

Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on the human rights of migrants

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(Please use this reference in your reply)

22 September 2025

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the human rights of migrants, pursuant to Human Rights Council resolutions 53/9, 52/4 and 52/20.

In this connection, we would like to bring to the attention of the European Parliament and of the Council of the European Union our concerns regarding the proposal for a directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, which may have negative impacts on the **human rights of migrants, refugees and asylum seekers, including children and those in vulnerable situations and on organizations and human rights defenders assisting and protecting migrants, refugees and asylum seekers, including victims of trafficking.**

In this communication, we do not aim at providing a comprehensive analysis of the proposed Directive and its compatibility with international human rights law and standards. We focus on one aspect of the proposal, which is particularly concerning, namely the apparent lack of full alignment of the criminal offence defined in the proposed Directive with relevant international instruments and lack of inclusion of a humanitarian clause in accordance with international law obligations, which falls within the scope of the mandates entrusted to us by the Human Rights Council.

According to the information received, on 28 November 2023, the European Commission published its proposal for a directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA (COM(2023)0755 – C9-0430/2023 – 2023/0439(COD)). The purpose of the directive is to update existing EU criminal law rules of the “Facilitators Package”, composed of Directive 2002/90/EC establishing a common definition of the offence of facilitation of unauthorized entry, transit, and residence, and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence.

The Council of the European Union reached a general approach on the proposal on 13 December 2024. The proposal is currently under review by the European Parliament, Committee on Civil Liberties, Justice and Home Affairs, which is expected

Permanent Delegation of the European Union
to the United Nations Office and other international organizations in Geneva

shortly to adopt its report on the proposal – on the basis of which the co-legislators will enter into inter-institutional negotiations to finalise and eventually adopt the legislative text.

As the European Parliament and the Council of the European Union prepare to enter into inter-institutional negotiations on this legislative instrument, we wish to express our concern that the text as proposed by the Commission raises doubts as to its compatibility with international human rights obligations, in particular in view to the lack of clear provisions to prevent the criminalization of humanitarian assistance.

In this regard, we would like to draw attention to the fact that the definition of the criminal offence of facilitation of unauthorised entry, transit and stay in the Union as included in the Commission proposal deviates from the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, ratified by the European Union in 2006.

Article 3 of the text as proposed by the Commission establishes that “1. Member States shall ensure that intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence where:

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

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

While the proposed formulation includes the requirement of a financial gain or other material benefit as part of the crime of facilitation in certain respects, it deviates from the international definition in making the actual financial benefit not always necessary. The definition enshrined in the proposed text eliminates the “dolo” or “intent” to obtain a benefit, which is a key element of the UN Protocol, and its absence in the proposed text could lead to criminalization of humanitarian assistance, a legitimate service provision under market rates or simply an unfulfilled expectation, or a refused offer of payment.

In addition, if the elements set forth in the second part of Art. 3. 1, b or Article 3.2 are present, namely, where there is a possibility of causing 'serious harm' (Article 3(1)(b)) or in cases of 'public instigation' (Article 3(2)), the requirement of a financial or material benefit does not apply. The text of the proposal does not, furthermore, provide definitions for what may constitute “serious harm” and “public instigation”, increasing the possibility that humanitarian action may be targeted by the proposed directive.

Article 3 does not provide either a definition of what does not constitute a criminal offence and the text as it stands does not contain a distinction between abusive or exploitative action and action engaged in for humanitarian or solidarity reasons.

In this context, we would like to bring to your attention the Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, where in paragraph 88, the Interpretative notes explicitly say “The travaux préparatoires should indicate that the reference to “a financial or other material benefit” as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations” (A/55/383/Add.1, para. 88; Travaux Préparatoires, p. 469.)

