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Is All that Glitters Gold?

Scrutinizing the EU's Revised Approach to Transnational Crime in the context of Migrant Smuggling

Vittorio Cama

PhD Candidate in Criminal Law,
University of Trento

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**EU
GLOBACT**
TRANSNATIONAL CRIME AND EU LAW:
towards Global Action against Cross-border Threats to
common security, rule of law, and human rights



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1. Introduction

- November 28, at the **International Conference on a Global Alliance to Counter Migrant Smuggling**, the EC announces a new package that includes a **new Directive**, aimed at replacing the «Facilitators Package» and a **new Regulation** on police cooperation;
- The package is part of the renewed EU action plan against migrant smuggling for the period 2021-2025, following up on the EU action plan against migrant smuggling, which was adopted in May 2015;

It includes:

- The **Directive on preventing and countering the facilitation of unauthorised entry, transit and stay in the EU**;
- The **Regulation to reinforce Europol's role** in the fight against migrant smuggling and trafficking in human beings;
- Global Alliance to Counter Migrant Smuggling.



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1. Facilitators Package: criticalities

- **Over-criminalization;**
- The true purpose of the «**fight**» against smuggling, **ie protection of individuals**, was lost sight of;
- The criminalization of the facilitation of the irregular entry of third-nationals is completely **detached** from the aims pursued by smuggler transnational networks;
- States have a duty to criminalize conducts of smuggling **irrespective of the profit-driven motive** (including the aim to provide **humanitarian assistance**)
- Article 1(2) Directive 2002/90/EC **left it to the States** to decide whether to criminalize conducts carried out for humanitarian purposes (“Humanitarian clause”)



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2. All chickens came to roost: the Kinshasa case

Whether the principle of **proportionality** referred to in **Article 52(1)** of the Charter of fundamental rights, read in conjunction with the **rights to personal liberty** and the right to **property** (art. 6 and 17 CFR), the rights to **life** and **physical integrity** (art. 2 and 3 CFR), the right to **asylum** (art. 18 CFR), the right to respect for **family life** (art. 7 CFR)

- preclude the provisions of **Directive 2002/90/EC** and **Framework Decision 2002/946/JHA** (so called Facilitators package), in so far as they impose on Member States **the obligation to provide for penalties** of a criminal nature against any person who intentionally facilitates, or engages in acts intended to facilitate, the unauthorized entry of foreign nationals into the territory of the Union, **even where the conduct is carried out on a non-profit-making basis, without providing**, at the same time, an obligation on Member States to **exclude** from criminalization **conduct** facilitating unauthorized entry **aimed at providing humanitarian assistance** to the foreign national.

- preclude the criminal offence provisions laid down in **Article 12 of Legislative Decree No 286**, in so far as it **criminalizes the conduct** of a person who engages in acts intended to procure the unauthorized entry of a foreign national into the territory of the State, even where the conduct is carried out on a non-profit-making basis, without at the same time excluding from criminalization **conduct** facilitating unauthorized entry aimed at providing humanitarian assistance to the foreign national.



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3. The new Directive proposal – Article 3

Article 3

Criminal offences

1. Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where:

- a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit; or
- b) there is a high likelihood of causing serious harm to a person.

2. Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence.



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3. The new Directive proposal – Recital 7

«It is appropriate to provide for criminal liability where there is a **link to a financial or material benefit**, or where migrants are highly likely to be subjected to serious harm. These elements **will usually not be fulfilled** when it comes to **assistance among family members** or the **provision of humanitarian assistance** or the **support of basic human needs**. **Third-country nationals should not become criminally liable** for having been the subject to such criminal offences. Moreover, **it is not the purpose of this Directive to criminalise**, on the one hand, **assistance provided to family members** and, on the other hand, **humanitarian assistance or the support of basic human needs** provided to third-country nationals in compliance with **legal obligations**.»



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4. Is All the Glitters Gold?

- **Vagueness** of the notion of «financial or material benefit»;
- **No binding rules** on the non-criminalization of humanitarian assistance;
- Similarly, no binding rule ensures that Member States **do not make victims of smuggling liable**;
- Member States are asked to criminalize not only individuals facilitating irregular entry for financial or material benefit but also, **alternatively**, cases where «there is a high likelihood of causing serious harm to a person» (even migrants?)
- Criminalisation of **mere instigation**;
- **Scant** provisions on **prevention** and strengthening of **police measures**.



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5. Thank you for your Attention!