PUNISHING COMPASSION

SOLIDARITY ON TRIAL IN FORTRESS EUROPE

AMNESTY INTERNATIONAL

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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Cover photo: *Supporters of the NGO Sea-Watch hold flags and rescue-blankets during a demonstration in solidarity with the German captain of rescue vessel Sea-Watch 3, Carola Rackete, on 6 July 2019 outside the Chancellery in Berlin*
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GLOSSARY

TERM	DESCRIPTION
REFUGEE	A person who has fled from their own country because they have a well-founded fear of persecution and their government cannot or will not protect them. Asylum procedures are designed to determine whether someone meets the legal definition of a refugee. When a country recognizes someone as a refugee, it gives them international protection as a substitute for the protection of their country of origin.
ASYLUM-SEEKER	Someone who has left their country seeking protection but has yet to be recognized as a refugee. During the time that their asylum claim is being examined, the asylum-seeker must not be forced to return to their country of origin. Under international law, being a refugee is a fact-based status, and arises before the official, legal grant of asylum. This report therefore uses the term refugee to refer to those who have fled persecution or conflict, regardless of whether they have been officially recognized as refugees.
MIGRANT	A person who moves from one country to another to live and usually to work, either temporarily or permanently, or to be reunited with family members. Regular migrants are foreign nationals who, under domestic law, are entitled to stay in the country. Irregular migrants are foreign nationals whose migration status does not comply with the requirements of domestic immigration legislation and rules. They are also called "undocumented migrants". The term "irregular" refers only to a person's entry or stay.
REFOULEMENT	A term used to describe the forcible return of an individual to a country where they would be at risk of serious human rights violations. Individuals in this situation are entitled to international protection; it is prohibited by international law to return refugees and asylum-seekers to the country they fled – this is known as the principle of **non-refoulement.** The principle also applies to other people who risk serious human rights violations such as torture and the death penalty, but do not meet the legal definition of a refugee. **Indirect refoulement** occurs when one country forcibly sends them to another country that subsequently sends them to a third country where they risk serious harm; this is also prohibited under international law.
PUSH-BACKS	Expression commonly used to describe coercive practices in which authorities summarily refuse entry to people seeking protection or return individuals who have already entered the country's territory back to the country from which they came. Pushbacks often take place at or in proximity of an international border and may involve the threat or use of force by border officials with the objective of preventing or deterring people from approaching or crossing the border. Pushbacks often involve a group of people.

TERM	DESCRIPTION
COLLECTIVE EXPULSIONS	A term to refer to the deportation of a group of people without the application of legally established procedures and an objective examination of each case individually. Collective expulsions are prohibited under international law.
HUMAN RIGHTS DEFENDER	Someone who, individually or in association with others, acts to defend and/or promote human rights at the local, national, regional or international levels, without using or advocating hatred, discrimination or violence.

ACRONYMS

AYS	Are you Syrious
BiH	Bosnia and Herzegovina
CMS	Centre for Peace Studies (Croatia)
CRS	*Compagnies Républicaines de Sécurité* (France)
EASO	European Asylum Support Agency
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EKANA	National List of Undesirable Foreigners (Greece)
ERCI	Emergency Response Centre International
FRA	Fundamental Rights Agency
HRC	UN Human Rights Committee
HRDs	Human Rights Defenders
ICCPR	International Covenant on Civil and Political Rights
IGPN	*Inspection Générale de la Police Nationale* (France)
IOM	International Organisation for Migration
MSF	*Médecins Sans Frontières* (Doctors without borders)
NCPT	National Commission for the Prevention of Torture (Switzerland)
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
PROEM-AID	Professional Emergency Aid (Spain)
SAR	Search and Rescue
SCO	*Servizio Centrale Operativo* (Italy)
SMH	*Salvamento Marítimo Humanitario* (Spain)
SOLAS	International Convention for the Safety of Life at Sea
UNHCR	Office of the United Nations High Commissioner for Refugees

1. EXECUTIVE SUMMARY

In recent years, human rights defenders and civil society organizations that have helped refugees and migrants have been subjected to unfounded criminal proceedings, undue restrictions of their activities, intimidation, harassment, and smear campaigns in several European countries. Their acts of assistance and solidarity have placed them on a collision course with European migration policies. These policies are aimed at preventing refugees and migrants from reaching the EU, at containing those who make it to Europe in their first country of arrival, and at deporting as many as possible back to their countries of origin.

By rescuing refugees and migrants in danger at sea or in the mountains, offering them food and shelter, documenting police and border guard abuses, and opposing unlawful deportations, human rights defenders have exposed the cruelty caused by immigration policies and have become themselves the target of the authorities. Authorities and political leaders have treated acts of humanity as a threat to national security and public order, further hindering their work and forcing them to divest their scarce resources and energy into defending themselves in court.

This report shows how European governments, EU institutions and authorities have deployed an array of restrictive, sanctioning and punitive measures against individuals and groups who defend the rights of people on the move, including by using immigration and counter-terrorism regulations to unduly restrict the right to defend human rights.

Human rights defenders (HRDs) play an essential role to advance the enjoyment of human rights in society, as has been recognized by all states in the UN Declaration on Human Rights Defenders. The Declaration requires states to guarantee a safe and enabling environment in which they can operate without fear of reprisals. Restrictions on the right to defend human rights (which encompasses the rights to freedom of expression, association and peaceful assembly, among others) need to be provided by law, and to be necessary and proportionate to a legitimate aim. As the cases illustrated in this report show, this threshold is often not met, leading to violations of the human rights of HRDs and of people on the move. Far from acknowledging and recognizing the crucial role played by HRDs defending the rights of people on the move and ensuring that they can operate safely and freely, European authorities have instead created a hostile environment for them.

In this report, Amnesty International has documented cases of restriction and criminalization of assistance and solidarity towards people on the move in eight countries: Croatia, France, Greece, Italy, Malta, Spain, Switzerland, and the United Kingdom.

For example, NGOs in Croatia such as Are You Syrious and the Centre for Peace Studies have been harassed, intimidated and prosecuted for “facilitating irregular migration” after becoming uncomfortable witnesses to the authorities’ push-backs and collective expulsions at the borders with Bosnia and Herzegovina and Serbia. In France, human rights defenders who helped people on mountain passes at the border with Italy have also been prosecuted and convicted for “facilitating irregular entry”, while human rights defenders distributing food and other basic necessities to refugees and migrants near Calais have been harassed and intimidated by the police, and have faced prosecutions when they challenged police misconduct towards foreign nationals. In Greece, Sarah Mardini and Séan Binder, who volunteered with a local NGO to help refugees and migrants disembarking in Lesvos after a dangerous sea journey, spent over 100 days in pre-trial detention and are facing accusations of facilitating irregular entry, espionage, money laundering and forgery. In Italy, a persistent smear campaign fuelled by government officials against NGOs conducting rescue operations at sea, has accompanied the imposition of a code of conduct and the passing of laws aimed at restricting and hampering their life-saving activities in the central Mediterranean. Criminal investigations for facilitating irregular entry and other offences have affected the crews of most NGOs and

have led to multiple instances of impounding of NGO rescue vessels. In Malta, three teenage asylum-seekers are being prosecuted on terrorism and other charges for daring to stand up to the unlawful attempt of a shipmaster to take them and over 100 other rescued people back to Libya, where they were facing real risks of human rights abuses. In Switzerland, several individuals, including a pastor, have been prosecuted for facilitating irregular entry and stay of foreign nationals who were in need, distress or danger. In Spain, the authorities have prevented NGO rescue ships from saving lives in the central Mediterranean. In the UK, a group of 15 human rights defenders was convicted for terrorism-related charges for halting what they believed was an unlawful deportation, which would have exposed some asylum-seekers to grave risks in their countries of origin.

Many of the criminal investigations and prosecutions brought against HRDs described in this report rely on the crime of facilitation of irregular entry, transit and stay in the territory of an EU member state. In 2002, the EU sought to harmonize member states' legislation in this area through a directive and a framework decision, known as the "Facilitators' Package," to combat smuggling of human beings in Europe. However, Amnesty International has found that the vagueness of its provisions and the extent of the discretion left to member states in implementing them, has led to criminal proceedings and sanctions against numerous human rights defenders who were doing nothing more than showing solidarity with people on the move. This, in the end, constitutes undue interferences with the rights of human rights defenders that cannot be justified by the states' goal to combat human smuggling.

