

HUMAN SMUGGLING IN AFRICA

The creation of a new criminalised economy?

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1. Introduction

Mobility has been a key facet of resilience across much of the African continent throughout its history, and those on the move have long relied on the support of smugglers to facilitate the journey. However, the birth of the modern migrant smuggling industry as a multi-million global business is much more recent, as is the perception of the migrant smuggler as a highly organised criminal figure.

Shrinking avenues for legal movement, combined with unprecedented mass displacement rates, have resulted in a sharp increase in people irregularly on the move and consequently in a growing need for the services smugglers provide.

Policy discourse began to twin migration governance with human smuggling dynamics only shortly before the turn of the century. Since then human smugglers have been catapulted to fame and have played a major, pivotal role in migration mechanics. Of course, human smuggling far pre-dates this; however until then it was not a priority for policymakers.

While it is impossible to know for certain how many irregular migrants and refugees (together referred to as 'migrants' going forward)¹ use the services of smugglers, it is increasingly recognised that the majority of the world's 3 billion migrants will have used the services of smugglers at some point along their journey. As at 2016, human smuggling was considered by Europol to be the fastest-growing criminal market in terms of both operators and profits.²

This is a key moment to take stock of policy and legal responses to human smuggling in Africa, following the 2018 adoption of the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration (the Global Compacts). In the Global Compacts, states renewed their commitments to 'strengthen the transnational response to smuggling of migrants'. Yet the transnational response remains fragmented and of questionable effectiveness.

Since the promulgation of the Global Compacts, irregular movement remains high on the African policy agenda. The African Union (AU) declared 2019 'the

Year of Refugees, Returnees and Internally Displaced Persons' and committed to finding 'durable solutions to forced displacement in Africa'. As explored further below, smugglers play a pivotal role in the experiences of refugees and asylum seekers on the continent and are a key consideration in crafting 'protection-sensitive responses to mixed migration in Africa'.³

Across Africa, perceptions of migrant smugglers as mere facilitators of movement and providers of a hugely important service continue to be prevalent. This creates a disjuncture with the perception and legal characterisation of smugglers as criminals under international, and in some cases domestic, legal frameworks.

The rise of counter-smuggling measures on the political agenda of international organisations, destination states and, to a lesser extent, countries of transit and origin can be tracked predominantly across the last 15 to 20 years, and in particular since 2005.

During this period enhanced investment in border control has swollen the profits of the smuggling industry. In many contexts this has transformed the market from a side industry that supplemented other licit and illicit revenue streams (often the transportation or smuggling of licit goods across boundaries) to a hugely lucrative industry attractive to organised crime.

These dynamics can be tracked in the spike in irregular migration from Africa to Europe, which peaked in 2015 when the European Border and Coast Guard Agency (Frontex) detected 1.82 million irregular entries at the external sea and land borders of the European Union (EU).⁴ This was termed the 'migrant crisis' by media and politicians alike and triggered unprecedented concerns about irregular migration as well as investment into border control within 'Fortress Europe'. It also catalysed a spike in demand for the services of smugglers – EU Frontex 2016 arrivals data, which tracks arrivals from a range of origins but predominantly transiting the Middle East and North Africa, suggested that over 95% of irregular arrivals into 'Fortress Europe' used human smugglers for part or all of their journey.⁵

In the 'migrant crisis', concerns about the role of smugglers were in part based on well founded fears

that across many legs of these journeys the lines between smuggling and trafficking were blurring, as smuggling became characterised by high levels of the exploitation of migrants. This called into question perceptions of human smuggling as a 'victimless crime', namely a 'crime considered to have no direct victim usually because only consenting adults are involved'.⁶

The Global Compacts

While the 'migrant crisis' is widely recognised to have dwindled, the hysteria it caused about irregular migration remains, as do the actors who facilitate it. This is well demonstrated by the controversy surrounding the adoption of the compact on migration. Four EU states refused to adopt the compact, and protests and petitions against signing were widespread across EU countries. Critics cited the compact on migration as an 'incentive for illegal migration'.⁷

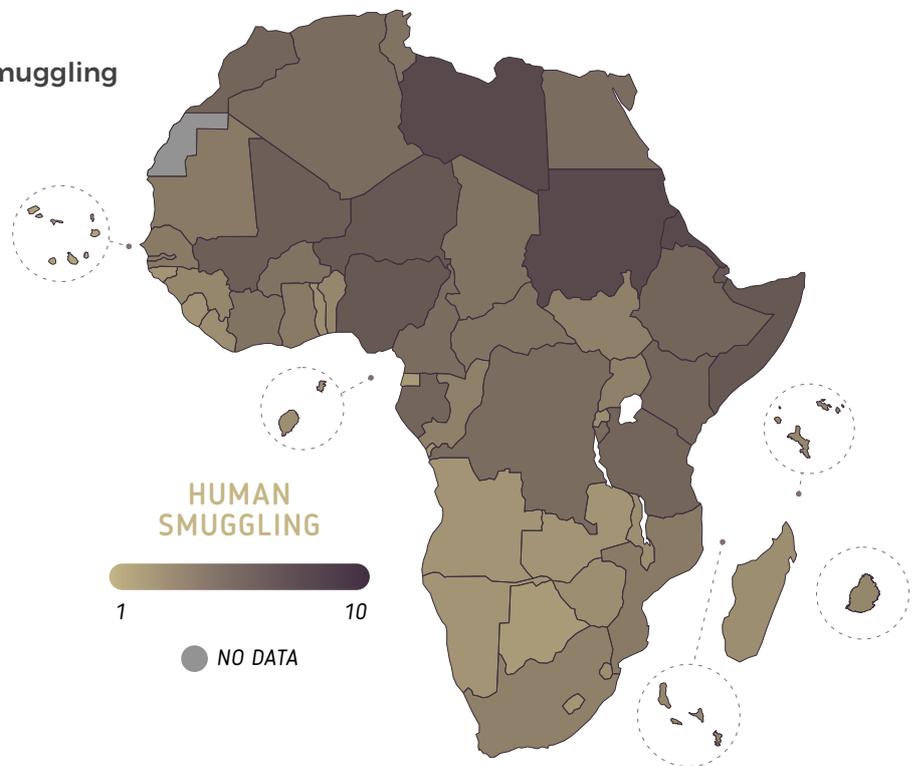
The compact on refugees built on an existing base of international refugee law, which the United Nations High Commissioner for Refugees (UNHCR) expressly avoided materially revisiting.⁸

In contrast, the compact on migration offers perhaps the first '360-degree vision' of international regulation of migration.⁹ However, the very title of the Global Compact for Safe, Orderly and Regular Migration proved problematic. African states requested the deletion of the terms 'and regular' to mitigate the risk of criminalising migrants and refugees moving irregularly.¹⁰ Similarly, the 'emphasis on addressing irregular migration', which runs through the compact, appears predominantly driven by security and border control concerns, with a lesser focus on the development benefits of migration.

While the 'migrant crisis' is widely recognised to have dwindled, the hysteria about irregular migration remains

Figure 1 The prevalence of human smuggling in Africa

The heat map shows the prevalence of human smuggling across Africa, based on data collated for the Africa Organised Crime Index 2019. The Index was developed through a literature review encompassing more than 3 000 academic articles, 1 300 policy reports and over 8 000 news articles. It utilises 49 underlying data sources, and is built on 26 indicators; it is informed by the expertise and input of more than 200 contributors. It will be updated in 2021.



Source: <https://ocindex.net>

The term 'regular' was retained, in part due to arguments that 'irregular' migration exposes those on the move to greater risks, and policies seeking to mitigate harm should thus focus on prevention. Clearly, the approach taken to countering irregular migration, and addressing the role played by human smuggling networks, remains controversial.

Such controversy is in part due to a failure to recognise that without safe and legal migration routes, irregular movement is inevitable. Further, that enhanced border control, including along borders which were previously open, permitting circular migration and localised cross-border flows, heightens the demand for smugglers. While practical and effective approaches to 'managing migration' remain controversial, the evidence base regarding the impacts of approaches focusing merely on border control is clear.

Migrant protection risks in Africa

The shift in the smuggling industry from a form of community resilience, supporting mobility when required as a key element of livelihoods, to a far more criminalised market, has serious consequences for the protection risks of those on the move. The journeys of migrants moving through many areas of Africa are extremely high risk, in part due to the increasing commoditisation of migrants in the human smuggling industry.

Many current approaches drive the smuggling market towards its more exploitative manifestations

This can, to some extent, be tracked in migrant fatality figures. It is key to note that these are believed to be a significant underestimate and do not relate only to journeys facilitated by smugglers (with the exception of fatalities relating to the

Mediterranean, where almost all will have been smuggler facilitated). Between January 2014 and October 2019 almost 7 500 migrant fatalities were recorded inside Africa. An additional estimated 19 000 fatalities, a significant proportion of which concerned African nationals, occurred in the Mediterranean crossing.¹¹

Responses to addressing human smuggling in Africa have largely adopted a criminal justice perspective, often backed by military power. Such approaches drive the smuggling market towards its more exploitative manifestations, undermining state governance structures and increasing risks faced by migrants. Continuing along this path is unlikely to yield different results – clearly it is time for a rethink.

Criminalisation of human smuggling

Human smuggling was first criminalised in international law through the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (the 'Smuggling Protocol'). The Smuggling Protocol came into force in 2004. This catalysed a trickle of legislative reform internationally as countries translated the provisions of the Smuggling Protocol, with varying degrees of fidelity to its provisions, into domestic legal frameworks. National framework divergences from the Smuggling Protocol provide insights into domestic concerns surrounding human smuggling and the particular drivers for criminalisation.

The legal frameworks used to counter human smuggling have widely been recognised as a pre-requisite in countering smuggling markets. This report will explore this element of the counter-smuggling response. It will examine the legislative approaches taken by African governments in criminalising human smuggling and explore how such provisions have aligned or differed from those agreed under the Smuggling Protocol. This analysis paves the way for an examination of whether, and in certain jurisdictions how, such states have enforced legal frameworks criminalising human smuggling in practice.

Impact of the COVID-19 pandemic on human smuggling

Efforts to counter the COVID-19 pandemic have seen unprecedented restrictions on movement being imposed in many countries, both at borders and within countries. Many communities and policymakers have adopted increasingly hostile attitudes towards migrants, whom they now additionally perceive as contagion risks.

These measures have had the short-term impact of reducing the smuggling business, and the flows of irregular migrants, across most regions of Africa. They are also heightening migrant-protection risks. In the medium term, if these obstacles to movement continue, they are likely to swell the profits of the smuggling industry.

It is too early to conclusively determine the extent to which COVID-19 is disrupting the smuggling market in Africa and to identify how long these disruptions will last. Some changes to the market may persist in the medium term, while in many cases the 'norm' will quickly return. We can, however, anticipate that some of the measures introduced to control COVID-19 are likely to increase the drivers for movement; the vulnerability of migrants at any point in their journey; the militarisation of borders; and the further reduction of safe and legal routes.

This report was researched and written before the COVID-19 pandemic emerged in early 2020.

The impacts of COVID-19 on human smuggling in Africa are therefore analysed in a discrete section of the report. The dynamics analysed across the remainder of the report hold, albeit that some elements of the market are experiencing current disruption due to the pandemic. Indeed, some of the trends considered in this report, particularly where the smuggling industry is driven towards its more exploitative manifestation, may be accelerated by states' responses to COVID-19.

Structure of this report

Part 1 of this report considers the speedy ascent of human smuggling up the agenda of some African governments, sometimes as a foil for measures to combat irregular migration and driven in part by pressure from the EU. It sketches out the dynamics of smuggling markets, outlines the shifting narratives surrounding human smuggling in Africa, considers the criminalisation of human smuggling under international law, and scrutinises the drivers for legislative reforms criminalising human smuggling on the continent.

Part 2 examines the legislative approaches taken by African governments to criminalise human smuggling (defined pursuant to the Smuggling Protocol).¹² This comparative analysis enables identification of key trends of concern and best practice structures.

Part 3 considers how such approaches have moved from paper to practice, scrutinising counter-smuggling enforcement in jurisdictions whose domestic laws criminalise smuggling. Where such enforcement has constituted a sustained pressure on the smuggling industry, it analyses how the smuggling markets have reacted to such interventions, highlighting overarching trends which characterise phases of market responses.

Drawing on this research, this report then turns to analysing responses. It concludes by detailing a consolidated set of recommendations for African policymakers, legislators, law enforcement and media which respond to human smuggling as a form of organised crime within the realistic parameters of the current political context and seeks to build upon lessons learned from enforcement to date.

The epilogue to the report considers the impact of Covid-19 on human smuggling dynamics. This section draws on information shared by the Global Initiative Against Transnational Organized Crime's network and civil society partners in the field across the African continent. It also draws from the policy brief written by the author for the Global Initiative titled 'Smuggling in the time of COVID-19: The impact of the pandemic on human-smuggling dynamics and migrant-protection risks'.¹³

2. Methodology and limitations

This report is based on mixed methodology research approaches.

In identifying laws criminalising human smuggling offences (understood in accordance with the Smuggling Protocol) across Africa, this report draws primarily on:

- the database of legislation on the United Nations Office on Drugs and Crime (UNODC) 'Sharing Electronic Resources and Laws Online' (SHERLOC) portal;¹⁴
- the Legal Atlas database;¹⁵ and
- Global Initiative research conducted for the Africa Organised Crime Index which included a review of available databases for legislation, together with widespread qualitative expert verification.¹⁶

These sources were supplemented and verified by:

- extensive review of the body of literature (including policy reports, academic papers, international and local press coverage, as well as grey literature) concerning human smuggling, human trafficking, and irregular migration dynamics in Africa; and
- long semi-structured interviews with over 20 experts on migration dynamics and key informants working in civil society, law enforcement, and the military in Africa.

This report also draws on field work conducted by and for the Global Initiative:

- periodically between 2015 and the time of publication (most recently in September 2019) in Niger, Chad, Mali and Libya;
- in Egypt in July 2019;
- in Algeria in October 2019; and
- in Kenya in December 2019.

In such field missions, interviews were conducted with (i) local analysts, researchers and civil society organisations and actors; (ii) migrants and refugees employing smuggling services; (iii) those involved in the human smuggling trade; (iv) domestic legal practitioners; and (v) state officials (in Egypt). The report also draws on interviews conducted by the Global

Initiative in Malta with 106 migrants and refugees who had travelled irregularly overland to Malta from a range of countries of origin in Africa between July and November 2018 and July and September 2019.¹⁷ Illicit markets are, by their nature, often secretive and difficult to research. The Global Initiative draws on its longstanding relationships with a network of actors across the region to support information-gathering and seeks to triangulate findings to the extent possible to mitigate the risk of false narratives.

The legal analysis in this report is based on a review of the provisions and legislation flagged to be relevant to human smuggling, either in the databases listed above, through the ENACT Organised Crime in Africa Index, or in subsequent research and conversations. Consequently, this research is vulnerable to the limitations of the data-gathering exercises conducted for the SHERLOC, Legal Atlas and Organised Crime in Africa Index databases. Although the author has sought to offset these by cross-checking positions with local analysts where possible, this limitation remains. The author welcomes any updates, or additional relevant laws, identified by readers, which can be incorporated into later iterations of this analysis.

Where domestic laws are drafted in languages other than English and French, translations were used to analyse their contents; where translation errors occur, these may influence interpretation. Native speakers in Arabic spot-checked translations.

In certain legal systems (typically those classed as 'monist') some treaties can be 'self-executing', meaning they become part of national law, and thus enforceable by state authorities, upon ratification, without additional steps to incorporate it into domestic legislation. Having said this, in Africa, most Francophone States (typically considered monist), require Treaties to be published domestically to have the force of law.

In cases where no domestic legislation has been enacted to translate the Smuggling Protocol into domestic law, there is a risk that the direct applicability of the Protocol will not have been identified through the data sources outlined above, and will therefore not been considered in this report. In Togo, which ratified the

Smuggling Protocol in 2010 the ratification instrument states that the protocol will be 'enforced as if it were the law of the state (*La presente loi sera exécutée comme loi de l'Etat*)'¹⁸.

The Smuggling Protocol was not written with a view to being self-executing – for example, although it creates the obligation to criminalise the offence of 'smuggling of migrants,' it does not prescribe specific penalties for such offence. It is therefore not clear that the Smuggling Protocol can be self-executing, and therefore whether in Togo it could be enforced in prosecutions. For this reason, Togo is not counted among the countries that have national provisions criminalising the offence of 'smuggling of migrants'. With this possible exception, and while recognising that prosecutions data is patchy, the research for this report found no evidence that national courts or law enforcement were using the

Smuggling Protocol as a directly enforceable element of the national corpus.

The criminalisation obligations under the Smuggling Protocol apply to (i) the 'smuggling of migrants';¹⁹ (ii) aggravated smuggling offences;²⁰ and (iii) the procurement, production or possession of fraudulent documents for the purpose of enabling the smuggling of migrants;²¹ (iv) enabling 'a person who is not a national or a permanent resident' to remain in the state concerned without complying with the necessary requirements for legally remaining in the state, and by using illegal means; and (v) attempting,²² participating as an accomplice in,²³ and organising or directing²⁴ any of the listed crimes. While recognising this, the scope of this report is limited to analysis of (i) to (iii). In addition, it considers the prohibition on prosecuting migrants for employing the services of smugglers.

PART 1

3. Understanding the human smuggling industry

Human smuggling can be characterised as a supply and demand market where local aspirations are achieved through illicit access. The growth of connectivity in Africa, through both increasing internet penetration and growing mobile phone ownership,²⁵ has been cited as one driver for enhanced aspirations of mobility, exposing source communities to the successful transitions of diaspora émigrés and to wealthier livelihoods. With smartphone usage exploding across Africa – current growth rates estimate that by 2025 smartphone adoption will almost double (growing from 36% in 2018 to an estimated 66% in 2025) – this driver appears set to increase.²⁶

Although human smugglers do not create the demand for movement,²⁷ a fact policymakers seek to ignore, they do shape the direction and volume of flows and should therefore be understood as a vector in irregular migration.²⁸

The specific dynamics of migrant smuggling networks, their operating mechanics and structures, are shaped by the markets in which they operate. There is no uniform modus operandi of smuggling networks. Services are shaped around the specific demands of clients, resulting in an extremely broad spectrum of services.

Some networks can be likened to corporate structures, with clear roles, hierarchies and kingpin 'CEOs'. More commonly, networks are loosely interconnected, ever-shifting allegiances between criminal entrepreneurs, specialists and generalist operators based on market need. Some networks move migrants across large distances from their country of origin to their destination country, offering 'full-package' schemes and end-to-end services. Others specialise in transport merely to the next smuggling hub.²⁹

Market structures are not static but dynamic and reactive, adapting to the changing political conditions of the jurisdictions in which they operate and evolving to evade detection. For example, in 2019, police in Niger discovered that smugglers were hiding migrants

under sheets in trucks carrying merchandise. Smugglers switched to using pickups only up to 15km from hubs, transporting migrants onwards individually on tuk-tuks and rickshaws, often at night. Smuggler scouts canvass the area on motorbike to identify patrols and shape routes.³⁰

Across many regions in Africa characterised by longstanding levels of high mobility, the smuggling industry has significant local legitimacy and is a key source of income and employment. For many nomadic communities, providing smuggling services is a core livelihood and not traditionally perceived as immoral. Smugglers often come from the same communities as their clients, and the interests of both are aligned in the safe journey of the migrant. The smuggler relies on his or her reputation to drum up business. Smuggling is not an inherently exploitative industry and has long constituted an important source of community resilience.

The more difficult a stretch of the journey becomes to traverse independently, the more important the services provided by smugglers. Hostile approaches to irregular migration, which often manifest in enhanced border control and the militarisation of migration control, thus swell the demand for smugglers.

Across many regions in Africa, the smuggling industry has significant local legitimacy and is a key source of income and employment

Such approaches also make migrant journeys riskier. The smuggler has to operate more clandestinely to evade interdiction, making the journey more dangerous for the migrant. Smuggling networks professionalise in order to succeed in such challenging environments, and organised crime groups are attracted to enter the market (an issue explored further in Part 3 of this report).³¹

4. Distinguishing between human smuggling and trafficking

It is important to distinguish between the smuggling of migrants, as described above, and human trafficking, as they are distinct crimes requiring separate policy responses.

Human trafficking constitutes three elements: (i) an 'action', being recruitment, transportation, transfer, harbouring or the receipt of persons; (ii) a 'means' by which that action is achieved (by threat or the use of force, or other forms of coercion, e.g. abduction, fraud, deception, abuse of power or a position of vulnerability) and the giving or receiving of payments or benefits to achieve consent; and (iii) a 'purpose' – namely, to exploit.³²

In distinguishing between the two it is important to note that smuggling commences as a willing transaction between migrant and smuggler, a bilateral contract for services. Although in some cases smuggling arrangements may end in trafficking, the vast majority do not, and the migrant bids farewell to the smuggler at the end of the journey.

The arrangement, for a fee, of an individual's journey on a false passport from Kenya to Saudi Arabia, where the individual then seeks work independently, is an example of smuggling. Were this individual tricked into travelling to the Middle East through a promise of employment as a maid, and then trapped in their employer's house, passport confiscated and wages unpaid, this becomes trafficking. The latter example, a clear example of trafficking, is true for thousands of East African nationals. A significant proportion of trafficking is harder to identify.

Although human smuggling and trafficking are distinct crimes under international law, in practice they are widely recognised to exist on a continuum, as migrants can move between dynamics that have characteristics of each phenomenon while on a single journey. However, the elements of each crime differ, as do the policy responses required.

This report focuses on human smuggling, considering human trafficking only when it intersects with human smuggling on the migrant trail and in destination countries.

5. The role of smugglers in asylum system mechanics

Forced displacements across the globe have increased dramatically in the last seven years. As at June 2019 over 70 million people had been forcibly displaced globally, with an additional 37 000 daily fleeing their homes due to persecution or conflict.³³ A significant proportion of these are displaced within their own countries, while over 30 million of these are refugees or asylum seekers who have moved outside their country of origin.³⁴

The international framework governing refugee protection is straining under this pressure. However, it remains crucially important, as was recognised in the 2018 Global Compacts which, while non-binding, were stated to 'represent the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees'.³⁵

A significant proportion of this displacement occurs in Africa; in 2018, seven of the top 10 refugee source countries were on the continent.³⁶ However, it is key to recognise that most of such movement is intra-continental, with the vast majority of refugees hosted in neighbouring states – Uganda and Sudan constitute two of the top five refugee host countries globally.³⁷ Given limited avenues for legal movement, and the contexts in which many are forcibly displaced from their country of origin, a significant proportion are then forced to move irregularly and, as explored above, will be reliant on the services of smugglers for part or all of their journey.

Refugees are granted a range of protections under international law, both within standalone instruments, including the 1951 Refugee Convention, and in the broader international human rights legal framework, including the Universal Declaration of Human Rights which enshrines the 'right to seek and be granted asylum in a foreign territory'. However, states' obligations under international refugee law are only activated once the refugee reaches the relevant territory. Partly due to this, the response of most destination states to record-breaking human displacement has focused on narrowing routes for legal movement. This not only breaches the onus on states to interpret their obligations under international treaties 'in good faith',³⁸ but swells

demand for smugglers, making refugees reliant on the services they provide to call down their rights under international law.

The translation of the criminalisation obligations regarding the 'smuggling of migrants' in the Smuggling Protocol into the national corpus of a number of countries in Africa (and internationally) as detailed in Part 3 below has widened the scope of the term 'smuggler', with serious implications for those supporting refugees and asylum seekers who are moving out of contexts of persecution.

While the Smuggling Protocol sought to 'exclude smuggl[ing] migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers',³⁹ partly by stipulating that the intent of the perpetrator be for material or financial benefit, this is often not reflected in domestic laws criminalising the smuggling of migrants in Africa and more broadly ([see section 9.3](#) for a discussion of the central position of the 'financial or material benefit' to the smuggling offence).

Most of such movement is intra-continental, with the vast majority of refugees hosted in neighbouring states

Consequently, those smuggling refugees and asylum seekers risk the same sanctions as organised crime groups moving migrants for profit. Although judicial discretion can mitigate this risk in some contexts, mandatory minimum sentencing regimes, in place across a number of domestic smuggling offences in Africa, remove such discretion (explored in [section 9.7 below](#)). The classification of those supporting refugees crossing international borders as 'smugglers' further cements the relationship between refugees and smugglers, underscoring the reliance of refugees on smugglers, and their vulnerability when law enforcement operations increase the risk of engaging smugglers' services.

6. Smuggling narratives

Over the last decade the focus of African and EU policy on the phenomenon of 'irregular migration', and linked to this the (in some cases rhetorical) focus on human smuggling, has spiked. This can be tracked in the rhetoric used in intra-continental⁴⁰ and African-EU policy documents regarding migration. Franzisca Zanker's analysis of over 76 such policy documents found that the use of the term 'irregular' almost tripled in African and EU policy documents between 2005 and 2016, while terms depicting states' policies governing irregular migration as a 'fight' or 'combat' almost doubled across the same time period.⁴¹

Similarly, the growing focus on human smuggling can be tracked through African and EU policy documents between 2005 and 2016.⁴² The oft-used label of 'migration management' has become an increasingly clear euphemism for restricting 'unmanaged', i.e. irregular, migration.⁴³

A number of governments in Africa have been found to repeatedly over-represent irregular migration flows, with the Algerian government claiming in April 2018 that over 500 irregular migrants were entering Algeria daily, an estimate far outstripping those of local and international organisations working in the region.⁴⁴ These projections justify further investment in the 'fight' against irregular migration – more specifically, further funds channelled into border controls. In Algeria this has included the construction of a sand mound (known as a 'sand berm') along the borders with Mali, Niger and Libya.

As state rhetoric increasingly characterised migration governance as a 'fight' against irregular migration, which was depicted as a destabilising force threatening state sovereignty and national security, there was a growing need for a clear opponent. The impact of this has been twofold: the demonisation of migrants across media and political discourse and the widespread characterisation of human smugglers as the criminals driving migrants to take unsafe journeys that compromise their safety.

Media and political discourse play a significant role in legitimising draconian counter-migration measures,

shaping public anti-migration sentiment while failing to publicise the significant economic and social benefits of migration. This has been recognised in the Global Compact for Migration which commits states to promote 'evidence-based public discourse to shape perceptions of migration', without which public support for measures encouraging legal migration will continue to be eroded, limiting political space for implementing such policies.⁴⁵

States are able to sanctify repressive border control measures by portraying them as ways to protect migrants

The increasingly combative language surrounding human smuggling is evocative of the war on drugs, leading a number of commentators to identify possible similarities in the approach to both illicit markets. The clear failure of the 'war on drugs' should constitute a lesson against the burgeoning 'war on smuggling'. More specifically, the growth of significant underground violent economies feeding the demand for drugs forced onto the black market by prohibited licit access should act as a warning against feeding demand for smuggling services by closing legal routes to migration.⁴⁶

As the 'war on smuggling' is usually 'tackled' in broader migration policies, this risks the blurring of opponents, driving a fight against migration writ large. Illustratively, during a visit to Niger to commit \$474-million in aid, French President Emmanuel Macron was quoted in international news as pledging to drive towards 'the lasting stabilisation of Libya and the fight against migration and human trafficking'.⁴⁷

The focus of states' rhetoric on human smugglers has been characterised as 'virtue signalling',⁴⁸ whereby states are able to sanctify repressive border control measures by portraying them as measures seeking to protect migrants from exploitation by criminals.

This also acts as a displacement activity, shielding migrants, and the blocking of irregular migration, as the true focus of border control. This is perfectly illustrated in the European Agenda on Migration published in 2015 which characterised 'action to fight criminal networks of smugglers and traffickers [a]s first and foremost a way to prevent the exploitation of migrants by criminal networks'.⁴⁹

The dual focus of the statement on smuggling and trafficking is common – the term 'smuggling' occurs alongside 'trafficking' in over 50% of the usage of the term 'smuggling' across the African, EU and EU-African policy documents analysed by Zanker.⁵⁰ Twinning the two phenomena, distinct crimes under international law, blurs the distinction between traffickers and smugglers, effectively eradicating the agency of migrants who have made carefully calibrated decisions to move. Instead migrants become passive objects of criminal exploitation – a phenomenon clearly deserving of a law enforcement approach and thus justifying an increasing securitisation of borders and migration 'governance'. The desire to move, which sits at the core of modern migration and is most difficult to address, can therefore be conveniently ignored.

In cases where the desire to move is addressed, policy documents often posit 'legal migration' routes as the solution. Indeed, both EU and African policy documents contain a dual focus on 'legal migration and mobility' and 'irregular migration and trafficking'.⁵¹ However, investment in measures to counter the latter, manifesting predominantly in enhancing border control, has significantly outstripped measures implemented to enhance legal migration pathways across most states in Africa and the EU.

Illustratively South Africa, a significant destination country in south-south migration, outlined a number of measures designed to facilitate legal migration and regularisation in the 2017 White Paper on Migration published by the Department of Home Affairs. Measures outlined in the White Paper included growing regularisation and visa programmes. The White Paper also listed various

recommendations to further securitise South Africa's borders and curtail the rights of refugees. The former set of measures stalled, with none experiencing any tangible progress, while the latter quickly progressed. Legal amendments to South Africa's refugee legal framework were enacted shortly after the White Paper was published.⁵²

The topic of legal migration can be characterised as experiencing the greatest 'discourse gap' in African and EU migration policy rhetoric: broadly supported in policy documents, but thoroughly restricted by the majority of practical measures.⁵³

The desire to move, which sits at the core of modern migration is most difficult to address

While anti-migration rhetoric continues, progressive reforms to enhance legal migration on paper will continue to stall while policies to enhance migrant detention and interdiction accelerate through government, in breach of the state's reiterated commitments to 'use migrant detention only as a measure of last resort'.⁵⁴ Such state measures, together with growing forced displacement levels, driven by violence, conflict and climate change, among others, means that a growing proportion of modern movement is irregular. While the focus of states remains on blocking (or in many cases diverting) this movement, smugglers will become increasingly pivotal to modern migration.