We would also like to refer to the judgement of 3 June 2025 of the Court of Justice of the European Union in the Kinsa case (Case C-460/23), where the Court considered whether the principle of proportionality, as established by article 52.1 of the Charter of Fundamental Rights of the European Union (“the Charter”), “read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17 [of the Charter], as well as the rights to life and physical integrity referred to in Articles 2 and 3 [of the Charter], the right to asylum referred to in Article 18 [of the Charter] and respect for family life referred to in Article 7 [of the Charter], precludes the provisions of Directive [2002/90] and Framework Decision [2002/946], which the current proposed text intends to replace, in so far as they impose on Member States the obligation to provide for penalties of a criminal nature against any person who intentionally facilitates or engages in acts intended to facilitate the unauthorised entry of foreign nationals into the territory of the Union, even where the conduct is carried out on a non-profit-making basis, without providing, at the same time, an obligation on Member States to exclude from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance to the foreign national”. The case in question refers to the entry into Italy of a Nigerian woman with two children, one of them her own daughter, and her niece, who were all traveling with false documentation. Regarding the interpretation to whether that conduct could be constructed as a criminal offence within the meaning of the Directive 2002/90, the Court admitted that “at first sight the open wording of Article 1(1)(a) of Directive 2002/90 would lend itself to different interpretations. In particular, although that provision does not expressly refer to the conduct of a person who, in breach of the rules governing the movement of persons across borders, brings into the territory of a Member State minors who are third-country nationals and are accompanying him or her, and over whom he or she exercises actual care, that provision, in itself, also does not expressly preclude an interpretation according to which such conduct falls within the scope of the general offence provided for in that provision”. The Court confirmed, however, that the “latter interpretation cannot be accepted” and explains that “In the first place, the objectives of Directive 2002/90 militate against such an interpretation. As the Commission noted in its written observations, such conduct does not constitute facilitation of illegal immigration, which that directive seeks to combat, but stems from the assumption by the person concerned of his or her personal responsibility by virtue

of the care that he or she exercises over those minors. That conclusion is necessary a fortiori, in the second place, in the light of Articles 7 and 24 of the Charter.” A similar interpretation can be drawn in the case of the activity of civil society organizations and other organizations and individuals whose intention is to provide humanitarian assistance or support to migrants, refugees and asylum seekers. In our view, the current text of the proposal does not resolve, and even exacerbates, such interpretative issues.

Similarly, we observe that the Commission’s proposed text appears to be at odds with the stated objective of the proposal, which, as indicated by the Commission, is to revise the legal framework consistently with the Commission’s 2020 Guidance on the implementation of European Union rules on definition and prevention of the facilitation of unauthorised entry, transit and residence. As the Commission recalls, such guidance asserts that “humanitarian assistance mandated by law (for example in the framework of search and rescue operations) cannot and must not be criminalised, that criminalisation of any non-state actors that carry out search and rescue operations at sea, complying with the relevant legal framework, amounts to a breach of international law and is therefore not permitted by EU law”. Accordingly, “where applicable, an assessment of whether an act falls within the concept of ‘humanitarian assistance’ – a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalised – should be carried out on a case-by-case basis, taking into account all the relevant circumstances”.

Without a provision clearly determining what constitutes a criminal offence, as established in the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, and what does not, in line with the judgement of the Court of Justice of the European Union and with the Commission’s own guidance, as reflected in recital 7 of the proposal, the proposed directive, if adopted in its current form, would in practice likely lead to, and exacerbate the risk of, the criminalization of humanitarian assistance to migrants, including victims of trafficking in persons, refugees, asylum seekers and other persons in need of international protection.

We reiterate the concerns already shared by the Special Rapporteur on the situation of human rights defenders in February 2024,¹ underlining how the optional character of the humanitarian clause in the original legislation opened the door for the criminalisation of support to migrants, refugees and asylum seekers, aimed at seeing their fundamental rights upheld. The Commission previous effort to address this issue was not resolve with the guidance issued in 2020, at which time only 8 Member States had included humanitarian clauses in their legislation transposing the 2002 Directive. As the Special Rapporteur noted, this risk of criminalisation was compounded by the European Union's failure to align the 2002 Directive with international standards on the definition of people smuggling, as established in UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, by failing to include a profit motive as one of the constitutive elements of the criminal offence.

While the proposed text partially aligns European Union law with the UN Protocol Against the Smuggling of Migrants by Land, Sea, and Air by incorporating a material or profit motive as a defining element of the offence of smuggling under article 3, it fails to fully harmonize with the Protocol by omitting the requirement of a

¹ [Position Paper: on the EU Commission’s proposed Directive to update the EU legal framework on people smuggling](#)

profit motive for actions deemed criminal where there is a high likelihood of causing serious harm to a person. This omission leaves the current proposed text inconsistent with the Protocol, which explicitly defines smuggling in article 3 as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”

Furthermore, article 6 of the Protocol calls upon States Parties to “adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.” A comprehensive alignment would therefore require adherence to both the definitional and legislative obligations outlined in the Protocol. The UN Protocol only includes the risk to “endanger, or are likely to endanger, the lives or safety of the migrants concerned” as an aggravating circumstance of the criminal offence described in article 6 (where we may add the financial or material benefit is an intrinsic part). This divergence from the international standard, as the Special Rapporteur on the situation of human rights defenders already noted, risks the misapplication of the legislation against human rights defenders working in high risk situations, such as when they are involved in search and rescue missions at sea - situations in which human rights defenders are already frequently being criminalised in the European Union, as documented by the European Union's own Fundamental Rights Agency.

