

STUDY

Requested by the PETI committee



**Fit for purpose?
The Facilitation Directive
and the criminalisation of
humanitarian assistance to
irregular migrants:
2018 Update**



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
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Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, aims to update the 2016 study "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants". It takes stock of and examines the latest developments that have taken place since 2016, specifically the legislative and policy changes, along with various forms and cases of criminalisation of humanitarian actors, migrants' family members and basic service providers. The study uses the notion of 'policing humanitarianism' to describe not only cases of formal prosecution and sentencing in criminal justice procedures, but also wider dynamics of suspicion, intimidation, harassment and disciplining in five selected Member States – Belgium, France, Greece, Hungary and Italy. Policing humanitarianism negatively affects EU citizens' rights – such as the freedom of assembly, freedom of speech and freedom of conscience. When civil society is effectively (self-)silenced and its accountability role undermined, policies to combat migrant smuggling may be overused and give rise to serious breaches of the EU's founding values, notably the rule of law, democracy and fundamental rights. Moreover, policing humanitarianism negatively affects wider societal trust and diverts the limited resources of law enforcement from investigating more serious crimes.

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ABBREVIATIONS

AMIF	Asylum, Migration and Integration Fund
Btk	Act C of 2012 on the Criminal Code in Hungary
CESEDA	Code of Entry and Stay of Aliens and of the Right of Asylum in France
CoE	Council of Europe
CSA	Civil society association
DG HOME	Directorate-General for Migration and Home Affairs
DG JUST	Directorate-General for Justice and Consumers
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ELDR	European Liberal Democrat and Reform Party (formerly ALDE)
IMPACT	European Multi-Disciplinary Platform against Criminal Threats
ERCI	Emergency Response Centre International
ESRC	Economic and Social Research Council (UK)
EUNAFOR MED	European Union Naval Force Mediterranean
Eurojust	European Union Agency for Judicial Cooperation
Europol	European Union Agency for Law Enforcement Cooperation
FRA	European Union Agency for Fundamental Rights
Frontex	European Border and Coast Guard Agency
HUF	Hungarian forint
ICCPR	United Nations International Covenant on Civil and Political Rights
ICF	Inner City Fund International
IOM	International Organization for Migration
Lex NGO	Hungarian Act LXXVI of 2017 on the Transparency of Organizations Receiving Foreign Funds
LIBE	European Parliament Committee on Civil Liberties, Justice and Home Affairs
MEGA	Make European Great for All (European Civic Forum campaign)
MEPs	Members of the European Parliament
MOAS	Migrant Offshore Aid Station
MRCC	Maritime Rescue Coordination Centre in Rome
MSF	Médecins Sans Frontières (En: Doctors Without Borders)
NGO	Non-governmental organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe

- PETI** European Parliament's Committee on Petitions
- PICUM** Platform for International Cooperation on Undocumented Migrants
- Proem-AID** Professional Emergency Aid (Spanish search and rescue NGO)
- PSE** Parti Socialiste Européen (En: PES – Party of European Socialists)
- REFIT** European Commission's regulatory fitness and performance
- SAR** Search and rescue
- SOCTA** Serious Organised Crime Threat Assessment
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union
- TUI** Legislative Decree of 25 July 1998, n. 286 – Single Act on the provisions governing immigration and the status of foreigners in Italy
- UNODC** United Nations Office on Drugs and Crime
- Verts/ALE** Groupe des Verts/Alliance libre européenne (En: Greens/European Free Alliance)

EXECUTIVE SUMMARY

Overview

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the European Parliament's Committee on Petitions, serves to update the 2016 study "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants".¹ The initial study undertook a legal and socio-political assessment of the EU's tools aimed at combatting migrant smuggling. It mapped the so-called EU Facilitators' Package comprising the EU's Facilitation Directive² and Framework Decision.³ The initial study assessed EU legislation against the international legal framework and explored the direct and indirect effects of these laws and/or policies on civil society organisations, local authorities and ship-owners in 17 EU Member States. The initial study concluded that the EU Facilitators' Package is not fit for purpose and thus legislative change is needed to bring the EU legislation and policies in line with international, regional and EU criminal justice and fundamental rights standards. In 2017, the European Commission undertook a regulatory fitness and performance (REFIT) assessment of the EU Facilitators' Package, but despite the evidence in preceding studies, it refrained from changing the EU's anti-smuggling laws and transforming old 'third-pillar' legislation into new Lisbon Treaty instruments.⁴

This 2019 update study regards such REFIT findings as a problem and attributes some responsibility to the vagueness of the EU Facilitators' Package. This study provides even more evidence of wide-spread criminalisation of civil society actors that have saved the lives of refugees and other migrants in the Central Mediterranean and Aegean Seas, and who have provided basic services and assistance upon their arrival – in the hotspots in Greece and Italy and in places of transit and residence in Belgium, Hungary and France. It takes stock of and evaluates the developments across the EU that have taken place since 2016 up until November 2018.

The study compiles a selection of practical cases where civil society actors have experienced various forms of interference when providing humanitarian assistance and enabling access to rights (see Section 3). These dynamics can be better understood not only through the lens of 'criminalisation' on the grounds of migrant smuggling, but also more widely through the notion of "policing humanitarianism".⁵ The notion of policing covers the four different, but interlinked forms (modalities) of interference with civil society's free space ranging from suspicion, intimidation and harassment to disciplining and actual criminal justice measures, such as misguided prosecutions. The media monitoring exercise captured 92 entries/articles indicating the institutional nature of policing and its escalation in 10 EU Member States and at the EU level (see Annex1).

The so-called European humanitarian refugee crisis started in 2015. In the beginning it was characterised by an unprecedented number of irregular arrivals to the EU who were driven by conflict and instability in the Middle East (in countries including Syria as well as Libya and Afghanistan) and other regions (e.g. West Africa and North Africa), coupled with a lack of adequate reception infrastructure in European host states. Local citizens, non-governmental organisations (NGOs) and volunteers from all across European Union were first responders to the

¹ S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M. Manieri and M. Levoy (2016), "Fit for Purpose? The Facilitation Directive and the Criminalization of Humanitarian Assistance to Irregular Migrants", Study for the European Parliament's LIBE Committee, Brussels.

² Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002.

³ Council of the European Union (2002) Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, 2002/946/JHA, OJ L 328, 5 December 2002.

⁴ European Commission (2017), 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, Staff Working Document, SWD (2017) 117 final*, Brussels, 22 March.

⁵ S. Carrera, V. Mitsilegas, J. Allsopp and L. Vosyliute (forthcoming), "Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society", *Hart Publishing* (<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>).

'crisis' in Greece, Italy and elsewhere.⁶ In 2015, the State of the Union address by President of the European Commission, Jean-Claude Juncker, called for more solidarity as a noble mission that EU Member States need to undertake together: "But when, generations from now, people read about this moment in Europe's history books, let it read that we stood together in demonstrating compassion and opened our homes to those in need of our protection."⁷ However, later public moods shifted towards more restrictive approaches on migration and in turn – on humanitarian assistance.

The study finds that preventing civil society actors from fulfilling their humanitarian and human rights missions is likely to have assorted negative consequences affecting a range of actors, including citizens and society as a whole. These not only include well-documented negative impacts on the lives and human dignity of asylum seekers and immigrants, but also on the rights and freedoms of EU citizens as well as democratic rule of law principles at the EU and national levels. Quite paradoxically, removing access to basic service provision and assistance from irregular migrants in the name of 'combating human smuggling' leads to more insecurity for all actors and individuals involved, and even increased opportunities for various criminal groups in the EU and in third countries.⁸

The detrimental effects of criminalising solidarity towards migrants and refugees are well documented by academia and by international and regional human rights bodies.⁹ This study takes a new approach – *the policing of civil society actors and citizens*. This approach suggests that citizens' rights and freedom of assembly are put into question when acts of compassion and solidarity are criminalised. The infringements on activities of civil society actors, some of which are ensuring the accountability of state policies on migration in light of human rights and humanitarian grounds, often have broader ramifications for the EU's fundamental values, chiefly the rule of law, democracy and fundamental rights enshrined in the Article 2 of the Treaty on the European Union (TEU) and the EU Charter of Fundamental Rights. In particular, on the possibility for EU citizens to promote, enjoy and defend fundamental rights within the EU Member States.

The current study shows that this worrying increase in policing of civil society actors has not happened in a legal and political vacuum. First, the EU Facilitators' Package has itself created legal uncertainty over *what is (not) a crime of migrant smuggling*.¹⁰ The UN Protocol against the Smuggling of Migrants provides clearer answers. The Protocol considers 'migrant smuggling' as a crime when committed for financial or other material benefit purposes.¹¹ Despite the concerns expressed since the presentation of and negotiations on the EU Facilitators' Package in 2002 by members of the European Parliament and public, the EU opted for the creation of new criminal concepts – 'facilitation of entry and transit' and 'facilitation of residence and stay'.

The new notion of 'facilitation of entry and transit' does not require proof of financial benefit or other material benefit to be considered a crime. Thus, in the EU Member States it is possible to prosecute for actions that do not

⁶ S. Carrera, J. Allsopp, & L. Vosiylütė (2018), "Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism". *International Journal of Migration and Border Studies*, 4(3), pp. 236-276.

⁷ President of the European Commission (2015) State of the Union 2015: Time for Honesty, Unity and Solidarity. Press Release, European Commission. 9 September (http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm).

⁸ S. Carrera and E. Guild (eds) (2016), *Irregular Migration, trafficking and smuggling of human beings: Policy Dilemmas in the EU*, CEPS, Brussels; V. Mitsilegas, & Y. S. Holiday (2018), "The criminalisation of irregular migrants". In E. Guild, & T. Basaran (eds) (2019), "Global Labour and the Migrant Premium the Cost of working abroad", London: Routledge; X. Zhang, G. Sanchez, L. Achilli (2018) "Crimes of Solidarity in Mobility: Alternative Views on Migrant Smuggling", *The Annals*, 676 (1), 21 February, pp. 6-15.

⁹ See for example UN Special Procedures (2018), Joint communication of Special Procedures ahead of the informal summit of EU heads of state or government in Salzburg, [OL OTH 64/2018](https://www.unhcr.org/refugeesandmigrants/2018/9/18-09-19-salzburg), on 19-20 September 2018; UN Human Rights Office (2017), "In search of dignity: Report on the human rights of migrants at Europe's borders", United Nations, Geneva; Council of Europe Venice Commission Legal Experts (2018), "Hungary: "Stop Soros" Provision on Illegal Migration Should Be Repealed as It Seriously Impairs Legitimate NGO Work", Strasbourg, 22 June (<https://www.coe.int/en/web/human-rights-rule-of-law/-/hungary-stop-soros-provision-on-illegal-migration-should-be-repealed-as-it-seriously-impairs-legitimate-ngo-work-say-venice-commission-legal-experts>).

¹⁰ S. Carrera, et al. (2016), op. cit.

¹¹ United Nations General Assembly (2000), *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Resolution 55/25*, 15 November ([URL](https://www.unhcr.org/refugeesandmigrants/2000/11/55-25)).

have clear criminal intent, namely, an aim to generate profit from migrant smuggling, in contradiction with Article 6 of the UN Protocol against the Smuggling of Migrants. Only four out of 28 EU Member States are in line with UN standards. So, only in Germany, Ireland, Luxembourg and Portugal do criminal proceedings require a proof of migrant smugglers obtaining financial or other material benefit for their actions.¹² Interestingly, in these countries, media monitoring has not captured interferences with civil society free space, which is an indication that a good definition of ‘what is a crime?’ could by default prevent misguided prosecutions, when humanitarian actors are acting without profit motives.

The ‘facilitation of residence’ does require financial or other material benefit. However, it does not exempt bona-fide service providers, such as, for instance, land-lords, hotels and AirBnB providers, that charge smuggled migrants the same amount as any other clients, without any ‘unjust enrichment’ motive. This means that companies or organisations whose business model is providing the service and not profiting from the vulnerable situation of migrants are at risk of being criminalised.

However, even if the EU Facilitation Directive requires the profit motive to establish the crime for the ‘facilitation of residence and stay’, this is not the case in 13 out of 28 EU Member States, namely, in Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom.¹³ When facilitation of residence and stay without a profit factor is sufficient to establish a crime or offence, non-profit civil society actors, including citizen movements, as well as family members and friends are at risk of criminalisation.¹⁴ It is illustrated in Chapter 4 and Annex 1 that indeed these have been the developments in Belgium, France, Greece, and the United Kingdom.

In addition, the Facilitation Directive (Article 1:2) suggests that each Member States can choose whether to criminalise civil society acting for humanitarian purposes for the facilitation of entry without profit motives, which is legally, politically and morally wrong. The relevant paragraph reads as follows:¹⁵

Any Member State *may* decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

Therefore, the Facilitation Directive stands at odds with the EU’s founding values as enshrined in Article 2 TEU, the EU’s Fundamental Rights Charter, and its commitment to secure and protect humanitarian actors outside the EU – as noted in the Article 214 TEU and as has been widely agreed in the European High Level Consensus on Humanitarian Aid.¹⁶

In addition, the Facilitation Directive does not cover humanitarian assistance in situations of residence and stay (in paragraph 1(b)). In countries, where such exemptions are declared, they are drafted overly narrow, as only covering situations of life and death that are already covered by international maritime law. In other countries, this leads to a discussion on what is genuine humanitarian assistance. Some forms of explicit exemption were found in Belgium, Greece, Spain, Finland, Italy, Malta and the United Kingdom.¹⁷ Nevertheless, formal prosecutions occurred in countries where humanitarian exemptions were declared. The subsequent analysis in Section 3 and Annex 1 indicates that formal prosecutions of humanitarian actors were launched in Belgium, Greece, Italy, Malta and the United Kingdom.

¹² FRA (2014), “Criminalisation of Migrants in an Irregular Situation and of Persons engaging with them”, Vienna, March

¹³ FRA (2014), “Criminalisation of Migrants in an Irregular Situation and of Persons engaging with them”, Vienna, March.

¹⁴ S. Carrera, et al. (2016), op. cit.

¹⁵ EU Facilitation Directive 2002/90, Article 1 para.2, emphasis added.

¹⁶ Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008), The European Consensus on Humanitarian aid, (2008/C 25/01), 30.1.2018. (http://ec.europa.eu/echo/files/media/publications/consensus_en.pdf)

¹⁷ European Parliament Committee on Petitions (2017), Notice to Members - Subject: Petition No 1247/2016 by Paula Schmid Porrás (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea, 31.7.2017.

Concerns have been raised, for example by the EU Fundamental Rights Agency (FRA), that the legal definition of the facilitation of irregular migration is over broad and also fails to exempt important humanitarian actors who are acting on charitable intent.¹⁸ The UNODC Legislative Guide also confirms that the purpose of having an international legal framework to prosecute migrant smuggling should take into account the rights of others, in particular the right to seek asylum: "the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons".¹⁹

Despite the abovementioned non-compliances with the EU Facilitators' Package, there were no infringement procedures started. The European Commission seems to have experienced reluctance on the part of EU Member States to report about the implementation of the Framework Decision for years after it was passed. For example, in 2006, five Member States were not providing the relevant information to the Commission and from four, the information that could not be used for the in-depth assessment.²⁰ At that time, the Commission has been questioning the impact of the Facilitators' Package and, in line with the judgment of the European Court of Justice in case C-176/0, putting forward the idea of a new EU instrument, bringing the Framework Decision and Directive into one legal act that "aims at a higher level of harmonisation" in defining crimes and sanctions.²¹ After 2010, with the Treaty of Lisbon entering into force, and in particular, after its Protocol 36 on 'Transitional Provisions' (Title VII, Article 10) of the Lisbon Treaty, came to an end in December 2014, the Commission had new possibilities to inject 'more EU' within the former 'third pillar' legislation, meaning that new legislation in criminal matters would move beyond 'minimum approximation' towards 'more harmonisation'.²²

The uncertainty, compounded with the lack of compliance emerging from current EU and its Member States policies and laws, has been reflected in recent and ongoing concerns of European citizens and policy-makers. In October 2016, Paula Schmid Porras presented Petition 1247/2016 to the European Parliament's Committee on Petitions (PETI) regarding the charges against the three Spanish lifeguards volunteering for PROEM-Aid on Lesbos island, Greece on the grounds of migrant smuggling.²³ In November 2018, the PETI Committee heard the Petitioner, who was calling for obligatory exemption of humanitarian assistance from criminalisation in the EU's Facilitation Directive as, despite the acquittal of her clients in May 2018, new misguided prosecutions against volunteers had been initiated by Greek authorities.²⁴

The cases of criminalisation of solidarity has mobilised citizens at the European and national levels. The European Citizens' Initiative (ECI) called "We are a welcoming Europe – let us help!" (#WelcomingEurope) reflects increasing concerns among citizens and volunteers offering assistance to immigrants and asylum seekers in the EU. The ECI is supported by more than 170 organisations. The petition aims to gather a million signatures. It calls upon the

¹⁸ FRA (2014), "Criminalisation of Migrants in an Irregular Situation and of Persons engaging with them", Vienna, March.

¹⁹ United Nations Office on Drugs and Crime (2004), 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.

²⁰ European Commission (2006) Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, COM/2006/770 final, Brussels, 6.12.2006. (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52006DC0770>).

²¹ Ibid.

²² S. Carrera, N. Hernanz and J. Parkin (2013) "The 'Lisbonisation' of the European Parliament Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice", *CEPS Paper in Liberty and Security in Europe*, No. 58, CEPS, September. (<https://www.ceps.eu/system/files/LSE%20No%2058%20Lisbonisation%20of%20EP.pdf>).

²³ European Parliament (2017), Petition No 1247/2016 by Paula Schmid Porras (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea, Committee on Petitions, Brussels, 31.7. 2017.

²⁴ European Parliament, Committee on Petitions (2018) Recording of the Committee meeting on 21 November, 2018, from 15:41 to 18:33, The European Parliament's Multimedia Centre. (<http://www.europarl.europa.eu/ep-live/en/committees/video?event=20181121-1430-COMMITTEE-PETI>).

European Commission to decriminalise humanitarian assistance across the EU and to support EU citizens who want to offer safety to people seeking international protection.²⁵

The European Civic Forum has also initiated the knowledge-sharing online tool called 'Civic Space Watch' that provides a possibility for putting "together alerts from civil society, existing analyses and institutional resources" about the infringements on civil society free space.²⁶

In addition to civil society, regional and international bodies started to raise their concerns regarding the situation of human rights defenders across the EU. For example, Dunja Mijatovic, the Council of Europe Commissioner for Human Rights highlighted "worrying retrogression in the protection of human rights defenders and their ability to work in a growing number of European countries".²⁷ She called on governments to "value human rights defenders for their engagement and contributions towards the peaceful and just functioning of society".²⁸ Also, the World Organisation Against Torture started to follow the situation of judicial harassment of humanitarian and human rights organisations in EU Member States within the framework of the Observatory for the Protection of Human Rights Defenders in the EU.²⁹

Second, the political climate and policy salience of migration has changed. Prior to 2015, attempts to criminalise acts of solidarity could be remedied partly by traditional criminal justice 'checks and balances' – for example, prosecutors might drop a humanitarian facilitation case on the basis of a public interest test, as foreseen in the professional codes for prosecutors.³⁰ Yet, since the European humanitarian refugee crisis of 2015, the so-called fight against migrant smuggling became a key political priority for the European Agenda on Migration³¹ and the European Security Agenda.³² Anti-smuggling measures were also artificially framed as migration management tools to reduce irregular immigration at the times of 'crisis'. As a consequence, actors with different mandates were deployed to combat migrant smuggling – from border guards, including Frontex officers, gathering intelligence at the hot-spots,³³ to military actors, such as EUNAVFOR MED Operation Sophia destroying boats used for smuggling in the Mediterranean and even NATO ships – providing situational awareness.³⁴ Some of these actors portrayed the humanitarian assistance provided by civil society actors as non-cooperative, suspicious, if not overall counterproductive to the underlying goal of 'stemming the flows'.³⁵

Thirdly, the fight against migrant smuggling has been used to disguise the deficits of the European solidarity at times of 'crisis' when unilateral and self-interested decisions have prevailed. Some politicians demonstrated "the crisis of leadership that has set states against each other, and citizens against newcomers, in a race to the populist bottom".³⁶ In some of the countries this "race to the bottom" entailed violating the very founding principles of the EU, such as fundamental rights and rule of law.³⁷ Some of them have passed the burden of responsibility over

²⁵ For more information refer to <http://www.weareawelcomingeurope.eu/>.

²⁶ For more information refer to <https://civicspacewatch.eu/about-the-watch/>

²⁷ Council of Europe, Commissioner for Human Rights (2018) "States' Duty to Protect Human Rights Defenders", Council of Europe, Strasbourg 6 December, (https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/states-duty-to-protect-human-rights-defenders).

²⁸ Ibid.

²⁹ World Organisation Against Torture, "Observatory for the Protection of Human Rights Defenders" (<http://www.omct.org/human-rights-defenders/observatory/>).

³⁰ Carrera et al. (forthcoming), op. cit.

³¹ European Commission (2015a), "A European Agenda on Migration", Communication, COM(2015) 240 final, Brussels, 13 May.

³² European Commission (2015b), "The European Agenda on Security", Communication, COM(2015) 185 final, Strasbourg, 28 April.

³³ See for example: Frontex (2017), Annual Risk Analysis (for 2016), 15 February.

³⁴ Carrera et al. (forthcoming), op. cit.

³⁵ Forensic Oceanography (2017), Report "Blaming Rescuers" by C. Heller and L. Pezzani, was produced as part of the Forensic Architecture agency at Goldsmiths (University of London) (<https://blamingtherescuers.org/>).

³⁶ E. Ambrosi (2017), "The unbearable lightness of leadership", Opinion, *EUobserver*, Brussels, 18 October (<https://euobserver.com/opinion/139507>).

³⁷ See for example: P. Wintour (2017), "Italian minister defends methods that led to 87% drop in migrants from Libya", *The Guardian*, 7 September.

the 'emergency' to other EU Member States, third countries and to humanitarian actors, in particular those saving lives at sea.³⁸

This study finds that when the argument of 'the fight against migrant smuggling' is used not for the purpose of bringing criminal groups to justice, it risks becoming politicised. The fight against migrant smuggling in recent years has been reframed as a broader security and migration management issue, that has justified interferences with civil society free space for the purpose of preventing and stemming flows of asylum seekers and irregular migrants. The study provides evidence on 'misguided prosecutions' of humanitarian actors, service providers and smuggled migrants, that served to discourage migration. In such situations, traditional criminal justice checks and balances are critically diminished by overriding political influences.³⁹ Therefore, the study proposes shifting the burden of proof from civil society organisations whether their actions constitute 'genuine humanitarian assistance', to a question for national governments and EU agencies – of what are the objectives of 'a genuine fight against migrant smuggling' that needs to be supported from the EU budget.

Therefore, the legal vagueness of the EU Facilitators' Package regarding what is (not) a crime, when combined with the political salience of migration issue, the lack of an EU-level holistic approach and long-term solutions on migration and asylum policies, has led to an increase in the EU's political and operational support and funding for anti-smuggling activities. This has resulted in the policing of citizens and civil society in the receiving societies, specifically in search and rescue (SAR) at sea as well as along land borders and transit zones. This has negative consequences for social trust.

SAR in the Mediterranean Sea

While some Member States were overwhelmed, unable and/or unwilling to conduct effective SAR activities, civil society actors were there to fill 'the protection gap' at sea (see Annex 4). The code of conduct imposed by Italy on civil society SAR activities, coupled with the creation of related offences, has effectively led to the withdrawal of civil society missions in the Central Mediterranean where they have largely been replaced by the Libyan coast guard.⁴⁰

The net of suspicion was cast ever wider as these changes evolved. In Italy, Carmelo Zuccaro, the prosecutor in Catania, spread unfounded accusations that NGOs conducting SAR were 'colluding with smugglers' in Italian media.⁴¹ Even though the subsequent hearing in the Italian senate showed that the prosecutor had no evidence to support his claims,⁴² several politicians took up the accusations, labelling SAR NGOs as "migrant taxis" and exploiting them for populist purposes of political mobilisation of electorates.⁴³ Subsequently, a binding code of conduct was adopted in Italy as a disciplining measure solely targeting NGOs conducting SAR in the Central Mediterranean. This was seen by civil society, academia and human rights bodies as a major attack on SAR NGOs and their independence. It institutionalised suspicion and introduced an exceptional application of international maritime law so that it applied only to civil society and *not* to merchant or government ships.⁴⁴

³⁸ Forensic Oceanography (2017), Report "Blaming Rescuers" by C. Heller and L. Pezzani, was produced as part of the Forensic Architecture agency at Goldsmiths (University of London) (<https://blamingtherescuers.org/>).

³⁹ Carrera et al. (forthcoming), op. cit.

⁴⁰ P. Cuttitta (2018a), "Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part I)", *Border Criminologies Blog*, 18 April (<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-migrants>). P. Cuttitta (2018b), "Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn (Part II)", *Border Criminologies Blog*, 19 April (<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0>).

⁴¹ DW (2017), "Italy Prosecutor Claims NGOs Working with Human Smugglers", News, 24 April (<http://www.dw.com/en/italy-prosecutor-claims-ngos-working-with-human-smugglers/a-38554753>).

⁴² The Malta Independent (2017), "Italian Prosecutor: No NGOs-Migrant Smuggler Links Emerge", 3 May (<http://www.independent.com.mt/articles/2017-05-03/local-news/Italian-prosecutor-no-NGOs-migrant-smuggler-links-emerge-6736173786>).

⁴³ Adnkronos (2017), "Sink NGO "migrant Taxis" in Med Says Salvini", 27 April (https://www.adnkronos.com/aki-en/security/2017/04/27/sink-ngo-migrant-taxis-med-says-salvini_B7Zq5H1MwzMZ4NiAtuYJk.html).

⁴⁴ Sea Watch (2017) ""Nonsensical", "Dishonest", "Illegal": the 'Code of Conduct'", Interview with Dr. Violeta Moreno-Lax, 24 July (<https://sea-watch.org/en/nonsensical-dishonest-illegal-the-code-of-conduct/>).

The Italian binding code of conduct stirred legal uncertainty and imposed a major restriction on SAR NGOs – not granting automatic permission to disembark rescued persons to the closest port of safety. In response, some major NGOs, such as MSF (Médecins Sans Frontières), Save the Children, Sea-Eye and MOAS (Migrant Offshore Aid Station), have suspended their operations, while others, like Jugend Rettet and Proactiva Open Arms were prosecuted and their vessels seized. Similarly, in the Aegean, SAR NGOs Team Humanity and Proem-AID (Professional Emergency Aid) were prosecuted by Greek authorities, although they were eventually acquitted.⁴⁵ A further misguided prosecution in Greece accused ten volunteers of migrant smuggling. The Greek authorities resorted to detention of two volunteers – Sarah Mardini and Sean Binder – who were held in a high security prison pending their trial.⁴⁶

In the Central Mediterranean, at the time of reporting, the only remaining big NGO ship is Aquarius, which is run by SOS Méditerranée and MSF. Aquarius has become a symbol of the lack of a common EU policy on migration and asylum in the Mediterranean, and the lack of solidarity among EU Member States and towards asylum seekers and people at risk at sea, as it continues to navigate a number of unresolved political controversies, from closed ports to refusals to grant a state flag to the vessel.⁴⁷ In addition, in Italy, the government of Salvini also attacked national coast guard authorities performing SAR,⁴⁸ Salvini, also demanded changes in EU operations, such as Operation Sophia, so that they would no longer disembark rescued people.⁴⁹ These developments have led to a drop in the absolute numbers of sea crossings; however, the mortality rate in the Mediterranean has increased.⁵⁰ Through its (in)action, funding and political or operational cooperation, the EU bears responsibility for the violations of human rights of refugees and other migrants (see Figure 4. Mortality rate per thousand sea crossings in the Mediterranean, January 2014 – March, 2018).⁵¹

Land borders and transit zones

At land borders and transit zones,⁵² the policing of humanitarianism takes different shapes. In Hungary, the government spread various accusations against leading human rights organisations for being potential ‘migrant smugglers’.⁵³ Soon after, certain civil society organisations were prohibited from entering border transit zones and this eventually led to changes in the Hungarian Criminal Code that enabled the criminalisation of any organisation working with migrants for activities such as “preparing or distributing informational materials” or “initiating asylum requests for migrants”.⁵⁴ The fight against migrant smuggling has in this way been used as a justification by the Hungarian government to start judicial and fiscal harassment of humanitarian and human

⁴⁵ A. Safdar (2016), “NGOs decry charges against volunteers in Greece”, *Al Jazeera*, 16 January (<http://www.aljazeera.com/news/2016/01/ngos-decry-arrests-volunteer-lifeguards-greece-160116193522648.html>); Team Humanity (2018), “Danish Lifeguard fighting a battle of injustice”, Crowdfunding Campaign (<https://startsomegood.com/danish-lifeguard-fighting-a-battle-of-injustice>).

⁴⁶ Smith, H. (2018) “Arrest of Syrian ‘hero Swimmer’ Puts Lesbos Refugees Back in Spotlight”, *The Guardian*, 6 September. (<https://www.theguardian.com/world/2018/sep/06/arrest-of-syrian-hero-swimmer-lesbos-refugees-sara-mardini>).

⁴⁷ Carrera and Lannoo (2018), op. cit.

⁴⁸ L’Obs (2018) “Migrants du Diciotti: pourquoi Matteo Salvini est poursuivi par la justice italienne.” 26 August (<https://www.nouvelobs.com/monde/migrants/20180826.OBS1328/migrants-du-diciotti-pourquoi-matteo-salvini-est-poursuivi-par-la-justice-italienne.html>).

⁴⁹ Euractiv (2018) “Italy to Push EU for Reform of ‘Operation Sophia.’” *Euractiv.Com*, 30 August (<https://www.euractiv.com/section/justice-home-affairs/news/italy-to-push-eu-for-reform-of-operation-sophia/>).

⁵⁰ L. Vosyliūtė (2018), “Is saving lives still a priority for the EU?”, *Reconnecting Europe Blog*, 19 April (<http://www.picum.org/Documents/Publi/2018/Main-Findings-of-the-Report-2018.pdf>).

⁵¹ S. Carrera, El Qadim, N., Fullerton, M., Garcés-Masareñas, B., Kneebone, S. Y., López Sala, A., Chun Luk, N., Vosyliūtė, L (2018), “Offshoring Asylum and Migration in Australia, Spain, Tunisia and the US: Lessons learned and feasibility for the EU”, CEPS Research Reports, Brussels, September 2018.

⁵² De Vries, Carrera and Guild (2016).

⁵³ S. Walker (2018), “Hungary to Criminalise Migrant Helpers with ‘Stop Soros’ Legislation.” *The Guardian*, 29 May. (<https://www.theguardian.com/world/2018/may/29/hungary-criminalises-migrant-helpers-stop-george-soros-legislation>)

⁵⁴ Council of Europe Venice Commission Legal Experts (2018), “Hungary: “Stop Soros” Provision on Illegal Migration Should Be Repealed as It Seriously Impairs Legitimate NGO Work, Say Venice Commission Legal Experts”, op. cit.

rights civil society organisations and to reduce their capacity to uphold fundamental rights and the rule of law in the country.⁵⁵

This has been recognised by a recent Joint Opinion issued by the Council of Europe's Venice Commission and OSCE's ODIHR (Organization for Co-operation and Security in Europe, Office of Democratic Institutions and Human Rights). It deals with Hungary "On the Provisions of the So-Called 'Stop Soros' Draft Legislative Package, which Directly Affect NGOs".⁵⁶ It concluded that the Hungarian legislation constitutes an unlawful interference with the freedom of association, and in some cases, expression. The Joint Opinion also highlighted that a legal provision in domestic law concerning the criminalisation of facilitation of irregular migration may pursue a legitimate aim, yet it "must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from applying for asylum".

In other Member States, such as Belgium and France, civil society actors and, in particular, individual volunteers acting in solidarity with refugees and migrants were also seen with suspicion and prosecuted for hosting them. Some politicians in these governments have also attempted changes in their legislation. For example, in Belgium, the minister of justice, secretary of state for asylum, migration and administrative simplification as well as the deputy prime minister proposed a law allowing the police to enter private households to search for migrants with expulsion orders without the proper house search order issued by an independent judge. The proposed law was widely criticised by the judiciary, civil society and academia, as well as by local authorities, for opening a new avenue to intimidate and criminalise citizens who were acting in solidarity with refugees and immigrants.⁵⁷

The compilation of practical cases in Annex 1 of this study shows that such civil society actors face a range of challenges: they are often looked upon with suspicion; they are harassed and intimidated by local authorities and police (see, for example, the ample testimonies by volunteers being teargassed in Italy and Greece); they are disciplined for unrelated offences with the aim of stopping their humanitarian activities (such as food hygiene norms imposed to stop the distribution of food to persons in an irregular situation in France); or they are brought to prosecution in criminal courts for activities that have otherwise been praised, with various nominations and prizes.⁵⁸

A key finding of this research is that even when such cases result in eventual acquittals, the damage has already been done – society in general is encouraged to view humanitarians as criminal suspects and individuals and groups are discouraged from providing assistance to vulnerable asylum seekers and migrants. The policing of civil society actors negatively affects fundamental rights of EU citizens, the freedom of assembly, freedom of speech and opinion, all of which lay at the foundations of national constitutional systems and EU primary law. Civil society, and the human right of freedom of association enabling its very existence, constitutes a central piece in the wider democratic rule of law puzzle. When civil society is dismantled and effectively silenced or side-lined, this constitutes a major threat to the EU's founding values – *democratic rule of law with fundamental rights* – laying at the basis of mutual-trust cooperation.

Still, refugees and other migrants pay the highest price – their lives are simply not saved at sea or their human dignity is negated at the border and transit zones. They are left to starve and even die from preventable diseases, left without shelter or without sleeping bags, without legal advice and possibilities to submit legitimate claims for international protection.⁵⁹ Such policies increase the destitution of migrants and their exclusion from basic socioeconomic services and rights. This in itself qualifies as inhuman and degrading treatment contrary to all

⁵⁵ M. Szuleka (2018), "First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland", CEPS Paper in Liberty and Security in Europe No. 2018-06, CEPS, Brussels, 24 April (<https://www.ceps.eu/publications/first-victims-or-last-guardians-consequences-rule-law-backsliding-ngos-case-studies>).

⁵⁶ Council of Europe Venice Commission and OSCE ODIHR (2018), Joint Opinion on the Provisions of the So-Called 'Stop Soros' Draft Legislative Package which Directly Affect NGOs, CDL-AD(2018)013, Strasbourg, 25 June.

⁵⁷ L'Echo, "Le projet de loi sur les visites domiciliaires mis au frigo", 21 August (<https://www.lecho.be/economie-politique/belgique/federal/le-projet-de-loi-sur-les-visites-domiciliaires-mis-au-frigo/10041620.html>)

⁵⁸ Carrera et al. (forthcoming), op. cit.

⁵⁹ L. Fekete, F. Weber and A. Edmond-Pettitt (2017), *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, London; J. Allsopp (2017), "Solidarity, smuggling and the European Refugee Crisis: Civil society and its Discontents", *Diritto, Immigrazione e Cittadinanza*, 3/17.

relevant legally binding international, regional and EU human rights instruments. Consensus on this is emerging among civil society actors and EU citizens at a national level and across the international and regional bodies that are responsible for the monitoring and implementation of human rights standards.⁶⁰

The United Nations is also becoming increasingly concerned about these developments. A Joint Communication of Special Procedures issued on September 2018 by the UN Office of the High Commissioner for Human Rights (including five UN special rapporteurs) addressed to the presidents of the European Commission, the European Council and the European Parliament “ahead of the informal summit of EU heads of state or government in Salzburg on 19–20 September 2018” raised similar issues about the impacts of irregular immigration policies on civil society actors. The Joint Communication underlined that “[t]he EU and its Member States must ensure that acts of solidarity with migrants by civil society organisations and human rights defenders, including during search and rescue operations and border crossing, are not criminalised”.⁶¹

In addition, some of the activities of EU justice and home affairs agencies involved in addressing migrant smuggling are based on widespread, yet robust evidence lacking assumptions about this phenomenon. There is a paradox in the narrative found in the key reports about the highly organised, hierarchical, transnational criminal groups of migrant smugglers.⁶² On the one hand, the migrant smugglers that are violent and driven by greed and involved in other criminal activities (such as human trafficking, arms trafficking and terrorism), but on the other hand, the local community members or people providing services via peer-to-peer platforms (such as BlaBlaCar or AirBnB) can ‘inadvertently’ become migrant smugglers.

Moreover, beyond the statistics of prosecutions on migrant smuggling, qualitative analysis shows that in many cases those affected are family members, friends who acted out of compassion or asylum seekers who had no other legal alternative to access the EU, but to come under forged documents and become criminalised. Women and children who get involved in migrant smuggling are in a particularly vulnerable and precarious situation, for example, migrant children collaborating with smugglers for a discount on their journey are prosecuted as migrant smugglers and depending on the national legislation – lose their right to seek asylum. Therefore, the prosecutions in these cases raise concerns of secondary victimisation rather than dismantle ‘organised criminal groups’.

Finally, measures taken in cooperation with countries of origin and destination indicate that the fight against migrant smuggling leads to greater and strengthened involvement of more professional criminals. This happens when anti-smuggling measures are promoted by the EU or its Member States in third countries for migration management concerns, disregarding the general rule of law situation, corruption and potential impacts on the human rights of citizens and migrants attempting to transit their respective third countries. Anecdotal evidence illustrates that sometimes EU Member States may even use slush-funds to bribe foreign militias and high-ranking migrant smugglers for short-term political goals.⁶³

Conclusions and recommendations

The European Commission’s REFIT assessment of the EU Facilitators’ Package was a missed opportunity to bring EU legislation in line with international standards of the UN Protocol against the Smuggling of Migrants and the increased EU competence in criminal law, laid down in the 2009 Lisbon Treaty and the EU Better Regulation

⁶⁰ See for example UN Special Procedures (2018) Joint communication of Special Procedures ahead of the informal summit of EU heads of state or government, [OL OTH 64/2018](#), op. cit.; UN Human Rights Office (2017) “In search of dignity: Report on the human rights of migrants at Europe’s borders”, op. cit.; Council of Europe Venice Commission Legal Experts (2018), “Hungary: “Stop Soros” Provision on Illegal Migration Should Be Repealed as It Seriously Impairs Legitimate NGO Work, Say Venice Commission Legal Experts”, op. cit.

⁶¹ UN Special Procedures (2018) Joint communication of Special Procedures ahead of the informal summit of EU heads of state or government, [OL OTH 64/2018](#), op. cit.

⁶² See for example: Europol (2017), “European Union serious and organized crime threat assessment: Crime in the age of technology” (SOCTA 2017), Europol, The Hague; Europol’s European Migrant Smuggling Centre (2017), “First Year Activity Report: Jan 2016 – Jan 2017”, Europol, The Hague; Frontex, Risk Analysis Unit, Africa-Frontex 2016 Intelligence Community Joint Report, Warsaw, April 2017.

⁶³ P. Wintour (2017) “Italian minister defends methods that led to 87% drop in migrants from Libya”, *The Guardian*, 7 September. 2017. (<https://www.theguardian.com/world/2017/sep/07/italian-minister-migrants-libya-marco-minniti>).

guidelines. The UN Protocol against the Smuggling of Migrants and accompanying guidelines provide a clear definition and standard of reference of *what* should be criminalised and *what* should be exempted. As it stands, the EU's legislation encourages Member States to depart from a main definition through a derogatory clause of Article 6(4) of the UN Protocol against Migrant Smuggling, stating that "[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law". However, a wide margin of appreciation makes futile the very purpose of the UN Protocol.

If the Facilitators' Package is a criminal justice tool, it needs to bring about more legal certainty across the EU on what is criminal and what is to be exempted from criminalisation. As it currently stands it is a 'bad law' and should be properly 'Lisbonised' into a sole EU legal act. Therefore, the conclusions reached in the 2016 study are confirmed - the current EU legislation is still 'not fit for purpose', and it needs to be changed and clarified. In addition, the operational activities of the EU and national agencies involved in the fight against migrant smuggling need to be carefully assessed in light of their impacts on the fundamental rights of smuggled migrants, their family members and friends as well as civil society actors providing humanitarian assistance. The civic society free space of humanitarian and human rights organisations needs to be vigilantly protected.

The situation in Hungary and Italy illustrates the approach based on closing land and/or sea borders and fighting smuggling at all costs. Such approaches lead to violations of the states' sovereign duty to save lives and safeguard human dignity, as well as repression of watch-dog civil society. Hence, in the long-term, such approaches pose a risk to EU founding values. EU justice and home affairs agencies are located in front-line EU Member States to support them in securing external EU borders and fighting cross-border crime. EU funding is also channelled for this purpose. In this way, the EU also becomes responsible for Member State actions.

Recommendation 1: What should be investigated and prosecuted?

- The EU's Facilitators' Package should be changed, 'Lisbonised' and brought in line with the UN Protocol against the Smuggling of Migrants. The definition of a base crime should therefore insist on financial and other material benefit and in particular, on unjust enrichment requirements for the facilitation of entry and transit, and for stay and residence.
- The EU Handbook on Investigating and Prosecuting Migrant Smuggling could further define what kinds of crimes the EU needs to focus on and the limits set by criminal justice checks and balances.
- In this area, the priority should be given to EU police and judicial cooperation tools that are compatible with the EU criminal justice standards laid down in the European Investigation Order.

Recommendation 2: What should *not* be criminalised?

- In the EU Facilitation Directive, Article 1:2 should be changed so as to prohibit the criminalisation of humanitarian assistance, and to prevent the misguided prosecutions of various humanitarian actors, human rights defenders and basic service providers.
- The definition of 'humanitarian assistance' should encompass different forms of solidarity with refugees and other migrants, starting from SAR activities and ending with the peaceful disobedience actions of human rights defenders. In this context, the EU should draw inspiration from several documents. Firstly, in line with the EU Charter of Fundamental Rights, 'humanitarian assistance' should protect any basic service provision that upholds the human dignity of refugees and other migrants and/or that enables access to fundamental rights, including the right to asylum, access to justice and legal aid, and others. Secondly, the definition agreed in the European High-Level Consensus on Humanitarian Aid⁶⁴ and also the principles and safeguards for the Union humanitarian aid operations foreseen within Article 214 TEU should be applicable inside the EU. Finally, the UN Declaration on human rights defenders,⁶⁵ should

⁶⁴ Council of the European Union and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008), European Consensus on Humanitarian Aid, Joint Statement, 2008/C 25/01. OJ C 25, 30 January, pp. 1–12 (http://ec.europa.eu/echo/files/media/publications/consensus_en.pdf).

⁶⁵ United Nations General Assembly (1998) Resolution A/RES/53/144 adopting the Declaration on human rights defenders. (<http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/RES/53/144&Lang=E>).

uphold the rights of watch-dog civil society that monitor and uphold the rights of migrants, including the various forms of peaceful civil disobedience.

- The EU, its Member States and local authorities should be encouraged to fund initiatives and projects implementing the principle of 'firewalls'. The 'firewalls' call for strict separations between immigration enforcement, public services and civil society mandates. For example, immigration authorities should not have access to information regarding the migration status of people in need of humanitarian assistance and solidarity. Public services and civil society should not be obliged to report or share information on the migration status of their users and clients. The EU *Handbook on Investigating and Prosecuting Migrant Smuggling* should include information and training on 'firewalling' when it comes to cases of human smuggling.

Recommendation 3: How it should be monitored?

- The upcoming European Parliament could set up a new parliamentary inquiry to gather evidence and hear the testimonies of civil society actors and EU citizens who have been victims of misguided prosecutions and to investigate whether the cases were politicised.
- Civil society, through the newly proposed EU values fund, could be supported to collect evidence showing non-compliance with the EU's legal framework and submit it to the European Commission, so as to enable it to start infringement procedures against a Member State or EU institution/agency.
- Civil society could also be supported by establishing and expanding an EU strategic litigation fund. This could be used to protect civil society actors, migrants and refugees, their family members and friends as well as bona fide service providers from unjust criminalisation.
- The study also proposes to set up an independent observatory to monitor the policing of civil society actors across the EU. This could be composed of representatives from academia. Such an independent body could conduct qualitative country analysis, media monitoring and contain a possibility for civil society to submit individual and collective complaints and testimonies about interference with their mandates by the national or EU agencies.

Recommendation 4: How should the status quo be assessed?

- The European Ombudsperson should assess the fundamental rights impacts on migrants and EU citizens of the EU's anti-smuggling operations in the EU and third countries, and in particular activities led by the EU justice and home affairs agencies, namely Frontex and Europol, as well as the EU's External Action Service (Operation Sophia).
- The European Court of Auditors should assess the EU support and funding to EU Member States as well as to third countries, in terms of effectiveness and efficiency, taking into account the impacts on the fundamental rights of migrants and EU citizens, societal changes in the countries of origin, transit and residence, and changes in the 'migrant smuggling business model'.
- The European Parliament's Budgets and Budgetary Control Committees could also undergo thorough assessment prior to approving the budgets for EU justice and home affairs agencies' operations and missions that are supporting Member States or third countries in addressing migrant smuggling.

Recommendation 5: What should be the alternatives to migrant smuggling?

- EU justice and home affairs agencies are not adequately addressing the underlying reasons why migrants choose to use smugglers' services. More safe and legal alternatives to come to the EU have been proposed by the European Parliament in its Resolution of 12 April 2016 on the situation in the Mediterranean. It has also highlighted the need for a holistic EU approach to migration.⁶⁶ This study reiterates the importance of humanitarian visas to expand legal migration channels, and the need to

⁶⁶ European Parliament (2016), Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration ([2015/2095\(INI\)](#), P8_TA(2016)0102, Strasbourg, 12 April.

monitor and end discriminatory visa rejections for Blue Card applicants as well as for seasonal workers, students and researchers. In addition, there is a need to increase the possibilities for third-country workers (regardless of their first admission category), refugees and persons with humanitarian protection status to reunify with family members.⁶⁷

- The European Parliament has suggested an EU search and rescue mission. The CEPS Taskforce Report on a European Border and Coast Guard earlier reflected that the national coast guards are well trained and equipped to conduct such a mission.⁶⁸ The main question to be resolved is political – how to share the responsibility among all the EU Member States over the rescued persons and who should do it?

⁶⁷ C. Conti (2018), "Impossibility for Family Reunification", ReSOMA Discussion Brief, July.

⁶⁸ S. Carrera, S. Blockmans, J.P. Cassarino, D. Gros, E. Guild, & E. Letta (2017), *The European Border and Coast Guard Addressing migration and asylum challenges in the Mediterranean?* CEPS Task Force Report, 1 February.

1. INTRODUCTION

1.1 Aims, objectives and research questions

1.1.1 Aims

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the European Parliament's Committee on Petitions (PETI). The current research aims to update the previous study conducted by a CEPS-led consortium: "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants". Therefore, the study takes stock of and evaluates the developments that have taken place since 2016. The study also takes into account the impacts of the policing of civil society actors (CSAs) in the EU as well as in third countries of origin and destination.

1.1.2 Objectives

First, we analyse the EU legislative developments, namely the Commission's regulatory performance and fitness (REFIT) exercise and the concerns expressed by the European Parliament as well as citizens related to the Facilitators' Package. Second, we analyse policy changes and various forms of policing of CSAs assisting refugees and migrants, as well as their family members, service providers and other professionals. Third, we capture some of the unintended consequences related to the high prioritisation of measures to combat migrant smuggling, specifically the individual and societal costs in Europe and countries of origin, transit and destination and the lack of a holistic picture of migration. Finally, the study puts forward evidence-based recommendations. These range from legal changes for amending the Facilitators' Package in light of the EU's legal framework and international standards to changes in political priorities and the employment of a more evidence-based approach on migration.

1.1.3 Research questions

In light of the above-mentioned aims and objectives, this study raises the following research questions:

1. What have been the recent developments at the EU level related to the Facilitators' Package (section 2 in this study)?
 - To what extent did the REFIT take into consideration the conclusions of previous research and studies (See section 2.1.)
 - What are the remaining concerns of the European Parliament and EU citizens related to the Facilitators' Package? (See sections 2.2 and 2.3.)
2. What are the dynamics of policing humanitarianism, witnessed across the EU since 2016? (See section 3 and Annex 1).
 - What are the most important developments in law and policies of selected EU Member States, which enable suspicion, intimidation, harassment, disciplining and the formal criminalisation of humanitarian actors? (See section 3.1.)
 - What have been the most significant cases of suspicion, intimidation, harassment, disciplining and misguided prosecutions of humanitarian actors? (See sections 3.2. and 3.3.)
3. What kinds of 'unintended' impacts are anti-smuggling policies having? (See section 4.)
 - How does this affect the rule of law, fundamental rights and democracy in the EU? (See section 4.1.)
 - How does policing humanitarianism affect social trust? (See section 4.2.)
 - How do such policies impact on the experiences of refugees and other migrants as well as countries of origin, transit and destination? (See section 4.3.)

4. How can EU legislation and policies be improved or changed in line with other EU, regional and international standards? (See section 5.)

1.2 Our approach, scope and definitions

1.2.1 Our approach

The analysis in the initial study has already shown that the Facilitators' Package adopted in 2002 was a bad law and also an old "third pillar" law that does not fully embrace increased EU competences in the matters of criminal law after the Treaty of Lisbon. However, if the rule of law is well functioning, its deficiencies could be remedied through traditional criminal justice checks and balances, professional codes and standards of judiciary, law enforcement and border and coast-guard officials. Many of these have upheld or proactively cooperated with those who uphold the fundamental rights of irregular migrants and asylum seekers. It is only recently that the context has changed, although the Facilitators' Package at the EU level has remained the same.

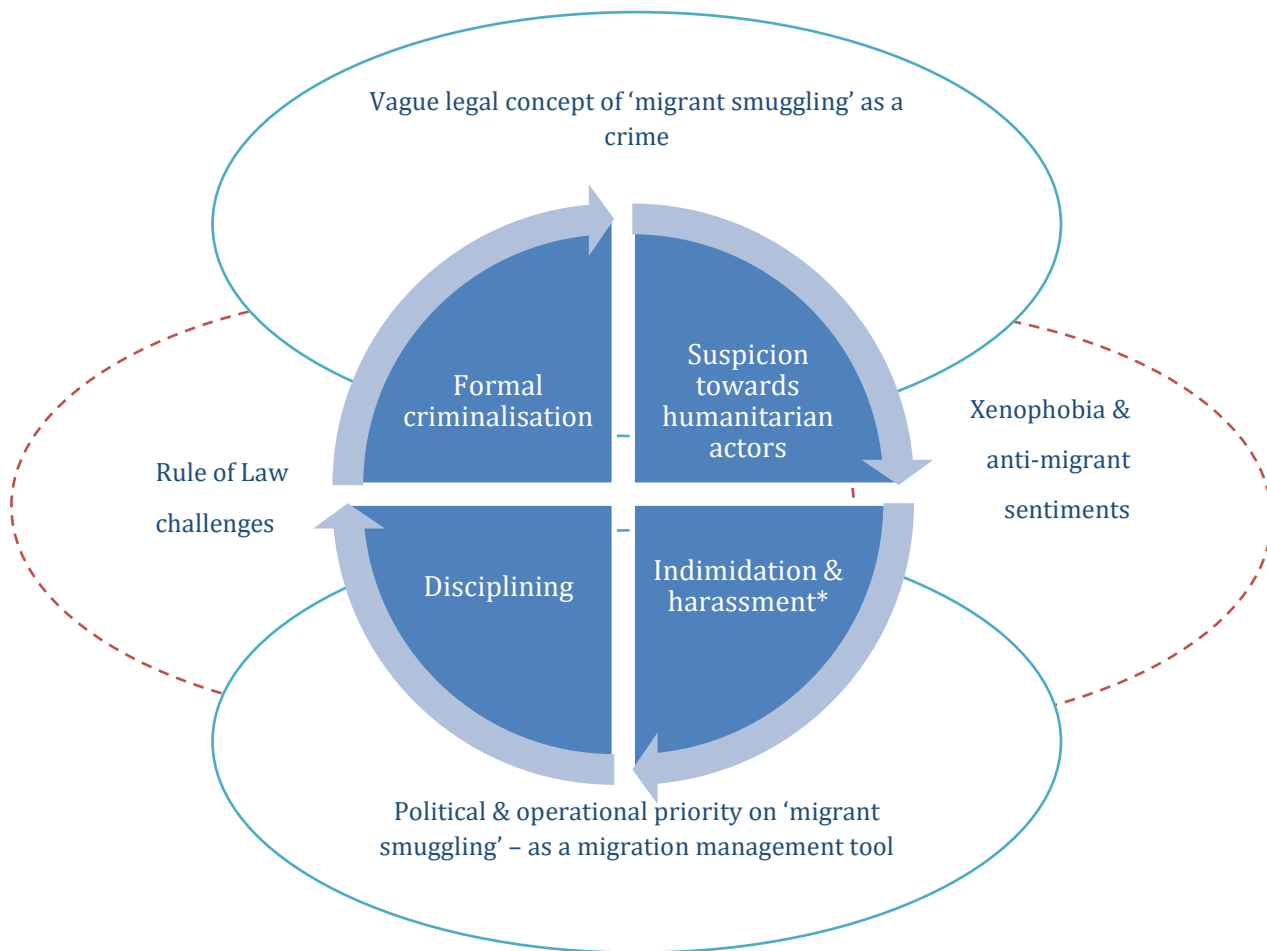
Since the emergence of the so-called European humanitarian refugee crisis in 2015, anti-smuggling measures have increasingly been used as migration management tools, chiefly with the aim of preventing irregular migration. This has been in addition to their more traditional role as a criminal justice tool for the pursuit of organised criminals and their profit. Migrant smuggling has quickly become a top political priority for the EU and subsequently a top operational priority for the EU justice and home affairs agencies. Irregular migration has been seen as a key issue among certain national politicians for mobilising their electorates. Therefore, particularly in pre-election periods, 'fake news' and conspiracies about the CSAs have been spread as well as accompanying outbursts of hate-speech and xenophobic rhetoric towards migrants and those who assist them.⁶⁹

In this context, officials and professionals have been pressured 'by political masters' to show results. The traditional criminal justice checks and balances that had been effective earlier (prior to 2015) have failed. In some cases, they have come too late, after highly politicised cases had been opened against CSAs who acted in solidarity with migrants and refugees. In other cases, 'the fight on migrant smuggling' has been used by some governments or individual politicians to advance their own agendas – as a card in national political communication, electoral campaigns and as a 'window screen' in the context of wider rule of law challenges. Humanitarian actors, individuals and service providers engaging with refugees and other migrants have been targeted by methods of suspicion, intimidation and disciplining that fall outside the realm of criminal justice.

In this study, the authors continue to argue that rather than counting convictions of humanitarian actors, it is more important to understand the systemic and escalating policing of CSAs. This notion extends beyond formal convictions on the grounds provided in the Facilitators' Package and often explains how the situation has escalated to criminal charges against civil society and other not-for-profit actors. CSAs, along with family members, friends and bona fide service providers, do not all fit the definition of highly 'organised criminal groups' operating for profit. The examples covered in this in-depth study illustrate how instances of suspicion started in the media and among some officials or high-level politicians have escalated to intimidation and harassment (by police and local authorities). They also show how disciplining measures have been used to indiscriminately target CSAs on unrelated grounds, including public order, public land occupation and food hygiene. In this context, some formal criminalisation cases against humanitarian actors have been started. Whether these cases have resulted in actual criminal convictions or not, they have further reinforced the vicious cycle. We call this dynamic the *policing of civil society actors*. See Figure 1.

⁶⁹ See for example Joint communication to the EU by all the UN special procedures, Joint communication of Special Procedures ahead of the informal summit of EU heads of state or government, [OLOTH 64/2018](#), op. cit.

Figure 1. Dynamics of policing CSAs (shown in the centre) and contextual factors



* 'Intimidation and harassment' do not have a stable or fixed place in the cycle of policing; while they often occur after suspicion, they can take place before, throughout or after disciplining and formal criminalisation.

Note: The orange ovals represent contextual factors at the Member State level; the blue ovals represent contextual factors at the EU level.

Source: Authors.

1.2.2 Definitions

- **Civil society actors**

In this study, we understand 'civil society actors' (CSAs) as a broad category, which includes non-governmental organisations (NGOs) and other civil society, faith-based organisations, individual volunteers, activists and various public mobilisations and movements.

- **Policing CSAs**

We use the term policing CSAs over 'judicial harassment' as we also cover non-judicial methods of policing, from raising suspicion, spreading conspiracies and disinformation or 'fake news' about civil society, to actual physical

violence and the overuse of force by law enforcement, local or national authorities.⁷⁰ The goals are very similar – to silence and intimidate CSAs and distract or prevent them from continuing their activities.