6.1. Pan-Africanism versus border control

Within Africa there is a disjuncture between smuggling narratives, at the national, regional and continental level, as an element of the broader discussion surrounding the role of borders. 'Open borders' play a key role in the Pan-Africanism touted by the African Union, envisaged to 'allow for robust

trade ... [and] contribute to integration, prosperity and peace', with an 'integrated continent' being one of the goals of the AU's Agenda 2063.⁵⁵ The AU's vision of continental progress requires free movement of African nationals across the continent, as promulgated through various instruments, including but not limited to the AU Migration Policy Framework (2006), the Common Position on Migration (2015), and most recently the AU Free Movement of Persons Protocol, formally adopted in 2018.⁵⁶

Even within the AU's policies there is ongoing tension between the desire to control and regulate the cross-border movement of people, and 'open borders' as an aspirational goal. For example, three of the five pillars of the AU's Border Governance Strategy relate to border security, governance, or management.⁵⁷ Although these themes are expressed in terms of broad 'governance' rather than restrictive 'management' (a term coined by the EU and which the AU actively moves away from), there continues to be a focus on regulating borders.

Historically, the AU's strategies have in many cases proved toothless in enforcing compliance

There is significant variation among the stances of the regional economic communities (RECs) regarding free movement. Notably ECOWAS (Economic Community of West African States), ECCAS (Economic Community of Central African States) and the EAC (East African Community) have longstanding regional freedom of movement protocols. However this does not guarantee freedom of movement, with ECCAS imposing extremely high visa requirements, even within the RECs.⁵⁸

The focus of AU member states themselves is predominantly on sovereign borders, as illustrated by the glacial pace of ratification of the protocol on

freedom of movement. This contrasts to the rapid ratification of the continental African Continental Free Trade Area, which came into force little more than a year after inception. The AU Free Movement of Persons Protocol was notably absent from the agenda for the July 2019 AU summit in Niger, and while signed by 32 countries, it had only been ratified by four as at July 2019. Fifteen countries need to ratify the treaty before it comes into force.⁵⁹

Although signing does not bind a state to comply with the protocol, or indeed to ratify it in the future, it does mean that under international law a state 'is obliged to refrain from acts which would defeat the object and purpose of a treaty'.⁶⁰ Together with the principle that states should comply with their obligations under international law 'in good faith',⁶¹ signing should in theory prevent states from taking action to increase the restrictiveness of their immigration policies in relation to African nationals.

Historically, the AU's strategies have in many cases proved toothless in enforcing compliance. But they have had greater impact in limiting repressive actions by states which, perhaps more conscious of the reputational ramifications rather than obligations under international law, hold back from taking domestic action which contravene protocols or strategies they have signed. Nevertheless, the glacial progress in ratifying the Free Movement of Persons Protocol calls into question whether it will ever come into force or whether it will remain a largely symbolic measure, similar to the pan-African passport introduced in 2016 which has had limited impact in practice.

Perhaps a more practical indication of the position of individual states on trans-continental migration are their visa policies. Visa restrictiveness for African nationals is decreasing across the continent, as celebrated and publicised by the African Development Bank, but progress is extremely slow.⁶² Meanwhile, ever more African countries are increasing spending on border control and regional policy documents reflect increasingly strict approaches to movement, even across previously permissive areas such as ECOWAS.

7. Smuggling of migrants: the need for a legal response

Although frequently dominating current global headlines, human smuggling did not become the subject of multilateral international discussions until the 1990s.⁶³ Neither did it feature as a significant concern at national state level until the late 1980s (with the exception of the US in response to Chinese immigration).⁶⁴ However, relatively quickly after it was identified as a concern, it was recognised as a transnational phenomenon requiring an international response framework.

The first international policy response in the form of a UN 1993 resolution dealing with 'the prevention of smuggling of aliens' focused on migrant smuggling by sea, titled: 'Enhancement of Safety of Life at Sea by the Prevention and Suppression of Alien Smuggling by Ship'.⁶⁵ This reflects the same dual focus, on the protection of migrants and an interdiction against smuggling, that can be tracked through to Operation Sophia in 2015.⁶⁶ Further, it demonstrates a clear focus on the 'international criminal groups' facilitating the smuggling, although at this stage the phenomena of trafficking and smuggling were treated as one.

Policy positions were quickly found to be insufficient and instead a 'legal lacuna under international law is increasingly perceived as an obstacle to the efforts of the international community to cope, in an efficient manner, with the phenomenon of smuggling of illegal migrants for criminal purposes'.⁶⁷

7.1. Smuggling becomes a crime: the Smuggling of Migrants Protocol

The entry into force of the Smuggling Protocol in 2004 first criminalised the smuggling of migrants as a form of organised crime under international law. The Smuggling Protocol is one of three additional Protocols adopted by the UN in 2000 to supplement the United Nations Convention against Transnational Organized Crime (UNTOC), with the additional protocols known as the 'Palermo Protocols'. The other two Palermo Protocols addressed trafficking in persons, and the manufacture and trafficking of firearms.⁶⁸

The selection of human trafficking and human smuggling as two of the three specific types of crime requiring a specific protocol under the UNTOC clearly highlights how they had become a priority for contributing states. (While African countries were poorly represented in the initial plenary discussions surrounding the drafting process for the UNTOC, representation increased as the discussions progressed, with Francophone countries particularly vocal).⁶⁹ The transnational nature of human smuggling, and the perceived threat it posed to the imperviousness of national borders, constituted a clear impetus for this priority.

There is significant criticism of the Smuggling Protocol, primarily from perspectives which would prefer further emphasis on the protection of human rights. But it should be borne in mind that the protocol, like all instruments of international law, is the result of state compromise. The current provisions regarding non-criminalisation of migrants, protecting and assisting them, should therefore be viewed in this light.

7.1.1. Criminalising smuggling: arming the right fight

Quickly after becoming the subject of multilateral discussions in the 1990s, the smuggling of migrants was identified as a 'very special form of organised crime', thus requiring a specific legal convention.⁷⁰ In later communiqués more specifically relating to Africa, the UN identified the existence of a legal framework on human smuggling in line with the UNTOC, its protocols, and the national legislative corpus, as a 'pre-requisite to ensure the effectiveness of the fight against these phenomena' by African states.⁷¹

Although this is no doubt correct, the 'phenomena' against which the fight is waged should be focused on human smuggling as a form of organised crime, as envisaged under the Smuggling Protocol, and not merely the facilitation of irregular migration, or irregular migration itself.

The Smuggling Protocol is inherently attached to the UNTOC, and should not be read in isolation. This is sometimes ignored, as the Smuggling Protocol and

the additional Palermo Protocols have taken on an independent life of their own.

A danger in reading the Smuggling Protocol in isolation is that it dilutes the focus on organised crime and therefore on organised crime networks involved in smuggling. Instead, smuggling becomes embedded within rhetoric and enforcement action, which is predominantly focused on blocking irregular migration and concentrates on the migrant as the key actor. This has certainly been the case in the majority of African states considered in this report. Instead, the 'fight' should be focused on human smuggling as a form of organised crime, as envisaged under the Smuggling Protocol, and high-level smuggling operators should be the priority.

The 'fight' should be focused on human smuggling as a form of organised crime, as envisaged under the Smuggling Protocol

The UNTOC is a criminal justice convention. The Smuggling Protocol, as its adjunct, should not be perceived as providing the structure for holistic responses to irregular migration. A holistic approach to countering smuggling should incorporate a whole raft of perspectives focusing on the migrant, including prevention and victim support, which are missing from the Smuggling Protocol.

Elements focusing on the welfare and needs of the migrant are outlined in international human rights and migration law instruments. The focus of the Smuggling Protocol is specifically on the perpetrators, namely smugglers, as criminal agents. Its provisions protecting the migrant from prosecution for dealing with smugglers take a similar approach, concerned with demarcating the difference between the perpetrator and the migrant.

7.1.2. A tale of two protocols: Smuggling and Trafficking Protocols

Although enacted simultaneously, the journeys of the Smuggling Protocol and the Trafficking Protocol diverged immediately.

The Trafficking Protocol triggered a wave of legislative reform and abundant policy measures seeking to target this phenomenon, which quickly rose to the top of the international agenda. In contrast, the reaction to the Smuggling Protocol was desultory, despite widespread ratification.

Further the definition of trafficking under the Trafficking Protocol received widespread acceptance and can now be tracked across the vast majority of legal instruments criminalising such offences. In contrast, the Smuggling Protocol's definition of the smuggling offence and criminalisation obligations were far less strictly echoed in national legislation internationally, including in Africa.

The disparity in adoption of the two protocols reflects the uneven focus given to each by the UNODC.

The UNODC, as an almost entirely voluntary-funded agency, is necessarily driven by the priorities of donors, whose interest in trafficking has historically far outstripped their interest in smuggling.⁷² Within the UNODC, the team dedicated to countering trafficking was far larger than that relating to smuggling. The agency as a whole was far less focused on driving engagement with, and adoption of, the Smuggling Protocol, reflecting the interests of donors at the time.

The UNODC's drive surrounding the Trafficking Protocol has greatly increased awareness of trafficking. In some contexts it has encouraged a perception of trafficking as a domestic concern, and not merely an internationally imposed norm. However, widespread confusion regarding the distinctions between human smuggling and human trafficking means that such enhanced awareness has also vilified smugglers, bolstering the perceived need for sanction and interdiction as the primary response to smuggling.

8. Smuggling becomes a crime in Africa

As of 2019, 40 of 54 African states had ratified the Smuggling Protocol.⁷³ The research for this report (pursuant to the methodology set out above) found that far fewer – namely 22 – had criminalised in national law the offence of ‘smuggling of migrants’ broadly as defined in the Smuggling Protocol (notably including the focus on the intent of the perpetrator being ‘for financial or material benefit’). This is analysed in Part 3 of this report.

In contrast, aligned to the disparity in international focus on the Trafficking and Smuggling Protocols outlined above, as of the end of 2019, 85% of countries in Africa had domestic laws which criminalise all or most forms of trafficking, substantially in line with the Trafficking Protocol.⁷⁴

Of course far more than 22 countries in Africa have legal provisions which penalise the facilitation of irregular migration (and therefore do not specify the intent of the perpetrator). Many pre-date the Smuggling Protocol. However, these are typically structured as ‘aiding and abetting’ the breach of administrative immigration requirements and fall beyond the scope of this paper.

8.1. Drivers of legal reforms that criminalise smuggling

The drivers behind legislative reform seeking to criminalise smuggling have played a significant role in shaping divergence from the Smuggling Protocol. They have guided the subsequent focus of enforcement and moulded the impact of defining human smuggling practices as offences.

Drivers can broadly be divided into external and domestic, although in most contexts the two intersect. Firstly, we analyse whether, and how, destination countries can be external drivers for this legal reform. Secondly, we consider a number of case studies which illustrate how in each country external and domestic factors have combined to create the environment required for this reform.

8.1.1. Influence from destination countries

The role of the EU in shaping the criminalisation of migrant smuggling from their countries of origin and through their transit in Africa is widely recognised. The role of other key destination countries on African migration routes, and whether they have sought to influence the criminalisation of migrant-smuggling in the migrants’ countries of origin, remains largely unexplored. Although touched on below, it does not constitute the primary focus of this report, and continues to be an incompletely mapped area.

8.1.2. The eastern route: the Gulf States

The number of people moving irregularly from the Horn of Africa through Yemen and on to the Gulf States (the eastern route), predominantly Saudi Arabia, is significantly higher than the number of those moving towards Europe from that region. In 2019 arrivals in Yemen, many of whom then seek to travel on to the Gulf countries, spiked, with figures for the first six months of the year exceeding all previous records.⁷⁵

In response, Saudi Arabia is estimated to have deported over 260 000 Ethiopians, at a rate of roughly 10 000 per month, between May 2017 and March 2019, with deportations continuing at a similar rate.⁷⁶

However, the scant rights granted to irregular migrants, and their pivotal role in domestic labour and the construction industry,⁷⁷ call into question the political drivers for Gulf States in stopping such irregular movement, despite such highly publicised deportations.

Certainly, pressure from countries of origin does not appear to feature highly. Ethiopia, the country of origin for the majority travelling on the eastern route, imposed a ban on labour migration to the Gulf States in 2013 in response to mass expulsions and reports of endemic abuse of Ethiopian migrants. This had no impact on the numbers travelling; travel agencies continued to operate, if marginally more clandestinely, and overland routes increased, with many women travelling to neighbouring countries and flying from there.

In September 2018 Ethiopia lifted this ban for countries with whom it had entered into bilateral

labour agreements (namely Qatar, Saudi Arabia, and Jordan)⁷⁸ and enacted legislation seeking to enhance the protection of migrant workers.⁷⁹ Since the accession of Biy Ahmed as prime minister of Ethiopia, who made the kingdom his first official visit, Ethiopia has drawn ever closer to Saudi Arabia and avoided publicly criticising recent deportations, instead praising Saudi Arabia for paying the fares of deportees.⁸⁰ The choice of Saudi Arabia as the site for the historic peace deal between Eritrea and Ethiopia further cements this close relationship.

A cooperation agreement signed between a number of East African and Horn of Africa countries in January 2020 is a positive step towards a more unified and powerful negotiating position with the Gulf States on issues of labour migration and migrant worker safety.⁸¹ The influence of the Gulf States on migration and smuggling policies in countries of origin, including Ethiopia, remains unclear.

8.1.3. The south-south route: South Africa

The vast majority of migration in Africa is intra-continental, and the south-south route is a significant and growing migration route, with South Africa the most common destination country. In multilateral meetings, South Africa has reportedly asked transit countries on the south-south route to step up efforts to counter irregular migration. But the country does not appear to have publicly sought to significantly influence policymaking regarding human smuggling in the south-south route countries of origin and transit. This is likely in part because inbound irregular migration from neighbouring countries dwarfs that from elsewhere on the continent, and for these human smuggling is (at least perceived to be) less key.

Yet irregular immigration is a key policy concern in the country, with South Africa repeatedly taking action against irregular migration, partly in the form of significant expulsions. The government reported that it had deported over 10 000 'undocumented foreigners' in the first six months of 2019.⁸² A raft of policy and legislative changes across 2017-2019, which have followed the endemic criminalisation of migrants across political and public discourse,⁸³ have made South Africa

an increasingly hostile destination country for African migrants. A growth in xenophobic attacks, in particular on Somali nationals, has had a similar effect.

The extent to which migrants have been demonised in the South African media is illustrated by a television news report aired in 2019 titled 'Borders: Guns, Drugs and People', relating how 'the military play cat and mouse with criminal syndicates'. A clip shows heavily armed border officials on a night chase, accompanied by threatening war music. A woman in sandals with an infant strapped to her back is captured at gunpoint, and the programme presents her case as an example of the 'criminals' border officials are up against.⁸⁴

Migration is repeatedly linked to national security concerns, with policy documents issued by the government, and in particular the Home Affairs department, linking migrants with terrorism and drug trafficking (while presenting no evidence to substantiate such connections).⁸⁵

The vast majority of migration in Africa is intra-continental, and the south-south route is significant and growing

However, although irregular migration is a key political concern, human smuggling is largely absent from public discourse in South Africa. This is reflected in its lack of domestic smuggling offence, defined broadly in line with the Smuggling Protocol (i.e. including the focus on the intent of the perpetrator. Facilitation of irregular movement is criminalised in immigration legislation). In 2018 South Africa was in the process of drafting a tailored human smuggling law, in the context of the EU funded GLO-ACT project, but progress appears to have stalled. The draft bill received significant push-back, particularly in relation to the protection provisions of the Protocol and a perception that it would introduce greater rights for smuggled migrants.⁸⁶

The lack of focus on smugglers is likely in part due to the fact that smugglers play a lesser role in the irregular entry of migrants into South Africa on the southern route than they do in either the eastern or northern migration routes. Overland irregular migration into South Africa is predominantly facilitated by the widespread corruption of border officials. Although a significant and lucrative smuggling economy exists within the country, supported by heavy state collusion and specialising in the production of fraudulent documentation, smugglers are not held accountable for the bulk of irregular migration in the political or public psyche.

Consequently, although significant resources are allocated to the increasingly securitised 'fight' against irregular migration, smugglers are not the key opponent; irregular migrants are. Logically, any influence brought to bear on countries of transit and origin would therefore focus on irregular migration flows more broadly, rather than focusing on the role played by human smugglers.

8.1.4. The northern route: the European Union

The EU has been singularly involved as an external player driving the criminalisation of smuggling across Africa. The EU's focus on stopping continental migration to Europe is clearly reflected in the shape of many domestic smuggling offences, particularly in the widespread criminalisation of emigration, as discussed further in [section 9.6](#).

The EU has pursued a strategy of externalising its borders and outsourcing border control into 'buffer zones', most notably Libya and Sudan. This policy has been widely criticised.⁸⁷ Although crudely successful in decreasing arrival numbers since 2015, the strategy has also fuelled ongoing instability in such buffer zones.

A 2016 EU self-analysis noted that 'at least €17 billion has been spent on deterring refugees and migrants through tighter border controls and bilateral agreements'.⁸⁸ The same analysis then cites the success of 'bilateral agreements, such as the EU-Turkey deal'. This deal was widely criticised for violating both international and European law prohibiting collective expulsion of asylum claimants and refugees.

It also arguably breaches the non-refoulement principle under international law which forbids a country receiving asylum seekers to return them to a country in which they would be in danger of persecution.⁸⁹

The EU's analysis concludes that 'these measures have been effective in reducing flows'.⁹⁰ This narrow focus on 'reducing flows' has led to EU policy failing to assess the wider impacts of its measures. It has also contributed to the EU's imperviousness to critiques which evaluate its policy measures against wider parameters, including their effects on human rights.

The EU has been singularly involved as an external player driving the criminalisation of smuggling across Africa

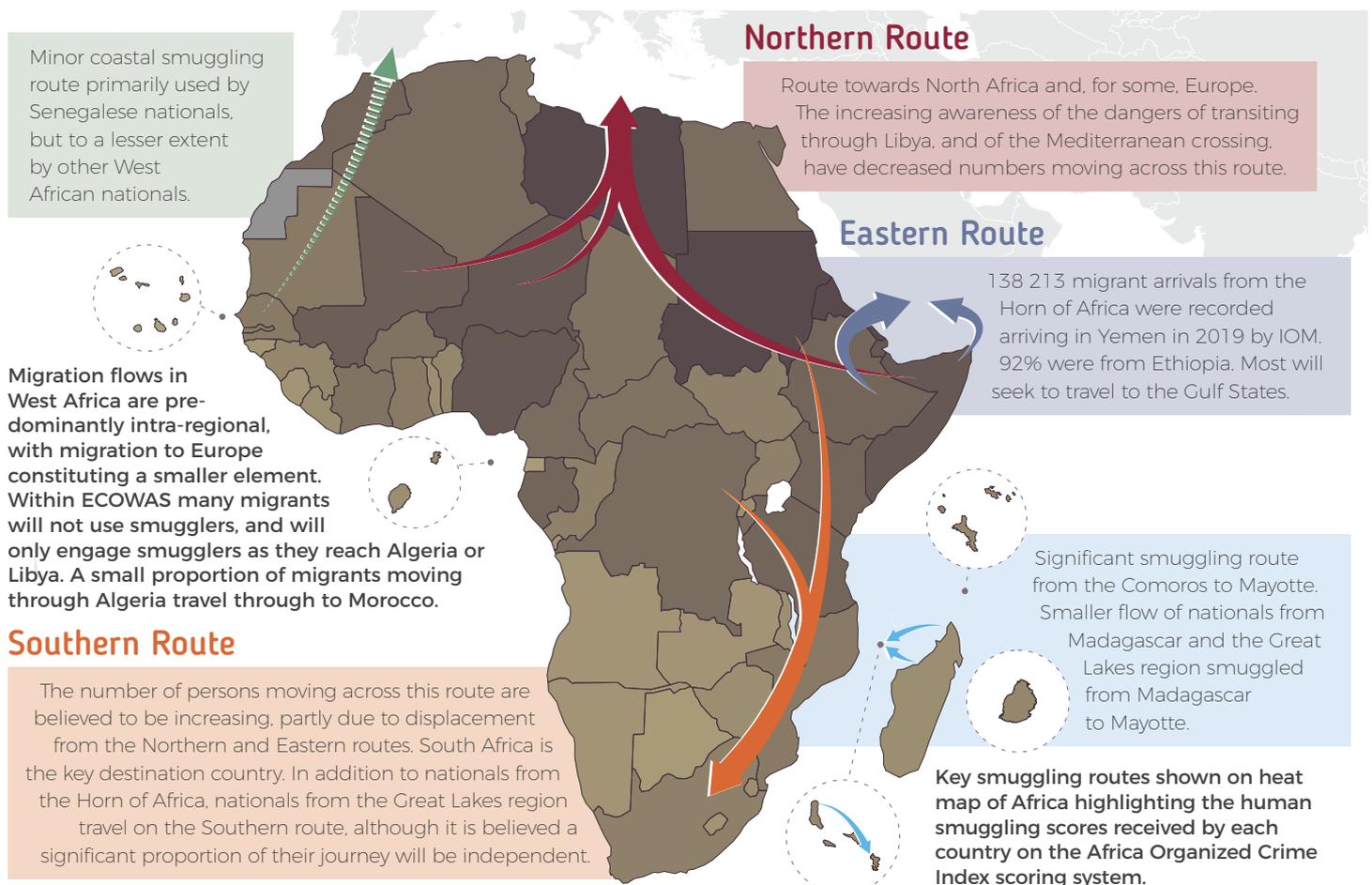
The EU's 'migration management' strategies rely on a range of largely unaccountable state and non-state actors. The approaches of these allies to 'migration management', a term coined by the EU, include arbitrary detention, forced returns in breach of the non-refoulement principle, and widespread denial of migrant rights.⁹¹ This is in breach not only of international law, but of the 2018 commitments by states to 'uphold the prohibition' on non-refoulement in the Global Compact.⁹² By failing to object to such practices, and implicitly sanctioning them through continuing support, the EU has compromised its leverage in negotiations regarding human rights abuses more broadly.⁹³ To cite one egregious example, the ongoing EU funding for 'migration governance' granted to Sudan legitimised the Sudanese government despite ongoing human rights abuses. It is also likely to have indirectly funded the operations of the Janjaweed militia (now the Rapid Support Forces).⁹⁴

The Algerian government defended its informal December 2014 repatriation deal with Niger for the repatriation of Nigerien nationals living in an irregular context in Algeria, and its 2018 mass expulsions

of migrants (widely recognised to breach the non-refoulement principle).⁹⁵ In doing so, the former minister of foreign affairs, Abdelkader Messahel, underlined that Algeria 'is facing the same problems as Europe.' This implicitly compares the actions of Algeria's government, with those of the EU. Messahel continued, 'We have conducted repatriation operations under arrangements made with neighbouring countries.'⁹⁶ These 'arrangements', reportedly more an informal 'gentlemen's deal' rather than a permanent agreement, remain undocumented publicly. This is in line with the opacity surrounding Algeria's migration governance more broadly.

The combined pillars of 'development aid ... and security'⁹⁷ which can be tracked through the EU's approach to migration have particularly focused on sub-Saharan Africa. This is clearly reflected in the 'priority countries' of the EU's 2016 'Migration Partnership Framework': Ethiopia, Senegal, Nigeria, Mali and Niger. Significant pools of funding for 'migration governance' accompanies this policy focus. The EU's expenditure on 'addressing the migration crisis' as a bloc, excluding unilateral expenditure from member states, reached €22 billion between 2015 and 2018.⁹⁸

Figure 2 Overview of main overland smuggling routes



Source for data regarding migrant arrival figures: The IOM Displacement Tracking Matrix, as compiled and cited in EUTF Monitoring and Learning System HoA 2019 Annual Report, https://ec.europa.eu/trustfundforafrica/sites/eutf/files/eutf_hoa_2019_-_q4_annual_report.pdf

8.1.5. Case studies: external and internal drivers intertwine

Domestic drivers for the criminalisation of smuggling can broadly be categorised into national security concerns and public pressure, the latter resulting from highly publicised tragedies involving migrant fatalities in the context of smuggling. The section below scrutinises key catalysts for the enactment of legal provisions criminalising human smuggling in three focus countries – Niger, Egypt and Ethiopia – granting insight into the interplay of factors creating the space for legislative reform.

Domestic drivers for the criminalisation of smuggling can broadly be categorised into national security concerns and public pressure

8.1.5.1. Niger

Niger's Loi 2015/36 was the first piece of legislation in Africa devoted solely to smuggling offences. It was hailed upon enactment as a significant success by much of the international community. The trade-off for enacting the law and co-operating to stop irregular migration through Niger was financial. Niger became the top EU aid-receiving country per capita globally.⁹⁹

Niger has been a priority partner for EU actions on migration. This is signalled in the progress highlighted in the EU's partnership framework, namely 'Increased engagement to tackle root causes and assist communities affected by high level of smuggling (i.e. in Agadez) has been put in place.'¹⁰⁰ The 'i.e.' rather than 'e.g.' may be attributed to grammatical error, but it also reflects the focus placed by the EU on Niger's role in 'managing' migration flows to Europe.¹⁰¹

Perhaps this focus is premised partly on the fact that a larger proportion of those moving through Niger

intend to reach the EU as their final destination than do people choosing to move through other countries, such as Mali, into North Africa. The proportion that do seek to reach the EU, at 50%, remains lower than media coverage would suggest.¹⁰² Further, Niger, predominantly a transit country for migration, was likely more amenable to co-operating on countering irregular migration flows than were regional countries of origin. In the latter group, remittances resulting from emigration present a significant contribution to government budgets.

This external pressure was complemented by domestic outrage followed viral footage of the October 2013 tragedy. At least 92 Nigerien migrants, abandoned by their smugglers, died of hunger and thirst attempting to transit the desert towards Algeria.¹⁰³ This created significant traction among elements of Niger's population to strengthen enforcement against human smuggling.¹⁰⁴ Prior to the implementation of Loi 2015/36 no appropriate legal framework for prosecuting human smugglers existed in Niger. Consequently, this traction was in part focused on creating a legal tool to enable the punishment of those responsible.

8.1.5.2. Egypt

After the 2011 revolution and 2013 political transition in which Abdel Fattah el-Sisi, assumed the presidency, Egypt's national security received greater prioritisation. Immigration laws and policies, viewed by the incoming government as lax and overly sympathetic to refugees under the previous administration, were tightened. Irregular cross-border migration, as part of border control, became a reputational concern, 'portray[ing] to the world that Egypt is unable to secure its borders' in the words of one former military official.¹⁰⁵

The enactment of Egypt's Law 2016/82, 'On Combating Illegal Migration & Smuggling of Migrants' was embedded in this broader policy and legal shift.

El-Sisi's security drive was particularly concerned with threats to Egypt coming from Libya, leading to increased military and police operations across the borders under the auspices of counter-terrorism operations. But the geographic focus of enforcement

action regarding Law 2016/82 has been on the northern coast of Egypt, where disembarkations were typically destined for Europe.

Geographic constraints certainly shaped enforcement action – it has never been feasible to fully safeguard the 1 150 km Egypt-Libya border, or Egypt's southern borders with Sudan, both of which are in mostly remote desert. Law enforcement operations in these areas has often relied on heavily militarised localised operations to counter specific threats – such as the aerial bombardment of the Rashaida torture camps in the Sinai by the Egyptian government – rather than ongoing territorial control.¹⁰⁶ However, while geographic obstacles played a part, it is also key to recognise the role EU pressure played in driving the coastal focus of state counter-smuggling operations.

The Turkey-EU deal demonstrated that the EU was willing to reward countries active in stemming irregular migration flows, posing an opportunity for Egypt. The government appears interested in more than a monetary payout, which constituted the bulwark of the Turkey deal, and has publicly distanced itself from comparisons with Turkey as a partner to the EU. Interest rather lies not only in enhanced EU aid expenditure and trade collaboration, but in the tacit agreement that the EU will avoid public criticism of Egypt's human rights violations, including its repressive stance towards civil society organisations (CSOs).

A desire to stop Egyptians making the sea passage to Europe, in part due to fears of a brain drain, also drove heightened enforcement, a focus which can be tracked by enforcement that prioritises those leaving the country rather than those entering it (this is discussed further at [section 10.6](#)). Concern surrounding Egyptian irregular emigration spiked following the Rashid shipwreck in September 2016, when over 500 people, the majority Egyptian nationals, drowned close to the coast, about 75 km from Alexandria.¹⁰⁷ Although this was by no means the first such tragedy,¹⁰⁸ the authorities received particularly heavy criticism for a slow response which was perceived to increase fatalities, and the tragedy became a highly publicised scandal.

Law 2016/82 had already passed through Cabinet by the time of the Rashid disaster. However the tragedy accelerated the law's progress through Parliament and shaped subsequent enforcement and policy direction. This included the 'National Strategy on Combating Illegal Migration for 2016-2026', built on three pillars, namely enhancing legal frameworks around smuggling, protecting vulnerable migrants, and raising awareness among Egyptian youth on the dangers of irregular migration (the latter clearly signalling concerns regarding Egyptian emigration).