A review of the Facilitators' Package is urgently needed to align it with the UN Smuggling Protocol, as well as international human rights and refugee law. In particular, a requirement of a financial or other material benefit should need to be shown before the criminalization of the facilitation of irregular entry, transit and stay of a foreign national in an irregular status. Moreover, amendments are required to prohibit the criminalization of smuggled migrants, and to provide for a mandatory humanitarian exemption clause to act as a bar to prosecutions against individuals offering assistance to refugees and migrants. Amnesty International is also calling for the repeal of the offence of irregular entry, in line with international law provisions recognizing that irregular entry may be the only option for many to seek protection and that people using the services of smugglers should not be punished.

In preparation of this report, Amnesty International interviewed dozens of people who reported undue restrictions, burdensome bureaucratic requirements, sanctions and practices such as harassment and intimidation aimed at hampering their activities to assist refugees and migrants, whether as individuals or as members of groups. Many of these human rights defenders are themselves refugees and migrants. In the course of numerous research missions, prosecutors, lawyers, and officials were also interviewed. Amnesty International also monitored judicial hearings and reviewed dozens of judicial rulings, as well as legal texts, academic papers, international organizations' and NGOs' reports.

The variety of the measures and practices used by national authorities at various levels makes it virtually impossible to determine how many people, NGOs and civil society groups have been affected. The opening of criminal investigations is a more tangible manifestation of the criminalization of solidarity. According to one study, between 2015 and 2018, 158 individuals were investigated or prosecuted for facilitating irregular entry or stay of foreign nationals in an EU state, and 16 NGOs were affected by the criminal proceedings.[1] Amnesty International is concerned that many more cases may go unreported, especially when they affect human rights defenders who are themselves refugees and migrants, due to the risks of public exposure for individuals whose status may be precarious.

Furthermore, Amnesty International analysed numerous cases where undue restrictions and prosecutions of legitimate activities of HRDs were imposed, including through interviews of HRDs, lawyers, prosecutors and other public officials, and the review of charges brought against them and judicial decisions available to the organization. The report documents how the "criminalization of solidarity" has hampered individuals' and NGOs' activities to save lives, protect the dignity and defend the rights of refugees and migrants in Europe.

This report shows that national authorities, within the framework of agreed EU migration and asylum policies, have on multiple occasions deliberately misused migration laws and policies and other measures to crack down on human rights defenders of people on the move. Measures purportedly used to combat smuggling fail to meet the threshold of necessity, legality, and proportionality, leading to undue interferences with the right to defend human rights.

Amnesty International urges European leaders at the EU and national levels to stop undermining and criminalizing human rights defenders. The criminal cases against the HRDs featured in this report should be dropped or dismissed. It is also urgent that the Facilitators' Package and national laws on the facilitation of

[1] ReSoma, Crackdown on NGOs and volunteers helping refugees and other migrants, June 2019, http://www.resoma.eu/node/194

irregular entry, transit and stay are amended to prevent them from being misused to punish acts of solidarity and humanity. In addition, Amnesty International calls on governments and EU institutions to take all appropriate measures to ensure that the UN Declaration on Human Rights Defenders is fully implemented within Europe to provide a safe and enabling environment for human rights defenders.

2. METHODOLOGY

This report is based on two years of research into the criminalization of acts of solidarity towards refugees and migrants in Europe (so called "criminalization of solidarity"). Since the beginning of 2017, Amnesty International has monitored the cases of individuals and non-governmental organizations (NGOs) whose activities in support of refugees and migrants were restricted, sanctioned or criminalized by the authorities in several European countries.

Focussed research visits to interview prosecutors, lawyers, authorities and officials, human rights defenders, members of NGOs, and refugees and migrants were undertaken as follows:

July and August 2018, northern France (Calais and Grande-Synthe)

December 2018, Croatia (Zagreb)

January 2019, northern France (Calais and Grande-Synthe)

February 2019, Sicily

March 2019, the Hautes Alpes-Piedmont, on the Italian/French border

March 2019, Greece

April 2019, Croatia (Zagreb)

June 2019, Switzerland

September 2019, Greece

September 2019, Malta

Overall, we conducted interviews with over 50 individual human rights defenders; 14 lawyers; nine prosecutors (although more were contacted and either refused to speak to us or were not available); 15 officials from government or other authorities' offices; and over 50 refugees and migrants. In addition, countless communications were exchanged with at least 10 NGOs.

In addition, Amnesty International took part in numerous discussions on the criminalization of solidarity and on the reform of the EU Facilitators' Package with relevant EU institutions' officials and members of civil society platforms in Brussels. Meetings and exchanges with officials of the EU Borders' Agency Frontex also took place, in particular in Brussels in October 2019.

Amnesty International monitored trials and hearings of people prosecuted for helping migrants and refugees, namely in the cases of: Martine Landry, Loan Torondel and Tom Ciotkowski in France; Pastor Norbert Valley, Anni Lanz and Lisa Bosia in Switzerland; and the "Stansted 15" in the United Kingdom.

Amnesty International's regular contacts with members of NGOs involved in criminal investigations and their lawyers have provided a constant flow of information about the many instances of criminalization and the rising number of court cases that were opened in the past two years.

Dozens of judicial rulings and legal texts have been analysed, as well as other relevant documents and reports by intergovernmental organizations, NGOs and academics.

The cases that feature in this report were selected to illustrate the range of acts of solidarity that have been criminalized across Europe and the range of methods used by the authorities to criminalize solidarity. When the authorities have criminalized the same type of conduct on multiple occasions, only a few cases have

been selected to illustrate the problem. Often, the cases which have been selected are the ones for which proceedings remain open.

This report does not cover Hungary. The specific situation of human rights defenders of people on the move in Hungary has been documented by Amnesty International in other reports, including "Hungary: New laws that violate human rights, threaten civil society and undermine the rule of law should be shelved" (20 June 2018, Index number: EUR 27/8633/2018).

USE OF TERMINOLOGY

Amnesty International defines "criminalization of solidarity" as the misuse of criminal, civil or administrative laws to target and harass human rights defenders (HRDs) working for the rights of migrants, asylum-seekers and refugees. This includes HRDs who are themselves migrants, asylum-seekers and refugees.

Solidarity is described in the report as taking many forms; for example, rescuing people at sea, offering humanitarian assistance to refugees, asylum-seekers and migrants in need, preventing an unlawful deportation which would send people to face a real risk of serious human rights violations, monitoring and reporting on refugees, migrants and asylum-seekers' rights, or protesting against anti-immigration groups that threaten them. Regardless of the nature of the act, acting peacefully and intent/ motivation are the key elements of Amnesty International's understanding of when a person is engaging in an act of solidarity.

According to the UN Declaration on Human Rights Defenders, anyone who acts to promote or defend human rights is an HRD. Therefore, Amnesty International regards people who engage in acts of solidarity to protect the rights of refugees, migrants and asylum-seekers as HRDs, regardless of whether they are private citizens acting in their individual capacity, volunteers or members and staff of NGOs. In the report, the term "HRD" or more descriptive terms such as "individuals/volunteers/NGOs/civil society actors/humanitarian actors assisting refugees and migrants" and variations thereof are used interchangeably, depending on the context.

The term "people on the move" in the report includes refugees, migrants and asylum-seekers. When the term "refugees and migrants" is used, it includes asylum-seekers.

The terms "residence" and "stay" are used interchangeably.

Wherever possible we have tried to use "irregular entry/stay" rather than "illegal entry/stay" in line with our call for the irregular crossing of borders not to be addressed as a criminal matter.

3. BACKGROUND

In recent years, in several European countries authorities and political leaders have subjected individuals, non-governmental organizations (NGOs) and civil society groups who help people on the move to criminal proceedings, undue restrictions of their activities, intimidation, harassment, and smear campaigns.[2] Under the Declaration on Human Rights Defenders[3], states are committed to enable and protect individuals who, alone or in association with others, act to promote and defend human rights. In reality, however, authorities and political leaders have treated acts of humanity and charity towards refugees and migrants as a threat to national security and public order, serious enough to warrant the time and resources of police, prosecutors and the courts. Why are people who help others in the name of dignity, fairness, generosity, solidarity, political or religious belief being treated like criminals?

By saving lives at sea and in the mountains, exposing human rights violations against refugees and migrants at borders, or offering water, food and shelter to destitute people on the move in Europe, human rights defenders (HRDs) have laid bare the failures of European policies on migration and asylum and their inconsistency with human rights principles and obligations which are binding upon European states.