- **Suspicion**

Some national and/or EU officials and politicians have explicitly claimed or suggested in the media and various reports that somehow civil society is mainly responsible for a large number of arrivals or residence of refugees, asylum seekers and migrants in an irregular situation. Such rhetoric has shifted the portrayal of civil society from it being the unintentional 'victim' of the so-called migrant smuggling business model towards assigning it a more proactive role, such as a 'pull factor' or 'migrant taxi', and towards accusations of being collaborators with migrant smugglers or of being labelled as belonging to organised criminal groups. Suspicion alone has had the effect of harming the reputation of certain organisations, and the civil society sector as such has reported decreasing public trust and donations.

- **Intimidation/harassment**

The suspicion often results in intimidation and harassment on many levels – individual, organisational and societal. For example, lay people reacting to media articles that raise suspicion about CSAs have made various threats against organisations and the people working for them. Populist and opportunistic politicians and officials are further propelling such suspicion among responsible authorities. The testimonies gathered in previous studies indicate that such suspicion is spreading among some law enforcement, judicial, border and coast guard officials. The intimidation and harassment can be exerted alone, for example, in the form of direct threats and repeated bodily searches or checking of ID documents. In two cases, the testimonies mention the rapes of female volunteers by the law enforcement agents.⁷¹ In addition, there are ample cases of certain non-formal behaviours being disciplined by police or local authorities. Such measures are discretionary and directed against certain civic mobilisations, protests and squatting. They manifest as the overuse of arrests, disproportionate use of force against volunteers, reported incidents of clashes with riot police and use of water cannons and tear gas.

- **Disciplining**

Interviews and on-line surveys in previous studies have shown that at the local and national levels, humanitarian actors have been charged and sanctioned with offences not related to smuggling. Laws on public order, food hygiene, safety and other grounds have been disproportionately applied against humanitarian actors. For example, in Italy, volunteers received indictment orders not to go to the places where asylum seekers gather; in France, volunteers were banned from providing food on the grounds of hygiene and public health norms.

- **Formal criminalisation**

This study shows that, once initiated, criminal cases serve to discourage CSAs from pursuing their mission and diminish their operational capacity as well as cause reputational harm. This is the case even where such arrests result in acquittal. In this study, we therefore assess several well-known cases that were opened against humanitarians (including in countries that officially exempted humanitarian actors under the letter of the law). The study takes the view that all initiated criminal proceedings, even if they eventually led to acquittal or were dropped – should be assessed not on the basis of the outcome, but on the basis of their societal and individual impacts. These include their 'chilling effect' on EU citizens' freedoms of association, assembly and conscience as well as societal mistrust (see section 4).

- **The impacts of policing CSAs on rule of law, democracy and fundamental rights**

⁷⁰ The Human Rights Defender's use terminology of "judicial harassment". The policing of civil society actors is broader as it also encompasses non-judicial harassment. "Judicial Harassment, for Example can include criminal charges, civil lawsuits or administrative proceedings. Accusations often used against HRDs range from violations of protest laws, NGO laws or public order to entirely fabricated charges of terrorism, subversion or crimes against the security of the state. Many HRDs are convicted to very long prison terms, which are often also aimed at intimidating the broader human rights community. Even in cases where HRDs are eventually acquitted, judicial harassment diverts time, energy and resources away from their human rights work.

⁷¹ Carrera et al. (forthcoming), op. cit.

We link interference with humanitarian and other CSAs with the broader issues of the rule of law, democracy and fundamental rights. First, in our view, attacks on humanitarian actors are possible because of a lack of respect for fundamental rights and democratic deliberation based on facts and because of a lack of rule of law oversight in different EU Member States. Attacks on CSAs negatively affect not only the question of upholding human dignity and saving the lives of refugees and other migrants, but also the future of EU societies. The impacts on freedom of assembly and freedom of speech are of particular concern, as they affect possibilities to defend human rights and to oppose certain political ideas via democratic and legal avenues, public discourse and civic action. In addition, the rule of law requires legal certainty that persons who do not have criminal intentions and who act within their mandate will not be prosecuted under an over-stretched concept of crime. Criminal justice safeguards, such as the presumption of innocence and proofs of criminal intent are other impacted areas.

- **Policing CSAs as an ‘institutional’ issue requiring a rule of law approach**

This study proposes an additional checklist of when certain acts should be seen not as ‘a one-off’, but as a part of systemic and institutional policing of CSAs that requires the EU to pursue the rule of law approach vis-à-vis the EU Member State in question:

- First, changes in EU Member States’ anti-smuggling legislation and policies are explicitly targeting CSAs assisting refugees, asylum seekers and undocumented migrants. This indicates the institutional nature of the measure. Particular attention should be paid to cases where such policing measures are proposed as a follow-up to suspicion about CSAs and their activities, or that are based on unfounded accusations or other disinformation and conspiracies that are spread by high-level politicians or other officials. The context of elections and political mobilisations here are key.
- Second, another important factor is the non-compliance of Member States with the recommendations proposed by EU institutions, regional and international human rights bodies. The repeated and unaddressed concerns expressed in different avenues signal that interference with civil society space is taking institutional or systemic shape.
- Third, there is evidence of targeted and repetitive behaviour emerging from personal testimonies and media monitoring. This could also indicate the institutionalised and systemic nature of policing, targeting the CSAs that are assisting refugees, asylum seekers and undocumented migrants.
- Fourth, there is some albeit limited statistical evidence on the overuse of anti-smuggling grounds in investigations and prosecutions against individuals who do not have criminal intent – humanitarian organisations, family members and friends, bona fide service providers or smuggled migrants themselves. Where there is a wide gap between the people being suspected, arrested and convicted for the facilitation of migration, for example, it might indicate that a disproportionate number of innocent people are being investigated and prosecuted with no good grounds. This stands in contrast to human trafficking, which is a well-defined crime, the definition of which captures different elements of the criminal intent.

1.2.3 Scope

This study highlights important developments across the EU. Nevertheless, we focus on developments specifically in five countries – Belgium, France, Greece, Italy and Hungary. Three of these countries have been subject to previous research.⁷² Italy and Greece are two first-entry countries from the Central and Eastern Mediterranean that have formally exempted humanitarian assistance. Yet, several cases of formal criminalisation of humanitarian actors have reached the courts in Italy and Greece, along with France and Hungary. Meanwhile, Belgium, France and Hungary do not have formal exemptions. However, different dynamics have played out there. Whereas in France the principle of *fraternité* has been upheld by the courts, in Hungary the crackdown on CSAs and the rule of law backsliding are interlinked, raising challenges for the upholding of EU values.

For these five countries, the case studies provided demonstrate the interface between legal and policy changes. They show that the experiences of CSAs, and in particular humanitarian actors and professionals (doctors,

⁷² Carrera, et al. (forthcoming), op. cit.

lawyers, journalists, landlords and shipowners), must be seen in the legal and socio-political context that differs both across and within Member States.

1.3 Methodology

The methodology employed to conduct this updated study draws on the previous research for the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) by Carrera et al. in 2016. Due to the time constraints, this research uses evidence gathered by three of the authors for a recent research project funded by the UK's Economic and Social Research Council (ESRC).⁷³ It does not offer new interviews or surveys. The study relies on existing studies conducted in this field. It also documents the tendencies in criminalising humanitarian actors by showcasing the authors' media monitoring, which has been ongoing since the 2016 study.

1.3.1 Desk research

The desk research conducted for this study encompassed the following aspects:

- 'state of art' overview;
- relevant EU policy developments, notably documents from the European Commission, European Parliament, etc;
- relevant studies and impact assessments (such as those by Inner City Fund International (ICF), Tipik Legal and our previous study for the European Parliament's LIBE Committee);
- relevant findings from international and regional human rights mechanisms, including case law; and
- relevant studies and opinions of the EU agencies (EU Agency for Fundamental Rights (FRA), Frontex, Europol and Eurojust).

1.3.2 Media monitoring

Fast-paced developments are often better reflected in the media, although relying on such sources as evidence necessarily comes with a need to assess sources in context and to recognise media bias. Keeping in mind the focus on the English media, the authors have cooperated with the Platform for International Cooperation on Undocumented Migrants (PICUM) in gathering and illustrating developments with accounts from the media from September 2016 to October 2018. The authors have also consulted a range of French, Italian and Spanish sources (see Annex 1).

1.3.3 Compilation of civil society reports and academic research

Since 2016, there has been an increased focus on this phenomenon from academia. Therefore, new relevant academic monographs and peer-reviewed articles on the subject of migrant smuggling and the role of humanitarian organisations are discussed in this study and attached in a separate compilation so as to showcase the new and emerging evidence in this field. Civil society reports that have gathered first-hand testimonies and which meet the criteria of academic rigor are also included in this compilation (see Annex 2).

⁷³ Ibid.

2. LATEST POLICY DEVELOPMENTS ON THE FACILITATORS' PACKAGE

KEY FINDINGS

- The European Commission has conducted a REFIT evaluation of the Facilitators' Package, where it concluded that there was no need to change the EU's legal framework in this field. It did, however, recognise that there is fear among civil society actors of being criminalised.
- The REFIT relied on various studies conducted in the period between 2014 and 2016 that have confirmed the need to narrow the definition of crime, by including a material or other financial benefit requirement, and to introduce a mandatory exemption of humanitarian actors from the criminalisation in order to bring about more legal certainty.
- The European Parliament's Committee on Petitions (PETI) has received a petition from Paula Porras Schmidt on the case of Proem-AID and Team Humanity volunteers who were arrested on 14 January 2016 in Lesbos, Greece. The petitioner called for non-criminalisation of entry when there is no financial or other material benefit and for the obligatory exemption of humanitarian actors by the EU institutions. The Commission, in reply to this petition, has maintained the arguments that were put forward in the REFIT evaluation.
- Since 2016, the number of cases where CSAs, family members, service providers and carriers have been criminalised has increased (see the further assessment in section 3 and Annex 1). EU citizens have been mobilising on this issue at the EU level, including campaigns via the WeMove.org and Change.org platforms, various observatories (like Civic Space Watch) and at the national level (see Annex 2). These public mobilisations culminated with the European Citizens' Initiative "We are a welcoming Europe". Among its goals, it is calling for the non-criminalisation of acts of solidarity with refugees and migrants, including those in an irregular situation.
- In light of citizens' concerns, increased academic evidence and civil society reports on policing and criminalisation of humanitarian actors, in addition to the politicisation of NGOs proactively engaged in search and rescue (SAR), the European Parliament in July 2018 called for guidelines defining 'what should not be criminalised' as migrant smuggling and for the exemption of humanitarian assistance. The European Parliament reiterated its earlier stance that the Facilitators' Package should target organised criminal networks and that a more holistic approach on migration, particularly in cooperation with third countries, is needed.

2.1 REFIT conclusions in light of the latest studies: A missed opportunity

The European Commission via its REFIT exercise has evaluated whether the Facilitators' Package, as "one of the tools to counter migrant smuggling and thus contribute to reducing irregular migration, achieves its objectives and is still fit-for-purpose".⁷⁴ In this exercise, the Commission mainly relied on two studies that were carried out for evaluation purposes⁷⁵ – namely, the study entitled "Overall report on the transposition of Facilitators Package" elaborated by Tipik Legal in 2014⁷⁶ and the "Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling)" conducted by

⁷⁴ European Commission (2017), 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, Staff Working Document, SWD(2017) 117 final, Brussels, 22 March 2017 (further referred to as REFIT), p. 1.

⁷⁵ As mentioned in European Commission (2017) REFIT Evaluation, p. 11.

⁷⁶ This study is referred in footnote 53 of the European Commission (2017) REFIT p. 11: "The study was carried out by TIPIK Legal. It covered all Member States except DK". It was not publicly available. The country by country assessments were kindly provided by the European Commission.

the ICF in 2016.⁷⁷ In addition, the Commission conducted a public consultation with various stakeholders in the period between 2014 March and 2016 March, which was annexed to the REFIT evaluation.⁷⁸

The European Commission, in the REFIT exercise, also considered the study commissioned by the European Parliament's LIBE Committee on "Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants",⁷⁹ the FRA study conducted in 2014⁸⁰ and the UK's House of Lords report on the "EU Action Plan against migrant smuggling" finalised in 2015,⁸¹ as well as evidence and opinions from different sources and stakeholders preceding the REFIT assessment. The European Commission further considered studies conducted by the UN Office on Drugs and Crime (UNODC) Working Group on Smuggling of Migrants, including on the issue of "Financial or Other Material Benefit" in the UN Protocol against the Smuggling of Migrants.⁸²

This section examines the extent to which the REFIT took the above-mentioned studies into consideration. Tables 1 to 3 compare the key challenges related to the Facilitators' Package, its impacts and recommendations. First, Table 1 presents the main gaps in the legal framing of the Facilitators' Package responsible for the risk of criminalisation of humanitarian assistance. Second, the direct and unintended consequences EU legislation has for those providing support or services to undocumented migrants is shown in Table 2. Finally, Table 4 lays down the key recommendations proposed to address the issues identified.

2.1.1 Key challenges identified in the legal framing of the Facilitators' Package

Different studies have been critical about the over-broad and vague legal definition provided in the Facilitators' Package on what exactly constitutes a crime of facilitation of entry/transit and residence. The main concern was that in principle, it allows for the criminalisation of CSAs, family members and service providers for actions of solidarity and compassion without a criminal intent. The two reasons for this are (i) the lack of a financial and material benefit requirement as well as (ii) the lack of an obligatory clause exempting humanitarian assistance.

Table 1. Key challenges identified in the legal framing of the Facilitators' Package

Key challenges	FRA (2014)	House of Lords (2015)	Carrera et al. (2016)	ICF (2016)	UNODC (2017)	REFIT (2017)
Lack of financial or other material benefit requirement	✓	✓	✓	✓	✓	X

⁷⁷ N. Bozeat, S. Petronella, J. Behrens, M. Labayle, N. Rossella (on behalf of ICF) (2016) "Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling)". The study was carried out on request of European Commission by ICF International. It covered all Member States and non-EU Schengen Associated countries.

⁷⁸ Annex II to the European Commission (2017) REFIT evaluation.

⁷⁹ Carrera et al. (2016), op. cit.

⁸⁰ FRA (2014), op. cit.

⁸¹ UK House of Lords. *4th Report of Session 2015-16 – EU Action Plan against migrant smuggling* (London, 2015).

⁸² For example, UNODC (2011), "International Framework for Action to Implement the Smuggling of Migrants". The European Commission representatives took part in UNODC expert group workshops on the subject, such as expert group meeting in Vienna on 15-16 November 2016, that were later referred to in UNODC (2017), "Issue Paper – The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol", Vienna.

Non-obligatory exemption of the humanitarian clause	√	√	√	√	√	X
Legal uncertainty among bona fide service providers	√	√	√	√	X	X
Legal uncertainty among actors providing humanitarian assistance	√	√	√	√	√	X
Criminalisation of migrants who are victims of smuggling	√	X	√	√	X	X
Disproportionate sanctions and penalties	√	X	√	√	X	X
Heterogeneous implementation by Member States	√	X	√	√	√	√

Source: Authors.

- **Lack of a ‘financial and other material benefit’ requirement for criminalisation**

One of the main shortcomings of the Facilitators’ Package, observed by various studies, is the fact that it obliges states to sanction the facilitation of entry, transit and residence, but it does not provide legal certainty. This risks not respecting the harm principle⁸³ and poses further challenges to fundamental rights.⁸⁴ As raised by Carrera et al. in the study conducted for the European Parliament’s LIBE Committee in 2016, the Facilitators’ Package departs from the idea that punishment will be rightfully imposed by law enforcement and judicial authorities when it aims to prevent harm, otherwise it is unduly interfering upon an individual’s liberty and therefore must be avoided.

The UNODC study also stressed that Article 1(1)(a) of the Facilitation Directive (2002/90/EC)⁸⁵ defining the crime of facilitation of entry and transit lacks the element of financial and other material benefit; therefore, it creates a wide scope for criminalisation.⁸⁶ This goes against international standards set by Article 6 of the UN Protocol against the Smuggling of Migrants by Land, Sea, and Air (UN Protocol against Migrant Smuggling)⁸⁷ in which the offence is characterised by its for-profit element, as evidence of criminal intent. Only 4 out of 28 EU Member States are in line with the UN standards.

The Facilitation Directive’s Article 1(1)(b) is in line with the UN standards, as it requires the profit motive for residence and stay. Fifteen EU Member States seem to require some sort of profit to criminalise facilitation of residence and stay. The other EU Member States justify the criminalisation of entry, transit and/or residence and stay without a profit motive through the derogatory clause left in the UN Protocol against Migrant Smuggling in Article 6(4): “Nothing in this Protocol shall prevent a State Party from taking measures against a person whose

⁸³ Carrera et al. (2016), p. 92.

⁸⁴ FRA, p. 15.

⁸⁵ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, pp. 17–18.

⁸⁶ UNODC (2017), op. cit. p. 10.

⁸⁷ United Nations General Assembly (2000a), *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, Resolution 55/25*, 15 November.

conduct constitutes an offence under its domestic law." Thus, the REFIT concluded that the Facilitators' Package is in line with UN standards.

Other studies have taken a different approach – that the very purpose of the UN Protocol against Migrant Smuggling and in particular of Article 6 was to give a standard on what is criminal in migrant smuggling activities. It seems that the intention of the drafters of the UN Protocol, who insisted on a material or other financial benefit requirement, was at least partly to avoid criminalising family members, civil society organisations and individuals acting out of solidarity with refugees, asylum seekers and irregular migrants: "[T]he Protocol should not require States to criminalise or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers".⁸⁸ Yet the REFIT notes that "the appreciation of the financial gain element can vary widely across and within Member States, being left mostly to the discretion of the judicial authority or even ignored in the national law."⁸⁹

- **Lack of a mandatory exemption of humanitarian assistance**

The European Commission confirmed that there was an attempt to remedy the lack of financial or other material benefit requirement for the facilitation of entry and stay in the Facilitation Directive's Article 1(1)(a) by a humanitarian exemption clause in Article 1(2). In the REFIT the European Commission claims that "the UN Protocol does not contain an explicit exemption of humanitarian assistance from criminalisation such as Art. 1(2) of the Directive. In effect, the requirement of a financial or other material benefit as a constituent element of the offence rules out the ambiguity that behaviours aimed at providing humanitarian assistance could be criminalised".⁹⁰

While the Directive contains explicit reference to 'exempting humanitarian assistance', it is important to highlight that the clause is not mandatory. It was left up to EU Member States to decide whether they want to explicitly exclude such actors. For instance, "[o]nly seven Member States specifically include in national law an exemption from punishment for facilitation of unauthorised entry and/or transit intended to provide at least some form of humanitarian assistance (BE, EL, ES, FI, IT, MT, UK)".⁹¹

In addition, the clause does not cover facilitation of residence and it therefore leaves a range of society actors still unprotected. Responses to the REFIT stakeholder consultation also showed that legal uncertainty and fears of being criminalised have increased among CSAs (see Annex 4). The European Commission acknowledged these fears, but concluded that they were not substantiated.

The lack of an exemption from and definition of humanitarian assistance was also highlighted as one of the key problems of the Facilitators' Package. The ICF, Carrera et al. and FRA have stressed the importance of making such an exemption mandatory for all EU Member States, as otherwise they would fall short in granting protection to those who are assisting undocumented migrants. The 'may' clause in Article 1(2) of the Facilitation Directive has in a way confirmed that 'criminalisation of solidarity' falls within the competence of the EU Member States, disregarding its wider repercussions on the EU's founding values.⁹²

Some of these studies attempted to provide a definition of 'humanitarian assistance' that could bring more clarity to the EU legal framework. For instance, Carrera et al. defines humanitarian assistance as "the provision of services that help migrants to access their fundamental rights (including to health care, shelter, hygiene and legal assistance) and to live with dignity".⁹³ The ICF qualifies it "as being any action guided by the principles of: humanity, solidarity, impartiality and independence (i.e. the distinction of humanitarian and related objectives from economic and financial objectives)".⁹⁴ In addition, the ICF included a non-exhaustive list of examples of what

⁸⁸ UNODC (2004), p. 333.

⁸⁹ REFIT, p. 23.

⁹⁰ European Commission (2017) REFIT Evaluation, op. cit., p. 31.

⁹¹ Ibid., p. 14.

⁹² Carrera et al. (2018), op. cit.

⁹³ Carrera et al. (2016), op. cit., p. 47.

⁹⁴ ICF (2016), op. cit., p. 103.

constitutes humanitarian assistance, such as “providing or assisting migrants to access basic rights including health care, shelter, education and local transport, as well as necessities such as food and clothing, or rescue at sea”.⁹⁵

It seems that in the context of the so-called European humanitarian refugee crisis and given the political salience of anti-smuggling as a tool for migration management, even explicit exemptions of civil society have not managed to discourage or prohibit the incrimination of this activity (see section 3). As of 2018, out of seven EU Member States that have exempted humanitarian actors, prosecutions of CSAs were reported in at least five of them – Belgium, Greece, Italy, Malta and the UK.⁹⁶ This suggests that the letter of the law, while important, is in itself not enough to prevent the policing and arrests of humanitarian actors and should be complemented by other non-legal measures. Legal clarity can nevertheless offer important protections from eventual prosecutions.

- **Lack of legal certainty among the humanitarian actors**

The inconsistency between the UN Protocol against Migrant Smuggling and the EU Facilitators’ Package was a main source of concern for all the studies conducted prior to the REFIT exercise. The Carrera et al. study concludes that the EU’s Facilitation Directive is not in line with and does not add to upholding the UN standards as it does not prevent the “wide scope of criminalisation allowed by domestic legal regimes”.⁹⁷ The ICF study, although it sees the two documents as not conflicting,⁹⁸ eventually recommends that the Facilitators’ Package should be aligned with the UN standards in order to promote legal certainty and consistency across EU Member States’ implementation of international obligations and EU legislation.⁹⁹ Thus, even though there are different opinions on the disparity between the two legal frameworks, all of the evaluations express concern regarding the lack of compliance with fundamental rights and lack of clarity and legal certainty in the EU Facilitators’ Package.

The European Commission, in the REFIT, shares the ICF’s idea that “[d]espite some differences ..., the Protocol and the Facilitators Package remain coherent with each other”,¹⁰⁰ arguing that the EU qualification of the offence is just broader. Moreover, regarding opinions about the mismatch between the EU and UN legal frameworks, it holds that “[w]hile inconsistencies with international law have been identified as an issue affecting the application of the Facilitators Package by 24.6% of the stakeholders who replied to the public consultation, the differences between the Facilitators Package and the Protocol did not prove to create difficulties for the EU and its Member States”.¹⁰¹

The European Commission thus failed to problematise the fact that the majority of the EU Member States have pushed for a wider scope for the definition to facilitate the prosecution of smugglers¹⁰² than the one given in the UN Protocol. Preceding studies raised concerns that such a wide margin left to the Member States to criminalise various acts without criminal intent is detrimental to the protection of a civil society that upholds the rights of refugees and other vulnerable members of the community.¹⁰³

In addition, the results of the public consultation conducted by the European Commission on the EU legislation to tackle migrant smuggling¹⁰⁴ clearly manifest the risk of punishment of humanitarian assistance due to deficiencies in the legislation’s framing (see Annex 4). For instance, in responses to question 7, “Main issues affecting implementation for all categories of respondents”, the largest majority of respondents recognised “insufficient protection of those providing humanitarian assistance”¹⁰⁵ (see Annex 3, Figures A1 and A2). For the

⁹⁵ Ibid., p. 103.

⁹⁶ Carrera et al. (forthcoming), op. cit.

⁹⁷ Carrera et al. (2016), op. cit., p. 62.

⁹⁸ ICF (2016), op. cit., p. 42.

⁹⁹ Ibid., p. 41.

¹⁰⁰ European Commission (2017) REFIT Evaluation, op. cit., p. 31.

¹⁰¹ Ibid., p. 31.

¹⁰² Ibid., p. 20.

¹⁰³ FRA (2014); ICF (2016); Carrera et al. (2016).

¹⁰⁴ European Commission (2017) REFIT Evaluation, op. cit., p. 44.

¹⁰⁵ Ibid., p. 48.

following question, "Is the definition sufficiently clear and adequate to meet the objectives?" for almost all categories of respondents the answer was "No" (the only exceptions were the categories of "other" and representatives of "member states" (see Annex 3, Figure A3).¹⁰⁶ For both questions, respondents justified their answers by invoking the risk of criminalisation of humanitarian assistance and proposed a revision to provide clear distinctions between migrant smugglers and those providing assistance, for instance, by adding the element of financial gain to the offence and defining humanitarian assistance.¹⁰⁷

The lack of clarity in the law was thus noted by several stakeholders to be the main source of uncertainty for individuals and organisations assisting undocumented migrants regarding the risks of criminal sanction. Furthermore, such legal uncertainty is responsible for the heterogeneous implementation by Member States and confusion among national authorities, especially those working at the border.¹⁰⁸

- **Lack of legal certainty among bona fide service providers**

Finally, although it includes a 'for profit motive', the definition of the facilitation of stay and residence in the Facilitation Directive Article 1(1)(b) does not provide an element to safeguard bona fide service providers such as landlords and taxi drivers. Carrera et al. in their 2016 study and the ICF study proposed a requirement of unjust enrichment and/or unjust profit in the qualification of the offence to exclude bona fide service providers. Meanwhile, the FRA, UK House of Lords and the REFIT evaluations recognised the problem but did not make any further recommendations, as shown in Table 1.

- **Lack of prohibition to criminalise smuggled migrants**

Smuggled migrants are likewise not exempt from punishment according to the EU Facilitators' Package, despite the presence of an explicit provision of this nature in the UN Protocol against Migrant Smuggling. In the EU, victims of human trafficking are explicitly exempted (see Directive 2011/36/EU on preventing and combating trafficking in human beings and Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime – the Victims' Rights Directive).¹⁰⁹ There are also "several more specific instruments on protection measures and financial compensation to victims of crime".¹¹⁰ However, victims of smuggling might not fall under this framework and can still be penalised, especially because authorities might suspect their involvement in the facilitation of entry, stay or transit.

- **Disproportionate sanctions and penalties**

The Facilitators' Package provides a wide margin of discretion to Member States, as mentioned previously, creating discrepancies at the level of law enforcement across Member States. This variation can be dangerous for those erroneously accused of 'migrant smuggling' despite lacking evidence of criminal intent and/or financial or other material benefit. The study conducted by the ICF found out that "[t]he range of penalties adopted by Member States varies significantly, from fines as minimum penalties to imprisonment of up to 14 years as maximum penalties in cases of aggravating circumstances".¹¹¹ Although the REFIT acknowledges the existence of disproportionate sanctions and penalties, it does not propose how to address the issue.

The analysis below pays particular attention to the years of imprisonment and fines, as it does not seek to conduct an exhaustive review of all the punitive measures that could be applied by national authorities to such an offence. Table 2 shows the penalties and its aggravations applied in the domestic law of each country for the base crime of facilitation of entry, transit and residence. See the sanctions with aggravated circumstances in Table 3 and the broader discussion on domestic law in the five selected Member States in subsection 2.1.2.

¹⁰⁶ Ibid., p. 48.

¹⁰⁷ Ibid., pp. 48 and 49.

¹⁰⁸ Carrera et al. (2016), op. cit., p. 45.

¹⁰⁹ European Commission (2017) REFIT Evaluation, op. cit., p. 29.

¹¹⁰ Ibid., p. 29.

¹¹¹ ICF (2016), op. cit., p. 27.

Table 2. Sanctions for the base crime of facilitation of migrants in five selected EU Member States

Sanctions for smuggling migrants in Member States' legislation	Facilitation of entry (without profit)	Facilitation of transit (without profit)	Facilitation of residence
Belgium ¹¹²	Imprisonment of 8 days to 1 year and a fine of €1,700 to €6,000 , or with one of these punishments alone	Imprisonment of 8 days to 1 year and a fine of €1,700 to €6,000 , or with one of these punishments alone	Imprisonment of 8 days to 1 year and a fine of €1,700 to €6,000 , or with one of these punishments alone
France ¹¹³	Five years of imprisonment and a €30,000 fine	Five years of imprisonment and a €30,000 fine	Five years of imprisonment and a €30,000 fine
Greece ¹¹⁴	Maximum penalty of 10 years of imprisonment and a fine of at least €20,000 ; Carriers: (a) by a maximum penalty of 10 years of imprisonment and a fine of €10,000 up to €30,000 for every transported person	Carriers: (a) by a maximum penalty of 10 years of imprisonment and a fine of €10,000 up to €30,000 for every transported person	Facilitation to reside or stay: at least 1 year of imprisonment and a fine of at least €5,000 Provision of shelter for hiding: (a) by a maximum penalty of 10 years of imprisonment and a fine of €10,000 up to €30,000 for every transported person
Hungary ¹¹⁵	Imprisonment not exceeding 3 years	X	Imprisonment not exceeding 2 years
Italy ¹¹⁶	Imprisonment from 1 to 5 years and with a fine of €15,000 for each person	Imprisonment from 1 to 5 years and with a fine of €15,000 for each person	Unfair advantage to favour stay (with material benefit): imprisonment

¹¹² Article 77, Belgium Law of 15 December 1980, on access to the territory, residence, establishment and removal of aliens. Cited by Tipik Legal study on Belgium, 2014.

¹¹³ Article L.622-1, of the French Code of Entry and Stay of Aliens and of the right of Asylum. Cited by Tipik Legal study on France, 2015.

¹¹⁴ Articles 29–30, Law 4251/2014, Greek Immigration and Social Inclusion Code (ex Law 3386/2005, Article 87(5)). Cited by Tipik Legal study on Greece, 2014.

¹¹⁵ Articles 353 – 354, Act C of 2012 on the Hungarian Criminal Code. Cited by Tipik Legal study on Hungary, 2015.

¹¹⁶ Article 12, Italian Legislative Decree 25 July 1998, n. 286 – Single Act of the provisions governing immigration and the status of foreigners. Cited by Tipik Legal study on Italy, 2014.

			<p>up to 4 years and a fine of up to 30 million lire;¹¹⁷</p> <p>5-bis. The provision of accommodation for undue profit: imprisonment from 6 months to 3 years</p>
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Source: Authors' compilation.

Directive 2002/90/EC does not go into detail regarding what comprises "[e]ffective, proportionate and dissuasive sanctions" and leaves complete freedom to Member States to decide on it. As can be observed in Table 2, the majority of sanctions vary from 1 to 10 years of imprisonment, and financial sanctions range from €1,700 to €30,000. Thus, there is no harmonised penalty system among Member States, and some of these sanctions are extremely disproportionate, if taking into account that a volunteer providing relief to a migrant in distress could face 10 years of prison in Greece. Clearly, the dissuasive factor outweighs the need for proportionality in these domestic laws.

Moreover, Article 1 on penalties in Framework Decision 2002/946/JHA instructs Member States to penalise smugglers with custodial sentences with a maximum sentence of not less than 8 years (or a maximum of 6 years if it is to preserve the coherence of the national penalty system)¹¹⁸ when committed for financial gain, as part of a criminal organisation or when endangering life. Table 3 gives an overview of the aggravating sanctions prescribed in domestic legislation if the crime was committed for financial gain or involved taking part in the actions of a criminal organisation. As can be observed, these range from 1 to 15 years of imprisonment and fines from €1,000 to €750,000, presenting the same problem of lack of harmonisation and disproportionality.

Table 2 is based on Tipik Legal's study from 2014–15. However, it is important to note that in the Hungarian case, there has been an increase in the penalties for this type of offence since 2015. The felony for facilitation of entry is now punishable by 1 to 5 years, whereas the earlier provision foresaw up to 3 years.¹¹⁹ Furthermore, "[t]he new law foresees a plethora of ways to increase the penalty to 20 years, when violence is used against migrants or/and when smugglers act in an organised manner".¹²⁰ In 2018 an amendment to Act C of 2012 on the Penal Code, as part of the 'Stop Soros' package, sought to punish by 1 year of imprisonment new activities generally undertaken by those associated with NGOs aiding irregular migrants¹²¹ (donations, taking part in or organising their activities).¹²²

The disproportionality of penalties in Greece is the most striking among the five Member States. The penalty for facilitating the entry or transit of an irregular migrant into Greece is 10 years of imprisonment,¹²³ which is the

¹¹⁷ Article 12(5), Italian Legislative Decree 25 July 1998, n. 286 – Single Act of the provisions governing immigration and the status of foreigners. Cited by Tipik Legal study on Italy, 2014.

¹¹⁸ Council of the European Union (2002), Council Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328/2, 28.11.2002, Article 1, Paragraph 4.

¹¹⁹ Carrera et al. (forthcoming), op. cit., p. 80.

¹²⁰ Ibid., p. 80.

¹²¹ 353/A amendment to Act C of 2012 on the Hungarian Criminal Code. In Bill T/333, Unofficial translation by Hungarian Helsinki Committee.

¹²² 353/A (3), amendment to Act C of 2012 on the Hungarian Criminal Code. In Bill T/333, Unofficial translation by Hungarian Helsinki Committee (<https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>).

¹²³ Law 4251/2014, Immigration and Social Inclusion Code, Article 29(5) (ex Law 3386/2005, Article 87(5)). Cited by Tipik Legal study on Greece, 2014.

same amount for human trafficking,¹²⁴ a much more serious crime as it is per nature violent and involves undignified and inhuman conditions for the victim. The additional charges are also disproportionate in Greece, given their severity and the lack of mechanisms to protect service providers, family members, migrants and humanitarian actors.

Table 3 below lists the sanctions when migrant smuggling was conducted in aggravating circumstances, namely for the financial gain or other material benefit, or when acting as a part of 'organised criminal group', which previous studies have seen as problematic.

Table 3. Sanctions for migrant smuggling in aggravating circumstances

Aggravating circumstances: Financial benefit and be part of a crime organisation	Facilitation of entry	Facilitation of transit	Facilitation of residence
Hungary ¹²⁵	Financial gain: 1 to 5 years On a commercial scale : between 2 to 8 years .	X	X
France ¹²⁶	Organised group: 10 years of imprisonment and a €750,000 fine.	Organised group: 10 years of imprisonment and a €750,000 fine.	Organised group: 10 years of imprisonment and a €750,000 fine:
Italy ¹²⁷	Organised Group: imprisonment from 5 to 15 years and a fine of €15,000 for every person. Direct or indirect financial profit : The imprisonment is increased by a third to a half , and a fine of €25,000 per person.	Organised Group: imprisonment from 5 to 15 years and a fine of €15,000 for every person. ¹²⁸ Direct or indirect financial profit : The imprisonment is increased by a third to a half , and a fine of €25,000 per person.	Unfair advantage to favour stay: imprisonment up to 4 years and a fine of €15,500 EUR . ¹²⁹ Organised group : the sanction is increased from a third to a half .

¹²⁴ United States Department of State, 2017 Trafficking in Persons Report – Greece, 27 June 2017 (<http://www.refworld.org/docid/5959ecc73.html>).

¹²⁵ See Art. 353 (1.a), Art. 353(3.d), Art. 459(1) point 28, in Btk. Cited by Tipik Legal study on Hungary, 2015.

¹²⁶ See Article 132-71 in the Criminal Code, and Art. L. 622-5 in CESEDA. Cited by Tipik Legal study on France, 2015.

¹²⁷ See TUI, Art. 12(1) (3.d), Art. 12(1) (3-ter.b), Art. 12(1)(5). Cited by Tipik Legal study on Italy, 2014.

¹²⁸ Art. 12(1) 3. (d) and (e) of the Italian Legislative Decree 25 July 1998, n. 286, Single Act of the provisions governing immigration and the status of foreigners. Cited by Tipik Legal study on Italy, 2014.

¹²⁹ The original Italian Law cited by Tipik Legal study on Italy, 2014 contains a reference to "a fine of up to 30 million lira".

Greece ¹³⁰	<p>Financial gain or organised crime: at least 10 years of imprisonment and a fine of at least €50,000.</p> <p>Ship masters or captains of ships, floating crafts or aircrafts and drivers: at least 10 years of imprisonment and a €30,000 to €60,000 fine for every transported person, if the offender acts for financial gain.</p>	<p>Ship masters or captains of ships, floating crafts or aircrafts and drivers: at least 10 years of imprisonment and a €30,000 to €60,000 fine for every transported person, if the offender acts for financial gain.</p>	<p>Financial gain: at least 2 years of imprisonment and a fine of at least €10,000 shall be imposed.</p>
Belgium ¹³¹	<p>Directly or indirectly a patrimonial gain:</p> <p>1 to 5 years imprisonment and a €5,000 to €50,000 fine.</p> <p>Organised crime¹³²:</p> <p>15 to 20 years imprisonment and a €1,000 to €150,000 fine.</p>	<p>Directly or indirectly a patrimonial gain:</p> <p>1 to 5 years imprisonment and a €5,000 to €50,000 fine.</p> <p>Organised crime:</p> <p>15 to 20 years imprisonment and a €1,000 to €150,000 fine.</p>	<p>Directly or indirectly a patrimonial gain: 1 to 5 years imprisonment and €5,000 to €50,000 fine.</p> <p>Organised crime:</p> <p>15 to 20 years imprisonment and a €1,000 to €150,000 fine.</p>

Source: Authors' compilation.

2.1.2 Heterogeneous implementation by Member States

The present section analyses the study conducted by Tipik Legal in 2014–15 on the transposition of the Facilitators' Package in each Member State, under request by the European Commission. This assessment served as the basis for the "Overall report on the transposition to national law of Facilitators Package", which is one of the primary sources of the REFIT evaluation. This section does not seek to conduct an exhaustive examination on the transposition of the Facilitators' Package in all Member States; instead, it pays specific attention to the main issues regarding the elements of 'financial and material benefit' and 'humanitarian exemption' in five countries, namely, Hungary, France, Italy, Greece and Belgium. Finally, it analyses the issues arising from the different levels of penalties for smuggling migrants in the domestic law of these countries.

¹³⁰ See Law 4251/2014 Art. 29(5) and (6), Art. 30. Cited by Tipik Legal study on Greece, 2014.

¹³¹ In Law of 15 December 1980, on access to the territory, residence, establishment and removal of aliens: Art. 77 bis 2nd to 4th paras, Art. 77quinquies. Cited by Tipik Legal study on Belgium, 2014.

¹³² In the Criminal Code of 8 June 1867, Art. 324. Cited by Tipik Legal study on Belgium, 2014.

Table 4. Transposition of the Facilitators' Package into national legislation

Transposition of the Facilitators' Package into national legislation (2014–15)	Material or financial benefit for entry	Material or financial benefit for transit	Material or financial benefit for residence / stay	Humanitarian exemption
Hungary	X	X ¹³³	√	X
France	X	X	X	√
Italy	X	X	√	√
Greece	X	X	X	√
Belgium	X	X	X	√

Source: Authors' compilation.

According to Directive 2002/90/EC, the definition of the criminal offence for facilitation of stay is conditioned on financial gain. However, as shown in Table 4, only two countries, Hungary¹³⁴ and Italy,¹³⁵ have transposed this requirement into their domestic law. Meanwhile, in other Member States this element is just an aggravation to the offence.¹³⁶ In this setting, those providing humanitarian assistance are vulnerable to criminalisation when acting within the territory of most of these countries. For instance, that is the case in Greece, where the humanitarian exemption is only applied regarding assistance to migrants in distress at sea.¹³⁷ At the same time, the relief support on land is very important to ensure migrants and asylum seekers have access to minimum rights, as they cannot resort to public or private services in order to avoid expulsion or arrest. In Greek law, a wide spectrum of public actors is prohibited from providing services to undocumented migrants, and the majority of service providers (doctors, landlords, etc.) are obliged to report them to the authorities.¹³⁸ Thus, humanitarian volunteers and civil society organisations unfairly risk facing severe penalties for smuggling due to the lack of safeguards for their activities.

¹³³ The legal provision for the facilitation of transit was not mentioned by Tipik Legal's study on Hungary.

¹³⁴ See Article 354, Btk. Cited by Tipik Legal study on Hungary (2015).

¹³⁵ See Article 12(5) and (5-bis), in the Italian Legislative Decree 25 July 1998, n. 286. Cited by Tipik Legal study on Italy (2014).

¹³⁶ See in Greece, Law 4251/2014, Article 29(5) (6), and Article 30; Belgium, Article 77, Law of 15 December 1980, on access to the territory, residence, establishment and removal of aliens. France, CESEDA, Article L. 622-1 and L. 622-4, 3^o point, and in the Criminal Code Article 121-3, 1st subparagraph. Cited by Tipik Legal study on Greece (2014), Belgium (2014), France (2015).

¹³⁷ Law 4251/2014, Article 30(6). Cited by Tipik Legal study on Greece (2014).

¹³⁸ Carrera et al. (forthcoming), op. cit., p. 71.

In Italy, the section of the legislation on the facilitation of stay sets higher standards regarding safeguards for civil society than the Facilitators' Package.¹³⁹ It diminishes the risks of criminalisation of humanitarian assistance as well as service providers, such as landlords. The criminal offence of facilitating the permanence of irregular foreigners is conditioned on taking 'unfair advantage' out of their situation or drawing 'undue profit' when providing accommodation.¹⁴⁰ In 2013, in order to bring more clarity to the element of 'unfair advantage', the Italian Supreme Court confirmed that "there must also be specific intent to procure an 'unjust profit' by taking advantage of the migrant's irregular situation, resulting in 'unfair and excessively onerous conditions on the tenant (migrant)'".¹⁴¹ In addition, it also noted in 2015 that 'undue profit' could be "drawn from contract terms much more beneficial to the owner, even if such terms are not excessively detrimental to the migrant".¹⁴²

Even though Hungary complies with the Directive on the definition of the crime for stay, its legislation on the matter went through amendments in 2018, as part of the 'Stop Soros' package proposed by the Fidesz government.¹⁴³ The objective of such a change is to criminalise anyone engaging or not with civil society organisations and who assists irregular migrants to *enter* or *reside* in Hungary even if they act for no financial benefit.¹⁴⁴ The misdemeanour can also occur if the support is given to a foreigner who intends to apply for international protection or if it merely consists of giving information or legal advice (discussed in more detail in subsection 3.1.1).¹⁴⁵

The Facilitators' Package grants a lot of freedom for Member States to transpose the EU *acquis* into their domestic law. In this context, there is a great risk that with the rise of illiberal and anti-migration governments in the EU, some may take the same path as Hungary. Given the chance of a legislative revision, it would likely result in harsher security measures to the detriment of safeguards for civil society (the exemption of family members, volunteers providing humanitarian assistance, victims and service providers), whereas the shrinking space of civil society in these same countries has been noted.¹⁴⁶ At present, this risk is especially true in Italy in light of its position as a first country of entry and the conservative stance of Italy's interior minister Matteo Salvini on migration.

In addition to this setting, the European Commission has been turning a blind eye to national laws that fall short in the transposition and implementation of the Directive's standards. In such cases, the Commission could initiate legal action against Member States at the Court of Justice of the European Union, as EU directives have a direct legal effect. However, the Commission has recently stated the following:

It should be stressed that in the area of criminal law, EU legislation only provides for minimum rules on criminal offences and sanctions. Therefore, even if the definition of the offence currently set out in Directive 2002/90/EC were to be modified as to prescribe criminalisation of facilitation of irregular entry and transit only when conducted for financial gain, Member States would still maintain the freedom, within the limits of EU law, to go further than what is prescribed in the Directive and choose to

¹³⁹ Article 12(5) and (5-bis), Italian Legislative Decree 25 July 1998, n. 286. Cited by Tipik Legal study on Italy, 2014.

¹⁴⁰ Ibid.

¹⁴¹ See "Supreme Court, Sentenza 597/2013, 24 April 2013; Supreme Court, Sentenza 46070/2003, 23 October 2003; Supreme Court, Sentenza 5093/2012, 17 January 2012. The same reasoning had already been established in 2003, in a case where it had not been ascertained, however, from the conditions of the contract that the landlord had intended to impose unduly onerous responsibilities on the tenant. See Supreme Court, Sentenza 46066/2003, 16 October 2003". In footnote 59 of UNODC (2017) Issue Paper – The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol (Vienna, 2017), p. 40.

¹⁴² See footnote 60 "Supreme Court, Judgment no. 17117, 20 January 2015. The meaning and effect of "intent to gain". Court of Catania, Proc. n. 93/2016 R. I.M.C., 21 January 2016". In UNODC (2017) Issue Paper – The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol (Vienna, 2017), p. 40.

¹⁴³ 353/A amendment Btk. In Bill T/333, Unofficial translation by Hungarian Helsinki Committee (<https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>).

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Civic Space Watch (<https://civicspacewatch.eu/about-the-watch/>).

criminalise the facilitation of unauthorised entry and transit, also when conducted without the aim of achieving a financial profit.¹⁴⁷

The answer given by the Commission seems to disregard that those standards serve a purpose, which is to harmonise Member States' legislation in order to have a common and effective response to the issue. Extending criminal liability to everyone facilitating residence does not "go further than what is prescribed", but rather sets lower standards according to human rights and European fundamental rights. Thus, even though Member States have some liberty regarding the wording or to set higher standards than the Directive's, its essence and predicted outcomes still must be followed.

Furthermore, contrary to the Commission's view, a mandatory exemption has already been effectively implemented in the Directive on Human Trafficking where it explicitly prohibits the criminalisation of victims:¹⁴⁸

(14) Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be *protected from prosecution or punishment* for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.

As can be seen in Table 4, none of the countries included the condition of financial gain in the qualification of the offence for facilitation of entry and transit, despite having previously agreed to the definition of the UN Protocol.¹⁴⁹ This element often serves as an aggravation to the offence, resulting into higher sanctions (Table 3). Such broad legislation has proven to be costly and ineffective at dismantling the smuggling business model, since national authorities often do not know how to filter which cases are important to pursue.¹⁵⁰ Thus, a great amount of time and resources are spent in cases that are committed by low-key actors such as migrants, their family members or 'humanitarian actors'. This is not a consequence of the inability of national authorities alone, but rather permissive and broad legislation at the national and EU levels. Therefore, the Facilitators' Package has not been contributing to the European Commission and Member States' aim to "disrupt the criminal networks, that make *significant profits* out of the smuggling of migrants to and within Europe, putting their very lives at risk every day, and not to prosecute individuals and organisations that would provide genuine assistance to those in need."¹⁵¹

What is more, in some cases investigation and prosecution against volunteers and other low-key actors have been identified as politically motivated.¹⁵² In these cases, the aim is often to intimidate NGOs providing humanitarian assistance on land or at sea, discourage small-scale entities and show results from the fight against smuggling migrants. In any case, both circumstances prove the need for solid and detailed legislation from the EU level to effectively fight the real criminal organisations while protecting those providing humanitarian assistance,

¹⁴⁷ Notice to Members, PETI Committee (2017), op. cit.

¹⁴⁸ European Parliament and Council of the European Union (2011), Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/3, 5 April. Emphasis added. (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en>).

¹⁴⁹ Article 6 (1) Each State Party shall 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) The smuggling of migrants. In UN General Assembly (2000), Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15.11.2000 (<http://www.refworld.org/docid/479dee062.html>).

¹⁵⁰ Carrera et al. (forthcoming), op. cit., p. 60.

¹⁵¹ Notice to Members, PETI Committee (2017), op. cit., Emphasis added.

¹⁵² Carrera et al. (forthcoming), op. cit., p. 61.

migrants and their relatives. To accomplish the latter, a detailed mandatory exemption is important as well as the inclusion of fundamental human rights provisions in the EU *acquis* text.

Table 4 can be misleading as it shows that almost all countries apply some kind of exception to punishing humanitarian assistance, although it is important to note that they also lack clarity or apply this exception to very specific cases. Therefore, in these same Member States, several cases of actual criminalisation of humanitarian assistance have been reported by the media and civil society organisations.¹⁵³

Belgium and Hungary have two opposite approaches to the exception of humanitarian assistance in the legislation on smuggling migrants; however, in both cases there are people who have been unfairly criminalised for it.¹⁵⁴ In Belgium, the lack of clarity in the legislation is an issue for the protection of civil society acting in solidarity. Article 77(2), exempting humanitarian assistance for the facilitation of entry, transit and stay, does not go into detail on the types of activities humanitarian assistance covers, leaving a lot of margin of discretion to authorities.¹⁵⁵ Finally, in Hungary there is no exemption whatsoever, but there is a climate of political persecution and illiberal policies, which has been shrinking the civil society space and criminalising relief activities towards migrants.

In the Italian case, rescue activities and humanitarian assistance are only exempt in its territory.¹⁵⁶ Nevertheless, many NGOs rescue people from dinghies in distress close to the Libyan coast and international waters. Still, the exception of humanitarian assistance in Italian law and the UN Convention on the Law of the Sea do not protect people from criminalisation – several cases involving the prosecution of fishermen¹⁵⁷ and service providers¹⁵⁸ have been reported. Moreover, the political criminalisation of SAR boats, especially in Italy and Malta,¹⁵⁹ have led to a tragic situation in the Mediterranean. At present, despite a decrease in the number of migrants crossing the sea, the number of drownings have risen sharply,¹⁶⁰ due to the lack of NGO rescue boats operating in the Mediterranean;¹⁶¹ meanwhile, merchant ships are avoiding routes with dinghies in distress due to the inconvenience of having their boat stranded in European ports.¹⁶²

¹⁵³ See for further information the media monitoring, campaigns and reports compiled by CEPS and PICUM in Annexes 1–3.

¹⁵⁴ *Ibid.*

¹⁵⁵ Law of 15 December 1980, on access to the territory, residence, establishment and removal of aliens. Cited by Tipik Legal study on Belgium, 2014.

¹⁵⁶ Article 12(2) Without prejudice to the provisions of Article 54 of the Criminal Code, the activities of rescue and humanitarian assistance provided in Italy towards foreigners in need, however present in the territory of the State, does not constitute a crime. In the Italian Legislative Decree 25 July 1998, n. 286 – Single Act of the provisions governing immigration and the status of foreigners, cited by Tipik Legal study on Italy, 2014.

¹⁵⁷ L. Tondo (2018), “Tunisian fishermen await trial after ‘saving hundreds of migrants’”, *The Guardian*, 5 September (<https://www.theguardian.com/world/2018/sep/05/tunisian-fishermen-await-trial-after-saving-hundreds-of-migrants>).

¹⁵⁸ L.M. Monella (2018), “Italian jailed and fined after unwittingly driving migrants across border with BlaBlaCar”, *Euro News*, 4 September (<http://www.euronews.com/2018/09/04/italian-jailed-and-fined-after-unwittingly-driving-migrants-across-border-with-blablacar>); Euractive (2017), “Italian prosecutor investigating NGO rescuers says has no proof of wrongdoing”, 4 May (<http://www.euractiv.com/section/justice-home-affairs/news/italian-prosecutor-investigating-ngo-rescuers-says-has-no-proof-of-wrongdoing/>).

¹⁵⁹ La Vanguardia (2018), “Italia inmoviliza el barco de Proactiva Open Arms y acusa a la ONG de promover la inmigración ilegal”, 14 March (<https://www.lavanguardia.com/internacional/20180319/441667332120/italia-retiene-barco-proactiva-open-arms-inmigracion-ilegal.html>); and I. Martin (2018), “Transport Malta insists Sea-Watch 3 cannot leave port”, 6 August (<https://www.timesofmalta.com/articles/view/20180806/local/transport-malta-insists-sea-watch-3-cannot-leave-port.686158>).

¹⁶⁰ UNHCR (2018), “Mediterranean crossings deadlier than ever, new UNHCR report shows”, 3 September (<http://www.unhcr.org/news/press/2018/9/5b8935964/mediterranean-crossings-deadlier-new-unhcr-report-shows.html>).

¹⁶¹ L. Tondo (2018), “No NGO rescue boats currently in central Mediterranean, agencies warn”, 12 September (<https://www.theguardian.com/world/2018/sep/12/migrant-rescue-ships-mediterranean>).

¹⁶² H. Strange (2018), “Ships ‘not willing to save Mediterranean migrants’ say aid groups as Aquarius seeks safe harbor” 12 August (<https://www.telegraph.co.uk/news/2018/08/12/ships-not-willing-save-mediterranean-migrants-say-aid-groups/>).

As mentioned above, the Greek humanitarian exemption is very specific, it comprises only SAR and the facilitation of entry for asylum seekers rescued at sea.¹⁶³ This exception in the law has proven to be flawed in the protection of those assisting migrants in distress. That is first because rescuers cannot identify whether the individual is in need of international protection,¹⁶⁴ and second because the legal framework contains an exemption from punishment but not from prosecution.¹⁶⁵ At present, Sara Mardini, a 23-year-old Syrian refugee, and Sean Binder, a 24-year-old German volunteer who lives in Ireland, have been in custodial imprisonment since August 2018, accused of facilitation of migrants' illegal entry in order to gain profit from it.¹⁶⁶ Both are part of the volunteer crew of the Emergency Response Centre International (ERCI), involved in SAR activities in Lesvos. Under Greek law, they could be held in custody for up to 18 months before trial, and face very high penalties if convicted, "perhaps the most serious any aid worker has ever faced".¹⁶⁷

In the French case, humanitarian assistance and family members are exempted only regarding the facilitation of residence at the time of the study,¹⁶⁸ although the Constitutional Council in France recognised that Article L.622-4 was inconsistent with the principle of *fraternité* enshrined in the French constitution.¹⁶⁹ Thus, it included facilitation of transit in the humanitarian exemption in July 2018.¹⁷⁰ However, helping migrants to cross the border is still not covered by this article. This gap in the law enables the repetition of cases such as the criminalisation of Caroline Christinaz, the Swiss journalist. She was investigated on suspicion of assisting the illegal entry¹⁷¹ of four migrant minors, who were freezing cold when crossing the dangerous border with Italy.¹⁷² Yet, this gap does not seem to be a concern for some French authorities. Notably, Deputy Director for Immigration Jean de Croone stated that helping a migrant to cross the border does not consist of humanitarian help but rather creates the situation of illegality of the migrant.¹⁷³ This statement disregards the point that "[w]hile such humanitarian needs may not appear as imminent as the risk of drowning at sea, our research revealed that land borders also pose extremely grave and in some cases life or death situations of humanitarian need".¹⁷⁴

Despite some advancement of the safeguard for civil society acting in solidarity, the French legislature decided to add other changes that fall short the previous provisions in Article L.622-4, para. 3. Currently, it provides less clarity and more limited protection to those providing aid than before. The old version contained a list of activities to be exempted from resulting in criminal liability, notably "food, housing services or medical care aimed at

¹⁶³ Greek Law 4251/2014, Immigration and Social Inclusion Code, Article 30(6) (ex Law 3386/2005, Article 88(6)): "(6) The above sanctions shall not be imposed in case of rescue of persons at sea as well as of the transportation of persons in need of international protection according to the international law of the sea". Cited by Tipik Legal study on Greece, 2014.

¹⁶⁴ UNODC (2017), Issue Paper – The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol (Vienna, 2017), p. 36.

¹⁶⁵ Ibid.

¹⁶⁶ T. Embury-Dennis (2018), "Syrian refugee who pulled sinking boat to safety 'in state of disbelief' after being imprisoned in Greece", *The Independent UK*, 6 September (<https://www.independent.co.uk/news/world/europe/sara-mardini-yusra-refugee-crisis-mediterranean-greece-syria-ngo-a8526446.html>).

¹⁶⁷ Ibid.

¹⁶⁸ Article L. 622-4, paragraph 3 of CESEDA. Cited by Tipik Legal study on France, 2015.

¹⁶⁹ RFI (2018), "Top French court rules fraternity applies to migrants", 6 July (<http://en.rfi.fr/20180706-top-french-court-enshrines-fraternity-towards-migrants-law/>).

¹⁷⁰ L'article L. 622-4 CESEDA: In the first paragraph, the words "irregular stay" are replaced by the words "irregular transit or residence".

¹⁷¹ M. Caleb (2017), "Briançon : deux journalistes arrêtés par la gendarmerie lors d'un reportage sur des réfugiés." *Politis*, 17 Novembre (<http://www.politis.fr/articles/2017/11/briancon-deux-journalistes-arretes-par-la-gendarmerie-lors-dun-reportage-sur-des-refugies-37954/>).

¹⁷² O. Perrin (2017), "La polémique enfle après l'interrogatoire de la journaliste du «Temps» à Briançon", *Le Temps*, 15 November (<https://www.letemps.ch/opinions/polemique-enfle-apres-linterrogatoire-journaliste-temps-briancon>).

¹⁷³ Committee on Civil Liberties, Justice and Home Affairs (2018), hearing on "The Implementation of the Facilitation Directive and humanitarian assistance", 27 September.

¹⁷⁴ Carrera et al. (forthcoming), op. cit., p. 116.

ensuring dignified and decent living conditions for the alien or any other assistance aiming at preserving his/her dignity and natural integrity",¹⁷⁵ which was reduced to "all other help given for *exclusive* humanitarian purpose".¹⁷⁶

The heterogenous implementation of the EU Facilitators' Package is an outcome of the Commission's reluctance to 'Lisbonise' this legislative tool. For example, Carrera et. al. in their recent book claim that such a choice would have prioritised societal interests:¹⁷⁷

The Commission's decision not to revise EU criminal law on migrant smuggling leaves much to be desired in terms of justification and coherence. Rather than examining critically the legality and effectiveness of the current EU substantive criminal law framework on migrant-smuggling, it justifies choices in criminalisation on the grounds of boosting investigatory and prosecutorial interests. In this manner, substantive criminal law becomes a mere tool for prosecutorial efficiency, rather than reflecting normative or societal choices for criminalisation.

