

European Council on Refugees and Exiles—Written Evidence (PMS0004)

1. Introduction and Summary

- 1.1 The European Council on Refugees and Exiles (ECRE) is a European network of 88 member organisations in 38 countries protecting and advancing the rights of refugees, asylum seekers and displaced persons. Our mission is to promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law.
- 1.2 ECRE welcomes this much needed inquiry into the EU Action Plan against migrant smuggling, at a time when unprecedented numbers of people are fleeing conflict to Europe. Nearly 340,000 people had arrived in Europe by the end of July,¹ with Greece and Italy coming under particular pressure. UNHCR has called the situation in the Mediterranean a refugee crisis as those arriving are predominantly fleeing war and persecution in Syria, Afghanistan, Eritrea and other countries.² Numbers of refugees and migrants arriving in Greece have soared 750% above those recorded last year.³ Due to a lack of legal routes to Europe, the overwhelming majority of those fleeing have been forced to use the services of migrant smugglers.
- 1.3 There is no doubt that those who use the services of smugglers to arrive in Europe put their lives in grave danger. IOM has confirmed that whilst 188,000 people had been saved in the Mediterranean by the beginning of August this year, there were 2,000 people at least who died.⁴
- 1.4 ECRE considers that the Commission's European Agenda on Migration includes a number of measures that constitute a move in the right direction, such as boosting resources to save lives, increasing the number of resettlement places and measures that enhance solidarity. However, ECRE is concerned about other aspects of the European Agenda on Migration which are predominantly security-driven and risk undermining a rights-based approach, including certain measures relating to tackling migrant smuggling as discussed below.
- 1.5 The EU Action Plan against migrant smuggling provides several useful initiatives to improve cooperation between EU institutions and Member States and to tackle new areas such as the financial and communication means of smugglers. However, the Action Plan focuses much of its energy on security and responses to the supply side of smuggling.
- 1.6 Unlike the Global Approach to Migration and Mobility (GAMM), the person making the journey is largely absent from the Action Plan apart from passive references to people being victims of smuggling, labour or sexual exploitation and as the target of deterrence strategies. The lack of acknowledgement of why people need to migrate, the situations they are fleeing, their motivations and needs, including for international protection, means that there is a large gap in the policy, and this includes any real analysis of the links between smuggling and trafficking and vulnerability at different stages of the journey, and consequently, how policies will need to be tailored to reflect this reality.

¹ <http://frontex.europa.eu/news/number-of-migrants-in-one-month-above-100-000-for-first-time-I9Mllo>

² <http://www.unhcr.org/5592bd059.html>

³ <http://www.unhcr.org/55c4d1fc2.html>

⁴ <https://www.iom.int/news/deadly-milestone-mediterranean-migrant-deaths-pass-2000>

1.7 The EU and Member States need to recognize more openly that the majority of those using smugglers are fleeing war, conflict and persecution, that people have a right to seek asylum and that because there are so few legal routes to Europe, using smugglers is often the only way people have of reaching safety. The EU also needs to be clear that any naval operations do not put the lives of people fleeing war at risk, and that they do not limit people's ability to reach Europe to seek asylum.

2. One of the priorities of the European Agenda on Migration is the prevention of migrant smuggling, with the goal of transforming migrant smuggling networks into "high risk, low return" operations. Are the four objectives of the Action Plan the right ones to achieve this goal? Which, if any, of the proposals in the Action Plan should be prioritised in this context?

2.1 The EU Action Plan against migrant smuggling sets out specific actions to implement both the European Agenda on Migration,⁵ which identifies the fight against migrant smuggling as a priority, as well as the European Agenda on Security,⁶ which singles out cooperation against migrant smuggling inside the EU and with third countries as a priority in the fight against organized crime networks. The two agendas of migration and security come together in the four objectives highlighted in the Action Plan: enhanced police and judicial response; improved gathering and sharing of information; enhanced prevention of smuggling and assistance to vulnerable migrants; and stronger cooperation with third countries.