Similarly, as mentioned above, regarding the impact of the proposed directive language on civil society, we are also concerned, as has been previously raised by the Special Rapporteur on the situation of human rights defenders, by the lack of a definition of what constitutes “public instigation”, a new term that creates a new different offence (and not in line with the UN Protocol) included in proposed article 3.2: “Member States shall ensure that publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence”. Not only this article lacks the key element of financial or material benefit as exposed above, but it is our opinion that this newly created offence of 'public instigation' could be used against human rights defenders. While recital 6 states that “Providing objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation,” the absence of a clear and mandatory clause explicitly preventing the criminalisation of solidarity with migrants, refugees and asylum-seekers raises serious concerns. Existing patterns of criminalisation against human rights defenders in European Union Member States further exacerbate this risk. Without safeguards, the proposed novel offence of 'public instigation' could be misused to target human rights defenders and deter individuals or groups from sharing information about migration to the EU. Additionally, the recitals fail to adequately define or clarify what constitutes “objective information or advice,” leaving room for arbitrary interpretation and potential misuse.

We would also like to draw your attention to the concerns referred to in a targeted substitute impact assessment of the Commission's proposal for a revised Facilitation Directive (COM(2023) 755 commissioned by Ex-Ante Impact Assessment Unit of the Directorate for Impact Assessment and Foresight, within the Directorate-

General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament. The study raised concerns to the risk of over-criminalisation aggravated by the proposed provisions on the liability of legal persons. Article 7 of the proposed text calls States to “take the necessary measures to ensure that legal persons can be held liable for the criminal offences referred to in Articles 3, 4 and 5 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person. As the study already raised, the criminalization of legal persons in the abovementioned terms “can in fact only affect incorporated service providers and legally constituted NGOs – rather than organised criminal networks”.

We are concerned that ultimately, the criminalization of humanitarian assistance and civil society organizations providing support to migrants, refugees and asylum seekers, may have a negative impact on the situation, and in particular, identification and access to protection, of victims of trafficking in persons, given the critical role they play in supporting Member States in identifying and providing assistance to victims of trafficking in persons. In this regard we wish to recall that there is a positive obligation to identify and protect victims of trafficking in persons, as established in the international instruments on trafficking in persons, which also apply to the territory of the European Union Member States, as established in article 6 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, and article 10 and 12 of the Council of Europe Convention on Action against Trafficking in Human Beings, applicable as well in the EU Member States jurisdiction.

In this context, the importance and role of partnerships with civil society is included in international and regional instruments relating to trafficking in persons, including the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which specifically includes a provision for cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, in the provision of assistance to and protection of victims (art. 6(3)). In addition, the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in its general recommendation No. 38 on trafficking in women and girls in the context of global migration (2020) calls States to “Collaborate with civil society organizations, including through strengthening their human, technical and financial resources, to ensure that victims of trafficking are identified, assisted and protected at an early stage, including through the operation of mobile units, and the availability of safe disclosure procedures and safe spaces, targeting in particular sites where displaced and migrant women and girls are accommodated, registered or detained”.

The role of civil society and obligation of collaboration was reiterated by the Special Rapporteur on trafficking in persons, especially women and children in her report to the Human Rights Council in 2023: “The Special Rapporteur stresses the importance of ensuring an enabling environment for civil society and protection of human rights defenders, including those defenders assisting migrants and refugees. Policies and practices to combat trafficking in persons frequently refer to partnerships with civil society (...) Civil society actors who protect the safety and rights of migrants,

including trafficked persons and those at risk of trafficking, are human rights defenders and entitled to the full protection of the international human rights system. Indeed, the Global Compact for Safe, Orderly and Regular Migration recognizes their contributions to ensuring safe, orderly and regular migration. However, threats and risks to those human rights defenders are particularly acute in the context of mixed migration movements at sea, where States often impair or criminalize their search and rescue operations. In 2018, the Special Rapporteur and a number of other special procedure mandate holders called upon the European Union to “ensure that acts of solidarity with migrants by civil society organizations and human rights defenders, including during search and rescue operations and at border crossing, are not criminalized” (A/HRC/56/60, paras. 55-56).