8.1.5.3. Ethiopia

In 2015 Ethiopia overhauled pre-existing legislation to enact Proclamation No. 909/2015 to 'Provide for the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants'.¹⁰⁹

Ethiopia's decades-long history of vulnerability to labour trafficking through recruitment agencies meant it had well established counter-trafficking programmes and frameworks. But the desire to strengthen its approach to trafficking and increase a focus on smuggling was driven in part by concerns regarding the treatment of Ethiopians abroad. In particular there was concern for the welfare of those travelling across the northern route as awareness of the harm suffered by migrants transiting through Libya grew. Ethiopians, perceived as able to pay ransom amounts in part due to diaspora support, have been particularly targeted by criminals kidnapping for ransom, further driving the government's need to react.¹¹⁰ This was combined with EU pressure to drive enactment of the proclamation.¹¹¹

Proclamation 909/2015 was preceded by provisions governing human smuggling in the Criminal Code 2004, enacted shortly after Ethiopia's accession to the Smuggling Protocol.¹¹² Local law academics and the preface to the proclamation cite the inadequacy of the Criminal Code, and particularly its 'inappropriate penalties' and lack of detail regarding procedural and protection issues, as key drivers for the enactment of Proclamation 909/2015, which provided a more comprehensive legislative framework.¹¹³

Arguably the provisions governing human trafficking, which lacked clear definitions, particularly for male

victims, were those requiring reform. However the wholesale re-drafting of provisions governing both smuggling and trafficking saw the sanctions for human smuggling offences become far more punitive. The basic human smuggling offence in the later provisions attracted similar sanctions to aggravated human smuggling offences (principally concerning contexts where the migrant is put at risk), in the Criminal Code.¹¹⁴

Perhaps due to significant technical assistance provided by external partners, primarily IOM and UNODC, throughout the drafting process, the proclamation was originally drafted and negotiated in English and only later translated into Amharic, creating significant translation difficulties.¹¹⁵

The United States' annual Trafficking in Persons (TIP) report, while not without its detractors, remains one of the most effective global instruments compelling action on trafficking. It assesses legal frameworks to counter TIP as one of its criteria. A desire to perform better in the TIP report reportedly contributed to the enactment of Proclamation 909/2015.¹¹⁶ This desire was also reflected in the spike in reported investigations into traffickers, which tripled from 99 in 2014,¹¹⁷ prior to the enactment of Proclamation 909/2015 in August 2015, to 294 in the 2015 reporting year.¹¹⁸ Meanwhile, the impact of Proclamation 909/2015 on counter-smuggling enforcement appears limited.

PART 2

9. Creating the crime? Legislative frameworks in Africa

9.1. Overview

Pursuant to the Smuggling Protocol, the offence of 'smuggling of migrants' is defined as (i) the procurement of illegal entry of a person who is not a national or permanent resident; (ii) intentionally in order to obtain, directly or indirectly, a financial or other material benefit (Article 6(1)(a)).

This research found that, as at 2019, eleven African states, namely Libya, Niger, Nigeria, Namibia, Guinea, the Central African Republic, Zambia, Mauritania, Eswatini, Mozambique and Djibouti criminalised smuggling offences in line with these minimum requirements.¹¹⁹ A further eleven states have criminalised the offence composed of the two elements (action and intent) stipulated in the Smuggling Protocol, but do not, within the definition of the basic offence, explicitly stipulate that the smuggled migrants cannot be 'a national or permanent resident'. These states are: Senegal, Mali, Kenya, Ghana, Ethiopia, Egypt, Burkina Faso, Algeria, Equatorial Guinea, Lesotho and Guinea Bissau.¹²⁰ The Government of Namibia is reportedly intending

to repeal the current national legislative provisions to counter human smuggling. If this goes ahead, and no additional provisions are enacted, Namibia would have no provisions combatting migrants smuggling.

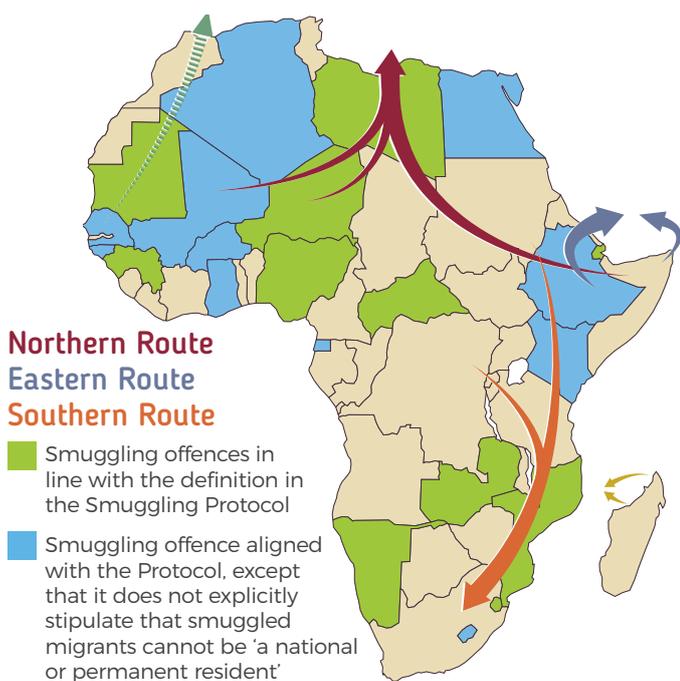
For the purposes of the analysis in this report, (i) the procurement of the illegal entry of a person into a state; (ii) for the purpose of financial or material benefit shall be termed 'smuggling'. In line with this, for the purposes of this report, 22 countries in Africa criminalise smuggling.

While many additional countries criminalise the facilitation of irregular migration, where the intent of the perpetrator is not limited to 'financial or other material benefit', these are not considered in this report. For example, Morocco criminalises the procurement of unlawful entry 'with or without' financial or material gain. It is therefore excluded in this count. Similarly, Tunisia, which has implemented a number of reforms to its Immigration Act following the enactment of the Smuggling Protocol, makes no reference to financial or material gain and is therefore excluded. States including Sudan, Mauritius, and the Gambia dictate legal penalties for the facilitation of irregular migration (without reference to financial gain). These pre-date the

Smuggling Protocol, are clearly framed as administrative immigration offences, and fall beyond the scope of this report.

The Smuggling Protocol requires states to criminalise a wider range of conduct relating to the 'smuggling of migrants', including enabling a person to remain in the state unlawfully,¹²¹ the attempt to commit any smuggling conduct,¹²² aggravated smuggling offences¹²³ and the procurement of fraudulent documents for the purpose of smuggling.¹²⁴ The first two fall beyond the scope of this report; the second two are analysed below.

Figure 3 Map showing key regional smuggling routes, highlighting countries with laws criminalising smuggling



9.2. Distorted Reflections: the protocol and national legal frameworks

Most African states that criminalise human smuggling in domestic laws have diverged from the basic definition of the smuggling offence set out in the Smuggling Protocol.¹²⁵ As noted above, this stands in stark contrast to both the speed and fidelity of translating the Trafficking Protocol into national law across the continent.

In the Global Compact for Migration, states re-committed to 'Adopt legislative and other measures as may be necessary to establish the smuggling of migrants as a criminal offence, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit for the smuggler, and include enhanced penalties for smuggling of migrants under aggravating circumstances, in accordance with international law.'¹²⁶ However, deviation from the Smuggling Protocol, including changing the definition of the basic offence of migrant smuggling, is the norm.

In Africa most domestic provisions go beyond the criminalisation obligations in the Smuggling Protocol. They not only fail to narrow the scope of the basic offence to non-nationals and residents, but also commonly criminalise the facilitation of unlawful emigration, in breach of international law. This may be in part motivated by a desire to curtail irregular migration, and to ensure that the criminalisation provisions operate as a deterrent (although, as explored in [section 9.7](#) below, it is unclear whether this works for smuggling offences).

Divergence from the smuggling offence within the Smuggling Protocol is by no means particular to Africa – a UNODC 2017 study of 13 countries found that none had translated the Smuggling Protocol's definition of 'smuggling of migrants' into domestic legislation unchanged.¹²⁷ Given that these countries represent a range of countries of origin, transit and destination, widely different jurisdictions and culture, and a combination of civil, common and mixed law systems, they present a representative picture globally.

These findings show that one of the key pillars of the Smuggling Protocol, namely the definition of the basic smuggling offence, has been widely disregarded. Too much focus has been placed on the optics of enacting laws criminalising smuggling, and too little on the shape of those laws and their likely impact if implemented in the relevant socio-political contexts.

The sections below analyse how African domestic legal frameworks have translated smuggling offences, considering the key points of divergence from international law.

9.3. A matter of intent: material or financial benefit

A key element of the Smuggling Protocol definition of 'smuggling of migrants' is the intent of the perpetrator to gain 'financial or material benefit' (shortened to 'benefit'). This incorporates part of the definition of an 'organised crime group' in the UNTOC, which requires the group to operate for 'material or financial benefit', tying the smuggling offence to organised crime operations more broadly. The Smuggling Protocol includes the benefit element both in the definition of the basic smuggling offence (Article 3) and in the obligation to criminalise smuggling (Article 6).

The UNODC's official record of the negotiations surrounding the Smuggling Protocol (known as the '*travaux préparatoires*') make clear that the benefit element was included to enshrine the protocol's focus on the activities of organised crime groups for profit. They were careful to ensure that the facilitation of irregular migration for no material motive, and in particular on the basis of family ties or for humanitarian reasons, fell beyond the scope of the UNTOC and the Palermo Protocols.¹²⁸

The Smuggling Protocol sets minimum standards for states to comply with in criminalising the smuggling of migrants. States are permitted to adopt higher or stricter standards into their national legislation. Whether the exclusion of the benefit element constitutes a 'stricter' standard permitted by the Protocol, or a fundamental deviation from the criminalisation obligation in breach of the Protocol, has been the topic of discussion within international organisations.¹²⁹

The author would argue it falls squarely in the latter, distorting the core interpretation of 'smuggling of migrants', diluting the required link to organised crime and enabling a far greater scope than envisaged under the Smuggling Protocol. In line with this, countries not incorporating this element have been excluded from consideration in this report. This is true even in jurisdictions which otherwise closely follow the 'smuggling of migrants' offence as defined in the Smuggling Protocol closely, such as Morocco, which amended its provisions criminalising the smuggling

of migrants following the coming into force of the Smuggling Protocol.

Morocco's Law 02/03 explicitly criminalises the facilitation of irregular entry or exit 'free of charge or onerous'.¹³⁰ Although a reform of Law 02/03 was expected to align further the definition with that of the Smuggling Protocol,¹³¹ this has not yet occurred. Benefit is not considered an aggravating factor of the offence, nor does legislation incorporate an exclusion for facilitation of irregular entry/exit for humanitarian reasons. Consequently, the offence under Law 02/03 is better interpreted as criminalising facilitation of irregular entry or exit, and fails to focus on organised crime, or consider the intent of the perpetrator. Botswana's Anti-Human Trafficking Act (Amendment) Act 2018 similarly criminalises smuggling 'whether or not' for benefit, and is therefore excluded from this analysis.¹³²

Where the smuggling is being undertaken for profit, a focus on this financial element can help target high value prosecutions rather than low level operators

Including benefit into the definition of the basic smuggling offence not only limits its scope but was identified by local prosecutors interviewed as part of 2017 UNODC research to be of significant strategic value in directing the prosecution of such offences.¹³³ Where the smuggling is being undertaken for profit, a focus on this financial element can help target high value prosecutions rather than low level operators. Where no profit incentive exists and the 'material gain' is rather in the form of services (included within the broad definition of benefit in the Smuggling Protocol), this can indicate a trafficking dynamic, or in some cases indicates that facilitating movement is linked to terrorism.¹³⁴

Egypt's Law No 82/2016, although retaining the element of 'material gain' in the basic smuggling

offence, broadens this to include 'moral' (or alternative translations would suggest 'symbolic') gain without reference to 'financial' gain.¹³⁵ Benefit is intended to be interpreted broadly and is typically not limited to financial payment; it could for example include a reduction in fee paid, a free train or aeroplane ticket, or provision of works or services (such as sexual gratification).¹³⁶ While some states have chosen a narrower definition premised entirely on financial gain, many have followed this wider definition.¹³⁷

Nevertheless, the explicit inclusion of 'moral gain' into both the basic smuggling offence in Egypt's Law No 82/2016 and the definition of 'gain' would appear to push the interpretive parameters even wider. It would encapsulate both the facilitation of irregular migration for purposes of humanitarian or close-family assistance without any material benefit, as neither is explicitly excluded. The former is commonly carved out of the scope of smuggling offences in legislation which is silent on benefit, while both are beyond the scope of the offences the protocol seeks to govern. Indeed, the UNODC legislative guide for implementing the Smuggling Protocol emphasises that smuggling by persons or organisations for 'altruistic' reasons, such as of asylum seekers, should not fall within the basic smuggling offence.¹³⁸ Yet such actions would almost certainly fall within scope of Egypt's Law No 82/2016.

Globally, such exclusion is not unusual – the EU chose to exclude benefit from its definition of the basic smuggling offence, and 2017 UNODC research on the topic found that 10 of the 13 countries whose domestic legal frameworks were reviewed as part of the study excluded the benefit element, although it was typically taken into account at the sentencing stage.¹³⁹

The EU Facilitator's Package has been the focus of significant criticism for failing to incorporate the benefit element as part of the basic smuggling offence. Eighty-eight percent of respondents in a 2017 public consultation on the Facilitator's Package disagreed with its exclusion, in particular due to the risk of criminalising humanitarian assistance.¹⁴⁰ The EU predicated its decision to exclude the benefit element, like most countries whose legislation is silent on the issue of benefit in the basic offence, on concerns regarding the

increased burden of finding evidence. This is particularly difficult as the majority of cash transactions for smuggling services take place via hawala, using money brokers and outside destination countries.¹⁴¹ Most EU countries do, however, include benefit as an aggravating element of the offence,¹⁴² while some effectively require it for punishment under national law.¹⁴³

Inclusion of the benefit element is therefore pivotal in targeting counter-smuggling legislation and ensuing enforcement at organised crime

In 2018 Hungary marked World Refugee Day by enacting legislation decreeing imprisonment of anyone providing assistance to undocumented refugees, migrants, or asylum seekers, driving the criminalisation of 'smuggling' without the element of benefit to its extreme manifestation.¹⁴⁴

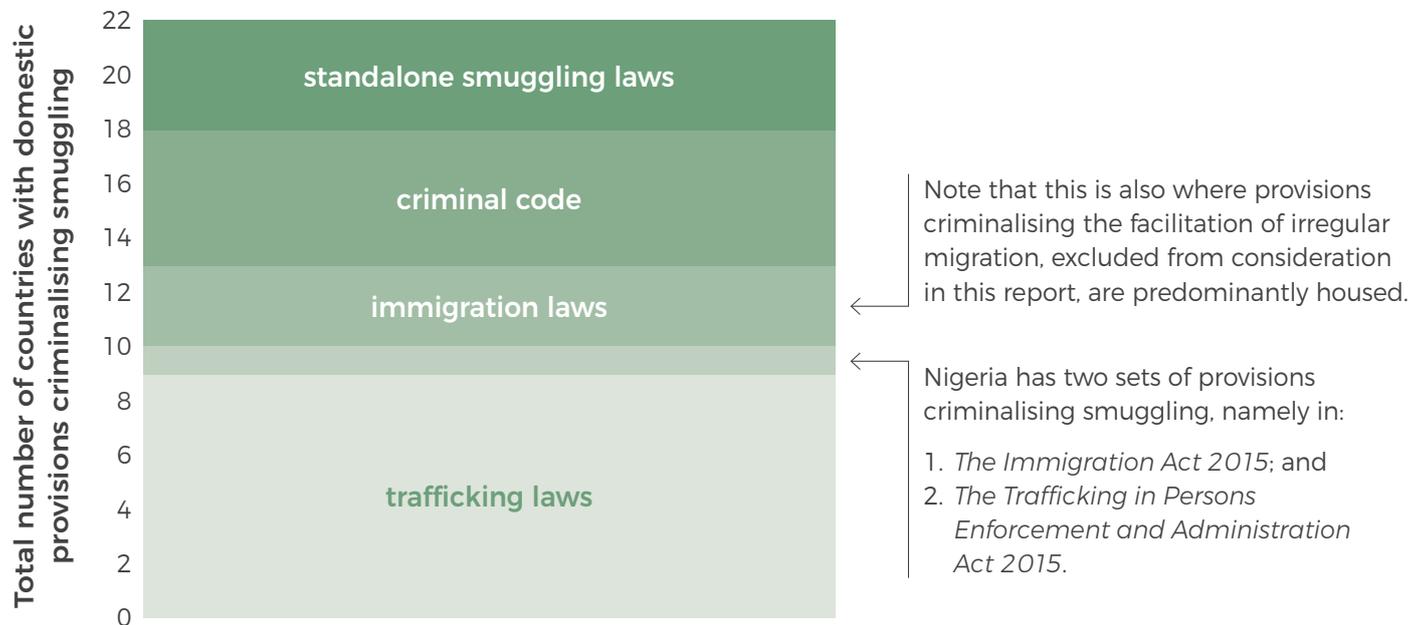
Inclusion of the benefit element is therefore pivotal in targeting counter-smuggling legislation and ensuing enforcement at organised crime, and not merely creating a disproportionate system of sanctions governing migration.

9.4. Where to house smuggling offences?

Having established the minimum requirements for the criminalisation of smuggling, the next concern is determining in which legislative frameworks smuggling offences are most effectively housed.

A review of national laws of African states incorporating provisions criminalising smuggling offences demonstrates that such offences are housed within one (or in the case of Nigeria, two) of the following legislative frameworks: immigration laws, the criminal code, trafficking in persons legislation or stand-alone smuggling laws. Each of these structures has different ramifications for the way the smuggling offence is framed.

Figure 4 Where to house smuggling offences?



9.4.1. Immigration laws

Four countries with domestic smuggling offences, namely Ghana, Kenya, Libya and Nigeria, house these within immigration laws. Nigeria has two separate smuggling offences, one within the Immigration Act 2015, and one within the Trafficking in Persons (Prohibition), Enforcement and Administration Act 2015.

The fact that immigration laws are the home of offences relating to facilitating irregular migration has influenced the continued inclusion of smuggling offences in these frameworks. The EU's policy focus on stemming irregular migration (with criminalisation of smuggling as a limb of this), has also likely influenced this. Housing smuggling offences in immigration laws encourages the perception of smuggling as an immigration offence.

The 'facilitation of irregular migration' can primarily be distinguished from smuggling offences through their lack of focus on the intent of the perpetrator, which in smuggling offences must be to gain financial or material benefit. Legal frameworks sanctioning the facilitation of irregular migration typically ascribe far lower sanctions, often permitting a fine instead of imprisonment.

Such offences are largely framed as aiding and abetting the central offence of illicit migration;¹⁴⁵ the focus remains on the irregular migrant, with the person facilitating their entry or exit of ancillary importance. Such migration infractions should be addressed through administrative rather than criminal sanctions, with 'proportionate and reasonable' penalties.¹⁴⁶ It is widely recognised that criminalising such conduct is 'beyond the legitimate interest of states to control and regulate irregular immigration', can lead to a range of human rights violations, and should be avoided.¹⁴⁷ It is therefore key that infractions of immigration regulations are clearly distinguished from smuggling offences, particularly as the latter criminalise the perpetrator (a key difference between civil and criminal legal structures).

Framing smuggling offences within immigration laws is detrimental from two key perspectives: perception and investigation. Firstly, framing smuggling within immigration laws severs the link between smuggling and organised crime which is clearly crafted in the framework of the Smuggling Protocol read alongside the UNTOC. Instead it promulgates the perception of both the irregular migrant and the smuggler as

perpetrators and encourages the criminalisation of irregular migration more broadly.

Libya's Law No 19/2010 sets out a number of 'acts of illegal immigration', including 'facilitating the transportation of illegal immigrants inside the country with knowledge of their illegality', and then defines human smuggling as commission of 'an act of illegal immigration' for financial or material gain.¹⁴⁸ The smuggling offence is therefore embedded within the migration control framework, rather than identified as a form of organised crime.

Framing smuggling offences within immigration laws is detrimental from two key perspectives: perception and investigation

Similarly, in Kenya the act of 'unlawfully enter[ing] or [being] unlawfully present in Kenya in contravention of the Kenya Citizenship and Immigration Act, 2011 is sanctioned within the same legal provision as smuggling, and granted the same penalty.¹⁴⁹ Embedding provisions to counter human smuggling within immigration laws therefore risks adding an inappropriate weapon to the wrong fight – that against irregular migration, rather than that against organised crime – and promulgates a criminal rather than administrative sanction for immigration offences.

Secondly, in jurisdictions where immigration officials and broader law enforcement officers are employed in different divisions and granted different training, smuggling offences embedded in immigration laws fall within the ambit of the former but not the latter. This means a significant proportion of law enforcement officers will not be familiar with provisions related to immigration or, where smuggling offences are embedded within these structures, those related to smuggling.

Further, in contexts where specific units deal with serious and organised crime, such as Ghana, whose definition of the offence of smuggling is incorporated in the Immigration Act 2012, homing smuggling offences in immigration laws can mean they fall outside the scope of such units' remit, either by design or merely because they are overlooked. This makes the likelihood of investigations and prosecutions of organised crime groups working in human smuggling, rather than low level brokers or drivers, diminish further.

9.4.2. Criminal Code

Five countries incorporate smuggling offences in domestic criminal codes: Algeria, Central African Republic, Guinea, Mozambique and Namibia.¹⁵⁰ Incorporating human smuggling offences in the criminal code effectively addresses both perception and investigation concerns associated with the immigration law structures detailed above. Human smuggling is differentiated from administrative immigration offences and is instead incorporated alongside other instances of serious and organised crime.

In many jurisdictions the criminal code is the legislative instrument that law enforcement is most familiar with; it lies at the core of training and consequently of enforcement. Incorporating human smuggling in this code ensures it automatically falls within the scope of law enforcement.

Embedding human smuggling offences within the criminal code also minimises the risk that human smuggling offences sit in parallel to other criminal provisions, replicating or contradicting other elements of the criminal corpus, and making their interaction unclear.

9.4.3. Standalone human smuggling laws

Standalone human smuggling laws, currently in force in Egypt, Niger, Mauritania and Guinea-Bissau exacerbate this risk of creating parallel legal structures which sit alongside, rather than interacting with, the criminal code and ancillary criminal laws. On the other hand such separate instruments can work as advocacy or awareness tools.

While awareness-raising regarding the risks of procuring smuggling services is a central pillar of many multilateral strategies surrounding irregular migration, including the Global Compact, its success as a deterrent is unclear.

In Niger the title of Loi 2015/36 – ‘Law regarding Human Smuggling’ – makes its limited application clear. This is also true of the smuggling law in Guinea-Bissau (Lei para combater tráfico de migrantes) and Mauritania (‘Loi relative à la lutte contre le trafic illicite de migrants’). However in Egypt the title of Law No 82 for 2016, namely ‘Law On Combating Illegal Migration & Smuggling of Migrants’, removes one of the key advantages of housing smuggling in a standalone law – to distinguish it from immigration offences.

9.4.4. Trafficking in persons laws

In recognition of the widespread tendency to fail to clearly distinguish between smuggling and trafficking offences in perception and in law, states have committed in the Global Compact to ‘design, review or amend relevant policies and procedures to distinguish between the crimes of smuggling of migrants and trafficking in persons by using the correct definitions and applying distinct responses to these separate crimes’.¹⁵¹

Nevertheless, ten countries, Burkina Faso, Ethiopia, Mali, Senegal, Zambia, Lesotho, Eswatini, Equatorial Guinea, Djibouti and Nigeria (which, as noted above, houses one smuggling offence in its immigration law, and one within its trafficking law) incorporate smuggling offences into legal instruments which address two key offences, human smuggling and human trafficking. In these approaches the majority of provisions are devoted to the latter.

Such legal frameworks both reflect and promulgate the blurring of the two phenomena in international discourse. Although in many contexts the two phenomena are intrinsically linked, and distinguishing between the two can appear an academic exercise when faced with practical realities, they are fundamentally different crimes under international law, requiring separate policy and legal responses.

Failing to distinguish between the two offences dates back to the earliest concepts surrounding them, and until the late 1990s, states and international organisations used a number of terms interchangeably, including ‘alien smuggling’ ‘clandestine illegal migration’ and ‘trafficking of aliens’.¹⁵²

However, at the point at which both human trafficking and human smuggling became criminal offences under international law, they were addressed in separate protocols as distinct offences composed of different *actus* and *mens rea* (i.e. involving separate elements of the offence, and intentions of the perpetrator).

Incorporating smuggling offences in trafficking laws both reflects and promulgates the blurring of the two

The Smuggling Protocol acknowledged that smuggling can be accompanied by heightened levels of violence, and therefore the protocol requires the criminalisation of ‘aggravated’ offences of human smuggling. Within the protocol, aggravated offences are those which entail danger to the lives of migrants or ‘inhuman or degrading treatment, including for exploitation’.¹⁵³ UNODC’s Model Law on Migrant Smuggling designed to guide states in translating the Smuggling Protocol into national legislation suggests further contexts which should be classed as ‘aggravated’ offences.¹⁵⁴

The international legal framework also addresses possible intersections between the two crimes, recognising that ‘the presence of exploitation in what would otherwise be a smuggling case may make the trafficking offence applicable if the State Party has ratified and implemented the TIP Protocol’.¹⁵⁵ UNODC’s model smuggling law comments on the fact that it is difficult to imagine ‘a situation where a migrant has been smuggled for the purpose of forced labour or

slavery, without there also having been some element of deception or coercion in the process', referring to the required 'means' element of the trafficking definition.¹⁵⁶ This underlines the danger that smuggling dynamics can transition into trafficking.

However, it remains important to recognise that the elements constituting the two crimes are distinct. For aggravated smuggling offences, it is the intent of the perpetrator to obtain material or financial gain, together with evidence that the smuggling occurred in circumstances that involved 'inhuman or degrading treatment, including exploitation'. In trafficking cases, it is necessary to prove that the intention of the perpetrator was exploitation. The *mens rea* of the perpetrator remain distinct, as do the required elements of the offence.¹⁵⁷

Binding smuggling and trafficking within a single legal instrument, whose title often refers solely to trafficking, shapes the response to the former through a lens focused on the latter. This distorted focus tracks through the law, with the preamble to Senegal's Loi 2005/06 exclusively addressing the 'scourge' of trafficking, referring to smuggling only obliquely once as 'organising illegal migration'.

The titular focus on trafficking occurs across three of the four Francophone countries which address the two phenomena in the same instrument – namely Burkina Faso, Mali and Senegal. In each, the titles of such laws refer to 'trafficking in persons and related practices' (*portant lutte contre la traite des personnes et les pratiques assimilées*).¹⁵⁸ Referring to smuggling as '*pratique assimilées*' is incorrect, misaligned with the protocols, and wrongly suggests the two phenomena should be addressed in the same manner. The title of Djibouti's law – the fourth Francophone country – expressly refers to both human trafficking and human smuggling, however only a small element of the law itself is devoted to the latter.

The title of one of Nigeria's laws criminalising smuggling – the Trafficking in Persons (Prohibition), Enforcement and Administration Act 2015 (Trafficking Act 2015) – entirely excludes any reference to smuggling, not even obliquely as a form of 'related practices'.

Such titles enhance the risk that the two distinct offences receive homogenous treatment, as can be tracked in the laws of Burkina Faso, Mali, and Senegal, all of which prescribe the same penalties – a mandatory minimum of five years' imprisonment and a maximum imprisonment of 10 – for the basic offences of smuggling and trafficking in persons.¹⁵⁹

In the case of Burkina Faso and Senegal, the smuggling provisions do not distinguish between the basic offence and aggravated smuggling, while in Mali aggravating factors are limited to contexts where the smuggled person is under 15 years of age, where the penalty increases to a minimum of 10 and maximum of 20 years.¹⁶⁰ The inclusion of mandatory minimum sentencing provisions (as discussed further at [section 9.7.1](#)) means that a person could be charged with the same penalty, five years' imprisonment, for smuggling one migrant into the relevant country, with no harm experienced by the migrant, or for recruiting, by force or deception, a person into exploitation such as prostitution.

Similarly, Nigeria's Trafficking Act 2015 stipulates that the basic smuggling offence is punishable by a mandatory minimum sentence of five years.¹⁶¹ The same mandatory minimum sentence is prescribed for any person who procures a person under 18 for sexual exploitation, or buys or sells human beings for any purpose, both of which constitute trafficking offences.¹⁶² From a harm perspective, such treatment of smuggling and trafficking offences appears inequitable.

An initial analysis of the penalties ascribed to smuggling and trafficking offences in each of these four legislative structures could suggest that greater sanctions are attributed to the irregular crossing of the country's international borders, which can be framed within the context of national security, thus inviting higher sanction. However, in the case of Nigeria this consideration is rendered moot as smuggling offences are ascribed the same sentence as the 'importation or exportation' of a person into or out of Nigeria for the purpose of sexual exploitation, which dictates a cross-border element within the trafficking offence. Nigeria's Trafficking Act 2015 does not set a maximum for sentencing for any of these offences.¹⁶³ However the incorporation of the same mandatory minimum threshold means that the

judiciary are guided to consider the offences to be of similar gravity.

As noted above, confusingly, Nigeria incorporates smuggling offences both within its Immigration Law 2015 and within the Trafficking Act 2015. The basic offence of human smuggling as governed by Nigeria's Immigration Act, introduced alongside the Trafficking Act 2015, is punishable by a sentence of 10 years.¹⁶⁴ This penalty overrides that in Nigeria's Trafficking law.¹⁶⁵ This means that the basic smuggling offence is punishable by an imprisonment term of five years more than the basic trafficking offence.

In the case of Mali, pre-existing sanctions relating to facilitating irregular migration continue to be in force in immigration laws, while smuggling offences reside in trafficking laws. A nuanced application of these two offences would enable facilitators of irregular migration to be charged only administrative sanctions (starting at three months' imprisonment), while organised crime groups involved in smuggling would be liable for the mandatory minimum sentence of five years under the smuggling offences in the trafficking law. In practice enforcement is limited so it is unclear how the separate provisions are used.

Incorporating smuggling and trafficking offences in unified laws also creates confusion about definitions. In the English version of Ethiopia's Proclamation No 909/2015, the definition of 'human trafficker' and 'human smuggler' are both set out in section 2. Although the drafting to some extent differentiates between the two by referring to the distinctly defined crimes of trafficking and smuggling, both the 'human trafficker' and the 'human smuggler' are defined as a person who 'solicits people from their residence to migrate by providing a promise'.¹⁶⁶ This odd provision appears in part influenced by the trafficking offence and in part by the cross-border 'migration' element of the smuggling offence. However it incorporates all elements of neither offence. This permits the perpetrator of these elements to be termed either a 'human trafficker' or 'human smuggler', legally obliterating this key distinction.