2.2 The Action Plan is based on a multidisciplinary approach and acknowledges the cross-cutting nature of migrant smuggling, at the juncture between migration, security and external relations policies. Most policies and activities undertaken at international and EU level currently tackle the supply side of the smuggling of migrants and are concerned with improving the detection and apprehension of smugglers at EU borders (through capacity building/border management; data exchange, including data systems and joint operations). New activities have been included in the Action Plan to step up EU assistance and fill gaps in taking action against money laundering and financial investigations; targeting smugglers' means of communication with migrants by cooperating with internet service providers; targeting business operators and means of transport used by smugglers for their activities. The Action Plan also foresees an increased role for the EU Agencies (Frontex, Eurojust, Europol) and the EEAS, and greater integration of migration in foreign policy including stronger cooperation with third countries, for example on capacity building and information exchange.

2.3 ECRE welcomes the renewed focus of the EU on saving lives at sea in the EU Agenda on Migration, recognizes that the smuggling of people may constitute a crime that endangers human lives and that smuggling networks need to be tackled.

2.4 ECRE has concerns about the possible impact of the EUNAVFOR Med⁷ naval operation to identify, capture and dispose of vessels and assets used or suspected of being used by migrant smugglers or traffickers, now fully operational and undertaking monitoring missions as mandated under phase 1 of operations.⁸ The EU needs to be clear that any naval operations do not put the lives of people fleeing war at risk, and that they do not limit people's ability to reach Europe to seek asylum. ECRE is also concerned that without the necessary increases in legal ways to reach Europe, the focus on disrupting vessels may lead to refugees and migrants taking even more dangerous routes. In terms

⁵ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf

⁶ http://ec.europa.eu/dgs/home-affairs/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015D0778&qid=1435825940768&from=EN>

⁸ http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/press-releases/20150728_en.htm

of its impact on smuggling, smuggling has proven to be an extremely fluid network that adapts to changing circumstances and there have to be concerns that smugglers will simply resort to more dangerous routes, charging higher prices, with little or no regard for the safety of those they are transporting. The EU and Member States need to recognize more openly that the majority of those using smugglers are fleeing war, conflict and persecution, that people have a right to seek asylum and that because there are so few legal routes to Europe, using smugglers is often the only way people have of reaching safety.

- 2.5 There are far fewer activities by the EU or Member States that currently directly tackle the demand side of the smuggling of migrants (i.e. aimed at decreasing the need for smugglers' services or discouraging migrants from using smugglers), such as the opening up of legal channels for people to come to Europe safely, or awareness raising activities.
- 2.6 On information campaigns (highlighted as a flagship measure), little evidence exists about the impact campaigns have in influencing migration plans. It is often argued that migrants know that there are risks involved or that those who want to migrate will not listen to negative information on the journey ahead and will undertake the trip regardless. Awareness raising campaigns to inform people about legal migration possibilities are limited in their usefulness. Legal migration channels are almost non-existent, so there is very little information that can be provided.
- 2.7 International organisations, the UN and civil society have called for the establishment of more legal channels for migrants and refugees to reach Europe as a way to address people smuggling. In its Ten Point Plan to Save Lives at Sea⁹ ECRE calls on EU institutions and Member States to significantly increase the numbers of refugees admitted to Europe through resettlement programmes and humanitarian admission; give refugees the possibility to apply for safe entry and international protection through EU embassies in countries neighbouring refugees' regions of origin; make use of the possibility to grant humanitarian visas in accordance with Articles 19(4) and 25(1) of the EU Visa Code¹⁰ to help those in need of international protection to leave areas of conflict in a safe and legal manner; facilitate family reunification for people in the region who have family members living in Europe so that they can easily join their loved ones; and expand legal channels for migration beyond highly skilled workers.
- 2.8 The EU Migration Agenda stresses the need to "open more safe, legal ways into the EU" and mentions sponsorships, humanitarian permits, and family reunification. However, these are only mentioned in relation to persons in need of protection. The EU Action Plan against smuggling tries to put forward a balanced approach in terms of intentions and objectives. However, the main way to decrease demand for smuggling – opening legal channels to Europe – is only a small part of the introduction to the section on a Stronger European Response to Migrant Smuggling in the Action Plan, and no concrete plans have been brought forward by the EU or MS so far.