HRDs of people on the move have found themselves on the firing line of the political leaders and government representatives. In recent years, political leaders and government representatives across Europe have chosen to exploit the migration debate for electoral gain over the responsibility to govern migration consistently with human rights obligations, often unashamedly fuelling fears about migration and fostering racism and xenophobia. In this context, HRDs have found themselves on a collision course with European governments' migration policies, aimed at preventing arrivals of refugees and migrants in the EU, and at containing people who manage to reach Europe in the first country of arrival in the Union.

From 2015, faced with growing numbers of people trying to reach Europe in search of safety or a better life, and thousands of deaths at sea, European leaders focused on reducing arrivals above any other consideration.[4] Securing the external borders of the Union from irregular crossings became their priority and smugglers, who were identified as the immediate cause of irregular crossings, emerged as the enemy to beat. European leaders agreed an Action Plan, whose centrepiece was a European military mission in the central Mediterranean, EUNAVFOR MED, designed to disrupt the smugglers' business model.[5] They increased resources for border control by Frontex, the EU border agency. They created hotspots in Italy and Greece to register people on arrival and rapidly detect the economic migrants who should be returned to their countries. They also offered foreign governments outside Europe, including some with appalling human rights records, cooperation and aid to assist with stopping smuggling of human beings towards Europe and preventing departures bound for Europe.[6]

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[2] Report of the Special Rapporteur on the situation of human rights defenders, 16 January 2018, UN Doc. A/HRC/37/51 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/008/51/PDF/G1800851.pdf?OpenElement

[3] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, adopted by the General Assembly in its resolution 53/144, https://undocs.org/A/RES/53/144

[4] European Agenda on Migration https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf and European Agenda on Security https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf

[5] Joint Foreign and Home Affairs Council: Ten point action plan on migration, 20 April 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_4813; https://www.consilium.europa.eu/en/press/press-releases/2018/05/14/eunavfor-med-operation-sophia-operation-to-contribute-to-better-information-sharing-on-crime-in-the-mediterranean/

[6] See Amnesty International's reports: *Libya's dark web of collusion: Abuses against Europe-bound refugees and Migrants*, 11 December 2017, Index: MDE 19/7561/2017; *Greece: A Blueprint for Despair. Human Rights Impact of the EU-Turkey deal*, 14 February 2017, Index: EUR 25/5664/2017; *Hotspot Italy: How EU's Approach Leads to Violations of Refugee and Migrant Rights,* 3 November 2016, Index: EUR 30/5004/2016; *Europe: A perfect storm: The Failure of European Policies in the Central Mediterranean*, 6 July 2017, Index: EUR

Presciently, the EU Action Plan against Migrant Smuggling promised to strengthen the legal framework against smuggling "while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress".[7] Five years on, however, Amnesty International has documented many human rights violations against refugees and migrants, as well as against the HRDs who assist them. As noted by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, governments' strategy to shield their countries from migration has relied on deterrence measures.[8] Nevertheless, these measures have failed to deter people who were pushed to leave their countries by conflict, persecution and poverty, and have instead exacerbated the risks of their journey. HRDs, who have reacted to the suffering of refugees and migrants and attempted to alleviate the effects of governments' measures of deterrence have themselves become targets of the authorities. The criminalization of rescue NGOs in the central Mediterranean is one of the best-known examples of this, though not the only one. European leaders' disengagement from rescue operations near Libyan coasts and their resourcing and support for abusive Libyan authorities have rendered people's journey from Libya even deadlier. As a result, thousands of people have been intercepted at sea and brought back to suffer and die in horrendous conditions in Libya. HRDs who have intervened to save people's lives and bring those rescued to a safe port in Europe are being regarded by European governments as part of the problem. They have been accused of colluding with smugglers - accusations which to date remain baseless – or of constituting a "pull factor" for refugees and migrants that further encourage smugglers – a circumstance which has also been disproven in studies looking at the pattern of departures from Libya in relation to the presence of rescue boats at sea.[9]

European leaders' continuing failure to agree on a reform of European asylum rules, known as the "Dublin system", has also contributed to the suffering of refugees, asylum-seekers and migrants, which HRDs have tried to alleviate, thus exposing themselves to harassment, intimidation, and criminal prosecution. The Dublin system requires people seeking asylum to make their claim in the first country of entrance in the EU and await their status determination in that country, unless narrow family unity criteria assign responsibility for their claim to another European country.

With no other option to move regularly (which involves having the required documents to cross borders and doing so through official border crossings), many people decide to continue their journey within Europe irregularly to reach families or communities or to seek better opportunities in other countries. These people can become stranded at the internal borders of the EU, with no access to services or livelihoods because of their irregular status, as is happening in northern France. Often, they put themselves at risk trying to cross borders at dangerous points to avoid being detected, as it is the case at the border between Italy and France. HRDs who have reacted to the sufferings and hardship endured by people on the move by offering them food, shelter, clothes and safe lifts across borders, or who have documented the authorities' violations against people on the move, have faced hostility and obstruction by the authorities, at times escalating into harassment and intimidation, and in several cases criminal prosecutions and convictions.

Countries at the external borders of the EU, such as Greece, Italy and Malta, deem the Dublin system unfair, because they are left to shoulder the largest part of the responsibility for receiving, processing, returning or integrating the people who manage to reach their territory. For years, attempts at agreeing a more equitable distribution of asylum-seekers have stalled, leading countries on the external border of the EU, such as Croatia, to feel legitimized to adopt bolder measures to protect their borders, including by cracking down on HRDs assisting refugees and migrants.

In some cases, HRDs have been prosecuted because they have deliberately infringed the law to protest or take civil disobedience actions, for example to oppose a deportation which they believed would have put the life and safety of the people to be deported at risk; or to protest what they perceive as the inhumane militarization of borders. On several occasions, HRDs have faced excessive charges that do not reflect the severity of their acts, and which infringed on their rights to freedom of expression and peaceful assembly.

This report documents the ways in which European governments and authorities have criminalized, obstructed and undermined HRDs of people on the move and urges European leaders and institutions to take concrete steps to ensure respect for the rights of HRDs and acknowledge their role as essential to promote inclusive, fair and rights-respecting societies. However, concern for the situation of HRDs cannot be

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03/6655/2017; *Between the devil and the deep blue sea: Europe Fails Refugees and Migrants in the Central Mediterranean*, 8 August 2018, Index: EUR 30/8906/2018.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Action Plan against migrant smuggling (2015 - 2020), p 3, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf

[8] Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions Saving lives is not a crime, 7 August 2018, A/73/314, p 14, https://undocs.org/A/73/314

[9] E. Cusumano, M. Villa, "Sea Rescue NGOs: a Pull Factor of Irregular Migration?", November 2019 https://cadmus.eui.eu/bitstream/handle/1814/65024/PB_2019_22_MPC.pdf?sequence=3&isAllowed=y

separated from the situation of the refugees and migrants that they seek to protect. To stop violations against HRDs of people on the move, European leaders need to bring asylum and migration policies in line with their international obligations, including ensuring access to borders for those who seek protection, and dignified living conditions for all refugees and migrants in Europe.

4. HUMAN RIGHTS DEFENDERS OF PEOPLE ON THE MOVE IN EUROPE

Human rights defenders are individuals who, alone or in association with others, act to promote or defend human rights at the local, national, or international levels. Their rights are recognized in the UN Declaration on Human Rights Defenders,[10] adopted in 1998 by consensus by the UN General Assembly. The Declaration articulates states' obligations enshrined under international human rights law to the particular role and situation of human rights defenders. Deriving from this Declaration and the international treaties on which it is based, the right to defend human rights reaffirms the importance of other rights, such as the right to freedom of expression, peaceful assembly and association, amongst others.[11] The Declaration not only asserts the need for states to guarantee a safe and enabling environment in which human rights defenders can carry out their work without fear of reprisals, it also recognises their work as a fundamental pillar of the international human rights system. When the Declaration was adopted, it shifted "the understanding of the human rights project: from a task accomplished mainly through the international community and States, to one that belongs to every person and group within society".[12]

The Declaration does not create new rights. Rather it articulates rights protected under other treaties. In practice, this means that human rights defenders have a right to take peaceful action and speak out to prevent human rights violations from taking place, support victims of human rights violations, seek and disseminate information regarding human rights, develop and discuss new human rights ideas, monitor and criticise the activities of authorities and other powerful actors, and demand justice, accountability and redress, without fear of attack or retaliation.