The blurring between the two offences extends to the terms used to designate the clients of smuggling and victims of trafficking, with possibly wide-ranging

ramifications for the rights ascribed to each, as discussed further in [section 9.5 below](#).

The legal frameworks governing smuggling offences are under review in Mali, Senegal, and Zambia, in part with a view to separating them from trafficking provisions.¹⁶⁷ As countries review existing smuggling legislation, it will be key to assess whether they move away from the trend of coupling trafficking and smuggling.

9.4.5. Recommendations for where to house smuggling offences

The administrative offence of facilitating irregular migration, and the criminal offence of smuggling, should be drafted differently and sit within different laws. The two offences should also, as in the case of Mali, be able to co-exist and enable law enforcement to charge perpetrators depending on their intent and their links to organised crime.

The administrative offence of facilitating irregular migration, and the criminal offence of smuggling, should be drafted differently

However, in practice the offence of smuggling is still often addressed in immigration laws, encouraging an unclear distinction between smuggling and the facilitation of irregular migration, and indeed irregular migration itself. Where sanctions for smuggling offences have experienced a significant increase, it can result in harsher penalties for those who are merely facilitating irregular migration and have little impact on the operations of organised crime.

Civil and criminal frameworks in most countries operate in parallel, intersecting but fundamentally different. By definition, violation of a criminal law makes the perpetrator a criminal, a semantic shift which echoes the legislative intent of the Smuggling Protocol – to target organised crime operating in the smuggling of human beings.

Where the perpetrators are merely facilitators of irregular migration, their criminalisation is more problematic. This was a key critique of the EU legislative regime governing human smuggling in a 2017 review. The majority of responders felt that, given the broad drafting of the smuggling offence to include the facilitation of irregular migration, it should receive administrative, rather than criminal, sanction.¹⁶⁸

Housing smuggling offences within immigration or trafficking laws has damaging consequences for the way they are perceived and enforced, while standalone smuggling laws risk creating parallel legal systems for smuggling offences which do not fit into the body of criminal legislation.

Arguably the most effective way of countering each of these risks is instead to address smuggling within the criminal code. In order for this to operate effectively, the smuggling offence must also be properly drafted so as not to be too wide in scope, thereby avoiding inappropriate and excessive criminalisation.

9.5. Migrants as criminals, objects or victims

9.5.1. Objects or victims?

The Smuggling Protocol as originally drafted referred to 'victims' of smuggling. The shift in terminology to the 'object' of smuggling or the 'smuggled migrant' not only changed the tone of the protocol but also excluded the applicability of protections applicable to 'victims' under Article 25 of the UNTOC (rightly, in the eyes of many commentators).¹⁶⁹

This is shaped by the understanding that it is not the smuggled migrant but the state, whose borders are unlawfully crossed, that is the victim of the offence. Consequently, the definition of human smuggling in international law focuses on the action of smuggling, rather than the impact on the smuggled migrant.¹⁷⁰

By contrast, trafficking operates as an offence against an individual, resulting in the exploitation of that person, often through either forced labour or forced sex work. The terminology surrounding the two offences in the separate protocols sought to reflect this distinction,

termining trafficked individuals 'victims', while persons who are smuggled were 'objects'.¹⁷¹ This change made to the Smuggling Protocol was no doubt driven in large part by the fact that the remedies available to 'victims' under international law are not available to 'objects', limiting states' responsibilities to smuggled migrants where there is not additional evidence of abuse or exploitation.

Where smuggling offences are incorporated within trafficking laws, this distinction between the 'victims' of trafficking and the 'objects' of smuggling can be (intentionally or through drafting error) blurred. This is the case for Mali's Loi No 2012-023, which provides that 'Notwithstanding any provision to the contrary, victims of the offences provided for by this law may not be prosecuted or sentenced'.¹⁷² Given that the law covers both offences, 'objects' are effectively upgraded to 'victims' and would appear to be afforded the same protections. The drafting of Mali's law is broader than the prohibition on prosecution of migrants for having used smuggling services in the Smuggling Protocol.

This would seemingly grant smuggled migrants the right to 'apply for their retention on the national territory on a temporary or permanent basis',¹⁷³ a right granted exclusively to victims of trafficking under the Trafficking Protocol, and not to smuggled 'objects' under the Smuggling Protocol.

The bundling of smuggling and trafficking offences has posed a number of obstacles in the practical application of Mali's Loi 2012-023, with commentators highlighting the lack of clarity surrounding who constitute 'victims' entitled to the 'protections' under the law.¹⁷⁴ Further, although Loi 2012-023 grants a raft of protections to 'victims', it provides limited details of their implementation.

Similarly, the definition of 'victim' in Ethiopia's Protocol No 909/2015 encompasses 'any person against whom the offence stipulated under the Proclamation has been committed or any person who has sustained harm...due to the commission of the crime'.¹⁷⁵ While on an initial reading the 'object' of a basic smuggling offence may or may not fall within its scope, the object of an aggravated smuggling offence certainly

will. Further, the drafting of smuggling offences as offences 'committed against' children, women or other persons also makes the migrant rather than the state the victim of the offence.¹⁷⁶ Being classified as a 'victim' grants persons the right to range of material and reintegration support and the right to draw from a particular fund (although the fund reportedly remains empty).

The lack of clarity surrounding the term 'victim' continued in early discussions at the Attorney General's Office in Ethiopia regarding the drafting of a new 2018 protocol to govern smuggling and trafficking offences, where the drafters similarly posited using the term 'victim' to mean both victims of trafficking and smuggled migrants.¹⁷⁷ For both Proclamation No 909/2015 and discussions regarding future enactment, it is unclear whether this was grounded more on confusion between the two offences, and rights ascribed to each classification, or an intention to grant smuggled migrants greater rights.¹⁷⁸ Broadly, the enhanced rights ascribed to 'objects' of smuggling services under these legal structures appears to be an unintended consequence of the approach of incorporating smuggling into trafficking laws.

9.5.2. Migrants as criminals: protection from prosecution

One of the three purposes of the Smuggling Protocol is the protection of the rights of migrants. A key element of this pillar is the explicit prohibition on the prosecution of migrants merely for having used smuggling services (the Prosecution Prohibition).¹⁷⁹

The Prosecution Prohibition was agreed to late in negotiations on the protocol. Similarly, the savings clause which ensures that smuggled migrants retain their rights under international law, including international human rights and refugee law, was incorporated only after significant discussion, and towards the end of negotiations.¹⁸⁰ While in 2018 states reiterated their recognition of 'an overarching obligation to respect, protect and fulfil the human rights of all migrants, regardless of their migration status'¹⁸¹ in the Global Compact for Migration, such rights continue to be widely ignored in practice.

Although the power of the Prosecution Prohibition is significantly narrowed by Article 6(4) of the Smuggling Protocol, which carefully preserved states' right to prosecute smuggled migrants for a breach of immigration offences, it remains a key concern for many African governments when considering whether to ratify the SOM Protocol and translate it into domestic legislation.¹⁸² Reluctance to accept the Prosecution Prohibition, together with the provisions for protection granted to smuggled migrants, have proven the key obstacle to ratification for a number of states. Ironically, many parties to the Smuggling Protocol have simply excluded such inconvenient obligations from their translations of the Smuggling Protocol into domestic law.

Of the 22 African countries which have domestic legal provisions criminalising smuggling, nine include the Prosecution Prohibition.¹⁸³ They are Egypt, Ethiopia, Mali, Senegal, Guinea Bissau, Mauritania, Eswatini, Kenya (caveated, as explained below), and one of the two laws sanctioning smuggling offences in Nigeria (the Immigration Act 2015, but not the Trafficking in Persons Act 2015).

In Kenya the Prosecution Prohibition is made conditional on the cooperation of the migrant in investigations prosecuting the smugglers.¹⁸⁴ This significantly narrows the blanket protection from prosecution afforded by the Smuggling Protocol, and in contexts where witness protection is weak, could endanger the migrant.

Thirteen of the 22 countries criminalising smuggling exclude the Prosecution Prohibition.¹⁸⁵ This leaves migrants using the services of smugglers vulnerable to prosecution for such involvement. It also performs a symbolic act. The inclusion of the Prosecution Prohibition in the Smuggling Protocol made clear that it was not an instrument to fight against irregular migration, which should not be, in itself, considered a crime. Its exclusion in domestic translation vitiates this point, enabling criminalisation of smuggling to be wielded as a tool in a broader fight against irregular migrants. Indeed, in Zambia, a review of the current law criminalising smuggling is underway, principally because the current legislation enables prosecution of any person who 'consents to being smuggled' for a smuggling offence.¹⁸⁶

The exclusion of the Prosecution Prohibition is common not only in Africa but is found more broadly, including in the EU's legal framework to counter human smuggling, the Facilitator's Package. Exclusion in the EU framework has attracted widespread criticism – inadequate protection of the rights of smuggled migrants was the key criticism voiced by 70% of respondents in an EU 2017 public consultation of the Facilitator's Package.¹⁸⁷ Although no member state explicitly criminalises irregular migrants who seek the services of facilitators or are the subject of migrant smuggling,⁷⁵ a number of member states have convicted migrants involved in smuggling activities under coercion, such as steering boats at gunpoint.¹⁸⁸

While the protocol permits prosecution of smuggling conduct by migrants, Article 6 stipulates that this must be undertaken intentionally in order to attract a penalty. Involuntary conduct would not be sufficient to indicate involvement in a smuggling offence and shatter the protection provided by the Prosecution Prohibition. Sanctioning migrants for acts committed under coercion thus constitutes a breach of the protocol (although of course not of domestic translations which have conveniently erased the Prosecution Prohibition entirely).

The widespread failure to translate the Prosecution Prohibition into national legislation, together with additional provisions seeking to protect the rights of smuggled migrants set out in Article 16 of the Smuggling Protocol, deviates from one of the three stated purposes of the Smuggling Protocol. It leaves migrants vulnerable to criminal prosecution for using the services of smugglers, in contravention not only of widely accepted norms on the treatment of breaches of migration regimes but, in some cases, of the protections granted to asylum seekers fleeing persecution.

9.6. Criminalisation of emigration

The offence of human smuggling as defined in the Smuggling Protocol addresses the facilitation of 'illegal entry' but makes no mention of 'illegal exit'. This respects the position under international law which enshrines the right of a person to leave a country, including their own,¹⁸⁹ while respecting state sovereignty in deciding the procedures for entering a country.

Of the 22 African countries which criminalise smuggling, twelve (or fifteen including Zambia, Lesotho and Niger) include the facilitation of unlawful exit in the definition of basic smuggling offences: Algeria, Burkina Faso, Egypt, Equatorial Guinea, Ethiopia, Ghana, Guinea Bissau, Kenya, Libya, Mali, Mozambique and Senegal.¹⁹⁰ The definition of 'smuggling' in Zambia, Niger and Lesotho's legislation track the definition of the human smuggling offence in the Smuggling Protocol (i.e. refers only to unlawful entry). However, the offence itself refers to smuggling a person 'into or out of Zambia', ensuring their 'entry to or the illegal exit from Niger', or facilitating their 'illegal entry into or departure from Lesotho' respectively. It is unclear whether the offence of smuggling 'out' of Zambia, Niger or Lesotho would be feasible to prosecute given the definition of 'smuggling'.

The EU's involvement in the enactment of smuggling legislation in Africa has, to a large extent, been fuelled by the fear of destination countries in Europe regarding irregular migration, and a desire to block arrivals onto their territory. This has clearly shaped the legislation enacted, driving widespread criminalisation of emigration.

This criminalisation of facilitating emigration also reflects the overarching concern regarding the sanctity of borders which underlies many states' concerns surrounding human smuggling. In some cases, particularly in states such as Egypt and Algeria, this focus on exit, particularly of its citizens, relates to a fear of a brain drain (also reflected in the shape of Egypt's enforcement efforts – as detailed in [section 10.6 below](#)).

Algeria's Criminal Code defines a 'smuggler' as one who facilitates the unlawful 'entry, circulation, stay or ... departure of a foreigner'.¹⁹¹ However the act of human smuggling is defined merely as 'the act of organising illegal exit of the national territory of one or more people in order to extract, directly or indirectly, an advantage, financial or otherwise'.¹⁹² This appears to reflect a state priority.

In Ethiopia, facilitation of an unlawful exit was not an element of the smuggling offence under the 2004 Criminal Code but was incorporated into Proclamation No 909/2015. This could reflect both enhanced EU

pressure to stem emigration towards the EU, but also a repeatedly reiterated concern of the Ethiopian government regarding the mass emigration of Ethiopians, and a desire to change its reputation as primarily a country of origin for migration.

In the case of Niger, where the risk of a brain drain is perceived to be limited,¹⁹³ the policy driver for criminalising the facilitation of emigration appears to be predominantly the influence of the EU. This has attracted significant criticism and is clearly targeted at seeking to stop persons crossing into Libya, whose borders are minimally patrolled, where enforcement of law is difficult, and which operates as one of the EU's 'buffer zones'.

In jurisdictions where emigration writ large is not generally perceived to be problematic domestically, the drive to criminalise irregular exit certainly appears to originate externally. For example, early drafts of a proposed regional policy governing mixed migration contained a clear focus on harmonising national approaches towards the criminalising of smuggling of migrants out of the region without a clear basis in international law. This recommendation was then removed and the focus on emigration softened, but it clearly reflects ongoing donor priorities.

9.7. Penal structures: sanctions proportionate to the crime

The topic of sanctioning human smugglers is highly sensitive and closely linked to political discourse surrounding migration more broadly. The Smuggling Protocol is silent on the exact penalty to be ascribed for smuggling offences. While the sanctioning guidelines in the UNTOC require the gravity of the offence to be considered when determining the appropriate penalty, this leaves domestic legislators with significant discretion in prescribing the appropriate penalty.¹⁹⁴

Many commentators argue that the penalties for human smuggling offences are not relevant to their deterrent effect, a key conceptual driver of sanctioning regimes. The deterrence effect on high-level smugglers is particularly weak because convictions are almost exclusively of low-ranking human smugglers.¹⁹⁵

This, together with low conviction rates, means that sentencing regimes become irrelevant to the intentions of high-ranking smuggling operators, which are more likely to be attuned to sentencing provisions. Despite this, a number of African countries prescribe extremely lengthy prison sentences to sanction smuggling – notably Namibia, where the upper ceiling is set at 25 years, Niger where it is 30, and Ethiopia where it is 20.¹⁹⁶

The deterrence effect on high-level smugglers is particularly weak because convictions are of low-ranking human smugglers

As Ethiopia has enacted the second version of laws governing smuggling, it is possible to track the change in severity and structure of penalties over time. As at 2019, smuggling and trafficking offences are addressed in Proclamation 909/2015, while the preceding legislative framework addressed both offences in the Criminal Code. The penalty for smuggling increased dramatically from between five and 10 years' imprisonment together with a fine in Proclamation 909/2015. This increases to not less than 20 years where it is a repeat offence, perpetrated by a public official, or involves other 'aggravating factors'.¹⁹⁷

(This penalty also closely tracks, although does not exactly reflect, the penalty for trafficking – 15 to 25 years, or 25 years to life in aggravated circumstances. This is in line with similar penalty regimes in other jurisdictions addressing trafficking and smuggling offences within one law, explored in [section 9.4.4 above](#).)¹⁹⁸

9.7.1. Mandatory minimum sentencing frameworks

Smuggling, as a complex crime for which the wrong people are too often targeted, is an inappropriate offence to carry mandatory minimum sentencing structures, and the Smuggling Protocol does not prescribe such an approach.

Nevertheless, 16 of the 22 smuggling offences in the domestic legislation of African countries prescribe a mandatory minimum sentence.¹⁹⁹ This is also true of the legal provision criminalising the facilitation of irregular migration 'regardless of profit' in Morocco. In 14 of these smuggling offences there is no option of a fine as an alternative, although in many cases it can be an additional penalty.²⁰⁰

Mandatory minimum sentencing frameworks hamper the freedom of judges to consider mitigating circumstances, forcing jail terms as soon as the defendant is found guilty. The mandatory minimum sentences range between one year (Guinea, Central African Republic, Guinea Bissau)²⁰¹ and 15 years (Ethiopia, Lesotho, Zambia),²⁰² averaging at six years. Nine countries (together with Morocco) prescribe mandatory minimum sentencing equal to or greater than four years – automatically categorising the smuggling offence as a 'serious crime' under the UNTOC.²⁰³

Mandatory minimum sentencing for human smuggling offences has been criticised for eliminating the proportionality of the punishment to the offence; being unjustified as a tool of deterrence (predominantly for the reasons explored above); and failing to meet its objectives of changing the risk profile of human smuggling activities and shrinking the human smuggling market.²⁰⁴ Of particular concern is that the low-level operators who make up the vast majority of convictions may in many cases have no direct links to an organised crime network and operate either independently or in extremely loose structures, yet be automatically caught under the same sentencing regime.

Such sentencing structures are arguably in breach of international law obligations. Firstly, breaching the rule of proportionality, they effectively constitute arbitrary imprisonment of the perpetrator. Secondly, the UNTOC requires state parties to ascribe sanctions to convention and protocol offences which 'take into account the gravity of that offence'.²⁰⁵ Mandatory minimum sentencing regimes, which exclude from consideration mitigating factors and eliminate the discretion of the

judiciary in sentencing, fail to take the 'gravity of the offence' into account.²⁰⁶

In Australia, which operated a mandatory minimum sentencing regime for offences involving over five smuggled migrants from 2001, most convictions receive the minimum permitted penalty of five years' imprisonment.²⁰⁷ This, together with judicial criticism littered across case transcripts,²⁰⁸ demonstrates that the sentencing structure is considered excessive. The prescribed minimum was described as often so 'disproportionate to the criminality and circumstances of that case that injustice is done' by the Judicial Conference of Australia.²⁰⁹

A review of Australia's previous regime found that in under 8% of smuggling cases prior to the introduction of mandatory minimum sentencing, judges prescribed sentences equal to or above the current minimum of five years.²¹⁰ Following a 2012 review of the mandatory minimum sentencing regime,²¹¹ the attorney general directed the commonwealth director of public prosecutions (the government's prosecuting authority) to charge all but aggravated offences as the simple offence of smuggling a single individual, even if over five migrants were clearly involved, because the basic offence does not carry a mandatory minimum sentence.²¹² This guidance encourages promulgation of a fiction to avoid the mandatory minimum sentencing regime, highlighting its inadequacy.

Prosecution data for smuggling crimes in Africa is difficult to obtain. Poor data collection and publication mechanisms are further complicated by the semantic coupling of human smugglers and human traffickers, making mere statistics without supporting case files unhelpful. Nevertheless, analysis based on published figures and on interviews with key informants in the relevant countries show mandatory minimum sentencing regimes being circumvented, or minimum sentencing being applied.

Niger's Loi 2015/36 mandates a minimum of five years' imprisonment for the basic smuggling offence, with no option of a fine as an alternative. Between May 2015 and December 2018, 107 smugglers were prosecuted and sentenced for human smuggling charges at the

courts in Agadez.²¹³ As at 28 July 2019, five persons remained detained in the prisons of Agadez²¹⁴ – clearly the mandatory minimum sentence had either failed to be applied or carried out.

A captain in Niger's intelligence services, the Direction Générale de la Documentation et de la Sécurité Extérieure (DGDSE), explained that 'minimum sentences are applied to smugglers ... because ... the state prefers to find some economic agreement with them ... They agree on some transaction, in the form of a fine, and release the person, so that state coffers will receive some money.'²¹⁵

The prosecutor of Agadez explained that most charged with smuggling offences are tried, and given that the vast majority plead guilty, sentenced, within the 18-month pre-detention maximum legally permitted, and that their sentence is typically under one year's imprisonment. At the point of sentencing, the length of pre-trial detention is set off against the prescribed term, and often the accused is released immediately.²¹⁶

The judiciary reportedly apply mitigating circumstances across almost all smuggling cases and take good behaviour during pre-trial detention into account as further justification for low prison terms. Although the prosecutor was aware of some suspects who had received five-year sentences, in accordance with the mandatory minimum (although clearly none of these had been in Agadez, the prosecutor only just having moved into post), he confirmed these were the exception rather than the norm.²¹⁷ Further, where the mandatory minimum had been applied, this had been due to aggravating circumstances, with the accused trafficking either drugs or people alongside transporting migrants.²¹⁸

Both the prosecutor of Agadez and the DGDSE captain also suggested that low sentencing was in part attributable to judicial corruption²¹⁹ and to the fact that Nigerien smugglers and judges hail from the same community in Agadez. This is also reflected in the predominantly foreign composition of those arrested in Agadez, together with the fact that 80% of those in Agadez prison as at July 2019 were foreign, lacking local networks of influence.²²⁰ Although corruption

clearly contributes to low sentencing, the near-blanket application of mitigating factors by the judiciary also speaks to the perceived misalignment of penalty and crime.

9.8. Aggravated offences

Article 6 of the Smuggling Protocol requires that the following 'aggravating circumstances' in smuggling offences are recognised and carry more stringent sanctions: circumstances (a) that endanger, or are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants. In the Global Compact on Migration, states reaffirmed their commitment to 'assisting in particular those migrants subject to smuggling under aggravating circumstances'.²²¹

The first limb is interpretively simple and wide ranging, encompassing many current high-risk modes of smuggling migrants. The second echoes and incorporates a core element of international treaty law, set out in key international and regional human rights instruments, including the African Charter on Human and People's Rights 1986,²²² and has been recognised to include serious injury to mental as well as physical health.²²³ The inclusion of the term 'exploitation' appears to be a deliberate nod to the Trafficking Protocol.

15 of the 22 countries criminalising the basic smuggling offence legislate for aggravated offences, which carry higher penalties.²²⁴ With four exceptions, all of these recognise the aggravating circumstances prescribed by the Smuggling Protocol. Mali only recognises smuggling of persons under the age of 15 as an aggravated offence, while Ethiopia's Proclamation No 909/2015 and Libya's Law No 19, 2010 do not address inhumane or degrading treatment to the migrant. Zambia's Anti Human Trafficking law only includes the 'death of the migrant' as a possible aggravating factor.

The smuggling of vulnerable persons (typically women and children, and in some cases mentally or physically disabled persons) or of a large number of persons, the use of arms to commit the offence, and circumstances where the perpetrator is a public official (discussed in more detail at [section 12](#), Smuggling as a state-

sponsored enterprise) are common aggravating factors across these jurisdictions, in line with those suggested by the Model Law on Smuggling.

The presence of aggravating circumstances in smuggling not only requires a higher penalty. It arguably changes the nature of states' obligations to the objects of smuggling, activating states' obligations under international law to protect persons in their jurisdictions from human rights violations, regardless of whether they are committed by private persons.²²⁵

9.9. Fraudulent documents

The Smuggling Protocol imposes obligations on states to criminalise the production, procurement, provision, or possession of a fraudulent travel or identity document, when committed for the purpose of enabling the smuggling of migrants.²²⁶ A vast underground market exists in the trade of fraudulent documentation, both genuine and mis-sold articles, and those entirely fabricated by fraudsters. Smuggling of migrants by air travel, which always requires fraudulent documentation, typically garners significantly less press attention, although it is much more lucrative per capita for smugglers. While a significant proportion of those travelling irregularly overland will require fraudulent documents, many simply evade checkpoints or bribe border officials.

Nineteen of the 22 countries with domestic smuggling offences explicitly refer to the commission of these offences through the use of fraudulent documents.²²⁷

Curiously, while eight of these ascribe the same sanction to smuggling with fraudulent documents as without,²²⁸ six (Ethiopia, Niger, Guinea Bissau, Eswatini, Mauritania and Zambia) prescribe lower sentences, and four (Central African Republic, Lesotho, Equatorial Guinea and Egypt) treat the use of fraudulent documents as an aggravating factor and ascribe higher penalties. Kenya's Law 12-2011 addresses 'documentary offences' separately from smuggling, but does not explicitly link the two, and 'documentary offences' do not require an element of financial or material benefit. Consequently, although higher penalties are ascribed to documentary offences than to smuggling, the link between the two offences is not spelt out clearly,²²⁹ and the 'documentary offences' appear to ignore the intent of the perpetrator.

The Smuggling Protocol does not stipulate the use of fraudulent documents as an aggravating factor, and the Model Law suggests that one advantage of 'an omnibus offence' which encapsulates documentary offences into the basic smuggling offence is that this 'minimises the risk that a sentencing judge might form the view that legislators were intentionally reflecting different degrees of culpability in different offences' as 'there may be little or no difference in the degree of culpability of the different players involved at the different stages of the smuggling process'.²³⁰ This would suggest that ascribing different penalties to documentary offences and the basic smuggling offence contravenes the recommended approach.

PART 3

10. From paper to practice: counter-smuggling enforcement

The following two sections outline counter-smuggling enforcement action taken across a selection of the 22 countries in Africa that criminalise smuggling. It considers the current dynamics of the smuggling market, whether any enforcement action against smuggling is

occurring, what shape that enforcement takes, and who that enforcement action has been focused on.

The countries selected for scrutiny grant insight into dynamics across the three major smuggling routes out of and within Africa, namely the northern route to Europe, the eastern route to the Gulf States, and the southern route predominantly to South Africa.

Many countries play a role in a number, or all, of these smuggling routes; however in most cases they are more prominent in one migration dynamic than another. For example, Kenya operates principally as a transit country on the southern route, while Ethiopia is a significant country of origin on the eastern route, and to a lesser extent the southern route. Of the jurisdictions analysed, those where there has been the most stringent counter-smuggling enforcement are primarily transit points on the northern route to Europe.

For the majority of countries, the enactment of domestic smuggling offences has not led to marked changes in enforcement approaches, meaning it is still too early to analyse the shape enforcement would take, and what impact it would have on the market. In these contexts, state action is patchy and the impacts on the human smuggling market are temporary and often geographically limited.

For the majority of countries, the enactment of domestic smuggling offences has not led to marked changes in enforcement approaches

How legislation and any accompanying policy are implemented provides a clearer indication of government priorities than the legislative reform timetable, which can fulfil a predominantly symbolic function.

[This section](#) considers the enforcement action taken against smuggling markets; [section 11](#) then analyses how this enforcement action has shaped the smuggling market.

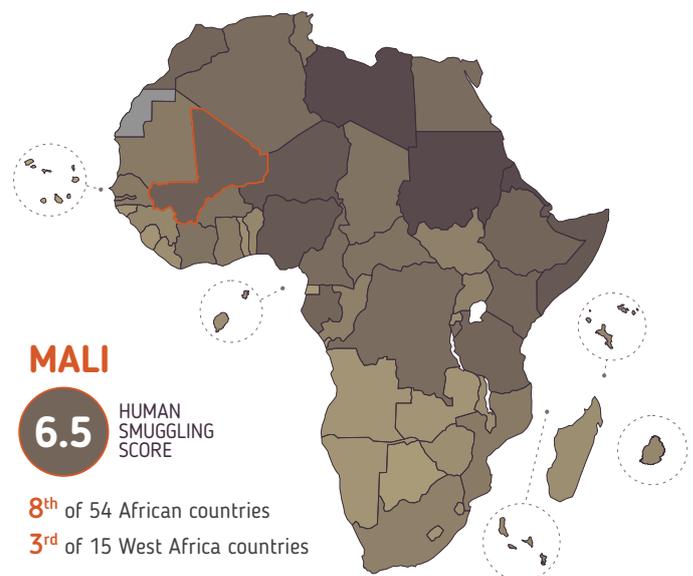
10.1. Mali

The enactment of Loi No 023-12 occurred alongside Mali's 2012 coup, which further diminished the government's control over the northern part of the country. The timing of the enactment is surprising,

given that smuggling and trafficking cannot have been a priority at that point. This, together with the limited enforcement of Loi No 023-12, suggests it perhaps performed a predominantly symbolic act.²³¹

The low awareness of Loi 023-12 among law enforcement and the judiciary, particularly in the three years following enactment, also stymied enforcement.²³² In 2018 the detention of nine human smugglers, including a number of high-level operators, in the northern city of Gao briefly slowed the flow of migrants through the town.²³³ However, flows resumed following their release mere months after detention, and they continued with their previous activities. This detention is likely to have been a result of a disruption in the complex architecture tying together smugglers and security forces in Gao, rather than as a sign of enhanced enforcement.

Figure 5 Prevalence of human smuggling in Mali



The 'scores' for each criminal market is based on the value and reach of the market. 'Value' refers to the overall value of the market as part of the national economy and seeks to explore its profitability. Reach can be thought of as the non-monetary impact a market has on the state and considers the degree of pervasiveness of any activity related to the illicit market. The overall score for human smuggling across Africa is 4.47.

The value and reach of the smuggling market in Mali is above the continental human smuggling average of 4.47 and notably the same as the cocaine (6.5), and higher than the heroin (3.5) markets, but below non-renewable resource crimes. A thriving trade in fraudulent documents facilitating irregular movement of migrants enhances the pervasiveness of the market; Tuareg tribes are significant players in the smuggling economy; funds gained from the industry are broadly believed to indirectly fund insurgent movements in the country's north. In terms of smuggling prevalence ratings, Mali falls behind Niger and Nigeria within the West Africa region, which come joint first in prevalence scores. The smuggling industry in Mali is ranked the eighth most prevalent on the continent, with Mali as a whole one of the 10 countries in Africa with the highest overall criminality.

Source: *Organised Crime Index Africa 2019*.

Military activity focused on counter-terrorism in and around Gao, which has included enhanced checkpoints and monitoring, appears to have driven smugglers to operate on less visible routes.²³⁴ However, more broadly the patchy control of Mali's government in the north of the country means that the smuggling economy is largely shaped by state absence.

To date human smuggling has been less lucrative than smuggling other illicit goods and has therefore remained a side-show in the cross-border mobility economy of northern Mali.²³⁵ The highly organised groups moving drugs, primarily cocaine, do not materially overlap with those smuggling migrants; although vehicles carrying cocaine may pick up some passengers en route, this is merely an informal side-stream.