3 According to the European Commission, the Action Plan "should be seen in the broader context of EU efforts to address the root causes of irregular migration". Does it suggest the correct set of measures to bring this about?

- 3.1 Member States to date have been primarily addressing human smuggling from the point of view of law enforcement. There is a need for the EU to put smuggling in a wider context, which the Action Plan recognizes by referring to the need to address other issues such as information, cooperation with third countries and assistance to migrants.

⁹ <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1034-ecres-ten-point-plan-to-prevent-deaths-at-sea.html>

¹⁰ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0810&from=EN>

- 3.2 The EU's Global Approach to Migration and Mobility (GAMM), adopted in 2011¹¹ has already sought to address the root causes of migration and the relationship between migration and development through a general framework for cooperation between the EU and third countries. The GAMM stresses that policies should be migrant-centred, and that the human rights of migrants are a cross-cutting issue. It aims to strengthen respect for fundamental rights and the human rights of migrants in source, transit and destination countries alike.
- 3.3 The EU Action Plan should not be pursued in isolation, as a targeted cooperation area, but as part of a more holistic cooperation package with partner countries. The GAMM should still remain the overarching framework for cooperation with third countries in this regard.
- 3.4 In terms of the measures included in the Action Plan, there are some areas that could be prioritized:
- The collection of information in third countries that is already happening could be strengthened through the roles of Immigration Liaison Officers (ILOs) and coordination between the ILOs, MS, EU Delegations and more regular information exchange between MS;
 - Inter-agency coordination should be fostered between Europol, Frontex and Eurojust, but guarantees will be needed that such coordination is not at the expense of fundamental rights protection. In this regard, the hotspots approach proposed in the Action Plan remains unclear;¹²
 - There is a lack of criminal statistics, data and regular reporting mechanisms on smuggling;
 - Data on the role of smuggling in secondary movements within the EU also needs to be collected in a uniform manner, including through the development of indicators;
 - Humanitarian assistance to irregular migrants should be decriminalized;
 - Smuggling should not be looked at in isolation, but instead as part of a holistic approach and cooperation package with partner countries that corresponds to their needs and capacities;
 - Legislative frameworks in partner countries that will protect the fundamental rights of migrants, including those smuggled, and whereby investigation will not put them in additional and unnecessary risks, should be supported;
 - There is currently little evidence that return measures can prevent smuggling/ irregular travel: there has been no evidence to substantiate a cause-effect relationship between the two so it is unclear if the current focus on return measures without any change in the situations of conflict that people are fleeing, will have any impact on the use of smuggling to get to Europe.

4 Are Member States currently meeting their obligations under the existing EU framework against migrant smuggling? What are the deficiencies of the current framework, and do the actions foreseen in the Action Plan address these?

- 4.1 The existing EU framework against migrant smuggling includes the "Facilitators Package" adopted in 2002 which consists of Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence and Council Framework Decision 2002/946/JHA to strengthen the penal framework to prevent the facilitation of unauthorised entry, transit and residence. The Directive criminalises the facilitation of irregular migration and residence, whilst the Decision establishes minimum rules for penalties, liability of legal persons and jurisdiction. Article 26 of the Schengen Agreement and Directive 2001/51 concerning the carrier's liability are also important in the EU legal framework as they are regarded as tools for combating irregular migration, including smuggling of

¹¹ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/index_en.htm

¹²See ECRE statement on the European Council conclusions of 25th June <http://ecre.org/component/content/article/70-weekly-bulletin-articles/1125-ecre-raises-serious-concerns-over-council-conclusions-and-mistrust-between-member-states.html>

people. Finally, as the Action Plan covers return as an area of importance, return and readmission polices are also relevant.