When actions in defence of human rights are unduly restricted, hindered, punished or suppressed, or when nothing is done to prevent or eliminate such situations, states are failing to comply with their international human rights obligations. States have a duty to ensure that everyone under their jurisdiction can enjoy all human rights in practice, including the right to promote and strive for the protection of human rights[13] and must take specific measures to create a safe and enabling environment for exercising this right. The necessary conditions for this environment include: the public recognition of human rights defenders; a conducive legal, institutional and administrative framework; access to justice and an end to impunity for

[10] The Declaration's full name is the "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" – with this longer title is frequently abbreviated to "The Declaration on human rights defenders", UN Doc. A/RES/53/144

[11] OHCHR Factsheet no. 29, Human Rights Defenders: Protecting the Right to Defend Human Rights, https://www.ohchr.org/Documents/Publications/FactSheet29en.pdf

[12] Report of the Special Rapporteur on the situation of human rights defenders, 23 July 2018, A/73/215 https://undocs.org/en/A/73/215

[13] Declaration on Human Rights Defenders, Article 2 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/770/89/PDF/N9977089.pdf?OpenElement

violations against defenders; effective protection policies and mechanisms paying attention to groups at risk; specific attention given to women human rights defenders and other defenders facing discrimination.[14]

Those who respond to the needs and defend the human rights of people on the move, such as refugees and migrants, are also human rights defenders.[15] As described in this report, they include a wide variety of people working individually or collectively, such as local residents, paid or unpaid members of NGOs and members of civil society groups, activists, humanitarian workers, first responders and rescuers, journalists, lawyers, as well as affected individuals and communities who have themselves been displaced or have chosen to migrate. Health workers, government officials, and civil servants, or members of the private sector who work along borders and stand up for the rights of people on the move are also human rights defenders. As noted by the Special Rapporteur on the situation of human rights defenders, "human rights defenders working to protect people on the move are often ordinary people, [or] who have witnessed the suffering of people on the move; they may not even be aware that they are acting as human rights defenders. What this broad and diverse group has in common is the exercise of peaceful activities to address the situation of people on the move."[16]

Human rights defenders of people on the move are facing increasing challenges, inextricably linked to the treatment and policies applied to the people whose rights they defend. As migrants and refugees have experienced growing hostility and their rights are being denied, human rights defenders have faced a range of challenges and attacks. They have faced slander, threats, harassment, and multiple obstacles devised to hinder their activities, including unfounded judicial proceedings to stop their operations to save lives at sea, assist people in danger on mountain passes, provide food and shelter to people in need, and of try to shed light on human rights violations.

These restrictions often stem from migration laws and policies. The authorities, however, should not misuse migration laws and policies to undermine the very right to defend human rights. While some limitations to the right to defend human rights can be justified, these should always be provided by law, and be necessary and proportionate to the pursuit of a legitimate aim.[17]

As noted by the UN Special Rapporteur on the situation of human rights defenders:

"[W]hile States have the sovereign right to determine their migration policies, this right is constrained by the obligations voluntarily assumed by States under international human rights law. Although a diverse array of international agreements apply to certain, widely recognized groups, such as refugees and migrant workers, all people on the move and their allies share the same universal human rights articulated in the Universal Declaration of Human Rights. Where limitations are allowed to the rights of people on the move, international human rights law requires that such restrictions be in response to a pressing public or social need, pursue a legitimate aim, and be proportionate to that aim. All too often, restrictions on the rights of people on the move to defend their rights, or on human rights defenders defending their rights, fail one or more of these requirements."[18]

4.1 RESTRICTIONS TO THE RIGHT OF ASSOCIATION

Restrictions of the activities of HRDs of people on the move have frequently taken the form of burdensome requirements imposed on the NGOs to which they belong, including at the point of registration or for seeking, utilizing and receiving funding. These constitute interferences with the right to association which can contravene states' obligations under international human rights law.[19] Enshrined in different international

[14] Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, 2013, UN Doc. A/HRC/25/55 https://undocs.org/A/HRC/25/55

[15] The Special Rapporteur on the situation of human rights defenders published a report on this group of human rights defenders in 2018, describing their activities, the threats they face and the international human rights framework, see UN Doc. A/HRC/37/51, 16 January 2018 https://undocs.org/A/HRC/37/51

[16] Extracts from Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/37/51, 16 January 2018 https://undocs.org/A/HRC/37/51

[17] The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Commission on Human Rights, 28 September 1984, https://www.refworld.org/docid/4672bc122.html

[18] Report of the Special Rapporteur on the situation of human rights defenders, 16 January 2018, UN Doc. A/HRC/37/51 https://undocs.org/A/HRC/37/51

[19] See Amnesty International's report Laws designed to silence: The global crackdown on civil society organizations, Index: ACT30/9647/2019

and regional human rights instruments, the right to freedom of association allows for individuals to form or join formal or informal groups to take collective action to pursue a common goal.[20]

While the right to association is not absolute, international human rights law requires states to ensure that any restriction imposed on individuals' right to gather and organize must be adequately prescribed by law, in accordance with the principle of legality, and be necessary and proportionate to a legitimate aim. This means that such measures must be established in terms that are sufficiently precise and clear to allow their consequences to be reasonably foreseeable by those affected by them.

To comply with these provisions, states must ensure that any interference by authorities genuinely pursue one of the limited reasons allowed for such restriction, which are listed in the International Covenant on Civil and Political Rights (ICCPR), namely national security, public safety or public order, public health or morals and the protection of the rights and freedoms of others (Article 22).[21] Even when it is demonstrated that a measure regulating or interfering with the right to association pursues a legitimate aim, the measure must respond to a pressing social need and be proportionate in pursuit of its aim. Measures restricting the work of civil society organizations, including by imposing administrative burdens, must be as unobtrusive as possible, with due regard to the significance of the interests at stake.

An adequate legal framework to facilitate the right to association requires states to establish a procedure to recognize organizations as legal entities in a way which is understandable, non-discriminatory and which is either affordable or free of charge.[22] The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has recommended that states implement a notification regime through which the legal personality of an association does not depend upon state approval. Rather, they should automatically acquire legal personality by notifying authorities of their creation.[23] Associations that are not registered are equally protected under international human rights law and such organizations should not be subjected to criminal sanctions for carrying out peaceful activities.

The right of groups to seek, receive and utilize resources from national, foreign and international sources is an essential component of the right to association.[24] The UN Human Rights Council has stressed the importance of safeguarding the capacity of civil society organizations to engage in fundraising activities, calling upon states not to criminalize or delegitimize activities in defence of human rights on account of the origin of funding.[25] Similarly, the UN Human Rights Committee and the Special Rapporteur on the rights to freedom of peaceful assembly and of association have stressed the importance of safeguarding NGOs' capacity to engage in fundraising activities, and have argued that funding restrictions that impede the ability of associations to pursue their statutory activities constitute an interference with Article 22 of the ICCPR.[26]

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[20] See article 20 of the Universal Declaration of Human Rights (UDHR); article 22 of the International Covenant on Civil and Political Rights (ICCPR), http://www.un.org/en/universal-declaration-human-rights/; article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx; article 16 of the American Convention on Human Rights (ACHR), https://www.cidh.oas. org/basicos/english/basic3.american%20convention.htm; article 10 of the African Charter on Human and Peoples' Rights (ACHPR), http://www.achpr. org/instruments/achpr/; and article 11 of the European Convention on Human Rights (ECHR), https://www.echr.coe.int/Documents/Convention_ENG.pdf

[21] See also article 16 of the ACHR, https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm; article 11 of the ECHR, https://www. echr.coe.int/Documents/Convention_ENG.pdf

[22] Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, U.N. Doc. A/HRC/20/27, 21 May 2012, para.95, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

[23] Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, U.N. Doc. A/HRC/20/27, 21 May 2012, para.95, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf, p 58

[24] Resolution adopted by the United Nations General Assembly A/RES/53/144, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Art. 2.1, 1999, https://www.ohchr.org/ Documents/Issues/Defenders/Declaration/declaration.pdf

[25] Human Rights Council Resolution, 22/6, Protecting human rights defenders, UN Doc. A/HRC/Res/22/6, para. 9.b, http://ap.ohchr.org/documents/ dpage_e.aspx?si=A/HRC/RES/22/6

26 Human Rights Committee and Viktor Korneenko et al v. Belarus, (1274/2004) UN Doc CCPR/C/88/D/1274/2004, 2006, para 7.2, http://hrlibrary. umn.edu/undocs/1274-2004.html; Report of the Special Rapporteur on the right to freedom of peaceful assembly and of association, 2013, UN Doc. / AHRC/23/39, para. 16, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf. At the regional level, the Council of Europe has expressed itself along the same lines, and, more recently, relevant considerations have been made by the Advocate General in a case concerning the requirement imposed by Hungary on civil society organisations receiving foreign funding, before the Court of Justice of the EU. See https://www.osce.org/odihr/132371?download=true; Recommendation CM/Rec(2007)14 of the Committee of Ministers of the Council of Europe, para 50, at: https://www.osce.org/odihr/33742?download=true . See, more recently, Resolution 2095 (2016) Strengthening the protection and role of human rights defenders in Council of Europe member States, para 6.3, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22500&lang=en; and Court of Justice of the EU, Advocate General's Opinion in Case C-78/18 Commission v Hungary, 14 January 2020, at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200002en.pdf