The Commission had new possibilities to inject 'more EU' within the former 'third pillar' legislation with the Treaty of Lisbon entering into force, and in particular after its Protocol 36 on 'Transitional Provisions' (Title VII, Article 10) of the Lisbon Treaty, came to an end in December 2014. The new EU legislation in criminal matters was meant to move beyond 'minimum approximation' towards 'more harmonisation'.¹⁷⁸ It also obliged EU policy makers to take into account fundamental rights safeguards and potential impacts while legislating on EU law criminal matters. Mitsilegas also argued that post-Lisbon instruments provide new possibilities in the EU criminal law to decriminalise certain activities in the field of EU criminal law.¹⁷⁹ For example, the EU human trafficking directive has been 'Lisbonised'. Therefore, declining to 'Lisbonise' the EU Facilitators' Package created a division between the 'old' third pillar instruments and the EU legal framework on migrant smuggling.

2.1.3 Key impacts evidenced in practice

The analysis below covers the chief impacts resulting from application of the Facilitators' Package in practice. Table 4 summarises the main findings in selected studies preceding the REFIT and the Commission's assessment in the REFIT.

Table 5. Key impacts in practice

Direct and unintended consequences related to the Facilitators' Package	FRA (2014)	House of Lords (2015)	Carrera et al. (2016)	ICF (2016)	UNODC (2017)	REFIT (2017)
Evidence of prosecutions and convictions	✓	✓	✓	✓	✓	X

¹⁷⁵ Article L. 622-4 paragraph 3 of CESEDA. Cited by Tipik Legal study on France, 2015.

¹⁷⁶ Ibid., emphasis added.

¹⁷⁷ Carrera et al. (forthcoming), op. cit., p. 21.

¹⁷⁸ S. Carrera, N. Hernanz and J. Parkin (2013) "The 'Lisbonisation' of the European Parliament Assessing progress, shortcomings and challenges for democratic accountability in the area of freedom, security and justice", *CEPS Paper in Liberty and Security in Europe*, No. 58, CEPS, September. (<https://www.ceps.eu/system/files/LSE%20No%2058%20Lisbonisation%20of%20EP.pdf>).

¹⁷⁹ V. Mitsilegas (2018) "Extraterritorial Immigration Control, Preventive Justice and the Rule of Law in Turbulent Times" in Santos Vara, J, S Carrera and T Strik (eds) *Constitutionalising the External Dimension of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham, Edward Elgar.

Evidence of policing civil society actors	√	X	√	√	X	X
Negative impact on humanitarian assistance, SAR and basic services	√	X	√	√	√	X

Source: Authors' compilation.

- **Lack of evidence of prosecutions and convictions**

The European Commission in its REFIT concludes: “Based on the available quantitative and qualitative data collected through various sources, it is not possible to draw an accurate and conclusive picture on the effects of the crime definition in the Facilitators Package in general and of the humanitarian assistance exemption in particular.”¹⁸⁰

The decision of the Commission to keep the wide definition of the offence for entry and transit contrasts with what is stated in the EU Action Plan against Migrant Smuggling (2015–20). The latter emphasises “the need to focus on the “business model” of smuggling, “ensur[ing] that appropriate criminal sanctions are in place *while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress*” [emphasis added].¹⁸¹

What is more, the wide margin of discretion left to Member States to decide what qualifies as an offence also fails to comply with the Facilitation Directive’s own specific objective – “finding a common definition of smuggling”.¹⁸²

After analysing these studies, the European Commission concluded in the REFIT that one of the challenges or potential negative impacts of the Facilitators’ Package is to address the “perceived risks” of criminalisation of humanitarian assistance.¹⁸³ Unlike the other evaluations conducted by academia and relevant institutions, the Commission considers the risks of criminalisation of humanitarian assistance arise as a consequence of “an inefficient implementation of the EU acquis by Member States” rather than deficiencies in the legal framing of the Facilitators’ Package.¹⁸⁴ Thus, the European Commission concluded that there is no need for a legislative change, but only to improve certain operational measures, such as “reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society”.¹⁸⁵

The European Commission supported this conclusion by saying that “there appears to be rather limited evidence that social workers, family members or citizens acting out of compassion have been prosecuted and convicted for facilitation of unauthorised entry, transit or residence”.¹⁸⁶

The European Commission has nonetheless included a footnote that “[p]roblems faced by some individuals or organisations were mentioned by some respondents in the framework of the public consultation and/or have been reported by some NGOs”.¹⁸⁷ In the same footnote, the Commission acknowledged some evidence gathered by FRA and the International Organization for Migration

¹⁸⁰ European Commission (2017) REFIT Evaluation, op. cit., p. 23.

¹⁸¹ UNODC (2017), op. cit. p. 13.

¹⁸² European Commission (2017) REFIT Evaluation, op. cit., p. 6.

¹⁸³ Ibid., p. 35.

¹⁸⁴ European Commission (2017) REFIT Evaluation, op. cit., p. 35.

¹⁸⁵ Ibid., p. 35.

¹⁸⁶ Ibid., p. 21.

¹⁸⁷ Ibid., p. 22. Footnote 100.

(IOM).¹⁸⁸ In the REFIT, the Commission also mentioned two court cases in France, pointing out that even though cases of prosecution are not inexistent, they have not resulted in any criminal sanctions but in acquittal.

Developments since 2016 show evidence of disproportionate numbers of investigations and eventual acquittals of CSAs (see Annex 1). This study relates the fact that criminal investigations and prosecutions can be started without having to gather and prove any evidence of 'criminal intent', but only 'intentional assistance to enter/transit/stay and reside' to someone who is not in possession of valid travel documents in the EU. Criminal investigations of activities without any profit motives, violence or without belonging to an organised crime group at once infringe upon the presumption of innocence and distract the time and resources of national authorities from other more harmful crimes. Going after the 'low-hanging fruit' of humanitarian actors distracts from the advancement of the intended public goal – dismantling organised criminal groups. It can be seen as a waste of public and limited resources to fight crime.

A prosecution can cause damages to the individual erroneously accused, thus it should be avoided at all costs according to the harm principle.¹⁸⁹ The risk of criminalisation of humanitarianism and service providers besides individual harms also include societal costs and hence have broader implications. National authorities have often proven to be incapable of determining at early stage which cases should be taken forward.¹⁹⁰

National practitioners also lack guidance on the application of the Facilitators' Package due to its vagueness. The European Commission's REFIT insists that the risks are not as significant as there are other legal instruments to prevent the punishment of humanitarian actions. The genuine application of criminal law, for example, would exempt acts committed in a state of necessity to avert a danger and international law obliges assistance to anybody in distress at sea.¹⁹¹ In this way, the Commission opposes the need to reform the EU Facilitators' Package, despite the evidence of such developments. For example, in their report the UK's House of Lords highlights cases where fishermen were still charged for the offence of smuggling migrants; the same report stresses that those legal instruments would not protect service providers such as landlords.¹⁹²

- **Evidence of policing CSAs**

The studies conducted by Carrera et al. for the LIBE Committee¹⁹³ and by the ICF¹⁹⁴ reported methodological challenges in the collection of evidence from domestic courts related to the criminalisation of humanitarian assistance. However, the Carrera et al. study also revealed that "it is misleading to regard a criminal conviction as the only index of punitiveness".¹⁹⁵ As explained in section 1 of this study, also of concern is the policing of CSAs: How can we establish the systemic nature and escalation of such instances?

¹⁸⁸ European Commission (2017) REFIT Evaluation, p. 22, Footnote 100. Other information has been reported in the FRA monthly data collections on the current migration situation in the EU, or in the press. See for instance in France, two recent Court cases: http://lemonde.fr/police-justice/article/2017/01/06/un-enseignant-chercheur-relaxe-apres-avoir-aide-des-migrants_5058581_1653578.html and <http://www.lefigaro.fr/flash-actu/2016/12/02/97001-20161202FILWWW00130-une-amende-pour-avoir-aide-deux-erythreens.php>. See also references in IOM report on 'Migrant smuggling data and research: a global review', 2016, p. 121 (<https://www.iom.int/news/migrant-smuggling-iom-publishes-first-global-report-evidence-base>).

¹⁸⁹ Carrera et al. (2016), op. cit., p. 92.

¹⁹⁰ Ibid., p. 91.

¹⁹¹ European Commission (2017) REFIT Evaluation, op. cit., p. 22.

¹⁹² House of Lords, p. 26.

¹⁹³ Carrera et al. (2016), op. cit., p. 91.

¹⁹⁴ ICF (2016), op. cit., p. 12.

¹⁹⁵ Carrera et al. (2016), op. cit., p. 91.

In 2016, there was already evidence gathered by academia and civil society¹⁹⁶ of different forms of policing CSAs, such as disciplining, harassment, intimidation and suspicion and these were seen as unintended consequences of the Facilitators' Package.¹⁹⁷ The studies noted above show signs of their systematic recurrence over the years, justifying the need for a revision of the EU *acquis*. Notwithstanding that they were a common topic in three different studies, the REFIT did not acknowledge these other forms of criminalisation in its conclusion. The Carrera et al. (2016) study concluded that all of these forms of policing and criminalisation negatively affect not only migrants, but also actors providing humanitarian assistance, service providers, family members, and society as a whole. In addition, Jennifer Allsopp in 2016¹⁹⁸ argued that such policing sends a strong message that interacting with undocumented migrants can be a criminal offence;¹⁹⁹ this may consequently foster the rise of discrimination (based on race, ethnic origin or religion), xenophobia and hate crimes, which have the effect of disrupting social cohesion in society as a whole.²⁰⁰ Also, the logic of criminalisation spreads fear and affects trust in public institutions, especially in the criminal justice system.²⁰¹ CSAs and migrants may, for example, be less willing to approach police and other law enforcement agents with evidence of harmful crimes committed by violent organised smugglers and other nefarious groups. Again, this has consequences for society as a whole.

- **Negative impacts on humanitarian assistance, SAR and basic services**

Other unintended consequences of the Facilitators' Package are the fear of sanctions and a deterrent effect on the work of individuals and civil society organisations providing humanitarian assistance to migrants in distress. Regarding the former, the REFIT concluded that “[a]lthough perceived risks of being criminalised for providing humanitarian assistance must be taken into serious consideration, they do not appear to be so prominently linked to the legal framework in place as to its understanding and actual application”.²⁰²

Likewise, the Commission also claims that there is not enough evidence regarding its deterrent effect.²⁰³ It explains that civil society initiatives devoted to refugees and migrants have actually significantly increased, especially in Germany and Greece, and in the commercial sector among shipowners, for instance.²⁰⁴

Amid the lack of response by the EU and Member States to the arrivals of refugees and other migrants, civil society organisations have often acted as first responders and filled this vital gap, for example in Italy, Greece and Hungary in 2015.²⁰⁵ Accordingly, the European Commission in its REFIT recognised the risk of criminalisation of humanitarianism as a growing problem since more people could fall under its scope. Subsequent research shows that the risk of criminalisation discourages acts of solidarity with refugees and other migrants, notably proactive SAR conducted by NGOs.²⁰⁶

¹⁹⁶ Ibid., p. 40.

¹⁹⁷ FRA, p. 12.

¹⁹⁸ Commissioner for Human Rights, Council of Europe (2010), *Issue Paper Criminalisation of Migration in Europe: Human Rights Implications*, p. 17.

¹⁹⁹ Ibid., p. 17.

²⁰⁰ Jennifer Allsopp (2016), “The European Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: measuring the impact on the whole community”. In *Irregular Migration, Trafficking and smuggling of human beings*, Brussels, CEPS, p. 47.

²⁰¹ Allsopp (2016), p. 47.

²⁰² European Commission (2017) REFIT Evaluation, op. cit., p. 22.

²⁰³ Ibid., p. 22.

²⁰⁴ Ibid., p. 22.

²⁰⁵ Carrera et al. (2018), op. cit.

²⁰⁶ Ibid.

Sometimes civil society actors or other professional were also requested to cooperate with law enforcement authorities by providing information about their clients or sharing the other information.²⁰⁷ For example, in the UK, NHS doctors were obliged to share information about their patients, for the purpose of countering irregular migration.²⁰⁸ Such practices not only were violating the human dignity and other fundamental rights of migrants, but also counterproductive in dismantling the criminal networks. The empiric research, found that when civil society was absent or denied access human traffickers came in the scene to fill in the 'void' – they provided food, shelter and responded to other basic needs in return for sexual or labour exploitation.²⁰⁹

Sometimes civil society was also requested to be part of anti-migrant smuggling operations and to take pictures taken during the SAR operations, that could be later used to identify the person who was steering the boat.²¹⁰ Such requests were disregarding humanitarian mandate and impartiality principles and increased the mistrust towards the law enforcement and criminal justice actors (see Section 4.2.). As to avoid such situations the firewall concept has been recommended by the previous and current UN Special Rapporteur on the human rights of migrants.²¹¹

A lack of 'firewall' – a formalised separation between basic service provision and immigration control, whether in law, or in practice - negatively impacts the work of social services providers at the local and regional level when fulfilling their commitments and responsibilities to protect the fundamental rights of migrants in irregular situation.²¹² It is also central for civil society actors to keep their independence and impartiality so as to maintain trust with their clients, i.e. asylum seekers and immigrants. Firewall projects should also facilitate trust-based cooperation with law enforcement and other governmental authorities.

2.1.4 Comparison of conclusions and recommendations

For all of the reasons mentioned above, a legislative revision of the EU Facilitators' Package was recommended by the FRA study, the UK's House of Lords assessment, Carrera et al.'s study for the LIBE Committee and the ICF report (Table 5). While the UNODC did not provide recommendations for the EU Member States specifically, only the REFIT evaluation opposed a **legislative change**.

Table 6. Comparison of conclusions and recommendations

Recommendations	FRA (2014)	House of Lords (2015)	Carrera et al. (2016)	ICF (2016)	UNODC (2017)	REFIT (2017)
Legislative reform of the Facilitators' Package is needed	√	√	√	√	X	X

²⁰⁷ Carrera et al. (forthcoming), op.cit.

²⁰⁸ L. Vosyliūtė and A.L. Joki (2018), "The social inclusion of undocumented migrants", ReSOMA Discussion Brief, October.

²⁰⁹ Carrera et al. (forthcoming), op.cit.

²¹⁰ Carrera et al. (forthcoming), op.cit.

²¹¹ United Nations, Report of the Special Rapporteur on the human rights of migrants, 25 September 2018. Retrieval from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/298/96/PDF/N1829896.pdf?OpenElement>.

²¹² F. Crépeau and B. Hastie (2015) "The Case for 'Firewall' Protections for Irregular Migrants", *European Journal of Migration and Law*, 17(2-3), 157-183.

Guidelines/more effective implementation of the current Facilitators' Package is needed	√	X	X	X	√	√
Mandatory exception of humanitarian assistance	√	√	√	√	√	X
Inclusion of a financial benefit or other material benefit requirement for facilitation of entry, transit and residence	X	√	√	√	√	X
Include an unjust enrichment/unjust profit requirement to exclude bona fide service providers	√	X	√	√	√	X

Source: Authors' compilation.

All of the reports agree that humanitarian assistance needs to be exempted from criminalisation in the EU, with the exception of the REFIT. The UNODC addresses the lack of clarity in promoting guidance regarding the definition of the offence of humanitarian assistance, as well as guidance for better compliance with the Protocol's purposes and principles:

Irrespective of whether or not 'financial or other material benefit' is included within National law as an element of smuggling of migrant offences, the overall framework within which relevant laws are understood and applied needs to include safeguards to ensure that faith-based organizations, civil society and individuals acting without any purpose to obtain a financial or other material benefit are excluded from the application of smuggling offences while ensuring that such exclusion cannot be used as a loophole to escape justice.²¹³

However, the European Commission in its REFIT gives only very general and broad conclusions on non-legislative measures and proposes a new notion of 'genuine humanitarian assistance', implying that there are forms of humanitarian assistance that are not genuine:

The effective implementation of the existing legal framework and a reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society could contribute to improving the current situation and avoid criminalisation of *genuine* humanitarian assistance. This includes enhancing the effectiveness of the legislation on the spot, offsetting the risk of unintended consequences, and in particular the risk that no assistance is provided to those in need, in breach of the EU Charter of Fundamental Rights, the non-refoulement principle and other international human rights commitments.²¹⁴

The UNODC study proposed to apply non-legislative measures such as guidance at the national level on the UN Protocol against Migrant Smuggling with respect to its correct implementation, including concepts of "humanitarian exemption" as well as financial and other material benefit:²¹⁵

Where necessary, guidance to criminal justice practitioners on the scope of concepts such as 'financial or other material benefit' and 'profit', when [they] are included in the national legal framework around smuggling of migrants, should have regard to the spirit of the Organized Crime Convention and the Smuggling of Migrants Protocol, including their stated purposes.

²¹³ UNODC (2017), op. cit., p. 71.

²¹⁴ European Commission (2017) REFIT Evaluation, op. cit., p. 35, emphasis added.

²¹⁵ UNODC (2017), op. cit., p. 71.

The European Commission states that the EU legal framework's "full and correct implementation should be prioritised, in the context of the Action Plan".²¹⁶ As a positive development, the European Commission concluded that it will reinforce the pursuit of Member States' non-compliance with the risk infringement procedures: "In parallel, instances of non-conformity will continue to be pursued with Member States to ensure correct transposition and application of the current EU legal framework. If necessary, the Commission will use its powers under Article 258 [of the Treaty on the Functioning of the European Union, TFEU], including initiating infringement procedures."²¹⁷

The key feature of the Facilitators' Package is the lack of clarity, particularly how it affects the fundamental rights of refugees and migrants and those who act in solidarity with them. The wide margin of appreciation granted to Member States in the Facilitators' Package is not likely to be sufficiently addressed and remedied via infringement procedures. Up until today there have been no infringement procedures on this question initiated, despite emerging evidence of the criminalisation of humanitarian actors and bona fide service providers (see the discussion in section 3).

2.2 EU citizens' concerns reaching EU institutions

2.2.1 Petition 1247/2016

Article 227 TFEU foresees that "any citizen, acting individually or jointly with others, may at any time exercise his right of petition to the European Parliament". Such petitions addressed to European Parliament's PETI Committee give EU citizens, civil society and enterprises an opportunity to call "attention to any infringement of a European citizen's rights by a Member State or local authorities or other institution."²¹⁸

In October 2016, a lawyer from Spain, Paula Schmid Porras, has presented Petition 1247/2016 to the PETI Committee. She has raised concerns similar to those identified in the studies mentioned above, about the criminalisation of humanitarian assistance in the European Union.

The petition is based on a concrete case. Her clients were three Spanish lifeguards – Manuel Blanco, Julio Latorre and Enrique Rodriguez. They were volunteering on Lesbos island for the Spanish non-profit organisation Proem-AID. On 14 January 2016 they were arrested together with Salam Aldeen and Mohammed Abbassi – two volunteers from the Danish organisation Team Humanity.²¹⁹ Despite assistance to migrants in distress being a duty under international maritime law (as recalled by the REFIT),²²⁰ and despite the official declaration that Greece exempts humanitarian actors from criminalisation, the volunteers were accused of migrant smuggling. They had to pay bail of €5,000 and were facing up to 10 years of prison. This case and the petition have led to broader civil society mobilisation²²¹ calling for the urgent need to reform the Facilitators' Package in order to avoid the recurrent penalisation of people helping undocumented migrants and especially in rescues at sea.

The petition calls for the European Parliament, the Commission, other institutions and Member States to "take steps to ensure that the Directive is modified to require all Member States to exempt from criminal liability those humanitarian actors engaged with migrants in an irregular situation".²²² The petitioner, Schmid Porras, reinforces the arguments found in the relevant studies analysed above, that the EU's legal framework is vague, does not require material or other financial benefit for criminalisation and does not oblige Member States to exempt

²¹⁶ REFIT, p. 35.

²¹⁷ Ibid., p. 36.

²¹⁸ European Parliament, "Petitions" (<http://www.europarl.europa.eu/at-your-service/en/be-heard/petitions>). Accessed 14 Sept. 2018.

²¹⁹ A. Safdar (2016), "NGOs Decry Charges against Volunteers in Greece", Aljazeera, op. cit.

²²⁰ European Commission (2017) REFIT Evaluation, op. cit., p. 22.

²²¹ See the European Citizens' Initiative, "We are welcoming Europe" <https://weareawelcomingeurope.eu/fr/> and a number of NGOs and civil society organisations (see Annex of the Petition 1247/2016).

²²² European Parliament (2017), Petition No 1247/2016 by Paula Schmid Porras (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea, Committee on Petitions, Brussels, 31.7.2017, p. 1.

humanitarian assistance. The petitioner brings special attention to the fact that the Facilitators' Package was designed in a way that violates international law when leaving leverage for Member States to criminalise humanitarian actors assisting at sea. The petition recalls the duty under the UN Convention on the Law of the Sea²²³ that "sets out the long-standing obligation of a State to require the master of a ship flying its flag to render assistance to persons and ships in distress at sea".²²⁴

The Commission stated in its reply to the petition of 31 of July of 2017 (four months after the REFIT was published), that "[t]his conduct [SAR] is different from choosing to transport migrants, who may even be in no immediate danger, through the territory or across the border of a Member State, to help them reach another destination".²²⁵

In this statement, the Commission disregards physical and operational gaps left by EU and Member State operations after the withdrawal of Mare Nostrum and reiterates the intent to leave a wide margin of discretion to Member States on whether to punish this type of offence in light of their attempts to stem irregular migration.

The petitioner raises concerns over non-compliance with the fundamental rights enshrined in the EU Charter, as well as the violation of international humanitarian law and the lack of a more holistic approach to irregular migration when recalling Articles 67,²²⁶ 67(2)²²⁷ and 79(1)²²⁸ of the Treaty on European Union (TEU) and the commitments made by the Commission to work on

[a] Common European immigration policy [that] should build on the universal values of human dignity, freedom, equality and solidarity espoused by the EU, including full respect of the Charter of Fundamental rights and the European Convention of Human Rights. Based on its humanitarian traditions, Europe will also continue showing solidarity with refugees and persons in need of protection.²²⁹

The petition also mentions the major inconsistencies between the EU's legislation and its own internal and international commitments on the matter. For instance, Schmid Porras notes the gap between the Facilitators' Package and the UN Protocol against the Smuggling of Migrants, more specifically, with respect to the lack of a financial gain element for the qualification of the crime of migrant smuggling. The petitioner is also concerned that

the Commission will make, in 2016, proposals to improve the existing EU legal framework to tackle migrant smuggling, which defines the offence of facilitation of unauthorized entry and residence, and

²²³ Article 98.1, paragraph 1, of the United Nations Convention on the Law of the Sea provides as follows: "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him".

18) The same report concludes and recommends that "Human rights and refugee law principles are an important point of reference in handling rescue-at-sea situations" (p. 14).

19) Failure to respect the duty to rescue is usually a criminal act.

²²⁴ Petition 1247/2016, op. cit., p. 7.

²²⁵ Notice to members, Subject: Petition No 1247/2016 by Paula Schmid Porras (Spanish) on behalf of NGO Professional Emergency Aid (PROEM-AID) concerning the criminalisation of persons engaging with migrants in an irregular situation and the criminalisation of humanitarian assistance at sea.

²²⁶ Article 67 TEU provides that "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States".

²²⁷ Article 67(2) TEU provides that "it shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals".

²²⁸ Article 79(1) TEU provides that "the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings".

²²⁹ European Commission (2008), A common immigration policy for Europe: Principles, actions and tools (Brussels, 17.6.2008 (COM(2008) 359 final)), as quoted in Petition 1247/2016, p. 5.

strengthen the penal framework. It will seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress.²³⁰

The European Commission, having to reply to the same arguments raised by the studies analysed by the REFIT, reiterates in its response to the PETI Committee, that unlike the UN Protocol against Migrant Smuggling, the Facilitators' Package contains a clause to exempt the criminalisation of humanitarian assistance.²³¹ The petitioner proposes an obligatory exemption of humanitarian actors in Article 1(2) of the Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence by changing the 'may' clause to a 'shall' clause.²³² The petitioner argues that criminalising acts of solidarity has a very negative effect on European society as a whole and its image abroad, as it escalates the cases of racism, intolerance and integration problems.²³³

Still, the Commission decided to maintain its previous conclusion made in the REFIT: "While the quality, quantity, and comparability of the information that could be collected through this evaluation is unfortunately limited, it does not indicate the actual widespread and repeated prosecution and conviction of individuals or organisations facilitating irregular border crossings or transit for reasons of humanitarian assistance."²³⁴

The Commission recommended non-legislative measures, such as promoting better implementation of the Facilitators' Package with the assistance of Eurojust and FRA, along with civil society organisations. When responding to the request to impose on Member States the financial or other material element requirement, the Commission stressed its limited competence in the area of criminal justice:

It should be stressed that in the area of criminal law, EU legislation only provides for minimum rules on criminal offences and sanctions. Therefore, even if the definition of the offence currently set out in Directive 2002/90/EC were to be modified as to prescribe criminalization of facilitation of irregular entry and transit only when conducted for financial gain, Member States would still maintain the freedom, within the limits of EU law, to go further than what is prescribed in the Directive and choose to criminalize the facilitation of unauthorized entry and transit, also when conducted without the aim of achieving a financial profit.²³⁵

Nevertheless, the Commission also has not yet used an opportunity to 'Lisbonise' the old third pillar legislation and also its current competence to ensure minimum safeguards to protect fundamental rights when fighting organised crime, such as the rights to a presumption of innocence, fair trial and proportionality of fines among others.²³⁶

The Petitioner has called for the implementation of the TEU Article 214:3 that requires establishing an EU framework for humanitarian operations: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures defining the framework within which the Union's humanitarian aid operations shall be implemented."

During the time of the REFIT, the Commission was unaware of the European definition of 'humanitarian assistance', despite the widespread acceptance of the European Consensus on Humanitarian Aid in 2008.²³⁷ "Besides, there is no 'one-size-fits-all' European definition of what constitutes humanitarian assistance in each

²³⁰ Petition 1247/2016, op. cit., p. 5.

²³¹ European Commission (2017) REFIT Evaluation, op. cit., p. 31.

²³² Petition, 1247/2016, op. cit., p. 10.

²³³ Paula Schmid Porras's presentation to the European Parliament.

²³⁴ Notice to Members, PETI Committee (2017), op. cit., p. 2.

²³⁵ Notice to Members, PETI Committee (2017), op. cit., p. 2.

²³⁶ Carrera, S., Guild, E., Vosyliūtė, L., Scherrer, A., & Mitsilegas, V. (2016). Study for the European Parliament LIBE Committee "The Cost of Non-Europe in the Area of Organised Crime", republished in *CEPS Paper in Liberty and Security in Europe*, No. 90. (<https://www.ceps.eu/publications/cost-non-europe-area-organised-crime>).

²³⁷ Council of the European Union and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission (2008), European Consensus on Humanitarian Aid, Joint Statement, 2008/C 25/01. OJ C 25, 30.1.2008, pp. 1-12 (http://ec.europa.eu/echo/files/media/publications/consensus_en.pdf).

and every situation. Member States generally do not define the concept of humanitarian assistance in their legislation, but leave it to the appreciation of the competent national authorities.”²³⁸

Interestingly, it still looks that the European High Level Consensus of Humanitarian Aid of 2008 and the UN Protocol against Migrant Smuggling are tools for external and not internal consumption. For example, when the European Commission looks abroad to cooperate with third countries on anti-smuggling activities, the ratification and correct application of the UN Protocol is promoted, while the EU and its Member States apply the same Protocol on a rather derogatory basis of Article 6:4. The baseline for any prosecution should be the ‘criminal intent’ or lack of it. Similarly, in the context of cooperating with third countries the EU is actively using and advocating a notion agreed at the EU level on humanitarian aid, which is “a fundamental expression of the universal value of solidarity between people and a moral imperative”.²³⁹ Moreover, the objective of humanitarian aid is also well defined in para. 8 of the European Consensus: “The objective of EU humanitarian aid is to provide a needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity wherever the need arises if governments and local actors are *overwhelmed, unable or unwilling to act*”.²⁴⁰ Thus, although TEU Article 214 is placed under heading five, “External Action of the Union (ECHO & EEAS)”, the European High Level Consensus of Humanitarian Aid of 2008 and even the UN Protocol against Migrant Smuggling appear solely applicable to the external dimension, the EU’s soft power and credibility when cooperating with third countries would require consistent implementation of EU law inside the Union, or in other words – to practice inside what they preach when going outside.

The petitioner Paula Porras Schmid was called to the hearing of the EP PETI Committee to follow up on her petition on 21 November, 2018. Although, on 7 May 2018, the Court of Mytilene acquitted the five volunteers concerned,²⁴¹ the very act of their prosecution has exacerbated mistrust in society – towards civil society and towards the criminal justice systems.²⁴² The petitioner insisted on prohibition of criminalisation of humanitarian actors, as new misguided prosecutions took place in Greece. Two of the volunteers – Sarah Mardini and Sean Binder – were held in high-security preventive custody at the time of the PETI hearing.²⁴³ The EP PETI Committee decided to keep the petition open and to send inquiries to the Italian and Greek governments as well as to Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship. The chairperson of this Committee, MEP Cecilia Wikström, concluded that it “may be the most important petition received by the PETI Committee for this mandate of the European Parliament”.²⁴⁴ And MEPs during this hearing stated that decisive action is needed at EU level, otherwise EU institutions become responsible for allowing EU Member States to prevent and prosecute humanitarian actors and human rights defenders.²⁴⁵ The EP PETI Committee concluded that criminalisation of civil society is contrary to founding EU values and principles as well as in contravention of international human rights, humanitarian and maritime laws and therefore requires speedy, clear and obligatory EU level guidance.²⁴⁶

²³⁸ Notice to Members, PETI Committee (2017), op. cit., p. 2.

²³⁹ The European Consensus on Humanitarian aid (2008); and “We are a welcoming Europe” (<https://weareawelcomingeurope.eu/en/about/>).

²⁴⁰ Ibid., emphasis added.

²⁴¹ T. Baster and I. Merminod (2018), “Humanitarian Workers Acquitted of ‘Crime’ of Helping Refugees”, *New Internationalist*, 10 May (<https://newint.org/features/web-exclusive/2018/05/10/humanitarian-workers-acquitted-helping-refugees>).

²⁴² Carrera et al. (forthcoming), op. cit.

²⁴³ H. Smith (2018) “Arrest of Syrian ‘hero Swimmer’ Puts Lesbos Refugees Back in Spotlight”, *The Guardian*, 6 September. (<https://www.theguardian.com/world/2018/sep/06/arrest-of-syrian-hero-swimmer-lesbos-refugees-sara-mardini>).

²⁴⁴ European Parliament, Committee on Petitions (2018) Recording of the Committee meeting on 21 November, 2018, from 15:41 to 18:33, The European Parliament’s Multimedia Centre. ([www.europarl.europa.eu, http://www.europarl.europa.eu/live/en/committees/video?event=20181121-1430-COMMITTEE-PETI](http://www.europarl.europa.eu/live/en/committees/video?event=20181121-1430-COMMITTEE-PETI)).

²⁴⁵ Ibid.

²⁴⁶ Ibid.

2.2.2 European Citizens' Initiative: "We are a welcoming Europe"

The European Citizens' Initiative, "We are a welcoming Europe", was registered by the Commission on 15 February 2018 and is composed of a coalition of over 170 civil society organisations across Europe, coordinated by the Migration Policy Group for the EU NGO Platform on Asylum and Migration, whose aim is to stop the criminalisation of humanitarian assistance and reclaim the right to help.²⁴⁷ After its inscription, the initiative has a year to collect 1 million signatures in order to be heard by the European institutions.²⁴⁸ The petition includes national level campaigns in Austria, Belgium, Bulgaria, Croatia, Finland, France, Greece, Hungary, Italy, Luxembourg, the Netherlands, Romania, Slovakia and Slovenia. As of end of November 2018, there were approximately 90 thousand signatures gathered and three months remaining to complete collection of signatures.

The petition says that "[t]oday, we, the citizens of Europe, are raising our voices to change the discourse on migration and build a Europe that welcomes those in need and reflects our principles of solidarity, dignity and human rights".²⁴⁹ Under the "We are a welcoming Europe" slogan, the initiative proposes three main areas of action: first, allowing for community sponsorship of refugees; second, decriminalising humanitarian assistance and basic service provision; and third, defending victims of labour exploitation and human rights abuses.

At times when governments are unable to respond quickly and effectively, civil society has stepped in to guarantee people's access to fundamental rights. However, during the migration 'crisis', or better said humanitarian crisis, civil society's assistance to undocumented migrants, asylum seekers and refugees was often seen in conflict with the fight against irregular migration.²⁵⁰ The initiative also denounces the Facilitators' Package as enabling the criminalisation of humanitarian assistance, through prosecution or convictions, but also through intimidation. For instance, as pointed out by Frontex, NGOs have been considered a pull factor for irregular migrants to risk dangerous journeys to come to Europe.²⁵¹ This discourse, based on a logic of criminalising migration, tends to put the blame on civil society organisations and consequently can have a detrimental impact by engendering a difficult environment for volunteers and NGOs to work in. The initiative reminds the EU that the criminalisation logic interferes not only with migrants' rights but also society's civil rights.²⁵²

Therefore, besides tackling the criminalisation of humanitarian assistance, the initiative also wants to build a discourse and immigration policy that actually reflects and complies with European society's values and principles, enshrined in the EU Treaties (TEU), of solidarity, dignity and human rights.

The main three points of the initiative are the following:

- 1) **Support community sponsorship.** Citizens across Europe want to sponsor refugees and those fleeing persecution to offer them a safe home and a new life through safe and legal ways. In order to do that it is necessary that the Commission offers direct support to local groups that help refugees who are granted national visas.²⁵³
- 2) **Prevent the criminalisation of humanitarian service provision.**
- 3) Finally, provide access to **justice for victims of exploitation and abuse.** "We are a welcoming Europe" urges the "Commission to guarantee more effective ways and rules to defend all victims of labour exploitation and crime across Europe and all victims of human rights abuses at our

²⁴⁷ "We are a welcoming Europe" (<https://weareawelcomingeurope.eu/en/about/>).

²⁴⁸ "Organisers of successful initiatives will participate in a hearing at the European Parliament. The Commission will have 3 months to examine the initiative and decide how to act on it". See in "European citizens' initiative", *European Parliament* (<http://www.europarl.europa.eu/at-your-service/en/be-heard/citizen-s-initiative>).

²⁴⁹ "We are a welcoming Europe" (<https://weareawelcomingeurope.eu/en/about/>).

²⁵⁰ "We are a welcoming Europe" (<https://weareawelcomingeurope.eu/en/about/>).

²⁵¹ Carrera et al. forthcoming; and Heller and Pezzani (2017).

²⁵² "We are a welcoming Europe", op. cit.

²⁵³ Ibid.

borders”.²⁵⁴ Often undocumented migrants “do not get justice or file complaints because they fear they will be deported by the authorities. But this would not be the case if the complaints mechanisms under EU law were effective”. They “call [for] the European Commission to listen to its citizens who want a working justice system for all and guarantee more effective ways and rules to defend victims of exploitation and human rights abuses”.²⁵⁵

The movement highlights the same issues that the petition and other studies have previously done, stemming from the lack of legal clarity that enables Member States and national authorities to criminalise any interaction with undocumented migrants, from distributing food to buying a train ticket or even rescuing people at sea.²⁵⁶ Moreover, other civil society organisations are fighting for a popular ownership of Europe.

In addition, there are new mobilisations in the area of migration. For example, MEGA or “Make Europe Great for All” is a campaign promoted by a vast network of civic associations and movements coordinated by the European Civic Forum and co-funded by the Europe for Citizens Programme. Its focus is to promote a European Union more open to civil society’s voice and demands in the shaping of the EU’s future – an important process for democracy – as well as to combat Euroscepticism and demystify xenophobic and nationalist narratives.

Finally, Civic Space Watch is another example of a civil society collaborative movement by the European Civic Forum to promote a response to the rise of illiberal governments in Europe and safeguard civil society’s space while addressing and sharing knowledge on issues faced in the bloc. One of its main objectives is to build “a mutual support scheme and a reporting point where civic actors can share new developments on the ground, denounce attacks and call for solidarity”.²⁵⁷ On its page “Take Action”,²⁵⁸ “activists can choose among several options to ask for the support from other European activists and networks to give visibility to local issues at the trans-European level”.²⁵⁹ Along this line, it is currently giving support to the collection of signatures of the European Citizens’ Initiative, “We are a welcoming Europe”.

2.3 The European Parliament’s concerns and objections

In this section, we focus on the concerns and objections raised by the European Parliament since the very inception of the Facilitators’ Package. In July 2018, the European Parliament also passed a resolution proposing that the European Commission draft guidelines exempting humanitarian assistance from criminalisation.

2.3.1 Objections by the European Parliament to the Facilitators’ Package from the very beginning

The European Parliament has been the main critic of the Facilitators’ Package since its creation. This is a position that it has maintained over the years to protect civil society’s rights. In 2000, following the presentation of the initiative by the French government with a view to adopting EU legislation on migrant smuggling, the European Parliament, which only had consultative powers, proposed several amendments for the consideration of the European Council.²⁶⁰ Its propositions exposed the many gaps in the framing of the legislation, namely the lack of safeguards for victims of smuggling, people providing humanitarian assistance and service providers; legal uncertainty; as well as a strong focus on punishment and deterrence as a solution to the detriment of a more holistic approach to curbing irregular migration.

²⁵⁴ Ibid.

²⁵⁵ Civic Space Watch (2018), “Our values are at risk: Let’s reclaim a welcoming Europe”, 17 May. (<https://civicspacewatch.eu/our-values-are-at-risk-lets-reclaim-a-welcoming-europe/>).

²⁵⁶ “We are a welcoming Europe”, op. cit.

²⁵⁷ Civic Space Watch, “About the Watch” (<https://civicspacewatch.eu/about-the-watch/>).

²⁵⁸ Civic Space Watch, “Time to act!” (<https://civicspacewatch.eu/contribute/>).

²⁵⁹ Civic Space Watch, “Time to act!” (<https://civicspacewatch.eu/contribute/>).

²⁶⁰ See Report on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence (10675/2000 – C5-0427/2000 – 2000/0821(CNS)) and on the initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence (10676/2000 – C5-0426/2000 – 2000/0820(CNS)), 25 October 2000 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2000-0315+0+DOC+WORD+V0//EN>).

The European Parliament had already foreseen the danger of penalising humanitarian aid; therefore, the main critique in its report was the lack of distinction between organised criminal groups and humanitarian actors, as can be seen in the speech by Mr. Ozan Ceyhun (PSE) (rapporteur from Germany) in the plenary debate:

While the criminal networks trading in human beings must be combated, NGOs or churches and other similar organizations which offer humanitarian aid to persecuted human beings must not be treated as criminals. For this reason, it was very important to define facilitation and the honest facilitator precisely. The text of the French initiative did not distinguish between individual and organized facilitation or between commercial and moral facilitation. That is why a correction was crucial.²⁶¹

The original proposal defined the smuggling of migrants as “the act of facilitating intentionally, by aiding directly or indirectly, the unauthorized entry, movement or residence”.²⁶² Thus, the lack of any criteria of financial gain in the definition of the offence was denounced by MEPs as dangerous. The report explained that anyone interacting with undocumented migrants could fall under the wide scope of criminal liability, especially migrants’ relatives and humanitarian actors.²⁶³ Yet, it would be contrary to the definition of migrant smuggling in Article 27 of the Schengen Convention²⁶⁴ and to most national legislation. To exclusively target organised criminal groups, the European Parliament amended Article 1 of the General Offence:

Each Member State shall take the measures necessary to ensure that the act of facilitating intentionally *for purposes of direct or indirect gain*, by aiding directly or indirectly, the unauthorized entry, movement or residence in its territory of an alien who is not a national of a Member State of the European Union is regarded as an offence.²⁶⁵

The European Parliament reinforced it in Amendment (6), recital 3: “Consequently measures should be taken to combat the aiding of illegal immigration, for purposes of direct and indirect gain, whether in connection with unauthorized crossing of the border in the strict sense or for the purpose of sustaining networks that exploit human beings”.²⁶⁶ The purpose of specifying direct and indirect gain was justified as a way to extend the scope of criminal liability to anyone taking advantage of undocumented migrants: “It should also be made clear that such gain should be either direct or indirect, depending on the nature of the activities, direct financial gain being that derived from the direct organization of and participation in the offences in question, whilst indirect financial gain is that derived from the work done by immigrants.”²⁶⁷

Moreover, the European Parliament proposed a set of specific amendments in order to provide more legal certainty for the protection of those who act with the intent to provide humanitarian assistance. In Amendment 11, it adds to Article 4: “Associations, organizations or other legal persons acting for humanitarian reasons shall be immune from criminal prosecution”.²⁶⁸ The safeguard is also reinforced in the same article when specifying what is considered humanitarian assistance in Amendment 12: “Legally recognized organizations and associations whose aims include defending, protecting and promoting aliens who are not nationals of an EU Member State shall not be held liable in respect of the aid referred to in Articles 1 and 2 when they act out of humanitarian reasons”.²⁶⁹ Again, it added to Article 3 more clarity to the exemption of civil society organisations with Amendment 7:²⁷⁰ “The legal persons referred to in this Article, and also their agents, representatives and

²⁶¹ Plenary debates. Wednesday, 14 February 2001, Strasbourg (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20010214+ITEM-012+DOC+XML+V0//EN&language=EN>).

²⁶² Report on the initiative of the French Republic (2000), op. cit., p. 8.

²⁶³ Ibid., p. 10.

²⁶⁴ See in the Schengen Convention. Article 27 (emphasis added): 1. The Contracting Parties undertake to impose appropriate penalties on any person who, *for financial gain*, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party’s laws on the entry and residence of aliens.

²⁶⁵ Report on the initiative of the French Republic (2000), op. cit., p. 7, emphasis added.

²⁶⁶ Ibid.

²⁶⁷ Ibid., p. 8.

²⁶⁸ Ibid., p. 10.

²⁶⁹ Ibid.

²⁷⁰ Ibid., p. 16, emphasis added.

employees, shall not be held liable in cases involving *legally recognized non-profit-making organizations and associations* whose aims include defending, protecting and promoting aliens who are not nationals of an EU Member State and whose activities are motivated by humanitarian considerations”.

Some other parliamentary propositions in the report would have been very important to tackle the negative unintended consequences of the Facilitators’ Package to smuggled migrants, as previously mentioned by the Carrera et al. (2016) study for the European Parliament’s LIBE Committee. Amendment 9 to Article 2 aimed at exempting smuggled migrants from criminalisation: “Aliens whose illegal entry is assisted by this offence *shall not be prosecuted as parties to that offence.*”²⁷¹ The European Parliament explained in its report that “a clear distinction should be made between unauthorized entry and the act of aiding unauthorized entry”.²⁷² Furthermore, many irregular migrants “are refugees who are granted political asylum in the Union after entering it”.²⁷³ Therefore, the rectification would have created a safeguard for victims of smuggling and, as already explained in the relevant studies mentioned above, it would have removed one of the bases for criminalising humanitarian assistance.

Amendment 6, for Article 3(3a) intended to protect service providers, specifically safeguarding carriers from sanctions when they are transporting persons who are seeking asylum within the EU:

(3a) The legal persons referred to in this Article, and also their agents, representatives and employees, shall not be held liable for the commission of an offence defined by Directive 2000/.../EC in cases where aliens who are not nationals of an EU Member State and who have been transported to an EU Member State wish to seek the protection provided under the 1951 Geneva Convention on the Protection of Refugees.²⁷⁴

This approach is different from everything proposed by the relevant studies analysed above. It has mainly focused on the exemption from criminalisation of landlords as service providers, in particular in situations relating to the right to seek asylum in the EU. This is an interesting approach, but it is one that appears to have been abandoned by the European Parliament. The amendment was in full compliance with the EU’s commitment to protect those fleeing persecution when holding the idea that no one, besides the state receiving an asylum demand, has the power to interfere with the movement of someone fleeing persecution:

Carriers cannot in any way be held liable for transporting persons who request asylum immediately upon arrival within the territory of a Member State, since we would otherwise be requiring them to prevent asylum-seekers from travelling and from requesting the protection provided under the 1951 Geneva Convention. Furthermore, carriers have neither the ability nor the authority to assess the admissibility of an application for asylum and hence under no circumstances can they be directly or indirectly persuaded to carry out an assessment of suitability. Sanctions must be proportionate and balanced and the punishment must be made to fit the crime.²⁷⁵

Such a possibility for asylum seekers to arrive in the EU while using ordinary means of transport would eliminate or reduce the opportunities for migrant smugglers to profit from their situation. Such an article would have been a major contribution to stemming irregular arrivals, by simply allowing asylum seekers to reach EU regularly. However, as has been discussed in the European Parliament, in the context of Global Compacts on Refugees, besides resettlement and family reunification there are no viable legal pathways for genuine asylum seekers, as the proposal on Humanitarian Visas is still pending.²⁷⁶ Similarly legal migration channels for purposes of

²⁷¹ See in Article 2 “Each Member State shall take the measures necessary to ensure that participation, as an accomplice or instigator, in the offence referred to in Article 1 shall be considered to be an offence, as shall also the attempt to commit such an offence. *Aliens whose illegal entry is assisted by this offence shall not be prosecuted as parties to that offence*”, emphasis added.

²⁷² Report on the initiative of the French Republic (2000), op. cit., p. 9.

²⁷³ *Ibid.*, p. 9.

²⁷⁴ *Ibid.*, p. 15.

²⁷⁵ *Ibid.*

²⁷⁶ See European Parliament’s legislative train schedule here - <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-humanitarian-visas-%E2%80%93-amendment-of-the-eu-visa-code>.

employment and education remain very limited for sub-Saharan countries.²⁷⁷ This pushed them into irregularity, that in turn has further increased the restrictive trend in EU migration and border control policies. Such policies are increasingly assigning responsibility for assessing migrants' papers to civil society and other third-party actors (e.g. landlords,²⁷⁸ lawyers, doctors, journalists, academia²⁷⁹ or service providers in general).

The statement by Cecilia Malmström (ELDR) (SV) during a plenary debate on the topic summarises well the implications of the Facilitators' Package initiative: the initiative proposed by France only deals with a small part of these incredibly complex issues concerning migration and refugees.²⁸⁰ Alima Boumediene-Thiery (FR) (Verts/ALE) also recalls "that the figures for overall immigration have remained stable in recent years, proving that restrictive policies on immigration and visas have succeeded only in increasing the number of illegal immigrants".²⁸¹

Thus, in order to control irregular migration, the European Parliament previously proposed a more holistic approach together with a security logic.²⁸² As further explained, policies in that vein are doomed to fail without a common immigration and asylum policy.²⁸³ The latter has major relevance as "[r]efugees and persons refused political asylum are an important group of 'illegal immigrants' in the Union. For this reason, a common asylum policy covering everything from asylum procedure to social security benefits is particularly important."²⁸⁴

Therefore, the European Parliament recommended amending recital 2:

The Treaty establishing the European Community and the Treaty on European Union provide for the gradual creation of an area of freedom, security and justice, which means includes, inter alia, that illegal immigration must be combated. the implementation of a common immigration and asylum policy covering family reunion, the right of residence and an integration policy, as well as the combating of illegal immigration.

Moreover, it creates Recital 2a:

In this connection it is particularly important to lay the foundations of a common asylum and immigration policy, to settle a common asylum procedure and, in addition, to improve the legal status of refugees.²⁸⁵

The deficiencies found in the legal framework were numerous, and despite proposing the above-mentioned amendments, the European Parliament rejected the French proposal on 15 February 2001. Regardless, the Facilitators' Package was adopted by the Council on 28 November 2002.

The Parliament has nonetheless kept its stance on the issue and insisted over the years on a revision of the EU *acquis* on smuggling. Notably, in its annual report on fundamental rights (2014), it reiterated the need to change the law to avoid penalising people for assisting migrants at sea, urging "the EU and the Member States to amend or review any legislation sanctioning people assisting migrants in distress at sea" and "the Commission to review Council Directive 2002/90/EC defining the sanctions in case of facilitation of unauthorized entry, transit and

²⁷⁷ European Parliament (2018), Progress on UN Global compacts for safe, orderly and regular migration and on refugees (2018/2642(RSP)), P8_TA(2018)0118, Strasbourg, 18 April.

²⁷⁸ FRA (2014), p. 8.

²⁷⁹ D. Batty (2018), "UCL row over email stating immigration-check fine of £20,000". *The Guardian*, 12 July (<https://www.theguardian.com/uk-news/2018/jul/12/ucl-row-email-immigration-check-fine-draconian-discriminatory>).

²⁸⁰ Plenary Debates, "Facilitation of Unauthorized entry and residence", 2001 (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20010214+ITEM-012+DOC+XML+V0//EN&language=EN>).

²⁸¹ *Ibid.*

²⁸² *Ibid.*

²⁸³ Report on the initiative of the French Republic (2000), *op. cit.*, p. 5.

²⁸⁴ *Ibid.*, p. 6.

²⁸⁵ *Ibid.*, p. 6.

residence in order to clarify that providing humanitarian assistance to migrants at sea who are in distress is to be welcomed and not an action which should ever lead to any form of sanctions".²⁸⁶

Meanwhile, that same year (2014), the FRA published its report on the Facilitators' Package. This also shed light on the problem of sanctioning rescuers at sea, more specifically drawing attention to the criminalisation of fishermen.²⁸⁷ In 2015, the LIBE Committee asked CEPS to conduct a study on the subject,²⁸⁸ as previously mentioned in section 2.1. In 2016, the petition from the lawyer Paula Schmid Porras was addressed to the PETI Committee reporting the same concerns. In April of the following year the European Parliament noted with respect to the forthcoming REFIT that the Commission was "considering a revision of Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence" and took "the view that anyone who provides different forms of humanitarian assistance to those in need should not be criminalized and that Union law should reflect that principle".²⁸⁹

Yet in spite of the wide array of evidence and long history of controversy surrounding the legislation, the REFIT concluded that "based on the findings of the studies supporting this evaluation as well as the opinions and information gathered through broader stakeholder consultations, there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators Package at this point in time".²⁹⁰

2.3.2 Calls from the European Parliament for the exemption of humanitarian assistance

The European Parliament reaffirmed its commitment to humanitarian assistance in its resolution of 18 April 2018 on progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees, calling "for the non-criminalization of humanitarian assistance" and for "greater search and rescue capacities for people in distress, for greater capacities to be deployed by all states, and for the support provided by private actors and NGOs in carrying out rescue operations at sea and on land to be acknowledged".²⁹¹

Given the unlikely reform of the Facilitators' Package in the near future and the Commission's very vague proposals in the REFIT for improving the implementation of the EU legislation, the European Parliament has decided to take action on this urgent matter. On 5 June 2018, MEPs from the LIBE Committee voted on a non-legislative resolution with a number of demands for the Commission and Member States for preventing the criminalisation of humanitarian assistance. This was adopted by the LIBE committee with 30 votes to 16 and 2 abstentions and confirmed by plenary on 2 July 2018.²⁹² The main concern expressed in the resolution was "the unintended consequences of the Facilitators Package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole".²⁹³ The resolution

[u]rges the Commission to adopt guidelines for Member States specifying which forms of facilitation should not be criminalized, in order to ensure clarity and uniformity in the implementation of the current acquis, including Article 1(1)(b) and 1(2) of the Facilitation Directive, and stresses that clarity of

²⁸⁶ See para. 39 of the European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)), P7_TA(2014)0173, 27 February 2014.

²⁸⁷ FRA (2014), *op. cit.*, p. 2.

²⁸⁸ Carrera et al. (2016), *op. cit.*

²⁸⁹ See para. 88 of the European Parliament (2016), Resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), P8_TA(2016)0102, 12 April.

²⁹⁰ European Commission (2017) REFIT Evaluation, *op. cit.*, p. 35.

²⁹¹ European Parliament (2018), Progress on UN Global compacts for safe, orderly and regular migration and on refugees (2018/2642(RSP)), P8_TA(2018)0118, Strasbourg, 18 April.

²⁹² Guidelines for Member States to prevent that humanitarian assistance is criminalised: extracts from the vote and statement by Claude MORAES (S&D, UK), Rapporteur (<https://multimedia.europarl.europa.eu/documents/20143/25366322/1157515%5BSD-EN%5D.pdf/9a47c848-da0b-ba97-f673-4f608070ef2a?download=true>).

²⁹³ See point 2 of the text adopted by the European Parliament (2018), Guidelines for Member States to prevent humanitarian assistance from being criminalized (2018/2769(RSP)), P8_TA(2018)0314, Strasbourg, 2 July.

parameters will ensure greater consistency in the criminal regulation of facilitation across Member States and limit unwarranted criminalization.²⁹⁴

In addition, MEPs also called for EU countries to transpose into their national legislation the clause to exempt humanitarian assistance from criminal liability.²⁹⁵ This decision is therefore in line with the recommendations made by the FRA and UNODC mentioned in section 2.1 of this study. Finally, in order to tackle the methodological challenges of finding information on the number of arrests, prosecutions and convictions of humanitarian actors encountered by the evaluations (namely the ICF, the Carrera et al. (2016) study and the REFIT), MEPs called for Member States

to put in place adequate systems to monitor the enforcement and effective practical application of the Facilitators Package, by collecting and recording annually information about the number of people arrested for facilitation at the border and inland, the number of judicial proceedings initiated, the number of convictions, along with information on how sentences are determined, and reasons for discontinuing an investigation.²⁹⁶

They also called for a definition of what is not criminal in humanitarian assistance and for a more holistic approach on migration and migrant smuggling, in cooperation with third countries.

²⁹⁴ See 7 of the text adopted by the European Parliament on the Guidelines (2018).

²⁹⁵ See point 6 of the text adopted by the European Parliament on the Guidelines (2018).

²⁹⁶ Ibid.

3. POLICING CIVIL SOCIETY ACTORS: LEGAL/POLICY CHANGES IN EU MEMBER STATES AND CASES OF CRIMINALISING HUMANITARIAN ASSISTANCE AND SOLIDARITY

KEY FINDINGS

- As discussed in section 2, the deficiencies of the Facilitators' Package remain critically important. In particular, the absence of clear guidance for national legislators within the EU legal framework on what should (or should not) be a base crime and regarding what the safeguard provisions should be results in complex and heterogeneous implementation. While the EU has competence to enforce existing standards, the vagueness and wide margin of appreciation given to Member States makes it hard to implement in practice. For example, even in Member States where the humanitarian exemption is applied, humanitarian actors acting without profit motives have still been investigated and prosecuted, albeit eventually acquitted.
- Legal and policy changes have enabled various modes of CSA policing through a range of different mechanisms that hamper and preclude assistance to refugees and other migrants. Two of the most dangerous examples come from Italy and Hungary.
- In Hungary, the 'Stop Soros' package has outlawed certain activities of CSAs: sharing information and assistance in filing asylum claims have been criminalised as offences related to migrant smuggling. In addition, immense pressure has been exerted to prevent Hungarian CSAs from accessing funding from outside the country and citizens have been discouraged from supporting the CSAs assisting migrants on the grounds that they might also be incriminated for supporting migrant smuggling. Such possibilities for judicial and fiscal harassment have seriously compromised the independence and watchdog role of civil society.
- In Italy, a range of accusations against SAR NGOs have stoked suspicion and led to disciplinary actions. Italian authorities have imposed a new binding code of conduct to discourage and preclude civil society from conducting SAR activities. Unprecedented policing and criminalisation of SAR NGOs have resulted in many organisations discontinuing their activities. In 2016, at least 10 NGOs were operational in the Mediterranean, including Jugend Rettet, Sea Watch, Sea-Eye, LifeBoat, SOS Méditerranée and Mission Lifeline from Germany. At the end of November 2018, the Aquarius ship halted operations after being pushed around EU Member States without permission to disembark survivors.
- Formal prosecutions on the grounds of 'migrant smuggling' have been started against CSAs that seek to uphold the rights of asylum seekers and undocumented migrants. In the majority of cases so far, the charges have subsequently been dropped, but damage has been done to both the reputations of such actors and to societal trust in the rule of law more broadly.

3.1 Legal and policy changes targeting CSAs providing assistance to asylum seekers and undocumented migrants

Section 3 explores the key legal and policy changes that have taken place since 2016 in three of five selected EU Member States that targeted CSAs assisting refugees and migrants and/or created or enabled an environment for their judicial harassment. These developments cover instances of policing that go beyond the criminal prosecutions on the grounds provided in the Facilitators' Package but which still employ the argument of fighting migrant smuggling as their primary justification. The analysis looks in detail at the example from Hungary on Lex NGOs and the changes in the provisions of the Hungarian Criminal Code. It elaborates on the code of conduct passed in Italy, which has had impacts on the humanitarian NGOs involved in SAR activities in the Central Mediterranean. It also discusses proposals to conduct house searches in Belgium without a proper house search

order when the purpose is to find migrants in an irregular situation. On Greece and France, the analysis is more focused on the actual application of current laws and instances of the policing of CSAs.