Armed groups facilitate passage for smugglers in return for a 'tax', but do not directly manage the human smuggling market.²³⁶ Human smugglers thus need connections to armed groups to operate in northern Mali, raising the barrier to entry. These armed groups, already controlling the migration corridors, are well positioned to enter the trade if it becomes as lucrative as illicit drug smuggling. The trans-Saharan

cocaine route is currently in decline, disrupted by enforcement activity and ongoing instability in the region (which increases the risk of narcotics being seized in transit). Dwindling profits may catalyse a greater shift into human smuggling in the future if the downward trend continues and is not sufficiently offset by increasing trafficking in counterfeit drugs and the opioid tramadol.

10.2. Ethiopia

In Ethiopia, while official prosecution figures suggest that Proclamation No 909/2015 has marked a significant increase in enforcement against trafficking offences,²³⁷ enforcement against the smuggling of migrants has not experienced a similar change.²³⁸ Figures of prosecutions and arrests of human smugglers pursuant to Proclamation No 909/2015 are not available. But the mere fact that they are not publicised by the government, in contrast to the expansive publicising of trafficking arrests, reflects the focus of domestic enforcement efforts on trafficking and the government's perception that it was important to its reputation to curtail that crime.²³⁹

Development practitioners on the ground point to the significant impact of Proclamation No 909/2015 as an advocacy and policy tool when conducting community outreach on human trafficking, as it helps signal a domestic concern regarding trafficking rather than merely an internationally imposed standard. However this impact is more limited in the context of human smuggling. This is in part due to the wide gap between local communities' perception of smugglers simply as facilitators of movement (which chimes with the smugglers' self-perception) and the legal definition of smuggling as a criminal activity.

The Amharic translation of Proclamation No 909/2015 has attracted criticism among Ethiopian law enforcement and legislators for being insufficiently specific, in part driving the current review of the document. Local prosecutors reportedly cite translation inaccuracies as key obstacles towards effective implementation. However scarce resources, limited awareness and patchy political will to crack down on human smuggling also play a part.

Figure 6 Prevalence of human smuggling in Ethiopia



The Africa Organized Crime Index grants the same score to both human smuggling and human trafficking markets in Ethiopia. Arms trafficking was ranked as the market causing greatest harm (scoring 6.5), mainly due to the trafficking of arms across the border with Sudan. Ethiopia ranks as one of the most resilient countries in Africa (with resilience to organised crime measured across a range of indicators including national policy and legal frameworks, law enforcement operations, and government transparency and accountability).

Source: *Organised Crime Index Africa 2019*

More specifically, limited understanding of the smuggling provisions in Proclamation No 909/2015 and hesitation in classifying community members as smugglers pose obstacles to enforcement by regional border officials. The 2018 restructuring of intelligence, military and police forces, previously dominated by the Tigrayan ethnicity and re-shuffled in reaction to attempted military coups, eroded the already limited operating capacities of law enforcement and intelligence structures.

It is unclear whether there is sufficient political will to stop human smuggling operations. The fragile political situation drives human smuggling lower down the government agenda, while the positive effects of emigration, predominantly the easing of unemployment and significant remittance flows, call into question the desirability of slowing emigration, whether facilitated by a smuggler or not. This is particularly true as high unemployment, caused by a demographic bulge and a slowing economy,²⁴⁰ is recognised as a key driver of ongoing instability.

Despite this, the government has repeatedly reiterated its focus on returning Ethiopians home²⁴¹ and employing them in their own country, a focus which could arguably be more aligned with addressing the problem of Ethiopians smuggled out of the country. The role of the government in catalysing regional meetings on migration (attended by senior Ethiopian government figures)²⁴² supports this view. In addition, the government has invested significant resources to secure the repatriation of its citizens stranded across the northern route (particularly in Sudan), southern route (in Tanzania predominantly), and eastern route (in Djibouti).²⁴³

A 2019 uptick in the detention of Ethiopians travelling out of the country and their return by law enforcement to their regions of origin can be seen as corroboration of the government's stated desire to keep Ethiopians at home. Justification for the process under either domestic or international legal frameworks is unclear, sparking the concern of international organisations operating in the area.²⁴⁴

As Ethiopia's government seeks to position itself as a peace broker in Sudan and mediator in the Somalia/Kenya tensions, there appears to be a desire to move away from its reputation as a key country of origin for irregular migrants. The visible human cost of irregular emigration, counted in the corpses picked up daily by law enforcement across Kenya's borders, constitutes another reason for seeking to slow irregular emigration flows.

This is reflected in the focus of enforcement on Ethiopians leaving the country, rather than on other nationalities entering, or on the smuggling networks

themselves. Yet reports of Somali frustrations at recently arrested and returned Ethiopian migrants re-appearing in Somalia mere days later suggest that even in this context enforcement is patchy.²⁴⁵ The government's focus on emigration is reflected in its criminalising of the facilitation of irregular exit (as discussed in [section 9.6 above](#)).

10.3. Kenya

In Kenya, which has gradually shifted from a destination to a transit country for irregular migration, primarily on the southern route, prosecutions under the Kenya Citizenship and Immigration Act 2011, which houses the smuggling offence, are predominantly of migrants rather than smugglers. Although arrests of the latter do occur,²⁴⁶ they are extremely limited,²⁴⁷ with smugglers typically bribing law enforcement to evade detention, and not the prime enforcement focus.²⁴⁸

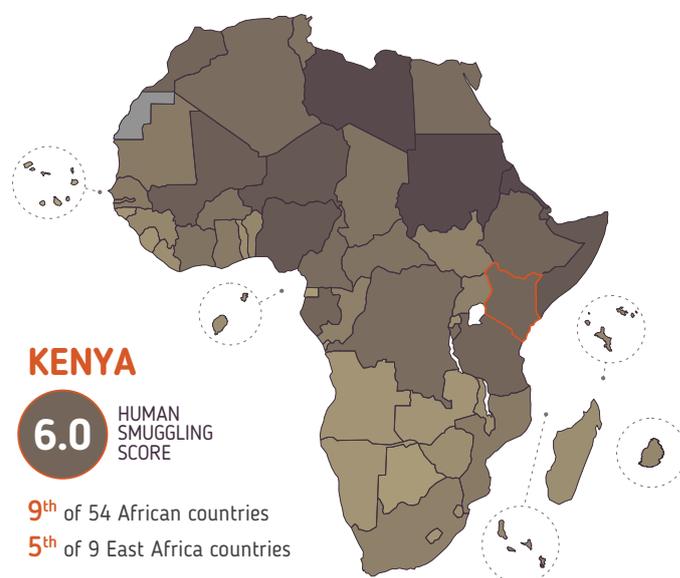
The widespread detention and criminalisation of irregular migrants has been driven by the longstanding perception that they pose a terrorist threat, particularly those of Somali origin (whose border with Kenya has been officially closed since 2007). There are also concerns regarding the return of disenfranchised jihadi fighters from North Africa. Kenya's repeated attempts to close the Dadaab refugee camp, often strategically timed to coincide with electoral campaigning, were framed as a crackdown on hotbeds of terrorism.²⁴⁹

Previously, irregular migrants, predominantly of Ethiopian or Somali origin, were charged with being unlawfully present in Kenya under Section 13(2) of the Immigration Act 2011. Following its repeal, detained migrants lacking the necessary papers were charged with unlawfully seeking work in Kenya. Arrest was typically followed by a guilty plea, summary judgment, and imprisonment in lieu of a fine, together with a repatriation order.²⁵⁰

Detention of migrants, regardless of the status of their paperwork, is common in Kenyan law enforcement. Legal advisers working for Kituo Cha Sheria, a non-governmental organisation (NGO) providing legal advice to migrants in Kenya, report that in the 18 months before December 2019 the detention of migrants who hold

the correct papers in Nairobi has decreased. This is due in part to educating law enforcement officials regarding the papers allowing migrants to remain.²⁵¹ Similarly, the focus on Somali migrants, with common raids on Somali communities and targeting of areas with high levels of Somalis, has reportedly diminished. Detentions of irregular migrants more broadly continue, in part driven by the increased numbers of migrants from the Horn of Africa transiting through Kenya on the southern route.

Figure 7 Prevalence of human smuggling in Kenya



The human smuggling and trafficking markets rank the same and are outstripped by heroin and arms trafficking (both of which are scored at 7). All these markets were considered to cause significant harm in the country. The networks co-ordinating smuggling and trafficking operations are believed to overlap, with significant and organised sexual violence characterising both markets.

Source: *Organised Crime Index Africa 2019*

Law enforcement priorities in Kenya markedly shift across time, with one analyst characterising this as the government 'picking a theme of the month'.²⁵² Crackdowns often fulfil a symbolic function, responding

to public pressure or isolated events. In the case of human smuggling, spikes are typically tied to spikes in immigration or electoral cycles when immigration has become a contentious issue.²⁵³

A reported increase in the arrests of human smugglers and human traffickers (terms used interchangeably by Kenyan law enforcement and media alike) in the first half of 2019 suggest these crimes may have been the chosen theme.²⁵⁴ This may be in part attributable to the growing popularity of the southern route, and the increasing numbers of irregular migrants, predominantly from the Horn of Africa, transiting Kenya overland. This is driven in part by ongoing conflict in that region and by the northern route being more expensive and perceived to be more dangerous. However, arrests are most consistently of the migrants using smuggling services, with low-level drivers also detained in some instances.

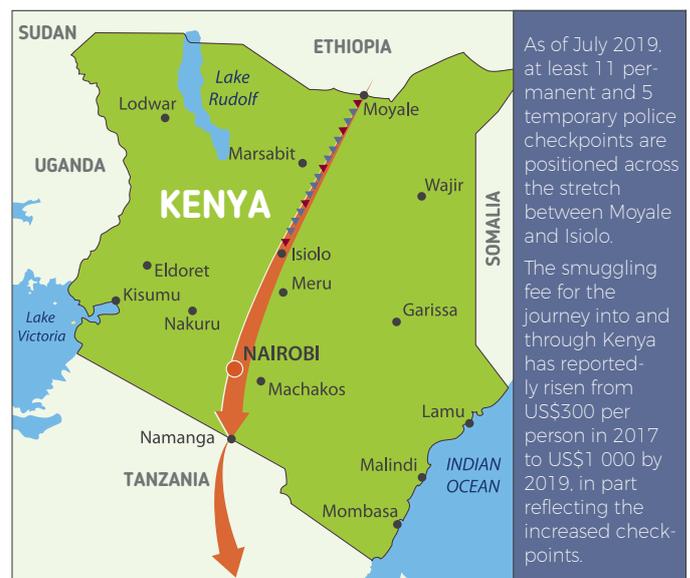
The joint military and police crackdown on human smuggling rings operating across the Ethiopian and Tanzanian borders in late 2015 exemplifies a similar trend, with the main impact a spike of arrests of Ethiopian migrants – estimated on the basis of news reports to reach over 1 000 between November 2015 and May 2016.²⁵⁵

A significant proportion of migrants from the Horn of Africa smuggled either into Kenya, or through Kenya on the south-south route, move into the country through the border in Moyale county. Bisected by the border, with Moyale district on the Ethiopian side, and Moyale county on the Kenyan side, it is a region characterised by high levels of smuggling not only of people but of other commodities including textiles and, to a lesser extent, weapons.

From Moyale irregular migrants predominantly travel to Isiolo on the way to Nairobi, and police checkpoints along the 500km stretch of road between Moyale and Isiolo have increased. However this has not stymied activity. It has merely made smuggling services more expensive, because of the increased frequency of bribes demanded.²⁵⁶ Across the country, widespread corruption among law enforcement – and the involvement of both law enforcement and state officers in the smuggling industry – facilitate smuggling operations. In any case,

the focus of checkpoints along the road between Moyale and Isiolo appears to be on countering terrorism threats and cattle rustling, not halting illegal migration.²⁵⁷

Figure 8 Southbound route through Kenya, with locations of enhanced checkpoints



Source: Interviews conducted by ISS with law enforcement in the region.²⁵⁸

Cases of human smuggling are typically reported in the media and by domestic law enforcement authorities as human trafficking, which is perceived as a more grievous offence.²⁵⁹ There was previously a separate unit in the office of public prosecutions in Nairobi focused on handling smuggling cases, but now smuggling and trafficking are both handled in the sexual and gender-based violence unit. Unsurprisingly, the focus appears to be more heavily on the trafficking of women and children for sexual exploitation.

The director of public prosecutions in Nairobi reported that her unit was handling 30 cases of trafficking and smuggling (arguing there was no distinction between the two), as at April 2019.²⁶⁰ Reportedly in many cases where individuals are arrested for smuggling, they are charged both with smuggling under Immigration Act 2015 and with trafficking under the Counter-Trafficking in Persons Act of 2010, as amended.²⁶¹

Kenyan court processes are extremely slow, and although arrests of smugglers have been reported, few convictions have been publicised. In one 2017 case adjudicated by a court in Wajir, a frontier county bordering Somalia and Ethiopia, a smuggler convicted of smuggling 29 Ethiopians under the Immigration Act 2015 was fined 500,000 KES (about US\$5 000, the amount prescribed by the Act), or imprisonment of three years in default. This is the highest available sentence for human smuggling, likely reflecting the high number of migrants being smuggled. In a separate 2017 case adjudicated in Milimani court, Nairobi, the sanctions were reportedly a fine of a similar amount, or imprisonment of six months. Both smugglers have reportedly appealed the sentence.²⁶² Human smuggling remains broadly perceived as a low-level crime, subsumed into the high levels of labour mobility between Kenya and its neighbours, and thus not a priority for law enforcement action.

The low priority garnered by human smuggling on the policy and law enforcement agenda is reflected in the focus of statements made by Kenyan heads of state regarding organised crime. Data collected by the ENACT project, which charts the statements made by Kenyan heads of state and law enforcement reported in media outlets catalogued on the LexisNexis portal between 2000 and 2017, found that out of 117 recorded statements, none referred to human smuggling, and only eight referred to human trafficking.²⁶³

10.4. Algeria

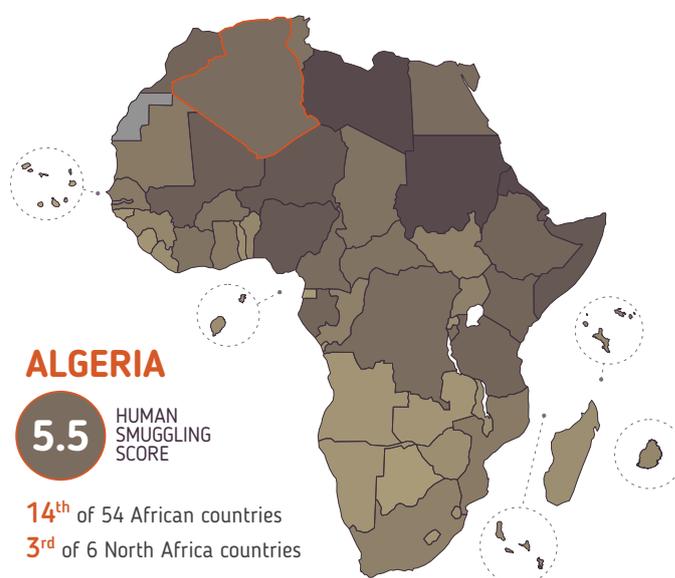
Algeria amended its Criminal Code in 2009 to incorporate provisions criminalising human smuggling. Domestic concerns about terrorism, particularly following the Arab spring and instability in Libya, catalysed the closure of its land borders with Libya in 2011 and an increasing militarisation of its borders. In 2013 the country closed its borders with Mali and Niger, bar two days per month on which the border with Niger is opened to facilitate trade.

The closure of borders made human smuggling bi-directional, swelling profits further. In contrast to neighbouring Tunisia and Morocco, Algerian authorities have consistently taken pride in their 'independence' from the EU in handling border control and been careful

not to be seen as receiving funding from Europe for 'migration management'.²⁶⁴

Although historically southern Algeria has been predominantly a region of destination and transit, more recently Algeria, together with other countries in North Africa, has emerged as a significant country of origin on the northern route towards the EU; arrivals from Algeria, Morocco and Tunisia constituted over 40% of arrivals in Spain and Italy in the first half of 2019.²⁶⁵

Figure 9 Prevalence of human smuggling in Algeria



Human smuggling rates relatively high in Algeria, which is an attractive transit and destination country due to its geographic position and its borders with Morocco and Libya. More recently, it is a growing country of origin. The criminal market with the highest score in Algeria is non-renewable resources crimes, driven almost exclusively by illegal oil smuggling into neighbouring countries.

Source: *Organised Crime Index Africa 2019*

The militarisation of borders, although it has had a significant impact on smuggling operations, has been predominantly focused on preventing cross-border

terrorism, and on the smuggling of arms and narcotics, rather than on ceasing the flow of people.²⁶⁶ Further, the Algerian government is playing a balancing act, publicly taking a hard line on migration while mitigating the harm wrought on borderland communities that rely heavily on cross-border trade.²⁶⁷ Despite this, the overall impact on cross-border trade has had severe economic consequences for borderland communities, including in the regions of Ain Guezzam, Tinzaouetene, and Bordj Baji Mokhtar. In these regions, the cross-border smuggling of staple commodities, including fuel, semolina and pasta, to profit from price differentiations, had been at the core of livelihoods since the early 1970s.²⁶⁸

The wave of arms trafficking and increased threats of terrorism ensuing from the Libyan conflict linked terrorism and smuggling as conjoined threats; previously, throughout Algeria's terrorism concerns in the 1990s, they had remained distinct. This twinning of terrorist threats and cross-border irregular migrants continues. In January 2019 Algeria warned that it would prohibit all Syrians from entering the country via its southern border due to concerns that Syrian asylum seekers crossing into Algeria from Mali and Niger could be members of jihadist groups. Hassen Kacimi, the officer in charge of migration at the Ministry of Interior, stated: 'We have hosted 50 000 Syrians in the past few years for humanitarian reasons, but we cannot accept members of armed groups fleeing from Syria when it comes to our security.'²⁶⁹ Kacimi also said that an established criminal network was helping Syrians travel within the region and into Algeria using fake Sudanese passports.²⁷⁰ He has repeatedly emphasised the terrorist, crime and disorder threats posed by immigration, which he portrays to be over 20 times higher than figures estimated by local civil society.²⁷¹

Algeria has installed radar and specialised units and built sand ditches and mounds at key strategic border points. The level of surveillance and control varies across Algeria's 3 262 km borders with Niger, Mali and Libya. The Algerian military reports a heavier focus on its border with Libya, and to a lesser extent Mali, where any movement across the border is considered a potential threat to national security.²⁷² Border control also varies between zones on the border – for example, around the village of Bordj Baji Mokhtar in Algeria, where gun caches are known

to proliferate, no cross-border movement is tolerated.²⁷³ Similarly, smugglers report enforcement levels vary between days and times, with personnel transitions generally signalling a more permissive environment.²⁷⁴

Enforcement appears greater against those moving migrants across these southern borders, rather than those hosting migrants within Algeria in one of the numerous 'foyers' which have grown significantly in the past few years. Consequently, a number of smugglers have turned from driving to providing accommodation to benefit from the lower risk in that activity.²⁷⁵ Many perceive the provision of lodging as a way of helping migrants.²⁷⁶

Increased enforcement against smuggling activities was accompanied by a 2018 spike in arrests of migrants (both regular and irregular), particularly from sub-Saharan Africa, followed by expulsion to the borders with Niger and Mali.²⁷⁷ Algeria has been expelling migrants since the late 1980s.²⁷⁸ The country's economic downturn has triggered expulsions of migrant communities in neighbourhoods of southern Algeria's cities, at a markedly faster rate, and in a more volatile manner, since 2015.

Breaches of the non-refoulement principle received particular attention in 2018, when allegations regarding severe human rights violations reported in the Associated Press drew unprecedented international²⁷⁹ and national civil society focus.²⁸⁰ Its reported abandonment of 13 000 migrants in the desert²⁸¹ was denied by the government.²⁸² Widely publicised repatriations, arrests and mistreatments of migrants triggered diplomatic tensions between Algeria and significant countries of origin, including Mali and Guinea, both of which reportedly recalled their ambassadors to Algeria in protest.²⁸³ Waves of arrests and expulsions continue, with a significant operation concluded in the first two weeks of January 2020.²⁸⁴

The growth in expulsions is a manifestation of growing xenophobia promulgated by the political elite, particularly under the reign of Ahmed Ouyahia (August 2017-March 2019). His campaign enhanced mass expulsions and labelled migrants 'a source of criminality, drugs and others scourges', a comment which went viral and received significant criticism.²⁸⁵ The political elite have leveraged xenophobic discourse, using irregular

immigrants as scapegoats for domestic problems, particularly since the significant growth in inwards migration between 2000 and 2010, and even more so from 2010 to 2017. During the latter period local civil society estimates suggest that the number of irregular migrants in Algeria doubled,²⁸⁶ primarily as a result of growing instability in the region. A key driver for Algeria's anti-immigration stance is a fear that many migrants based in Libya will seek to flee ongoing instability and move into Algeria, also reflected in Algeria's effective closing of the Libyan border.²⁸⁷

Demand for cross-border smuggling services across Algeria's southern borders with Niger and Mali remains high, with many intending to find work in Algeria rather than continuing the journey to Europe.²⁸⁸ Similarly, the number of migrants crossing the Algeria-Morocco border at the frontier connecting the villages of Béni Ounif-Féguig has reportedly increased, as Algeria's role in the western route to Europe has grown in prominence.²⁸⁹

10.5. Niger

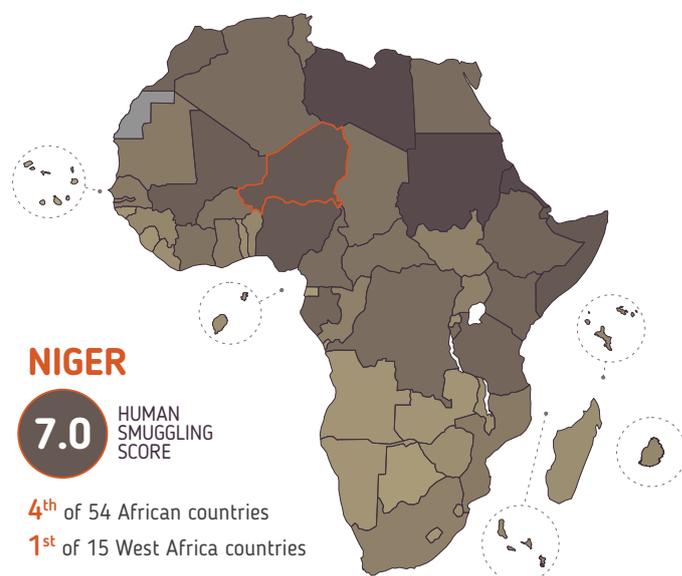
Niger's smuggling industry, and consequent revenue streams, was dealt a significant blow by the enforcement of Niger's Loi 2015-036, which commenced in mid-2016. Peaking in 2017, enforcement entailed hundreds of arrests on smuggling charges (typically of low-level drivers), thousands of migrants expelled from Niger, and the confiscation of many vehicles used in smuggling operations.²⁹⁰

Agadez, long economically dependent on smuggling, remains a smuggling hub on the journey to Libya and Algeria, but on a much-diminished scale. Alternative routes have grown, including the increased transit of migrants in recently booming gold mining sites in the Air mountains, marked by the establishment of the first reported migrant ghetto near one of the gold mines.²⁹¹ There are also new routes through other regions, including Tahoua and Zinder.²⁹²

Although some West African migrants continue to join the official convoys of Nigerien migrants travelling north from Agadez to Dirkou, which re-commenced in mid-2018,²⁹³ numbers remain low; estimates are about 300 foreign migrants travelling per week in the summer of

2019, compared to 2 000 in 2016.²⁹⁴ In 2019 this has been bolstered by Egyptians, estimated to number about 400, joining the weekly convoy.²⁹⁵ The hundreds of actors operating in the migration industry in Agadez in 2016 was reduced to an estimated 20-30 operators in December 2018.²⁹⁶ Smuggling operators continue to be stymied by a lack of demand as the number of foreign migrants moving through Agadez remained low in December 2019.

Figure 10 Prevalence of human smuggling in Niger



Niger ranks significantly above the average continental score of 4.47. Alongside Nigeria, it has the highest score of any smuggling market in the West Africa region, and 4th highest on the continent. The human smuggling market is deeply entrenched in the local economy of many of Niger's regions, and state-embedded actors are important players in the smuggling industry. The smuggling industry is only outstripped by the arms trafficking industry, which scores an 8, reflecting Niger's role as a key transit country for weapons flowing to conflicts in the region, although more recently increasing domestic demand has also fuelled the trade.

Source: Organised Crime Index Africa 2019

In the summer of 2019 a number of drivers who had left Agadez as their employment dried up reportedly returned, swelling the number of active drivers in operation. Some sources reported that by the summer of 2019 the number of active drivers hovered around pre-2016 figures, about 200.²⁹⁷ Many of these were predominantly driving Nigeriens. However it is also believed that many were driving routes further away from Agadez, accommodating foreign migrants.

Smugglers operating in Agadez reported a dip in arrests starting in 2019, with law enforcement once again more commonly requesting bribes rather than detaining them.²⁹⁸ Based on reported prosecutions by the public prosecutor of Agadez, Seyni Saido, the monthly rate of prosecutions between May 2015 and December 2018 was threefold that of the January to October 2019 period.²⁹⁹ Given that enforcement only commenced in mid-2016, the drop in prosecution rates is likely even starker.³⁰⁰

Although continued arrests in September and October 2019 demonstrate ongoing enforcement efforts,³⁰¹ Loi 2015-036 appears to have been enforced more leniently in 2019 than in previous years. Saido suggests that the decrease in prosecutions is due to the effectiveness of the enforcement campaign and reduction of migrant smuggling activities, although he also admitted that many were likely released before reaching his office.³⁰² While they certainly reflect a shrinking industry, diminished enforcement efforts and more clandestine modus operandi by smugglers are also likely to have contributed.³⁰³

Who are the smugglers detained in Niger?

The Agadez prosecutor reported that 107 people were sentenced for smuggling offences between 2015 and December 2018. The vast majority were low-level smugglers (known as '*passeurs*') granted short sentences. The exceptions were higher-level operators.

As at 18 July 2019, five persons were detained on smuggling charges in the Agadez prison. All were

foreigners; four of them were low-level operators working as middlemen in bus stations or helping in ghettos.³⁰⁴ The fifth, from Guinea Konakri, had been operating as a ghetto manager and *passeur* for a number of years, co-ordinating a small operation. It is likely that foreigners are more vulnerable to sustained arrest because they lack local protective networks of influence and financial capital, which can help prevent arrest or draw a lighter penalty.

One of the four low-level operators, whom we shall refer to as 'Kofi' (not his real name), shared his story, which exemplifies that of the majority detained under Loi 2015-036. Kofi is Ghanaian and had arrived in Niger five months prior to his arrest. He had been employed by a well-known Malian *passeur* who ran a local ghetto. Kofi collected migrants arriving on the bus from Niamey at set pick-up points outside the bus station and brought them to the ghetto, often at night. For each foreigner he was paid 5 000 CFA, which his boss said would ultimately earn him a free journey to Sebha.

One driver employed by the Malian *passeur* abandoned his cargo of migrants part-way through his journey through the Sahara towards Libya when he spotted a patrol. Having rescued the migrants, the police drove them back to Agadez, where the angry migrants took them to the ghetto. The police arrested Kofi, although the Malian *passeur* remained undetained. Kofi asserts he was unaware that the service he was asked to provide, conveying migrants between the bus station and the ghetto, was illegal.

The other three foreigners, two Senegalese and one Guinea Bissauan, had been working as recruiters (i.e. drumming up business among arriving migrants) in Agadez for similarly short periods of time and expressed similar ignorance of the legality, or otherwise, of their activities. The services provided by each are the most visible in smuggling operations and thus those that carry greatest risk of detention; higher-level operators exploit the limited understanding of the risks inherent in such activities held by foreign migrants wishing to fund onward travel.

A November 2018 operation resulted in the arrest of two Tuareg and one Nigerian '*yantchaga*', the Hausa term for higher-level operators, together with additional mid-level smugglers. The *yantchaga* – Abdallah Malohiya, Alhagie Gombo, Ajja al-Jumma – were well known businessmen in Agadez who owned ghettos and co-ordinated a number of drivers.

Locals in Agadez expressed surprise at the arrest of these *yantchaga*, particularly because of the reported links of one Tuareg detainee to the president's family.³⁰⁵ Their arrest, which constitutes the biggest success so far, is likely due to the involvement of EU police officers in the specialist unit responsible for the investigation, which included significant intelligence gathering, in part through the use of wiretaps.

These *yantchaga* had transnational links, including to Nigeria and Libya. One detainee operated a ghetto which functioned like a closed detention facility in Sebha, together with checkpoints which intercepted migrants and brought them to the facility. All were found to be trafficking Nigerian women and girls, and one to be trafficking Nigerian cannabis.

All those detained as part of the November 2018 operation were moved to Niamey prison to mitigate the risk that local corruption in Agadez would ensure their early release. Nevertheless, Malohiya and Gombo, alongside other smugglers held in the Niamey prison, were released in October 2019, a mere 10 months after detention.³⁰⁶ Although the circumstances of their release are unclear, it certainly demonstrates that the mandatory minimum sentence of five years' detention was not implemented.

Agadez's prosecutor expressed the views that a high number of arrests to date had crippled the local smuggling industry.³⁰⁷ However other sources suggested that the detainees were easily replaceable by their networks.

10.6. Egypt

Law 2016/82 led to a broad increase in enforcement against smuggling networks, with state officials attributing Egypt's success in 'suppress[ing] or reduc[ing] [human smuggling] significantly' to this legal reform.³⁰⁸ One military figure conceded that the law and subsequent enforcement had not 'completely eliminated' human smuggling, but claimed it had reduced it by 90%.³⁰⁹ Even more emphatically, presidential spokesman Bassam Radi is reported in Egyptian media as stating that 'Not even one case [of illegal immigration] has been recorded since September 2016'.³¹⁰

Although likely correct concerning disembarkations towards Europe, more broadly this remains unverified and likely inaccurate, with human smuggling recognised as endemic by law enforcement and military officials, as well as by international and local civil society working in the country.³¹¹ The focus of statements does, however, demonstrate the government priority concerning disembarkations.