4.2 IMPLEMENTING THE DECLARATION ON HUMAN RIGHTS DEFENDERS WITHIN THE EU

The European Union has long proclaimed its aspiration to defend human rights both within and outside its borders. Indeed, the Treaty on European Union states that it is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights."[27] With regards to human rights defenders, the EU's External Action Service claims that support to human rights defenders is one of the major priorities of the EU's external human rights policy and it adopted specific guidelines in 2008,[28] outlining practical actions that diplomatic delegations can take in third countries, including support for human rights defenders who have been smeared, attacked, criminalized and imprisoned for their legitimate activities. Yet, in a twist of bitter irony, across Europe, human rights defenders standing up for the rights of people in the move are being criminalized and their activities unduly restricted as a result of migration laws and policies that are designed to maintain the "Fortress Europe". The recent attempt of Frontext, the EU border Agency, at contracting a surveillance company to monitor social media activities of NGOs in the context of departures of refugees and migrants from Africa towards Europe indicates that the agency views NGOs, not as performing a legitimate role which state and interstate institutions are required to protect, but as adversaries potentially implicated in irregular border crossings. After being challenged by privacy rights groups, the call for tender was cancelled.[29] Similar activity by the European Asylum Support Agency (EASO) was challenged by the European Data Protection Supervisor on grounds of lacking any legal base.[30]

The instances of criminalization and undue restriction of the activities of HRDs documented in this report are evidence that it is urgent and a matter of consistency and fairness for the European Union to ensure that vigorous action is taken to implement the Declaration on Human Rights Defenders also within Europe. The European Commission should take the lead to ensure that detailed guidelines are drafted and adopted and rolled out at national level. They should include measures to promote knowledge at all levels of society about the legal framework protecting HRDs internationally, including among the legal professions.

[27] The Treaty on European Union, Art. 2. https://eur-lex.europa.eu/eli/treaty/teu_2012/oj
[28] EU Guidelines on Human Rights Defenders, https://eeas.europa.eu/headquarters/headquarters-homepage_en/3958/EU%20Guidelines%20on%20Human%20Rights%20Defenders
[29] https://privacyinternational.org/long-read/3288/privacywins-eu-border-guards-cancel-plans-spy-social-media-now
[30] https://edps.europa.eu/sites/edp/files/publication/19-11-12_reply_easo_ssm_final_reply_en.pdf

5. THE EU FACILITATORS' PACKAGE: CRIMINALIZING SOLIDARITY IN EUROPE

Many of the criminal investigations and prosecutions brought against HRDs and NGOs described in this report rely on the crime of facilitation of irregular entry, transit and stay in the territory of an EU member state. In 2002, the EU adopted rules to clamp down on the smuggling of people. Aiming to harmonize member states' legislation in this area, it adopted the Facilitation Directive, which defines what constitutes facilitation of unauthorized entry, transit and stay,[31] and the accompanying Council Framework Decision, strengthening the penal framework to prevent said facilitation.[32] They are known together as the Facilitators' Package. The Facilitators' Package requests that member states criminalize at national level behaviours facilitating irregular entry, transit and stay. However, as a study commissioned by the European Parliament concluded, rather than consistency, it has brought about "legislative ambiguity and legal uncertainty" resulting in criminal sanctions being applied in member states to "a broad range of behaviours that cover a continuum from people smuggling at one extreme to assistance at the other".[33] The criminalization of humanitarian assistance to refugees and migrants breaches the human rights of both human rights defenders and refugees and migrants. It is therefore important to determine how the Facilitators' Package departs from international law and standards applicable to the EU and its member states.

There are two types of conduct which are criminalized in the Facilitation Directive at Article 1(1): (a) intentionally assisting a third country national to enter or transit across the territory of a member state, in breach of that state's laws on entry and transit of aliens; and (b) intentionally assisting *for financial gain* a third country national to reside within the territory of a member state, in breach of that state's laws on residence of aliens. A "humanitarian clause" at Article 1(2) of the Facilitation Directive grants member states discretion not to criminalize conduct that facilitates unauthorized entry or transit (not stay) when motivated by the aim to provide "humanitarian assistance".

Article 1 of the Facilitation Directive, states:

"1. Each Member State shall adopt appropriate sanctions on:

[31] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002L0090

[32] 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, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32002F0946

[33] Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants, 2016, p 10 https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf

(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. 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."

The Facilitators' Package requires that those whose behaviours are subject to criminalization, and their accomplices, be punished through "effective, proportionate and dissuasive sanctions."[34]

5.1 THE FACILITATORS' PACKAGE: NOT IN LINE WITH INTERNATIONAL LAW AND STANDARDS PROTECTING THE RIGHTS OF REFUGEES AND MIGRANTS

As described in this report, Amnesty International considers that a significant number of criminal investigations, prosecutions and convictions which have affected HRDs in recent years can be traced back to the legal ambiguity of the Facilitators' Package and its failure to uphold human rights principles and obligations applicable to European states and institutions.

As seen in the previous chapter, any limitation to the right to defend human rights needs to be provided by law, and be necessary and proportionate to the pursuit of a legitimate aim. The misuse of anti-smuggling legislation to restrict the life-saving and dignity-protecting activities of human rights defenders all too often fails to meet this three-part test.

Such misuse is rendered possible because of the ways in which the Facilitators' Package defines and punishes the facilitation of irregular entry, transit and stay. Specifically, the Facilitators' Package falls short of international standards because it:

(i) fails to make the element of financial gain/material benefit an essential element of the crime of facilitation of irregular entry and stay;

(ii) includes the element of financial gain/material benefit only in the crime of facilitation of irregular residence/stay, but without shielding from criminalization and prosecution fair/non-exploitative provision of accommodation/shelter by landlords or by friends/family;

(iii) leaves discretion to member states to exempt from criminalization humanitarian assistance provided in the context of irregular entry/transit, but not if provided in connection with irregular residence/stay;

(iv) fails to define what may be regarded as humanitarian assistance, thus leaving a great margin of discretion to member states;

(v) applies the humanitarian assistance exemption only to the facilitation of unauthorized entry or transit, thus leading to the assumption that there is no space for humanitarian assistance with regard to the facilitation to reside in the territory of a member state;

(vi) fails to exclude from criminalization actors who may be facilitating irregular residence unintentionally or without financial gain, or actors, including landlords, who may request fair and non-exploitative remuneration for their services, and who are therefore placed at greater risk to be criminalized; and

(vii) states that its provisions are to be applied without prejudice to the principle of non-refoulement (which prohibits states from forcibly transferring an individual to a place where they would be at real

[34] These can include: the confiscation of the means of transport used for the offence, the prohibition to practice the occupation in the course of which the offence was committed, or deportation - if the perpetrators happen to be third country nationals. Specifically, the Council Framework Decision requires member states to ensure that, when committed for financial gain, assistance to enter or transit across the territory of a member state in breach of the laws of the state concerned are punishable with a maximum prison term of not less than eight years where committed as an activity of a criminal organisation or while endangering the lives of the persons who are the subject of the offence.

risk of serious human rights violations), however it fails to prohibit the criminalization of smuggled migrants.

The Facilitators' Package departs from the internationally agreed definition of "smuggling" as contained in the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol), adopted in 2000 and ratified by the EU and by all EU member states, except Ireland (which has signed it). The Protocol aims to prevent and address people smuggling and, importantly, guarantee international cooperation for the protection of the rights of people who have been smuggled (Article 2).[35] "Smuggling of migrants" is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Article 3). According to the UN Smuggling Protocol, therefore, for a conduct to be regarded as smuggling and to be subjected to criminalization, there must be the intention "to obtain, directly or indirectly, a financial or other material benefit" (Article 6). In line with its expressed aim of protecting the rights of smuggled migrants, the UN Smuggling Protocol prohibits the criminalization of smuggled persons themselves (Article 5).