3.1.1 Hungary: Policing CSAs

In Hungary, after the elections in 2010, the Fidesz-led government started to slowly undermine the rule of law checks and balances.²⁹⁷ The attacks on CSAs, and in particular on leading humanitarian and human rights NGOs, were part of this broader agenda.²⁹⁸ Thus, the policing of CSAs in Hungary started prior to the so-called European humanitarian refugee crisis. From 2013, civil society organisations started to face increasing policing by government campaigns and national authorities.²⁹⁹ The ruling party started spreading suspicion with various defamatory messages that targeted leading humanitarian and human rights NGOs.³⁰⁰ The suspicion was followed by intimidation and harassment – police raids were conducted on the offices of NGOs.³⁰¹ These were unlawful.³⁰² Organisations that received funding from the EEA and Norway Grants NGO Fund were also subject to suspicion and disciplinary actions.³⁰³ Initially, these actions were justified by the danger of foreign political interference in the country due to NGOs' foreign-based funds. Notably, the campaign against the Hungarian-American philanthropist, George Soros, illustrates the situation in Hungary. Soros was the personalisation of Western liberal values, which were seen as antagonistic to the Hungarian national government; as a result, Soros-related institutions and foundations, such as the Central European University, the Open Society Foundations and their grantees have been severely targeted in the 'Stop Soros' package.³⁰⁴

In summer 2015, asylum seekers and refugees coming predominantly from civil war-torn Syria were prevented from boarding trains going to Austria and started to camp at Keleti station. This was met by a mix of compassion and public panic. The government started to exploit anti-migrant sentiments and xenophobia in the Hungarian media and in official speeches.³⁰⁵ Subsequently, CSAs acting in humanitarian relief to this population became an object of political persecution. Since then, the accusations against leading humanitarian and human rights organisations have gone from them colluding with smugglers to being an active 'pull factor' attracting illegal migrants and consequently a threat to national security.³⁰⁶ The government has been trying to hamper CSAs' activities through new controversial laws and policies targeting asylum seekers and migrants, and those CSAs that assist or mobilise for their rights.

Box 1 details the changes in the Hungarian Criminal Code where the definition of migrant smuggling and related crimes were broadened so as to enable more active policing of CSAs. Later on, a separate law (known as Lex NGO)

²⁹⁷ P. Bárd (2017), "The Open Society and Its Enemies: An attack against the CEU, academic freedom and the rule of law", CEPS Policy Insight No. 2017/14, CEPS, 14 April 2017.

²⁹⁸ M. Szuleka (2018), "First Victims or Last Guardians? The Consequences of Rule of Law Backsliding for NGOs: Case Studies of Hungary and Poland", CEPS Paper in Liberty and Security in Europe No. 2018-06, CEPS, Brussels, 24 April (<https://www.ceps.eu/publications/first-victims-or-last-guardians-consequences-rule-law-backsliding-ngos-case-studies>).

²⁹⁹ The Hungarian Helsinki Committee (2017b), "Timeline of governmental attacks against Hungarian civil society organisations" 7 April (https://www.helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_07042017.pdf).

³⁰⁰ "The Metropolitan Court of Budapest in its first instance ruling found that in the 'National Consultation' questionnaire, the Cabinet Office of the Prime Minister had violated the Hungarian Helsinki Committee's right to good reputation." In the Hungarian Helsinki Committee (2018a), "Helsinki Committee wins lawsuit against cabinet office over Stop Soros national consultation", 28 February (<https://www.helsinki.hu/en/hhc-wins-lawsuit-against-cabinet/>).

³⁰¹ Atlatzso (2014), "A Pizkos Tizenháromra vadászott a rendőrség az Ökotársnál és a Demnetnél", 8 September (<https://atlatzso.hu/2014/09/08/a-pizkos-tizenharomra-vadaszott-a-rendorseg-az-okotarsnal-es-a-demnetnel/>).

³⁰² HVG (2015), "A bíróság helyt adott az Ökotárs panaszának – jogellenes volt a házkutatás", 19 January (https://hvg.hu/itthon/20150129_A_birosag_helyt_adott_az_Okotars_panaszan).

³⁰³ Hungarian Helsinki Committee (2017a), "Bill on NGOs receiving foreign funds was submitted to the Parliament", 12 April (<https://www.helsinki.hu/en/bill-on-ngos-receiving-foreign-funds-was-submitted-to-the-parliament/>).

³⁰⁴ The Hungarian Helsinki Committee (2017b), op. cit.

³⁰⁵ European Commission against Racism and Intolerance (ECRI) (2016), "General Policy Recommendation no. 16, On Safeguarding Irregularly Present Migrants from Discrimination", *European Commission against Racism and Intolerance*, Council of Europe, Strasbourg.

³⁰⁶ The Hungarian Helsinki Committee (2017b), op. cit.

was passed in Hungary, which limits access to foreign funding. EU funding for CSAs working on migration was also made virtually inaccessible, putting them in a very vulnerable position. The attack against CSAs working with refugees and other migrants culminated in 2018 with the Stop Soros package. This law criminalises a range of activities deemed to be related to migrant smuggling; problematically for civil society, these include the monitoring of human rights violations at border zones, the distribution of information to asylum seekers or undocumented migrants, as well as assistance with filing an asylum application. The law also classifies individual donations to such organisations as the financing of migrant smuggling activities. Thus, the policing of CSAs takes many shapes in Hungary from suspicion and intimidation, to judicial and fiscal harassment, outlawing in substance the activities of humanitarian and human rights organisations operating in this field.

Box 1. Hungary: Extending the definition of ‘migrant smuggling’ in the Criminal Code, 2015–17

In 2015, new laws were introduced to Section 353 of the Hungarian Criminal Code on ‘Illegal Immigrant Smuggling’, which entered into force on 15 September 2015.³⁰⁷ These new measures focus mainly on fighting the facilitation of entry and the protection of the national borders. They operate in two main ways:

First, through tougher penalties, in which there has been an increase in the time of imprisonment for the felony of facilitation of entry and border damage.³⁰⁸ In addition, the law foresees several ways to increase the penalty to 20 years with aggravations, such as for acting in an organised manner or using violence against migrants.³⁰⁹

Second, new types of crimes have been introduced to the code to criminalise migrants³¹⁰ and those mobilising for their rights.³¹¹ “Section 352/B criminalises anyone who ‘destroys and vandalises the barrier’ with one to five years’ imprisonment.”³¹² In addition, aggravations can increase the penalties for the offence, such as (c) *by participating in civil disturbance*.³¹³ These new legislative amendments evidently have the intent to intimidate civil society and migrants, in order to discourage disobedience or protests against anti-migration policies. Another offence has been added related to protesting and obstructing the erection of fences to prevent asylum seekers and irregular migrants from entering the country. The new law has thus introduced a new misdemeanour “punishable with one year of imprisonment for those who ‘obstruct the construction or maintenance of the barrier’.”³¹⁴ Such broad legislation could criminalise any CSA for contestation with police and border guards as well as with Hungarian ‘border hunters’.³¹⁵

The Hungarian Criminal Code provisions on migrant smuggling and related offences, have not only been changed, but also actively used by national authorities to prevent irregular migration.³¹⁶ Notably, the police have begun to enforce more thoroughly the obligation to report irregular migrants staying and residing in Hungary.³¹⁷ The legal and policy changes in Hungarian immigration and asylum law have become a source of concern for CSAs.³¹⁸ Such laws and policies have had a chilling effect and led to the withdrawal of activities in the border zones; possibilities for shelter for vulnerable migrants have also diminished due to great uncertainty regarding

³⁰⁷ Carrera et al. (forthcoming), op. cit., p. 79.

³⁰⁸ Section 353 (2) on the Criminal Code (<http://www.refworld.org/pdfid/4c358dd22.pdf>).

³⁰⁹ Section 353(3) (4) (5) Act C of 2012 of the Criminal Code. Carrera et al. (forthcoming), op. cit. p. 80.

³¹⁰ Section 352/A, of Act C of 2012 of the Criminal Code, criminalises ‘any person who enters the territory of Hungary by unlawfully crossing the barrier’ with imprisonment of up to three years. Ibid., p. 80.

³¹¹ Section 353 from paragraph (1) to (6), of Act C of 2012 of the Criminal Code. Ibid.

³¹² Ibid.

³¹³ Section 352/B (c) of Act C of 2012 of the Criminal Code. Ibid., p. 81.

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Ibid., p. 84.

³¹⁷ Section 208 of the Hungarian Petty Offences Act states. Ibid., p. 82.

³¹⁸ Ibid., p. 84.

what services CSAs can provide.³¹⁹ CSAs assisting refugees and other migrants have also reported an increased hostility towards them from the state institutions and society at large.

The Hungarian Criminal Code was once again extended as part of the Stop Soros package (see Box 4).

Box 2. Hungary: Lex NGO and other measures targeting the financial independence of CSAs

Lex NGO (Act LXXVI of 2017 on “Transparency of Organizations Receiving Foreign Funds”) entered into force in April 2017. It was created under the pretence of fighting other areas of crime – money laundering and terrorism.³²⁰ However, this law does not cover all types of civil society groups carrying the same legal status of ‘association’ or NGO. This law exempts faith-based associations that are pursuing religious activities or which are founded by that date and other types, such as sports associations.³²¹ Therefore, it indicates the government’s intentions to target, stigmatise, intimidate, silence and consequently hamper the activities of a certain segment of civil society that is active in a public debate and promotes liberal and European values, including fundamental rights.³²²

The legislation requires that all civil society organisations receiving at least HUF 7.2 million per year have to register as foreign-funded organisations.³²³ Additionally, they must publish online detailed information about their donors, and note in all documents, press statements, websites and publications the following statement: “This organisation is funded by foreigners.”³²⁴ This has an extremely negative effect on their image, as conservative politicians inflame and spread within society the presumption that organisations receiving international funds lobby for foreign interests in Hungarian politics.³²⁵

These measures are likely to dissuade domestic and international donations as well as affect civil society organisations’ credibility within Hungarian society. Such financial pressure hinders the continuation of their activities; meanwhile, non-compliance has even worse consequences. The law foresees very high fines and ultimately the revocation of the entity’s legal status and its dissolution.³²⁶ For instance, the Hungarian Helsinki Committee, one of the leading human rights NGOs that provides humanitarian and legal assistance to asylum seekers, refugees, detainees and victims of law enforcement violence, refused to register as ‘foreign funded’. Subsequently, its cooperation agreements with the state were terminated in October 2017.³²⁷

³¹⁹ Ibid.

³²⁰ F. La Bruyère (2017), « Les ONG hongroises sous étroite surveillance », *RFI*, 13 June (<http://www.rfi.fr/emission/20170613-ong-hongroises-sous-etroite-surveillance>).

³²¹ Article 1 (4) (a) and (c), Act LXXVI of 2017 on the Transparency of Organisations Receiving Foreign Funds. Unofficial translation by The Hungarian Helsinki Committee (2017c) (<https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>).

³²² Bárd (2017), op. cit.

³²³ Act LXXVI of 2017, on the Transparency of Organisations Receiving Foreign Funds, Article (2): “amount specified in Article 6 paragraph (1) (b) of the Act on Money Laundering”. Unofficial translation, by The Hungarian Helsinki Committee (2017c), op. cit.

³²⁴ Article 2 (5), Act LXXVI of 2017, on the Transparency of Organisations Receiving Foreign Funds. Unofficial translation, by The Hungarian Helsinki Committee (2017c), op. cit.

³²⁵ Hungarian Helsinki Committee (2017d), “What Is the Problem with the Hungarian Law On Foreign Funded NGOs?”, 10 October (<https://www.helsinki.hu/en/what-is-the-problem-with-the-hungarian-law-on-foreign-funded-ngos/>).

³²⁶ Article 3, Act LXXVI of 2017, on the Transparency of Organisations Receiving Foreign Funds. Unofficial translation, by The Hungarian Helsinki Committee (2017c), op. cit.

³²⁷ The Hungarian Helsinki Committee (2017b), op. cit.

The Lex NGO was widely criticised by several international and regional human rights bodies, such as the Council of Europe (CoE) Commissioner for Human Rights,³²⁸ CoE Expert Council on NGO Law,³²⁹ UN Special Rapporteur on the situation of human rights defenders³³⁰ and the Venice Commission.³³¹ The European Parliament also raised critical questions with the Hungarian prime minister in numerous debates on the rule of law situation in Hungary.³³² In December 2017, seven months after the legislation had passed, the European Commission launched an infringement procedure against Hungary for violating the fundamental rights of freedom of expression and association, enshrined in the EU Charter, in addition to infringing national, regional and international law.³³³ Yet, when the Hungarian government revised this law in July 2018, it did so as part of the Stop Soros package³³⁴ (see Box 4).

Box 3. Hungary: Obstacles to receiving funding from the Asylum, Migration and Integration Fund for CSAs

Another governmental tactic to pose financial constraints on the associations is to hamper their access to the Asylum, Migration and Integration Fund (AMIF) from the EU. In Hungary, authorities have decided not to provide 25% of AMIF co-financing for civil society, “meaning that civil society organisations must independently source financing for any proposed AMIF initiative”.³³⁵ The reluctance to provide AMIF co-funding should be seen in the light of Lex NGO, which is aimed at spreading suspicion about ‘foreign funding’. Thus, by default any potential civil society applicant willing to access AMIF funding needs to first secure a grant from outside.

If a civil society organisation is successful in getting 25% co-financing, the Hungarian government exerts financial control over the successful AMIF grantee. The Hungarian government specified that NGOs can only receive AMIF funding if they give to the Ministry of Interior “a blanket authorisation to directly withdraw money from the organisation’s bank account at any point during and after the project implementation”.³³⁶ This makes financial, political and operational independence from the Ministry of Interior for any NGO receiving EU funding highly unlikely.

³²⁸ Commissioner for Human Rights (2017), letter to Mr László KOVÉR, Speaker of the National Assembly of Hungary, 26 April ([https://rm.coe.int/ref/CommDH\(2017\)14](https://rm.coe.int/ref/CommDH(2017)14)).

³²⁹ Expert Council on NGO Law (2017), “Opinion on the Hungarian Draft act on the transparency of organisations supported from abroad”, 24 April (<https://rm.coe.int/168070bfbb>).

³³⁰ United Nations Special Rapporteur on the situation of human rights defenders (2017), “Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders”, REFERENCE: OL HUN 2/2017, 9 May (<https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-HUN-2-2017.pdf>).

³³¹ CoE Venice Commission (2017), “Opinion on the Draft Law on the transparency of organisations receiving support from abroad”, 20 June ([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)015-e)).

³³² For example, European Parliament (2017a), “Resolution of 17 May 2017 on the situation in Hungary (2017/2656(RSP))”; J. Sargentini (2018), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur Judith Sargentini, Draft Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, Brussels, 11 April.

³³³ European Commission (2017), “Infringements -European Commission refers Hungary to the Court of Justice for its NGO Law”, IP-17-5003, 7 December.

³³⁴ The Hungarian Helsinki Committee (2018), unofficial translation of “Chapter X – On the Special Tax on Immigration” (<https://www.helsinki.hu/wp-content/uploads/Special-immigration-tax-as-adopted-20-July-2018.pdf>).

³³⁵ Ibid.

³³⁶ R. Westerby (2018), “Follow the Money: Assessing the use of EU Asylum, Migration and Integration Fund (AMIF) funding at the national level”, Brussels: UNHCR and ECRE, January, p. 41 (<https://www.ecre.org/wp-content/uploads/2018/01/follow-the-money-AMIF-UNHCR-ECRE-23-11-2018.pdf>).

Box 4. Hungary: The Stop Soros package changes in the Criminal Code & tax regulations

The Stop Soros package of the same year is an outcome of the escalation from the initial changes in the Hungarian Criminal Code, Lex NGO and exertion of control over the NGOs through the EU's AMIF funding mechanism. It presents an example of judicial and fiscal harassment and intimidation, as a form of policing targeting humanitarian and human rights CSAs. The Stop Soros package, together with Bill T/333 and the Seventh amendment to the Basic Law (Bill T/332) entered into force in July 2018.³³⁷

The change in the Criminal Code – judicial harassment

The amendment extended criminal liability to a wider range of CSAs, when providing relief or colluding with humanitarian NGOs. Bill T/333 amended Section 353/A to Section 353 under Act C of 2012 of the Penal Code, to fight the facilitation of illegal immigration.

Section 11 of the bill criminalises any organisation in which its activities³³⁸ comprise the facilitation of a migrant's irregular entry and residence with an aim to obtain a residence permit³³⁹ or to allow the initiation of an ill-founded asylum procedure.³⁴⁰ Anyone who provides financial means for these actions, or who regularly carries out such activities is more severely punished, as the penalty can go up to a year of imprisonment. The offence is also aggravated when the organised activities are committed for financial gain, providing support to more than one person or close to the borders. Moreover, paragraph 5(a) includes in the offence persons who organise border monitoring,³⁴¹ prepare or distribute information materials or commission such activities,³⁴² or who build or operate a network for doing so.³⁴³ Section 11 of the Seventh amendment to the Basic Law (Bill T/332) thus effectively criminalises as migrant smuggling-related crimes the 'initiation of an asylum procedure' or the "distribution of informational material to asylum seekers and irregular migrants and refugees".³⁴⁴

The change in tax law – fiscal harassment

The Stop Soros legislation includes a provision that increases the fiscal pressure even more with an additional 25% of the tax base for organisations financing, working with and/or promoting migration.

The law foresees as activities supporting migration:

- a) carrying out media campaigns and media seminars and participating in such activities;
- b) organising education;
- c) building and operating networks; or
- d) propaganda activities that portray immigration in a positive light.³⁴⁵

Potential impacts

³³⁷ The Hungarian Helsinki Committee (2018b), op. cit.

³³⁸ Section 353/A (1) Amending Act C of 2012 on the Penal Code. Unofficial translation by The Hungarian Helsinki Committee (2018c), op. cit.

³³⁹ Ibid.

³⁴⁰ Ibid.

³⁴¹ Section 353/A (5) a) Amending Act C of 2012 on the Penal Code, op. cit.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Section 353/A (1) a) Amending Act C of 2012 on the Penal Code. Unofficial translation by The Hungarian Helsinki Committee (2018c) of Bill T/333 amending certain laws relating to measures to combat illegal immigration May 2018, Budapest (<https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf>).

³⁴⁵ The Hungarian Helsinki Committee (2018d), op. cit.

According to the section on the general reasoning of the Bill, the objective of these amendments is mainly to protect public order and public security, which are threatened since “immigration poses serious risks and is therefore a question of national security”. Moreover, it reinforces the idea that “they (the population) do not want Hungary to become an immigrant country”.³⁴⁶ However, these new provisions deeply affect more than just migrants. They are responsible for the shrinking of the space of Hungarian civil society. The new provisions aim at criminalising precisely the activities that are conducted by civil society organisations assisting migrants. In the same way, according to paragraph 2, the law attempts to outlaw people who collude with the NGOs’ ideas while also criminalising their donations to such organisations, thus once again closing the possibilities for CSAs in Hungary to get additional funding independent from government through individual donations.

Following the announcement of the Stop Soros package, international and regional bodies expressed their concern over the legislation, as summarised in the report by Judith Sargentini, calling for the activation of Article 7(1) TEU against Hungary:³⁴⁷

On 14 February 2018, the president of the Conference of INGOs (international NGOs) of the Council of Europe and president of the Expert Council on NGO Law made a statement indicating that the package does not comply with the freedom of association, particularly for NGOs dealing with migrants. On 15 February 2018, the Council of Europe commissioner for human rights expressed similar concerns. In its concluding observations of 5 April 2018, the UN Human Rights Committee expressed concerns that by alluding to the “survival of the nation” and protection of citizens and culture, and by linking the work of NGOs to an alleged international conspiracy, the legislative package would *stigmatise NGOs and curb their ability to carry out their important activities in support of human rights and, in particular, the rights of refugees, asylum seekers and migrants*. It was further concerned that imposing restrictions on foreign funding directed to NGOs might be used to apply illegitimate pressure on them and to unjustifiably interfere with their activities.

In addition, the Venice Commission and the OSCE ODIHR (Organization for Co-operation and Security in Europe, Office of Democratic Institutions and Human Rights) stated in June 2018 that such legislation violates the principle of legal certainty and constitutes an unlawful interference with the freedom of association, and in some cases also the freedom of expression. The Venice Commission furthermore highlighted that the Stop Soros package does not meet human rights or rule of law standards.³⁴⁸

3.1.2 Belgium: Policies and laws stirring suspicion, intimidation and harassment

Similar to the situation in Hungary and Italy, suspicions have been spread and exploited in Belgium about acts of solidarity by citizens and NGOs with refugees and other migrants. A new law allowing for searches of private homes in Belgium for persons in an irregular situation subject to expulsion orders was proposed as a consequence of these ‘suspicions’.

Box 5. Belgium: Proposed bill for ‘house searches’ for migrants in an irregular situation

In Belgium, the suspicion that people working in CSAs assisting refugees and other migrants ‘collude with smugglers’ or commit other crimes related to migrant smuggling – such as facilitation of transit, stay and residence – resulted in the government’s attempt to append a new article to the Immigration Act.³⁴⁹ The Belgian Minister of Justice, Koen Geens (Christian Democratic and Flemish Party (CD&V)), presented a bill for a vote in parliament with the support of Secretary of State for Asylum, Migration and Administrative Simplification Théo

³⁴⁶ “General Reasoning” in Hungarian Helsinki Committee (2018c), op. cit.

³⁴⁷ Sargentini (2018), op. cit.

³⁴⁸ CoE Venice Commission and OSCE ODIHR (2018), op. cit.

³⁴⁹ Law of 15 December 1980, on access to the territory, residence, establishment and removal of aliens.

Francken (New Flemish Alliance (N-VA)) and Deputy Prime Minister Jan Jambon (N-VA).³⁵⁰ This provision would enable the police, carrying a warrant issued by the *juge d'instruction* (investigative judge), without going through the magistrate or independent judge (which is the case now) to search residences for migrants in an irregular situation who have been given expulsion orders.³⁵¹

This bill has been extremely controversial. Francken and his party (N-VA) have been pressuring for its adoption: "We are allowed to do this with entrepreneurs, why not with people who offer a roof to 'illegals'."³⁵² Judges, lawyers, CSAs assisting refugees or other migrants as well as other political parties have strongly criticised and opposed it.

The main concerns expressed by the opposition have been the risks of lowering criminal justice safeguards and infringing the privacy and other fundamental rights of Belgium's citizens and residents;³⁵³ the instrumentalisation of the law to stir suspicion about the activities of humanitarian NGOs and citizens who act out of compassion; and the opening of new possibilities for law enforcement agents to intimidate and harass those acting in solidarity with refugees and other migrants.³⁵⁴ The negative resonance led half of the *communes* (Belgium local authorities) to vote for a motion to prevent the advancement of this legislation.³⁵⁵ Eventually, the strong resistance of local authorities and other actors mentioned above succeeded in freezing negotiations over this bill. However, for CSAs assisting asylum seekers and migrants in an irregular situation, it is still a source of concern and uncertainty as a future government could attempt to reopen negotiations over the bill.

3.1.3 France: Repressive policies towards migrants in transit that create a hostile environment for CSAs

Box 6. France: A hostile environment for CSAs assisting asylum seekers and undocumented migrants

The French government put great pressure on municipalities and law enforcement authorities to solve the issue of migrants living on the streets by the end of 2017.³⁵⁶ The only way to accomplish such an achievement in so little time would clearly lead to an intensification of the repressive approach already in place since 2015.³⁵⁷ This included the calculated dismantling of migrant camps in French cities, such as in the north of Paris,³⁵⁸ Calais and

³⁵⁰ R. Crivellaro (2018), "Le projet de visites domiciliaires reporté: "Nous avons perdu la bataille de la communication"", *RTBF*, 3 September (https://www.rtb.be/info/belgique/detail_le-projet-de-visites-domiciliaires-reporté-nous-avons-perdu-la-bataille-de-la-communication?id=10009576).

³⁵¹ RTL Info (2018), "L'Office des étrangers demande que la loi autorise la police à entrer dans une habitation pour arrêter une personne qui fait l'objet d'une mesure d'éloignement" 23 January (<https://www.rtl.be/info/belgique/societe/l-office-des-etrangers-demande-que-la-police-puisse-entrer-dans-une-habitation-pour-arreter-une-personne-qui-fait-l-objet-d-une-mesure-d-eloignement-989184.aspx>).

³⁵² L'Echo (2018), "Le projet de loi sur les visites domiciliaires mis au frigo", 21 August (<https://www.lecho.be/economie-politique/belgique/federal/le-projet-de-loi-sur-les-visites-domiciliaires-mis-au-frigo/10041620.html>).

³⁵³ Enshrined in Article 15 of the Belgian Constitution, and article 8 of the European Convention on Human Rights. See in R. M'biló (2018), "Les visites domiciliaires", Bruxelles: CPCP, Regards décalés, juin 2018 (<http://www.cpcp.be/etudes-et-prospectives/collectionregards-decales/visites-domiciliaires>).

³⁵⁴ L'Echo, "Le projet de loi sur les visites domiciliaires mis au frigo", 21 August (<https://www.lecho.be/economie-politique/belgique/federal/le-projet-de-loi-sur-les-visites-domiciliaires-mis-au-frigo/10041620.html>).

³⁵⁵ M'biló (2018), op. cit.

³⁵⁶ M. Encaoua (2017), "Emmanuel Macron ne veut plus un migrant dans la rue" *Le Parisien*, 28 July (<http://www.leparisien.fr/politique/emmanuel-macron-ne-veut-plus-un-migrant-dans-la-rue-28-07-2017-7161942.php>).

³⁵⁷ Le Point (2017), "A Paris, les migrants vivent cachés dans de minicampements", 23 September (https://www.lepoint.fr/societe/a-paris-les-migrants-vivent-cachees-dans-de-minicampements-23-09-2017-2159217_23.php).

³⁵⁸ C. Legrand (2017), "À Paris, situation tendue pour les migrants et les associations", *La Croix*, 5 September (<https://www.la-croix.com/France/Immigration/A-Paris-situation-tendue-migrants-associations-2017-09-05-1200874556>).

Dunkirk.³⁵⁹

In addition, the police adopted a stricter position against migrants situated in visible parts of the city, which is often denounced as being unnecessarily violent.³⁶⁰ Consequently, such a policy has been responsible for creating a tense environment for humanitarian assistance in the above-mentioned cities. The dispersion tactic by the police is to prevent migrants from stopping to sleep or eat at the same site.³⁶¹ By this logic, NGOs distributing material needs, food or medical help are often asked to move from their usual place of distribution³⁶² or are even prohibited by the municipalities from providing any kind of aid at all.³⁶³ Moreover, most of the time the police monitor volunteers' assistance for the same purpose.³⁶⁴ This policy creates tension: the relief provided by volunteers is perceived as a major impediment to police work as well as to the objective of politicians to fight irregular migration.

The local authorities and judicial system also play an important role in the intimidation of NGOs. A report shows a case of an intent to exert financial pressure through the harassment of donors and supporters: "At the beginning of 2018, local companies which supported the associations in the Calais Warehouse, either through donations (wood pallets, barrels, etc.) or by taking orders, were victims of pressure by the Prefecture and the Calais town hall. These companies ... were threatened [with being] exempted from public tendering if they continued supporting the associations in Calais Warehouse."³⁶⁵

The report shows another case of judicial harassment:

The members of l'Auberge des Migrants were [on] several occasions summoned by the *Direction Departementale de la Sécurité Publique*, which is part of the Police Nationale, to attend hearings on financial transactions made in the association's bank account. ... [T]he members of the organisation were called for a hearing four times since November 2017, where they were prompted to justify certain transactions.³⁶⁶

3.1.4 Italy: Policing CSAs conducting SAR activities in Italy – suspicion, intimidation, disciplining and criminalisation

Code of conduct on SAR NGOs and closure of Italian ports

In 2016, Eugenio Cusumano mentioned that already at that time "some NGOs fear their objectives [to save more lives at sea] may become victims of their own success".³⁶⁷ The presence of the NGOs near the Libyan waters has been key to preventing deaths at sea. In 2016, these organisations rescued 46,796 migrants (26% of the total),

³⁵⁹ Le Monde (2018), "Le campement de migrants de Grande-Synthe à nouveau évacué", 6 September (https://abonnes.lemonde.fr/societe/article/2018/09/06/le-campement-de-migrants-de-grande-synthe-a-nouveau-evacue_5351027_3224.html?).

³⁶⁰ C. Beaulieu (2017), "Paris: taxés de violence envers les migrants, les policiers en colère", *Le Parisien*, 13 January (<http://www.leparisien.fr/paris-75018/paris-taxes-de-violence-envers-les-migrants-les-policiers-en-colere-13-01-2017-6564948.php>).

³⁶¹ Le Point (2018), "A Paris, les campements ont disparu, pas les migrants "invisibles", 13 September (https://www.lepoint.fr/politique/a-paris-les-campements-ont-disparu-pas-les-migrants-invisibles-13-09-2018-2250961_20.php).

³⁶² Sciences Po Refugee Help (2018), "Projet de loi asile et immigration: Précarisation des droits des demandeurs d'asile", 26 February (http://refugeehelp.fr/onewebmedia/Sciences%20Po%20Refugee%20Help%20_%20Pre%CC%81carisation%20des%20demandeurs%20d'asile.pdf).

³⁶³ E. Vigny (2018), "Calais: the police harassment of volunteers", p. 21.

³⁶⁴ Le Point (2017), op. cit.

³⁶⁵ Vigny (2018), op. cit., p. 26.

³⁶⁶ Ibid.

³⁶⁷ E. Cusumano (2016). "How NGOs Took over Migrant Rescues in the Mediterranean", *EUobserver*, 1 September (<https://euobserver.com/opinion/134803>. Accessed 17 Oct. 2018).

while the majority of people were still being rescued by the Italian and European operations. The high numbers of refugees and migrants rescued by the NGO vessels nonetheless began to raise suspicion among EU agencies and national authorities from the end of 2016 onwards.

Suspicion about the activities of SAR NGOs in Italy escalated and led to the government imposing a binding code of conduct in August 2017.³⁶⁸ This setting facilitated and encouraged the criminalisation of the remaining organisations operating in the Mediterranean. It subsequently became an additional means for 'judicial harassment' of various organisations regarding their flag states, intimidation and arrests of the staff and seizures of boats, so that life-saving humanitarian operations would not continue. Such operations are seen by some border police authorities and politicians as being at odds with their primary goal of stemming the flows of refugees and other migrants in the Mediterranean. Below we further analyse some emblematic cases of policing SAR NGOs as a consequence of the code of conduct, notably Proactiva Open Arms and Jugend Rettet as well as the Eritrean priest, Mussie Zerai.

Box 7. Italy: A binding code of conduct for SAR NGOs saving lives in the Mediterranean

The government's binding code of conduct was a major attack on SAR NGOs in Italy; it institutionalised suspicion and introduced exceptional rules solely for civil society and not, for example, for merchant or government ships. In August 2017, Médecins Sans Frontières (MSF), Save the Children and Sea-Eye suspended their operations, in disagreement with the proposed code of conduct and due to security threats arising from the Libyan coast guard after the country established its SAR area, forbidding entry to humanitarian organisations.³⁶⁹ At the beginning of September, MOAS (Migrant Offshore Aid Station) also announced that they would be suspending operations in the absence of guarantees of the possibility to access a safe harbour to disembark people rescued.³⁷⁰ Thus, among the NGOs having the capability to disembark people to the shore, SOS Méditerranée, with its vessel Aquarius, remained the only big NGO rescue ship conducting fully-fledged rescue operations, with smaller vessels acting in a supporting role – Jugend Rettet's ship Luventa and Proactiva's vessel Open Arms.³⁷¹ In addition to the binding code of conduct in August 2017, the Luventa was confiscated and criminal investigations were opened by the prosecutor of Trapani. The investigation also covered the Eritrean priest Mussie Zerai.³⁷² By 18 March 2018, Proactiva's vessel Open Arms had been seized too.³⁷³

3.1.5 Greece: Policing SAR CSAs and those working in hotspots

In Greece, the Hellenic Coast Guard in cooperation with the International Maritime Rescue Federation introduced a vetting procedure for the CSAs engaged in SAR activities. As national border/coast guard authorities commented, NGOs had to become part of the Hellenic Coast Guard's grid so as not "to duplicate the efforts in one area".³⁷⁴ This has led to the departure of some SAR NGOs. However, more discouraging were the prosecutions

³⁶⁸ C. Heller and L. Pezzani (2017), "Blaming the Rescuers", *Forensic Oceanography, Forensic Architecture, Goldsmiths, London University* (<https://blamingtherescuers.org/report/>).

³⁶⁹ P. Ford (2017), "Italy sees major drop in migrant crossings from Libya to Europe. But is the cost too high?", 8 September (<https://www.csmonitor.com/World/Europe/2017/0908/Italy-sees-major-drop-in-migrant-crossings-from-Libya-to-Europe.-But-is-the-cost-too-high>).

³⁷⁰ MOAS (2017), "Moas shifts operations to South East Asia" (<https://www.moas.eu/moas-shifts-operations-south-east-asia/>).

³⁷¹ SOS Méditerranée (2017), "SOS MEDITERRANEE continues its search and rescue activities", 13 August (<http://old.sosmediterranee.org/aquarius-continues-search-and-rescue-activities/?lang=en>).

³⁷² The Independent (2017), "Charity demands return of seized rescue ship as court hearing begins", by Samuel Osborne, on 19.09.2017 (<https://www.independent.co.uk/news/world/europe/italy-refugee-rescue-ship-jugend-rettet-iuventa-libyan-smugglers-mediterranean-migrant-a7955796.html>).

³⁷³ Amnesty International (2018), "How Italy's seizure of an NGO ship exposes Europe's dangerous policy", 22.03.2018 (<https://www.amnesty.org/en/latest/news/2018/03/how-italys-seizure-of-an-ngo-ship-exposes-europes-dangerous-policy/>).

³⁷⁴ Interview with national border/coast guard authorities, 9 of June, 2017, Lesbos island, Greece.

of Team Humanity and Proem-AID. These were also discussed in the context of a petition submitted to the PETI Committee.

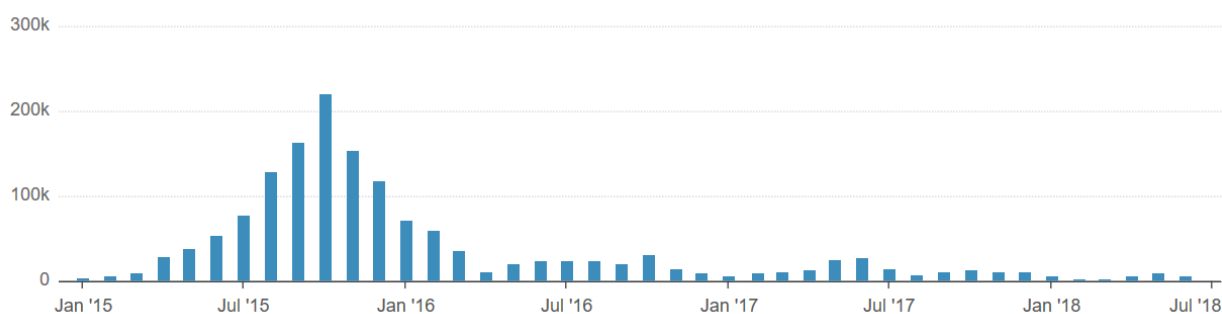
Another new type of policy in Greece requires the registration of all CSAs. The policing of CSAs in Greece is explicitly manifested as an obligation to register and implicitly as that of being 'coordinated'. An interviewee representing a civil society organisation in Lesvos explained the need to register both individual volunteers and organisations.³⁷⁵ A survey respondent explained that "if these requirements of registration were not met, the NGO and volunteers would be acting in violation of the [Greek] law and policies requiring registration". An interviewee from a civil society organisation reported the intimidation experienced by activists squatting in Lesvos who, though often known to be EU citizens, were frequently asked about their migration status by police.³⁷⁶ These bureaucratic measures and controlling tactics were perceived as an obstacle to the provision of humanitarian assistance.

3.2 Policing civil society conducting SAR activities

3.2.1 Lack of a holistic approach to challenges in the Central Mediterranean: Why SAR NGOs entered the scene

After the end of the Mare Nostrum operation in November 2014, an operational and territorial gap in SAR was left. This gap was not filled by proactive European SAR operations, despite the solemn intentions expressed in the European Agenda on Migration to replace Mare Nostrum.³⁷⁷ This gap continued throughout the 'European refugee humanitarian crisis' from 2015 onwards and was marked, as mentioned previously, by a sharp increase of people arriving irregularly in Europe, mainly fleeing violent conflicts and/or poverty (see Figure 2).

Figure 2. Monthly sea arrivals via the Mediterranean Sea, 2015–18



Note: The Mediterranean Sea in this figure includes the Western, Central and Eastern (Aegean) Mediterranean routes.
Source: UNHCR, "Mediterranean situation", as of 19 June 2018 (<http://data2.unhcr.org/en/situations/mediterranean>).

The first life-saving mission by CSAs was initiated by Malta-based MOAS. It started SAR activities along the Central Mediterranean route on 25 August 2014, as it describes below:

Our flagship vessel, the Phoenix, left the Malta Grand Harbour that day as the first Mediterranean private search and rescue (SAR) initiative of its kind. Equipped with a specialist SAR crew, a fully-equipped clinic and two humanitarian drones, MOAS was out to demonstrate proof of concept and make a real impact

³⁷⁵ Interview with a civil society organisation providing legal assistance, 8 of June, 2017, Lesvos island, Greece.

³⁷⁶ Interview with a civil society organisation providing legal assistance, 8 of June, 2017, Lesvos island, Greece.

³⁷⁷ European Commission (2015a), op. cit., p. 2. It states: 'Search and rescue efforts will be stepped up to restore the level of intervention provided under the former Italian "Mare Nostrum" operation. To triple the budget for the Frontex joint-operations Triton and Poseidon, the Commission has already presented an amending budget for 2015 and will present its proposal for 2016 by the end of May.'

on the loss of life that had come to define the Central Mediterranean migration route. Over the next 60 days, MOAS would save 3,104 children, women and men.³⁷⁸

More organisations launched their SAR operations, likewise to fill the gap left in the Central Mediterranean after the end of Operation Mare Nostrum. From the end of summer 2014 to mid-summer 2017 civil society organisations were willingly conducting their humanitarian work there. Their preparedness and readiness to cooperate was praised and appreciated by the Italian coast guard on numerous occasions, including later, after accusations.³⁷⁹

At the beginning of July 2017, in the Central Mediterranean there were nine organisations deploying their vessels for SAR operations.³⁸⁰ Some of them were branches of international humanitarian organisations, such as MSF and Save the Children, which conducted SAR activities as one of a wide spectrum of operations they are running across the globe. Others were small NGOs, established precisely for this purpose, such as MOAS, Sea Watch, Sea-Eye, SOS-Méditerranée, Life Boat Foundation, Jugend Rettet and Proactiva Open Arms.

The vessels deployed by these NGOs are of different sizes and capacities. NGOs deploying large vessels, such as Dignity I and Bourbon Argos, are run by MSF³⁸¹ while Aquarius is run by SOS Méditerranée (in cooperation with MSF). The Vos Hestia of Save the Children³⁸² and the Phoenix run by MOAS³⁸³ performed full SAR activities, meaning that they both rescued the migrants in distress and disembarked them in Italy. The remaining NGOs have smaller vessels – only rescuing migrants from boats in distress, hosting them on board their vessels and waiting for the arrival of a larger asset as appointed by the Maritime Rescue Coordination Centre in Rome (MRCC Rome). The very success of SAR NGOs in rescuing refugees and other migrants soon became a point of controversy.

3.2.2 Suspicion: A shift in approach towards SAR NGOs – from ‘helpers’ to potential ‘smugglers’

Prior to the NGOs arriving on the SAR scene, the Italian coast guard had to rely on merchant, cargo or cruise ships being deployed during SAR incidents. In the period between 2014 and 2015, over 1,000 merchant ships were involved in migrant rescue operations, assisting with the rescue of more than 50,000 people.³⁸⁴ They often did not have the capacity to respond to the urgent needs of rescued refugees and other migrants, starting from medical aid to even having enough food for them to eat:

The [shipping] industry is faced with the increasingly frequent need to conduct large scale rescues, often involving very different challenges to conventional rescue operations. While merchant ships are not best suited to conduct large scale operations that may involve the rescue of hundreds of people at a time, it is likely that ships will continue to be called upon to assist by Rescue Co-ordination Centres (RCCs) for the foreseeable future.³⁸⁵

Thus, specialised SAR NGOs, in the beginning, were met as a relief service for the coast guards and shipping industry. However, European political and operational priorities turned towards the fight against smuggling and

³⁷⁸ MOAS (2018), “Mediterranean Mission 2014-2017” (<https://www.moas.eu/central-mediterranean/>).

³⁷⁹ D. Giovinazzo (2017), “La Guardia costiera: “Le Ong non sono un fattore di attrazione per i migranti”, 3 May (<http://www.eunews.it/2017/05/03/migranti-guardia-costiera-ong-non-sono-un-fattore-di-attrazione-per-i-migranti/84403>).

³⁸⁰ Amnesty International, Report “A perfect storm: Failure of European Policies in Central Mediterranean”, 2017, p. 17 (<https://www.amnesty.org/en/documents/eur03/6655/2017/en/>).

³⁸¹ MSF Official Website (<https://www.msf.org.uk/country/mediterranean-search-and-rescue>).

³⁸² Save the Children (2017), “Rescue at Sea: the inside story of a high Stake Transfer”, 16 May (<https://www.savethechildren.net/article/rescue-sea-inside-story-high-stakes-transfer>).

³⁸³ MOAS (2018), op. cit.

³⁸⁴ International Chamber of Shipping (2015), “Large Scale Rescue Operations at Sea Guidance on Ensuring the Safety and Security of Seafarers and Rescued Persons”, second Edition 2015, London (<http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/large-scale-rescue-at-sea.pdf?sfvrsn=30>).

³⁸⁵ International Chamber of Shipping (2015), op. cit.

unresolved questions of responsibility sharing led to shifting the blame onto the rescuers.³⁸⁶ They were accused of being a pull factor for migrants.

At the inception of conspiracies related to SAR NGOs was the Nijmegen-based Gefira foundation, with the publication of articles such as “NGOs are smuggling immigrants into Europe on an industrial scale”.³⁸⁷ A closer look at the Gefira foundation found unclear political motivations, though its owner rejected the claim that it has links with the Dutch right-wing party of Geert Wilders.³⁸⁸ The articles published by this foundation seem to have reached and influenced officials working at one of the EU justice and home affairs agencies. Gefira’s publications on several occasions were put forward as a proof of NGO collusion, also some national-level officials have reiterated similar arguments.³⁸⁹

In February 2017, Frontex Executive Director Fabrice Leggeri said that “we face a kind of sad paradox that as the international community increases efforts to send more rescue ships close to Libya, smuggling rings pack ever more people onto unseaworthy boats and push them out toward the open sea”.³⁹⁰ With this statement, he was alluding to the idea that SAR operations actually contribute to the loss of life and increase smuggling. Although the destruction of the wooden boats by the EU Naval Force Mediterranean (EUNAFOR MED) Operation Sophia has not been called to attention as one of the key factors contributing to the phenomenon, there is evidence that “an unintended consequence of Operation Sophia’s destruction of vessels has been that the smugglers have adapted, sending migrants to sea in unseaworthy vessels, leading to an increase in deaths”.³⁹¹

A similar conclusion was reached by the “Blaming the Rescuers” report.³⁹² Subsequently, in March 2017 the Catanian prosecutor Carmelo Zuccaro raised widespread suspicion about the activities of civil society at sea.³⁹³ He claimed in the media to have evidence of NGO collusion with smugglers;³⁹⁴ nevertheless, later on in a hearing before the Senate he admitted he had no such proof.³⁹⁵ In reaction to such accusations, the majority of NGOs signed a voluntary code of conduct, to show the public that they are organised,³⁹⁶ though the moods of societal distrust and suspicion continued.

³⁸⁶ Forensic Oceanography (2017), Report “Blaming Rescuers” by Charles Heller and Lorenzo Pezzani, was produced as part of the Forensic Architecture agency at Goldsmiths (University of London) (<https://blamingtherescuers.org/>).

³⁸⁷ Gefira (2016), “NGOs are smuggling immigrants into Europe on an industrial scale” (<https://gefira.org/en/2016/12/04/ngos-are-smuggling-immigrants-into-europe-on-an-industrial-scale/>).

³⁸⁸ Open Migration (2017), “Getting to know Gefira and the “identitarians” of Defend Europe: our interviews”, 26 September (<https://openmigration.org/en/analyses/getting-to-know-gefira-and-the-identitarians-of-defend-europe-our-interviews/>).

³⁸⁹ Authors’ own experience while conducting a research project titled “Anti-Smuggling Policies and their Intersection with Humanitarian Assistance and Social Trust”, supported by the UK’s Economic and Social Research Council. Gefira Foundation articles and analysis were referred as ‘evidence’ by officials working at one of EU JHA agencies.

³⁹⁰ Associated Press (2017), “EU: Migrant deaths in central Mediterranean rise despite aid”, *Fox News*, February 15, 2017, (<http://www.foxnews.com/world/2017/02/15/eu-migrant-deaths-in-central-mediterranean-rise-despite-aid.html>).

³⁹¹ UK House of Lords (2017), “European Union Committee, “Operation Sophia: a failed mission”, 2nd Report of Session 2017–19 HL Paper 5, London, 12 July 2017, para. 45, p. 14.

³⁹² Forensic Oceanography (2017), op. cit.

³⁹³ F. Flori and L. Bagnoli (2017) “Accusations against Ngos at sea: what is false or misleading in that smear campaign”, May 19, 2017 (<https://openmigration.org/en/analyses/accusations-against-ngos-at-sea-what-is-false-or-misleading-in-that-smear-campaign/>).

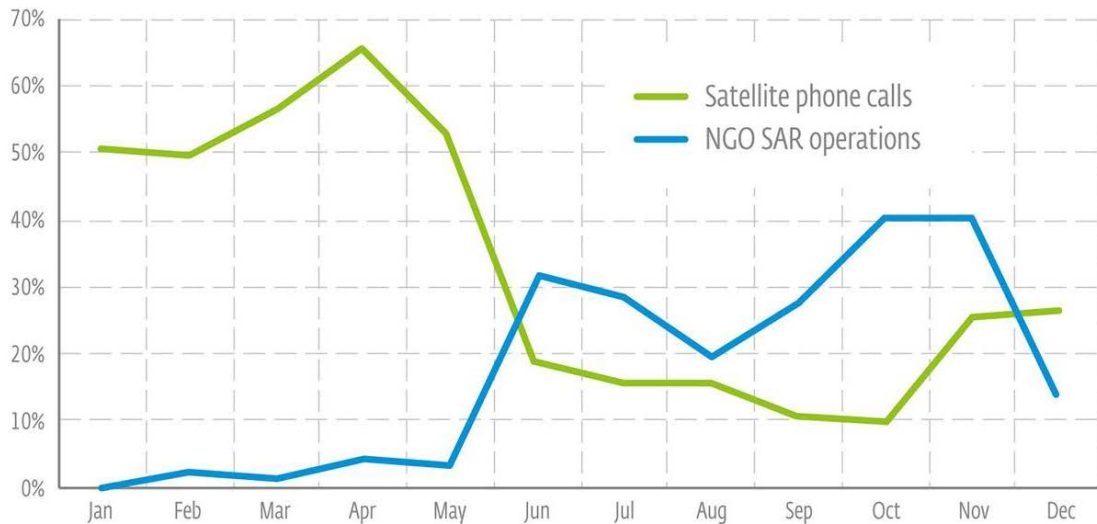
³⁹⁴ K. Dambach (2017), “Italy prosecutor claims NGOs working with human smugglers”, 24 April (<http://www.dw.com/en/italy-prosecutor-claims-ngos-working-with-human-smugglers/a-38554753>).

³⁹⁵ Associated Press (2017), “Italian prosecutor: no NGOs-migrant smuggler links emerge”, *Independent Malta*, 3 May (<http://www.independent.com.mt/articles/2017-05-03/local-news/Italian-prosecutor-no-NGOs-migrant-smuggler-links-emerge-6736173786>).

³⁹⁶ Human Rights at Sea (2017), “NGO Voluntary Code of Conduct”, March (<https://www.humanrightsatsea.org/wp-content/uploads/2017/03/20170302-NGO-Code-of-Conduct-FINAL-SECURED.pdf>).

Since 2017, Frontex has started to differentiate who saves how many migrants and refugees at sea. Frontex has put a specific focus on NGOs with the clear undertone that they save 'too many' or 'too quickly' – not waiting for the actual distress phone call, but conducting proactive SAR (see Figure 3).³⁹⁷

Figure 3. Monthly comparison between the rescue operations performed by NGOs and those initiated via satellite phone calls by migrants in distress in the Central Mediterranean



Source: Frontex (2017) Annual Risk Analysis (for 2016), 15 February 2017, p. 32.

The increased numbers of persons rescued, as well as those missing or dead may also stem from better statistical data gathering, as “the ability to monitor the situation, to count the dead and the missing, has also improved”.³⁹⁸

3.2.3 Formal criminalisation of SAR NGOs

Since the end of 2016, private rescuers have suffered under heavy campaigns of de-legitimation and criminalisation. Spurious accusations of colluding with and abetting smugglers have been spread by important media outlets,³⁹⁹ EU agencies like Frontex⁴⁰⁰ and high-level politicians. Events further led to the launch of several exploratory inquiries by prosecutors in Italy.⁴⁰¹ Moreover, doubts raised over NGOs' intentions with SAR activities opened the way for the Italian government to impose its code of conduct in August 2017.⁴⁰² This setting facilitated the actual criminalisation of the remaining organisations operating in the Mediterranean.

This section goes on to analyse the emblematic cases of persecution of SAR NGOs: Team Humanity and Proem-AID in Greece, Proactiva Open Arms and Jugend Rettet in Italy and Sea-Eye in Malta. The last big rescue ship, the Aquarius, run by SOS Méditerranée (in cooperation with MSF), is being pushed around countries along the Mediterranean. It recently landed in Spain to disembark survivors, having been denied permission to offload in Italy.

³⁹⁷ Frontex (2017), op. cit.

³⁹⁸ Interview with E. Cossuano in Flori and Bagnoli (2017), op. cit.

³⁹⁹ R. Duncan (2016), “EU border force flags concerns over charities interaction with migrant smugglers”, *Financial Times*, 15 December.

⁴⁰⁰ Frontex (2017), “Annual Risk Analysis”, 15 February, p. 32.

(http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf).

⁴⁰¹ Forensic Oceanography (2017), op. cit.

⁴⁰² Ibid.

Box 8. Greece: Prosecution of Team Humanity and Proem-AID volunteers

The first precedent in the recent crisis was set by the Greek authorities, who in mid-January 2016 arrested rescuers, saving lives in the Aegean – Team Humanity and Proem-AID. Five rescuers faced trial in Lesbos on 7 May 2018, which resulted in their acquittal.⁴⁰³

Three Proem-AID fire-fighters and two Team Humanity volunteers were accused by Mytilene’s Prosecutor’s Office of facilitating human smuggling in January 2016. Proem-AID is a Spanish organisation of professional fire-fighters and lifeguards whereas Team Humanity is a Danish humanitarian organisation. Four of the five accused volunteers were made to pay a €5,000 fee to be released on bail. The bail of Salam Aldeen, a Team Humanity volunteer, was higher (€10,000) and he was required to stay in Greece for more than a year and to report to a police station weekly.

The volunteers were accused by the Hellenic Coast Guard of attempting human smuggling. According to the public testimony of Aldeen, the volunteers were arrested when they were looking for persons in distress but had not rescued persons on board.⁴⁰⁴ Although the unofficial proceedings insinuated an attempt by Aldeen to cross into Turkish waters, the crew claimed to have proof of them being arrested in Greek territorial waters. That same day they had been conducting SAR operations under the coordination of Hellenic Coast Guard. Thus, Aldeen was puzzled as to how on the same day a person can be recognised as a rescuer and then arrested as a smuggler. The trial took place on 7 May 2018 and although it resulted in acquittal, subsequently other volunteers were charged for illegal activities. The trial also took an immense psychological toll.

However, misguided prosecutions have not stopped with this acquittal. Ten other volunteers have been accused of migrant smuggling and two of them – Sarah Mardini and Sean Binder – were held in high-security preventive custody as of end of November.⁴⁰⁵

Box 9. Italy: Prosecution of Jugend Rettet volunteers and Mussie Zerai

The obstruction of activities by Mussie Zerai and Jugend Rettet is part of a broad political persecution of SAR NGOs that has been taking place in Italy. Prosecutor Carmelo Zuccaro, responsible for the seizure of Jugend Rettet’s ship *Iuventa*, was previously involved in spreading defamatory accusations against these private organisations and had to withdraw his statements in 2016.⁴⁰⁶

Jugend Rettet was created by people committed to preventing deaths in the Mediterranean Sea and with their ship *Iuventa* they have saved 14,000 people from distress.⁴⁰⁷ However, their SAR activities were disrupted for more than a year due to the detention of their ship by Italian authorities on 2 August 2017.⁴⁰⁸ A few days afterwards, the organisation refused to sign the government’s code of conduct, claiming it would affect its

⁴⁰³ Team Humanity (2018) “Danish Lifeguard fighting a battle of injustice” a Crowdfunding Campaign (<https://startsomegood.com/danish-lifeguard-fighting-a-battle-of-injustice>).

⁴⁰⁴ PICUM (2017) “Greece: We were saving lives every day... now there is a possibility that I will be facing life in jail” Testimony by Salam Aldeen, Co-founder of Team Humanity (teamhumanity.eu). (<https://picum.org/testimonies-people-share-stories-accused-intimidated-punished-helping-migrants/>).

⁴⁰⁵ H. Smith (2018) “Arrest of Syrian ‘hero Swimmer’ Puts Lesbos Refugees Back in Spotlight”, *The Guardian*, 6 September. (<https://www.theguardian.com/world/2018/sep/06/arrest-of-syrian-hero-swimmer-lesbos-refugees-sara-mardini>).

⁴⁰⁶ See L. Vosyliūtė (2018), “‘Saving Lives at Sea’ still a Priority for the EU?”, Heinrich Boll Stiftung, 19 April (<https://eu.boell.org/en/2018/04/19/saving-lives-sea-still-priority-eu>); and Jugend Rettet Press Statement (2018), “Parallels between seizures of the rescue ships Open Arms and IUVENTA”, 21 March (https://jugendrettet.org/f/files/180321_PM_EN.pdf).

⁴⁰⁷ Jugend Rettet official website (<https://jugendrettet.org/en/>).

⁴⁰⁸ Forensic Architecture (2017), “The *Iuventa*”, 18 June (<https://www.forensic-architecture.org/case/iuventa/>).

capacity to rescue at sea.⁴⁰⁹ The chief prosecutor of Catania took the preventive measure owing to suspicions that the NGO had aided illegal migration and colluded with smugglers on three different occasions.⁴¹⁰ The prosecutor firmly believes that on 10 September 2016 and 18 June 2017 Jugend Rettet arranged for the direct handover of migrants by smugglers, returned empty boats for re-use and took the motors of the vessels to resell.⁴¹¹

Furthermore, days after the apprehension of the *Iuventa*, the prosecutors in Trapani started an investigation against Mussie Zerai.⁴¹² The Eritrean priest, who has lived in Italy, is responsible for saving thousands of lives by answering migrants' calls and warning the competent Italian authorities and NGOs of vessels in distress.⁴¹³ After more than 10 years of providing assistance to rescuers, he was later nominated for the Nobel Peace Prize in 2015.⁴¹⁴ Yet, he is currently being investigated for acting as an intermediary with Jugend Rettet and other organisations.⁴¹⁵ The priest helped to save the lives of thousands of migrants and refugees crossing the Mediterranean by transmitting their coordinates to MRCC Rome. He is now under investigation on suspicion of abetting illegal immigration.⁴¹⁶ The priest has made a public statement in light of these accusations:

Every time I informed the Italian Coast Guard operational center and the Maltese command. However, I have never had direct contact with the Jugend Rettet ship involved in the Trapani Prosecution investigation, nor have I ever been part of the alleged 'secret chat' of which some newspapers have alluded to: my communications have always been forwarded through a normal cell phone. All the reports are the result of requests for assistance that I have been directed not from boats leaving Libya, or at the time of sailing, but from offshore vessels off the coast of Africa, outside Libyan territorial waters.⁴¹⁷

The Jugend Rettet volunteers also believe this is retaliation for not signing the code of conduct imposed by the Italian government.⁴¹⁸ Since the beginning of the investigation, several attempts have been made to tarnish their image with unscrupulous accusations of owning weapons⁴¹⁹ and the leaking of photographs taken out of context to the media.⁴²⁰ In addition, no charges have been brought for almost a year, yet the processing of the case through the Anti-Mafia Investigation Directorate enables the prosecutor to keep the ship without concrete evidence.