The enhanced focus of the Egyptian government on human smuggling can be tracked in statements made by Algeria's heads of state regarding organised crime – data collected by the Africa Organized Crime Index found that eight out of 10 statements made in 2018 referred to human smuggling. Although the data collection methods have their limitations, as they only encompass resources catalogued on Lexis Nexis, the high proportion of recorded statements focused on human smuggling yields a clear focus.³¹²

The most visible impact of Law 2016/82 was the abrupt stopping of boats departing from Egypt towards Europe. No boat is known to have departed from Egypt since early 2017. Although it is rumoured that some boats arriving in Europe reporting Libya departures are concealing Egyptian departures, this is unverified and even if true, would suggest only a small fraction of previous departure rates continue. Smugglers continue informing migrants that boats depart from the coast near Alexandria; however this appears to be a method of increasing business.

Figure 11 Prevalence of human smuggling in Egypt



Egypt has a moderately high score for the human smuggling market (the same as for the human trafficking market), reflecting its key role as a transit and destination state. Smuggling pervasiveness peaked in 2016 and 2017 and is believed to have decreased since. Egypt's overall criminality rating of 5.14 places it 22nd in Africa, but when analysed regionally, means it falls behind only Libya in North Africa. The markets surrounding synthetic drugs (predominantly tramadol), cannabis, and arms trafficking were ranked as most pervasive and having the strongest negative impacts on the country. Criminal networks, state-embedded actors, and foreign actors were all noted as playing a significant role in Egypt's criminal markets.

Source: *Organised Crime Index Africa 2019*

Intensifying collaboration between the EU and Egypt on 'migration management' from 2015 onwards occurred in parallel to a dramatic uptick in the detention of migrants on Egypt's northern coast; the tally increased by 28% during the first eight months of 2016 as compared to previous annual averages,³¹³ often on the

basis of administrative migration law infractions. Arrests of undocumented migrants by state officials, both on Egypt's borders and further into the country, have continued to increase.³¹⁴

The state's success in blocking departures from the northern coast has led to increased engagement between the EU and Egypt, reportedly one of the main goals of enforcement efforts, and was the topic of a number of high level EU/Egypt government meetings held in early 2019.³¹⁵

The focus of enforcement against the smuggling industry has clearly been on coastal disembarkations, and more broadly on smuggling operations facilitating movement out of the country, rather than on movement into the country (which would appear to pose a greater security threat). Interviews with a senior figure in the Egyptian military, now retired, revealed a tacit acceptance that the new law was being applied unevenly across geographies and migrant populations.³¹⁶

While arrests on overland smuggling routes into Egypt are believed to have increased, the enforcement environment for human smuggling operations away from the coast remains more permissive.³¹⁷ Such smuggling occurs predominantly across three key routes – into Egypt by air (predominantly from Syria); into Egypt over the land border with Sudan; and both into and out of Egypt across the western borders with Libya.³¹⁸

Longstanding circular migration routes with Egyptians travelling into Libya for work were disrupted by the closure of the border in 2015, in turn fuelling significant human smuggling operations. Although Egypt has agreed to permit Egyptian labour migration to Libya, this has not yet come into effect. Despite an increase in checkpoints since 2011, the desert terrain facilitates evasion, and Egyptian media has reported that despite a 'tightening of the noose', human smuggling groups moving persons overland continue to operate freely.³¹⁹

Recent reported cases predominantly feature smugglers moving people out of the country, such the February 2019 arrest of 71,³²⁰ and detention of 22,³²¹ alleged smugglers moving Egyptian and foreign migrants out of Egypt using fraudulent documents. Further, many

arrests of those involved in coastal departures have been reported in Egyptian media, including the 56 arrested in the wake of the Rashid case,³²² the first under Law 2016/82. However, official data has not been made available, and it is unclear which proportion of arrests are of migrants and which are of smugglers.

Similarly, the state quickly cracked down on a new smuggling route out of the country which emerged in the spring of 2019. The closure and heightened security across the Libya/Egypt border, together with ongoing insecurity in the north of Libya, catalysed a new small smuggling route: Egyptians flying into Niger from Cairo on work visas and then travelling northwards into Libya to find work. The speed at which this route developed suggests networks involved Cairo-based Egyptian groups. This movement was disrupted in September 2019 after intelligence reached the Egyptian embassy and Nigerien authorities, who conducted targeted raids and arrested over 80 Egyptian migrants in a convoy leaving Agadez.³²³

The focus of enforcement efforts against smuggling networks moving people out of Egypt (particularly, although not exclusively, towards Europe) has contributed to an increasingly stagnant migrant population within the country. Although there is movement across the border to Libya, anecdotal evidence suggests this is smaller than inward flows. NGOs working with migrants in Egypt perceive refugees to be a growing proportion of the mixed migration flows entering Egypt. This could be due to growing awareness that departures to Europe have stopped, diminishing Egypt's attraction as a transit country. The rapid transmission of information among migratory routes ensures many migrants will be aware of the shift in Egypt's coastal flows.³²⁴

As paths to Europe remain closed and resettlement rates decrease, the stagnant migrant population continues to grow, and conditions for migrant populations deteriorate. Gender-based violence in migrant populations has reportedly increased, as has gang-based violence, particularly among migrant Sudanese groups. It is unclear where the migrants will move on to, although smugglers are likely to be

required. Some migrants report their original destination was Cairo, but that widespread racism against Africans, and a lack of rights, made remaining untenable, forcing them to move towards Europe, for which they engaged the services of smugglers.³²⁵

Local NGOs working in refugee camps report that smugglers continue to frequent camps, and believe that northern coastal smuggling networks are lying dormant, ready to re-commence activities if the political and enforcement context becomes more permissive.

11. Impact of enforcement: creating the criminal?

Of the six jurisdictions whose enforcement efforts are described above, arguably it is only three, Algeria, Niger and Egypt, which have undertaken sustained enforcement against human smuggling to an extent which enables an analysis of the impact of such action on the smuggling markets. In the case of Algeria, the focus of enforcement is on border control more broadly, and predominantly on the smuggling of other commodities; however the enhanced operating risk for human smuggling triggers similar impacts.

Such sustained enforcement against the human smuggling industry increases the operating risk for smugglers, driving the market to react in a number of key ways. As the risk matrix shifts, so does the required smuggler profile, namely:

- existing networks become more sophisticated;
- fewer criminal organisations are driven out of the market, pushing it towards a more professionalised manifestation through 'natural selection;' or
- actors with experience in organised crime, typically who have experience moving other illicit commodities, such as narcotics, weapons, or licit contraband, across borders move into the market, either filling the space created by those driven out, or muscling out existing operators.

For example, the increasingly risky operating environment for smuggling networks in southern Algeria has resulted in many highly organised smuggling networks composed of armed groups based in Mali

and Niger, although a small volume of low-level smuggling continues.³²⁶

In contexts where enforcement has experienced some success in shrinking the smuggling industry, this has had significant impacts on market dynamics, migrant vulnerabilities, and on those whose revenue streams have dwindled or disappeared. The market reaction to enforcement is shaped by the fact that in the jurisdictions considered it is predominantly low-ranking operators in smuggling networks, largely due to their enhanced visibility, that are most typically arrested. This phenomenon is aligned with a pattern predominant globally.

Smuggling networks constantly adjust their modus operandi to safeguard profits and displace risk. However such changes in operating mechanics often have significant impacts on the risks faced by irregular migrants. Migrants' vulnerabilities are particularly increased when counter-smuggling enforcement is one element of a broader drive against irregular migration, rather than focused on organised crime. Where enforcement can be characterised as primarily against irregular migration, it often occurs in parallel to increased arrests and expulsions of migrants, increasing their vulnerability to abuse at the hands of state actors.

The dynamics of smuggling networks across jurisdictions vary hugely. However some overarching trends can be determined in the reaction of the smuggling markets to counter-smuggling enforcement in the jurisdictions considered. An analysis of these trends yields the perception of a three-phase evolution of the smuggling markets, set out below.

11.1. Phases of the smuggling industry

Two key factors drive the attractiveness of criminal markets to criminal actors: profits and operating risk. Shifts in these two factors drive the smuggling industry through three distinct phases, with each entailing different risks for migrants.

PHASE 1: Low risk, low profits

Where profits and operating risk are low, criminal operators are typically characterised by lower levels

of sophistication. The criminal activity is often a sideshow to alternative legal businesses, or to the smuggling of commodities across borders to leverage price differences (e.g. fuel smuggling between Libya and Niger). This can be characterised as phase 1 of the smuggling market with low levels of enforcement, a low-risk operating environment for smugglers, and consequently low prices for smuggling services.

Phase 1 is also typically characterised by lower risks for the irregular migrants and refugees using smuggling services. Profits from the smuggling industry are typically reinvested in the local community and can act as a stabilising force, offsetting hardship among marginalised communities. With the exception of certain jurisdictions where the migration space has been highly securitised for a long time, such as Eritrea, and consequently smuggling markets operate in environments of high risk, most smuggling industries in Africa can be characterised as phase 1 markets for most of the 21st century.

PHASE 2: Profits and operating risk increase

Where enforcement drives up the operating risk, it also drives up the prices migrants and refugees must pay for smuggling services (although of course supply and demand dynamics will also factor in).³²⁷ Although an element of the price increase may be absorbed into operating costs, such as increased bribes or higher fuel costs to navigate more circuitous routes, a significant proportion will represent a growth in profits for the smuggler, making involvement in the industry more lucrative. The industry thus begins to offer a full-time revenue stream for operators.

It also changes the risk profile of human smuggling activities, which become 'criminalised' activities rather than merely an informal mode of transport. At this point more sophisticated criminal networks are attracted to the market by increased profits, while low-level operators either become increasingly professionalised or leave the market. Given the shifting nature of the actors involved in the smuggling industry, profits start to be reinvested in growing the criminal economy itself, diverting resources away from local communities.

This can be characterised as phase 2 of the smuggling market, where enforcement has driven up prices and operating risk to a medium level, but demand for smuggling services remains high. This is partly because the environment has not yet become unfeasibly hostile or dangerous for irregular migrants, but may also be attributable to a time lag in the shifts in operating risk reaching those embarking on their journey. Algeria, where significant state resources have been invested in border control, and risks for both migrants and smugglers have increased, but demand has not yet diminished, can be characterised as a phase 2 market.

Here the disjuncture is created between legal approaches to smuggling, which treat the phenomenon as criminal, and local perceptions, which to a large extent will remain rooted in a phase 1 understanding of the smuggling economy, i.e. merely as a facilitation of movement.

Such perceptions also start to shift, although in many jurisdictions the disjuncture will endure throughout, posing a significant obstacle to effective counter-smuggling action. Shifting perceptions can to some extent be tracked in the changing migrant perceptions of the role played by smugglers.

Data collected by the Mixed Migration Centre as part of its 4Mi project found that in Agadez, Niger, 81% of migrants perceived their *passeur* to be a professional smuggler, decreasing to 42% in Niamey, where the majority (51%) perceived *passeurs* to be operating as travel agents.³²⁸ This is in part due to the fact that migrants move using regular buses in the latter, where enforcement has been lesser, and not the former, where smugglers have been forced further underground and to operate more professionally.

Similarly, in Gao, Mali, where sporadic enforcement is the exception to overall state absence, 44% perceived *passeurs* to be professional smugglers, far lower than in Agadez which has experienced prolonged counter-smuggling enforcement (33% of migrants in Gao classified *passeurs* as travel operators).³²⁹

PHASE 3: Risk high, profits decrease, driving diversification of income streams

In phase 3 of the smuggling industry sustained enforcement has kept prices and operating risk high. In some contexts, where demand is inelastic (often in the case of refugees) or purchasing power high, as in the exodus of Syrian refugees during the Syrian conflict, this means the market remains static, with highly criminalised smuggling networks reaping significant profits from operations. However, in contexts where demand is more elastic, prices may exceed the purchasing power of those seeking smuggling services, and irregular migrants are deterred by the increasingly hostile environment of the relevant jurisdiction. This drives down demand, meaning that although the per capita profits remain high, overall revenues dwindle.

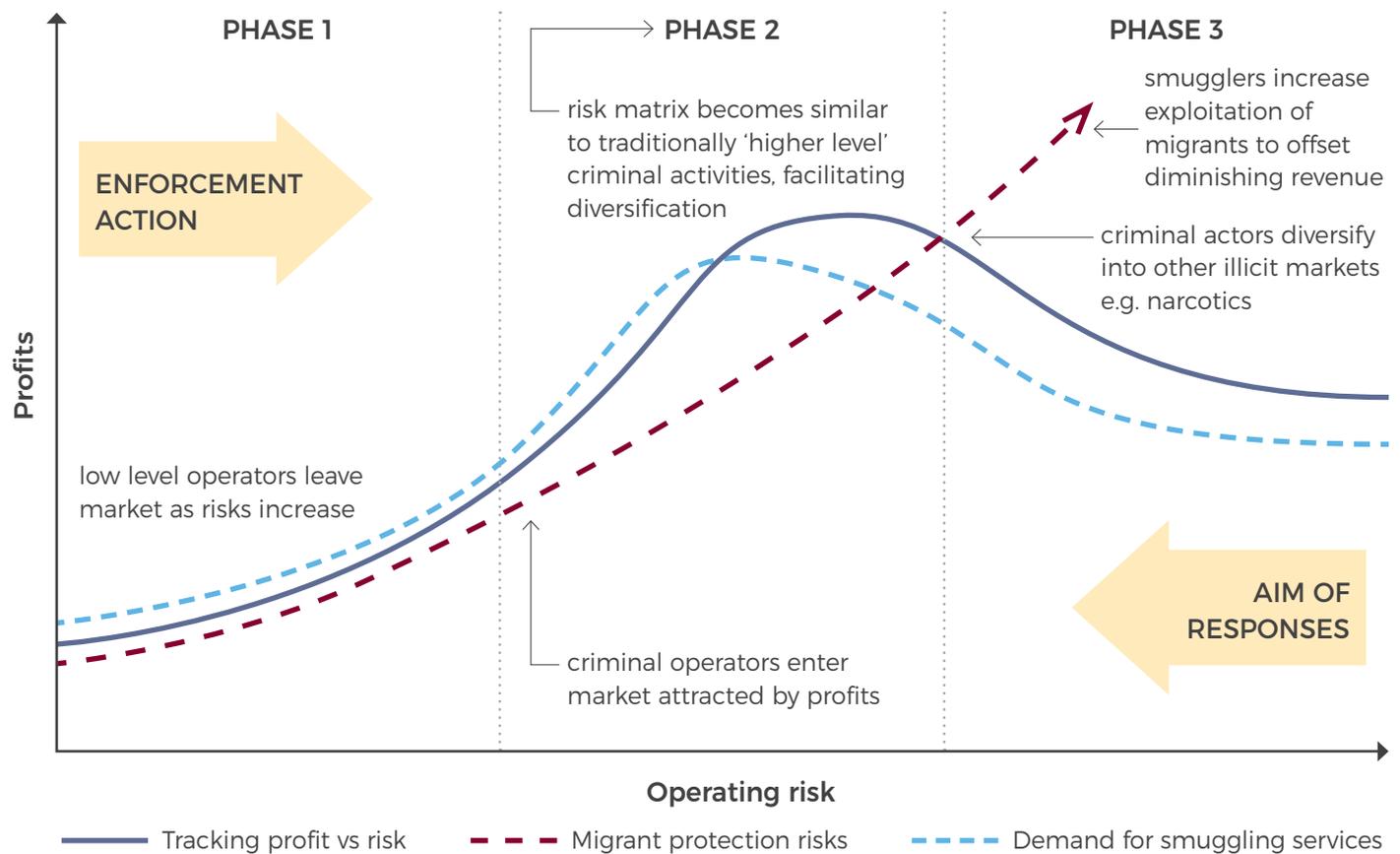
This drop in demand has been tracked in the decreasing numbers of migrants from West Africa and the Horn of Africa travelling across Libya, with more opting to move across alternative migration routes.

CSOs operating in Egypt have noted that an increasing proportion of the mixed migration flows moving irregularly into the country consist of refugees, rather than economic migrants. This could in part be due to the fact that refugee demand is inelastic, and therefore less reactive to the changing risk profile of the journey.

With operating capacity exceeding demand, actors in the smuggling industry can no longer rely on the market as a full-time revenue stream and are forced to diversify into alternative income streams. These can broadly be categorised into three categories, as smugglers:

- seek to draw greater profit from a smaller number of migrants using their services (through exploitation and extortion); or
- move into licit economies; or
- move into alternative illicit markets, likely the smuggling of illicit commodities, as this leverages existing networks accustomed to facilitating clandestine movement.

Figure 12 Market reactions to counter-smuggling enforcement action



Where alternative employment in legal markets is low (a characteristic which may have driven high involvement of the local community in the smuggling industry in the first place), actors are forced to turn to one of the other options.

Operators take action to protect and increase flows, either by shifting mechanics or by targeting the domestic market. For example, in Agadez, as the smuggling industry has dwindled, there has been a slight increase in Tebu living in Libya driving to Agadez to pick up foreign migrants and transport them back to Sebha in an effort to retain flows through the system. Nigerien networks have also sought to repurpose existing smuggling infrastructure to facilitate domestic emigration, despite the lower profit margins.

11.2. Overarching trends

11.2.1. Displacement of risk: migrant protection risks increase

The shape of smuggling operations is crafted around nuanced assessments of risk by smuggling networks. As operating risk increases, senior operators displace risk down the chain, with the smuggling industry as a whole seeking to shift risks away from itself and typically onto migrants.

For example, in Niger senior smuggling operators have adapted the way that drivers, lower-level actors, are paid in order to safeguard their own economic interests. Drivers who ferry migrants across the desert to Libya increasingly do not receive up front or part payment

prior to the journey, but since 2018 have instead been forced to accept full payment upon delivery of migrants to Sebha or other locations in southern Libya.³³⁰

This shifts the increased risk of interception, and therefore of failed delivery, onto the drivers and away from those higher up. It also has the (no doubt incidental) effect of enhancing migrant safety as the interests of driver and migrant are aligned in the safe conclusion of the journey, dissuading mid-desert abandonments in the face of patrols. Meanwhile drivers need to absorb heightened fuel and bribe costs into their own operating budget and must be able to navigate gaps in cash flows, increasing financial barriers to entry.

As operating risk increases, senior operators displace risk down the chain, with the smuggling industry as a whole seeking to shift risks away from itself and typically onto migrants

In Egypt, as the risks of interdiction associated with disembarkation towards Europe from the northern coast increased with the spike in enforcement in 2016, youths, predominantly minors who would face lesser charges if caught, were commonly made responsible for captaining the vessel. Similarly, in the face of growing interception risks on the Mediterranean crossing, between 2014 and 2016 there was an increase in migrants captaining boats carrying migrants, either under coercion or for a decreased fee.

In Algeria, where the government has substantially increased surveillance and border patrols, smugglers have also adapted operating mechanics to mitigate the enhanced risk to themselves. Although government enforcement efforts are not specifically focused on human smuggling, but rather on terrorism, arms and

drugs, tactics deployed by Algerian border security mean that the operating risk for smugglers is higher. For example, a smuggler moving migrants over the Algerian border overnight may be shot at by security personnel seeking to mitigate risk of any kind.

A significant proportion of migrants moving irregularly across Algeria's southern border are smuggled across the sand mound, between two and five metres high, erected by the state across portions of the Algeria-Niger and Algeria-Mali borders. Prior to enhanced enforcement, smugglers typically drove migrants across the border into Algeria and onto Ain Guezzam, a town about 15 km from the border. But in the current context of enhanced surveillance, smugglers drop the migrants, predominantly at night, between two and five km from the Algerian borders. They give migrants instructions on how to climb over the sand mound, but rarely remain with them during the night because 'it is too dangerous outside here'.³³¹

The high levels of security and patrols across the 20 km area north of the Algeria border with Niger and Mali means that smugglers rarely pick up migrants close to the border, instead waiting until they reach Ain Guezzam to mitigate the risk of interception.³³² Migrants report often getting lost, being 'paralysed with fear' in the desert, and 'walk[ing] all night long without food and water until ... reach[ing] Ain Guezzam'.³³³ Any crossing of the sand mound is considered a 'potential threat to national security', making migrants' journeys extremely high risk.³³⁴ The construction of the sand mound, together with additional resources invested in ensuring the borders are difficult to cross independently, has made smugglers all the more crucial for migrants seeking to cross the border, safeguarding demand while increasing the migrants' risks.

Migrants report being abandoned in the desert surrounding the southern Algerian borders at night by smugglers when they receive intelligence, via a telephone call from associates, of active patrols.³³⁵ Such mid-journey abandonments of migrants in the back of trucks, often at night given the increasingly clandestine movements of smugglers and commonly resulting in migrant fatalities, has also increased in Niger and

Libya following heightened enforcement.³³⁶ As noted above, paying the smuggler only after the migrants have reached their destination aligns the interests of smuggler and migrant towards the migrants' safe delivery. This payment structure has emerged in how drivers are paid by more senior smugglers to transport migrants across the desert between Niger and Libya.

Payment structures between migrant and smuggler can also act to align their interests, such as where migrants reserve their payment until safe arrival, sometimes leaving the payment due with a trusted intermediary (in an 'escrow' structure). In contrast, 'travel now pay later' (where the migrant pays nothing to the smuggler but agrees to work on the journey to finance the fee), and advance payment schemes (where the migrant pays 100% of the fee to the smuggler before setting off on the journey), which have been increasingly common across the northern route since 2016,³³⁷ provide migrants with no protection from abandonment.

In Niger smugglers reacted to increased enforcement by shifting from daylight advertising and operations, with the tacit or explicit consent of law enforcement, to moving at night and using longer and more remote routes avoiding checkpoints and patrols. Similarly, between 2015 and 2017 Libyan coastal departures from locations including Sabratha, Mutrud, al-Mayya and Garabulli often occurred during the daytime, with more than one vessel launching simultaneously. But across 2018, where the operating environment for smuggling networks had become more high risk due to counter-smuggling action taken by militias, there was no credible report of a daytime departure. Instead all vessels left at night, often from extremely remote and logistically challenging locations.³³⁸

Such night-time departures, longer routes and enhanced evasion of law enforcement have significant impacts on the risks faced by migrants. In Niger, statistics published by the International Organisation for Migration record a six-fold increase in desert fatalities between 2015 and 2017 on the roads towards Niger and Algeria,³³⁹ while in Libya, UNHCR data suggest the mortality rate of the sea crossing as a percentage of departures increased from 2.1% in 2017, to 3.3% in

2018.³⁴⁰ Interviews with migrants in Algeria confirm similarly heightened levels of danger surrounding their journey following construction of the berm and militarisation of the border, despite the fact that migrants are not the priority focus of border control.

11.2.2. Increase in price of smuggling services

The greater skills required by smugglers to evade interdiction, and the heightened risk smuggling activities entail in a more securitised environment, increases the cost of the journey. As the cost of operating rises, with increased fuel costs for longer journeys or higher bribes for state officials, these are largely or wholly passed on to migrants.

Market forces and economic principles of supply and demand govern the prices migrants must pay

Market forces and economic principles of supply and demand govern the prices migrants must pay. In instances where barriers are relatively easy to overcome, more smugglers can operate in the market and competition drives down prices. Where barriers are at their most formidable, the smuggling market consists of only a few capable providers who can charge a premium for their services. These barriers are not just physical but also political, and dynamic, shifting in reaction to the level of enforcement at any particular point. As enforcement levels increase, barriers are harder to cross, driving up costs.

In Niger, the price for foreign migrants making journeys across the desert and into Libya increased fivefold between 2015 (where the journey between Agadez and Sebha cost foreign migrants an average FCFA 150 000 (€230)) and December 2019 (where the same journey costs between FCFA 400 000 and FCFA 500 000 (€615–€765)).³⁴¹ This is due to increased fuel costs borne by smugglers taking longer and riskier routes

through the desert, the increased risk of arrest, and the higher bribes required for border officials if detained (although bribes were often found ineffective during peak enforcement).³⁴² Prices appear to have stabilised since January 2019.³⁴³ This is likely due to tailing off or plateauing enforcement activities, although lowered demand for smuggling services across the northern route may also be depressing prices and counterbalancing any heightened operating risks.

In Egypt, prices to transit into Libya have reportedly doubled in reaction to heightened border security.³⁴⁴ This has increased the vulnerability of migrants already in Egypt to other forms of exploitation, including organ trafficking, to finance onward movement.³⁴⁵

In Somaliland and Puntland migrants attributed a tangible increase in prices between 2013 and 2017 to the increase in smugglers' operating costs driven by heightened state efforts to limit irregular migration, together with enhanced collusion between law enforcement and smugglers. The result was decreased competition and the limiting of operators to those with the requisite connections, effectively creating a monopoly market.³⁴⁶

The impact of enforcement on the price of smuggling services typically increases the profit margins for smugglers per migrant. However, it can also make the journey unaffordable for many migrants, decreasing demand for smuggling services. The impact on the overall revenues of the smuggling market depends on the specific dynamics of the jurisdiction, and whether the market is operating within phase 2, or has shifted into phase 3.

11.2.3. Increased exploitation of migrants by smugglers

Enforcement can drive the smuggling market across the continuum away from facilitating the movement of the migrant and towards exploitation. Using the phases outlined in the section above and illustrated in [Figure 12](#), this occurs both in:

- Phase 2: Increased profits have attracted more criminalised operators and encouraged the professionalism of existing players. Smugglers

operate more clandestinely, which typically enhances risk for migrants, who cannot turn to the state for support. Migrants are increasingly commoditised.

- Phase 3: Enforcement efforts have driven prices so high and made the environment so hostile that migrants are dissuaded from travelling (although those forced to move may continue to use these routes when alternative movement is unavailable). The decrease in demand diminishes smugglers' overall income streams from facilitation (i.e. transportation) activities, meaning they either turn to legal employment, or alternative illicit markets, or extract profit from migrants in other ways.

This highlights the importance of identifying alternative income streams for those involved in smuggling when planning interventions to shrink the smuggling market.

In Niger, kidnap for ransom became a more common element of the migrant experience following enforcement of Loi 2015-036.³⁴⁷ Nigerien authorities also recognise that a spike in banditry from 2016, of which migrants are often the prey, can be attributed to enforcement of Loi 2015-036.³⁴⁸

Enforcement can drive the smuggling market away from facilitating the movement of the migrant and towards exploitation

In Egypt, heightened enforcement significantly shrunk the revenues of smugglers operating on the coastal routes in the north, which have been blocked since 2017. Smugglers in this area reportedly continue to earn a small revenue stream from falsely advertising boat trips to Europe to new irregular arrivals. These migrants pay between US\$2 000 and US\$3 000 for the promised journey, are transported and held in a location in Egypt and then abandoned or ransomed further.

An increase in organ trafficking in northern Egypt is likely linked to an increasing pool of migrants trapped there by the increasing difficulties in leaving the country. The hike in prices charged by smugglers leaves many unable to afford onward travel to Libya, making them extremely vulnerable to organ trafficking networks, which reportedly overlap with smuggling operators.³⁴⁹ In Agadez and Niamey, where the journey northwards into Libya has become increasingly dangerous and thus expensive, the number of sex workers and sex trafficking victims have been growing since the crackdown on the smuggling industry, as female migrants stuck part way through their journey turn to sex work to finance onwards travel.³⁵⁰

The number of sex workers and sex trafficking victims have been growing since the crackdown on the smuggling industry

In Libya, the flow of migrants to Europe has decreased dramatically since its climax in 2015. The northern route through Libya has become too expensive for many irregular migrants from the Horn of Africa and West Africa and is perceived to be extremely dangerous, displacing movement onto the southern and eastern routes. Further, the toxic reputation of the smuggling industry triggered a number of militias to turn away from the smuggling market in an effort to legitimise their operations and gain power. They turned instead to counter-smuggling operations, in return for financial support and reputational leverage from the EU.

Smuggling networks which continue to operate have been driven underground and increasingly turn to other methods of extracting profits from migrants, including extortion, forced labour and ransom. There has been a particular growth in ransom, both in frequency and in the quanta of ransom payments demanded. Bani Walid – a key smuggling hub in the summer of 2015 – had by the summer of 2018 experienced a significant drop in

the volumes of smuggled migrants transiting the town. This led the criminal operators co-ordinating smuggling operations to shift from 'monetising the movement of migrants to their ransoming', with ransom quanta for the release of East African migrants reportedly increasing from US\$2 000 to US\$5 000 in 2015 to as much as US\$10 000 in 2018.³⁵¹ Typically kidnap for ransom dynamics not only involve the unlawful detention of the migrant, but significant abuse – 31 of 53 irregular migrants detained and held for ransom in different locations across Libya reported experiencing physical abuse during detention.³⁵²

11.2.4. Alternative illicit markets: diversification of income streams

In phase 2 of the smuggling industry, where enforcement has driven up prices and heightened the risk of detention but demand has not yet dwindled, smuggling becomes a more lucrative industry. It attracts higher-level operators with experience moving other illicit commodities and evading detection. Increasing criminalisation means that human smuggling, previously a 'lower tier' crime, occupies a similar risk profile to other illicit activities, facilitating diversification across criminal economies.

In phase 3, where overall revenue streams have dwindled, smuggling operators leverage existing networks to gain other sources of income, either through exploiting the vulnerability of migrants (as noted above), or moving other illicit commodities.