In the UN Smuggling Protocol, the express requirement that there must be a financial or other material benefit for the individual to be held criminally liable for smuggling was meant to shield family members or support groups such as non-governmental organizations from punishment.[36]

The crime of smuggling is distinct from human trafficking, which is defined under the UN Protocol on trafficking in persons. Trafficking involves a form of coercion and has for its aim the exploiting the trafficked person.[37] Both crimes are prohibited by the UN Convention on Transnational Organized Crime and its two protocols – the UN Smuggling Protocol and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the UN Trafficking Protocol). The UN Office on Drugs and Crime recognizes that trafficking and smuggling can overlap and that the distinctions between the two are often subtle. Indeed, Amnesty International has documented how the journeys of refugees and migrants often involve using smugglers' services, with some people becoming trafficked at some point along the route.[38] However, smuggling involves consent, even when undertaken in dangerous or degrading conditions, and is not for the purpose of exploitation.[39] Thus, smuggling is not in and of itself a human rights abuse, although it may involve abuses. In contrast, trafficking is abusive *per se*.[40]

The Facilitators' Package is inconsistent with states' obligations in the UN Smuggling Protocol in several ways:

(i) whereas the UN Smuggling Protocol requires "a financial or other material benefit" to criminalize the facilitation of irregular entry or residence, the Facilitators' Package criminalizes all facilitation of irregular entry and transit, regardless of any profit, and requires an element of financial gain only to criminalize the facilitation of irregular stay, but in so doing it does not distinguish between fair and exploitative gain;

(ii) whereas the UN Smuggling Protocol requires "a financial or other material benefit" for criminalizing the facilitation of irregular entry in order to shield from criminalization family members or "support groups such as religious or non-governmental organizations", the Facilitators' Package grants discretion to member states not to criminalize the facilitation of irregular entry and transit when the aim of a behaviour is to provide humanitarian assistance; and finally,

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[35] Protocol against the Smuggling of Migrants by Land. Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, see https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-21%20AM/Ch_XVIII_12_bp.pdf

[36] See reference to the Travaux Préparatoires in 2016 Fit for purpose, p 26

[37] Trafficking is "(a) The action of: recruitment, transportation, transfer, harbouring or receipt of persons; (b) By means of: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; [for] (c) The purpose of exploitation, which include, at a minimum: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs", see *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), entered into force 25 December 2003, Art. 3.

[38] *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 30 September 2014, https://www.amnesty.org/en/documents/EUR05/006/2014/en/

[39] UN Office on Drugs and Crime, "Migrant Smuggling FAQs," 2018, https://www.unodc.org/unodc/en/human-trafficking/faqs-migrant-smuggling.html

[40] Much of this section draws on Amnesty International, *Deadly Journeys: The Refugee and Trafficking Crisis in South-East Asia*, 21 October 2015, https://www.amnesty.org/en/documents/ASA21/2574/2015/en/, p. 20-21

(iii) whereas the UN Smuggling Protocol expressly prohibits the criminalization of smuggled migrants, the Facilitators' Package does not, although it states that its provisions are to be applied without prejudice to the principle of non-refoulement.

The UN Smuggling Protocol's provisions better reflect the reality of the experience of people who may need to use smugglers' services to reach their destination. Scholars have recognized that "most asylum-seekers require smugglers at some, if not all, stages of their journey."[41] The UN Special Rapporteur on the human rights of migrants has described smuggling as a potentially life-saving operation: "In history, smuggling saved countless lives for Armenians exiting the Ottoman Empire, European Jews fleeing Nazi rule, Spanish Republicans, Central Europeans and Indochinese fleeing communism, Cambodians fleeing genocide, etc. Today, when no visa is available for anywhere, and one's life or one's family future is at stake, smuggling is often the only option."[42]

In recent years, EU leaders, determined and virtually single-mindedly concerned with stopping arrivals, have made policy choices that ignore the lack of opportunities for arriving safely and regularly into Europe, and that pay no attention to the frustrations of being stuck in the first country of arrival in Europe, while one's family and supportive communities are in another. More importantly, policies in several EU countries have blurred the distinction between smuggling and trafficking, broadening the criminalization net to shield their borders. While, as noted above, the distinctions between the two can sometimes overlap, as a study noted, "politicians and media frequently fail to distinguish trafficking and smuggling, often using the words as synonyms – usage which, deliberately or not, demonizes all transport of migrants and refugees as inherently evil",[43] thus making criminalization look justifiable, regardless of the specific circumstances and the adverse effects to the individuals in desperate need of protection.

In critiquing the failure of the Facilitators' Package to prevent the criminalization of humanitarian assistance, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions observed that: "The international community determined, in promulgating the Smuggling of migrants Protocol, that the real threat to global order was smuggling by criminal networks, not humanitarians…Only with a humanitarian exemption would the legislation reflect the values and principles of customary and conventional international law."[44]

EU states' misuse of the crime of facilitation of irregular entry, transit and stay to restrict the work of human rights defenders has further resulted in numerous violations of states obligations under international refugee law and human rights law.

The 1951 Refugee Convention, at Article 31, prohibits the penalization of asylum-seekers and refugees for irregular entry or presence on a territory.[45] The Office of the High Commissioner for Human Rights (OHCHR) has urged states to "[e]nsure that it is not a criminal offence to leave, enter or stay in a country irregularly, given that border crossing and the management of residence and work permits are administrative issues. Any administrative sanctions applied to irregular entry should be proportionate, necessary and reasonable,

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[41] Sharon Pickering, "Transnational Crime and Refugee Protection," *Social Justice* Vol. 34, No. 2 (2007), http://www.socialjusticejournal.org/archive/108_34_2/108_05Pickering.pdf, p. 53.

[42] "Statement by Mr. François Crépeau, Special Rapporteur on the human rights of migrants," 3 June 2016, http://icj-ch.org/wp-content/uploads/2012/06/Cr%C3%A9peau-ICJ-CH-Migrant-Smuggling.pdf.

[43] Institute for Race Relations, *Humanitarianism: The Unacceptable Face of Solidarity*, 11 November 2017, http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf, p. 7-8.

[44] Report of the Special Rapporteur of the Human rights Council on extrajudicial, summary or arbitrary executions, Saving lives is not a crime, A/73/314, 6 August 2018, para 74 https://www.ohchr.org/Documents/Issues/Executions/A_73_42960.pdf

[45] Art 31. 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees, restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. See: UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, http://www.refworld.org/docid/3be01b964.html, Art. 31. In this provision, "directly" should not be interpreted strictly: "Refugees are not required to have come 'directly' from their country of origin. The intention, reflected in the practice of some States, appears to be that, for Article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of 'good cause' for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account." Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection," UNHCR, 2001, http://www.unhcr.org/uk/publications/legal/419c778d4/refugee-protection-international-law-article-31-1951-convention-relating.html, p. 194

and should never include the detention of children."[46] It follows that providing humanitarian assistance to people who need to enter, transit or stay in a country irregularly, including in order to access protection, should also not be a criminal offence.[47]

The right to seek and enjoy asylum, enshrined in Article 14 of the Universal Declaration of Human Rights, requires that a person can leave and enter a state. Yet, current measures aimed at restricting this ability also restrict people's ability to access international protection. People who do not have a valid visa to enter a state, and who need to flee their country of origin, are often forced to use irregular transit routes. Criminalizing individuals and groups assisting people who try to exercise their right to seek asylum further restricts the latter's ability to do so.

Furthermore, all states are bound by the principle of non-refoulement,[48] whereby nobody can be returned to a country where they would be at real risk of serious human rights violations. Criminalizing human rights defenders assisting refugees and migrants in situations in which they could be returned to or pushed back towards countries where they would be at risk could undermine the principle of non-refoulement.

Furthermore, criminalizing human rights defenders who provide life-saving assistance may place a state in breach of its obligations to protect the right to life, which is codified in multiple international instruments, notably in Article 6 of the International Covenant on Civil and Political rights and in Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In her report on the criminalization and targeting of life-saving and protective services for people in need, the Special Rapporteur on extrajudicial, summary or arbitrary executions made some crucial remarks on the matter, noting that acts prohibiting or otherwise impeding humanitarian services violate the state's obligation to respect the right to life and that any death that may be linked to such prohibition would constitute an arbitrary deprivation of life. The Special Rapporteur also noted that both within and outside the context of armed conflict, laws and policies that seek to prevent life-saving and life-sustaining services to populations because of their ethnicity, religion, or immigration status constitute a violation of Article 6 of the International Covenant on Civil and Political Rights, stressing that "[t]he State may not fail to discharge its obligation to respect and protect the right to life, and then exacerbate and compound that failure by precluding others from undertaking activities aimed at providing that core obligation, particularly if the State's actions or inactions are driven by discriminatory motives or result in discrimination."[49]

The Special Rapporteur's remarks are especially pertinent to the criminalization of rescue NGOs and of those human rights defenders who have been helping people in distress at sea to be rescued.