Moreover, such a method has also made it very difficult for the NGO to bring legal action against the measure.⁴²¹ According to Philipp Külker, spokesperson for Jugend Rettet, the organisation submitted a complaint at the court

⁴⁰⁹ Jugend Rettet Press Statement (2018), "Systematic Walls-up Policy: Investigations against crew members of Jugend Rettet e.V.", Berlin, 9 July (https://jugendrettet.org/fi/files/PM_090718_ENGL_web.pdf).

⁴¹⁰ Are You Serious?, "AYS Interview with Jugend Rettet: 'The accusations are just empty claims.'", 22 April (<https://medium.com/are-you-serious/ays-interview-with-jugend-rettet-the-accusations-are-just-empty-claims-ba873e0f53f4>).

⁴¹¹ Forensic Architecture (2017), op. cit.

⁴¹² Vosyliūtė (2018), op. cit.

⁴¹³ P. Ford (2017), "Priest Named 'Guardian Angel of Refugees' Under Investigation in Italy", News Deeply, 4 September.

⁴¹⁴ Ford (2017), op. cit.

⁴¹⁵ Le Nir, A. (2017), "Italian prosecutors investigate priest who protects migrants", *La Croix*, 15 August (<https://international.la-croix.com/news/italian-prosecutors-investigate-priest-who-protects-migrants/5693>).

⁴¹⁶ Daily Mail (2017), "Italy police probe priest once hailed for Nobel Peace Prize", 9 August (<http://www.dailymail.co.uk/wires/afp/article-4775892/Italy-police-probe-priest-hailed-Nobel-Peace-Prize.html>).

⁴¹⁷ The Local (2017), "Eritrean priest denies Trapani charge of facilitating clandestine migration", 10 August. <https://www.thelocal.it/20170810/eritrean-priest-denies-trapani-charge-of-facilitating-clandestine-migration> and Grave preoccupazione per approvazione c.d. Decreto Sicurezza – crea irregolarità, insicurezza e lede diritti 7.11.2018 (<http://habeshia.blogspot.be/>).

⁴¹⁸ Jugend Rettet Press Statement (2018b), op. cit.

⁴¹⁹ Are You Serious?, op. cit.

⁴²⁰ Ibid.

⁴²¹ Ibid.

in Trapani in September 2017, which was denied as it was the same court that had allowed the seizure.⁴²² Later on, they raised an objection to the previous decision in the Supreme Court of Cassation in Rome.⁴²³

On 23 April 2018, the court rejected their request although the prosecutor lacked evidence while the NGO had presented clear evidence of its innocence with the help of forensic oceanographers and Forensic Architecture.⁴²⁴ This London-based research collective conducted an analysis using materials from different sources to create a coherent spatio-temporal model to explain the events. They used photographs, videos and reports from various private organisations as well as from European and national institutions, made possible with the growing documentation of SAR activities.⁴²⁵ The results not only showed the innocence of Jugend Rettet, they also confirmed Amnesty International's statements on the involvement of the Libyan coast guard in abetting smugglers.⁴²⁶ That notwithstanding, in July 2018 prosecutors from Trapani opened an investigation on 20 volunteers involved in SAR for facilitating illegal immigration.⁴²⁷

Some months after the seizure of the *Iuventa*, the same prosecutor from Catania, Carmelo Zuccaro, issued a preventive order against the Spanish organisation Proactiva Open Arms.⁴²⁸

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Realised with the support of Borderline Europe, the WatchTheMed platform and Transmediale.

⁴²⁵ Forensic Architecture (2017), op. cit.

⁴²⁶ Amnesty International (2017), "Libya's dark web of collusion: Abuses against Europe-bound refugees and migrants", 11 December (<https://www.amnesty.org/en/documents/mde19/7561/2017/en/>).

⁴²⁷ DW (2018), "Italy investigating German refugee rescue workers", *Deutsche Welle*, 28 July (<https://www.dw.com/en/italy-investigating-german-refugee-rescue-workers/a-44865029>).

⁴²⁸ M. Petrillo, L. Bagnoli and C. Torrisi (2018), "The prosecutor's case against the rescue ship Open Arms", *Open Migration*, 29 March (<http://openmigration.org/en/analyses/the-prosecutors-case-against-the-rescue-ship-open-arms/>).

Box 10. Italy: Prosecution of Proactiva Open Arms

Proactiva Open Arms has rescued more than 5,000 people in the Mediterranean over the past three years, but their activities were interrupted for a month with the detention of their vessel on 19 March 2018.⁴²⁹ The measure was a response to a rescue operation that took place on 15 March, which had resulted in the saving and disembarkation of irregular migrants in Italy.⁴³⁰ The NGO faced accusations of criminal association and facilitating illegal immigration by disobeying the code of conduct.⁴³¹ Moreover, authorities have launched an investigation against the director of the organisation, Gerard Canals, the captain Marc Reig and the mission's coordinator, Anabel Montes, on suspicion of smuggling migrants.⁴³²

According to the organisation, the crew rescued 218 migrants in SAR operations coordinated by MRCC Rome.⁴³³ However, due to a mistake by MRCC Rome, both the NGO and Libyan coast guard were requested to pursue the same rescue operation.⁴³⁴ The first one to get to the vessel in distress was the organisation's RHIB,⁴³⁵ which had lost contact with the main ship due to its distance. After the boarding had already started, the Libyan coast guard arrived demanding that the migrants be handed over to their responsibility according to the Italian authorities. The captain denied such a request as he would be violating the principle of *non-refoulement* due to the well-known human rights violations in Libya. Furthermore, he could not transfer these people after the inappropriate behaviour of the Libyan coast guards, who threatened to open fire against them, almost resulting in the drowning of 10 scared migrants.⁴³⁶ Although complying with humanitarian international law, this was a breach of the code of conduct signed by the NGO. Thus, MRCC Rome denied the ship the right to dock in Italy, and ordered it to request permission to dock in Spain, the ship's flag state, or Malta, which was the closest safe port.⁴³⁷ Although in Malta the captain disembarked two of the migrants who were in a critical condition,⁴³⁸ the captain did not try to request evacuation for all of them as the unlikelihood of receiving permission to disembark rescued migrants in Malta was well known.⁴³⁹ Eventually, Italy allowed the ship to dock at the Sicilian port of Pozzallo, with the police waiting for it.

The prosecution's accusations of criminal association were founded on the belief that "the people under investigation operate professionally and structurally for the NGO Proactiva Open Arms, and they intended to knowingly and repeatedly disregard the Code of Conduct".⁴⁴⁰

⁴²⁹ L. Tondo and Jones, S (2018), "Migrant-rescue boat Open Arms released by Italian authorities", *The Guardian*, 16 April (<https://www.theguardian.com/world/2018/apr/16/migrant-rescue-boat-open-arms-released-by-italian-authorities>).

⁴³⁰ Ibid.

⁴³¹ Statewatch (2018), "The seizure of the Open Arms boat as a paradigm of the European Union's war against human rights", April (<http://www.statewatch.org/analyses/no-327-open-arms-seizure.pdf>).

⁴³² Tondo and Jones (2018), op. cit.

⁴³³ Maritime Rescue Coordination Centre in Rome.

⁴³⁴ Petrillo, Bagnoli and Torrisi (2018), op. cit.

⁴³⁵ Rigid-hulled inflatable boat.

⁴³⁶ See Jugend Rettet Press Statement (2018a), op. cit.; and Are You Serious (2018), "'Give us the migrants or we will kill you,' The front lines of Criminalized Solidarity", 18 April (<https://medium.com/are-you-serious/ays-daily-digest-18-4-18-give-us-the-migrants-or-we-will-kill-you-the-front-lines-of-4a84d6762437>).

⁴³⁷ Are You Serious (2018), ibid.

⁴³⁸ Evacuated a critically ill three-month-old baby and its mother. See <https://www.facebook.com/proactivaservice/posts/1829728240391352>.

⁴³⁹ M. Petrillo, Bagnoli, L. and Torrisi, C (2018), "The prosecutor's case against the rescue ship Open Arms", *Open Migration*, 29 March (<http://openmigration.org/en/analyses/the-prosecutors-case-against-the-rescue-ship-open-arms/>).

⁴⁴⁰ Extract from the seizure order. See Statewatch (2018), "The seizure of the Open Arms boat as a paradigm of the European Union's war against human rights", April (<http://www.statewatch.org/analyses/no-327-open-arms-seizure.pdf>).

Several events were taken as a basis for the accusations of facilitation of illegal migration and breach of the code of conduct. First, the organisation was incriminated for conducting rescue operations in Libyan waters. According to Proactiva Open Arms, however, the operation took place 73 miles from Libya, thus in international waters.⁴⁴¹ The Libyan extension of its territorial waters from a 12-mile zone to one of 74 miles was made without any authorisation from competent authorities like the International Maritime Organization, creating a legal grey area for NGOs to act in.⁴⁴²

Second, Proactiva Open Arms refused to turn over the migrants to Libyan authorities, which was an act of civil disobedience of MRCC orders and a violation of the code of conduct signed by the NGO.⁴⁴³ At the same time, the act of refusal transpired in order to comply with the principle of *non-refoulement* within international humanitarian law.⁴⁴⁴ Third, according to the Italian authorities it failed to ask permission to dock in Malta, despite the country having “expressed [its] willingness to take charge of disembarking all the migrants”.⁴⁴⁵ This assumption is not based on any evidence to corroborate it.

Finally, the prosecution believes that there was no indication of imminent danger to justify the duty of rescue as the captain did not report any critical cases on board while heading to Italy. In reality, the issued order even accused the NGO of having created a dangerous situation when pursuing with the rescue while there was another competent authority assigned to conduct it, and therefore making the point that the sole intention of Proactiva Open Arms was to facilitate the entrance of the migrants into Italy.⁴⁴⁶ The document completely ignored the miscommunication emanating from MRCC and the threats issued by the Libyan coast guard.

In March, the judge of preliminary investigations (prosecutorial authority) of Catania, Nunzio Sarpietro, prolonged the seizure of the ship and the original charge of aiding illegal immigration, but he dropped the investigation of the director of the NGO.⁴⁴⁷ In May, the criminal court in Ragusa rejected the prosecutor’s appeal and confirmed the release of the ship.⁴⁴⁸ Meanwhile, the investigation against the captain and the coordinator is ongoing. The risks are between 5 and 15 years of imprisonment and fines of €15,000 for each of the 216 migrants who were on board.⁴⁴⁹

The analysis of these and other cases against private rescuers shows a determination to prove a certain theory, no matter what it takes. Prosecutors and law enforcement authorities insist that SAR NGOs have obscure intentions besides the pure will to save lives. The policing of SAR NGOs has been vigorous; many times, authorities

⁴⁴¹ Reuters (2018), “Italy seizes rescue ship that stopped migrants’ return to Libya”, 19 March (<https://af.reuters.com/article/commoditiesNews/idAFL8N1R12KX>).

⁴⁴² Petrillo, Bagnoli and Torrisi (2018), op. cit.

⁴⁴³ Code of Conduct: “- ... in accordance with relevant international law, commitment not to enter Libyan territorial waters, except in situations of grave and imminent danger requiring immediate assistance and not to obstruct Search & Rescue by the Libyan Coast Guard: with a view not to hinder the possibility for the competent National Authorities to intervene in their territorial waters, in compliance with international obligations; – Commitment not to transfer those rescued on other vessels, except in case of a request of the competent MRCC and under its coordination also based on the information provided by the ship’s master: after the embarkation of survivors, NGO vessels should as a rule complete the operation by disembarking survivors in a safe port under the coordination of the responsible MRCC, except in situations recalled above.” See in Euronews (2017), “Italy’s code of conduct for NGOs involved in migrant rescue: text”, 3 August (<https://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue/>).

⁴⁴⁴ Petrillo, Bagnoli and Torrisi (2018), op. cit.

⁴⁴⁵ Statewatch (2018), “The seizure of the Open Arms boat as a paradigm of the European Union’s war against human rights”, April (<http://www.statewatch.org/analyses/no-327-open-arms-seizure.pdf>).

⁴⁴⁶ Ibid.

⁴⁴⁷ Petrillo, Bagnoli and Torrisi (2018), op. cit.

⁴⁴⁸ FRA (2018), “Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations” (http://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf).

⁴⁴⁹ Ibid.

have lacked sufficient evidence to corroborate such action. It leads to the conclusion that the underlying rationale for these prosecutions has been to fight irregular migration by creating obstacles for SAR NGOs in Italy and Greece.

Box 11. Harassment of Sea-Eye volunteers by the Libyan coast guard

The 2017 Malta Declaration by EU government leaders and the Libyan government made official the policy intention to deter refugees. This came along with other concerning developments, such as the recognition of the Libyan Joint Rescue Coordination Center by the International Maritime Organization at the end of June 2017, the closure of the nearest European ports to SAR NGOs, the incoherent conclusions of the last European Council summit and the absence of concrete plans at a European level. The NGO SOS Méditerranée claims that all of the above measures have "left NGO ships with uncertainty".⁴⁵⁰

The Libyan coast guard has been trained, equipped and supported so that it is able to stop crossings towards Europe organised by smugglers. Reception camps have also been established for refugees and migrants in Libya. NGOs have responded with widespread concern about the conditions in Libya – they rightly foresaw increased hostility to their activities at sea as part of this new mission.

The NGO Sea-Eye claims, for example, that "last year members of the [Libyan] coast guard participated in attacks against NGO boats. In one documented case, they even attacked a refugee boat causing it to capsize – about 30 people drowned consequently."⁴⁵¹ It was also the Libyan coast guard, they stress, that seized their speed boat 'Speedy' outside Libyan territorial waters in July 2017. The rescue boat has since been impounded on what they claim to be illegal grounds.

The motto of the NGO is the following: "To let people drown means moral failure and can be justified by nothing." A representative of Sea-Eye has put it thus: "The loss of this boat is not only a harsh financial set-back (about €110,000) for Sea-Eye, but it also means a massive restriction of our rescue missions. Ultimately the seizure is harming the refugees, who are being deprived of this urgently needed sea rescue help."⁴⁵²

The controversy surrounding the Aquarius arrived on the back of this highly politicised, cumulative policing context; 'saving lives' was no longer a policy priority for the EU and both EU and Italian citizens were already mistrustful of civil society conducting SAR operations. The Aquarius case would have been harder to imagine in 2016 – when saving lives at sea was still seen as a legal and moral obligation.

Box 12. Central Mediterranean: Aquarius trapped in a political game between Italy, Malta and France

Sea-Eye is not the only rescue boat in the Mediterranean to face obstacles. In June 2018, the Italian government barred the French charity-run Aquarius rescue ship (which was carrying 630 migrants) from docking in Italy. Malta also refused to take it in and the ship was later welcomed by Spain. The boat, operated by SOS Méditerranée,

⁴⁵⁰ SOS Méditerranée (2018), "The Aquarius returns to sea, ready to save lives after technical and strategic upgrades in Marseille", 31 July (<https://sosmediterranee.com/press/the-aquarius-returns-to-sea-ready-to-save-lives-after-technical-and-strategic-upgrades-in-marseille/>).

⁴⁵¹ Sea-Eye (2018), "What does the Malta declaration mean for Sea-Eye's rescue activities?" (<https://sea-eye.org/en/malta-beschluesse-und-sea-eye-wie-gehts-weiter/>).

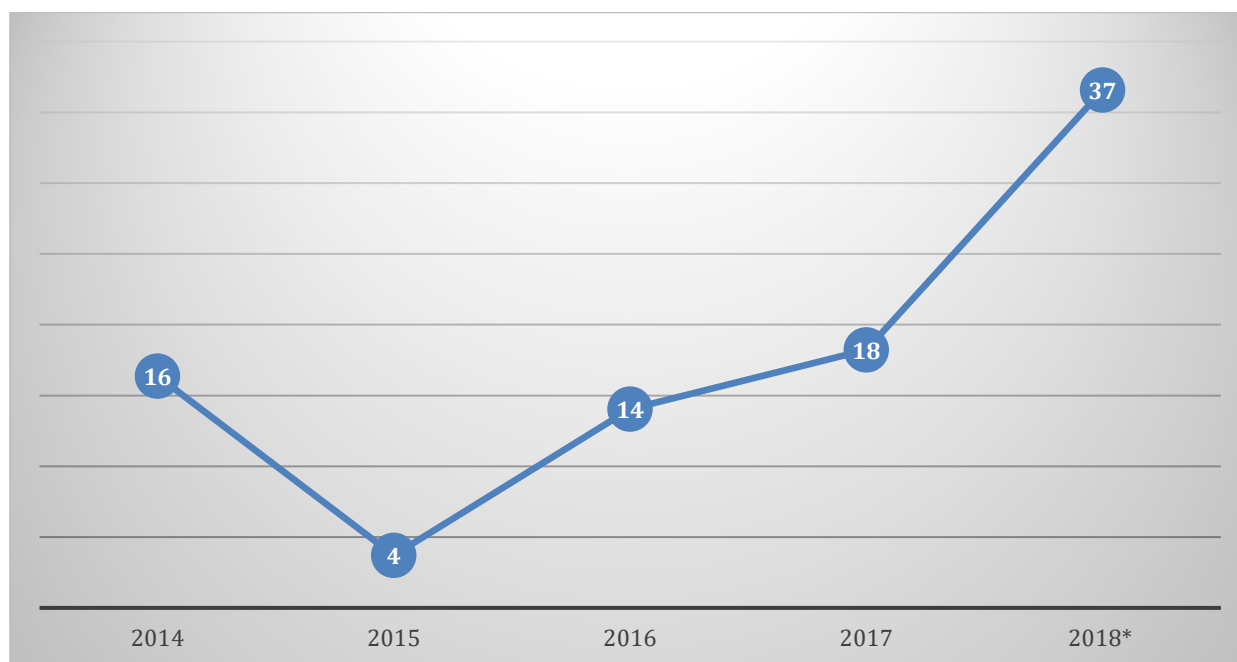
⁴⁵² Sea-Eye (2018), "What happened to the 'Speedy'?" (<https://sea-eye.org/en/was-geschah-mit-der-speedy/>).

was carrying especially vulnerable individuals, including 123 unaccompanied minors and 7 pregnant women.⁴⁵³ Since it first became operational in February 2016, the Aquarius claims to have rescued 29,318 men, women and children from drowning, 2,979 of whom were rescued in 2018.⁴⁵⁴ The attitude of the NGO SOS Méditerranée in the face of this threat has been defiant.

On 1 August 2018, the Aquarius returned to sea. A statement on the SOS Méditerranée website claims that “the Aquarius returns as one of the last humanitarian ships left in the Central Mediterranean to rescue and testify, with strong support from the European civil society”. Here, the support of civil society is wielded as a protective tool to uphold the ship’s humanitarian mission in the face of government hostility. The ship is operating in collaboration with MSF. This strategy of pooling resources and mandates can be seen as a response to the growing hostility, i.e. NGOs are seeking to align themselves to better respond to threats of policing, disciplining and criminalising. As part of its renovation, the Aquarius has installed freezers to hold dead bodies to preserve the dignity of those who die at sea.

All of the developments mentioned above targeting SAR NGOs have led to a sharp increase of the mortality rate among the refugees and other migrants attempting to cross the Mediterranean, even though the absolute numbers of sea crossings have been stemmed. This shows a human cost of preventing and discouraging SAR NGOs from conducting their life-saving activities (see Figure 4).

Figure 4. Mortality rate per thousand sea crossings in the Mediterranean, March 2014–18



* 2018 data from UNHCR, “Mediterranean situation”, as of 23 March 2018 (<http://data2.unhcr.org/en/situations/mediterranean>).

Source: L. Vosyliute (2018), “Is ‘Saving Lives at Sea’ Still a Priority for the EU?”, op. cit.

⁴⁵³ MSF (2018), “Migrants and refugees on the margins of society”, 8 February (<https://www.msf.org/italy-migrants-and-refugees-margins-society>); Aljazeera (2018), “Italy shuts ports to Aquarius ship carrying over 600 refugees”, 11 June (<https://www.aljazeera.com/news/2018/06/italy-shuts-ports-aquarius-ship-carrying-600-refugees-18061105355053.html>).

⁴⁵⁴ SOS Méditerranée (2018), op. cit.

3.3 Policing CSAs in the areas of first arrival, transit, stay and residence

3.3.1 France: Prosecuting and disciplining individuals, volunteers and activists

In France, the famous case of the farmer Cédric Herrou ended up in the French Constitutional Court after he was suspected of smuggling more than 200 persons when he claimed to be providing humanitarian assistance to refugees and other migrants (see Box 13). This is not the first case in France. For example, that of teacher Pierre-Alain Mannoni was another *délit de solidarité* (crime of solidarity)⁴⁵⁵ as well as that of retiree Martine Landry, who was prosecuted for the offence of solidarity, but eventually had her case dropped in July 2018 for lack of evidence that she could have helped people to cross the border. Yet another Amnesty International activist faces another five years in prison.⁴⁵⁶ Unlike in other Member States, such as Hungary,⁴⁵⁷ where the issue is relatively new, the history of the 'crime of solidarity' debate in France is longstanding.⁴⁵⁸

Box 13. France: Prosecution of Cedric Herrou for hosting asylum seekers and undocumented migrants

The French farmer, Cedric Herrou, was arrested and handed a four-month suspended sentence in summer 2017 for helping asylum seekers to enter France as they fled from war-torn countries such as Syria and Afghanistan. Herrou sheltered refugees in his farmhouse in southern France after he encountered them destitute at the Italian border along a disused railway track. Herrou became a symbol of resistance to anti-refugee politics in Europe; his face appeared in the form of graffiti in Greece and in cartoons in Italian newspapers. To some, he became the 'new Schindler': a symbol of plain old goodwill or hospitality for some and, to others, of Europe's anti-immigration regime.

French law dictates that anyone who facilitates the unlawful entry, movement or stay of a foreigner in France is liable to face up to five years in prison and a fine of up to €30,000. Following a long debate in France's recent history (which echoes wider debates occurring now all over Europe), however, immunity is granted in France to anyone who offers such help to a foreigner without receiving anything, such as money, in return. National constitutional provisions were successfully invoked in July 2018 by the French Constitutional Court to challenge the overreach of smuggling prohibitions in the case concerning Herrou. The counsel found that the French legislation was incompatible with the French constitutional principle of *fraternité*.⁴⁵⁹ The counsel acknowledged that the state is entitled to take measures to suppress irregular migration, but it ruled that it had to balance those measures against freedoms to act in solidarity with irregular migrants and refugees. With this new judgement, the French court conceded that in addition to this humanitarian safety net, the words 'unlawful stay' should be removed to ensure that the principle of *fraternité* extends to those in France both legally and illegally.

This important verdict has a much wider resonance for European civil society, which the court itself recognised. In the 'hostile environment' that has come to characterise a large part of the EU countries' responses to vulnerable migrants and refugees, the enlightenment principles of *fraternité* and solidarity on which the EU was founded are in danger and civil society is their guardian. The case of Herrou found that such freedoms among

⁴⁵⁵ See case L. Leroux (2017), « Marseille : Aide aux migrants : prison avec sursis en appel pour un enseignant-chercheur », 11 September. *Le Monde* (https://www.lemonde.fr/police-justice/article/2017/09/11/aide-aux-migrants-prison-avec-sursis-en-appel-pour-un-enseignant-chercheur_5184134_1653578.html).

⁴⁵⁶ *Le Monde* (2018), « Relaxe pour Martine Landry, la bénévole d'Amnesty poursuivie pour « délit de solidarité », 14 July 2018 (https://www.lemonde.fr/police-justice/article/2018/07/14/relaxe-pour-martine-landry-la-benevole-d-amnesty-poursuivie-pour-delit-de-solidarite_5331246_1653578.html).

⁴⁵⁷ J. Allsopp (2012), "Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France", RSC Working Paper no. 82, Oxford: Refugee Studies Centre (<https://www.rsc.ox.ac.uk/publications/contesting-fraternite-vulnerable-migrants-and-the-politics-of-protection-in-contemporary-france>).

⁴⁵⁸ *Ibid.*

⁴⁵⁹ This argument was anticipated and advanced by scholars including Jennifer Allsopp. See J. Allsopp (2012), "Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France", RSC Working Paper no. 82, Oxford: Refugee Studies Centre (<https://www.rsc.ox.ac.uk/publications/contesting-fraternite-vulnerable-migrants-and-the-politics-of-protection-in-contemporary-france>).

civil society are central to the maintenance of social trust in French society. Interestingly, in 2015, the Supreme Court of Canada arrived at a similar conclusion, finding that national constitutional provisions were successfully invoked to challenge the overreach of smuggling prohibitions. These cases are currently the subject of legal analysis by Cathryn Costello and Jennifer Allsopp.

Box 14. France: Journalists arrested while doing a story on undocumented migrant children

Caroline Christinaz, a journalist from the Swiss newspaper *Le Temps* and Raphaël Krafft, also a journalist from the French newspaper *Culture*, were arrested on the night of 11 November 2017, close to Briançon (High Alps) in France.⁴⁶⁰

They were in two different cars with other locals who had decided to stop to provide humanitarian assistance to four migrant minors who were freezing cold from crossing the dangerous border with Italy, the so-called Le col de l'Echelle, 1,762 meters high and partially covered with snow.⁴⁶¹

Christinaz was released on the spot. Yet unlike Raphaël Krafft, who was released for being considered just a witness, Christinaz was accused of facilitating the entry, transit and the residence of irregular migrants in French territory.⁴⁶² According to the Code Pénal, the offence might amount to high fines and imprisonment for up to five years.⁴⁶³ Therefore, she was asked to report for questioning at an "audition libre",⁴⁶⁴ meaning it was not mandatory, the following day at the Briançon's police station, where she was interrogated for two hours.⁴⁶⁵ Despite showing her press card to the police and explaining that she was working on a report on the irregular entry of migrant children, the authorities did not accept her justification.⁴⁶⁶ Moreover, the journalist stated that the agents and the prosecutor used intimidation and treated her as a suspect during the interrogation.⁴⁶⁷

The NGO Reporters Without Borders has condemned the authorities' accusations for violating freedom of the press, safeguarded by French law, arguing that a journalist cannot be considered a suspect of such a crime while she is acting in her profession.⁴⁶⁸ Finally, on 13 February 2018 the prosecutor did not press charges against Christinaz or Krafft, nor against the other two members of the association "Tous migrants", due to insufficient evidence.⁴⁶⁹ But once again, the psychological toll was significant on those involved from start to end, serving as a deterrent to the wider media community.

⁴⁶⁰ M. Caleb (2017), "Briançon : deux journalistes arrêtés par la gendarmerie lors d'un reportage sur des réfugiés." *Politis*, 17 Novembre (<http://www.politis.fr/articles/2017/11/briancon-deux-journalistes-arretes-par-la-gendarmerie-lors-dun-reportage-sur-des-refugies-37954/>).

⁴⁶¹ O. Perrin (2017), "La polémique enfle après l'interrogatoire de la journaliste du «Temps» à Briançon." *Le Temps*, 15 Novembre (<https://www.letemps.ch/opinions/polemique-enfle-apres-linterrogatoire-journaliste-temps-briancon>).

⁴⁶² Caleb (2017), op. cit.

⁴⁶³ L'express (2017), "Une journaliste suisse enquêtant sur les migrants arrêtée par la gendarmerie." *L'Express.fr*, 14 Novembre (https://www.lexpress.fr/actualite/monde/europe/une-journaliste-suisse-enquetant-sur-les-migrants-arretee-par-la-gendarmerie_1960649.html).

⁴⁶⁴ Article 61-1 du Code de Procédure Pénale Français.

(<https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000028991696&cidTexte=LEGITEXT000006071154>).

⁴⁶⁵ Caleb (2017), op. cit.

⁴⁶⁶ Council of Europe (2017), "Journalist Caroline Christinaz from "Le Temps" of Geneva Questioned by the Police While on a Reporting Assignment in France", 21 Novembre (https://www.coe.int/en/web/media-freedom/detail-alert?p_p_id=sojdashboard_WAR_coesojportlet&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&sojdashboard_WAR_coesojportlet_alertId=30827836).

⁴⁶⁷ Council of Europe (2017), op. cit.

⁴⁶⁸ L'express (2017), op. cit.

⁴⁶⁹ Council of Europe (2017), op. cit.

3.3.2 Belgium: From suspicion to prosecution of individual volunteers

Box 15. Belgium: Escalation from suspicion to arrests and charges

The case study in Belgium also shows how within two years a story escalated from suspicion towards volunteers in Maximilian Park to actual arrests and criminal charges on the basis of human smuggling.

Suspicion

After 2015, the park became a meeting point for migrants and consequently a place where they could access assistance by volunteers. The associations working there generally distribute food and material needs such as sleeping bags. Still, their work was not always perceived as positive; some high-level politicians in Belgium actually accused them of pulling irregular migrants to Belgium: “[Secretary of State for Asylum, Migration and Administrative Simplification] Theo Francken insisted people who come to the park are ‘purely economic migrants,’ not refugees, and accused rights groups of creating a ‘hub’ for migrants trying to reach the United Kingdom, saying most people do not want to seek asylum in Belgium.”⁴⁷⁰

Also, the widespread idea that people working in these associations collude with smugglers or facilitate ‘illegal’ migrants’ stay or transit resulted in an attempt to amend a new article to the Immigration Act.⁴⁷¹ This provision would ease police powers to obtain a warrant to search private homes for rejected asylum seekers and other migrants whose expulsion has been ordered.⁴⁷² Yet the argument was taken in a different direction by judges, lawyers and local authorities (see Box 5 above).

Intimidation and disciplining

Moreover, the situation in the park and in other areas of the city triggered several actions by the government to hamper the associations’ access to places where asylum seekers and migrants gather. At times, they were prohibited from distributing food,⁴⁷³ or were obliged to change the time and/or place of food distributions for hygiene reasons.⁴⁷⁴ For similar reasons, sleeping bags were confiscated by the police.⁴⁷⁵

Prosecutions

The situation escalated and on 6 September 2018 a trial was held of 11 people who had been arrested and charged with human smuggling in October 2017.⁴⁷⁶ This was considered by human rights defenders as “a trial that is eminently political. [Deputy Prime Minister, N-VA] Jan Jambon declared that the situation at Maximilian

⁴⁷⁰ M. Schlee (2018), “Theo Francken: Brussels ‘pampering’ NGOs and asylum seekers”, 8 October (<https://www.politico.eu/article/theo-francken-brussels-park-maximilien-pampering-ngos-and-asylum-seekers/>).

⁴⁷¹ Law of 15 December 1980, on access to the territory, residence, establishment and removal of aliens.

⁴⁷² RTL Info (2018), “L’Office des étrangers demande que la loi autorise la police à entrer dans une habitation pour arrêter une personne qui fait l’objet d’une mesure d’éloignement” 23 January (<https://www.rtl.be/info/belgique/societe/l-office-des-etrangers-demande-que-la-police-puisse-entrer-dans-une-habitation-pour-arreter-une-personne-qui-fait-l-objet-d-une-mesure-d-eloignement-989184.aspx>).

⁴⁷³ L’Echo (2018), “Le projet de loi sur les visites domiciliaires mis au frigo”, 21 August (<https://www.lecho.be/economie-politique/belgique/federal/le-projet-de-loi-sur-les-visites-domiciliaires-mis-au-frigo/10041620.html>).

⁴⁷⁴ Belga Bruzz (2018), “Stad Brussel: ‘Deel maaltijden in Maximiliaanpark uit aan het einde van de dag’”, 10 September (<https://www.bruzz.be/samenleving/stad-brussel-deel-maaltijden-maximiliaanpark-uit-aan-het-einde-van-de-dag-2018-09-10>).

⁴⁷⁵ BX1 Medias de Bruxelles (2017), “Parc Maximilien: 31 personnes interpellées, des bénévoles affirment que les sacs de couchage ont été jetés” 21 August (<https://bx1.be/news/parc-maximilien-31-personnes-interpellees-des-benevoles-affirment-que-les-sacs-de-couchage-ont-ete-jetes/>).

⁴⁷⁶ Global Voices (2018), “‘Crimes of solidarity’ in Europe multiply as 11 stand trial in Belgium for helping migrants”, 17 September (<https://globalvoices.org/2018/09/17/crimes-of-solidarity-in-europe-multiply-as-11-stand-trial-in-belgium-for-helping-migrants/>).

Park was the responsibility of the [migrants'] hosts. We first hear these very provocative declarations and afterwards we notice that there are real lawsuits that are filed."⁴⁷⁷

Moreover, Jambon has publicly expressed his interest in 'dismantling' the camps of migrants at Maximilian Park.⁴⁷⁸

Zakia is one of the 11 suspects on trial. She worked as a volunteer providing humanitarian assistance to irregular migrants at Maximilian Park during the summer of 2017. In the position of volunteer, she decided to help a migrant by buying him a SIM card; however, when in another situation she was asked if she knew about any truck that was going to the UK, she did not reply. In any case, the defendant was accused of indirectly helping the irregular migrant to cross the channel.⁴⁷⁹ She was later arrested for two months before the trial, while still breastfeeding her baby. She was charged with facilitating irregular migrants to stay and transit in order to receive profit, and in the preparation or execution of unlawful activities of a criminal organisation.⁴⁸⁰

Another two suspects in the trial were Myriam Berghe, a journalist at *Femmes d'Aujourd'hui* and Anouk Van Gestel, editor-in-chief of the women's magazine *Marie Claire*.⁴⁸¹ Neither of the journalists were arrested, but they are accused of human smuggling for accommodating migrants in transit,⁴⁸² with the aggravation of 'being part of a criminal organisation'. In addition, Berghe is also incriminated for committing the crime for financial benefit, as she has helped migrants to transfer money through Western Union.⁴⁸³ Such charges seem extremely disproportionate and could lead to a sentence of 10 years of imprisonment.⁴⁸⁴

Deswaef speaks of a 'political process' and finds it incomprehensible that the public prosecutor of Dendermonde has not made a distinction between volunteers and human smugglers. 'This is a very bad signal. Now that the language change has been granted Monday morning, it can hopefully be rectified by the Brussels Criminal Court', he says to BRUZZ. After all, solidarity is not punishable in Belgium.⁴⁸⁵

3.3.3 Intimidation and harassment of CSAs in places of transit and residence

There are numerous cases of intimidation and harassment. This area encompasses the overuse of police and other law enforcement powers against CSAs. As several case studies show, journalists who are attempting to shed the light on ongoing degrading conditions of irregular migrants and those who help them, become targeted too. The function of intimidation and harassment is to silence civil society criticism, to stop or discourage their operations, or to increase individual and organisational costs for continuing them. Yet, this behaviour is not limited to the police: volunteers have also reported the involvement of municipalities, private security actors and the judicial system in these practices. In fact, it is important to note that such actions are in part consequences of a chain of command coming from the government, and thus embody the actual policy towards irregular migration.

⁴⁷⁷ Ibid.

⁴⁷⁸ Belga Bruzz (2018), "Jambon praat met Close over 'ontmanteling' Maximiliaanpark", 10 September (<https://www.bruzz.be/samenleving/jambon-praat-met-close-over-ontmanteling-maximiliaanpark-2018-09-10>).

⁴⁷⁹ Global Voices (2018), op. cit.

⁴⁸⁰ Panhuyzen, Kevin Van den (2017), "I helped in the Maximilian Park and went into the cell for two months", *Belga Bruzz*, 20 October (<https://www.bruzz.be/samenleving/ik-hielp-het-maximiliaanpark-en-ging-twee-maanden-de-cel-2018-09-05>).

⁴⁸¹ Ibid.

⁴⁸² Belga Bruzz (2018), "Journalisten die transitmigranten herbergden beticht van mensensmokkel", 4 June (<https://www.bruzz.be/samenleving/journalisten-die-transitmigranten-herbergden-beticht-van-mensensmokkel-2018-06-04>).

⁴⁸³ Ibid.

⁴⁸⁴ Ibid.

⁴⁸⁵ Ibid.

The case study in Box 16 illustrates the scale of intimidation of CSAs in the Calais camp by police forces. Similar stories from activists and volunteers in Rome and Ventimiglia in Italy and Thessaloniki in Greece have been described in detail by the authors of this study elsewhere.⁴⁸⁶

Box 16. France: Report on "Calais: The police harassment of volunteers"

Four associations – namely, L'Auberge des Migrants, Utopia 56, Help Refugees (British) and Refugee Info Bus, which provide humanitarian assistance to migrants on the northern French coast – published a report on the systematic harassment and intimidation practices by the police to France's human rights ombudsman.⁴⁸⁷ It is important to note that their main activities are the distribution of food and material needs, legal assistance, medical care and child protection, which do not constitute a criminal offence under French law.

However, 646 incidents, related to police intimidation against volunteers, were collected from 1 November 2017 to 1 July 2018, by the "Human Rights Observers" project,⁴⁸⁸ through testimonies and official complaints. The actions of intimidation are set out below.

1) There were 214 identified reports of surveillance of volunteers, entailing 136 cases of observation, 21 of police following volunteers, as well as 57 of photographing and recording of volunteers by police officers' private devices, which occurred as a reaction to volunteers recording abuses of power by the police.⁴⁸⁹ Eléonore Vigny, an intern at l'Auberge des Migrants, reported an ostensive observation case:

Nearly twenty police officers were on top of a hill, equipped with shields and helmets, and watched us while we were installing our generator to allow our beneficiaries to charge their mobile phones. The beneficiaries were very scared and many came to ask me what was happening and if the police would come over. It lasted more than an hour. ... This constant surveillance of volunteers has a direct impact on their ability to provide humanitarian aid to displaced people in Calais. Many beneficiaries prefer not go to food or clothing distributions if there is a strong police presence, thus depriving them of access to basic services such as food.⁴⁹⁰

2) In addition, there were 205 identified cases involving identity checks – systematic identity checks are carried out purposively because they are volunteers.⁴⁹¹

3) Cases of searches include 4 body searches, 12 vehicle searches, 6 searches of personal belongings and 16 pat-downs. Moreover, females are more exposed to pat-downs (normally made by male police officers) than male volunteers. Of the 16 pat-downs documented, 14 were carried out on female volunteers, compared with only 2 on men. "This data raises the question of the impartiality of the officers whilst carrying out these controls",⁴⁹² a requirement for this type of search.⁴⁹³

⁴⁸⁶ Carrera et al. (2018), op. cit.

⁴⁸⁷ A. Chrisafis (2018), "French police accused of harassing aid workers at Calais", *The Guardian*, 8 August. (<https://www.theguardian.com/world/2018/aug/08/french-police-accused-of-harassing-aid-workers-at-calais>).

⁴⁸⁸ "Collaboration between the organisations working in the Calais warehouse which began in November 2017", In Vigny, op. cit., p. 4.

⁴⁸⁹ "The circular n° 2008-8433 of 23rd December 2008 clearly states in bold that "the police do not profit from particular protection regarding the right to one's image" and that "police officers cannot therefore oppose the recording of their image while carrying out a mission". Nevertheless, most officers order volunteers to turn off their mobile phones during a police operation." Cited in Vigny, op. cit., p. 9.

⁴⁹⁰ Vigny, op. cit., p. 7.

⁴⁹¹ National Police code of ethics, which stipulates, "When the law allows a police officer to carry out an identity check, the police officer does not rely on any characteristic to determine the person to control." Cited in Vigny, op. cit., p. 16.

⁴⁹² Ibid.

⁴⁹³ Article R. 434-11 of the Code of Ethics of the Police Nationale and the Gendarmerie. Cited in Vigny, op. cit., p. 16.

4) There were 39 cases of obstruction of humanitarian assistance and human rights monitoring faced by associations. These were commonly conducted through abusive car ticketing, fines, immobilisation of vehicles, summoning and prosecuting volunteers to the police station, confiscation of personal belongings and bans on distributing (by the municipal authorities), especially to British organisations. For example, “volunteers with the Refugee Women’s Centre, ... were arrested during a distribution and interviewed by the police. They were not given access to a lawyer, and were forced to give their fingerprints under the threat of prosecution if they did not oblige, despite no charges being made against them. No *procès-verbal* was given, and they were not informed of the ramifications of this incident.”⁴⁹⁴

The obstruction of work by civil society organisations is also denounced by the above-mentioned Calais report:⁴⁹⁵

One technique deployed in Calais, to obstruct distributions carried out by organisations, is the construction of blockades by the municipal authorities. On several occasions, distribution points were blocked with large rocks and/or earth to prevent the associations from reaching the regular distribution points. These actions seem to be more frequently carried out at distribution points that are deemed ‘too public’ by the local authorities, who wish to continually move displaced people further and further from the town centre and confine them to areas that are deemed less ‘visible’. Distributions organised by associations near the Stade de l’Epopée in winter were blocked by the instalment of large rocks that blocked the access to the site that was deemed by the Town Hall to be too ‘residential’.

5) Intimidation of volunteers, local companies funding the associations and the organisations themselves are often carried out through administrative restrictions or judicial harassment and sanctions. For instance, the members of l’Auberge des Migrants were on several occasions summoned to attend hearings on financial transactions made through the association’s bank account.⁴⁹⁶ Furthermore, there were 141 identified cases of police violence, 68 cases of abuse of power, 21 threats and 12 insults. “Intimidation of volunteers in Calais is therefore based both on legal measures, which are implemented repeatedly, and in a discriminatory manner, but also on illegal measures that intrinsically violate the obligations of the police.”⁴⁹⁷

Source: Authors, based on E. Vigny, *Calais: The police harassment of volunteers*, Report, 2018.

Nevertheless, it is important to recall that some of these actions taken by the police are actually part of a broader policy approach towards migration (see above on France). In addition, CSAs working in Paris are facing similar experiences. For example, doctors from the Médecins du Monde (Doctors of the World) stated by the end of 2017 that “[w]e were settled in the usual place, when the [police ordered us to move immediately. This is the first time Doctors of the World has been asked to interrupt a consultation to leave the premises. We had never seen that in France”.⁴⁹⁸

Box 17. Italy: Intimidation and harassment of volunteers in Rome and Ventimiglia

Since the previous report, the situation in Rome for civil society and activist groups aiding irregular migrants and asylum seekers has deteriorated significantly, replicating in some ways the hostile dynamic at the Italian sea border (see above). The atmosphere for migrant support groups meanwhile has also continued to be characterised by a hostile media and political discourse. Interior minister Matteo Salvini (Lega Nord), appointed

⁴⁹⁴ Vigny, op. cit., p. 24.

⁴⁹⁵ Vigny, op. cit., p. 22.

⁴⁹⁶ Vigny, op. cit., p. 26.

⁴⁹⁷ Vigny, op. cit., p. 34.

⁴⁹⁸ C. Legrand (2017), “À Paris, situation tendue pour les migrants et les associations”, *La Croix*, 5 September (<https://www.la-croix.com/France/Immigration/A-Paris-situation-tendue-migrants-associations-2017-09-05-1200874556>).

on 1 June 2018 following the election of the coalition government, has articulated a 'zero-tolerance' approach to irregular migration. Earlier, in June 2017, Rome's mayor Virginia Raggi (of the populist Five Star Movement) had declared a 'moratorium on new arrivals'. In Rome, informal camps where migrants seek shelter continue to be routinely disbanded and destroyed by the authorities, and CSAs continue to face administrative sanctions and intimidation by police. The Via Cupa camp, which was shelter to approximately 60,000 migrants between September 2015 and 2016 (as noted in the previous report for the LIBE Committee) remains off bounds. Beds are empty while individuals languish on the streets.

The destruction of migrant camps in Rome is usually coupled with document checks and migrants being taken in by police. In July 2018, for example, close to 400 migrants residing in the Baobab camp in Rome had their documents checked by police and 35, all said to be without documents, were detained.

Crackdowns on migrant transit camps have also been coupled by an increase in raids and closure of other camps housing regular migrants, such as those housing Roma communities or squats occupied by long-term refugees. In July 2016, a Roma camp was evicted despite an EU ruling requesting a delay and in clear breach of international standards.⁴⁹⁹ In late 2017, police evicted 800 Eritrean and Ethiopian refugees from an office block on Via Curtatone in central Rome, where they had had been living for four years. This is evidence of how the crackdown on migrant groups affects social trust and heightens the insecurity of ethnic minority groups more widely (see section 4.2 of this study on societal mistrust).

Following the eviction and destruction of migrant camps, no alternative has been provided by authorities. A 2018 report by MSF on informal settlements in Europe found that "around 10,000 migrants and refugees are living in inhumane conditions in Italy because of inadequate reception policies".⁵⁰⁰

In response to this increasingly hostile political climate in the capital, several civil society groups that previously expressed their position as 'deliberately non-political' as a means of avoiding targeting by authorities (noted in the previous report) have changed their position. "In the current situation we can no longer afford to be silent", commented one volunteer from an informal civil society group in Rome who was interviewed for this report. Increasingly unable to provide services to migrants, some civil society groups are concentrating efforts on awareness raising and drawing attention to the impacts of new criminalisation policies on societal mistrust. The recent arrest of the mayor of Riace, Mimmo Lucano, for example, on the charge of facilitating smuggling in the south of Italy was met with widespread solidarity protests across Rome and other major cities.

"In attacking him, they are attacking the idea of a common life; the idea of a peaceful society", reads a comment on the website of the informal civil society aid group, Baobab.⁵⁰¹ This comment draws a clear line between the climate of mistrust, policing and criminalisation faced by volunteers and the well-being and democratic legitimacy of society as a whole.

In Ventimiglia, meanwhile, tensions also remain high. French and Italian riot police are collaborating on operations, such as searching trains and forcibly returning migrants to the Italian border, and greater resources have been concentrated by both sides at the border. Between January and May 2018, French authorities claim to have sent back 10,524 people who tried to cross either by train, taking the motorway or across the mountains.⁵⁰² In April 2018, a migrants' 'March of solidarity' set out from Ventimiglia to Calais to draw attention to the closure and violence at the border.

⁴⁹⁹ A. Giuffrida (2018), "Italian police clear Roma camp despite EU ruling requesting delay", 26 July (<https://www.theguardian.com/world/2018/jul/26/italian-police-clear-roma-camp-despite-eu-ruling-requesting-delay>).

⁵⁰⁰ MSF, 2018. "Migrants and refugees on the margins of society", 8 February (<https://www.msf.org/italy-migrants-and-refugees-margins-society>).

⁵⁰¹ Baobab experience, "#IostoconMimmoLucano", 2 October (<https://baobabexperience.org/2018/10/02/iostoconmimmolucano/>).

⁵⁰² A. Giuffrida (2018), "Between Italy's cliffs and sea, migrants bid to outwit police", *The Guardian* 17 June (<https://www.theguardian.com/world/2018/jun/17/italy-ventimiglia-migrants-stuck-at-border-crisis-suffering>).

As noted previously at other borders like Calais and Szeged, protests by migrant solidarity groups have been met by protests of far-right groups. This is indicative of an increasingly politicised and tense environment in Italy and in France in relation to the migrant issue. In April 2018, for example, activists from a small French far-right group, “Generation Identitaire” (Identity Generation) clashed with migrant rights activists when they sought to block migrants’ passage across the border.⁵⁰³

⁵⁰³ Sputnik (2018), “Migrants’ Solidarity March Leaves Italy’s Ventimiglia for France – Reports”, 30 April (<https://sputniknews.com/europe/201804301064029144-migrants-ventimiglia-calais/>).

4. 'CRISIS' IN THE MAKING: UNINTENDED IMPACTS AND UNRESOLVED CHALLENGES

KEY FINDINGS

- Civil society actors constitute a cornerstone of functioning democracies, acting as the fundamental rights and rule of law defenders at a national level. Various experiences of policing of civil society, including suspicion, intimidation and harassment, disciplining and, in particular, formal prosecutions, negatively impact on their capacity to uphold the right to human dignity of refugees, asylum seekers and undocumented migrants. By definition, 'policing of civil society actors' is infringing on the enjoyment of rights by EU citizens, as enshrined in the EU Charter of Fundamental Rights, such as the freedom of assembly and freedom of speech. Therefore, the CoE, OSCE, as well as various UN bodies have been warning EU institutions and Member States about the negative impacts on the EU's founding values.
- The policing and criminalisation of CSAs has wider implications for societal trust and social cohesion. The vagueness of EU law and the policies of Member States enable and/or request law enforcement authorities to police contact between civil society and irregular migrants even where it is without criminal intent. This leads to widespread feelings of subjective insecurity as well as stigma, mistrust and prejudice towards migrants. Such measures negatively affect the image of civil society organisations and their activities. They also dissuade CSAs from turning to law enforcement or public authorities when issues arise, as they no longer believe in the impartiality of the criminal justice function.
- The activities of key EU justice and home affairs agencies involved in addressing migrant smuggling are based on widespread, however, unsubstantiated assumptions about this phenomenon. There is a paradox in the narrative found in the key reports about the highly organised, hierarchical, transnational criminal groups of migrant smugglers that are violent and driven by greed and involved in other criminal activities (such as human trafficking, arms trafficking, terrorism, etc.), and the local community members or people providing services via peer-to-peer platforms (such as BlaBlaCar or AirBnB), who can 'inadvertently' become migrant smugglers.
- Moreover, beyond the statistics of prosecutions on migrant smuggling, qualitative analysis on the ground shows that in many cases those affected are family members, friends who acted out of compassion or asylum seekers who had no other legal alternative to access the EU, but to come under forged documents and become criminalised. Women and children who get involved in migrant smuggling are in a particularly vulnerable and precarious situation, for example, migrant children collaborating with smugglers for a discount on their journey. The prosecutions in these cases raise concerns of secondary victimisation rather than dismantling 'organised criminal groups'.
- Lastly, measures taken in cooperation with countries of origin and destination indicate that the fight against migrant smuggling leads to the involvement and consolidation of more professional criminals. This happens when anti-smuggling measures are promoted by the EU or its Member States in third countries for migration management concerns, disregarding the general rule of law, corruption and potential impact on human rights.

4.1 Impacts on the rule of law and fundamental rights

4.1.1 Rule of law and democracy

The policing by states and their authorities of CSAs providing humanitarian assistance to irregular immigrants and asylum seekers raises profound challenges to international, regional, national and EU human rights and rule of law standards. Civil society, and the freedoms of association and expression that enable its very existence, constitutes a central component of the rule of law, which is a founding principle of both the EU and Member

States' constitutional systems.⁵⁰⁴ The rule of law is a *condition sine qua non* for social trust. The role of CSAs and citizens' movements in exposing the risks of abuse and actual breaches of fundamental human rights, and in mobilising to secure effective redress and access to justice, has remained central in upholding the democratic rule of law within the EU.

The construction of the European Communities, and the subsequent European Union, has taken place with a deep understanding and commitment that CSAs constitute a key component of accountability of governments' lawfulness and of potential abuses of individuals' rights and liberties.⁵⁰⁵ The participation of civil society in promoting 'good governance' in the EU is acknowledged in Article 15 TFEU. Particularly in the context of external relations policies, the European Commission has stated the following:

An empowered civil society is a crucial component of any democratic system and is an asset in itself. It represents and fosters pluralism and can contribute to more effective policies, equitable and sustainable development and inclusive growth. It is an important player in fostering peace and in conflict resolution. By articulating citizens' concerns, civil society organisations are active in the public arena, engaging in initiatives to further participatory democracy. They embody a growing demand for transparent and accountable governance.⁵⁰⁶

4.1.2 Fundamental rights: Freedom of assembly and freedom of speech

The EU Charter of Fundamental Rights stipulates in Article 12 the right to freedom of assembly and association at all levels, in particular on civic matters. This provision needs to be read in conjunction with the right of freedom of expression in Article 11 of the EU Charter of Fundamental Rights. Neither of these fundamental rights are limited to citizens of the Union, but are recognised for *everyone*. International and regional human rights standards underline the fundamental importance of freedom of association for civil society organisations and actors in liberal democratic and rule of law regimes. The UN International Covenant on Civil and Political Rights (ICCPR) establishes in Article 22.1 that everyone shall have the right to freedom of association with others". Similarly, the European Convention on Human Rights (ECHR) states in Article 11 that "Everyone has the right to freedom of peaceful assembly and to freedom of association with others".

The Council of Europe Venice Commission has underlined in several opinions that the freedom of association is an "essential prerequisite for other fundamental freedoms".⁵⁰⁷ The Council of Europe Committee of Ministers has highlighted the central contribution played by non-governmental actors in "the realization of democracy and human rights" as well as "security accountability and social well-being of democratic societies", as well as their "invaluable contribution also made by NGOs to the achievement of the aims and principles of the United Nations Charter and of the Statute of the Council of Europe".⁵⁰⁸

Central to the very nature of the human right of freedom of association is the principle of independence of CSAs work. Independence is especially crucial for CSAs promoting human rights protection and documenting human

⁵⁰⁴ European Commission (2014), Annex to Communication A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11 March.

⁵⁰⁵ See European Commission (2000), The Commission and Non-Governmental Organisations, Commission Discussion Paper. The European Economic and Social Committee (EESC), set up in the early 1950s, is a consultative body in the EU representing 'civil society'. It presents itself as contributing to 'strengthening the democratic legitimacy and effectiveness of the European Union by enabling civil society organisations from the Member States to express their views at European level'. Data and evidence provided by civil society has been also given an express role in the context of public consultations in the EU Better Regulation Guidelines and the evaluation of EU policies on the ground. See also European Commission, 'Better Regulation Guidelines', Staff Working Document, SWD(2015) 111 final, Strasbourg, 19.5.2015, and European Commission, 'Better Regulation Toolbox' (http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf).

⁵⁰⁶ Refer to European Commission (2012), The Roots of Democracy and Sustainable Development: Europe's Engagement with Civil Society in External Relations, COM(2012) 492 final, Brussels, p. 3.

⁵⁰⁷ See para. 45 of CoE Venice Commission Opinions (2011): Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, CDL-AD(2011)035, 19.10.2011.; and para. 64 of the Opinion on the Federal law on combating extremist activity of the Russian Federation, CDL-AD(2012)016, 20.6.2012.

⁵⁰⁸ Council of Europe (2007), Recommendation on the Legal Status of Non-Governmental Organisations in Europe, October, Recommendation CM/Rec(2007)14, Preamble.

rights violations by states. CSAs must be free from undue or unlawful interference from state actors. The 2015 CoE Venice Commission and OSCE (ODIHR) *Guidelines on Freedom of Association* emphasise the importance of the freedom of founders and members of civil society to determine their objectives and reach of activities.⁵⁰⁹ When it comes to issues related to “private or other forms of non-state funding” the same guidelines state:

State practices that raise the deepest concerns in this area are: outright prohibitions on access to foreign funding; requiring associations to obtain government approval prior to receiving such funding; undue delay in receiving approval for implementing foreign-funded projects; requiring the transfer of funds from foreign sources through a centralized government fund; imposing excessive reporting requirements, banning or restricting foreign-funded associations from engaging in human rights, advocacy or other activities; stigmatizing or delegitimizing the work of foreign-funded associations by requiring them to be labelled in a pejorative manner; initiating audit or inspection campaigns to harass such associations; and imposing criminal penalties on associations for failure to comply with any above-mentioned constraints on funding.⁵¹⁰

The notion of CSAs comprises not only NGOs themselves and the individuals forming part of them, but also ‘dis-organised’ or non-associated civil society movements, including human rights defenders and activists. This is, for instance, underlined in the 1999 UN Declaration *on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Declaration on Human Rights Defenders).⁵¹¹ Article 1 of the Declaration states: “Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”⁵¹² The right of freedom of association is recognised not only for ‘organisations’, but also for individuals. This means, for instance, that in light of the above-mentioned *Guidelines on Freedom of Association* that “the individual wrongdoing of founders or members of an association, when not acting on behalf of the association, should lead only to their personal liability for such acts, and not to the prohibition or dissolution of the whole association”.⁵¹³

Any restrictions to the freedom of association applicable to states must pursue a legitimate aim, be necessary in a democratic society and comply with the general principle of legality.⁵¹⁴ Any restrictions should not be used as a pretext to control civil society or obstruct their role in monitoring human rights.

⁵⁰⁹ Council of Europe Venice Commission and OSCE ODIHR (2015), *Guidelines on Freedom of Association*, Warsaw, paragraph 29, Principle 4.

⁵¹⁰ *Ibid.*, paragraph 222.

⁵¹¹ United Nations (1999), *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, General Assembly, A/RES/53/144, 8 March.

⁵¹² The Preamble of the UN Human Rights Defenders Declaration adds: “Acknowledging the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including in relation to mass, flagrant or systematic violations such as those resulting from apartheid, all forms of racial discrimination, colonialism, foreign domination or occupation, aggression or threats to national sovereignty, national unity or territorial integrity and from the refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources”.

⁵¹³ Council of Europe Venice Commission and OSCE ODIHR (2015), *op. cit.*, paragraph 29 and 254.

⁵¹⁴ Article 22.2 ICCPR; Article 11.2 ECHR.

