engle Merry, 'Legal Pluralism and Legal Culture' in Tamanaha, B. Z., Sage, C., and Woolcock, M. (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* (Cambridge University Press 2012) 68.

here.[461] This is a challenge because it creates different standards for what and who can be criminalised in relation to migrant smuggling. Additionally, EU's narrative on migrant smuggling contributes towards the delineation because it creates confusion and discretion for individual actors within the international community who are responding to situations suspected of migrant smuggling, such as prosecutors and judges.[462] The consequences are the possibility of over criminalising migrant smuggling and those assisting them, whilst simultaneously ignoring a proper criminal justice response where harm motives are absent.[463]

Per the Smuggling Protocol, the UN clearly offers the element of 'financial or other material benefit' as a necessary component in the crime of migrant smuggling.[464] This was included to ensure that the actions of family members and those with humanitarian intent was not criminalised, considering this was not the intention of the Protocol to criminalise.[465] Yet, the Renewed EU Action Plan relies on the Facilitation Directive, which has broadened the opportunities for prosecution, because it allows for the criminalisation of the facilitation of entry or transit without any proof of financial or other material benefit to the facilitator, merely the intentional assistance.[466] The proof of benefit is only required when the facilitation is of irregular stay.[467] This is a difference in the requirements needed for criminalisation of migrant smuggling and they are not compatible with each other. This is because the Smuggling Protocol excludes those who assist in the facilitation of irregular migration when there is no purpose to obtain a profit, while the Renewed EU Action Plan perceives these as migrant smugglers, and they can consequently be criminalised. Furthermore, the Smuggling Protocol states that smuggled migrants should not be criminalised for fact of having been the object of migrant smuggling.[468] This is not mirrored in the Renewed EU Action Plan. Consequently, a Pandora's

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[461] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, 2021) 6.
[462] *Ibid.*
[463] *Ibid.*
[464] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3.
[465] UNODC, 'Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto' (United Nations, New York, 2006) 469.
[466] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 17.
[467] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1.
[468] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 5.

Box is opened for prosecutors when dealing with cases of migrant smuggling because the difference in the standard of criminalisation offers many different ways to interpret what migrant smuggling is and who a migrant smuggler is.[469]

In her work on the Belgian approach to migrant smuggling, Roxane de Massol de Rebetz demonstrates that prosecutors have difficulties with responding to the complexity such an opening Pandora's Box because the situation of asylum seekers', refugees', and migrants' often involve situations related to the facilitation of irregular migration.[470] As a result, they often have different approaches in their criminal justice response. In one example it was claimed that the case of a migrant receiving a free passage for a part of their journey was a clear example of a material benefit and could thus be prosecuted through the crime established in the UN Smuggling Protocol.[471] In contrast, another prosecutor perceived a case of a migrant being involved in the facilitation of irregular migration to be a case of human trafficking instead of migrant smuggling.[472] Here, the non-punishment clause in EU's anti-trafficking legal framework was invoked, which protects refugees and other migrants, because the prosecutor found traces of abuse and exploitation in a situation of vulnerability.[473] These examples of the differences in the approach of prosecutors to criminalise migrant smuggling highlight the challenges created by the lack of a consistent and clear legal definition of migrant smuggling because it results in institutional differences.[474] This leads to fragmentation of the international legal system because there is not a consistent response in what and who to criminalise when concerned with migrant smuggling.

This fragmentation can also be seen in the number of refugees and other migrants who have been criminalised as migrant smugglers due to having facilitated part of their own journey.[475] For example, a Greek court sentenced a Syrian refugee to 52 years in prison after

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[469] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, 2021) 5.
[470] Roxane de Massol de Rebetz, 'Jurisdictional games and decision making: The Belgian approach in dealing with migrant smuggling' (2023) 45(2) Law & Policy 137, 146.
[471] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, 2021) 6.
[472] *Ibid.*
[473] *Ibid.*
[474] ILC Analytical Study 2006, 'ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi'. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006, 10.
[475] Sara Bellezza and Tiziana Calandrino, 'Criminalization of Flight and Escape Aid' (borderline-europe, 2017) 28.