However, they apply also to situations in which the state prohibits or hampers the provision of basic necessities: "(29) When the State is not providing food, water, shelter or rescue mechanisms sufficient to protect life and dignity, humanitarian actors are indispensable in delivering those services."[50] Criminalizing irregular entry, transit and stay increases the risks faced by migrants, asylum-seekers and refugees to a range of other human rights violations, including discrimination and labour exploitation, as well as denial of access to justice and other services and basic necessities.[51] Criminalizing human rights defenders who assist refugees, asylum-seekers and migrants by providing them with basic necessities and help them to access protection would place people on the move at heightened risk of violations and abuses.

As described further in this report, the criminalization of human rights defenders who carry out search and rescue activities at sea is also inconsistent with key principles of the law of the sea, including the obligation to assist people in distress at sea.[52] It is a commonly accepted and longstanding maritime tradition that shipmasters have an obligation to render assistance to those in distress at sea, regardless of their nationality, status or the circumstances in which they are found. The integrity of the maritime search and rescue (SAR) system depends upon it. This obligation is accepted as customary international law and has been codified in

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[46] UN Office of the High Commissioner for Human Rights, *Principles and Guidelines, Supported by Practical Guidance, on the Human Rights of Migrants in Vulnerable Situations*, 2016, http://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf, Principle 1

[47] Amnesty International, "Hungary: Crackdown on the Rights of Refugees and Migrants Continues Unabated Amidst European Commission Inaction," 6 July 2016, https://www.amnesty.org/en/documents/eur27/4405/2016/en/.

[48] The principle of non-refoulement is accepted as a norm of international customary law and enshrined in Article 3 of the Convention Against Torture and in Article 33 of the Refugee Convention

[49] See paras 25, 26 and 29, Report of the Special Rapporteur of the Human rights Council on extrajudicial, summary or arbitrary executions, Saving lives is not a crime, A/73/314, 6 August 2018, https://www.ohchr.org/Documents/Issues/Executions/A_73_42960.pdf

[50] Report of the Special Rapporteur of the Human rights Council on extrajudicial, summary or arbitrary executions, Saving lives is not a crime, A/73/314, 6 August 2018, https://www.ohchr.org/Documents/Issues/Executions/A_73_42960.pdf

[51] Amnesty International, *Italy: Exploited Labour Two Years on: The "Rosarno Law" Fails to Protect Migrants Exploited in the Agricultural Sector in Italy*, 26 November 2014, https://www.amnesty.org/en/documents/eur30/007/2014/en/, p. 13

[52] This point is also reinforced by the Human Rights Committee in General Comment 36 (para. 63)

the international law of the sea.[53] The law of the sea further requires that states coordinate and ensure the provision of search and rescue procedures and that they operate to ensure that people rescued at sea are delivered to a place of safety.[54]

States' attempts at preventing and hampering the rescue of refugees and migrants on the basis of immigration status violates also the prohibition against discrimination enshrined in many human rights treaties.[55]

5.2 THE FACILITATORS' PACKAGE: THE NEED FOR REFORM

It is becoming increasingly evident, even within EU institutions, that the Facilitators' Package, rather than clarifying the core conducts that should be prosecuted as smuggling and contributing to harmonizing member states' legislation in this area, has instead led to legal ambiguity and discrepancies in transposition into domestic law, which have contributed to the violation of the human rights of both human rights defenders directly affected by the criminalization, and the people they try to assist.

In 2015, faced with an unprecedented number of refugees and migrants arriving in Europe, the EU issued an Action Plan against Migrant Smuggling (2015-2020).[56] As part of the measures included in the plan, European leaders agreed that the Commission would propose improvements to the Facilitators' Package in 2016 and that it would "ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress".[57] In December of the same year, the European Parliament commissioned a study on the effectiveness of the Facilitators' Package and its impact on the many actors providing humanitarian assistance to refugees and migrants "in an increasingly ambiguous, punitive and militarised environment"[58]. The study recommended the Commission to present a legislative reform of the Facilitators' Package at the earliest opportunity, making mandatory the exemption of humanitarian assistance from criminalisation in cases of entry, transit and residence: "The humanitarian exemption should not be made a defence, but a bar to prosecutions, to ensure that no investigation is opened and no prosecution is pursued against private individuals and civil society organizations assisting migrants for humanitarian reasons".[59]

Furthermore, the study recommended the introduction of the financial gain element to all forms of facilitation, qualified to encompass only "unjust enrichment" or "unjust profit", thus exempting bona fide shopkeepers, landlords and businesses.[60] However, in 2017, following its own assessment of the Facilitators' Package's effectiveness, the Commission decided that there was insufficient evidence to support the need for revision, although this could be reconsidered once the EU Action Plan had been further implemented and more data was available.[61]

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[53] Article 98(1) of the 1982 UN Convention on the Law of the Sea (UNCLOS) and Regulation V/33.1 of the 1974 International Convention for the Safety of Life at Sea (SOLAS); on these obligations see Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 30 September 2014, https://www.amnesty.org/en/documents/EUR05/006/2014/en/, p 28; see also: UNHCR, Rescue at sea, a guide to principles and practices as applied to refugees ad migrants, at https://www.unhcr.org/uk/publications/brochures/450037d34/rescue-sea-guide-principles-practice-applied-migrants-refugees.html

[54] Amnesty International *Lives adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 30 September 2014, Index: EUR 05/006/2014 https://www.amnesty.org/en/documents/EUR05/006/2014/en/

[55] For example, Article 14 of the European Convention on Human Rights

[56] https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf

[57] https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eu_action_plan_against_migrant_smuggling_en.pdf

[58] Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants, 2016, p 10. The study found that the Facilitators' Package had substantially failed to implement key provisions of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (the UN Smuggling Protocol), such as the inclusion of "financial gain" as an element of the crime of facilitation of irregular entry, transit and stay; the inclusion of an exemption from punishment for humanitarian actors; and the inclusion of safeguards for victims of smuggling. The study also found that member states enjoy "disproportionate discretionary powers" in the implementation of the Facilitators' Package, resulting in legal uncertainty and inconsistency in the implementation of EU legislation

[59] Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants, 2016, p. 64.

[60] Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants, 2016, p 21 and p 64

[61] COMMISSION STAFF WORKING DOCUMENT 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), Brussels, 22.3.2017 SWD(2017) 117 final, http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf. The Commission noted that there was a "serious lack of reliable and comparable data on migrant smuggling offences and criminal justice responses at national and European level" affecting the evaluation. Moreover, different stakeholders participating in the assessment expressed contradicting views about the effectiveness of the measures: member states reported that there was no need to narrow the definition of the offence, for example by adding the element of financial or material gain, and were also against the introduction of a

In 2018, with mounting evidence of the unjust criminalization of individuals, groups and NGOs in several EU states, the European Parliament updated its earlier study and confirmed the conclusions reached in 2016, strengthened by new evidence. It recommended that the Facilitators' Package be brought in line with the UN Smuggling Protocol as to the activities that should and should not be criminalized; that it prohibit the criminalization of humanitarian assistance; and that humanitarian assistance be defined in broad terms to include various forms of solidarity towards refugees and migrants, including civil disobedience.[62] In a resolution adopted in July of the same year, the European Parliament urged the Commission to issue guidelines specifying which forms of facilitation should not be criminalized by member states and to make sure that the law is applied with greater clarity and uniformity.[63]

As will be demonstrated in the cases below, the failure of the Facilitators' Package to accurately incorporate the internationally agreed definition of smuggling and to include the compulsory application of a humanitarian exemption, is reflected in member states' varying legislation on the facilitation of irregular entry, transit and stay, contributing to the violation of the rights of human rights defenders and of people on the move.

mandatory exemption from criminalization; on the other hand, individuals and organizations were in favour of making the exemption from criminalization on humanitarian grounds mandatory and expressed concerns about the risk of criminalizing civil society organizations and human rights defenders

[62] Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants, 2016, pp 9-20 https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf

[63] The beginning of a new institutional circle, with a new Commission in office, has opened avenues to discuss these guidelines. Indeed, the new Commissioner for home Affairs, Ylva Johansson, explicitly committed to looking more closely into the European Parliament's request for clarifying guidelines in the course of the public hearing as part of her nomination procedure.