Box 18. Hungary: Impacts on the rule of law and fundamental rights

The Joint Opinion by the CoE Venice Commission and OSCE ODIHR dealing with Hungary and entitled “On the Provisions of the So-Called ‘Stop Soros’ Draft Legislative Package which Directly affect NGOs” of 25 June 2018,⁵¹⁵ examines the extent to which the criminalisation of certain activities of persons working for NGOs in Hungary – in the scope of the Stop Soros draft legislative package – constituted an unlawful interference with their freedoms of association, and in some cases, expression. The assessment focused on whether the extent of the restrictions by the Hungarian government to the right of freedom of association and expression were in accordance with the law, pursued a legitimate aim and were necessary in a democratic society. Despite reiterated concerns and criticism from international and regional human rights organisations,⁵¹⁶ it is worth noting that the draft legislation examined by this Joint Opinion was actually adopted on 20 June 2018.

The Venice Commission and ODIHR highlighted in this same Joint Opinion that while in principle a legal provision concerning the criminalisation of facilitation of irregular migration may pursue a legitimate aim, it “must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from applying for asylum”.⁵¹⁷ On these grounds, the Joint Opinion raised serious doubts about the legitimacy of the aim behind Hungarian Stop Soros legislative package. Furthermore, they raised similar doubts concerning the necessity of the legal restrictions in a democratic society. Quoting the European Court of Human Rights ruling *Mallah v France*,⁵¹⁸ the Opinion emphasised that Hungarian national law stands in difficult relationship with the necessity test when it does not include an express exception concerning humanitarian assistance, nor does it clearly differentiate financial gain as the strict counterpart of an illegal activity. They also highlighted that in the absence of a humanitarian exemption clause in the current Hungarian criminal law, “the authorities willingly accept the risk of stigmatization”.⁵¹⁹ The Joint Opinion stated that “there may be circumstances in which providing ‘assistance’ is a moral imperative or at least a moral right. As such, the provision may result in further arbitrary restrictions to and prohibition through heavy sanctions of the indispensable work of human rights NGOs and leave migrants without essential services provided by such NGOs”.

On the basis of the above, the Venice Commission and ODIHR concluded that the Hungarian Lex NGO failed to meet human rights and rule of law standards, and infringed upon the right to freedom of association and expression and should be repealed. In fact, the plenary of the European Parliament considered this Hungarian legislation and its negative impact on the freedom of association for non-governmental actors in the country one of the main concerns for voting favourably on the start of Article 7 TEU procedure on 12 September 2018.⁵²⁰

⁵¹⁵ Council of Europe Venice Commission, OSCE and ODIHR (2018), op. cit.

⁵¹⁶ Refer to Paragraph 44 of the European Parliament Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on the European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, A8-0250/2018, 4.7.2018.

⁵¹⁷ Page 19, paragraph 80 of the Joint Opinion.

⁵¹⁸ ECtHR, 10 November 2011, Application No. 29681/08. In paragraph 40 the ECtHR found in favour of the legality of French law in light of the fact that it included a legal impunity mechanisms for members of the family of the third country national in irregular situation, in particular ascendants, descendants, brothers and sisters and spouses or partners.

⁵¹⁹ Council of Europe Venice Commission, OSCE and ODIHR (2018), op. cit., p. 23.

⁵²⁰ See European Parliament News (2018), “Rule of law in Hungary: Parliament calls on the EU to act”, 12 September (<http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act>).

4.2 Impacts on societal trust

It has been argued that the increasing involvement of the EU and its actors in irregular immigration is likely to displace mistrust on the effectiveness of irregular immigration policies from domestic actors towards the EU.⁵²¹ As with mistrust on the effectiveness of policies to control irregular migration, mistrust for policies' fairness or democratic legitimacy has also emerged from across the political spectrum over the course of the refugee crisis and this has intensified in the two years since our last report, during which we have seen unprecedented pan-European mobilisation.⁵²²

Indeed, the unprecedented new concentration of powers to deter migrants and control the actions of CSAs at the level of the EU, coupled with a lack of clear protection for citizens to provide humanitarian assistance to irregular migrants and asylum seekers at the same level, has made the Union for one of the first times an arena of democratic deliberation. Parts of civil society have awoken across borders to contest policies and laws that they believe to be contrary to the 'core principles' of both the EU and its Member States, as well as contrary to broader humanitarian or political principles.

As well as an operational humanitarian mission, the Aquarius rescue boat mentioned above has become for some "the concrete symbol for those in Europe who place the universal values of respect for human life, dignity and solidarity before any other consideration".⁵²³ Once again, it is important to note that the issue of SAR and humanitarian assistance has wider implications for European social values, social trust and social cohesion. Policies that criminalise migration have broader impacts on the population, including making life more difficult for other minority groups in society and negatively impacting social trust in society as a whole.

Policies that criminalise contact with irregular migrants may lead to widespread feelings of subjective insecurity as well as stigma, ill trust and prejudice towards migrants. For example, speaking of the recent deployment of 3,000 new 'border hunters', enhanced policing and reports of violence at the external Schengen border between Hungary and Serbia, one civil society representative interviewed for the ESRC study noted earlier⁵²⁴ commented:

I wonder what is going to happen in a few years' time, when those officers who have taken part in these acts of violence will go back to their original postings and community ..., if it will normalize that violence? ... [I]t's a very serious issue, not to do with migrants and asylum seekers. These police officers will be the ones who stop me on the road or anyone else so that's very problematic.

His words echo those of a French civil society activist who commented to Allsopp in 2010 that "crimes of solidarity" do not just concern the rights of migrants but are also "about the rights of citizens". They are, she stressed, about something bigger that binds us: that is, the value of *fraternité*.⁵²⁵

As the European refugee crisis unfolded, the position of NGOs and civil society groups aiding irregular migrants and asylum seekers became more and more controversial with some important developments emerging since our first report on the effects of the Facilitation Directive for the LIBE Committee in 2016.

In our previous report, civil society groups highlighted a series of 'unintended consequences' of the anti-smuggling apparatus on their work. The results of a questionnaire of 69 civil society organisations and 13 cities across approximately 20 Member States gave an indication of the range of material, direct and perceived effects of the Facilitators' Package on irregular migrants and on individuals and organisations providing humanitarian assistance to them. Almost all of those surveyed considered their work to be humanitarian in nature; claiming to

⁵²¹ Carrera and Allsopp (2017).

⁵²² J. Allsopp (2017), 'Solidarity, Smuggling and the European Refugee Crisis: Civil Society and its Discontents' *Diritto, Immigrazione, Cittadinanza* (Rights, Immigration, Citizenship) 3, pp. 1-29.

⁵²³ SOS Méditerranée (2018), op. cit.

⁵²⁴ S. Carrera, Allsopp, J. and Vosyliūtė, L. (2018), "Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism". *International Journal of Migration and Border Studies*, 4(3), pp. 236-276; Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliute (2018), "Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society". London: Hart Publishing (<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>).

⁵²⁵ J. Allsopp (2012), *Contesting Fraternité: Vulnerable Migrants and the Politics of Protection in Contemporary France*, RSC Working Paper no. 82, Oxford: Refugee Studies Centre.

provide services that help migrants to access their fundamental rights (including to health care, shelter, hygiene and legal assistance) and to live with dignity. Just a handful of survey respondents reported direct experience of proceedings, prosecution or sanction for their work supporting asylum seekers and irregular migrants. Criminal acts included fundraising for the medical bill of a migrant domestic worker without license, protesting and misusing public funds. Yet a fifth of respondents from a range of Member States reported that their organisation or a member of their organisation had feared sanction for their work assisting an irregular migrant – related to both the transit of migrants and support during their stay in a Member State.

Although it has not been possible to reconduct the survey, other qualitative evidence confirms that these dynamics have continued and indeed *aggravated* since the time of fieldwork in 2015.

CSAs continue to report the ‘chilling effect’ of anti-human smuggling laws. There also remains widespread confusion among CSAs around how the Facilitation Directive should be implemented in their Member State, leading to misinformation and ‘erring on the side of caution’. This dynamic continues to compromise migrants’ access to vital services. This is especially true in the context of the significant increase in the number of people migrating to Europe and seeking asylum, where everyday citizens are obliged to volunteer vital services without full training in the absence of sufficient state provision. In Rome, for example, as mentioned above, the absence of decent housing for migrants continues to be met by a sustained response from civil society, at the helm of which remains a collective group of volunteers called Baobab Experience. Despite being lauded for their efforts internationally, the actions of this group have been met locally with an iron fist, with multiple evictions making asylum seekers – among them women and children – homeless. The most recent eviction took place on 13 November 2018.⁵²⁶ Other reported incidents of criminalisation in Italy and France include administrative fines for distributing food and for the erection of temporary shelters to distribute food. Meanwhile, policing measures include intimidating acts like the parking of police vans outside service provision spots and disciplining measures like repeated ID checks on volunteers. Some NGOs report an increase in attacks from far-right groups and an absence of police protection.⁵²⁷

Previous analysis has framed both the real and normative tensions between anti-smuggling laws in Europe on the one hand, and the safeguarding of the independence of humanitarian actors on the other, in terms of ‘unintended’ or ‘indirect’ policy consequences. Another body of work has seen this tension as reflective of a more fundamental tension in liberal democracy between communitarianism and universalism, and as evidence of the important role of civil society in protecting society’s ‘core principles’.⁵²⁸ These effects can be mitigated but never fully resolved. Indeed, an element of social mistrust or respectful conflict between civil society and statutory actors is a fundamental feature of a healthy democracy.

During 2016 and 2017, in some parts of the EU, attacks on civil society organisations under the guise of anti-smuggling measures nevertheless became more confrontational, leading some actors to consider that the counter effects of anti-smuggling measures on their work were intentional after all: intended to reduce the monitoring role of civil society and reduce scrutiny of statutory actors as well as create a hostile environment for migrants by reducing access to services.

In another development with parallels across the EU in countries including the Netherlands and Belgium, civil society organisations in the UK have complained that the work of border control is increasingly becoming co-opted into their everyday activities, threatening, on a practical level, the bonds of trust between service providers and the migrants, but also the independence of civil society. The effect of dissuading migrants from accessing services also has broader consequences for society. A representative from an international medical NGO based in the UK put it as follows:

⁵²⁶ Y. Gostoli (2018) “As Rome Camp Eviction Makes Refugees Homeless, Salvini Celebrates”, *Aljazeera*, 13 November. (<https://www.aljazeera.com/news/2018/11/rome-camp-eviction-refugees-homeless-salvini-celebrates-181113184605224.html>).

⁵²⁷ S. Carrera, Allsopp, J. and Vosyliūtė, L (2018), ‘The Effects of Anti-migrant Smuggling Policies on Humanitarian Assistance in the EU’. *International Journal of Border and Migration Studies (IJBMS)*: 3(4), 236-276.

⁵²⁸ Allsopp (2012), op. cit.

[W]hat we're seeing is a normalization of civil society being expected to play a role in immigration. Even if it's not explicit that it's a policing event, it's your responsibility to be concerned as well about someone's immigration status. Whereas the doctors we speak to would say it's not, I'm not interested in the person's immigration status, I want to treat the patient. And ... that's been replicated ... with landlords, in schools to a certain extent as well ... [A]lthough what you might hear from a politician is that the intended impact is to dissuade, about making it a hostile environment, from our perspective the hostile environment isn't persuading people from staying in the UK or from not coming to the UK, what it's doing is making sure you have greater health inequalities because people are getting more sick and not accessing any care ... it increases the risk of exploitation ... criminals taking advantage of marginalized people and thriving off this niche area which has been created.⁵²⁹

As well as serving to deter exploitation, previous studies have shown that a degree of trust is important for compliance with enforcement on the part of irregular migrants and those who assist them. In the Netherlands, it is reported that local authorities' obligation to report irregular migrants who make use of the new special night shelters has dissuaded them from accessing the service and left them sleeping rough. In a recent report, a representative of an NGO that provides health and social care in London reported that concerns about potential obligations to share data with government officials regarding clients meant they were less likely to collect the data in the first place, which has consequences for funding and for monitoring their work.⁵³⁰ Again, this has important wider implications for social trust.

Research suggests that the main concerns of practitioners continues to be how to deliver their assistance tasks and responsibilities without being penalised, and how to avoid social exclusion, maintain social cohesion and cater for the needs of all these populations. Meanwhile, organisations that used to provide shelter and food have leaned into new areas such as legal assistance in recognition of shortcomings in avenues for justice. The space for civil society groups supporting migrants and refugees in Europe has also expanded to include more informal and loose networks and activist groups that are increasingly connected across borders. Many such groups are working with migrants and refugees for the first time.

In this emerging arena of pan-European civil society activism, caution must be taken to recognise the specificity of each national context. One Hungarian civil society volunteer highlighted the problems that arose in this regard when activists came to show solidarity with migrants in Szeged at the external Schengen border in 2015:

There's EU and German money involved so I get they felt they had a stake in it and it was cool that they came to show solidarity and were helpful, but some had a political mission ... the other ones would come to Eastern Europe and the Balkans with a very certain type of rhetoric going on nationality. They had their own idea of what political organization means, not understanding what it looks like here. No Borders struggles in the West have a strong anti-capitalist focus, but you don't say that here because of the past traumas of communism. So, this new European solidarity is great, we were calling people ahead in different countries and coordinating between service providers and activist groups. ... [B]ut there's also a problem in this idea of facilitating only the transit of migrants from East to West, not challenging ideas of East and West within the Union.⁵³¹

CSAs have responded in numerous ways to the increased monitoring and attacks on their operations and reputations. Some – especially pursuant to the introduction of the EU–Turkey deal – chose to leave the arena of humanitarian assistance in the EU, not wishing to be complicit or 'instrumentalised' in the anti-smuggling agenda. Others continue to operate but 'with our heads down', avoiding unnecessary scrutiny and attention so as to continue to receive statutory funding to provide their crucial services and/or – in the context of the UK, Hungary, Greece and Italy – to maintain government-controlled access to hotspots, transit zones and detention centres where migrants are held. New scrutiny of their work is thus reportedly having a disconcerting 'silencing effect' on some NGOs.

⁵²⁹ Cited in Allsopp (2017), op. cit.

⁵³⁰ Allsopp (2017), op. cit.

⁵³¹ Allsopp (2017), op. cit.

Other civil society groups are taking a more vocal stance and framing their work as an immanent critique of national or European values or, in extreme cases, as civil disobedience against unjust laws.

Some civil society groups have been careful to specifically frame their work as existing in opposition to smuggling. A respondent from Italy interviewed for ongoing research, for example, stressed that the intimidation they undergo from police to stop their provision of food and services to migrants serves to encourage, not discourage smuggling networks: “[W]here the collective is prevented from providing these services, the migrants either end up in the street or are forced to turn back to smugglers for assistance. ... [B]ringing it into the public sphere is a form of protection.”⁵³²

Their work is thus framed as serving to uphold the value of social trust and the rule of law. A respondent from the Netherlands similarly commented in our previous 2016 study that the difficulties in accessing assistance generated by criminalisation caused vulnerable migrants to ‘stay in isolation, vulnerable to exploitation’. Among these migrants are the ‘most vulnerable’ a Belgium respondent stressed, including pregnant women, trafficking victims and sex workers in need of psychological and health support (see the previous report).⁵³³

Some civil society groups have suggested that in increasing their scrutiny of NGOs, certain government and EU actors are trying to distract attention away from policy failures and find a common ‘scapegoat’. Common critiques levelled in this regard include (i) EU and statutory actors lack standards for effective policy delivery; (ii) statutory actors have no standardised frameworks for measuring the effectiveness of their policies; and (iii) there is therefore a lack of evidence regarding the impacts of policies and standards being met. All of these impact on social trust more broadly.

Several civil society groups have appropriated the frame of European values to justify their actions in solidarity with migrants and refugees, appealing – as with the WeMove.eu petition – (see above) to a common sense of EU citizenship. CSAs have argued that the EU community’s ‘basic principles’ include assisting vulnerable migrants on the basis of its common history of receiving refugees (and a common shame regarding the episodes in European history where states have not ‘done their bit’). In the UK-based campaign “It’s Our Turn”,⁵³⁴ parallels are made with the historic Kindertransport movement that saved the lives of thousands of child refugees fleeing Nazi Germany in World War II. Calling for refugee resettlement and safe and legal routes to the UK, Safe Passage proposes to take children *away from* smuggling networks. Lord Alf Dubs, himself a Kindertransport survivor, lent his own name to the Bill seeking to facilitate safe passage for more unaccompanied minors from Europe to Britain. As Heidi Allen, the Conservative MP who tabled the amendment stressed in Parliament, the amendment was not just about helping child refugees, but also about the principle of ‘European solidarity’. Here social trust and solidarity appear synonymous. A fund was recently set up by Lord Alf Dubs.⁵³⁵ He framed efforts to resettle children from Calais to the UK as a modern-day following of the Kindertransport, which seeks to honour Europe’s past tradition and learn from mistakes.

Significantly, thousands and thousands of EU citizens voted with their feet, travelling freely across EU Member States to volunteer at the height of the crisis. In some areas of civil society – and in particular among the newer and more informal civil society groups – EU citizens have thus replicated and sought to transform the solidarity dynamics at the EU institutional level through activism and volunteering: just as EU institutions have positioned themselves in regional solidarity, such as posting Frontex officers pooled from EU Member States at certain EU external borders, EU CSAs and activists are also present at these borders serving a protective, safeguarding and monitoring function.

⁵³² Cited in Carrera, S., V. Mitsilegas, J. Allsopp and L. Vosyliute (2018), “Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society”. London: Hart Publishing (<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>).

⁵³³ Carrera, S., E. Guild, A. Aliverti, J. Allsopp, M. Manieri and M. Levoy (2016), “Fit for Purpose? The Facilitation Directive and the Criminalization of Humanitarian Assistance to Irregular Migrants”, Study for the European Parliament’s LIBE Committee, Brussels.

⁵³⁴ <http://safepassage.org.uk/resource/its-our-turn-campaign-pack/>

⁵³⁵ <http://safepassage.org.uk/what-we-do/alf-dubs-fund/>

Some EU citizen activists and volunteers have stated that being an EU citizen helped them in their work, meaning that they could mobilise their own 'citizen privilege' to assist less fortunate migrants. Other civil society volunteers (such as one of a group of Spanish fire-fighters currently on trial for migrant smuggling in the Mediterranean Sea for their work with the SAR charity Proem-AID, and some European activists in Ventimiglia who were issued cautions banning them from the border territory) claim that they were targeted regardless of, or specifically because of their EU citizenship by way of 'being made an example' to dissuade others.⁵³⁶

A new book by three of the authors of this study, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* explores the effects of EU policies, laws and agencies' operations in anti-smuggling actions, and their implementation across EU Member States in more detail.

4.3 Other unintended societal and individual impacts of migrant smuggling

4.3.1 EU policy-making in 'crisis' mode and unchallenged assumptions about the migrant smuggling phenomenon

Within Europe, migrant smuggling has been conceptualised primarily from migration management, security and criminological perspectives. Four key assumptions of the EU's approach on 'migrant smuggling' are the following:

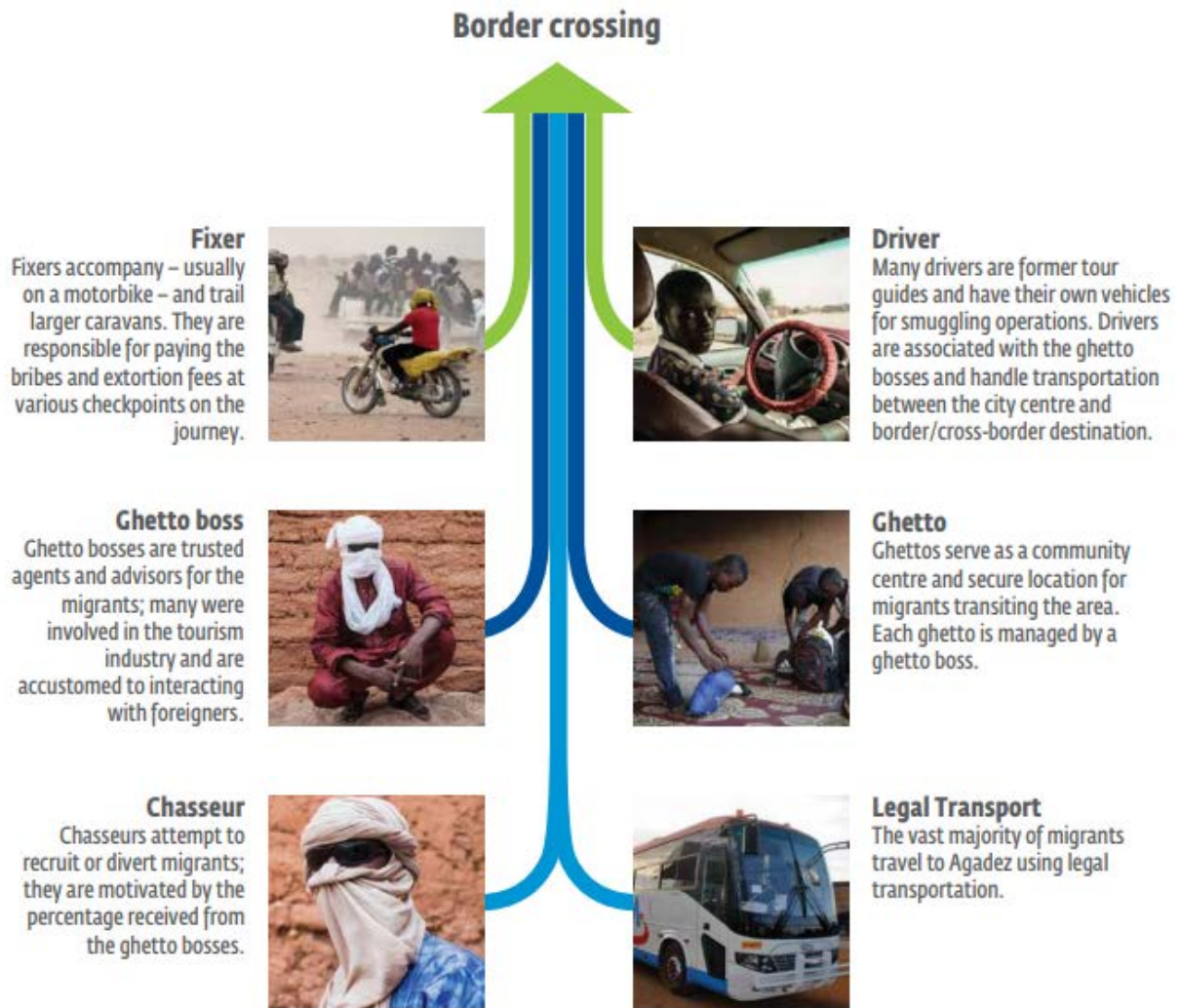
- 1) 'Migrant smugglers' are violent criminal professionals.
- 2) They work in highly organised criminal groups.
- 3) The 'business model' is aimed at increasing financial benefit and is highly profitable.
- 4) Therefore, criminal investigations and prosecutions will increase the risks for an organised criminal group to get caught and will lower the profits from migrant smuggling.

The first assumption provides that the 'persona' of a smuggler or 'smugglers profile' is construed as an exploitative, violent and foreign male criminal. Often it is profiled by occupation, as done by both Frontex (see Figure 5) and Europol's Migrant Smuggling Centre on the basis of suspects, and provides other 'profiling' characteristics, such as nationality and age.⁵³⁷

⁵³⁶ Allsopp (2017).

⁵³⁷ Europol's European Migrant Smuggling Centre (2017), "First Year Activity Report: Jan 2016 – Jan 2017", Europol, The Hague.

Figure 5. Profiles of migrant smugglers in Agadez, Nigeria



Source: Frontex, Risk Analysis Unit, Africa-Frontex 2016 Intelligence Community Joint Report, Warsaw, April 2017, p. 11.

The second assumption provides that the smuggling network constitutes an ‘organised crime group’ – transnational and hierarchical in nature and driven solely by profit and greed, and also often linked with ‘poly-criminality’ – with involvement in other criminal activities, such as document fraud, human trafficking, arms and/or drugs trafficking and terrorism⁵³⁸ (see Figure 6).

⁵³⁸ Europol’s European Migrant Smuggling Centre (2017), “First Year Activity Report: Jan 2016 – Jan 2017”, Europol, The Hague, p. 11.

Figure 6. Migrant smuggling network as an organised crime group

FACILITATORS/OCGs



The basic structure of the OCGs includes leaders who strategically coordinate activities along the route, organisers who manage activities locally through personal contacts, and opportunistic low-level facilitators.



In countries of origin, facilitators openly advertise their services on social media platforms.



Facilitators operate out of criminal hotspots and large logistical/transportation hubs, both in source countries and along the migration corridors. These are located mainly in large cities but also near border-crossing points and important highways. In a number of cases, crime hotspots were found around reception centres and (informal) camps.

Source: Europol's European Migrant Smuggling Centre, First Year Activity Report: Jan 2016–Jan 2017, Europol, The Hague, 2017.

For example, Europol describes the 'Facilitation of Illegal Immigration' area of crime as follows:

A complex, ruthless and multinational migrant-smuggling network has developed around Europe's unprecedented migration crisis, thus generating billions of euros for the criminal groups involved. ... In 2015, criminal networks involved in migrant smuggling are estimated to have had a turnover of between EUR 3–6 billion. ... The turnover from this highly attractive business [could double or triple](#) if the scale of the current migration crisis persists. A knock-on effect could be an increase in the exploitation of labour, where migrants may be forced to work to pay off their large debts with the smugglers.⁵³⁹

Therefore, on 27 March 2017, the Council decided to continue the EU policy cycle for organised and serious international crime for the period 2018–21 and once again selected the 'facilitation of illegal immigration' as one of the European Multi-Disciplinary Platform against Criminal Threats (EMPACT) priorities, "particularly focusing on those whose methods endanger people's lives, those offering their services online and making use of document fraud as part of their business model".⁵⁴⁰

Together these concepts are part of the largely unchallenged narrative of smuggling, which singlehandedly attributes the presence of assistance and basic services available irregular migrants, the travels and the tragedies that often afflict migrants to the actions of heinous smuggling facilitators. The academic evidence, in particular empiric research based on ethnographic observations in the EU and in developing countries, challenges these assumptions.⁵⁴¹

⁵³⁹ Europol (2017), "Crime Areas and Trends: Facilitation of Illegal Immigration.", *Europol Official Website* (<https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/facilitation-of-illegal-immigration>).

⁵⁴⁰ Interestingly new EMPACT distinguishes not only Trafficking in Human Beings, as a separate area of priority crime but also Document fraud as a separate category. Europol (2017), "EU Policy Cycle – EMPACT." *Europol* (<https://www.europol.europa.eu/crime-areas-and-trends/eu-policy-cycle-empact>). Accessed 11 Oct. 2018.

⁵⁴¹ G. Sanchez (2018), "Five Misconceptions Concerning Smuggling", Policy Brief Series, Migration Policy Centre, *European University Institute*, 2018 (<http://cadmus.eui.eu/handle/1814/54964>); L. Achilli (2018), "The "Good" Smuggler: The Ethics and Morals of Human Smuggling among Syrians." *The ANNALS of the American Academy of Political and Social Science* 676, no. 1, pp. 77-96; M. Micallef and T. Reitano (2017), "The anti-human smuggling business and Libya's political endgame", Institute for Security Studies and The Global Initiative against Transnational Organised Crime: Geneva (<https://issafrica.s3.amazonaws.com/site/uploads/nar2.pdf>); J. Brachet (2018), "Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara." *The ANNALS of the American Academy of Political and Social Science* 676, no. 1, pp. 16-35.

While these assumptions hold and are suitable in certain cases, closer to the continuum of human trafficking, or related to production of forged documents, they seem not to fit description of other types of activities that are criminalised as ‘migrant smuggling’ or ‘migrant facilitation’, such as housing, transportation and information sharing. The latter are more likely to be ‘community based’ and provided by citizens or humanitarian actors out of compassion, and without criminal intent, and thus their criminalisation raises concerns.

As illustrated above, the discourse surrounding smugglers and their networks has proven to be quite resilient, especially considering the research gaps in the field. The scholarship available to this day has found limited evidence of hierarchically organised criminality, transnational structures or significant structural complexity.⁵⁴² Furthermore, scholars have shown that while clandestine journeys are indeed dangerous, most often the risks associated with them emerge from the deployment of immigration and border enforcement and controls, along with exposure to treacherous landscapes and environments, rather than from smugglers’ actions alone. In other words, it is in fact the inability to secure legal paths for mobility that lies at the core of migrants’ decisions to contract smugglers.⁵⁴³ Seeking to avoid law enforcement and/or detection, smugglers opt for more remote routes and riskier travel methods, the safety and lives of those who travel with them becoming increasingly compromised.

None of these statements seeks to exempt smuggling facilitators from their responsibility in the tragic experiences faced by migrants. They do, however, seek to jumpstart a conversation concerning the definition and the scope of the smuggling legislation and its reach. While the larger discourse on smuggling portrays it as a phenomenon taking place outside of the EU’s borders, NGOs, volunteers and ordinary citizens within the EU face criminal charges for the work they carry out on behalf of migrants and refugees.⁵⁴⁴ The emphasis on organised crime models, the gaps in official data and the absence of empirical work on smuggling limit our understandings of the dynamics of irregular migration facilitation on the one hand, while on the other, obscure the ways in which smuggling legislation impacts on the lives of EU citizens. The following sections provide examples concerning criminalisation of migration facilitation and its implications.

For example, Europol’s SOCTA (Serious Organised Crime Threat Assessment) in 2017 once again stressed that “OCGs [organised criminal groups] involved in migrant smuggling display an *unprecedented level of organisation and coordination*” (emphasis added).⁵⁴⁵ However, in the same report Europol concluded that any EU citizen advertising a ride on BlaBlaCar or providing accommodation on AirBnB could potentially become facilitators: “Migrant smuggling networks heavily rely on social media to advertise smuggling services. Migrant smugglers make use of ride-sharing applications and P2P [peer-to-peer] accommodation platforms to provide a cover for their smuggling activities. This leaves regular users [of these platforms] *at the risk of inadvertently becoming facilitators* by unknowingly transporting or hosting irregular migrants.”⁵⁴⁶

The very premises of criminal law would be to deter people from doing a morally and socially bad thing, but in the area of facilitation one can be unknowingly doing a bad thing, while doing a good thing. Thus, it seems that criminal justice approach is over-stretched and not fit for migration management. This may explain why after all the emphasis on poly-criminality and organised criminal groups, law enforcement agencies continue to police, arrest and prosecute service providers without ‘unjust benefit’, civil society doing non-profit activities, family members, friends and even migrant communities.

Similarly, leading academic experts in the area of criminology, selected to act as an Academic Advisory Group on Europol’s SOCTA for 2017, briefly summarised their concerns on the current approach to address migrant smuggling predominantly via criminalisation and prosecution:

⁵⁴² Sanchez (2018), op. cit.

⁵⁴³ Achilli (2018), op. cit.

⁵⁴⁴ L. Vosyliute and C. Conte (2018), “Migration: Crackdown on NGOs assisting refugees and other migrants, Discussion Brief July 2018, Research Social Platform on Migration and Asylum – ReSOMA, Brussels.

⁵⁴⁵ Europol (2017), “European Union serious and organized crime threat assessment: Crime in the age of technology” (SOCTA 2017), Europol, The Hague.

⁵⁴⁶ Ibid.

In our view, policy-makers need to ensure that they track possible counterproductive effects of policies. The thousands of deaths of aspirant refugees and economic migrants in the Mediterranean Sea well illustrates this point – and the dilemmas faced by European policy-makers. Having pledged to protect and foster human rights, the EU and its Member States thus have the responsibility to monitor and minimise the harmful unintended consequences of their policy choices, *keeping also in mind that criminalisation and prosecution are not the only or necessarily the best strategy for dealing with the harms of organised crime groups and their activities.*⁵⁴⁷

4.3.2 Impacts of criminalisation on refugees, other migrants and family members

Across the EU there is a widespread absence of statistical and official data concerning those who are being accused, charged or convicted for the offence. As outlined in the initial study in 2016, EU Member States do not maintain statistics concerning smuggling and/or related offences; only Germany was found to provide specific statistics on the number of persons arrested on suspicion of facilitating irregular migration.⁵⁴⁸ Specifically, there are gaps concerning the demographics of those being charged with the offence, the grounds for the charges, and at a more general level, the overall numbers concerning smuggling offences. Furthermore, smuggling data is not disaggregated in terms of gender or age, and *family links*, which limits the ability to map the links between the hardship in family reunification, narrow sponsorship schemes and increased criminalisation of family members and friends.⁵⁴⁹

Cases submitted for prosecution under national smuggling statutes, implementing and even preceding the Facilitators' Directive across Europe, systematically involve practices that according to the language of the UN Smuggling Protocol would have fallen out of criminalisation as discussed in section 2, as they do not involve material/financial benefit and concern cases of assistance or support to immediate family members, friends or people in distress. As discussed in section 3 and showcased in Annex 1, we continue to find that smuggling prosecutions often involve the provision of assistance to friends, family members and people in distress in the context of their journeys.

Table 7 further indicates how mothers and fathers can be charged with smuggling for using false or forged documents to facilitate the illegal entry of their own children into the country; girlfriends and wives prosecuted on the grounds of having provided room and board for their boyfriends and husbands; and men and women who used their own children's birth certificates and passports to facilitate the family reunion of children with their parents, which otherwise would not be likely.⁵⁵⁰ As for the developments after the emergence of the so-called European humanitarian refugee crisis, the researchers also gathered empiric evidence of desperate parents trying to reunify with their family members by trying to use documents of other family members or to conceal and smuggle them from hotspots. For example, CEPS researchers within the frame of a research project titled "Anti-smuggling policies and their intersection with humanitarian assistance and social trust"⁵⁵¹ conducted interviews in Greece on a field research trip.⁵⁵² Interviewees representing civil society and national authorities mentioned several illustrative cases. National officials mentioned a case of a desperate mother trying to smuggle her 18-year-old son from Lesbos island (which applies geographical restrictions for asylum seekers) by putting him in a suitcase and trying to board a ferry, in order to reach mainland Greece. A civil society respondent relayed several cases where parents residing in other EU Member States were trying to reunify with their minor children aged 3

⁵⁴⁷ Taylor, M., X. Rauffer, M. Den Boer, A. Sinn, M. Levi, L. Paoli and E. Savona (SOCTA Academic Advisory Group) (2017), Comments by Academic Advisors, Europol (https://www.europol.europa.eu/sites/default/files/documents/comment_by_academic_advisors.pdf).

⁵⁴⁸ Carrera et al. (2016), op. cit., p. 40.

⁵⁴⁹ See also, C. Conte (2018), "Impossibility and hardship of family reunion for beneficiaries of international protection", Research Social Platform on Migration and Asylum – ReSOMA Discussion Brief, July.

⁵⁵⁰ Ibid.

⁵⁵¹ The project was coordinated by the School of Law of Queen Mary University London (QMUL) in cooperation with CEPS and Platform for International Cooperation on Undocumented Migrants – PICUM and it was funded by the UK's Economic and Social Research Council (ESRC).

⁵⁵² The field research trip took place on 6–12 June, 2017 in Athens and Lesbos island.

and 5 who were held by authorities in Greece.⁵⁵³ After experiencing how slow and burdensome the process was the parents were getting desperate. After a few weeks contacts with other organisations gave the impression that the parents had reunited with their children, so it looked like they had resorted to smugglers to facilitate the family reunification.⁵⁵⁴

Table 7. Exemplary cases: Prosecuting family members in the UK and France

Case	Brief description	Source
Mother of three prosecuted for ‘smuggling’ her own children	In 2001, a woman was accused of migrant smuggling when she attempted to smuggle her three children into France by forging her own passport. She admitted not having initiated a family-reunification process as applicable under French law as her own immigration status had yet to be approved, in addition to lacking the financial means outlined by French law to provide for the children. The children were denied entry into France and returned to Cameroon while the mother faced criminal proceedings. The woman was convicted of “assisting the irregular entry, transit and stay of a <i>foreigner in France</i> ” although the Court of Appeals of Paris eventually reversed the decision 16 months from the time of the woman’s initial arrest.	See Madame [Name Redacted], Cour D’Appel de Paris, Dossier no. 0100550, 21 June 2001. ⁵⁵⁵
Girlfriend prosecuted for hosting her boyfriend in an irregular situation	In 2007, a French woman was accused of migrant smuggling for providing accommodation for several months to a man with whom she had a romantic relationship. Her boyfriend was an irregular migrant of Moroccan origin. He abandoned the household as he was afraid that his girlfriend could be prosecuted as a result of allowing him to live with her.	See Madame [Name redacted] Tribunal de Grande Instance d’Aurillac, No. de parquet 07003283, No. de Jugement 448. ⁵⁵⁶
A wife prosecuted for allowing her husband to live with her	In this case the prosecution in France, in 2008, argued that the woman had committed a crime by allowing her Turkish-born legal husband to remain at the residence they shared despite knowing he had entered the country	See Madame [name redacted], Tribunal de Grande Instance de Lyon, No. De Parquet 0744606, No.

⁵⁵³ CEPS interview with national border/coast guard authorities on 9 of June 2017, Lesbos island, Greece.

⁵⁵⁴ CEPS Interview with a civil society organisation providing social assistance to refugees, 7 of June 2017, Athens, Greece.

⁵⁵⁵ Available in: https://sherloc.unodc.org/res/cld/case-law-doc/migrantsmugglingcrimetype/fra/2001/case_0100550_html/FR2_jur_ca-paris_2001-06-25.pdf

⁵⁵⁶ Available in: https://sherloc.unodc.org/res/cld/case-law-doc/migrantsmugglingcrimetype/fra/2007/jugement_n_443_de_2007_html/FR1_jur_2007-08-30_tgi-aurillac.pdf

	<p>irregularly. The court eventually acquitted the woman. In her case it was determined that she was protected “by the familiar immunity clause enshrined in the Code of Entry and Stay of Foreigners and Right of Asylum (CESEDA) which exempts spouses from criminal prosecution if they facilitate the irregular stay of their spouses into France.</p>	<p>Jugement 2394.6EME C, 18 March 2008⁵⁵⁷</p>
<p>A friend prosecuted for using her own children’s documents to facilitate</p>	<p>In 2005, this case concerned a British woman who sought to smuggle the 6-year-old daughter of a friend from Nigeria to the United States where the minor was to join her father. The case was detected at London’s Heathrow airport when the accused used her own daughter’s British passport to facilitate the travel of the smuggled minor. The accused was later charged and convicted. Her sentence was reduced on appeal. The smuggled child had travelled by air from Nigeria to London’s Heathrow airport, accompanied by the accused, who presented herself as the mother of the child. There was no indication suggesting that the woman accused in this case sought to obtain or obtained a financial or other material benefit for her involvement.</p>	<p>See <i>R v Olulode</i> [2006] EWCA Crim 538 (23 February 2006)⁵⁵⁸</p>

Source: Authors, based on UNODC Sherlock Database (<https://sherloc.unodc.org/>).

Another category of persons accused of migrant smuggling are asylum seekers who facilitate their own journeys. International law and the European Charter of Fundamental Rights in Article 18, as well as the Schengen Borders Code Articles 3, 5(4) and 13 indicate that persons should not be penalised for irregular entry if they are seeking international protection. Research identified that nevertheless, persons who eventually were granted asylum had been charged upon arrival with use of migrant smugglers or for using forged or false documents. Such prosecutions are in contravention not only with the above-mentioned international and European human rights obligations, but also with the UN Protocol against Migrant Smuggling and the EU Facilitators’ Package, both of which have provisions in place to prevent the criminalisation of migrants who facilitate their own journeys. For example, an asylum seeker who entered the UK with a forged document was charged with migrant smuggling in the UK.⁵⁵⁹ In this last category of cases, all of the accused were also placed in deportation proceedings as they had been apprehended ‘while in the commission of a criminal offence’. Other examples of cases identified involve, for example, that of a French woman – she welcomed into her home an Afghan child who had entered France irregularly. The woman was eventually acquitted, as it was determined that she never benefited financially

⁵⁵⁷ Available in: https://sherloc.unodc.org/res/cld/case-law-doc/migrantsmugglingcrimetype/fra/2008/jugement_n_2394_html/FR_2394_2008.pdf

⁵⁵⁸ Available in: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/gbr/2006/r_v_olulode.html?lng=en&tmpl=sherloc

⁵⁵⁹ Carrera et al. (2016), op. cit., p. 29.

from the child's presence in her home and that she had indeed filed the asylum claim and other legal documents for the child to remain in France.⁵⁶⁰ Yet another case involved the prosecution of a French woman on the charge of "assisting the legal entry, transit or stay of a foreigner in France".

Combined, these cases reveal the lack of criminal ties or financial intentions among many of those charged with smuggling or irregular migration facilitation. They also stand as powerful examples of how ordinary people across Europe are being impacted by subjective interpretations of what constitutes migrant smuggling. But they are also examples of how the growing restrictions to legal channels of mobility play a role in people's decisions to engage in acts regarded/labelled as smuggling and irregular migration facilitation. It is also important to highlight how many of these cases involve women, which in turn merits an examination into the gendered consequences of criminalisation of migrant smuggling without financial or other material benefit.

However, such cases involving family members, friends and asylum seekers as well as those discussed above involving humanitarian actors are behind the statistics on cases that are said to target highly organised criminal groups that are driven by greed and cruelty. The following section takes a closer look at women's experiences, and also at those of children, whose roles in smuggling (most often tied to their own attempts to migrate) have hardly been the focus of policy or research.

4.3.3 Impacts of combating migrant smuggling on women and children

While the criminalisation of the humanitarian assistance provided by civil society across Europe has generated significant attention, there are other forms of criminalisation processes taking place that may impact on often forgotten or marginalised populations. In the organised crime rhetoric that dominates the treatment of smuggling facilitation, the participation of women and children in smuggling processes has remained ignored.

Women are important actors in the facilitation of irregular migration. Within organised smuggling efforts, the legal record shows women often recruit migrants, collect their fees and drive them across checkpoints and cities.⁵⁶¹ In other smuggling contexts researchers have also identified that women perform other tasks often perceived as less relevant to smuggling facilitation, yet ensure the well-being and safety of migrants in transit. Women clean and prepare the facilities where migrants arrive and stay; they provide care for sick, injured, elderly, pregnant or child migrants; and they are also known to cook and feed those in transit.⁵⁶²

Much has been written about the vast earnings generated by smuggling. According to official reports, smuggling commands profits that rival those in sex trafficking or the drug trade.⁵⁶³ The legal record, however, reveals scant data on the income of the men and women prosecuted for smuggling. And in fact, when available, the amounts reported suggest smuggling facilitation earnings are quite limited, and only to supplement earnings from other low-paying jobs. Earnings also have a tendency to be gendered – with women earning less than men. Cases examined for this study indicate migrant women in transit, those lacking immigration status or experiencing serious financial challenges are most often among those who accept to perform tasks in smuggling and ultimately face prosecution.

⁵⁶⁰ Available in: https://sherloc.unodc.org/res/cld/case-law-doc/migrantsmugglingcrimetype/fra/2009/jugement_nr_7132009__html/Jugement_713_2009.pdf.

⁵⁶¹ Three women believed to be Austrian were convicted for working as drivers transporting migrants, handling a wire transfer account to handle funds received from smuggling transactions, and for acting as translators to recruit drivers in Hungary (https://sherloc.unodc.org/cld/case-law-doc/criminalgroupcrimetype/aut/2010/14os13510z_14os13610x_ogh_16_november_2010.html?lng=en).

⁵⁶² W. Vogt (2016), "Stuck in the middle with you: The intimate labours of mobility and smuggling along Mexico's migrant route." *Geopolitics* 21, no. 2, 366-386; Y. G. González (2018). "Navigating with Coyotes: Pathways of Central American Migrants in Mexico's Southern Borders." *The ANNALS of the American Academy of Political and Social Science* 676, no. 1, p. 174-193; G. Sánchez (2016), "Women's Participation in the Facilitation of Human Smuggling: The Case of the US Southwest." *Geopolitics*, 21, no. 2, 387-406.

⁵⁶³ Europol-INTERPOL (2016), "Migrant Smuggling Networks: Joint Europol-INTERPOL Report", Executive Summary, May (https://www.europol.europa.eu/sites/default/files/documents/ep-ip_report_executive_summary.pdf).

Table 6: Exemplary cases of prosecuting persons in situations of precarity

Case	Brief description	Source
A woman in a precarious situation prosecuted for 'profiting' from use of her legal documents	A much-publicised case in the UK, for example, involved a Dutch woman who was paid £3,000 for allowing a Nigerian woman use her legal documents, which allowed the latter in turn to legalise the stay of her husband (who was about to be deported) in the UK. The Dutch woman accused was employed as a hospital cleaner, and as the mother of a child was experiencing serious financial difficulties. She had decided to participate in the fraudulent scheme to temporarily alleviate her situation. She was sentenced to 16 months in prison for her role in the crime. The Nigerian couple – who also worked low-paying jobs cleaning offices and as caregivers to support their four children (who were UK nationals) – were also given prison sentences. ⁵⁶⁴	See <i>Olunsanya & Sabina v The Queen</i> (2012) EWCA Crim 900 (4 May 2012) ⁵⁶⁵

Source: Authors.

As mentioned previously, legal cases examined in preparation for this study reveal the incidence of women among those charged with smuggling and smuggling-related offences as a result of sharing their home with their spouses, who were determined to be irregular migrants, or of attempting to smuggle their children. While several of these cases were eventually dismissed, they had real consequences on the lives of the women. Some were separated from their children while others were sent to prison, their children having to be cared for by family members. Incarceration also prolongs the financial precarity faced by families, as often the arrested person is the head of household and main provider of the family. At least one of the women reported that her boyfriend, in an attempt to prevent her from being convicted, had abandoned the household.

Children tend to find themselves implicated in smuggling-related crimes, often as a result of working for smuggling facilitators to pay off their own journeys. According to the UNODC Trafficking Protocol, children should not be criminalised as a result of participating – even if consensually – in activities deemed illicit. Instead, they should be recognised as victims of trafficking and efforts to restore their rights must be put in place. Yet there is also evidence suggesting children (defined as people under the age of 18) often find themselves being charged with the commission of smuggling offences as a result of having travelled in the company of a smuggling facilitator, or for having provided services in exchange for the opportunity to migrate.⁵⁶⁶

In most cases, children are unaware of the legal implications concerning their participation in smuggling. A report from the UN Special Rapporteur on the human rights of migrants described an encounter with a 15-year-old who had been charged with smuggling in Lesbos. Unaware of the fact he was facing charges, the child was instead concerned about the whereabouts of his older brother, with whom he had been travelling. The older brother had been charged with smuggling and was therefore unable to care for his younger sibling.⁵⁶⁷ The IOM also

⁵⁶⁴ R. Alleyne (2013), "Nigerian Couple set up "ingenious" sham wedding to avoid deportation." *The Telegraph*, 27 January (<https://www.telegraph.co.uk/news/uknews/crime/8938123/Nigerian-couple-set-up-ingenious-sham-wedding-to-avoid-deportation.html>).

⁵⁶⁵ Available in: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/gbr/2012/olunsanya_sabina_v_the_queen_2012_ewca_crim_900_4_may_2012.html?lng=en

⁵⁶⁶ L. Achilli, H. Leach, M. Matarazzo, M. Tondo, A. Cauchi and T. Karanika (2017), "On my own: protection challenges for unaccompanied and separated children in Jordan, Lebanon and Greece". *INTERSOS, Migration Policy Centre: Rome* (http://mixedmigrationplatform.org/wp-content/uploads/2017/09/UASC_Online_Version.pdf).

⁵⁶⁷ United Nations General Assembly Human Rights Council (2013), "Report of the Special Rapporteur on the Human Rights of migrants, Francois Crépeau", A/HRC/23/46/Add.4, Addendum Mission to Greece, 17 April (http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/16add_greece_/16add_greece_en.pdf).

documented as part of a study on irregular migrant children from Egypt multiple cases of children who had negotiated to work for smuggling crews in order to finance their own journeys to Europe. While not all of the interviewed children faced smuggling charges, they reported being perceived as criminal and dangerous at the shelters where they were placed upon arrival, and being mistreated by locals.⁵⁶⁸

4.3.4 Impacts on third countries: Criminalisation dynamics creating more criminals

The EU's smuggling criminalisation processes and their impacts are not contained to Europe. Efforts to curtail smuggling beyond the EU's borders have not only been the subject of much criticism, as the case of Libya has shown. Other countries in the southern and eastern neighbourhoods have been impacted by agreements signed with the EU. These agreements seek to prevent irregular migrants from reaching Europe. In the case of Libya agreements involving direct collaboration with the Libyan Government of National Accord to curtail migrant departures has led to a reconfiguration of the smuggling market.⁵⁶⁹ People who once were involved in smuggling facilitation have now, attracted by concessions and the potential for earnings, become engaged in the interception of boats carrying migrants attempting to leave Libya, returning these to the inland to detention facilities not regulated by the state where widespread abuses are known to take place.⁵⁷⁰

In Niger, attempts to contain migrant flows through the injection of EU development and border enforcement capital has also had severe repercussions in the longstanding, community-based mechanisms that allowed for the mobility of migrants through the desert.⁵⁷¹ This has primarily done primarily through the designation of these mechanisms as smuggling of migrants under the direction of international organisations, the auspice of UNODC and the EU's security goals.⁵⁷² Researchers have warned that these changes have increased the vulnerability of people who across the region relied on the facilitation of migrants' journeys for their livelihood, and can increase the levels of inequality and instability in communities with high levels of precarity.

⁵⁶⁸ IOM (2016), "Egyptian unaccompanied children: a case study on irregular migration". Cairo: IOM (<https://publications.iom.int/books/egyptian-unaccompanied-migrant-children-case-study-irregular-migration>).

⁵⁶⁹ Micallef and Reitano (2017), op. cit.

⁵⁷⁰ A. Al-Arabi (2018), "Local specificities of migration in Libya: challenges and solutions." Middle Eastern Directions Program. Florence: *European University Institute* (<http://cadmus.eui.eu/handle/1814/52585>).

⁵⁷¹ J. Brachet (2018), "Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara." *The ANNALS of the American Academy of Political and Social Science* 676, no. 1, pp. 16-35.

⁵⁷² H. Lucht (2016), "Death of a Gin Salesman: Hope and Despair among Ghanaian Migrants and Deportees Stranded in Niger." In *Hope and Uncertainty in Contemporary African Migration*, Routledge, pp. 168-186.

5. CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions

This study has captured the policing dynamics of suspicion, intimidation and disciplining across the EU and shows their systemic nature in five selected Member States from 2016 to the present (October 2018). It should be read as an update of the original study, "Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", which was written for the European Parliament's LIBE Committee in 2015 and published in 2016. Like its predecessor, this report has highlighted that criminalising acts of solidarity with refugees and other migrants is made possible due to the vagueness of the EU legal framework on migrant smuggling. This factor is coupled with the increased political salience of the fight against smuggling and irregular migration. However, criminal justice-like measures targeting civil society should not be seen and justified as a migration management tool among others, this study has argued. As we have demonstrated, they have specific and nefarious impacts on the rights of EU citizens, smuggled migrants and also on the founding values of the EU. These include fundamental rights, democracy and the rule of law.

5.1.1 The Facilitators' Package is a bad law

This updated study concludes that the Facilitators' Package is essentially a bad law that is not fit for purpose in the evolving political and legal context of the EU; nor does it provide an adequate response to the challenges posed by recent changes in the trends of migrant and refugee arrivals, which have largely been met by an increasingly transnational European civil society that has come to the aid of Member States that have been unprepared or unwilling to offer a sufficient welcome that respects human dignity and human rights. As it stands, the Facilitators' Package gives Member States permission to stretch the definition of smuggling as far as to criminalise acts without any criminal intent, including those conducted by civil society actors to whom thousands owe their lives. We have noted two main deficiencies in the EU's definition on facilitation of entry and transit and how these affect the lives and activities of humanitarian actors: (i) the fact that it does not insist on a requirement of 'financial or other material benefit'; and also that (ii) it does not oblige Member States to exempt 'humanitarian assistance', but on the contrary leaves wide discretion to Member States to decide if they want to criminalise such actors.

We have also seen again, as identified in our previous report, that the EU's definition is not in line with the standards set by the UN Protocol against Migrant Smuggling in its Article 6, and nor is it in line with the overall purpose and intention of its drafters. The current definition and its application do not give legal certainty to CSAs, bona fide service providers or smuggled migrants and their family and friends who act out of compassion about 'what is (not) a crime of facilitation of entry/transit and residence/stay in the EU'. As it stands, the EU's legislation encourages Member States to depart from a main definition through a derogatory clause of Article 6(4). If the Facilitators' Package is a criminal justice tool, it needs to bring about more legal certainty across the EU on what is criminal and what is to be exempted from criminalisation. Therefore, the current law, which is not fit for purpose in this regard, needs to be changed and clarified.

5.1.2 Current application of the Facilitators' Package in some Member States infringes civil society's free space and other rights of EU citizens

In addition to problems with legal framing, this study has argued once again that the operational activities of the EU and national agencies involved in the fight against migrant smuggling need to be carefully assessed; their impacts on fundamental rights and interference with civil society space need to be vigilantly monitored and protected. Repeated concerns have been expressed in the studies prior to and after the European Commission embarked on the REFIT of the Facilitators' Package. This study finds that the REFIT was concluded while disregarding the prior and emerging evidence of the negative effects on CSAs assisting refugees and other migrants, including those in an irregular situation.

After 2016, Paula Porras Schmidt submitted a petition to the European Parliament's PETI Committee showing how the bad law has enabled the criminalisation of two SAR NGOs in Greece. In 2017, a European Citizens' Initiative was launched with the aim of preventing the further criminalisation of CSAs providing humanitarian assistance and upholding the human rights of refugees and other migrants across the EU. Various other citizen

and civil society initiatives have been taken at the national and European levels; moreover, European Parliament resolutions have been drafted with the goal of preventing Member States from infringing on civil society's free space and undermining its watchdog function in a democratic society. Interestingly, such developments appear to have brought CSAs across the EU closer (but not, as we have seen, without tensions or consequences). The developments identified in this study since 2016 have also sparked rising interest among international and regional human rights bodies. This mobilisation is reassuring as a function of democracy, but it equally shows the growing concern with the state of fundamental rights and rule of law in the EU.

5.1.3 The policing of CSAs challenges EU founding values

A closer look at the irregular entry, transit and residence of migrants and refugees in Belgium, Greece, France, Hungary and Italy has revealed a reported increase in the policing of humanitarian activities carried out by CSAs across the EU. These cases show wider policing dynamics at play. These dynamics of policing are most visible in relation to measures taken against those CSAs engaging in SAR in the Mediterranean Sea, and in new legislative and policy changes (as in Hungary) explicitly targeting CSAs assisting refugees and other migrants in accessing fundamental rights, such as shelter and food or advocating that their rights are upheld.

Anti-smuggling laws have been extended in Hungary via a number of targeted defamation campaigns seeking to hamper the legitimate activities of humanitarian and human rights CSAs. The last attack on civil society in the 'Stop Soros' package not only stirs suspicion related to the activities of civil society, but it also uses methods of judicial and fiscal harassment. We have seen that new changes in the Hungarian Criminal Code since our last report make it a crime related to migrant smuggling to 'distribute informational materials' and to 'file an asylum application' for asylum seekers and persons in an irregular situation. The new laws impose a disproportionate tax burden on CSAs assisting refugees and other migrants; the laws also raise suspicion of foreign funding and even the accessing of EU AMIF funds. Finally, the laws stir fear among the Hungarian population that giving individual donations to such civil society organisations can be seen as acts of financing migrant smuggling.

Another major example of the growing policing of humanitarianism and civil society related to anti-smuggling is the vigorous campaigns to de-legitimise and criminalise SAR NGOs since the end of 2016 in Italy and also Greece. Spurious accusations of colluding with and abetting smugglers have been spread by important media outlets,⁵⁷³ EU agencies like Frontex,⁵⁷⁴ and high-level politicians. These accusations have led to the opening of several exploratory inquiries by prosecutors in Italy.⁵⁷⁵ Such doubts raised against NGOs' intentions with SAR activities furthermore opened the way for the Italian government to impose its binding code of conduct in August 2017.⁵⁷⁶ This code has prevented CSAs from conducting SAR activities in the Mediterranean and encouraged the formal criminalisation of the remaining ones wanting to save lives at sea. It is indeed striking that at the time of writing (October 2018), only one ship, the Aquarius, remains to conduct proactive SAR operations, navigating the waters of legal uncertainty, political intimidation and harassment. This in-depth assessment has demonstrated that the policing of CSAs has quickly escalated from suspicion to actual prosecutions. We have seen that policing dynamics also have a cumulative effect of fostering mistrust, not only in how society perceives SAR NGOs, but also in civil society, public institutions and criminal justice tools more broadly. As it stands, the future rests uncertain.