- 4.2 Cooperation at MS level between departments, between MS, and the EU and MS has been difficult and could be improved. MS can tend to prefer to liaise bilaterally with countries of origin and transit.
- 4.3 A recent report by the Fundamental Rights Agency shows that in almost all EU Member States, irregular entry and stay are offences, often punishable with custodial sentences. The use of criminal sanctions and imprisonment to fight irregular migration harms not only the persons concerned, but also casts a negative light on how society as a whole perceives them.¹³
- 4.4 EU legislation means that EU Member States must punish persons who help irregular migrants to enter and stay in the EU. According to the Fundamental Rights Agency it is important that MS national legislation on smuggling of people “should always include financial and material benefit as a requirement for punishment” or explicitly exclude punishment for facilitation of unauthorized entry or stay based on humanitarian assistance grounds to avoid risks of NGOs or others being punished for rendering humanitarian assistance.¹⁴ The Social Platform has also raised concerns that the Facilitation Directive does not rule out imposing sanctions on individuals or organisations that offer assistance to undocumented migrants and pointed out that more and more responsibility is being put on service providers such as health and welfare, to provide information on undocumented migrants. This puts them in difficult situations morally and they can face financial and other penalties.¹⁵
- 4.5 The Action Plan has provisions that could enable Member States to have more operational capacity and cooperation with EU institutions such as Europol, and each other, on cases of smuggling which should aid the detection and apprehension of smuggling networks. It does not address concerns on the Facilitators Package and the rendering of humanitarian assistance. As the Commission is currently evaluating the Facilitators’ Package, ECRE hopes that this will be addressed as part of that process and will ensure that humanitarian assistance to refugees and migrants arriving in Europe is no longer a potential crime.

5 EU Agencies are expected to play a significant role in carrying out the objectives of the Action Plan. Do they have the mandate, budget and other capacities to fulfil this role?

- 5.1 The main challenge at the moment is coordination between different EU agencies: Frontex and Europol, Eurojust and EASO. The Action Plan includes activities to enhance cooperation. The Commission will set up a Contact Group of EU Agencies on migrant smuggling, to strengthen operational cooperation and information exchange between the relevant EU Agencies. In parallel, the capacities of EU Agencies to address migrant smuggling will be enhanced. Eurojust should set up a thematic group on migrant smuggling to strengthen and formalise cooperation between national prosecutors and enhance mutual legal assistance.
- 5.2 Support for capacity building to help Member States' law enforcement authorities to reduce migrant smuggling is crucial, as is the use of Joint Investigation Teams and the provision of mutual assistance

¹³ FRA: ‘The Criminalisation of migrants in an irregular situation and of persons engaging with them’ http://fra.europa.eu/sites/default/files/fra-2014-criminalisation-of-migrants_en.pdf

¹⁴ Fundamental Rights Conference 2014: Fundamental Rights and Migration to the EU: Conference Conclusions, FRA, November 2014, p.2.

¹⁵ See more at: <http://www.socialplatform.org/what-we-do/over-arching-campaigns/criminalising-solidarity/#sthash.av1lCg4G.dpuf>

in cases of migrant smuggling. Eurojust can make a strong contribution through the financing of Joint Investigation Teams and support for mutual legal assistance in criminal matters.

5.3 The Commission, with relevant EU Agencies, in particular CEPOL and Europol, as well as the European Judicial Training Network, will map training needs at EU and national level to enable a better targeting of capacity building. This should include tailor-made training for judiciary, law enforcement, border guards and consulate authorities on cross-border cooperation to counter migrant smuggling. The capacities of EU Agencies to collect, exchange and analyse information on migrant smuggling will be reinforced. It is crucial that the Fundamental Rights Agency develops the fundamental rights dimension, in particular as regards the protection of smuggled migrants.

6 Does the Action Plan sufficiently differentiate between migrant smuggling and human trafficking? What is your opinion of the proposal to extend the 2004 Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings to smuggled migrants?

6.1 The Action Plan clearly distinguishes that it focuses on migrant smuggling and not on human trafficking, and that although the two are interlinked trafficking is dealt with in a different policy, the EU Strategy Towards the Eradication of Human Beings . There is acknowledgement of the risk that people using smugglers to travel to Europe can become victims of trafficking for different reasons during the journey. However, unlike the GAMM, the person making the journey is largely absent from the Action Plan. The lack of acknowledgement of why people need to migrate, means that there is a gap in the policy, including any real analysis of the links between smuggling and trafficking and vulnerability at different stages of the journey, and consequently, how policies will need to be tailored to reflect this.