Where operating risk has become extremely high, such as in Libya, where the reputation of the smuggling market became toxic for groups seeking to gain long-term legitimacy in the country, traditionally 'higher tier' criminal markets can become comparatively lower risk. In Libya this has prompted armed groups to move into less sensitive markets, such as narcotics. The outwards enforcement posture of a number of militias in relation to the human smuggling market, including the so-called Tripoli militia cartel, also camouflages an increasing predation of state institutions as an alternate income stream.³⁵³

In Niger, some ex-smugglers found employment in the flows of Nigerien emigration to Libya (which are

believed to have increased, although predominantly for work in Libya rather than onward travel to Europe), either as drivers or employed at the transport office or checkpoint. Others turned to smuggling alcohol, trafficking tramadol or cannabis resin.³⁵⁴ Similarly, in Egypt 2018 cases of arrest and investigation of human smugglers demonstrates an overlap in the networks smuggling people and narcotics.³⁵⁵

In contrast, in Algeria, the state has applied a differentiated enforcement approach to crime across its southern borders, with a zero-tolerance approach to arms, minimal tolerance for drugs, and a more permissive approach to the smuggling of people. Consequently, the risk profile of migrant smuggling is not similar to that of other illicit markets and remains more aligned to 'low-level' smuggling, including that of fuel or staple commodities. The networks smuggling people across Algeria's borders with Mali and Niger are different from those involved in moving other illicit commodities, and there is limited overlap.³⁵⁶

11.2.5. Spikes in emigration and unrest

Phase 3 of the smuggling industry, where smuggling revenues are central to the political economy of the region, can drive greater emigration (due both to the drying up of a key livelihood and to existing smuggling networks drumming up domestic business) and in some cases increasing unrest. Counter-smuggling interventions, unless coupled with meaningful efforts to reduce the demand and untangle migrant smuggling from the broader political economies of certain markets, thus risk being not only ineffective but counter-productive.

In Algeria, smuggling activities, predominantly of fuel, cigarettes and other legal goods whose differing taxation across the borders created opportunities for profit, had long occurred with the tacit support of state officials. These formed the core livelihood of many borderlands communities, with the majority of the proceeds re-invested in local economies.³⁵⁷ Consequently the increasing militarisation of the border, which has had a significant effect on cross-border flows of fuel and other legal goods, dealt a blow to the economies of borderland communities and in some cases resulted in an increase in local unrest. For example, the 2018 protests in the

northern border settlements of Souani and Labtime, which relied heavily on cross-border trade.³⁵⁸

The government has recognised the economic impact of its actions to limit cross-border flows, both explicitly and tacitly. In October 2018 it launched its 'Special Programme for the Development of Borderlands' focusing on the development of Algeria's southern borderland economies.³⁵⁹ Of perhaps greater impact is the state's differentiated enforcement strategy which permits significant movement of licit commodities and people across many parts of Algeria's borders (other than that with Libya, which is predominantly closed). This is at odds with the state's publicly hostile stance to irregular immigration but constitutes a tacit recognition of the importance of cross-border smuggling to the livelihoods of borderland communities.

Niger is one of the few pockets of relative stability in a neighborhood that includes northern Mali, southern Libya, and northern Nigeria. In the past, revenues from human smuggling offered a key livelihood opportunity to marginalised groups in the north amid economic uncertainty and regional instability, acting as a force for stability. The migrant smuggling industry was deeply enmeshed in formal and informal political and security structures and represented (and continues to a lesser extent to represent) a substantial proportion of the local economy and state revenues.

Smuggling profits were invested in other sectors of the economy and also translated into greater informal political and military influence for Tebu groups who consolidated their control of certain smuggling routes in the region.³⁶⁰

The Tebu featured disproportionately in smuggling arrests, causing significant tensions among the community. The concern triggered among authorities by a late 2016 call for rebellion by Adam Tcheke, a former Tebu rebel, despite its being brief and entirely unenacted, demonstrates the perception of enhanced volatility.³⁶¹ The crackdown also caused resentment among many former Tuareg rebels who had been encouraged by authorities to work as migrant transporters following peace agreements in the late 1990s and 2000s, and therefore saw Loi 2015-036 as a breach of the peace deal.³⁶²

The Nigerien government first closed the Djado goldmine while taking action against the smuggling industry, thus depriving northern communities of two revenue streams simultaneously. It later sought to mitigate the impact of its counter-smuggling initiatives in the peace agreement struck between the Nigerien presidency and the Movement for Justice and the Rehabilitation of Niger (MJRN), an armed movement claiming to represent the interests of Tebu in northern Niger. Key elements of this agreement remain unimplemented.³⁶³

The failure of the Nigerien government to ensure that cutting off this revenue stream was coupled with credible and comparable alternatives worsened unemployment and exacerbated the very drivers of migration that created demand for smuggler services in the first place.³⁶⁴

In Niger this can be tracked in the increase in Nigerien migrants emigrating since 2016. As at December 2019, local transport operators report that on average

of 2 000 young Nigeriens leave for Libya every week in what is locally termed an 'exodus' due to its size.³⁶⁵ International Organisation for Migration flow-monitoring data corroborate this, showing a two-fold increase in Nigeriens travelling to Libya between July 2017 and 2019.³⁶⁶ Similarly, flows of Nigeriens to Algeria also doubled in 2019.³⁶⁷

The increasing effects of climate change on Niger's agricultural sector, which employs about 80% of its labour force, in part contributes to such increased emigration. However Global Initiative research suggests that the primary driver is likely to be the collapse in demand by foreign migrants for smuggling services.³⁶⁸ Existing operators have sought to plug the gap created by the sharp decrease in foreign migrants, so the smuggling industry continues. Now, however, it predominantly caters to Nigeriens emigrating, rather than foreign migrants transiting the country. The lower prices paid by Nigerien migrants also means the industry is far less lucrative.

RESPONSES

12. Smuggling as a state-sponsored enterprise

Human smuggling in Africa and more widely is a state-enabled economy, to different degrees depending on the political economy of the specific country. Firstly, state policies, such as the marginalisation of certain groups, drive movement and close legal migration routes, while punitive approaches to irregular migration force migrants to rely on smugglers.³⁶⁹ Secondly, state corruption, or indeed official state policy, typically lies at the core of smuggling industries. Reports of violence in clashes between smugglers and law enforcement are rare, reinforcing the image of the smuggling industry as one predominantly facilitated through the payment of bribes.

Interventions into the smuggling industry across the continent have largely concentrated on enhanced

border control, greater law enforcement, and arrests of both migrants and smugglers. To a significant extent, this strategy reflects the shape of EU efforts to combat migrant smuggling networks. These efforts have focused on fostering greater dialogue and collaboration with governments and law enforcement in source and transit states, increased border controls, and support to legal institutions in partner countries. Yet the central role played by the state in the smuggling industry complicates its role as a primary partner in anti-smuggling interventions.

In Egypt the state's counter-smuggling operations have been lauded by EU and international organisations alike. It is clear that the smuggling networks facilitating pre-2017 migrant departures from Egypt's Mediterranean coast towards Europe relied heavily on bribing government officials, including law enforcement and elements within the armed forces

and intelligence apparatus.³⁷⁰ It was precisely this collusion that enabled the Egyptian state, which exerts significant control over its officers, to quickly stem coastal departures in 2017.

State collusion remains at the heart of the highly lucrative air route from Syria to Cairo, which is facilitated by the corruption of airport officials. Smugglers bribe state airport officials to grant their clients three-month tourist visas, which can then be converted into longer-stay permits. They then await their clients outside the airport. This smuggling route appears to continue largely unchallenged, reflecting the focus of state enforcement efforts on emigration towards Europe, particularly of Egyptians.³⁷¹

A military official in Egypt explained that 'governments and the police are evaded' by smuggling networks due to the role played by 'intermediaries ... that have connections and relationships with those who have access to the security plans to combat these gangs'.³⁷² Such connections mean that smuggling networks 'have prior information on the movements of the governments and the security forces', enabling networks to 'modify their plans, to evade interdiction, facilitating cross-border movement'.³⁷³

The Model Law on Migrant Smuggling published by UNODC to guide states in translating the Smuggling Protocol into national legislation recognises the role of corruption in smuggling. Commission of a smuggling offence by a state official attracts a higher penalty than the same offence committed by a lay person. This difference is reflected in the national laws criminalising smuggling in Algeria, Ethiopia, Egypt, Libya and Niger.³⁷⁴ However, arrests of state officials remain extremely rare.

Approaches to stemming migration that emphasise criminal justice and border management in source and transit countries drive reliance on corruption, as state connections become ever more important to successful smuggling operations. This pushes the industry into the hands of organised crime syndicates with the requisite connections. It thus further entrenches existing networks of corruption or provides the impetus for new ones to proliferate.

While there have been some studies that examine the 'corruption-migration' nexus,³⁷⁵ there is a paucity of research regarding the relationship between corruption and migration as it pertains to specific migrant smuggling networks and markets. We can, however, start developing a few working hypotheses about the ways policy interventions in certain contexts have had an impact, or will in future, on the relationship between smuggling networks and corruption.

The modus operandi of a given migrant smuggling network is heavily shaped by the markets in which it functions. Consequently, the role of corruption in facilitating certain migrant flows varies across different routes, networks, and smuggling hubs. The greater the law enforcement focus on human smuggling, the more difficult it becomes for smugglers to operate without a level of state collusion.

The greater the policing on human smuggling, the more difficult it becomes for smugglers to operate without state collusion

Firstly, as enforcement increases (into phase 2 of the smuggling market), smugglers require connections to relevant state officials in order to operate, driving ill-connected smugglers out of business. In contexts where the state is lacking, connections are instead required with quasi-state armed actors, as is the case in areas of northern Mali where armed groups rather than the state control territory.

In territories where the state is deeply involved in the smuggling market, this can drive up demand for smuggling services, which become the only way to transit the territory. In Somaliland and Puntland, agreements among law enforcement, community militia and smugglers led to reports of migrants being detained by law enforcement and community militia, and passed onto the smugglers, who then tortured them to extract ransom before providing services. The only way of

avoiding this was by paying smugglers for protection, making smugglers absolutely necessary for migrants, particularly Ethiopian migrants, transiting these states.³⁷⁶

Secondly, as risks of interdiction increase for the smuggler, and state collusion becomes increasingly essential, bribe prices increase. The costs of these bribes are typically not borne by the smuggler, but passed onto the client, and reflected in a higher price for services. In Niger smugglers reported that between 2016 and 2018 a greater proportion of detection by law enforcement and military patrols would result in arrest. They also reported a spike in the level of bribes required by state officials to cooperate.

The modality of bribe payments also changed – from open transactions at checkpoints where smugglers collected dues from migrants, to clandestine arrangements to evade patrols.³⁷⁷ By the summer of 2019, in Niger smugglers built in the cost of bribes to the prices demanded from migrants, and reached agreements with state officials prior to travel to facilitate the departure from key smuggling hubs, like Agadez. Information provided by state officials enables the smugglers to time their departures and shape their routes to avoid patrols.

Interviews with migrants in 2019 suggest that a relatively small proportion pay bribes directly to border officials. A few migrants witnessed the smuggler paying bribes. The majority report crossing checkpoints with no clear evidence of bribes being paid.³⁷⁸

State security structures in Niger have long been reliant on revenues generated by collecting rents from smugglers. In late 2016 and 2017, the peak of counter-smuggling enforcement action, there was a small hiatus in this income stream. However, the pitifully low salaries of police and border officials in Niger have remained static, engendering ongoing reliance on bribes.³⁷⁹

The revenue gained by the state from the smuggling industry, indirectly through taxation of trans-Saharan travel agencies (locally called '*agence de courtage*') which operated openly as licit businesses, was offset by the increase in EU financial flows.³⁸⁰ There was no comparable rebalancing for border officials, or

indeed local communities involved in smuggling. Law enforcement postings in Agadez and the north remain desirable, despite often being far from police home towns. This suggests that additional income from bribes from the smuggling industry remains a significant draw.

Responses to the smuggling industry can be broadly divided into those focusing on supply, and those addressing demand

The prices of bribes closely track the sanctions attributable to different smuggling offences under Loi 2015-036. Bribes payable for being caught smuggling a woman northwards hovered around FCFA400 000 (€610) as at May 2019. This is significantly higher than the FCFA300v000 (€455) normally payable for the smuggling of foreign migrants and mirrors the higher sentences attributable for smuggling women under law 2015-036.³⁸¹

The relationship between enhanced enforcement and greater reliance on state involvement highlights a toxic and self-defeating relationship between enforcement and corruption. Where the smuggling industry professionalises, enabling it to succeed in an increasingly challenging operating environment, its need to corrupt state officials grows. So does its ability to do so, due to greater financial resources available for paying bribes and driving state complicity.

13. Smuggling as a supply and demand market: shaping responses

Responses to the smuggling industry can be broadly divided into two categories – those focusing on supply, and those addressing demand.

To date, approaches to countering smuggling networks on the continent have primarily focused on the former through support to law enforcement, criminal justice, and border security, as examined in this report. These

strategies seek to deter smugglers entering the market or continuing to operate by increasing sanctions for human smuggling and heightening enforcement against human smugglers, increasing the risks of interdiction.

Because smugglers pass on the increased risks to their clients (both through price hikes and shifts in modus operandi), supply side enforcement makes the activity it seeks to eliminate more profitable and increases the risks for migrants. Similar challenges in supply-centric approaches have been identified in a range of other illicit markets, including illicit drugs.³⁸² Consequently, while supply-side measures might experience a level of success in shrinking the smuggling market in certain contexts, unless adequately coupled with policies that reduce the demand for smuggler services, they can prove ineffective and yield a range of undesirable consequences.

Although approaches that seek to address the 'root causes of migration' can yield some results, they yield only long-term change, meaning they often prove inappropriate or undesirable in isolation, particularly to governments seeking results within electoral cycles. Jorgen Carling, in his taxonomy of strategies for countering migrant smuggling, posits that the demand side of the smuggling market can be addressed through three broad categories of responses. These are analysed in the context of the jurisdictions considered in this report below.³⁸³

Firstly, smuggling services can be rendered futile by preventing the objectives being reached, a strategy adopted in part by the EU and a number of African states through pursuing growth in readmission agreements and returns. The focus on returns can be tracked across EU and EU-Africa policy agreements relating to migration.³⁸⁴ However, pursuing this approach threatens the rights refugees are entitled to under the 1951 Refugee Convention and in particular the right to non-refoulement. This has not deterred states from pursuing this objective, as exemplified by the 2016 EU-Turkey deal, together with a number of bilateral agreements, such as that between Italy and Egypt which permits the return of any Egyptian national over

the age of 18,³⁸⁵ despite being in flagrant breach of the non-refoulement principle.

Further, as the savings clause and Article 16 of the Smuggling Protocol make clear, the protocol must be interpreted in a way that is not discriminatory to migrants who have used the services of smugglers and whose rights under international law are unaffected by their status as objects of smuggling. Immediate deportation, a favoured tactic in rendering smuggling services futile, precludes full assessment of asylum claims, in breach of such rights to equal treatment.

One migrant, echoing an oft-repeated sentiment, noted that 'life in Sudan was very dangerous, so I did not expect the journey to be much worse'

Secondly, smuggling services can be made undesirable by tipping the cost-benefit analysis of would-be users away from movement. The EU has funded a range of information programmes across Africa focused on publicising the risks of irregular migration to effect such movement. Although laudable in empowering migrants to protect themselves against the dangers of the route to the greatest extent possible, they have had limited impact in deterring movement, one of their stated aims.

Enhanced perceptions of danger can divert but not stop movement. The number of migrants from West Africa and the Horn of Africa travelling across the northern route via Libya decreased following the increased awareness of the human rights violations people on the move are suffering in Libya; similarly, flows temporarily decreased across the eastern route following the Saudi blockade of Yemen. However, these have not necessarily decreased the total numbers of those on the move – an increase in those believed to be moving on the southern route illustrates such displacement.

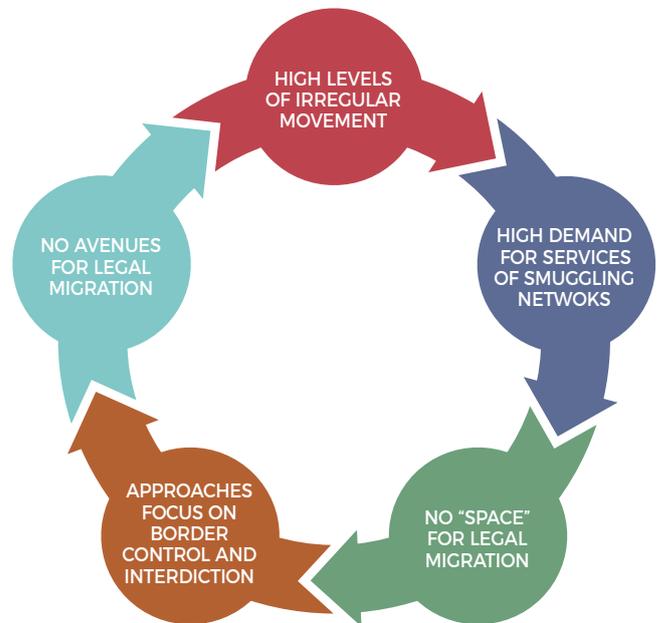
Both of these approaches are premised on an understanding of demand as elastic. However, arguably the elasticity of demand is contingent on the reason for movement – those that are forcibly displaced are only ‘choosing’ to move in the narrowest sense of the word. Dangers en route, or risks of return, may therefore be rendered irrelevant.

In many contexts the elasticity of demand for those moving for economic reasons is limited; where livelihood options are scarce, movement may equate to survival. Interviews with the migrants who have travelled irregularly overland from a range of countries of origin in Africa to Europe reaffirm that many had, at the outset of their journey, detailed awareness of the risks they would face. They were aware of the risks posed by kidnap for ransom, the fluctuating risk of the sea crossing depending on the time of year, and the threats posed by Libyan detention centres.³⁸⁶

One migrant, echoing an oft-repeated sentiment, noted that ‘life in Sudan was very dangerous, so I did not expect the journey to be much worse’.³⁸⁷ The forced returns of thousands of migrants from Saudi Arabia have had no effect on the movement of people from the Horn of Africa to Saudi and are merely accepted as part of the risks inherent in travel. Where demand is inelastic, policies addressing the cost-benefit balance or seeking to make movement futile are arguably rendered ineffective.

We thus turn to Carling’s third strand of demand-side responses – rendering the smuggling service needless, by ‘allowing the achievement of objectives through other routes’ – i.e. increasing avenues for legal migration.³⁸⁸ The political climate in destination countries on the northern and south-south routes, including the EU, South Africa, and Algeria, remain largely resistant to enhancing legal migration avenues. However, developments such as the opening of the border between Eritrea and Ethiopia, and movement towards re-opening the border between Libya and Egypt for Egyptians travelling for work, effectively fit within this approach. As noted in [section 6](#) (‘Smuggling Narratives’), while the AU advocates for ‘open borders’, individual states and regional blocs are far warier, and instead continue to invest heavily in border control.

Figure 13 Regular versus irregular migration: breaking the impasse



The EU, together with other destination countries on the continent including Morocco, argue that irregular migration, and thus the smuggling industry, must be stopped to enable space for legal migration avenues. This presents an impasse and makes irregular migrants extremely vulnerable as the identified ‘obstacle’ to ‘well managed’ migration.

Breaking this impasse will require states to recognise the impacts of the current legislative frameworks on migration. And then shaping policies around the well-recognised position that facilitation of movement will be more effective and beneficial to state security and economies than prohibition. Derivatives of the verb ‘facilitate’ are used 62 times in the Global Compact for Migration,³⁸⁹ echoing the language used in the SDGs where states committed to ‘[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies’.³⁹⁰ States must step up to these commitments and supplant smugglers as the principal facilitators of movement, widening legal avenues for migration and, to the greatest extent possible, rendering smuggling services needless.

14. Recommendations and way forward

It is of key importance to frame discourse on migration within realistic response frameworks and to keep political necessities explicit rather than opaque. Where political realities are ignored and untenable 'solutions' are posited, well intentioned 'solutions' or critique of government policy go ignored.³⁹¹ A pure pan-Africanism, with entirely open borders, is arguably an example of such an untenable solution.

The recommendations below build on the recognition that there is no panacea for erasing smuggling markets, and seek to offer granular steps towards an effective, harm-centric response. Crafted predominantly for African actors, from states to media, these recommendations seek to tread a middle path between the AU's pan-African vision and the increasingly protectionist approach of many individual states. The regional blocs should play a more active role in mediating this disjuncture and avoid consideration of measures which limit existing free movement rights.

Counter-smuggling initiatives should avoid measuring success merely through narrow metrics centred on 'flows' and 'volumes'; instead they should consider the broader ramifications of counter-smuggling policies for both those on the move and local communities in transit states and countries of origin.

Current approaches to countering smuggling markets in Africa broadly track the traditional mode of addressing illicit economies: criminal justice interventions, bolstered by military power when these are perceived to be insufficient. These effectively accelerate development of the smuggling market towards phase 3 manifestations, with long-term consequences for state governance structures and widespread harm to migrants. Continuing on the same track thus paints a bleak picture and points towards an increasingly exploitative human smuggling market on the continent.

Instead, to avoid increasing harm and growing the criminal smuggling economy, policies should focus on driving markets towards their phase 1 manifestations. Under phase 1, harm is lower, profits are smaller, and consequently the impacts on local economies and

communities, as well as on chains of corruption, which undermine good governance, are decreased.³⁹²

Policymakers (particularly for African states, regional blocs, and the African Union)

Adopt policies and programming enhancing cross-continent mobility, rendering smuggling services needless and facilitating labour migration to feed market demand.

As broken down above, the most effective approach to countering smuggling, and also decreasing the risks experienced by migrants, is to create more legal pathways for migration.

- Representatives of African governments repeatedly call for more legal avenues for migration towards the EU. Such calls are well founded, and more can be done to match an ageing European demographic and shrinking workforce with an African youth bulge.
- A similar focus should be turned inwards, towards enhancing lawful cross-continent movement, enabling unfettered labour migration independent of smuggling services and thus of corruption.
- Regulating and taxing legal mobility starves the illicit smuggling market of funds and provides an additional revenue stream for government. Countering low-level corruption in border officials lies at the core of the success of this strategy.
- Wealthier African states should play a greater role in promoting legal avenues for migration and recognising the benefits of migrants to their economies.

When considering the criminalisation of migrant-smuggling, ensure the timing of legislative reform is appropriate and that tailored laws arm the right 'fight'.

- In countries lacking provisions criminalising smuggling, but where criminalisation of irregular migrants is widespread, legal reform to introduce a criminal offence of 'smuggling' should not be a priority, as the harm it may cause likely outweighs its benefits.
- Although appropriate legal frameworks may well be a prerequisite for effective counter-smuggling

enforcement, they should not be rolled out regardless of the relevant political economy.

- Where law enforcement brutality towards migrants is endemic, tackle this issue prior to criminalising smugglers.

When shaping counter-smuggling responses, be sensitive to the elasticity, or lack thereof, of the demand for smuggling services.

- In the context of refugees and other migrants who, while not fitting into the definition of 'refugee', are driven to move through desperate circumstances, demand will be predominantly inelastic, rendering strategies that seek to tip the cost-benefit analysis ineffective.
- Factor in the likelihood of movement being displaced rather than halted given low elasticity of demand, and analyse whether the displaced routes are actually a preferable alternative, or merely increase protection risks.
- Consider the unique reliance of refugees on smuggling services, and scrutinise asylum structures which could dilute this dependency.

Consider smugglers as key players in the local economy rather than as criminal operators who need to be erased when crafting programmes.

In many cases the interests of smuggler and client may be aligned, while in contexts where the smuggling industry has become a core livelihood, enmeshed into local survival strategies, smugglers constitute key voices in the relevant political economy.

- Marginalised communities which have suffered longstanding exclusion from mainstream opportunities are often heavily reliant on smuggling. Their interests and needs must be engaged with when considering how to disrupt the smuggling economy.
- Programmes seeking to disrupt smuggling activities should be accompanied by policies which seek to enhance inclusion or, depending on the specific political economy of the relevant area, may yield greater harm than good, driving communities into more harmful activities, such as banditry or smuggling of narcotics.

Legislators

For countries introducing legislation, or amendments to existing legislation, criminalising the smuggling of migrants:

- Introduce provisions into the criminal code rather than in standalone smuggling legislation, trafficking legislation, or immigration laws.
- Reflect the definitions of 'smuggling of migrants' set out in the Smuggling Protocol, in particular that:
 - the intent of the smuggler must be 'for financial or material benefit'; and
 - the facilitation of unlawful crossing of borders *out of* a country for 'material or financial benefit' is not criminalised.
- Incorporate aggravated offences in line with the Smuggling Protocol, together with those reflecting enhanced penalties for the involvement of state officials.
- Ensure penalties are proportionate to harm; this includes avoiding mandatory minimum sentencing requirements.
- Respect the Prosecution Prohibition (Art 5) and additional protections granted to migrants under the protocol (Art 16).

The Smuggling Protocol is widely recognised to be imperfect. However, it provides the most comprehensive framework for countering the smuggling of migrants. Greater cross-jurisdictional harmonisation should facilitate cross-border co-operation, key in holistic counter-smuggling approaches.

Law enforcement

Measure the success of counter-smuggling law enforcement strategies through the quality, not the quantity, of arrests.

- Focus investigations through a harm reduction lens, targeting higher-level smuggling operators and networks causing the greatest harm, such as those increasingly exploiting migrants, or operating across trafficking and smuggling spaces. This also to some extent limits the shift of the smuggling industry across phases, and in particular the consequences for the protection risks of those on the move.

- Focus law enforcement operations on disrupting full-package travel from key smuggling hubs. 'Full package' offers are the first class of smuggling services, where prices are higher and the network often more organised. This modality therefore yields significant profits to sophisticated criminal actors. As networks offering such packages are typically integrated into the formal financial system, 'follow the money' approaches are viable.
- Avoid publicising a strong criminal justice approach in contexts where it cannot be effectively implemented, as it sends the wrong signal to markets, driving clandestine operation without an impact on market size.
- Leverage the symbolic power of arrests by targeting a small number of high- or mid-level operators and ensure that sentencing is in line with domestic legal frameworks. Where sentencing structures are simply ignored (as in Niger with the release of Malohiya and Gombo, alongside other smugglers held in the Niamey prison, mere months after arrest), this undermines the counter-smuggling framework.

Media

Reverse the ongoing trend in media and political discourse towards greater demonisation of those on the move, and of those who move them.

- Policies facilitating labour migration require public buy-in, which only occurs when the positive impacts of migration on countries' economies and societies are recognised in public discourse. The media should seek to highlight these positive impacts, as well as commenting on the negative consequences of migration rather than focusing almost exclusively on the negative.
- The Global Compacts reaffirmed the positive contributions refugees, and migration more broadly, can bring societies. Yet these should be more loudly publicised.

Destination states, including the EU

Recognise the relationship between domestic informal, unregulated and typically exploitative labour markets, and the migrant-smuggling industry which feeds it.

- Greater oversight of informal markets ranging from agriculture to informal beauty parlours and car washes is typically conceived as a domestic concern, unrelated to irregular immigration and human smuggling, which are addressed as elements of foreign policy. However, demand for undocumented labour, whose vulnerability is exploited to provide cheap services in exploitative conditions, fuels the smuggling industry, creating a need for networks to evade migration controls and create the required contexts of vulnerability.
- Dialogue between agencies considering modern slavery and domestic labour regulation and those managing migration matters and seeking to counter smuggling networks should be expanded.

For the EU, rather than demand an entirely different approach, instead publicise and bolster existing EU initiatives to facilitate labour migration.

- EU visa liberalisation and facilitation programmes are laudable but should be expanded to include additional countries of origin and to meet the significant labour demand in EU countries.
- Monitoring and implementation indicators should be incorporated to collect data on the impact of these schemes, which can be used to inform debate regarding the impacts of migration.
- Political discourse should publicise existing schemes and their benefits for particularly stretched industries, such as agriculture, technology, and medicine.

EPILOGUE: THE IMPACT OF COVID-19 ON RESPONSES TO HUMAN SMUGGLING IN AFRICA

Unprecedented movement restrictions imposed around the world to curb COVID-19 contagion are posing new obstacles to migrant and refugee journeys. Although the movement, licit and illicit, of goods is being disrupted, it is the movement of people, as primary carriers of contagion, that is being most severely restricted.

This is having significant impacts on the human smuggling industry across Africa, and across the world. These impacts are explored in depth in a policy brief by the author titled 'Smuggling in the time of COVID-19: The impact of the pandemic on human smuggling dynamics and migrant protection risks.'³⁹³

The text below outlines how COVID-19 is impacting trends and themes analysed in this report.

The impact of COVID-19 on smuggling & migration narratives

As analysed above, political discourse increasingly construed the fight against human smuggling as a 'war'. Now such terminology is also used to characterise the 'war' against COVID-19. The two 'fights' are interlinked, as restricting or halting human movement, COVID-19's primary transmission tactic, is the key part of counter-COVID responses.

As restrictions on legal movement grow, COVID-19 makes irregular and clandestine movement further fraught with danger, and it becomes framed as a threat to the public health and survival of states' citizens. It is no surprise that in many countries the military is being deployed to restrict the domestic movement of individuals and strengthen border controls.

COVID-19-driven anti-migrant sentiment may outlast the pandemic itself. The economic fallout of COVID-19 could plunge migrant-destination countries into recession, further hardening attitudes against migrants. Prior to the pandemic, widespread xenophobia in destination countries had driven the securitisation of borders. As migrants are increasingly viewed as a

source of contagion, this trend seems set to accelerate. As explored above, increasingly hostile environments towards migration deepen migrants' reliance on smuggling networks and increase protection risks on the migrant trail.

The impact of COVID-19 on border control and human smuggling

An unprecedented number of countries around the world have closed, or partially closed, legal ports of entry by sea, air and land to the crossing of people. This has both decreased cross-border movement, and forced that which remains into irregularity.

The closure or partial closure of points of entry of many land borders has been accompanied by enhanced patrolling between official entry points to prevent irregular crossing. South Africa has closed the majority of border points and deployed the military to patrol its borders. It has also launched (under emergency COVID-19 regulations) the construction of a new fence between South Africa and Zimbabwe.³⁹⁴

Due to the risks of contagion associated with human movement, irregular migration has become a policy priority for many states, including Algeria. As explored in [section 10.4](#), prior to the pandemic, Algeria's borders with Niger, Mali and Libya were already closed (bar two days per month in the case of the border with Niger) and heavily securitised.