being accused of facilitating illegal entry after having steered the boat that brough his family and 40 others to the Greek shores.[476] Additionally, in Italy, the majority of people who have been charged with the crime of migrant smuggling have in reality been migrants themselves who were steering and holding the compass in the boat that transported irregular migrants to Europe.[477] These examples are clearly not in line with the UN Migrant Smuggling Protocol standard of who to prosecute for migrant smuggling because the smuggled migrants themselves are not to be held liable for having been smuggled. Nevertheless, this is left open to prosecute in the EU by the Renewed EU Action Plan because they make no reference to the smuggled migrants themselves and anyone who intentionally assists in the facilitation of irregular migration. This is clear fragmentation because there are conflicting standards, which leads to differences in institutional practices. Further examples of this can be seen in relation to family members who assist in the facilitation of irregular migration for a relative. According to the UN Smuggling Protocol, family members should not face prosecution for migrant smuggling as long as they do not gain any profit.[478] However, per the definition relied on by the Renewed EU Action Plan, migrant smuggling constitutes any situation where someone intentionally assists in the facilitation of the journey.[479] An UNODC report has illustrated how courts across the EU has systematically charged relatives with migrant smuggling as a result of facilitating the journey of their family members.[480] This is further demonstrated through reports in the media. A Senegalese man was prosecuted for having assisted in the smuggling of his son after financing the journey.[481] Again, this demonstrates a difference in institutional practice. Per the UN Migrant Smuggling Protocol, this would not have been criminalised, however, the

[476] Chantal da Silva, 'Greek court sentences Syrian refugee to 52 years in prison over 'illegal' crossing from Turkey' (*Independent*, 28 April 2021) <https://www.independent.co.uk/news/world/europe/syrian-refugee-greece-lesbos-court-b1838166.html> accessed 23 March 2023.
[477] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart Publishing 2019) 59.
[478] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 5.
[479] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L 328, Art. 1.
[480] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, 2021) 7; UNODC, 'Women in Migrant Smuggling: A Case-law Analysis' (United Nations, Vienna, 2019), 12.
[481] BBC News, 'Doudou Faye: Men jailed for paying smugglers to take sons from Senegal' (*BBC News*, 8 December 2020) <https://www.bbc.com/news/world-africa-55231950> accessed 28 April 2023.

Renewed EU Action Plan allows for this opportunity. It is consequently a fragmented legal system that are responding to migrant smuggling.

The consequence of this fragmentation is that there are different standards in the international community that migrant smuggling can be criminalised under. This does not establish a strong criminal justice response to the issue of migrant smuggling, something the criminal networks that are smuggling migrants can benefit from because it creates grey areas which they can operate under. Instead of actually targeting these networks and subsequently dismantling or disrupting their business model, the international community and especially the EU will be busy punishing 'low-key actors' who are merely using the services provided by migrant smugglers, not participants in the criminal networks.[482] In a discussion with law enforcement and criminal justice practitioners, they make clear that the criminalisation of these 'low-key actors' has 'no visible impact on dismantling or disrupting the smuggling business model, but can only lead to more risks for victims of smuggling.'[483] Regrettably, by continuing to rely on the definition of migrant smuggling in the Facilitation Directive, this trend is likely to continue with the implementation of the Renewed EU Action Plan, instead of following the standards put forward by the UN Migrant Smuggling Protocol.[484] Opening Pandora's Box broadens the opportunity to prosecute facilitation of entry without any profit or other material benefit and leads to the fragmentation of the criminal justice response to migrant smuggling.

Still, there is hope that this fragmentation can be resolved. This is because the actions advised in the Renewed EU Action Plan aims at breaking the business model of criminal networks who smuggle migrants with the focus on 'a whole-of-route approach', instead of merely focusing on border control in the destination State.[485] To successfully achieve this, the Renewed EU Action Plan should narrow down its definition of migrant smuggling that clarifies the activities that constitute the crime and bring it in line with the definition of the Smuggling Protocol. The Renewed EU Action is a strong addition to the plurality of legal regimes existing

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[482] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, 2021) 7.
[483] Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society (Hart Publishing 2019) 60.
[484] Jennifer Allsopp, Lina Vosyliūtė and Stephanie Brenda Smialowski, 'Picking 'Low-Hanging Fruit' While the Orchard Burns: the Costs of Policing Humanitarian Actors in Italy and Greece as a Strategy to Prevent Migrant Smuggling' (2021) 27 European Journal on Criminal Policy and Research 65, 65 – 68.
[485] Andrew Fallone, 'Understanding the Future of European Union Counter-Smuggling Policy: The Renewed EU Action Plan Against Migrant Smuggling (2021 – 2025)' (STG Policy Papers, Issue 2021/19, 2021) 10 – 11.

in the same social field because it mirrors and supports many of the important obligations put forward by the UN Smuggling Protocol. However, the difference in how they define migrant smuggling weakens the impact they can have together. Together, these two can provide a strong framework that has a solid criminal justice response that prevents and combats migrant smuggling, whilst also ensuring the protection of smuggled migrants.