5.1.4 SAR NGOs are scapegoated for the lack of a holistic approach and solidarity among Member States

The Aquarius controversy in July 2018 (discussed at length herein) became a symbol of the lack of European solidarity related to the dignified reception of migrants and refugees; it showed the limits of current migration and asylum policies, which simply cannot be replaced or remedied via criminal measures targeting migrant

⁵⁷³ R. Duncan (2016), "EU border force flags concerns over charities interaction with migrant smugglers", *Financial Times*, 15 December.

⁵⁷⁴ Frontex (2017), "Annual Risk Analysis", 15 February, p. 32

(http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf).

⁵⁷⁵ C. Heller and L. Pezzani (2017), "Blaming the Rescuers", *Forensic Oceanography, Forensic Architecture, Goldsmiths, London University* (<https://blamingtherescuers.org/report/>).

⁵⁷⁶ Ibid.

smuggling. Approaches aimed at putting a temporary patch on cracking European solidarity in the area of migration and asylum do not address the core issue, but rather produce new and long-term challenges.

Although one of the priorities of the EU Agenda on Migration is to prevent more deaths at sea, the EU and its Member States left the Mediterranean without any rescue capacity with the termination of operation Mare Nostrum in 2014.⁵⁷⁷ Thus, NGOs stepped in to fill the gap in SAR in the Mediterranean in order to prevent more tragedy. In the beginning, public opinion was rather favourable to civil society organisations providing humanitarian assistance in light of the suffering of those fleeing war and conflict. However, the narrative, from praising humanitarian assistance, has shifted in subsequent years to a change of heart in public opinion.⁵⁷⁸ Many CSAs, acting as first responders to a crisis were portrayed as a 'pull factor'; yet, this is not a definition related to the crime of migrant smuggling. CSAs, including individual volunteers, citizens and organised civil society organisations that provide assistance, are unidimensionally seen as a block to the deterrence strategy and the 'hostile environment' pursued by the EU and many of its Member States. Often, this appears to be the main and only reason to accuse SAR NGOs of the crime of smuggling migrants; often such accusations lack any evidence.⁵⁷⁹ The objective to stop irregular migration has led to policy measures that put a great emphasis on closing the Mediterranean route through combatting the smuggling of migrants and outsourcing border protection to North African countries. This has resulted in a very hostile environment for NGO activities. Some report facing threats of violence and militarism by the Libyan coast guard and others, like the Aquarius, have been left for days in European waters, denied the right to disembark survivors to safety on land from the sea.⁵⁸⁰

5.1.5 Anti-smuggling policies and actions have counterproductive effects in the EU and third countries

Whereas the Facilitators' Package is intended to prosecute organised criminal groups, realities on the ground show that the targets of anti-smuggling operations have often been the 'low-hanging fruit' of visible humanitarian organisations, solidarity groups and various loose civic mobilisations that clearly act without criminal intent.

This study confirms that quite paradoxically, removing humanitarian and human rights CSAs and preventing them from providing basic services and assistance to irregular migrants in the name of combatting human smuggling leads to increased opportunities for various criminal groups, in the EU and in third countries.⁵⁸¹ Indeed, when criminal justice measures are used for migration management purposes (often disregarding socioeconomic and political contexts, as well as the levels of corruption and the relative maturity of the rule of law system), this can actually lead to more professional criminals entering the scene and a deeper consolidation of their networks.

As it stands, this study has demonstrated that criminal law is not functioning well in this domain. A recent book co-authored by three of the authors of this study⁵⁸² found that within the EU, just three joint investigations were reported to have borne fruit in terms of prosecuting criminal smuggling. Meanwhile, many others have failed because of various challenges including a lack of resources. On 27 August 2015, a lorry was found on an Austrian motorway containing the decomposing bodies of 71 individuals, including a baby, who had been smuggled through Hungary. Both Eurojust and Europol provided speedy operational support and the joint investigation

⁵⁷⁷ The European Patrol Network Operations, Poseidon in the Aegean, Triton in the Central Mediterranean, and EUNAVFOR MED Operation Sophia do not have search and rescue as primary goal. See in L. Vosyliūtė (2018), "Saving Lives at Sea' still a Priority for the EU?", *Heinrich Boll Stiftung*, 19 April (<https://eu.boell.org/en/2018/04/19/saving-lives-sea-still-priority-eu>).

⁵⁷⁸ Are You Serious?, "AYS Interview with Jugend Rettet: 'The accusations are just empty claims'", 22 April (<https://medium.com/are-you-serious/ays-interview-with-jugend-rettet-the-accusations-are-just-empty-claims-ba873e0f53f4>).

⁵⁷⁹ C. Heller and L. Pezzani (2017), op. cit.

⁵⁸⁰ Forensic Architecture (2017), op. cit.

⁵⁸¹ S. Carrera and E. Guild (eds) (2016), op. cit.; V. Mitsilegas, & Y.S. Holiday (2018), "The criminalisation of irregular migrants". In E. Guild, & T. Basaran (eds) (2019), "Global Labour and the Migrant Premium the Cost of working abroad", London: *Routledge*; Zhang, Sanchez and Achilli (2018), op. cit., pp. 6-15.

⁵⁸² S. Carrera et al. (forthcoming) *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society?*.

that followed led to multiple arrests and later, prosecutions.⁵⁸³ While this case can be seen as a ‘success’ in terms of the criminalising of nefarious and harmful migrant smuggling within the EU, such success is marred by the reality of those who died unnecessarily.

Fieldwork by the authors, backed up by other research in the public domain, revealed that the smuggling network involved in this case was being tracked by several national authorities, none of which were able to act to intercept the distress call intercepted *in time*:

All of those conversations were recorded but no one was there. Not the Austrians, not the Slovaks, not the Hungarians. No one was there to understand what they were talking about. In retrospect, it took place before the nose of the authorities but no one was there to listen to it ... there’s poor cooperation. Why were we intercepting the same phone three times into three different systems anyway?⁵⁸⁴

Anti-smuggling is now big business in the EU. This therefore raises the question: Where are the EU’s resources being diverted? To pulling down food distribution gazebos and searching humanitarian volunteers? As it stands, the police are fulfilling their operational mandates and numbers are ticked, but rarely is someone caught; money is wasted, good people suffer and often the real nefarious actors who profit from smuggling migrants in inhuman conditions rest unscathed.

In this context, CSAs often fill in the gap left by poor statutory humanitarian provisions and hold governments accountable for their disregard of the human rights of refugees and other migrants; moreover, they serve an important function in opposing mainstream ideas and approaches in EU or national migration and anti-smuggling discourse, on how policies and operations should be directed. Their work lays the ground for the important discussion of what is not ‘purely’ or ‘genuinely’ humanitarian action within EU policy circles as it relates to the facilitation of entry, transit and residence. At the time of writing, this is a question that is far from resolved and all across the EU CSAs continue to operate in acute legal uncertainty, facing stigma and misinformation.

5.2 Recommendations

5.2.1 What should be investigated and prosecuted?

- EU law should be brought in line with UN standards. The criteria of **‘financial gain or other material benefit’ and ‘unjust enrichment’** should be requirements to establish a base crime in terms of facilitation of entry and transit across the EU. The definition of a base crime needs to clearly capture the criminal intent of a migrant smuggler. The definition should therefore be changed to insist on financial and other material benefit and on unjust enrichment requirements for the facilitation of entry and transit, and for stay and residence. This change, by default, would exclude activities conducted by civil society, family members, friends and bona fide service providers without the intention to profit or abuse migrants. In all cases, sanctions including fines and imprisonment, need to be proportional to the harm incurred by the crime and its circumstances. In addition, facilitation of transit and stay should be regarded as administrative rather than criminal offences. This is because the facilitation of stay targets basic human needs such as shelter, food, medical and psycho-social services.
- In addition, the EU Handbook on Investigating and Prosecuting Migrant Smuggling should be elaborated. It could further define what kinds of crimes the EU needs to focus on (for example on the production of forged documents) and the limits set by criminal justice checks and balances. The handbook could contain tests on whether to start and pursue a prosecution by encouraging prosecutors to ask questions, such as what the impacts are on fundamental rights and criminality.
- The work of EU agencies should be focused on a criminal justice-led approach to countering ‘migrant smuggling’ instead of a ‘preventative policing’ approach. Priority should be given to developing Eurojust and Europol Joint Investigation Teams when organised criminal groups are detected. Joint Investigation

⁵⁸³ Europol (2016) “Hungary Concludes Investigation into the Death of 71 Migrants”, Europol, Press Release, 12 October. (<https://www.europol.europa.eu/newsroom/news/hungary-concludes-investigation-death-of-71-migrants-0>).

⁵⁸⁴ Interview with legal expert conducted by authors on 30 August 2017, Szeged, Hungary.

Teams should be compatible with the criminal justice standards laid down in the European Investigation Order.

5.2.2 What should not be criminalised?

- The EU Facilitators' Package should include an **obligatory prohibition on the criminalisation of CSAs** acting with humanitarian intent to assist migrants and refugees. Civil society actors providing humanitarian assistance and/or upholding human rights of refugees and other migrants should be exempted from criminalisation. The EU Facilitators' Package therefore needs to be changed accordingly and 'Lisbonised'. The EU human trafficking directive has been 'Lisbonised'. It sets a precedent for 'decriminalisation' as where victims of human trafficking are explicitly exempted from criminalisation. This provision should apply not only to smuggled migrants, but also to acts of compassion and solidarity by civil society actors, family members and friends acting without profit or unjust enrichment motive.
- 'Humanitarian assistance' should be defined broadly, in line with the EU Fundamental Rights Charter, and the existing definition of the European Consensus on Humanitarian Aid and states obligations under the UN Declaration on human rights defenders. Such a definition should protect not-for-profit actions undertaken by formally registered civil society organisations as well as citizen movements, and individual volunteers and activists who are protecting and upholding human dignity and related fundamental rights refugees and other migrants. The EU and national level discussions should refrain from deliberation on what is 'genuine humanitarian assistance' as it can narrow the definition to 'life-saving' activities, but disregard the responsibility to uphold human dignity, prevent suffering and other situations where inaction could lead to torture, inhuman and degrading treatment. Instead, EU should focus on 'genuine prosecutions' of criminals profiting from migrant smuggling.
- Finally, the EU, its Member States and local authorities should be encouraged to erect a firewall for vulnerable irregular migrants and asylum seekers who seek to access basic services, including shelter, sanitation and food. Such individuals would also benefit from protections when reporting crimes, including those related to migrant smuggling. The protection of such a 'firewall' should also extend to respecting CSAs' mandates in order to bring about trust-based cooperation with law enforcement and other governmental authorities. For example, the European Parliament could request the European Commission to develop such guidelines for implementing firewalls between civil society and law enforcement agencies, which guarantee humanitarian assistance and access to justice for migrants. However, such 'soft-law' measures cannot substitute or compensate for the necessary changes to the EU Facilitators' Package.

5.2.3 How should it be monitored?

- The European Parliament's PETI Committee could set up a parliamentary inquiry to hear the testimonies of CSAs that have been criminalised and to investigate whether the cases were politicised.
- The EU should establish a direct funding scheme for a civil society watchdog to monitor the human rights of migrants, refugees and their treatment by relevant national and EU agencies, in the context of border controls/surveillance and expulsions.
- Civil society, through the newly proposed EU values fund, could be supported to collect evidence showing non-compliance with the EU's legal framework and submit it to the European Commission, so as to enable it to start infringement procedures against a Member State or EU institution/agency.
- In countries where EU funding is instrumentalised to silence and hamper the watchdog activities of CSAs, the European Commission should no longer channel relevant migration and border-related funds via the Member State, such as the AMIF, but directly disburse it to civil society organisations from the Commission's special call targeting that country.
- Civil society could also be supported by establishing and expanding an EU strategic litigation fund. This could be used to protect CSAs, migrants and refugees, their family members and friends as well as bona fide service providers from unjust criminalisation.

- Besides enabling CSAs to defend their space, the study also proposes to set up an independent observatory to monitor the policing of CSAs across the EU. This could be composed of representatives from academia and civil society. Such an independent body could conduct media monitoring and contain a possibility for civil society to submit individual and collective complaints and testimonies about interference with their mandate by the national or EU agencies. The observatory could communicate the emerging signs of systemic and institutional cases to the European Commission, DG HOME and DG JUST, the European Parliament LIBE & PETI Committees and EU Fundamental Rights Agency. The observatory could also collect evidence of risk or threat of serious and/or systemic breach of the EU's founding values and submit it before the rule of law mechanism that was earlier proposed by the European Parliament.

5.2.4 How should the status quo be assessed and sanctioned?

- The European Commission should invoke infringements against the Member States that are abusing criminalisation provisions to prosecute humanitarian actors.
- The European Ombudsperson should assess the fundamental rights impacts on migrants and EU citizens of the EU's anti-smuggling operations in the EU and third countries, and in particular activities led by the EU justice and home affairs agencies, namely Frontex and Europol, as well as the EU's External Action Service, Operation Sophia.
- The European Court of Auditors should assess the EU support and funding to EU Member States as well as to third countries, in terms of effectiveness and efficiency, taking into account the impacts on the fundamental rights of migrants and EU citizens, societal changes in the countries of origin, transit and residence, and changes in the 'migrant smuggling business model'.
- The European Parliament Budgets and Budgetary Control Committees could also undergo critical assessment prior to approving the budgets for the EU justice and home affairs agencies' operations and missions that are supporting Member States or third countries in addressing migrant smuggling.
- EUNAVFOR MED Sophia and other EU-led operations should be the subject of a report by the European Court of Auditors and European Ombudsperson so as to evaluate for the European Parliament's committees their added value, efficiency and effectiveness in addressing 'migrant smuggling', as well as to assess if they are in line with the EU's fundamental rights.
- Similarly, the use of the AMIF and ISF should be subject to such reports. Their disbursements for Member States should be conditional on the absence of political prosecutions against civil society.

5.2.5 What should be the alternatives to prevent migrant smuggling?

- EU justice and home affairs agencies are not adequately addressing the underlying reasons why migrants choose to use smuggler's services. More safe and legal alternatives to come to the EU have been proposed by the European Parliament in its Resolution of 12 April 2016 on the situation in the Mediterranean. It has also highlighted the need for a **holistic EU approach to migration**, which was proposed by the European Parliament.⁵⁸⁵
- This study reiterates the importance of **humanitarian visas** to expand legal migration channels, and the need for the EU to better monitor and end discriminatory visa rejections for Blue Card applicants as well as for seasonal workers, students and researchers.
- There is a need to increase possibilities for third-country workers (regardless of their first admission category), refugees and persons with humanitarian protection status to reunify with family members.⁵⁸⁶ The Dublin III mechanism should also be rendered more operational so that unaccompanied minors

⁵⁸⁵ European Parliament (2016), Resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration ([2015/2095\(INI\)](#), P8_TA(2016)0102, Strasbourg, 12.4.2016.

⁵⁸⁶ Conti (2018), op. cit.

seeking asylum in the EU are able to transfer to live with relatives in other Member States via safe and legal routes.

- The European Parliament has suggested **an EU search and rescue mission**. The CEPS Taskforce Report on a European Border and Coast Guard earlier reflected that the national coast guards are well trained and equipped to conduct such a mission.⁵⁸⁷ The main question to be resolved is political: How to share the responsibility among all the EU Member States over the rescued persons and who should do it?⁵⁸⁸

⁵⁸⁷ Carrera et al. (2017), op. cit.

⁵⁸⁸ Cortinovis (2018), op. cit.

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ANNEX 1. MEDIA MONITORING COMPILATION

This media monitoring compilation covers a two-year period, from September 2016 until September 2018. It was conducted by PICUM and CEPS during the project entitled “Anti-Smuggling Policies and their Intersection with Humanitarian Assistance and Social Trust”, funded by the UK’s Economic and Social Research Council, and resulted in an academic research paper and a monograph.

The compilation includes cases of actual and indirect criminalisation of humanitarian assistance in 10 Member States. The methodology consisted of monitoring all European media, including well-known newspapers and the social media of relevant organisations. Annex 1 organises the cases country-by-country. A section at the end is dedicated to the phenomenon at the European Union level. The cases and their updates are categorised according to the modalities of policing: 1. Suspicion; 2. Harassment/ Intimidation; 3. Disciplining and 4. Formal criminalisation/prosecutions. The articles are displayed in a chronological order – from the oldest to the most recent. Numbering refers to articles found in media and often cover the same or similar cases, their follow-up and updates. In total there are 92 entries/ articles.

The compilation provides evidence of the scale of criminalisation of humanitarian assistance: it is not confined to some countries but is rather a trend across the EU. Media monitoring illustrates the escalation and the systemic nature of the phenomenon of policing civil society actors. Moreover, it shows that almost anyone coming into contact with irregular migrants and asylum seekers is vulnerable to criminalisation, including civil society actors, such as NGOs, volunteers, lawyers, journalists, doctors, social workers, firemen, etc. This media monitoring compilation provides the example of how the EU-level observatory on “non-criminalisation of humanitarian assistance” could be proactive and intervene prior to escalation to criminal prosecution.

BELGIUM

Modality 1: Suspicion

No.1

Le mea culpa de Theo Francken à propos de Médecins sans Frontières: “Je retire ce que j'ai dit”

(Theo Francken’s mea culpa about Doctors Without Borders: “I retract what I said”)

Staff writer
RTL Infor
24 March 2017

After exchanging a few tweets with Doctors Without Borders, Francken (Secretary of State for Asylum and Migration) urged the organisation to leave the Mediterranean Sea, accusing it of contributing to human trafficking and causing “indirectly more deaths”. His declarations were condemned by Belgian Prime Minister Charles Michel, who called on his minister to use more “nuance” in his communication. Without completely changing his words, Francken withdrew his comment qualifying Doctors Without Borders as a human trafficking organisation. “Rescue operations create an aspiration effect that leads to more drowning”, he said. “It’s a huge paradox naturally, a huge dilemma. You have to save people, but by saving people, you indirectly cause more people to take the road to departure.”

<https://www.rtl.be/info/belgique/politique/theo-francken-retire-ses-propos-sur-medecins-sans-frontieres-902347.aspx>

This was also reported by [Reuters UK](#), [LeVif](#), [RTBF](#), [RTBF](#), [LeSoir](#).

No.2

No. 2: Theo Francken: Brussels 'pampering' NGOs and asylum seekers

Maxime Schlee

Politico

8 October 2018

Francken insisted people who come to the park are "purely economic migrants", not refugees, and accused rights groups of creating a "hub" for migrants trying to reach the United Kingdom, saying most people do not want to seek asylum in Belgium.

<https://www.politico.eu/article/theo-francken-brussels-park-maximilien-pampering-ngos-and-asylum-seekers/>

Modality 2: Intimidation and Harassment

No. 3

Parc Maximilien: 31 personnes interpellées, des bénévoles affirment que les sacs de couchage ont été jetés
(*Maximilian Park: 31 people arrested, volunteers say sleeping bags were thrown away*)

BX1 Medias de Bruxelles

21 August 2017

The police conducted a raid Monday morning in Maximilian Park, where dozens of refugees have settled while awaiting a solution to their situation. Thirty-one people were arrested, and according to local volunteers, sleeping bags that had been donated last weekend to the refugees were confiscated. The police deny the allegation.

<https://bx1.be/news/parc-maximilien-31-personnes-interpellees-des-benevoles-affirment-que-les-sacs-de-couchage-ont-ete-jetes/>

Modality 3: Disciplining

No.4

Stad Brussel: 'Deel maaltijden in Maximiliaanpark uit aan het einde van de dag'

(City of Brussels: "Hand out meals in Maximiliaanpark at the end of the day")

Belga Bruzz
10 September 2018

The City of Brussels asks the volunteers in the Maximilian Park to distribute meals for migrants only at the end of the day for reasons of hygiene.

<https://www.bruzz.be/samenleving/stad-brussel-deel-maaltijden-maximiliaanpark-uit-aan-het-einde-van-de-dag-2018-09-10>

Modality 4: Formal Prosecution

No. 5

"Journalisten die transitmigranten herbergden beticht van mensensmokkel"

(*"Journalists who accommodated transit migrants accused of human smuggling"*)

Staff Writer
Belga Bruzz
4 June 2018

The article concerns a case of human smuggling involving 95 migrants and 12 persons charged with smuggling. Two of the charged are journalists: Myriam Berghe of *Femmes d'Aujourd'hui*, and Anouk Van Gestel, editor-in-chief of the women's magazine *Marie Claire*. The journalists have not been arrested, but in the event of a conviction for human smuggling offenses they risk up to ten years in prison.

<https://www.bruzz.be/samenleving/journalisten-die-transitmigranten-herbergden-beticht-van-mensensmokkel-2018-06-04>

No. 6

"Ne pénalisez pas notre humanité !": la lettre ouverte des deux journalistes inculpées de trafic d'êtres humains à Charles Michel

(*"Don't penalise our humanity!": Open letter of two journalists charged with human trafficking to Charles Michel*)

Le Vif/l'Express
4 September 2018

Two Belgian journalists, Anouk Van Gestel and Myriam Berghe, are charged with criminal association and trafficking of human beings. They risk going to prison for helping migrants in transit. Their trial starts on 6 September in Brussels.

<https://www.levif.be/actualite/belgique/ne-penalisez-pas-notre-humanite-la-lettre-ouverte-des-deux-journalistes-inculpees-de-traffic-d-etres-humains-a-charles-michel/article-normal-886471.html>

No. 7

'Ik hielp in het Maximiliaanpark en ging twee maanden de cel in'

("I helped in Maximilian Park and went to jail for two months")

Kevin Van den Panhuyzen

BRUZZ

5 September 2018

The article concerns the impending Brussels trial of 12 defendants, including two journalists, accused of human trafficking. One of the suspects is Zakia, a 30-year-old Maximilian Park volunteer, who spent two months in prison, away from her two-year-old son. Throughout the summer, she worked in Maximilian Park, where as a volunteer she tried to help migrants in transit. She helped with food distribution, finding places to sleep and translating from Arabic.

She concluded, "It's about intimidating emergency workers."

<https://www.bruzz.be/samenleving/ik-hielp-het-maximiliaanpark-en-ging-twee-maanden-de-cel-2018-09-05>

No. 8

'Crimes of solidarity' in Europe multiply as 11 stand trial in Belgium for helping migrants

Melissa Vida

Global Voices

17 September 2018

Eleven people who had been arrested and charged with human trafficking in October 2017 appeared in court in Brussels on 6 September, the first hearing of a trial that activists say is yet another case of 'criminalisation of solidarity' in Europe. The defendants are two Belgian journalists, one Belgian-Moroccan social worker, a Tunisian man who is a legal Belgian resident and seven people who are undocumented migrants. Eight of the defendants have been in jail since the arrest.

<https://globalvoices.org/2018/09/17/crimes-of-solidarity-in-europe-multiply-as-11-stand-trial-in-belgium-for-helping-migrants/>

No. 9

Procès des hébergeurs: la journaliste Myriam Berghe confirme avoir hébergé des migrants chassés de Calais

(Host trial: the journalist Myriam Berghe confirms having hosted migrants expelled from Calais)

Le Soir

7 November 2018

Myriam Berghe, a journalist, confirmed Wednesday that she had hosted migrants expelled from Calais in 2017. "They were psychologically weak, they didn't know where to go", she explained to the Criminal Court of Brussels. "In my home, I gave them time to recover".

<https://www.lesoir.be/188712/article/2018-11-07/procès-des-hebergeurs-la-journaliste-myriam-berghe-confirme-avoir-heberge-des>

No. 10

Un procès dans le procès «des hébergeurs»: Myria accusé de «racisme»

(A trial within the "host trial": Myria accused of "racism")

Louis Colart

Le Soir

8 November 2018

The Federal Migration Centre filed a civil claim for trafficking in human beings against nine of the 12 defendants tried before the Brussels court. Selma Benkhelifa, the lawyer for Walid C., a Tunisian migrant, believes that Myria (of the Belgian Federal Migration Centre) was "racist" toward her client.

https://plus.lesoir.be/188882/article/2018-11-08/un-procès-dans-le-procès-des-hebergeurs-myria-accuse-de-racisme?fbclid=IwAR1U6WJFIO_KkUojJqlyil5tailK8G4tkfpg3JCHI2dZHaTzveC3q6ag-4k

No. 11

Le procès des hébergeurs, un «procès politique» pour la journaliste Anouk Van Gestel

(The host trial: a "political trial" according to journalist Anouk Van Gestel)

Louis Colart

Le Soir

9 November 2018

The prosecutor's office demanded her acquittal in the so-called 'procès des hébergeurs' ('the host trial'). But journalist Anouk Van Gestel rues a gruelling, unfair legal battle that provided no clear answers to those who welcome migrants to their homes.

<https://plus.lesoir.be/189188/article/2018-11-09/le-proces-des-hebergeurs-un-proces-politique-pour-la-journaliste-anouk-van>

No. 12

"Moi, Dounia, hébergeuse de migrants, arrêtée, menottée, emprisonnée..."

("Me, Dounia, host of migrants, arrested, handcuffed, imprisoned...")

Gauthier De Bock

Moustique

9 November 2018

Solidarity is not a crime. This moral principle was reaffirmed this week by the justice system, yet some individuals still suffered the wrath of the state apparatus. The prosecutor did not criminalise Anouk Van Gestel, Myriam Berghe and other hosts, though they received light penalties.

<https://www.moustique.be/22244/moi-dounia-hebergeuse-de-migrants-arretee-menottee-emprisonnee>

No. 13

Procès dit "des hébergeurs de migrants": la défense de présumés trafiquants d'êtres humains salue un parquet "plus humain"

("Migrant host trial": the defense for alleged human traffickers welcomes a "more humane" prosecutor)

Medias de Bruxelles

9 November 2018

The trial of 12 people prosecuted for human trafficking came to a close. The verdict will be delivered on 12 December. Both hosts should be acquitted, while alleged smugglers face more than three years in prison.

<https://bx1.be/bruxelles-ville/proces-dit-hebergeurs-de-migrants-defense-de-presumes-trafiquants-detres-humains-salue-parquet-plus-humain/?fbclid=IwAR26C4v82I3YQxCdLq16I3pWIRVe0rorEJv4SOWAh4IhjDJfPCzsHoJ-J4s>

BULGARIA

Modality 2: Intimidation and Harassment

No. 14

Priest Is Withdrawn from Bulgaria after Threats for Hosting Migrants

Bulgarian Helsinki Committee

Liberties

20 March 2017

A Syrian refugee family was accommodated at the Catholic church in Belene (Bulgaria) by an Italian priest, Father Paolo Cortese. Following protests by locals, the Syrian family decided to leave the town, and the priest was recalled from Bulgaria after receiving death threats.

<https://www.liberties.eu/en/short-news/18123/18123>

This was also reported by [Dnevnik](#), [The Sofia Globe](#), [The Sofia Globe](#), [BalkanInsight](#), [Novinite](#), [The Sofia Globe](#).

CROATIA

Modality 4: Formal Prosecution

No. 15

Criminalising solidarity: Are You Syrious? Statement on politically motivated, unjust guilty verdict for our volunteer

Statement originally published by *Are You Syrious?*

25 September 2018

This past March, Are You Serious? volunteer Dragan Umicevic approached a police control near the Croatian border to alert police to a family of asylum seekers huddled in a field near Strošinci, on Croatian soil. A few days later, he was shocked to find himself facing charges of aiding and abetting the asylum seekers' "illegal crossing" of the Croatian border despite the fact that he had never laid eyes on the family nor ever communicated with them directly.

<http://www.statewatch.org/news/2018/sep/croatia-ays-case.htm>

DENMARK

Modality 4: Formal Prosecution

No. 16

When Denmark criminalised kindness (essay)

Lisbeth Zornig Andersen
Granta
December 2016

This is an essay in which the author, the Chair of Denmark's Children's Council, talks about her experience in helping asylum seekers (giving them a ride). The footage of the migrants entering the car made the news. After being called a traitor, Muslim-lover and receiving hate mails, she was investigated by the police, charged with people smuggling and convicted.

<https://granta.com/denmark-criminalised-kindness/>

This was also reported by [The Guardian](#), [The Guardian](#), [BuzzFeed](#).

FRANCE

Modality 2: Intimidation and Harassment

No. 17

France: criminalisation of solidarity in Hayange: interview with local *Secours Populaire*

Civic Space Watch

7 March 2018

While France has a lively, free civil society, tougher policies on and narratives about migration have contributed to shrinking the space for associative movements to provide help not only to migrants but also to other vulnerable people. The article is based on an interview with *Secours Populaire Hayange* President Anne Duflot-Allievi, who describes how the working environment has evolved.

<http://civicspacewatch.eu/france-criminalisation-of-solidarity-in-hayange-interview-to-the-local-secours-populaire/>

([MEGA Campaign](#): MEGA reports how *Secours Populaire* shelter in Hayange was left without electricity and discredited by local authorities due to *Secours Populaire's* disagreement with a measure that would have discriminated against asylum-seekers.)

No. 18

French police accused of harassing aid workers at Calais

Angelique Chrisafis

The Guardian

8 August 2018

Volunteers distributing food and water to homeless refugees and migrants in Calais are systematically being harassed and intimidated by French police, according to a report submitted to France's human rights ombudsman.

<https://www.theguardian.com/world/2018/aug/08/french-police-accused-of-harassing-aid-workers-at-calais>

Modality 3: Disciplining

No. 19

Calais mayor bans distribution of food to migrants

Amelia Gentleman

Flipboard

2 March 2017

The article is about the mayor of Calais, Natacha Bouchart, who, citing security reasons, has banned the distribution of food to migrants in an attempt to prevent a new refugee camp from forming, just three months

after the Jungle was demolished. Police are making it harder for activists to provide meals to migrants, including children and teenagers.

<https://flipboard.com/@flipboard/flip.it%2FPa0tg9-calais-mayor-bans-distribution-of-food-/f-4101851ae8%2Ftheguardian.com>

This was also reported by [TheGardian](#), [Independent](#), [ReliefWeb](#), [France24](#), [CNN](#), [TheTelegraph](#), [Time](#), [Business Standard](#), [Aljazeera](#), [Express](#), [Express](#), [International Business Times](#), [TheJournal.ie](#), [AhmedabadMirror](#), [DW](#), [RFI](#), [ABNA24](#), [Reuters](#), [The Migrant Observer](#), [Cyprus Mail](#), [TheStar](#), [France24](#), [LeParisien](#), [Libération](#), [L'Express](#), [HuffingtonPost](#), [FranceSoir](#), [l'OBS](#).

Modality 4: Formal Prosecution

No. 20

Monique, 62 ans : "Un matin, on frappe à la porte, c'est la police aux frontières"

(Monique, 62 years old: "One morning, someone knocks on my door, it's the border police" (from 2009))

Elise Vincent

Le Monde

28 September 2012

In 2009 (before the exceptions on aid to migrants were added to French law), Ms. Monique Pouille, a volunteer close to Calais, was arrested and interrogated for bringing food to migrants and charging their phones. The case was closed and no further action was taken.

http://www.lemonde.fr/societe/article/2012/09/28/un-matin-on-frappe-a-la-porte-c-est-la-police-aux-frontieres_1767178_3224.html

No. 21

Perché chi aiuta i migranti rischia di essere processato

(Because helpers of migrants are likely to be prosecuted)

Staff writer

Internazionale

10 January 2017

This article is about Cédric Herrou, a 37-year-old French farmer in the Rolla Valley (close to the Italian border), who is on trial in France for helping 200 migrants cross the border and providing food to 57 of them. It draws a comparison with Pierre-Alain Mannoni, a French teacher who was also tried on and acquitted of similar charges. It also discusses the criminalisation of solidarity in Europe and the 2002 Facilitation Directive (2002/90/EC).

<https://www.internazionale.it/notizie/2017/01/10/migranti-solidarieta-cedric-herrou>

This was also reported by [The New York Times](#), [The News York Times](#), [EuroNews](#), [RFI](#), [TheGardian](#), [RFI](#), [BBC](#), [CNN](#), [TheTelegraph](#), [TheGuardian](#), [Aljazeera](#), [VOX](#), [HuffingtonPost](#), [FranceInfo](#).

No. 22

Pour en finir avec le délit de solidarité

("Ending the crime of solidarity")

Communiqué de presse – Press release

Délinquants solidaires

12 January 2017

This is a press release concerning the collective action taken by 100 signatory organisations (NGOs, charities, and labour unions). They rue the increase in recent months in France of cases in which solidarity is considered a crime, and have signed a statement calling for an end to the criminalisation of humanitarian assistance.

http://snpespjj-fsu.org/IMG/pdf/delinquants_solidaires_manifeste.pdf

This was also reported by [Libération](#), [GISTI](#), [l'Humanité](#), [LesEchos](#), [SeneWeb](#).

No. 23

France prosecuting citizens for 'crimes of solidarity'

Kyle G. Brown

Aljazeera

25 January 2017

This article is about several cases of activists being brought to court for providing help to migrants (Houssam El Assimi, Pierre Mannoni, Cédric Herrou), under Article L.622-1 of France's immigration law, which states that anyone who "facilitates or attempts to facilitate the illegal entry, movement or residence of a foreigner in France shall be punished by imprisonment for five years and a fine of €30,000 [over \$32,000]". It also discusses the harassment of individuals and the criminalisation of humanitarian activities in order to intimidate, discourage, and prevent citizens from expressing solidarity with migrants, and describes the overall situation in France regarding the humanitarian crisis and its divisiveness in public opinion.

<http://www.aljazeera.com/indepth/features/2017/01/france-prosecuting-citizens-crimes-solidarity-170122064151841.html>

This was also reported by [BoingBoing](#), [AladdinsMiracleLamp](#), [Reddit](#), Google News, [RFI](#), [Arielis](#), [EqualTimes](#), [LeMonde](#), [Reforme](#), [Liberation](#), [LeParisien](#), [Huffingtonpost](#), [LeMonde](#), [Humanité](#), [Humanité](#), [Europe1](#), [TheStar](#), [Libération](#), [l'OBS](#), [LeParisien](#).

No. 24

Valley Rebels

(Six-part video)

Staff writer

The Guardian

28 April 2017

This six-part video explores the case of Cédric Herrou, a French farmer on trial for supporting and housing African asylum seekers. He faced up to five years in prison and a €30,000 fine. The video also shows how the French public opinion is divided between those that see him as a hero while others, including the government, as a criminal.

<https://www.theguardian.com/world/ng-interactive/2017/apr/28/the-valley-rebels-the-french-farmer-helping-refugees-cross-europe-video>

No. 25

Affaire Cédric Herrou : l'aide aux migrants est-elle légale en France ?

(*Cédric Herrou case: Is aid to migrants legal in France?*)

Stéphane Pair

France Info

8 August 2017

The Court of Appeal of Aix-en-Provence sentenced Cédric Hérou on Tuesday 8 August to four conditional months in prison for helping migrants. The French farmer is one of the most prominent figures of the Roya Citoyenne Association, which provides help to migrants at the French-Italy border. He was already sentenced to a €3,000 fine by the Court of First Instance. The French law from December 2012 differentiates smuggling for payment and selfless help to migrants. The latter is thus not a crime in France, but the article notes that in the eyes of public authorities, it seems to depend on the migration context, and they seem to be trying to stop similar solidarity actions from spreading.

http://www.francetvinfo.fr/monde/europe/migrants/affaire-cedric-herrou-l-aide-aux-migrants-est-elle-legale-en-france_2318307.html

This was also reported by [France24](#), [New York Times](#), [Aljazeera](#), [PRI](#), [Newsweek](#), [BBC](#), [TheLocal](#), [Kobini](#), [LeMonde](#).

No. 26

Aide aux migrants: le « délit de solidarité » dénoncé après la condamnation de Cédric Herrou

(Aid to migrants: 'crime of solidarity' denounced after Cedric Herrou's conviction)

Florian Reynaud

Le Monde

8 August 2017

This article focuses on the criminalisation of solidarity following the sentencing of Cédric Herrou, and explains Article L.622-1 of France's immigration law and its December 2012 modification, Article L.622-4 of 2012, which specifies that helping migrants stay cannot lead to prosecution if there is no direct or indirect compensation and the help ensured decent living conditions or preserved the dignity and physical integrity of migrants (through legal aid, food, housing or health care services). It remains illegal to aid in the entry and circulation of irregular migrants. However, the Court considers Cedric Herrou received compensation because the aid he provided supported his activism. This sends a clear message to other migrant rights activists and also blurs the exceptions added to the law in 2012.

http://www.lemonde.fr/societe/article/2017/08/08/aide-aux-migrants-le-delit-de-solidarite-denonce-apres-la-condamnation-de-cedric-herrou_5170166_3224.html#xtor=AL-32280270

This was also reported by [France24](#), [New York Times](#), [Aljazeera](#), [PRI](#), [Newsweek](#), [BBC](#), [TheLocal](#), [Kobini](#).

No. 27

Two journalists arrested in France while doing story on migrants

Staff member

Soynadie

14 November 2017

This article focuses on the arrest of two reporters, Caroline Christinaz and Raphael Kraft, by the Briançon police as they were travelling in vehicles driven by locals. They have decided to give a ride to four migrant minors in the border with Italy due to the weather's harsh condition. Ms. Christinaz, who had been in the car with the migrants, learned that she was being investigated on suspicion of assisting the illegal entry, circulation in French territory, a charge punishable by a heavy fine and/or up to five years in prison. Meanwhile Mr. Kraft was only heard as a witness.

http://www.soynadie.org/2017/11/14/two-journalists-arrested-in-france-while-doing-story-on-migrants/?lipi=urn%3Ali%3Apage%3Ad_flagship3_feed%3Bp%2FiloRKIRruXE%2BfNH4wjLO%3D%3D

This was also reported by [L'Express](#), [Politis](#), [Le Temps](#), [ValeursActuelles](#), [Europe 1](#), [Courrier International](#), [RT](#), [Il Fatto Quotidiano](#), [Ticinonews](#).

No. 28

France: Aid Worker Convicted for Tweet

Human Rights Watch

27 September 2018

A humanitarian worker was convicted for defamation on 25 September on account of an ironic tweet, representing the first case of this kind of conviction in France. Human Rights Watch said it shows a dangerous escalation in official harassment of groups providing crucial aid to migrants.

https://www.hrw.org/news/2018/09/27/france-aid-worker-convicted-tweet?utm_source=ECRE+Newsletters&utm_campaign=2e003a7895-EMAIL_CAMPAIGN_2018_09_27_11_56&utm_medium=email&utm_term=0_3ec9497afd-2e003a7895-422323345

No. 29

Crimes of solidarity: freedom for the “7 of Briançon”

La Cimade

24 October 2018

They face potential incarceration for helping migrants in distress in the French Alps. Bastien, Benoit, Eléonora, Juan, Lisa, Mathieu and Théo will face justice on 8 November in the city of Gap. They are accused of “helping undocumented foreign nationals to enter the national territory, in organised gangs”. The sentence is up to 10 years in prison and a €750,000 fine. Even though the notion “organised gang” refers to those who commit organised crime, the notion is now being used against volunteers from the NGOs *Tous migrants* and *La Cimade*, and, more generally, as a tool to intimidate citizens who show solidarity with migrants trying to cross the French Alps.

(English) : <http://www.statewatch.org/news/2018/oct/7-of-briancon.htm>

(French) : <https://www.lacimade.org/agir/nos-petitions/liberte-et-relaxe-pour-les-7-de-briancon/>

No. 30

Hautes-Alpes : procès des « 7 de Briançon », 160 CRS attendus ce jeudi

C. Michard

La Radio Plus

7 November 2018

A high-tension trial opens this Thursday at the *Tribunal Correctionnel de Gap*: the trial of the so-called '3 de Briançon', who have since become seven women and men suspected of having allowed migrants to enter in late April, near Briançon.

<http://alpesdusud.laradioplus.com/news/hautes-alpes/2217/hautes-alpes-proces-des-7-de-briancon-160-crs-attendus-ce-jeudi?fbclid=IwAR0tVzTx37A-DcBHVkTwJkdvveg2HPNInvmoYtq6lTisLKd7gUqoR2e5d9Q>

GREECE

Modality 1: Suspicion

No. 31

Refugees in Lesbos: are there too many NGOs on the island?

Helen Nianias

The Guardian

5 January 2016

Lesvos mayor Spyros Galinos is thankful for the outpouring of generosity, but points out that “many NGOs and individuals (are) coming to Lesbos without official registration and showing no cooperation with our municipality. This causes everyone upset and these NGOs arouse doubt and mistrust among the residents of Lesbos. I would say their presence is disruptive rather than useful.”

<https://www.theguardian.com/global-development-professionals-network/2016/jan/05/refugees-in-lesbos-are-there-too-many-ngos-on-the-island>

Modality 3: Disciplining

No. 32

Pleiades' press release on militarisation of humanitarian response to refugees

Hellenic Action for Human Rights

21 February 2016

The Hellenic Action for Human Rights, or Pleiades, called attention to a last-minute addition to a law passed by the Greek Parliament on 21 February 2016, entitled "Measures on precipitating the Government's work and other provisions" (Law 4368/16 (21 A'/21.02.2016)), by which the Greek army took over "exclusively everything related to the operation of reception centres and hotspots, in regards to the transportation, accommodation, catering and health care for refugees and immigrants", "in declination of any other legal provision". The army will also inspect and "coordinate" NGOs providing volunteer services to refugees.

<http://hellenicaction.blogspot.com/2016/02/pleiades-press-release-on.html>

Modality 4: Formal Prosecution

No. 33

NGOs decry charges against volunteers in Greece

Anealla Safdar

Aljazeera

16 January 2016

Five volunteer lifeguards were arrested by the Hellenic Coast Guard and charged with human smuggling, as part of a crackdown on civil society in Greek islands, activists say. Three Spanish members of PROEM-AID and one Danish member of Team Humanity were released on €5,000 bail, but a second Danish Team Humanity member, Salam Aldeen, was released on €10,000 bail and ordered to remain in the country and report to a police station every week.

<http://www.aljazeera.com/news/2016/01/ngos-decry-arrests-volunteer-lifeguards-greece-160116193522648.html>

This was also reported by [HuffingtonPost](#), [TheLocal](#), [CPH Post](#), [EuroWeeklyNews](#), [NPR](#), [Ekhathimerini](#).

No. 34

Dos españoles detenidos en Grecia por tratar de trasladar a Euskadi a ocho refugiados en una caravana

(Two Spaniards arrested in Greece for trying to transport eight refugees to Euskadi in a caravan)

Staff writer

El Mundo

28 December 2016

Two Spaniards are accused of smuggling human beings, a crime punishable by very long prison sentences in Greece. Mikel Zuloaga and Begoña Huarte were arrested in north-western Greece when they tried to cross into Italy by ferry with eight refugees. They have 12 days to pay a €2,000 fine. They later stood by their action, saying they would do it again (see http://ccaa.elpais.com/ccaa/2017/01/07/paisvasco/1483805777_194313.html).

<http://www.elmundo.es/sociedad/2016/12/28/5863a808e5fdea72078b4618.html>

This was also reported by [EITB](#), [Sud Ouest](#), [El Pais](#), [El Pais](#), [Express](#), [USA Today](#), [Ekathimerini](#), [El Mundo](#), [El Diario](#).

No. 35

Volunteers Who Rescued Migrants Are Cleared of Criminal Charges in Greece

The New York Times

7 May 2018

Three Spanish firefighters of [PROEM-AID](#) and two Danish members of [Team Humanity](#), who helped migrants arriving in Lesbos during the height of the refugee crisis, were cleared of human smuggling charges by a Greek court on 7 May. Manuel Blanco, Enrique Rodriguez, Julio Latorre, Mohammed Abbassi and Salam Aldeen, who had been arrested in January 2016 after successfully rescuing 51 migrants, were released on bail. The case drew international attention. NGOs and migrant organisations considered it an attempt to criminalise humanitarian aid. "This is a strong signal to other NGOs and just people working for humanity," said one of the defendants to the *New York Times*, adding that "saving lives and rescuing people is not a crime".

<https://www.nytimes.com/2018/05/07/world/europe/greece-migrants-volunteers.html>

This was also reported by [Deutsche Welle](#).

No. 36

Διδυμότειχο: Τρεις συλλήψεις για διακίνηση λαθρομεταναστών

(Didimoticho: three arrested on smuggling charges including a female minor)

Thrakinea

26 July 2018

A 52-year-old man and two women aged 15 and 27 were arrested in Didimoticho, and police are pursuing their 20-year-old accomplice to answer to the charge of procuring bus tickets for irregular migrants and transporting them to the bus terminal.

<http://www.thrakinea.gr/archives/129727>

No. 37

'Goodwill ambassadors' held in Greece for illegally aiding migrants

EURACTIV

29 August 2018

Police in Greece said on 28 August that they had arrested three members of a Greek NGO on suspicion of helping migrants to enter the country illegally. The members of Emergency Response Centre International (ERCI) were accused of being part of an "organised criminal network that systematically facilitated the illegal entry of foreigners", according to a police statement. Overall, six Greeks and 24 foreign nationals were implicated in the

case, they added. Among those arrested was Saraardini, a 23-year-old Syrian refugee, who in 2015 together with her sister employed their swimming skills to pull the waterlogged boat that brought them over from Turkey with another 18 people on-board.

<https://www.euractiv.com/section/justice-home-affairs/news/goodwill-ambassadors-held-in-greece-for-illegally-aiding-migrants/>

This was also reported by [El País](#), [ERCI Press release](#) (the NGO whose volunteers are being prosecuted), [Courrier International](#), [Independent](#) (UK), [The Guardian](#), [EUObserver](#), [InfoMigrants](#), [Aljazeera](#), [TheJournal](#), [Reuters](#), [The New York Times](#), [The Irish Times](#), [The Telegraph](#), [ECRE OPED](#), [WeMove.EU](#), [FreeHumanitarians](#).

No. 38

Three Greek journalists covering migrant crisis arrested for defamation

Reporters Without Borders
26 September 2018

Reporters Without Borders (RSF) criticised the overnight detention of three Greek newspaper journalists on suspicion of defaming the defence minister. It states that the measure was "disproportionate" and calls for the repeal of Greece's defamation law, under which journalists can be sentenced to imprisonment. The complaint was brought over a 21 September story claiming that contracts awarded to the defence minister's business associates for improvements in conditions at a refugee camp at Moria, a village on the island of Lesbos, constituted a misuse of European Union funding.

<https://rsf.org/en/news/three-greek-journalists-covering-migrant-crisis-arrested-defamation>

HUNGARY

Modality 1: Suspicion

No. 39

HUNGARY: Israeli intelligence firm targeted NGOs during election campaign

Civic Space Watch
23 July 2018

The Israeli private intelligence firm Black Cube was involved in a campaign to discredit NGOs ahead of Hungary's April election, according to a former Black Cube employee and a person with knowledge of the company's inner workings. Between December 2017 and March 2018, Hungarian NGOs and individuals connected to American-Hungarian businessman George Soros were contacted by agents using false identities who secretly recorded them. The recordings, which began appearing in the Jerusalem Post and Hungarian government-controlled daily paper Magyar Idők three weeks before Hungary's election, were used by Prime Minister Viktor Orbán to attack independent civil society organizations during the last days of the campaign. Orbán's right-wing Fidesz party went on to win in a landslide.

<https://civicspacewatch.eu/hungary-israeli-intelligence-firm-targeted-ngos-during-election-campaign/>

Modality 2: Intimidation and Harassment

No. 40

Hungarian volunteers offer warm welcome for refugees

Helen Womack

UNHCR

19 October 2016

The article concerns Gabor Ivanyi, a college principal and the chair of the Hungarian Evangelical Brotherhood, whose volunteers attempted to deliver food to refugees at the Hungarian border fence this summer. "Some officers threatened to handcuff us. The situation varied from day to day. It depended on the attitudes of individual police and army personnel."

<http://www.unhcr.org/news/stories/2016/10/5805e78219/hungarian-volunteers-offer-warm-welcome-refugees.html>

No. 41

Hungary steps up anti-immigration stance with plans for NGO tax

The Guardian

19 June 2018

The Hungarian Parliament has passed a law which criminalises the work of NGOs helping migrants. The legislation states that anyone who falls foul of the law can face up to one year in prison and other sanctions. In addition, the new law will introduce a 25% tax on aid groups the government says support migration. The law is known as the 'Stop Soros' law because it targets many organisations funded by the financier and philanthropist George Soros, whom Orban's government considers one of the main backers of irregular migration in Europe. The law has worried human rights activists throughout the EU owing to its potential criminalisation of their work.

<https://www.theguardian.com/world/2018/jun/19/hungary-anti-immigration-plans-ngo-tax-orban-bill-criminalise-aid>

This was also reported by [Reuters](#), [BBC](#), [EU Observer](#).

No. 42

Soros foundation to quit Hungary by end-August

Euractiv

17 August 2018

The Open Society Foundations (OSF) announced in May that it was leaving Hungary, citing what it called the "repressive" policies of nationalist firebrand Prime Minister Viktor Orbán. In June, Hungary passed the controversial so-called 'Stop Soros' law, which includes a punishment of up to a year in prison for anyone assisting someone who enters the country illegally.

<https://www.euractiv.com/section/justice-home-affairs/news/soros-foundation-to-quit-hungary-by-end-august/>

Modality 4: Formal Prosecution

No. 43

A migránsok is rákaptak a telekocsizásra

(Car-pooling is popular among migrants)

Origo

4 September 2015

This article addresses car-pooling in Austria and focuses on a car-pooling website that warns users to make sure they offer rides only to people who have a valid permit or visa or EU nationality.

<http://www.origo.hu/auto/20150904-telekocsi-migrans-mav-vonat.html>

No. 44

On the road with volunteers offering refugees rides from Hungary

Alison Langley

DW

7 September 2015

This article is about volunteers who have rushed to the Hungarian border to help migrants on their journey to Austria and Germany, despite the illegality of their actions. They organised via Facebook, and while it was supposed to be only about free car rides, volunteers have also brought food, clothing and toiletries.

<http://www.dw.com/en/on-the-road-with-volunteers-offering-refugees-rides-from-hungary/a-18697098>

This was also reported by [Aljazeera](#), [Forbes](#).

No. 45

Risking Arrest, Thousands of Hungarians Offer Help To Refugees

(Audio and text)

Lauren Frayer

NPR

29 September 2015

This article is about migrants entering Hungary across the Croatian or Serbian borders. While volunteers can offer food and water, other forms of help are restricted: "Hungarian law prohibits offering rides – even for free – to people who've entered the country illegally and without a visa. Another law grants Hungarian police and military extraordinary powers to search private homes if they suspect someone of harboring illegal migrants". Targeting traffickers, the laws can also be applied to well-intentioned volunteers and may have a chilling effect on those willing to offer assistance to migrants.

<https://www.npr.org/sections/parallels/2015/09/29/444447532/risking-arrest-thousands-of-hungarians-offer-help-to-refugees>

This was also reported by [Aljazeera](#), [Forbes](#).

No. 46

Brussels opens legal proceedings over Hungary's 'Stop Soros' law

The Guardian

19 July 2018

The European Commission sent an official letter to Hungary over the so-called 'Stop Soros' law, which criminalises the work of individuals and non-governmental organisations helping asylum-seekers and migrants. The letter states that the Hungarian government, via the law, is breaching the EU's Charter of Fundamental Rights. This is the first step in a European legal process, and if Hungary does not address the issue, it could be taken to the European Court of Justice (ECJ). Additionally, the European Commission announced that it referred Hungary to the ECJ for breaking other EU rules via asylum legislation related to the country's detention camps.

https://www.theguardian.com/world/2018/jul/19/brussels-begins-legal-action-against-hungary-over-stop-soros-law?CMP=tw_t_gu

This was also reported by [BBC](#), [Financial Times](#), [Times of Israel](#), [The Telegraph](#), [UK Business Insider](#), [Euronews](#).

ITALY

Modality 1: Suspicion

No. 47

Sicily prosecutor accuses NGOs of collaboration with Libya smugglers

Mark Casper

Jurist

23 April 2017

Sicilian Prosecutor Carmelo Zuccaro stated to reporters that an investigation has revealed evidence of direct contacts between some NGOs and smugglers in Libya. He emphasised the importance of intervention by politicians as these NGOs have been receiving questionable funding for facilitating the landings in Europe in concert with smugglers.

<http://www.jurist.org/paperchase/2017/04/sicily-prosecutor-ngos-cooperating-with-libya-smugglers.php>

This was also reported by [DW](#), [TheLocal](#), [The Washington Post](#), [RT](#), [The New Arab](#), [The Times](#), [The Independent](#), [BBC](#), [Reuters](#), [Express](#), [The Telegraph](#), [AnsaMed](#), [Aljazeera](#), [La Stampa](#).

No. 48

Migranti, sulle Ong Zuccaro insiste: "Notizie date da Frontex, non ho nuove prove". Orlando: "Nessun illecito disciplinare"

(Migrants, on Zuccaro Ong insists: "News given by Frontex, I have no new evidence." Orlando: "No disciplinary offence")

Alessandra Ziniti

Repubblica

3 May 2017

Carmelo Zuccaro claimed in front of the Senate's Defence Committee that there was a link between NGOs and human traffickers. He added that there was no evidence yet that could be used in a courtroom, but claimed that with further investigative powers granted by the Ministry he would be able to prove the crimes by the NGOs and its volunteers. However, the Ministry of Justice decided there were not enough grounds to continue to pursue this request.

http://www.repubblica.it/cronaca/2017/05/03/news/ong_migranti_scafisti_procura_catania_zuccaro-164500643/?ref=RHPPLF-BH-I0-C8-P3-S2.4-T1

This was also reported by [Euractiv](#), [Reuters](#), [The Daily Beast](#), [AP News](#), [Repubblica](#), [ABCNews](#).

No. 49

Migranti e Ong, l'ammiraglio della Guardia costiera "assolve" tutti. Nuovo fronte a Trapani

(Migrants and NGOs: coast guard admiral "performs" all; new front of Trapani)

Alessandra Ziniti

Repubblica

4 May 2017

Catanian Prosecutor Carmelo Zuccaro had to justify himself before the Defence Committee of Italian Senate. He was alleging links between NGOs conducting search and rescue and human traffickers. However, the commander of the Guardia Costiera, the Italian authority that coordinates to rescue at sea, opposed saying that "Humanitarian organisations help us."

http://www.repubblica.it/cronaca/2017/05/04/news/ong_l_ammiraglio_della_guardia_costiera_assolve_tutti-164587424/?ref=RHPPLF-BH-I0-C8-P2-S1.8-T1

No. 50

Italy softens claim of NGOs colluding with smugglers

Nikolaj Nielsen

EUObserver

8 June 2017

Italy's interior under-secretary, Domenico Manzione, appears to have softened accusations that aid groups are complicit in smuggling people across the Mediterranean sea from Libya. Speaking to MEPs in the civil liberties committee (Libe), Manzione said NGOs are performing a welcomed duty in saving people at sea, but that they need to follow rules and be more transparent.

<https://euobserver.com/migration/138160>

No. 51

Priest Named 'Guardian Angel of Refugees' Under Investigation in Italy

Peter Ford

News Deeply

4 September 2017

Rev. Mussie Zerai has received hundreds of night-time distress calls from refugee boats over the years. Now the Eritrean Roman Catholic priest finds himself under investigation by Sicilian prosecutors for collusion with smugglers.

<https://www.newsdeeply.com/refugees/articles/2017/09/04/priest-named-guardian-angel-of-refugees-under-investigation-in-italy>

This was also reported by [La Croix](#).

No. 52

Save the Children suspends migrant rescues in Mediterranean

Steve Scherer
Reuters
23 October 2017

Italian police searched the Vos Hestia on Monday as part of a wider investigation into the role that non-government organisations are playing in picking up migrants off the Libyan coast and bringing them to Italy. Save the Children said in a statement it was not under investigation and was cooperating with authorities. The documents seized by police concerned "presumed illegal actions committed by third persons".

<https://www.reuters.com/article/us-europe-migrants-ngo/save-the-children-suspends-migrant-rescues-in-mediterranean-idUSKBN1CS244>

No. 53

Immigration en Italie: les exagérations de Matteo Salvini

(Immigration in Italy: the exaggerations of Matteo Salvini)

Le Monde
27 September 2018

Interviewed by the French weekly *Valeurs actuelles*, Italian Minister of the Interior Matteo Salvini justified his migration policy by explaining, "In Italy, we simply sought to lay down rules to stop what was, until recently, a real invasion". He said, "[H]undreds of thousands of immigrants were daily brought to our shores by NGOs, in total indifference to the international community." The statistics published by the Guardia Costiera are formal and reflect a reality different from that described by the leader of the far-right party La Ligue.

https://abonnes.lemonde.fr/les-decodeurs/article/2018/09/27/immigration-en-italie-les-exagerations-de-matteo-salvini_5361175_4355770.html

Modality 3: Disciplining

No. 54

EU wil harder optreden tegen organisaties die migranten uit zee redden

(EU wants to act tougher against organisations that rescue migrants at sea)

Marc Peeperkorn

Volkskrant

4 July 2017

EU countries believe refugee organisation lifeboats in the Mediterranean ferry illegal economic migrants to Europe. European Ministers of Justice will discuss a code of conduct which prohibits organisations from continuing to sail in Libyan waters and expanding their GPS systems.