Prior, in 2018, the Special Rapporteur on trafficking in persons had already raised the critical role of civil society organizations in supporting victims of trafficking persons, and based on the findings of her report to the Human Right Council (A/HRC/38/45), recommended that States should ensure that “National and local social authorities and civil society organizations should be involved in procedures to detect trafficking cases and indications of the risk of trafficking, as well as in the organization of assistance, protection and support for victims or potential victims in cases where a high number of people are identified. Such measures must not be made conditional on the initiation of criminal proceedings, the legal qualification of the crime or the cooperation of victims with law enforcement authorities.” (A/HRC/38/45, para. 79).

Our concerns regarding the proposed text are exacerbated by our findings regarding the restriction of civic space and criminalization of humanitarian assistance. In the report of the Special Rapporteur on the human rights of migrants on right to freedom of association of migrants and their defenders, he “has received information demonstrating increasing hostility towards migrants and civil society organizations that work to protect migrants’ rights. In many countries, this hostility has resulted in the imposition of new restrictions in law and in practice on freedom of association for migrants and their defenders” (A/HRC/44/42). As the Special Rapporteur on the situation of human rights defenders has previously raised, in some countries, human rights defenders working in the context of migration are subjected to judicial harassment including criminal prosecution. Quoting the OHCHR/UN Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, Principle 18 States must “Respect and support the activities of human rights defenders who promote and protect the human rights of migrants” based on international human right obligations, and States should “provide, in law and in practice, a safe, accessible and enabling environment for individuals and organizations that work to promote or protect the human rights of migrants.”

We would like to stress that States’ obligations under customary international human rights law and all the core international human rights treaties relating to their migration governance measures require that human rights be at the centre of their efforts to address migration in all its phases, including in their responses to large and mixed movements.

We would also like to refer to the Global Compact for Safe, Orderly and Regular Migration (A/RES/73/195), in particular to objective 7, according to which States commit to respond to the needs of migrants who face situations of vulnerability, which

may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with obligations under international law.

Conclusion

In view of the above observations, we urge the European Parliament and the Council of the European Union to amend the Commission's proposal and ensure that the definition of the criminal offence of facilitation included in the future Directive is narrowly aligned with the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. We urge in particular to include in the provision the requirement of financial or other material benefit in all cases, avoid vague references to public instigation or incitement and to instrumentalization as aggravating circumstance. Safeguards should also be introduced to avoid criminalisation of migrants, refugees and asylum seekers facilitating their own journeys.

We also urge the European Parliament and the Council of the European Union to include in the future Directive a binding humanitarian exemption clause to exempt from criminal liability individuals who for humanitarian reasons or based on close family ties, and for no profit, assisted migrants, refugees and asylum-seekers and any other activity aimed at safeguarding the rights and dignity of migrants, refugees and asylum seekers. The exemption clause should provide for the non-criminalization of: 1. Acts of entry and transit of third-country nationals themselves; 2. Assistance provided to close family members; and 3. Humanitarian assistance which includes but is not limited to provision of shelter, food, legal aid and advice, medical care, information and transportation, monitoring, documenting and reporting human rights abuses, peaceful disobedience and advocacy for policy change.

We wish to stress that addressing irregular migration ultimately relies on enhancing and increasing the availability and accessibility of safe pathways for regular migration. On the other hand, any migration governance measures, including those aimed at addressing irregular migration, shall not adversely affect the enjoyment of the human rights and dignity of migrants. States' obligations under all the core, applicable international human rights treaties require that human rights be at the centre of their efforts to govern migration in all its phases. This includes that migration and border governance measures respect, inter alia, the principle of equality and non-discrimination, the principle of *non-refoulement*, the right to seek asylum, the right to life, the prohibition of torture, the promotion of gender equality, and the rights and best interests of the child. Crossing an international border in an unauthorized manner is an administrative matter in nature, and it does not deprive migrants of their human rights entitlements, including due process guarantees.

We highly recommend that you consult the [OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders](#) and [Global Compact for Safe, Orderly and Regular Migration](#). We look forward to receiving further information on the issues mentioned in this letter, and we stand ready to cooperate with you to enhance the protection of the human rights of all migrants, asylum seekers and refugees in the EU.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned observations.
2. Given that the legislative proposal is currently under negotiation, please indicate any concrete and immediate plans to address the questions and concerns raised in this letter, as well as other concerns raised by civil society and legal experts with the aim of bringing the future Directive in line with international human rights law and international criminal law, and in particular as regards to the inclusion of a binding humanitarian clause.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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