7 Does current EU action against migrant smuggling, including the actions suggested in the Action Plan, strike the correct balance between law enforcement and the human rights of migrants, including particularly vulnerable migrants such as minors and pregnant women?

7.1 At EU level, the EU Action Plan and other actions against migrant smuggling focus mainly on law enforcement and not enough on the human rights of migrants and refugees, including minors, pregnant women and other vulnerable groups.

7.2 The Fundamental Rights Agency of the EU has reported that the ‘criminalisation’ of undocumented and irregular migrants means that many people are afraid to use medical services, send their children to school or register births. Criminalisation also hurts people who help refugees and migrants. For example, it was shown after the Lampedusa tragedy that fishermen were scared of punishment for rescuing people who were drowning at sea.¹⁶ The report states that humanitarian assistance should be decriminalised; search and rescue and obligations under non-refoulement should not be jeopardised; people should be subject to detention for irregular entry or stay whilst the Returns Directive applies to them; people who are victims of exploitation and abuse should have a residence permit that is not dependent on the perpetrator of abuse. This is important in the case of victims of gender-based violence.

7.3 The EU Action Plan stresses the need for the EU to provide assistance and protection to vulnerable smuggled migrants, however it does not specify any concrete actions.

¹⁶ <http://fra.europa.eu/en/news/2014/fra-paper-criminalisation-irregular-migrants>

8 Do the Action Plan and other, related EU strategies (such as the European Maritime Security Strategy, Cyber Security Strategy and the EU Strategy towards the Eradication of Trafficking in Human Beings) form a coherent whole?

8.1 The majority of the policies above concern the security side of tackling smuggling and related issues. ECRE believes that if the EU only addresses the security and supply side of the issue of people smuggling to Europe, and fails to open legal channels to Europe for significant numbers of people who need to seek international protection, the Action Plan will fail to eradicate smuggling. It will merely change the routes and modus operandi. There needs to be more emphasis on the financial side of the business of people smuggling, as included in the Action Plan.

9 Are the actions proposed in the Action Plan compatible with the international framework on preventing human smuggling, including the UN Protocol on Smuggling of Migrants by Land, Sea and Air? Do they add to this framework in a coherent and meaningful manner?

9.1 The EU is a party of the UN Protocol against Smuggling and all MS but Ireland have ratified it. There are some differences in the UN Protocol and the EU Facilitators' Package. 'Facilitation' in the EU Facilitators Package includes the assistance of irregular migration (facilitation) by "any person", including criminal organisations¹⁷, whereas the Protocol defines the terms smuggling as clearly limited to organised criminal groups. Secondly, the definition of the UN Protocol includes the criterion of financial gain ("in order to obtain [...] a financial or other material benefit"), while the EU Facilitators Package only requires an element of "financial gain" for infringements under Article 1 (b), but not Article 1 (a) of the Directive. With regards to the savings clause, Article 19 of the UN Protocol is much more comprehensive (applicable to all persons), than that in Article 6 of the Framework Decision 2002/946/JHA (applicable to refugees and asylum seekers). While the UN Protocol clearly states that smuggled migrants themselves should not be criminalized (Article 5), the EU package does not include such explicit provision. In the Directive of the Facilitator's Package there is an optional provision to not impose sanctions in those cases where the aim of the facilitation is to provide humanitarian assistance. As noted above FRA and NGOs have called for a revision of this Article 1(2) making the optional provision obligatory.

9.2 Whilst the Action Plan is compatible overall, some concerns on fundamental rights as well as the Facilitators' Package are still unclear. The focus is very much on tackling smugglers and much less is said on fundamental rights, the rights of those helping refugees and migrants, and ensuring that people have access to asylum.

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¹⁷ See also 2002/946/JHA, Article 1 (3).