<http://www.volkskrant.nl/buitenland/eu-wil-harder-optreden-tegen-organisaties-die-migranten-uit-zee-redden~a4504326/>

This was also reported by [DW](#).

Modality 4: Formal Prosecution

No. 55

Italia inmoviliza el barco de Proactiva Open Arms y acusa a la ONG de promover la inmigración ilegal

(Italy detains Proactiva Open Arms boat and accuses NGO of promoting irregular migration)

19 March 2018

La Vanguardia

The authorities of the Italian region of Catania have detained a boat belonging to Proactiva Open Arms. The organisation, which is the only Spanish NGO rescuing migrants in the Mediterranean Sea, has been accused by Sicilian prosecutors of encouraging irregular migration and “illegal association”. The order was issued after Proactiva refused to follow Libyan Coast Guard instructions to hand over migrants, owing to concern over how the migrants would be treated in Libya.

<https://www.lavanguardia.com/internacional/20180319/441667332120/italia-retiene-barco-proactiva-open-arms-inmigracion-ilegal.html>

This was also reported by [El País](#), [Open Migration](#), [The Guardian](#), [Reuters](#).

No. 56

Italia libera el barco de la ONG española Open Arms

(Italy releases boat of Spanish NGO Open Arms)

Daniel Verdu and Carlos Garfella

El Pais

16 April 2018

A judge in Ragusa (Sicily) decided to release the rescue ship belonging to the Spanish NGO Proactiva Open Arms, which had been immobilised for one month in Catania. Its crew was accused of human smuggling after assisting 218 migrants and refusing to hand them over to the Libyan Coast Guard, due to concerns over how they would be treated in Libya. According to Proactiva's founder, Oscar Camp, this is just "a first step" and the charges have not been dropped, as the Italian investigation is ongoing.

https://elpais.com/politica/2018/04/16/actualidad/1523871692_947502.html

This was also reported by [The Local](#).

No. 57

Italy investigating German refugee rescue workers

Deutsche Welle

28 July 2018

Italian prosecutors are investigating rescue workers for international NGOs, including some who work for the German NGO Jugend Rettet. The investigation comes as Italy's populist government cracks down on private sea rescues.

<https://www.dw.com/en/italy-investigating-german-refugee-rescue-workers/a-44865029>

No. 58

Italian jailed and fined after unwittingly driving migrants across border with BlaBlaCar

Lillo Montalto Monella

Euronews

4 September 2018

An Italian man was given a suspended nine-month jail sentence and a suspended hefty fine for unknowingly driving undocumented migrants over the border through the car-sharing service BlaBlaCar.

<http://www.euronews.com/2018/09/04/italian-jailed-and-fined-after-unwittingly-driving-migrants-across-border-with-blablacar>

No. 59

Tunisian fishermen await trial after ‘saving hundreds of migrants’

Lorenzo Tondo in Palermo

The Guardian

5 September 2018

According to their lawyers, six Tunisian men arrested at sea maintain they saw a migrant vessel in distress and a common decision was made to tow it to safety in Italian waters. They claim they called the Italian coastguard so it could intervene and take them to shore. Prosecutors have accused the men of illegally escorting the boat into Italian waters and say they have no evidence of an SOS sent by either the migrant boat or by the fishermen’s vessel.

<https://www.theguardian.com/world/2018/sep/05/tunisian-fishermen-await-trial-after-saving-hundreds-of-migrants>

This was also reported by [El País](#), [BBC](#).

No. 60

Italy acquits Tunisian ‘migrant smuggling’ fishermen

BBC

22 September 2018

Six Tunisian fishermen arrested earlier this month by Italian authorities for “aiding illegal migrants” have been cleared. Supporters of the fishermen, from the southeast coastal town of Zarzis, said the men were aiding a boat in distress.

<https://www.bbc.com/news/world-africa-45613072>

No. 61

Charities plea for help after Aquarius migrant rescue ship’s flag revoked

Matthew Weaver

The Guardian

24 September 2018

The two charities that operate the Aquarius migrant rescue ship in the Mediterranean have urged European governments to step in to secure its future after its Panamanian flag was revoked following alleged pressure from the Italian government.

<https://www.theguardian.com/world/2018/sep/24/italy-blamed-after-aquarius-migrant-rescue-ships-flag-revoked>

No. 62

Il sindaco di Riace è stato arrestato

(The mayor of Riace was arrested)

Il Post

2 October 2018

Domenico Lucano, praised by many for his model of welcoming migrants, is under house arrest for facilitating illegal immigration and "marriages of convenience" for immigrants.

<https://www.ilpost.it/2018/10/02/sindaco-riace-domenico-lucano-arrestato/>

This was also reported by [BBC](#), [The Guardian](#), [DW](#), [Independent](#) (UK), [The Telegraph](#) (UK), [NY Times](#).

No. 63

Domenico Lucano: Italy's migrant-friendly mayor banned from Riace

BBC

17 October 2018

The mayor of Riace in southern Italy has been banished following accusations that he organised "marriages of convenience" for immigrants. The court order puts Domenico Lucano in the unusual position of being mayor of a town he is forbidden to step foot in.

<https://www.bbc.com/news/world-europe-45887193>

MALTA

Modality 2: Intimidation and Harassment

No. 64

Rescue aircraft Moonbird is back in business - but not from Malta

Times Malta

10 October 2018

The plane is now back in service, though not from Malta. The plane's operations were formally blocked in July and it had not been allowed to fly since the end of May. The NGO has repeatedly insisted that there was no legal basis for the Maltese government to halt the plane's operations.

<https://www.timesofmalta.com/articles/view/20181010/local/rescue-aircraft-moonbird-is-back-in-business-but-not-from-malta.691250>

Modality 4: Formal Prosecution

No. 65

Migrant rescue ship Lifeline docks in Malta after days at sea

BBC

27 June 2018

The vessel has been accused by Italy and France of ignoring international rules while carrying out its rescues. Malta has said it will detain the vessel while an investigation takes place.

<https://www.bbc.com/news/world-europe-44636556>

This was also reported by [Euractiv](#).

No. 66

German Lifeline ship captain facing Malta trial rejects guilt over migrant rescue operation

Deutsche Welle

2 July 2018

Claus-Peter Reisch commanded the *Lifeline* when it saved hundreds of migrants off the coast of Libya. He accused European countries of accepting the deaths of migrants "for political reasons".

<https://www.dw.com/en/german-lifeline-ship-captain-facing-malta-trial-rejects-guilt-over-migrant-rescue-operation/a-44484938>

This was also reported by [News Book](#).

No. 67

Malta detains second charity ship as death toll at sea rises

Reuters

Chris Scicluna

2 July 2018

Malta detained on 2 July the German vessel *Sea-Watch 3*, part of a crackdown on NGO rescue vessels in the Mediterranean. Many NGOs stopped their activities last year due to such persecution, but *Sea-Watch* continued operating across the Mediterranean. This is the second rescue boat Malta has detained within a week; the Dutch-flagged *Lifeline* was detained a few days earlier due to potential registration issues after Malta, for the first time in years, opened its port to 230 migrants to whom the Italian populist government refused to provide a safe port.

<https://www.reuters.com/article/us-europe-migrants-malta-ngo/malta-detains-second-charity-ship-as-death-toll-at-sea-rises-idUSKBN1JS19S>

No. 68

Migrants leave for Norway, others still stuck in Malta waiting for an EU lifeline

[Sarah Carabott](#)

Times Malta

19 August 2018

Some feared the ship could be impounded in Malta – a fate already suffered by three other rescue vessels, including the *Sea-Watch 3* – because of registration issues. The *Lifeline* has been held in Malta since June. The *Seefuchs* and the *Sea-Watch 3* are reportedly facing questions over registration. *Sea-Watch* insists its vessel was prevented from sailing for 51 days despite fulfilling all conditions of the flag state and having all the necessary registrations. It called on the government to put an “immediate end to the politically motivated blockade” of rescue vessels and stop “endangering human lives”.

<https://www.timesofmalta.com/articles/view/20180819/local/migrants-leave-for-norway-others-still-stuck-in-malta.686994>

This was also reported by [Independent Malta](#).

No. 69

Saving lives without a licence: Rescue ship trial delayed in Malta

Neave Barker

Aljazeera

24 October 2018

A court in Malta postpones the trial of Claus-Peter Reisch, a German captain of a refugee rescue ship impounded by the government.

<https://www.aljazeera.com/news/2018/10/saving-life-licence-rescue-ship-trial-delayed-malta-181003063133295.html>

UNITED KINGDOM

Modality 1: Suspicion

No. 70

Docs not Cops

29 September 2015

This is a campaign against the Immigration Act 2014. The NHS has provided free health care to UK residents since 1948, but with this Act, the government is planning to charge certain non-EU migrants before they are allowed treatment. Moreover, refugees, asylum seekers and undocumented migrants will be excluded from many crucial services.

<http://www.docsnotcops.co.uk/>

This was reported by [Red Pepper](#), [NPA](#), [Politics](#), [OpenDemocracy](#), [The Independent](#), [The Independent](#), [Doctors of the World](#), [Politics](#), [Doctors of the World](#), [Doctors of the World](#), [The Guardian](#), [The Independent](#), [RightToRemain](#), [Novaramedia](#), [Gal-Dem](#), [Novaramedia](#), [OpenDemocracy](#), [OpenDemocracy](#), [RS21](#), [BMJ](#), [Uneven Earth](#), [Institute of Race Relations](#), [The Guardian](#).

No. 71

The Hostile Environment: Turning the UK into a Nation of Border Cops

Staff writer

Corporate Watch

9 April 2017

This is a very detailed report of the Home Office's "hostile environment" measures against "unwanted" migrants, including compulsory identification checks in hospitals and schools, and multiple bans on "unwanted migrants" from renting homes, opening bank accounts or getting a driving licence. All these measures involve information sharing, criminalisation of migrants, citizen collaboration, and medical aspects.

<https://corporatewatch.org/the-hostile-environment-turning-the-uk-into-a-nation-of-border-cops-2/>

This was also reported by [Politics](#), [OpenDemocracy](#), [The Guardian](#).

No. 72

Big Brother state: How May's obsession with immigration turned Britain into a surveillance state

Politics

Natalie Bloomer and Samir Jeraj

11 September 2017

Today, some of society's most vulnerable people are so afraid of being turned over to the Home Office that they feel unable to access healthcare, find safe accommodation or seek justice for crimes committed against them. And with good reason.

<http://www.politics.co.uk/comment-analysis/2017/09/11/how-may-turned-britain-into-a-surveillance-society>

Modality 2: Intimidation and Harassment

No. 73

Spanish rescuers 'told by Italy to stay away from dinghy in distress'

The Guardian

29 June 2018

The crew of a Spanish rescue ship have said that Italian officials told them to let the Libyan Coast Guard respond to a distress call from a smuggling boat carrying migrants – only to hear shortly afterward that 100 migrants were missing and feared dead in the same area.

<https://www.theguardian.com/world/2018/jun/29/italy-and-libya-accused-after-migrant-deaths-in-dinghy-sinking>

No. 74

Italy's closure to rescue ships drives up sea deaths: think tank

Steve Scherer

Reuters

1 October 2018

Since taking power in June, Interior Minister Matteo Salvini, who heads the far-right League party, has refused to allow charity rescue ships to dock in Italy, a policy that has broad popular support after the arrival of almost 650,000 people from North Africa since 2014. But International Organization for Migration (IOM) estimates of the number of dead or missing at sea suggest there are dire consequences to this policy, according to Matteo Villa, a researcher at Italy's ISPI think tank.

<https://www.reuters.com/article/us-europe-migrants-italy/italys-closure-to-rescue-ships-drives-up-sea-deaths-think-tank-idUSKCN1MB353>

Modality 4: Formal Prosecution

No. 75

Man who tried to smuggle child refugee into UK: 'I'd never do it again. Well ...'

Josh Halliday

The Guardian

2 January 2017

This article is about Rob Lawrie, a former soldier, who was arrested at the Calais border when officers found an Afghan girl in his van. He explains how his life has changed and how, even if he narrowly avoided jail for trying to smuggle a child refugee into Britain, that he would attempt to get a minor to safety again if he thought he could get away with it.

https://www.theguardian.com/world/2017/jan/02/man-who-tried-to-smuggle-child-refugee-into-uk-id-never-do-it-again-well-?CMP=share_btn_tw

This was also reported by [DailyMail](#), [The Guardian](#), [The Independent](#), [The Yorkshire Post](#), [BBC](#) (audio), [Change.org](#) (petition), [BBC](#), [DailyMail](#), [Sky News](#), [NBC News](#), [LeMonde](#), [JustGiving](#) (campaign), [Newsweek](#), [Libération](#), [HuffingtonPost](#), [New Internationalist](#).

No. 76

EU citizens could face repeat of Windrush scandal, say landlords

Jamie Grierson

The Guardian

8 October 2018

The Residential Landlords Association has called for hard copy documents for EU citizens. The landlords have said that EU citizens living in the UK are at risk of facing some of the same difficulties caused for the Windrush generation by a lack of legal certainty around their status after Brexit. Under the right to rent rules of Theresa May's hostile environment policy, landlords are required to check the immigration status of potential tenants or risk prosecution.

<https://www.theguardian.com/politics/2018/oct/08/eu-citizens-could-face-repeat-of-windrush-scandal-say-landlords>

EUROPEAN UNION

No. 77

Protection of human rights defenders is vital to realise OSCE human rights commitments, says OSCE/ODIHR Director Link

Staff writer (press release)

OSCE

9 December 2016

Michael Georg Link, director of the OSCE Office for Democratic Institutions and Human Rights, reaffirmed that the protection of human rights defenders is essential for OSCE participating states: "Human rights defenders are often the focus of threats, attacks and legal harassment simply for trying to protect the rights of society's most vulnerable people, without discrimination. I encourage OSCE participating States to seriously consider the Hamburg Declaration, which outlines many important actions to safeguard human rights defenders from restrictions contrary to OSCE commitments."

<http://www.osce.org/odihr/287861>

This was also reported by [Diplomatic Intelligence](#).

Modality 1: Suspicion

No.78

EU border force accuses charities of collusion with migrant smugglers

Duncan Robinson

Financial Times

15 December 2016

According to a report in the *Financial Times*, EU border agency Frontex has accused NGOs of colluding with people smugglers operating in the central Mediterranean, stating in a confidential report that it has logged the "[f]irst reported case where the criminal networks were smuggling migrants directly on an NGO vessel".

<https://www.ft.com/content/3e6b6450-c1f7-11e6-9bca-2b93a6856354>

This was also reported by [Euractiv](#), [DailyBeast](#), [LaTribune](#), [DailyMail](#), [Statewatch](#), [The Intercept](#).

No. 79

Correction: Charities in the Mediterranean

(Retraction by *Financial Times*)

22 December 2016

An article on December 15 about charities and people smugglers overstated the content of confidential briefings from the EU's border agency, Frontex, by reporting that the agency had accused charities of colluding with migrant smugglers in the Mediterranean. The agency had raised a number of concerns about charities' interaction with migrant smugglers, as reported in our revised article, but had not itself made a direct accusation of collusion.

<https://www.ft.com/content/eae123e2-c840-11e6-9043-7e34c07b46ef>

This was also reported by [TIME](#)

No. 80

NGO rescues off Libya encourage traffickers, says EU borders chief

Patrick Wintour

The Guardian

29 February 2017

Speaking to Germany's Die Welt newspaper, Mr. Fabrice Leggeri, the head of Frontex, called for rescue operations in the Mediterranean to be re-evaluated, and accused NGOs of ineffectively cooperating with security agencies against human traffickers.

<https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief>

This was also reported by [Express](#), [HurriyetDailyNews](#), [Frontexit](#), [The European Post](#), [Reuters](#), [NewsThatMoves](#), [The Times UK](#), [EuroNews](#), [EuroPost](#).

No. 81

New Evidence Undermines EU Report Tying Refugee Rescue Group to Smugglers

Zach Campbell

The Intercept

2 April 2017

But the idea that NGOs are directly involved in smuggling people into Europe has swept through conservative media in recent months, fueled by a news report that the European Union's border agency, Frontex, had "accused

charities operating in the Mediterranean of colluding with people smugglers." The report, which appeared in the Financial Times in December, didn't name any particular charities, and it quickly started to show holes; within a week, the paper issued a correction and Frontex distanced itself from the accusations.

<https://theintercept.com/2017/04/02/new-evidence-undermines-eu-report-tying-refugee-rescue-group-to-smugglers/>

This was also reported by [Aljazeera](#), Subsequently, Frontex distanced itself from the accusation

(https://twitter.com/PatrickKingsley/status/809424345651154944?ref_src=twsrc%5etfw)

No. 82

EU migration crisis: border agency accused of stirring controversy

Stephanie Kirchgaessner

The Guardian

5 April 2017

Mario Giro, Italy's deputy foreign minister, said the recent allegation by Frontex – which suggested that aid groups were indirectly supporting criminal traffickers – showed a fundamental misunderstanding of so-called 'push' and 'pull' factors that are encouraging hundreds of thousands of people from Africa and the Middle East to leave their homes and make the treacherous journey across the Mediterranean to Europe.

<https://www.theguardian.com/world/2017/apr/05/eu-migration-crisis-frontex-people-traffickers>

No. 83

Refugee rescue group accuses EU border agency of conspiracy

Staff writer

Euractiv

13 April 2017

Spanish NGO ProActiva, which has been rescuing migrants in the Mediterranean since 2016, accused the EU's border control agency Frontex on 12 April of plotting to discredit private aid organisations in order to put off donors.

<https://www.euractiv.com/section/justice-home-affairs/news/refugee-rescue-group-accuse-eu-border-agency-of-conspiracy/>

This was also reported by [The Intercept](#), [Malta Today](#), [Standard-Examiner](#), [Jordan Times](#), [Aljazeera](#), [SputnikNews](#).

Modality 2: Intimidation and Harassment

No. 84

European Parliament wants to put an end to the solidarity offence in Europe

Cécile Barbière

Euractiv

9 July 2018

The European Parliament has approved a resolution expressing concern over the negative consequences that EU legislation is provoking over people who help migrants, since in some countries those assisting migrants and asylum-seekers are being accused of boosting smuggling. Members of the European Parliament have stressed that European legislation stipulates that Member States have the option of not penalising people when their assistance is humanitarian. For this reason, they have called on governments to adapt their legislation and ensure that citizens and civil society organisations assisting migrants “are not criminalised”. The document calls on the European Commission to adopt clear guidelines for Member States which specify which actions will not be penalised, in order to ensure clarity when applying European directives.

<https://www.euractiv.com/section/justice-home-affairs/news/european-parliament-wants-to-put-an-end-to-the-solidarity-offence-in-europe/>

This was also reported by [El diario.es](http://el.diario.es).

No. 85

Ships ‘not willing to save Mediterranean migrants’ say aid groups as Aquarius seeks safe harbour

Hannah Strange

The Telegraph

12 August 2018

The NGOs said that those on board reported encountering five boats which did not offer assistance, a “disturbing development” that suggested Italy’s ban on rescue ships was deterring crews from helping migrants in distress.

https://www.telegraph.co.uk/news/2018/08/12/ships-not-willing-save-mediterranean-migrants-say-aid-groups/?utm_source=ECRE+Newsletters&utm_campaign=9047056a42-EMAIL_CAMPAIGN_2018_08_13_03_36&utm_medium=email&utm_term=0_3ec9497afd-9047056a42-422323345

No. 86

Humanitarian ship seeks European port for rescued migrants

EURACTIV

13 August 2018

"Ships might be unwilling to respond to those in distress due to the high risk of being stranded and denied a place of safety", said Aloys Vimard, MSF's project coordinator on board the Aquarius.

<https://www.euractiv.com/section/justice-home-affairs/news/humanitarian-ship-seeks-european-port-for-rescued-migrants/>

No. 87

One in 18 migrants die crossing the Mediterranean as death rate soars amid divisions over EU rescue policy

James Crisp
The Telegraph
3 September 2018

The UN report blamed the increase in the death rate on fewer NGO boats being active on the Libyan coast. In 2017, there were eight but now there are just two. The Libyan Coast Guard, which has two patrol boats, is now the main organisation intervening off the Libyan coast.

<https://www.telegraph.co.uk/news/2018/09/03/migrant-death-rate-mediterranean-rises-despite-fewer-crossings/>

No. 88

No NGO rescue boats currently in central Mediterranean, agencies warn

Lorenzo Tondo and Karen McVeigh
The Guardian
22 September 2018

Thousands of migrants risk dying at sea because of a clampdown on NGO rescue ships, aid agencies have warned, in what has been their longest period of absence from the central Mediterranean since they began operating in late 2015. Since 26 August, no NGO rescue vessel has operated on the main migration routes between north Africa and southern Europe.

<https://www.theguardian.com/world/2018/sep/12/migrant-rescue-ships-mediterranean>

No. 89

Spain saves some 440 migrants as Panama gets involved in controversy with NGOs

Malta Independent

24 September 2018

While Spain's maritime rescue service pulled 447 people to safety on Saturday in the western Mediterranean, two humanitarian groups which operate the last private rescue vessel in the central Mediterranean, along what is considered the deadliest route for trafficked migrants, said Panama had revoked the ship's registration in response to Italian complaints.

<http://www.independent.com.mt/articles/2018-09-24/world-news/Spain-saves-some-440-migrants-as-Panama-gets-involved-in-controversy-with-NGOs-6736196760>

No. 90

« Pour les migrants en mer, le plus grand danger ce sont la politique, les politiciens et la politique extérieure de l'UE »

(For migrants at sea, biggest danger is EU politics, politicians and foreign policy)

Par Nick Romaniuk (Research Coordinator and rescue for SOS Méditerranée in the vessel « Aquarius »)

Le Monde (Idées)

02 October 2018

Nick Romaniuk, a research coordinator aboard the Aquarius, deplores the growing indifference to migrants lost at sea, writing in the newspaper *Le Monde*. He is surprised to have become a criminal when he works only to save lives.

https://abonnes.lemonde.fr/idees/article/2018/10/02/pour-les-migrants-en-mer-le-plus-grand-danger-c-est-la-politique-les-politiciens-et-la-politique-exterieure-de-l-ue_5363276_3232.html?

No. 91

Europe's migrant rescue boats face uncertain future

Lewis Sanders IV

Deutsche Welle

4 October 2018

The privately-operated rescue ship Aquarius arrived on Thursday in the port of Marseille in southern France after Panamanian authorities revoked its registration. Without a flag, the Aquarius is unable to operate in a legal capacity while in international waters. Before losing its flag, it was considered the last privately-operated ship conducting rescue missions on the Mediterranean. However, the Aquarius is not the only privately-operated rescue ship in legal limbo. Others, including those of Sea-Watch and Proactiva Open Arms, have been docked in Malta since earlier this year.

<https://www.dw.com/en/europes-migrant-rescue-boats-face-uncertain-future/a-45754123>

No. 92

Cómo respondió Europa a los otros 'Aquarius' de este verano
(*How Europe responded to this summer's other "Aquarius"*)

Naiara Galarraga Gortázar
El País
6 November 2018

The lack of a common policy for disembarking irregular migrants rescued in the Mediterranean Sea led to a great number of vessels being stranded this summer. In the majority of cases, EU Member States took days to agree on which countries would receive and process their asylum demand. This situation was considered one of the main causes for discouraging vessels to fulfil their obligation under international law to rescue people in distress at sea.

https://elpais.com/internacional/2018/10/12/actualidad/1539373409_293746.html

ANNEX 2. COMPILATION OF NEW EVIDENCE: CIVIL SOCIETY REPORTS AND ACADEMIC RESEARCH

Annex 2 lists a number of relevant reports on the criminalisation of humanitarian assistance published between 2016 and 2018. The reports are organised in the categories European Union, France, Greece and Global. Moreover, they are displayed in chronological order – from the most recent to the oldest. The report’s monitoring illustrates the growing concern expressed by important stakeholders such as academia, research institutes, European agencies and civil society itself, over the escalation and the systemic nature of the phenomenon of policing civil society actors.

EUROPEAN UNION

Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society

Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliute

Hart Publishing

24 January 2019

Policing Humanitarianism examines the ways in which European Union policies aimed at countering the phenomenon of migrant smuggling affect civil society activities in the provision of humanitarian assistance, and access to rights for irregular immigrants and asylum seekers. It explores the effects of EU policies, laws and agencies’ operations in anti-migrant smuggling actions and their implementation in the following EU Member States: Italy, Greece, Hungary and the UK. The book critically studies policies designed and implemented since 2015, during the so-called ‘European refugee humanitarian crisis’.

<https://www.bloomsburyprofessional.com/uk/policing-humanitarianism-9781509923014/>

###

The shrinking space for solidarity with migrants and refugees: how the European Union and Member States target and criminalize defenders of the rights of people on the move

Yasha Maccanico, Ben Hayes, Samuel Kenny

Published by Transnational Institute (TNI)

September 2018

This report looks at how EU policy has played out and offers a glimpse into the ways citizens and movements are resisting xenophobic and securitarian policies.

<https://www.tni.org/en/publication/the-shrinking-space-for-solidarity-with-migrants-and-refugees>

###

Humanitarian citizens: breaking the law to protect human rights

Janina Pescinski
OpenDemocracy
28 August 2017

This article draws on research that was presented at the European International Studies Association Pan-European Conference on International Relations in September 2017 (<http://www.paneuropeanconference.org/2017/>). It is about how the EU's crackdown on irregular immigration has impacted those providing humanitarian assistance to migrants. The EU Facilitation Directive (2002) "criminalises any act that facilitates the entry, transit or stay of unauthorized foreigners", but there is an optional humanitarian clause, at the States' discretion, that allows them not to impose sanctions on people whose aim is to provide humanitarian assistance. The article focuses on the French example of "délit de solidarité" and the story of Cédric Herrou.

<https://www.opendemocracy.net/mediterranean-journeys-in-hope/janina-pescinski/humanitarian-citizens-breaking-law-to-protect-human->

This was also reported by [Amnesty International](#).

###

Crackdown on NGOs assisting refugees and other migrants

Lina Vosyliute and Carmine Conte
ReSOMA
July 2018

Since 2015, NGOs providing humanitarian assistance and search and rescue have been experiencing an unprecedented policing of their activities. ReSOMA's first discussion brief on the topic analyses the trends behind these criminalisation cases, their causes and possible deterrent effects. NGOs and researchers can submit their evidence through the ReSOMA project to contribute to the Commission's Observatory of criminalisation cases and to draft effective guidelines that would present them.

http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Policy%20Briefs_topic4_Crackdown%20on%20NGOs_0.pdf

###

Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism:

Sergio Carrera; Jennifer Allsopp; Lina Vosyliūtė

27 July 2018

International Journal of Migration and Border Studies

This article examines the ways in which the EU's political priority of countering migrant smuggling affects the provision of humanitarian assistance and access to rights to irregular immigrants and asylum seekers. It explores the effects of EU policies, laws and agencies' operations in anti-migrant smuggling actions, and their implementation in two EU member states, Italy and Greece, in the context of the 'European refugee humanitarian crisis' during 2015-2017. It shows that the effects of EU and national policies criminalising the facilitation of entry and residence of irregular immigrants extend beyond cases where civil society actors have faced actual prosecutions and criminal convictions when assisting irregular immigrants and asylum seekers. It uses the notion 'policing the mobility society' to capture wider punitive dynamics which affect the activities of civil society actors, especially those critically monitoring and politically mobilising for the rights of migrants.

<https://www.inderscience.com/info/inarticle.php?artid=93912>

###

Crimes of Solidarity in Mobility: Alternative Views on Migrant Smuggling

Sheldon X. Zhang, Gabriella E. Sanchez, Luigi Achilli

The Annals

21 February 2018

This volume of *The Annals* presents a collection of empirically-based research projects on migrant smuggling, seeking to create a more nuanced understanding of the topic that supersedes perspectives that are often found in mainstream narratives of unscrupulous and ruthless criminal gangs preying on vulnerable and desperate migrants. The contributing authors rely on field data to reveal the complex and often symbiotic relationships between migrants and the people behind their journeys. Often misunderstood in juxtaposition to narratives of security and control, the lived experiences of migrants describe smuggling facilitators as relatives or close friends, acquaintances or distant operators – all members of a social network of varying relational proximity. Vulnerability in migration grows as the travel distance and transit points increase and the density of one's own community ties decreases. The procurement of smuggling services is always situated within the collective wisdom and lived experiences of the migrants and their communities, and the strategies to increase the odds of success and to reduce the hazards and uncertainty of traversing foreign terrains.

###

Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations

European Union Agency for Fundamental Rights (FRA)

2018

This FRA document compiles all the NGOs and their vessels/aircrafts involved in SAR activities in the Mediterranean as well as legal proceedings against them in the period of 2015-2018.

http://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf

###

Desperate Journeys: Refugees and migrants arriving in Europe and at Europe's borders

United Nations High Commissioner for Refugees (UNHCR)

January–August 2018

The UN Refugee Agency shows that crossing the Mediterranean Sea has become even more deadly. The report shows that while the total number of people arriving in Europe has fallen, the rate of deaths has risen sharply, particularly for those crossing via the Mediterranean Sea, due to the lack of rescue capacity.

https://data2.unhcr.org/en/documents/download/65373#_ga=2.60771502.200247833.1538036092-49319563.1538036092

###

Between the Devil and the Deep Blue Sea

Amnesty International

2018

This report touches upon the subject of the demonisation of NGOs and the criminalisation of solidarity in Section 3.

<https://www.amnesty.org/download/Documents/EUR3089062018ENGLISH.pdf>

###

Blaming the Rescuers

“Criminalizing Solidarity, Re-enforcing Deterrence”

Charles Heller and Lorenzo Pezzani

Forensic Oceanography, Forensic Architecture, Goldsmiths, University of London

Realised with the support of Borderline Europe, the WatchTheMed platform and Transmediale

2018

At the core of this report, lies the analysis of the dynamics of migration across the sea between 2015 and 2016. The authors rely on official documents, statistics, qualitative interviews, photographs and maps to assess how the conditions and the danger of crossings has evolved, and how the main actors operating at sea (including the state-led operations of the EU and its member states at sea, Libyan officials, smugglers, SAR NGOs and migrants) have affected them. While the report generates substantial new data, it also relies on existing analysis by official bodies and other forms of expertise. This demonstrates that the analysis on offer would have been available had it not been occluded by attacks against SAR NGOs.

English: <https://blamingtherescuers.org/report/>

French: https://blamingtherescuers.org/assets/annexes/Blamingtherescuers_summary_French_upload.pdf

###

Humanitarianism: Unacceptable Face of Solidarity

Liz Fekete, Frances Webber and Anya Edmond-Pettitt

Institute of Race

2017

The report discusses the current shrinking space and isolation of NGOs as well as their criminalisation when acting in solidarity towards irregular migrants, especially regarding assistance at land and sea borders.

http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf

###

Crossing the Mediterranean Sea by Boat: Mapping and documenting migratory journeys and experiences

Dr Vicki Squire, Dr Angeliki Dimitriadi, Dr Maria Pisani, Dr Dallal Stevens, Professor Nick Vaughan-Williams, Dr Nina Perkowski, Dr Vasiliki Touhouliotis

The University of Warwick

May 2017

This international project is comprised of researchers at the University of Warwick, University of Malta, and the Hellenic Foundation for European and Foreign Policy. The research team has carried out 257 in-depth qualitative interviews with a total of 271 participants across seven sites in two phases: Kos, Malta and Sicily from September-November 2015, and Athens, Berlin, Istanbul and Rome from May-July 2016. Additional interviews were carried out in Malta until March 2016. It focuses on the impact policies have directly on migrants, by "drawing together policy analysis and observational fieldwork with an in-depth analysis of qualitative interview data with people making – or contemplating making – the dangerous journey across the Mediterranean Sea."

Online interactive map accessible at: <https://crossing-the-med-map.warwick.ac.uk/>

https://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/crossingthemed/output/crossing_the_med_evidence_brief_ii.pdf

This was also reported by [Researchgate](#), [GMDAC-IOM](#), [Research Councils UK](#), [ALDA](#), [Birkbeck University of London](#), [Redvince](#), [PHYS.org](#), [Time Of Malta](#).

###

Decriminalising 'Humanitarian Smuggling' (RSC Research in Brief, no.6)

Rachel Landry
University of Oxford – Refugee Studies Centre
7 March 2017

This is a summary of the RSC Working Paper no. 119 "The 'humanitarian smuggling' of refugees: criminal offence or moral obligation?" It outlines the concept of "humanitarian smuggling", and critiques smuggling prohibitions at the international and the EU levels. It argues that these prohibitions are overbroad and vague and fail to meet basic requirements of the rule of law. Moreover, they criminalise acts that fall outside the law's stated purpose and that are often ethically defensible.

<https://www.rsc.ox.ac.uk/publications/research-in-brief-decriminalising-humanitarian-smuggling>

###

Research in Brief: Decriminalising 'Humanitarian Smuggling'

Rachel Landry
University of Oxford, Refugee studies centre
7 March 2017

This research brief summarises the legal and policy findings from the RSC Working Paper no. 119, "The 'humanitarian smuggling' of refugees: criminal offence or moral obligation?" It outlines the concept of 'humanitarian smuggling', and then critiques smuggling prohibitions at the international and the EU levels. It argues that these prohibitions are overbroad and vague, failing to meet basic requirements of the rule of law. Moreover, they criminalise acts that fall outside the law's stated purpose, acts that are often ethically defensible.

Finally, the brief analyses existing proposals to improve the framework governing smuggling and provides additional recommendations to decriminalise 'humanitarian smugglers'.

<https://www.rsc.ox.ac.uk/publications/research-in-brief-decriminalising-humanitarian-smuggling>

###

EMSC First Year Activity Report

Europol
24 February 2017

Europol launched the European Migrant Smuggling Centre (EMSC) in February 2016. In this report, from January 2016 to January 2017, Europol reveal that 17,459 new suspected migrant smugglers were identified (+24% v 2015).

<https://www.europol.europa.eu/publications-documents/emsc-first-year-activity-report>

This was also reported by [The Independent](#).

###

Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants

Dr Sergio Carrera, Prof. Elspeth Guild, Dr Ana Aliverti, Ms Jennifer Allsopp, Ms Maria Giovanna Manieri, Ms Michele Levoy.
The Policy Department for Citizen's Rights and Constitutional Affairs
2016

This is a study, commissioned by the European Parliament, that assesses existing EU legislation aimed at countering people smuggling – the 2002 Facilitators' Package – and how it deals with those providing humanitarian assistance to irregular migrants.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf)

This was also reported by [CEPS](#), [European Area of Freedom Security and Justice](#), [Migration4Development](#), [SocialPlatform](#), [ECRE](#).

###

Proud to Aid and Abet Refugees: The Criminalization of 'Flight Helpers' in Greece

Mariana Gkliati

University of Oxford, Faculty of Law

23 May 2016

Mariana Gkliati discusses alarming developments in EU policy that indicate a tendency towards placing a strain upon civil society that has been providing humanitarian assistance to newcomers at the EU's external borders.

<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>

###

Why Cooperating with Libya on Migration Could Damage the EU's Standing

John Sunderland
Newsweek
11 May 2016

The European mission to train Libya's coast guard and navy to stop people smugglers raises legal and ethical questions.

<http://www.newsweek.com/why-cooperating-libya-migration-could-damage-eus-standing-516099>

###

FRANCE

Calais: police harassment of volunteers

Eleonore Vigny
L'Aubergue des Migrants, Utopia, Help Refugees, Refugee Info Bus
July 2018

During the studied time, from 1 November to 1 July 2018, 646 incidents related to intimidation of volunteers in Calais were registered. This report outlines this intimidation and daily harassment that volunteers in Calais experience at the hands of French police.

EN: <https://helprefugees.org/wp-content/uploads/2018/08/Police-Harrassment-of-Volunteers-in-Calais-1.pdf>

FR: <http://www.laubergedesmigrants.fr/wp-content/uploads/2018/08/Rapport-Calais-le-harc%C3%A8lement-policier-des-b%C3%A9n%C3%A9voles.pdf>

###

GREECE

Proud to Aid and Abet Refugees: The Criminalization of ‘Flight Helpers’ in Greece

Mariana Gkliati

Oxford Faculty of Law

21 March 2016 & 23 May 2016

In these two articles, Mariana Gkliati, a PhD researcher at the Institute of Immigration Law (Leiden University), discusses the strain placed upon people providing humanitarian assistance to migrants in the EU.

<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid-and>

<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/registering>

GLOBAL

Evidential Issues in Trafficking in Persons Cases: Case Digest

Case Digest

United Nation Office on Drugs and Crime (UNODC)

2017

Analysing 135 cases, from 31 jurisdictions, this Case Digest aims to assist criminal justice practitioners around the world in addressing the recurring evidential issues typical of human trafficking cases.

https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf

This was also reported by [International Center for Missing & Exploited children](#), [FreeMovement](#), [Electronic Immigration Network](#), [OAS](#).

###

Beyond anecdotes: getting to the heart of human smuggling

Institute for Security Studies – Africa (ISS)

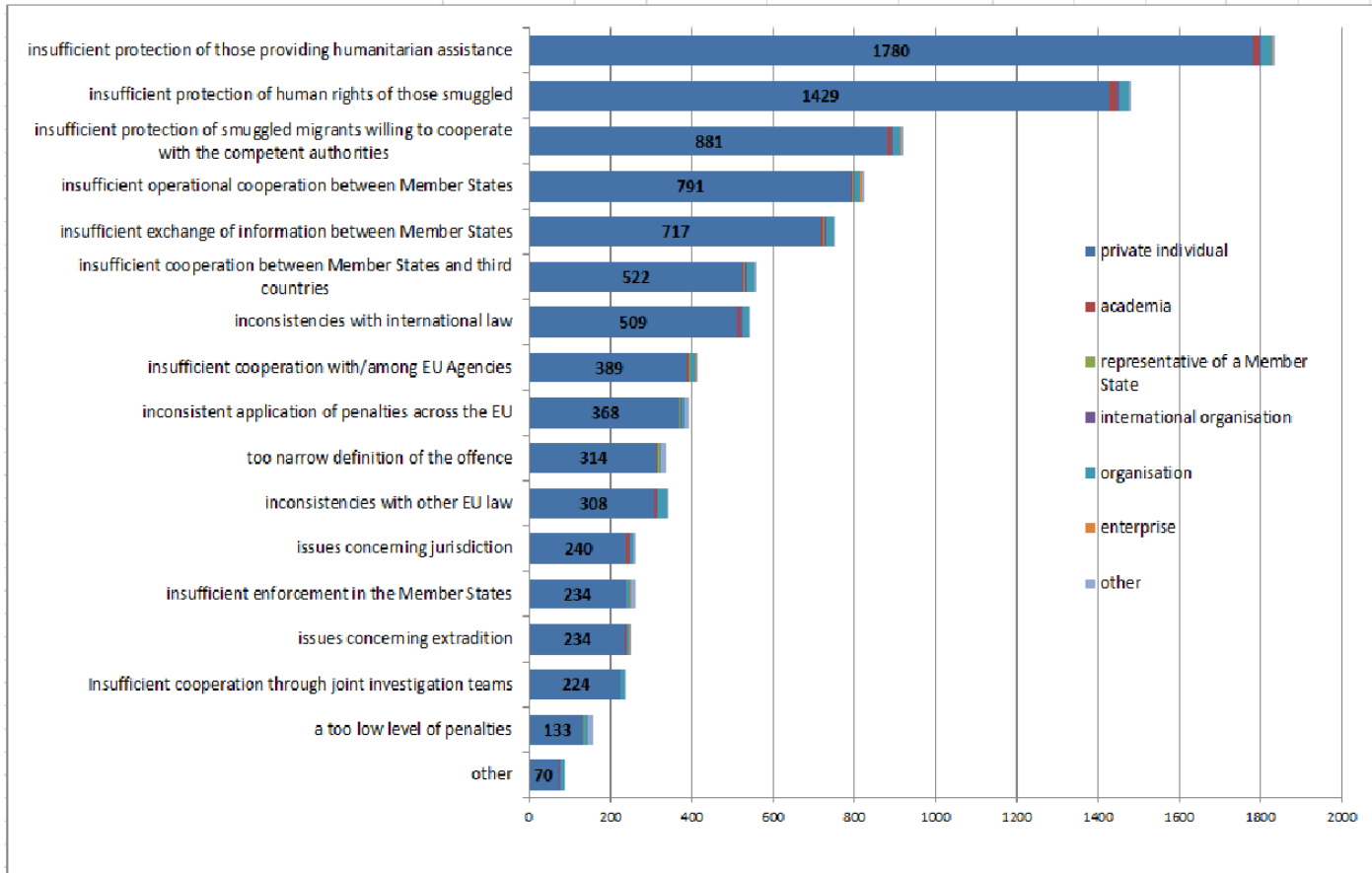
14 December 2016

This is a short infographic video explaining the smuggling phenomenon and the counterproductive anti-smuggling industry. The research brief also highlights how migrants are losing trust in international humanitarian actors, as they see them as among those who want to stop migration and thus not help migrants migrate.

<https://issafrica.org/media-resources/videos-and-infographics/beyond-anecdotes-getting-to-the-heart-of-human-smuggling>

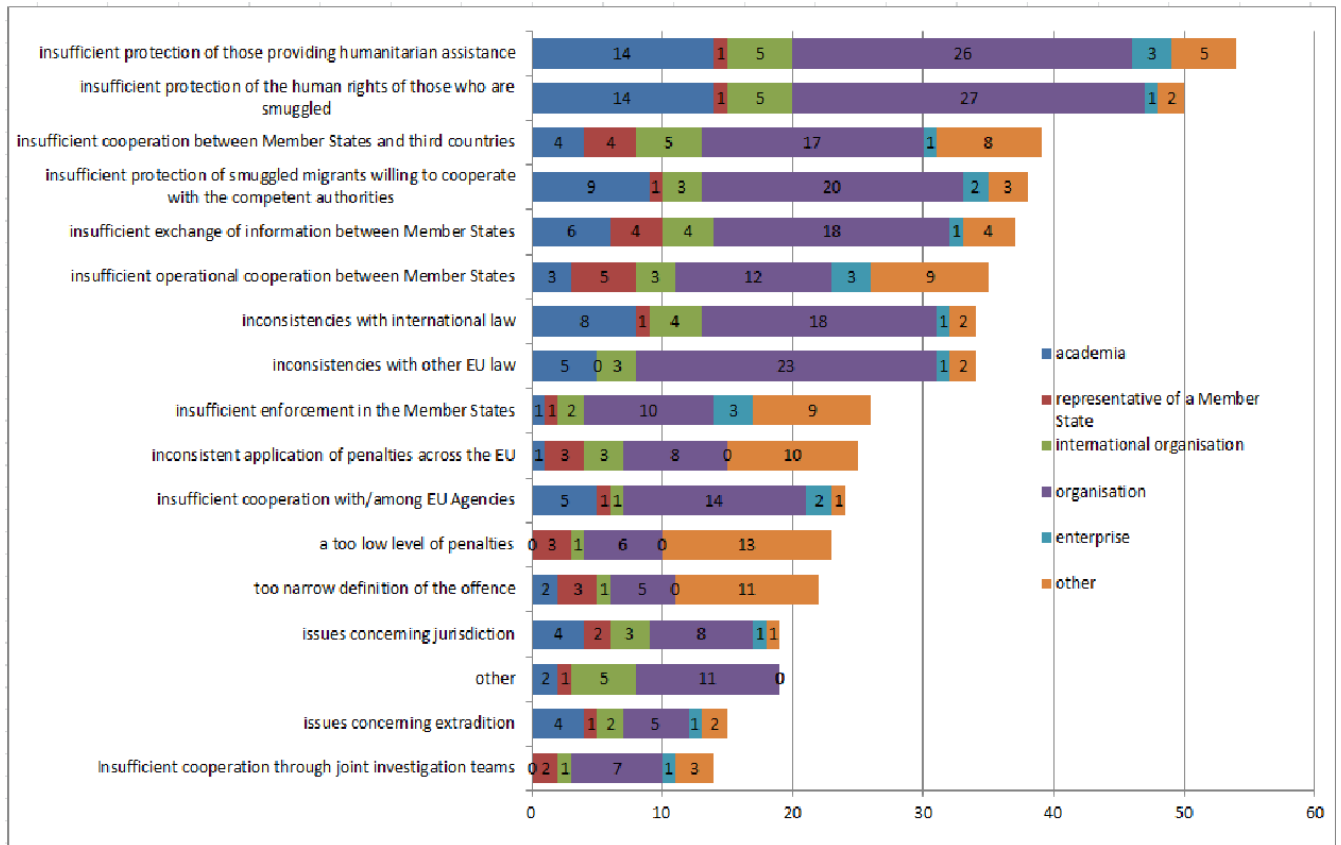
ANNEX 3. REFIT PUBLIC CONSULTATION: SELECTED QUESTIONS

Figure A1. Question 7: Main issues affecting implementation for all categories of respondents



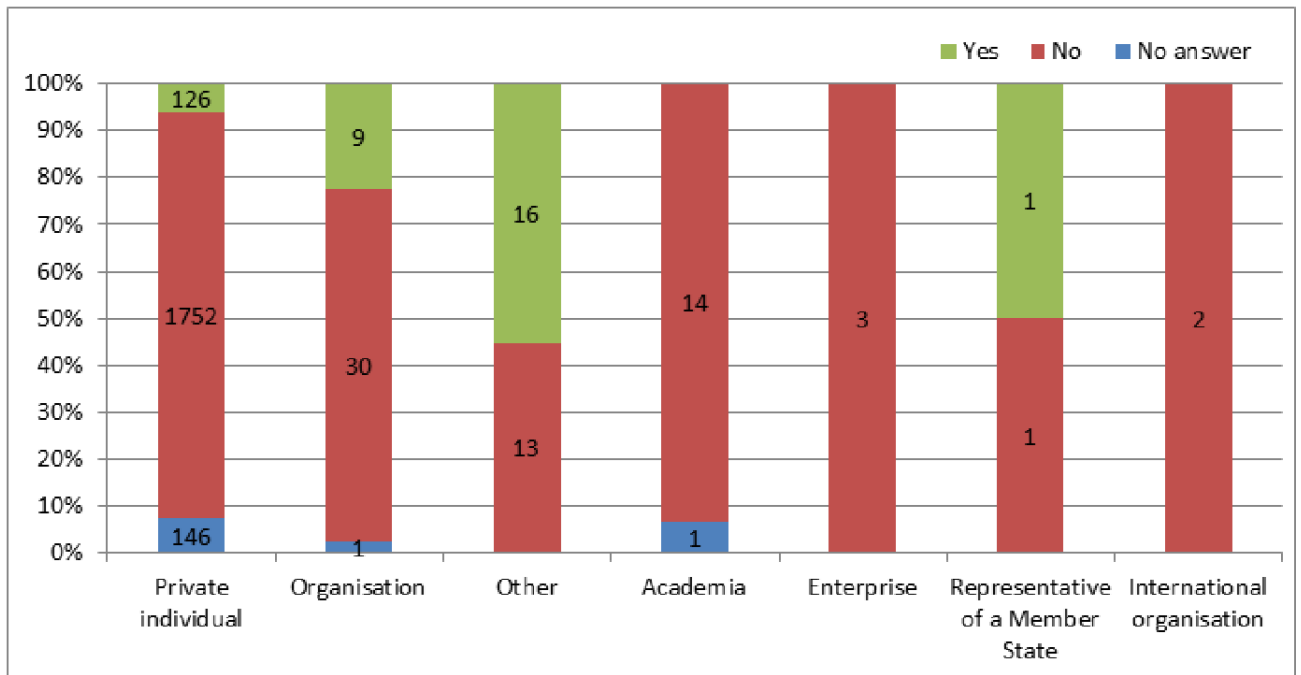
Source: European Commission (2017), REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: The Facilitators' Package, Directive 2002/90/EC and Framework Decision 2002/946/JHA, Staff Working Document, SWD (2017) 117 final, Brussels, 22 March, Annex II – Stakeholder Consultation, p. 49.

Figure A2. Question 7: Main issues affecting implementation for categories other than private individuals



Source: European Commission (2017), 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, Staff Working Document, SWD (2017) 117 final, Brussels, 22 March, p. 50.

Figure A3. Question 8: Is the definition sufficiently clear and adequate to meet the objectives?



Source: European Commission (2017), 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, Staff Working Document, SWD (2017) 117 final, Brussels, 22 March, p. 52.

ANNEX 4. EU AGENCY FOR FUNDAMENTAL RIGHTS: OVERVIEW OF NGO SHIPS INVOLVED IN SEARCH AND RESCUE IN THE MEDITERRANEAN AND UNDER CRIMINAL INVESTIGATION

Table 1: NGOs involved in SAR activities in the Mediterranean and vessels/aircrafts deployed by them (2015-2018)

NGO	Country*	Rescue vessel(s)	Operational in August 2018	
			Yes/No	Comment
Jugend Rettet	DE	'Iuventa'	No	(seized in Sicily (Italy) due to ongoing criminal investigations)
Médecins Sans Frontières (MSF)	FR	'Prudence' (operated by MSF Belgium)	No	(stopped in Oct. 2017)
		'Argos' (operated by MSF Belgium)	No	(stopped in Nov. 2016)
		'Dignity I' (operated by MSF Spain)	No	(stopped in 2016)
Migrant Offshore Aid Station (MOAS)	IT	'Phoenix'	No	(stopped in Oct. 2015)
Mission Lifeline	DE	'Lifeline'	No	(denied to leave the port and detained in Malta)
ProActiva Open Arms	ES	'Astral'	Yes	(mainly used for awareness raising since the end of 2016)
		'Golfo Azzurro'	Yes	
		'Open Arms'	Yes	
PROEMAID	ES	'Aita Mari'	Not yet	(plans to start operating in autumn 2018)
Refugee Rescue	UK	'Mo Chara'	Yes	
Save the Children	US	'Vos Hestia'	No	
Sea-Eye	DE	'The Sea-Eye'	No	

NGO	Country*	Rescue vessel(s)	Operational in August 2018	
			Yes/No	Comment
			(denied to leave the port and detained in Malta)	
		'The Seefuchs'	No (denied to leave the port and detained in Malta)	
Sea-Watch	DE	'Sea-Watch 3'	No (denied to leave the port and detained in Malta)	
		'Moonbird' (reconnaissance aircraft – with the support of the Evangelical Church in Germany & the Swiss Humanitarian Pilots Initiative)	No (flying permit not re-issued by Maltese authorities)	
SOS Méditerranée & Médecins Sans Frontières	DE/FR/IT/ CH FR	'Aquarius'	Yes	

Note: * = 'country' means the state where the NGO has been established or registered

Table 8 Source: FRA (2018), "Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations", (<http://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>) (based on publicly available information)

Table 2: Legal proceedings against private entities involved in SAR operations in the EU

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
ITALY				
'Iuventa' (operated by <i>Jugend Rettet</i>)	<ul style="list-style-type: none"> - Public prosecutor in Trapani (Sicily) - Tribunal of Trapani (Sicily) - Supreme Court of Cassation (Rome) 	<p>Ordering the ship to the port of Lampedusa (August 2017)</p> <p>Preventive seizure of the ship initiated by the prosecutor (August 2017)</p> <p>Preventive seizure confirmed by the</p>	<p>Yes</p> <p>(since July 2018 – against 10 former crew members, on account of facilitating irregular migration)</p>	<p>On the seizure of the ship = Yes (seizure confirmed)</p> <p>On the criminal responsibility of the crew members = case pending</p>

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
		<p>Tribunal of Trapani (Sicily)</p> <p>Supreme Court of Cassation rejected the objection to the seizure of the ship (April 2018)</p> <p>Investigations extended to individual (former) crew members by the public prosecutor (July 2018)</p>		
'Open Arms' (operated by ProActiva Open Arms)	<ul style="list-style-type: none"> - Public prosecutor in Catania (Sicily) - Tribunal of Ragusa (Sicily) - Criminal Court of Ragusa (Sicily) 	<p>Pre-trial seizure of the ship in the port of Pozzallo (Sicily) by the prosecutor - because of the violation of the IT Code of Conduct & jeopardising migrants' lives (March 2018)</p> <p>Ship released following an order of the pre-trial judge at the Tribunal of Ragusa (April 2018)</p> <p>The Criminal Court of Ragusa rejected the prosecutor's appeal and confirmed the release of the ship (May 2018)</p>	<p>Yes</p> <p>(against the captain & mission coordinator - on counts of "criminal association" and "facilitation of irregular migration")</p>	<p>On the lifting of the seizure of the ship = Yes (ship released)</p> <p>On the criminal responsibility of crew members = No</p> <p>(charges under investigation)</p>
'Golfo Azzurro' (operated by ProActiva Open Arms)	<ul style="list-style-type: none"> - Public prosecutor of Palermo (Sicily) - Tribunal of Palermo (Sicily) 	<p>Criminal investigations against unknown persons involved in migrant smuggling initiated by the public prosecutor</p> <p>Investigation discontinued by the Tribunal of Palermo (June 2018)</p>	<p>Yes</p>	<p>Yes</p> <p>(investigation discontinued)</p>
'Vos Hestia' (operated by Save the Children)	<ul style="list-style-type: none"> - Police - Public prosecutor in Trapani (Sicily) 	<p>Search on board after an undercover agent worked on the ship (October 2017)</p>	<p>No</p> <p>(investigations discontinued)</p>	<p>No</p> <p>(investigations discontinued)</p>

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
		Captain interviewed by the Deputy Prosecutor of Trapani		
<i>Médecins Sans Frontières</i> (no vessel, only staff subject to investigations)	- Public prosecutor in Trapani (Sicily)	Investigations against MSF staff (without specifying the details)	Yes (for aiding irregular migration)	No (investigations ongoing)
Sea Watch (no vessel concerned, only NGO staff subject to investigations)	- Public prosecutor in Palermo (Sicily)	Investigations for alleged conspiracy and migrant smuggling	Yes	Yes (investigations discontinued – June 2018)
MALTA				
'Lifeline' (operated by Mission Lifeline)	- Police - Public Prosecutor's Service	'Lifeline' impounded, while the other three vessels blocked at the port of La Valletta (end of June 2018)	<u>Yes</u> (against the captain – for <u>not following</u> orders of the Italian MRCC & entering Maltese territorial waters illegally)	No (all investigations & administrative procedures ongoing)
'The Sea Eye' (operated by Sea-Eye)		Maltese authorities <u>launched investigations</u> (July 2018) → due to potential issues with the registration of the ships (all three ships fly the flag of the Netherlands)	No	
'Seefuchs' (operated by Sea-Eye)			No	
'Sea-Watch 3' (operated by Sea-Watch)			No	
GREECE				
Volunteers working for the NGO 'PROEMAID' (no vessel seized)	- Public prosecutor of Mytilene (island of Lesbos) - Local court of Mytilene (island of Lesbos)	Arrest and detention of three volunteers (Spanish firefighters) (January 2016) → criminal charges and indictment (2017) Court in Mytilene (Lesvos) acquitted the	Yes (for migrant smuggling)	<u>Yes</u> (all three accused NGO volunteers acquitted)

NGO vessel concerned	Authorities/courts involved	Type of measures/legal actions	Actions against crew members	Court decision
		accused volunteers (May 2018)		
A German pensioner couple (private individuals, not associated with any NGO)	<ul style="list-style-type: none"> - Local court on the island of Symi (Aegean Sea) - Court of Appeal of the Dodecanese 	<p>Boat (a recreational craft) confiscated</p> <p>Couple convicted for migrant smuggling to 16,5 years of imprisonment each by the local court in Symi</p> <p>Court of Appeal acquitted the wife and reduced the husband's prison sentence to 3,5 years (March 2017)</p>	Yes (for migrant smuggling)	Yes (final judgment)
Emergency Response Centre International (no vessel seized)	<ul style="list-style-type: none"> - Police in Mytilene (island of Lesbos) 	Three NGO staff members arrested and criminal investigations started (August 2018)	Yes (for migrant smuggling)	No (investigations ongoing)

Table 9 Source: FRA (2018), "Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations", (<http://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>) (based on publicly available information)

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the PETI Committee, aims to update the 2016 study “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants”. It takes stock of and examines the latest developments that have taken place since 2016, specifically the legislative and policy changes, along with various forms and cases of criminalisation of humanitarian actors, migrants’ family members and basic service providers. The study uses the notion of ‘policing humanitarianism’ to describe not only cases of formal prosecution and sentencing in criminal justice procedures, but also wider dynamics of suspicion, intimidation, harassment and disciplining in five selected Member States – Belgium, France, Greece, Hungary and Italy. Policing humanitarianism negatively affects EU citizens’ rights – such as the freedom of assembly, freedom of speech and freedom of conscience. When civil society is effectively (self-)silenced and its accountability role undermined, policies to combat migrant smuggling may be overused and give rise to serious breaches of the EU’s founding values, notably the rule of law, democracy and fundamental rights. Moreover, policing humanitarianism negatively affects wider societal trust and diverts the limited resources of law enforcement from investigating more serious crimes.

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