6 Conclusion

This thesis has attempted to demonstrate how two legal regimes who are operating within the same social system to deal with the same issue are causing a fragmentation of the system. The UN Migrant Smuggling Protocol and the Renewed EU Action Plan are on the surface fighting the same fight against migrant smuggling, namely, to prevent and combat it. However, through an analysis of both legal regimes it is evident that they are basing their actions to combat migrant smuggling on two different definitions of what constitute migrant smuggling and who can be defined to be a migrant smuggler. This means that there are different institutional practices, which are causing legal fragmentation and ultimately a weaker criminal justice response.

To come to such a conclusion, this thesis observed migrant smuggling through the theoretical framework of a legal pluralistic approach by using system theory. Within the social complex of the international community, it was established that a plurality of legal regimes that focus on migrant smuggling exist. While these are operating with the same focus, they might not be structurally coupled with each other. This observation suggests that there is a possibility of a collision between the legal regimes, which subsequently can result in the fragmentation of the system.[486] The theory of the fragmentation of law suggested that several international norms and legal frameworks co-exist in a relationship of interpretation and conflict.[487] Through such observations, it was highlighted that there was a necessity to examine the plurality of legal regimes. This was necessary because the analysis of possible conflicts and collisions is needed to discuss a possible pluralistic, holistic multi-level approach to the issue of migrant smuggling. Therefore, to analyse this, an abstract-meta-structure and the method of functional comparative

[486] ILC Analytical Study 2006, ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006.
[487] *Ibid.*

law were employed to compare the two legal regimes that was the focus of this thesis: the UN Migrant Smuggling Protocol and the Renewed EU Action Plan. The method of functional comparative law 'combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society.'[488] Therefore, the two legal regimes were analysed and interpreted in light of their functional relation to society, meaning in relation to the issue of migrant smuggling. As such, the Smuggling Protocol and the Renewed EU Action Plan was explained and analysed, and their design and function were brough into relation to each to determine whether there were any similarities or differences that could potentially lead to a fragmentation of the system.

Through the analysis, if was first found that the UN Migrant Smuggling Protocol is one of the principal international instruments that represent a criminal justice response to the issue of migrant smuggling.[489] Its purpose is to prevent and combat migrant smuggling, to promote cooperation amongst States to that end, and to protect the rights of smuggled migrants.[490] The core obligation is to criminalise migrant smuggling, however, this is to be done in a manner that is consistent with the protection of the rights of the smuggled migrants.[491] Similarly, the Renewed EU Action Plan's aim is to prevent and combat migrant smuggling as well.[492] This is promoted through the strengthening of information exchange and international cooperation to investigate and prosecute migrant smuggling networks.[493] The protection of the rights of smuggled migrants is also touched upon. This is to form a comprehensive approach towards a criminal justice approach where migrant smuggling is prevented and combatted. This itself seems to correspond to the purpose and aim of the Smuggling Protocol, however when looking at the definition that clarifies the activities that constitute the crime of migrant smuggling it is clear that there are clear legal delineation between the two.[494] This is found to be a challenge because it creates different legal standards for what and who can be criminalised for migrant

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[488] Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 342.
[489] Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 47.
[490] Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) United Nations, *Treaty Series*, Vol. 2241, p. 507, Doc. A/55/383, Art. 3(a).
[491] *Ibid.*
[492] European Commission (2021), 'A renewed EU action plan against migrant smuggling (2021- 2025)', COM(2021) 591 final, 28.
[493] *Ibid,* 2.
[494] Kheira Arrouche, Andrew Fallone and Lina Vosyliūtė, 'Between politics and inconvenient evidence: Assessing the Renewed EU Action Plan against migrant smuggling' (CEPS Policy Brief No 2021-01, 2021) 6.

smuggling. It was also found that narrative of migrant smuggling created by the EU and the Renewed EU Action Plan contributes towards the delineation because it creates confusion and discretion in the international community and for those who are responding to situations suspected of migrant smuggling.[495] Possible consequences are that migrant smuggling is over criminalised, and many who are assisting the migrants face prosecution when they would not otherwise do so under the UN Smuggling Protocol because there is no for-profit motive.[496] This leads to the fragmentation of the international legal system because there is no clear consensus on what constitute migrant smuggling. Having such a fragmented perception of migrant smuggling weakens the criminal justice response to the issue and instead lead to the prosecution of 'low-key actors' instead of dismantling the business model of migrant smugglers. [497]

Still, it is suggested that this fragmentation can be resolved by the Renewed EU Action Plan narrowing its definition of migrant smuggling down and in line with the definition provided by the Smuggling Protocol. Doing this will allow the international community to work with the same understanding of what migrant smuggling is and reduces the complexity on what and who to criminalise. Together, the UN Migrant Smuggling Protocol and the Renewed EU Action Plan can provide a strong framework with core obligations and specific actions that represent a solid criminal justice response that prevents and combats migrant smuggling.

[495] *Ibid.*
[496] *Ibid.*
[497] *Ibid.*

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