However, according to smugglers operating across the borders with Niger and Mali, surveillance and border monitoring in Algeria have been increased in response to COVID-19. Police border guards (PAAF), gendarmerie units (Gendarmerie Gardes Frontières) and military patrols have all been increased. Further, COVID-19 has driven a shift in the differentiated border strategy previously adopted by the Algerian government, where border control infrastructure was less concentrated on stopping the movement of people. The re-focussing on pre-existing infrastructure, together with additional

resources, on stopping the cross-border movement of people has made it far more complex for smugglers to operate across the border.

Domestic movement restrictions have made it extremely difficult for smugglers to operate within the country. Finally, smugglers themselves are worried about COVID-19 and fear that migrants will carry the virus into the region. They have therefore become more wary about providing their services.

The stricter controls applied at Algeria's borders have had knock-on effects on smuggling throughout the region. For example, human smuggling in Northern Mali has experienced a significant pause due to the renewed difficulties of crossing Algeria's southern border.

COVID-driven restrictions on both cross-border and domestic movement in many countries across Africa have meant that the human smuggling industry across much of the continent slowed in March and April 2020. Although early signs suggest that smuggling activities started to increase slightly in May in many regions, as some controls were relaxed, they remained lower than pre-pandemic levels.

COVID-19 changes perceptions of smuggling among communities and non-state actors

As explored above, in many regions where mobility has been a key and longstanding facet of resilience, human smuggling is not stigmatised, or seen as an immoral activity. This creates a disjuncture with legal positions which criminalise smuggling activities.

Local legitimacy of smuggling operations and widespread complicity of borderland communities has posed a significant obstacle to counter-smuggling efforts to date. This is changing in some places as widespread fear surrounding COVID-19 and the risks of contagion are creating a taboo around migration, and the activities of smuggling networks.

Communicable diseases have a particular power to arouse fear because infection is 'transmissible, imminent, and invisible'.³⁹⁵ This is particularly true for diseases like COVID-19 which can be spread by asymptomatic carriers. Human smugglers in the Comoros islands, off

the coast of Tanzania, cited the fact that COVID-19 could be asymptomatic as a particular cause of concern, particularly around engaging with migrants.

In Libya, a number of municipalities that constitute key smuggling hubs on the northern migration route from Africa to Europe, including Kufra and Sebha, unilaterally took steps to close their communities to smuggling in March 2020, restricting access to the city and closing entry points. In Kufra the municipal council called on the military to increase patrolling, and in particular to combat people smuggling, and the risks of contagion it carries.³⁹⁶ This tracks a departure from previous rhetoric, given that smuggling is a key livelihood for many in these communities.

In northern Mali, where the state is predominantly absent, the Coordination of Azawad Movements, a coalition of armed groups, has consolidated support in Timbuktu and Gao, two smuggling transit points on the journey northwards to Algeria and Niger. The CMA has responded to fear of the pandemic at a community level by launching its own anti-COVID operation in March 2020, imposing movement restrictions across the areas it controls. It does, however, lack the capacity to implement meaningful public health measures and to maintain restrictions in the medium term.

Similarly, the Tebu militia operating in southern Libya has responded to COVID-19 by increasingly intercepting and disbanding smugglers as a measure to protect communities from contagion.

In some cases, smugglers have chosen to suspend operations, fearing for themselves and for their own communities. This has been reported by smugglers operating across Algeria's southern borders and by networks in Libya and Mali.

There is a precedent for community-led movement restrictions as a response to pandemics in the Sahel/Sahara region. A similar response, of communities turning against human smugglers, was tracked to the far more geographically limited threat of the Ebola epidemic in 2014/15.

In the short term, COVID-19 is changing longstanding perspectives on migration and those that facilitate it.

This could have significant implications for counter-smuggling responses if these perceptions last. Whether the taboos surrounding human smuggling endure or not depend to a significant extent on the pandemic's course through Africa and the responses taken by states.

Responses to COVID-19 drive the smuggling industry to change modus operandi

Smuggling operations during COVID-19 need to avoid not only the traditional targets of law-enforcement and border officials, but also to bypass additional travel restrictions and evade local communities and criminal networks issuing edicts prohibiting travel.

The operating risks for human smugglers therefore increase, and in many regions they must operate even more clandestinely in order to succeed and avoid interdiction. This is likely to drive the smuggling industry towards its phase 2 or phase 3 manifestations, as explored in [section 11](#).

Although it is too early to identify whether these changes to the industry are longstanding, preliminary evidence already highlights a number of the overarching trends outlined in [section 11](#), with significant implications for migrant protection risks. These are explored below.

Smuggling networks are diversifying routes to circumnavigate the border closures and evade detection. Niger closed its borders (with exceptions for the transportation of goods) from 19 March as a temporary measure to contain the spread of Covid-19. As a result of this, the longstanding weekly convoy between Agadez and Dirkou in northern Niger, used by migrant smugglers to afford them safety from bandits who operate around Agadez, was also cancelled in March 2020. Smugglers using the convoy to transport migrants towards Libya quickly confirmed they will merely find new routes.

These 'new routes' are riskier for two reasons. Firstly, they are unprotected by military escorts, and therefore more vulnerable to attack by bandits who operate in the region. Secondly, more smugglers are choosing to take more remote routes that bypass checkpoints.

These include the route that cuts through Chad on the journey between Agadez in northern Niger and Sebha in Southern Libya. This is a long and dangerous journey through the mountains, rendered particularly risky by the threat of bandits, traffickers and the Chadian army – one smuggler reported that he usually avoids this route because of the high numbers of migrant fatalities that typically ensue.

Networks are also changing their modus operandi to adapt to new restrictions and continue operating in the face of increased restrictions on cross-border and domestic movement. Mozambique closed its borders to foreigners on 31 March, while still permitting goods to cross. Prior to the full border closure, on 20 March, the Mozambican government had imposed strict border controls to prevent any unnecessary movement of people.³⁹⁷

On 24 March, smugglers attempted to move 78 Ethiopian migrants and refugees into Mozambique, across the northern border with Malawi, in the back of a container lorry. When they opened the lorry, Mozambican immigration inspectors found the bodies of 64 of the migrants, along with 14 survivors. These border restrictions are likely to drive other smugglers to take similar approaches. This method, of hiding migrants in sealed containers, has been repeatedly used in attempts to evade heightened border restrictions – mounting migrant fatalities as a result of these methods demonstrate the inherent risks to migrant safety.³⁹⁸

To reflect the longer routes and the higher risk of operating, smugglers and migrants have reported an increase in prices for smuggling services for many journeys in Africa, including for journeys across the southern borders of Algeria, between Niger and Libya, and in Mali.

For some smugglers, the risks of continuing to operate are simply too high. Demand has also been reduced for smuggling services in some regions as migrants too fear the risks of contagion posed by travel. Demonstrating their flexibility, some human smugglers are diversifying into the smuggling of other commodities, with dozens of smugglers working on the Agadez-Sebha routes

switching to the smuggling of fuel and goods from Libyan cities in the Fezzan to gold mining areas in northern Chad.

Looking to the future

In many regions in Africa the smuggling industry is suffering short-term restrictions on their capacity to do business, although some activities continue. Although the overall movement of people is decreasing in the short term, a growing proportion of the movement that still takes place is forced to be irregular.

Smugglers that continue operating are forced to take more remote and difficult routes and adapt modus operandi to evade detection, increasing risks to migrants. Although some migrants will choose not to leave home due to fears of contagion, demand for movement is not always elastic.

Many migrants and refugees will still need to move, including a significant proportion of those already in transit when the pandemic hit. For these, the journey becomes more dangerous, and available support in transit or at temporary refugee camps or detention centres diminishes, as organisations providing services to migrants and refugees are forced to scale back.

Despite a temporary lull, it is key to note that the underlying drivers for migration have not changed. If anything, they are set to increase as COVID-19 causes widespread decimation of livelihoods and unprecedented unemployment levels.

Given that COVID-19 is exacerbating pre-existing economic stress in migrants' origin countries and transit countries, once internal and border controls are relaxed (which is inevitable given resource constraints, and the need to enable economic revival), this could lead to a rapid and sustained outflow of irregular migrants. Pathways for legal migration appear to be

shrinking further, meaning that irregular migration globally is likely to reach volumes beyond those seen in recent years. Much of this movement will be smuggler-facilitated.

The long-term impact of the COVID-19 pandemic on the smuggling industry in Africa is contingent not only on how the virus spreads across the continent, but also on state responses both within the continent and in destination countries beyond it. If there is a renewed push to strengthen governance, provide more support to marginalised communities to address inequality, and take steps to counter climate change, COVID-19 could become a positive pivot point for global responses to migration and therefore to effective responses to the smuggling industry.

If instead states move to strengthen borders, re-centralise power and stoke xenophobia, pre-existing trends towards a more lucrative and exploitative smuggling industry look set to accelerate. Evidence of the latter is already emerging. However, it is too early to determine the medium-term outlook.

Political space for considering new responses to irregular migration and smuggling was extremely limited prior to the pandemic – Covid-19 is acting as a shock to the status quo, forcing a rethink, and a re-opening of many policy debates. It is yet to be seen whether this will yield new pathways for progress, or if the status quo quickly returns, and policy space for considering alternatives to militarising the migration space vanishes entirely.

It is clear however that to avoid emerging into a post-pandemic landscape characterised by a dramatically more severe migrant crisis and a more lucrative and professionalised smuggling market controlled by organised crime, it is key to monitor and mitigate the impact of COVID-19 on migrants and refugees throughout the pandemic.

Notes

- 1 The vast majority of global migration movements are composed of 'mixed migration flows', including both economic migrants and refugees. These labels are more than mere semantics and grant different rights under international law, as translated into the domestic frameworks of many countries. While some flows are predominantly composed of refugees and asylum seekers, with a minority of economic migrants, extremely few (if any) are composed entirely of economic migrants. Yet the terminology predominantly used in political and public discourse often uses the term 'migrant' to cover all those on the move. This is factually incorrect and risks ignoring the distinct drivers for movement and the separate frameworks under international law that apply to migrants and refugees. In recognition of this, this report uses the term 'migrant' to refer to economic migrants and refugees, together with other people on the move away from conflict and violence, including those who have not satisfied the state's asylum claims procedures and are therefore not recognised as refugees.
- 2 Europol, Migrant Smuggling in the EU, 22 February 2016, www.europol.europa.eu/publications-documents/migrant-smuggling-in-eu.
- 3 African Union, Concept Note on The Theme Of The Year: Refugees, Returnees And Internally Displaced Persons: Towards Durable Solutions To Forced Displacement In Africa, 7-8 February 2019, <https://reliefweb.int/sites/reliefweb.int/files/resources/67990.pdf>.
- 4 Frontex, Risk Analysis for 2015, https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2015.pdf.
- 5 Frontex Risk Analysis 2017, http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf. Following the dip in arrival figures in 2018, predominantly due to the decreased flow on the central Mediterranean route, this figure decreased only slightly, with 84% of migrants detected making irregular crossings into the EU from the central, eastern and western Mediterranean routes reporting the use of smuggling networks for all or part of their journey. Note that these figures are based on voluntary interviews with Frontex staff. Frontex, Risk Analysis 2019, https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2019.pdf.
- 6 Black's Law Dictionary, 11th ed, 2019.
- 7 Statement by Polish Interior Minister Joachim Brudziński, reported on Polish government website, Polska nie wyraziła poparcia dla Globalnego Paktu ws. Uchodźców, 18 December 2018, www.gov.pl/web/mswia/polska-nie-wyrazila-poparcia-dla-globalnego-paktu-ws-uchodzcow.
- 8 V Türk in C Alfred, UN Official: Refugee Compact Will Meet Fear and Ignorance with Facts, Refugees Deeply, 1 March 2018, www.newsdeeply.com/refugees/community/2018/03/01/u-n-official-refugee-compact-will-meet-fear-and-ignorance-with-facts.
- 9 Compact on Migration, par 11.
- 10 Africa Civil Society Organizations Regional Consultation on the Global Compact on Safe, Orderly and Regular Migration, Bamako, 28-29 August 2017 Report, Recommendation 2, September 2017.
- 11 International Office for Migration, Missing Migrants Project, Migration Data Portal, <https://migrationdataportal.org/themes/migrant-deaths-and-disappearances>.
- 12 Further discussion of the definition of 'human smuggling' is set out at Part 2 of this report. This notes that the Smuggling Protocol specifies that the person whose unlawful movement into a country is being facilitated must be a foreign national of that country in order to constitute the basic offence of 'smuggling of migrants'. This is not explicitly included in the basic smuggling offences in Senegal, Mali, Kenya, Ghana, Ethiopia, Egypt, Burkina Faso, Algeria, Guinea Bissau, Equatorial Guinea, Lesotho, Equatorial Guinea. Yet these countries are considered as part of the 22 countries that criminalise 'smuggling' for the purposes of this report.
- 13 L Bird, Smuggling in the time of Covid-19: The impact of the pandemic on human-smuggling dynamics and migrant-protection risks, The Global Initiative Against Transnational Organized Crime, April 2020, <https://globalinitiative.net/wp-content/uploads/2020/04/GIATOC-Policy-Brief-003-Smuggling-COVID-28Apr0930-proof-4.pdf>.
- 14 An electronic repository of laws compiled by UNODC relevant to the requirements of the Organized Crime Convention, the Protocols thereto and the international legal framework on terrorism. Available here: <https://sherloc.unodc.org/cld/v3/sherloc/>.
- 15 A legal intelligence platform which uses both artificial and human intelligence to compile and analyse international laws on a wide range of subjects, and which was used by the ENACT programme in its legal analysis. Available (for subscribers) here: www.legal-atlas.com.
- 16 See full research methodology for Organized Crime Index Project set out here: https://globalinitiative.net/wp-content/uploads/2019/09/enact_report.pdf. The Index was compiled under the Enhancing Africa's capacity to respond more effectively to transnational organised crime (ENACT) programme.
- 17 Interviews were conducted by the Global Initiative at the Marsa Initial Reception Centre in Malta, with the express authorisation of the centre. The purpose of all interviews was clearly explained to interviewees before conducting the interviews, and all interviewees were informed they could stop at any time.
- 18 Loi autorisant la ratification du Protocole contre le trafic illicite des migrants par terre, air et mer additionnel à

la Convention des Nations unies contre la criminalité transnationale organisée, adopté le 15 novembre 2000 à New York, http://ilo.org/dyn/natlex/natlex4.detail?p_lang=fr&p_isn=94356&p_count=96912&p_classification=17&p_classcount=3793.

- 19 Art 6(1)(a) Smuggling Protocol.
- 20 Art 6(3) Smuggling Protocol.
- 21 Art 6(1)(b) Smuggling Protocol.
- 22 Art 6(2)(a) Smuggling Protocol.
- 23 Art 6(2)(b) Smuggling Protocol.
- 24 Art 6(2)(c) Smuggling Protocol.
- 25 The continent leapfrogged fixed telephone, meaning landlines are relatively scarce, and many more people rely purely on mobile telephones.
- 26 GSMA, The Mobile Economy, 2019, www.gsmaintelligence.com/research/?file=b9a6e6202ee1d5f787cfebb-95d3639c5&download.
- 27 A significant body of research points to the fact that smugglers do not create the demand for their services. 2019 4Mi data collected in Niger and Mali further evidences this, with only 6% of refugees and migrants interviewed by 4Mi in Mali and 5% interviewed in Niger reporting that they had been encouraged to migrate by a smuggler. Instead, far greater influence in decision-making is played by friends (46% Niger; 37% Mali) and/or relatives. In many cases (51% Mali; 24% Niger) migrants made the decision alone. E Golovko, *Players of many parts: The evolving role of smugglers in West Africa's migration economy*, Mixed Migration Centre, 2019, www.mixedmigration.org/resource/players-of-many-parts/.
- 28 T Reitano and L Bird, *Understanding Contemporary Human Smuggling*, Global Initiative Against Transnational Organized Crime, 2018, https://globalinitiative.net/understanding_human_smuggling/.
- 29 P Tinti and T Reitano, *Migrant, Refugee, Smuggler, Saviour*, New York: Hurst & Co Publishers, 6 October 2016.
- 30 The Global Initiative Against Transnational Organized Crime, *Monitoring the Political Economy of Human Smuggling in Libya and the Sahel*, July 2019.
- 31 T Reitano and L Bird, *Understanding Contemporary Human Smuggling*, Global Initiative Against Transnational Organized Crime, 2018, https://globalinitiative.net/understanding_human_smuggling/.
- 32 Article 3 of the Additional Protocol to the United Nations Convention against Transnational Organized Crime (UNTOC) to Prevent, Suppress and Punish Human Trafficking, in particular Trafficking Involving Women and Children.
- 33 UNHCR, *Figures at a Glance*, June 2019, www.unhcr.org/uk/figures-at-a-glance.html.
- 34 UNHCR, *Worldwide Displacement Tops 70 million*, 19 June 2019, www.unhcr.org/uk/news/press/2019/6/5d03b22b4/worldwide-displacement-tops-70-million-un-refugee-chief-urges-greater-solidarity.html.
- 35 United Nations, *Report of the United Nations High Commissioner for Refugees, (A/73/12 (Part II))*, United Nations, New York, 2018, article 4.1, www.unhcr.org/gcr/GCR_English.pdf.
- 36 Namely Burundi, Eritrea, Central African Republic, Democratic Republic of Congo, Sudan, South Sudan, Somalia. Although note that two-thirds of refugees came from the top five countries (Syria, Afghanistan, South Sudan, Myanmar and Somalia) including only two African countries. UNHCR, *Global Trends*, 2018, www.unhcr.org/globaltrends2018/.
- 37 UNHCR, *Global Trends, Forced Displacement in 2018*, www.unhcr.org/5d08d7ee7.pdf.
- 38 M Fitzmaurice, *The Practical Working of the Law of Treaties* in MD Evans (ed), *International Law*, Oxford University Press, 4th edition, 166, 179, 2014; O Corten and P Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, 2011, 807.
- 39 United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Sales No E.05.V.2 p 333, para 19, 2004.
- 40 Excluding bilateral agreements as these were not included in the analysis. Zanker unpacks 76 policy documents from African and European institutions relating to the governance of migration between 2005 and 2016. F Zanker, *Managing or restricting movement? Diverging approaches of African and European migration governance*, *Comparative Migration Studies*, 2019, <https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-019-0115-9>.
- 41 Ibid.
- 42 F Zanker, *Managing or restricting movement? Diverging approaches of African and European migration governance*, *Comparative Migration Studies*, 2019, <https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-019-0115-9>.
- 43 Ibid. Zanker notes that while EU-African documents remain predominantly penned by the EU, this is not true of African documents and therefore cannot be identified as the key explanation behind this focus.
- 44 500 migrants subsahariens arrivent quotidiennement sur le territoire national, *El Watan*, 11 April 2018, www.elwatan.com/edition/actualite/500-migrants-subsahariens-arrivent-quotidiennement-sur-le-territoire-national-11-04-2018.

- 45 Objective 17, Global Compact for Safe, Orderly and Regular Migration, 13 July 2018, https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf.
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- 168** Question 7, Annex 2, European Commission, Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), [www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD\(2017\)0117_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf)
- 169** Travaux Préparatoires p48, p461.
- 170** Argument expounded upon in A Gallagher, F David, *The International Law of Migrant Smuggling*, Cambridge University Press, 2015.
- 171** See Smuggling Protocol and Trafficking in Persons Protocol.
- 172** Art 22, 'Nonobstant toute disposition contraire, les victimes des infractions prévues par la présente loi ne peuvent faire l'objet de poursuite ou de condamnation. Les dispositions de l'alinéa précédent ne sont pas applicables à la personne majeure qui, en connaissance de cause, concourt à la réalisation de l'infraction.'
- 173** Note that a similar right is granted by Article 22 of Loi 029/2008/AN (Burkina Faso).
- 174** Telephone interview with international migration analyst working in Dakar, November 2019.
- 175** Part 1, Art 8, Protocol No 909/2015.
- 176** Art 5(2)(a), Protocol No 909/2015. Similarly Art 27 refers to 'victim of ... smuggling of migrants'.
- 177** Telephone interview with expert in international law on human smuggling who has been involved in government discussions surrounding ratification of the SOM Protocol, and drafting of national smuggling legislation, in over seven countries, 11 September 2019.
- 178** The more generous treatment of 'objects' of migrant smuggling as 'victims' may be partly grounded in Ethiopia's self-perception as predominantly a source country, and therefore a desire to grant greater rights to Ethiopians who have been the 'victim' of smuggling or trafficking abroad. This conceptualisation of 'victims' as primarily Ethiopians is reinforced in Article 27, 'Repatriation of Victims', which deals exclusively with Ethiopian victims, while Article 28, which addresses foreign victims, is titled 'Repatriation of Foreign Nationals to their Country.'
- 179** Article 5, Protocol Against the Smuggling of Migrants By Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organized Crime, https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf.
- 180** A Gallagher and F David, *The International Law of Migrant Smuggling*, Cambridge University Press, 2014, 65.

- 181** Para 11, Global Compact for Safe, Orderly and Regular Migration, 13 July 2018, https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome_global_compact_for_migration.pdf.
- 182** Telephone interview with expert in international law on human smuggling who has been involved in government discussions surrounding ratification of the SOM Protocol, and drafting of national smuggling legislation, in over seven countries, 11 September 2019.
- 183** Morocco, which does have provisions criminalising smuggling of migrants but explicitly permits the offence to be with or without the FOMG element, does not have an explicit prohibition for prosecution. This analysis is based on a review of the legislation incorporating the relevant criminalisation of the smuggling provision. The intersection of such provisions with the broader legislative framework has not been analysed; consequently there is a possibility that a prohibition on prosecution could be incorporated in different legislation. However this is unlikely.
- 184** S4 Immigration Act 2015: 'A person who is a victim of the offence of human smuggling may not be held liable so long as he identifies and is willing to act as a witness in the prosecution of the smuggler...'
- 185** Algeria, Burkina Faso, Central African Republic, Ghana, Guinea, Namibia, Niger, Libya, Equatorial Guinea, Lesotho, Zambia, Mozambique and Djibouti.
- 186** UNODC, Zambia reviews legislation relating to smuggling of migrants, March 2020, <https://www.unodc.org/unodc/en/human-trafficking/Webstories2020/zambia-reviews-legislation-relating-to-smuggling-of-migrants.html>
- 187** Question 7, Annex 2, European Commission, Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA).
- 188** Italy, for example, has reportedly imprisoned more than 1 400 migrants for piloting smuggling boats, even though they were forced to do this at gunpoint. Z Campbell, The Wrong Catch: Italy Imprisons Refugees Who Were Forced to Pilot Smuggling Boats at Gunpoint, 16 September 2017, The Intercept, <https://theintercept.com/2017/09/16/italy-imprisons-refugees-who-were-forced-to-pilot-smuggling-boats-at-gunpoint/>.
- 189** This right is enshrined in numerous instruments of international law, including the Universal Declaration of Human Rights, Art 13(2); ICCPR, Art 12(2) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2003, Art 8(1), among others. UDHR, art 13.2; ICCPR, art 12; Protocol No 4 ECHR, Art 2; 1981 African Charter on Human and Peoples' Rights, Art 12(2); 1948 American Declaration of the Rights and Duties of Man, Art VIII; 1969 American Convention on Human Rights, Art 22; 1994 Arab Charter on Human Rights, Art 21. See generally Council of Europe Commissioner for Human Rights, The right to leave a country, Issue Paper, 2013.
- 190** See ref 119 and 120 for specific legal provisions.
- 191** Loi No 08-11 - Art 46: Any person who, directly or indirectly, facilitates or attempts to facilitate the entry, circulation, stay, or the irregular departure of a foreigner on Algerian territory. (Toute personne qui, directement ou indirectement, facilite ou tente de faciliter l'entree, la circulation, le sejour ou la sortie de facon irreguliere d'un etranger sur le territoire algerien).
- 192** Criminal Code 2012, Art 303 bis 30: Illicit traffic of migrants is considered to be the act of organising illegal exit of the national territory of one or more people in order to extract, directly or indirectly, an advantage, financial or otherwise. (Est considéré comme trafic illicite de migrants le fait d'organiser la sortie illégale du territoire national d'une personne ou plus afin d'en tirer, directement ou indirectement, un avantage financier ou tout autre avantage.)
- 193** International Centre for Migration Policy Development, A Survey on Migration Policies in West Africa, January 2016, https://fmmwestafrica.org/wp-content/uploads/2017/02/en-A_Survey_on_Migration_Policies_in_West_Africa_EN_SOFT2nd.pdf.
- 194** Article 11, UNTOC.
- 195** Question 11, Annex 2, European Commission, Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA). The majority of respondents on penalty structure opined that level of penalties was not relevant in deterring migrant smuggling.
- 196** Namibia: s16 Prevention of Organized Crime Act 2004; Niger: Art 13 Loi 2015/36; Ethiopia: s5 Proclamation 909/2015.
- 197** S243 Criminal Code 2004; s5 Proclamation 909/2015; 'aggravating factors' include the involvement of children, women, the disabled or the use of weapons or drugs, and life imprisonment if severe bodily injury is caused to the victim or if the operations are large scale or as part of an organised group.
- 198** S3 Proclamation 909/2015.
- 199** Algeria, Burkina Faso, Central African Republic, Ethiopia, Equatorial Guinea, Ghana, Guinea, Guinea Bissau, Lesotho, Mali, Mauritania, Niger, Senegal, Zambia, Mozambique and Djibouti.
- 200** Guinea permits a fine instead of the mandatory minimum imprisonment (one year).
- 201** Guinea: Art 334, Code Penal Loi 2016/0 5 9; Central African Republic: Art 256, Code Penal 2010; Guine Bissau: Art 10, lei para combater tráfico de migrantes 2019-05-06.

- 202** Ethiopia s5, Proclamation No. 909/2015; Lesotho: s12, Anti-Trafficking in Persons Act 2011; Zambia: s9, Anti Human Trafficking Act 2008 .
- 203** Burkina Faso, Ethiopia, Ghana, Mali, Niger, Senegal. Serious crime as defined at Art 3(1)(b) Organized Crime Convention.
- 204** A Trotter and M Garozzo, Mandatory Sentencing For People Smuggling: Issues Of Law And Policy, *MelbULawRw* 15; (2012) 36(2) Melbourne University Law Review 553.
- 205** Art 11(1), Organized Crime Convention; together with Art 1(3), Migrant Smuggling Protocol.
- 206** As detailed in A Gallagher and F David, *The International Law of Migrant Smuggling*, Cambridge University Press, 2014.
- 207** Attorney-General's Department, Submission No 17 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012, 2, Submission No 17. Notably five years is equal to the average across Africa's mandatory sentencing regimes for the basic offence of human smuggling, i.e. without the requirement for at least five smuggled migrants. Cited in A Trotter and M Garozzo, *Mandatory Sentencing For People Smuggling: Issues Of Law And Policy*, *MelbULawRw* 15; (2012) 36(2), Melbourne University Law Review 553.
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- 214** *Ibid.*
- 215** *Ibid.*
- 216** Interview conducted with Seyni Saidou, Agadez Prosecutor, July 2019 in Agadez for the Global Initiative Against Transnational Organized Crime.
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- 219** Global Initiative Against Transnational Organized Crime, *Monitoring the Political Economy of Libya and the Sahel*, July 2019.
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- 222** Art 5, The African Charter on Human's and People's Rights 1986.
- 223** Art 7, ICC Statute.
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- 227** Algeria, Mozambique and Namibia being the exception. The wide drafting of smuggling offences means that smuggling through use of fraudulent documents would nonetheless be captured. However there is no explicit reference to this.
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- 240** Despite a multi-year track record of average 10% year-on-year growth, the Ethiopian economy slowed below 8% in 2018 – December 2018, IMF country focus, www.imf.org/en/News/Articles/2018/12/04/na120418-ethiopia-remarkable-progress.
- 241** Including by repeated communiqués to Ethiopia's diaspora, such as this one in April 2019, in which Abiy Ali ends his statement with 'Welcome home to Ethiopia': www.ethioembassy.org.uk/prime-minister-abiyis-message-to-ethiopian-youth-and-children-in-the-diaspora/.
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- 312** Data collected for the Organized Crime Index, ENACT. Researchers reviewed newspaper articles catalogued online on LexisNexis between 2000 and 2017 for Kenya. Researchers focused on statements by the following government officials: (i) President/Prime Minister; (ii) Deputy Prime Minister/Vice President; (iii) Home Secretary/Internal Affairs Minister; (iv) Justice Minister/Justice Secretary; (v) The Chief of Police/ Police Commissioner.
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- 315** Interviews with civil society and international organisations in Egypt, July 2019.
- 316** Interview with retired Egyptian military official via secure messaging app, October 2019.
- 317** The intent of migrants moving across these routes and not onto Libya is unclear. Egypt is an increasingly unfavourable destination country for most irregular migrants, as they have no rights under domestic law, cannot regularise, are officially prohibited from working, and in the case of sub-Saharan Africans, face significant discrimination. Given that movement on boats to Europe has ceased – and the speed of information flow across smuggling networks and migration routes means this is likely known by those on the move to Egypt – it is unclear how migrants are seeking to move on. Although resettlements from Egypt to third countries have occurred, these are diminishing and carry long wait times. A number of Eritreans, realising the unexpected

- difficulty of being resettled, appear to be crossing into Libya. A separate flow of Eritreans is smuggled into Egypt and onto Libya's borders in the north, thus avoiding Libya's lawless south. Secondary movement by other East Africans smuggled into Egypt, including Sudanese (more of whom have been arriving in Egypt since the political unrest in 2018) and Somalis, do not appear to be moving on from Egypt.
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ENACT builds knowledge and skills to enhance Africa's response to transnational organised crime. ENACT analyses how organised crime affects stability, governance, the rule of law and development in Africa, and works to mitigate its impact.

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