6. SOLIDARITY TOWARDS REFUGEES AND MIGRANTS IN THE DOCKS IN EUROPE

> **"I did not know [that] providing help was prohibited by law."**
>
> 'Valérie – asylum-seeker in Switzerland.

This chapter analyses a selected number of cases exemplifying the types of conduct that have attracted criminal investigations and convictions, as well as other undue restrictions imposed by the authorities since 2017. They constitute powerful illustrations of the extent to which solidarity is being criminalized in Europe.

The largest group of cases of criminalization of solidarity that Amnesty International has documented are related to acts of assistance to people trying to cross sea or land borders irregularly such as: rescuing lives at sea in Greece, Italy, and Malta; alerting coastguards and other emergency services to the presence of people in danger at sea in Greece; providing people with adequate information, equipment and provisions to pursue their journey across the mountains from Italy towards France; giving lifts to people who seemed lost or weak or who were walking along dangerous roads in France and Switzerland; and bearing witness to, exposing and opposing human rights violations by the authorities at borders, such as push-backs, collective expulsions, ill-treatment or other misconduct by border guards and other officials in Croatia, France, and Italy.

Many cases regard the criminalization of acts of solidarity towards people who are already in Europe such as destitute people who are unable to access essential necessities and services, including food, water, sanitation, health care and shelter because of their irregular status. The conducts which have been criminalized or which have been otherwise restricted or sanctioned include: providing water, food, tents and access to sanitation in northern France; and offering shelter, including to asylum-seekers awaiting a decision on their claim on appeal, in Switzerland. In one case, a group of HRDs in the UK decided to carry out an act of civil disobedience to oppose a deportation which the protesters believed would have exposed the foreign nationals to grave dangers.

These actions were carried out by individuals and organizations to protect the lives and safety of refugees and migrants to facilitate their access to asylum and protection, to prevent them from being returned to countries where they would be at grave risk of human rights violations and abuses, to prevent loss of life and unnecessary deprivation and suffering. These actions were part of their activities to defend human rights peacefully, in accordance with the UN Declaration on Human Rights Defenders, which all European countries have committed to promote and protect.

States have brought charges of facilitating irregular entry, transit and stay, and sometimes they have also imposed charges for terrorism-related offences, espionage, being part of a criminal organization, irregularities in waste disposal and trafficking in illegal waste as well as non-criminal restrictive measures. Slanderous campaigns in the media and disparaging discourse by some political leaders and public officials have also often preceded or accompanied criminal investigations of human rights defenders.

There is no single reason explaining the significant number of criminal investigations, prosecutions and administrative restrictions and sanctioning deployed in different European countries against HRDs assisting refugees and migrants at European borders and in Europe between 2017 and 2020. EU leaders' determination to prioritize immigration control and to prevent new arrivals, which emerged clearly from EU and member states policies from 2015 onwards, set the stage for the use of the criminal justice system alongside other state resources to pursue these aims. It signalled to law enforcement officials, civil servants and the judiciary that controlling borders was the priority and that those assisting refugees and migrants were somehow comparable to smugglers. In this context, the failure of EU leaders to uphold and promote key principles of the UN Declaration on Human Rights Defenders, coupled with the lack of a clearly defined offence of human smuggling in EU and domestic legislation in many countries, has contributed significantly to the prosecution of HRDs acting to protect the rights of migrants and refugees in many of the cases illustrated below.

Each documented case will examine: the specific conduct of human rights defenders; how such conduct is protected under international human rights law; how the authorities have reacted to such activities, including through the use of administrative measures or the criminal justice system; the reasons and justifications provided for the criminalization and other restrictions imposed; and the impact such criminalization has had on human rights defenders and on refugees and migrants.

6.1 CROATIA: PROTECTING PEOPLE FROM HUMAN RIGHTS VIOLATIONS AT BORDERS

Croatia's border with Bosnia and Herzegovina (BiH), and that with Serbia, is an external border of the EU. Over the last two and a half years, Croatian authorities have engaged in a systematic and a deliberate effort to prevent and discourage irregular entries into the national territory, and thus into the European Union. Amnesty International and other human rights organisations have documented widespread pushbacks and collective expulsions from Croatia, frequently accompanied by police violence and intimidation.[64] The people who are forcibly deported from Croatia usually end up stranded in temporary squalid camps in BiH or Serbia. They report being apprehended, often deep inside of Croatian territory, rounded up in groups and forcibly expelled back to Bosnia – without formal procedure or the presence of Bosnian Border Police.[65] Many described how they were beaten and intimidated, and had their documents taken and mobile phones stolen or destroyed. Some were stripped of their clothes, including shoes, and forced to walk for hours through freezing cold rivers and in low winter temperatures in the direction of the Bosnian border, exposing them to frostbites and hypothermia. The reports, including by Amnesty International, indicate that the people who were returned, in most cases, asked for asylum, but that the Croatian police routinely ignored their requests.

As a result of pushbacks and collective expulsions from Croatia, close to 8,000 refugees and migrants are currently stranded in Bosnia and Herzegovina, approximately half of them in Bihac and Velika Kladusa, two small Bosnian towns in the vicinity of the Croatian border. Very few want to stay in the country; a vast majority hopes to continue their journey through Croatia, onward to other countries of the European Union. Until early 2017, Croatian authorities had employed a so-called "wave-through" policy; in other words, they turned a blind eye to irregular entries provided that the people who entered, also exited Croatia. That started to change in 2016, following the EU-Turkey deal,[66] and after the neighbouring Hungary and Slovenia had decisively clamped down on migration and fortified their borders. By erecting fences, tightening border security and enacting highly restrictive and punitive legislation to prevent refugees and migrants from re-entering the EU, they virtually choked off key access points to Western Europe, leaving Croatia to face an

[64] Amnesty International, *Pushed to the Edge: Violence and abuse against refugees and migrants along the Balkans route*, March 2019, EUR 05/9964/2019 https://www.amnesty.org/en/documents/eur05/9964/2019/en/

[65] Amnesty International, Pushed to the Edge: Violence and abuse against refugees and migrants along the Balkans route, March 2019, EUR 05/9964/2019 https://www.amnesty.org/en/documents/eur05/9964/2019/en/

[66] The EU-Turkey deal of 18 March 2016 aimed to return to Turkey every person arriving irregularly on the Greek islands, including asylum-seekers, despite that country not being safe for them. See: Council of the European Union, "EU-Turkey Statement" 18 March 2016, https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/. The document is technically only a "statement," but as it is usually referred to as a "deal," Amnesty International will use the latter term in this document.

increasing number of people potentially stranded on its territory. Croatia's response was to step up border security itself and employ a strict and often brutal policy of pushbacks and deportations that would, practically, deposit refugees and migrants back in Bosnia and Serbia – at the doorstep of the EU territory.

Croatia's draconian treatment of refugees and migrants over the past two and a half years has been widely reported by human rights organizations and the media, though the country's authorities have consistently denied any wrongdoing. Rather, the government has tried to justify robust measures at the border by insisting that EU law, and specifically Schengen Borders Code, allowed member states to "refuse entry" to irregular migrants.[67] Although various EU officials, including the former European Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopolous, warned Croatia that it must police external borders "in full compliance with the Charter of Fundamental Rights of the European Union and relevant international law," and further stressed that "Article 7 of the Schengen Borders Code required border guards fully respect the dignity of people,"[68] Croatian police continues - virtually unabated - to forcibly expel refugees and migrants found on its territory.

The reaction of EU institutions to the growing allegations of police violence and collective expulsions has been anything but consistent. Indeed, over the course of 2018 and 2019, European politicians have sent mixed messages to Croatia. As reports of pusbacks and police violence intensified in September 2018, in a bilateral meeting with the country's Prime Minister Andrej Plenković, German Chancellor Angela Merkel complimented Croatian police for making "great progress in protecting external EU borders." [69] Croatia's politicians repeatedly argued that decisive protection of EU external borders was one of the key requirements for Croatia's entry into the Schengen area,[70] suggesting that the EU condoned, if not openly encouraged, forceful enforcement at its external borders. Indeed, the European Commission Conclusion of October 2019 that Croatia had successfully fulfilled all technical criteria for the full integration into the Schengen Area sent a clear signal to the country's authorities that unlawful practices and human rights violations were not an obstacle to Schengen integration. [71]

Local associations and NGOs, set up in 2015, when the first refugees started arriving at the Croatian border, in 2017 became witnesses to the gradual change in the behavior of Croatian police. While continuing to provide immediate assistance to those in need on the country's territory, the NGOs also started documenting frequent violations on Croatia's borders and publicly calling out the authorities over indiscriminate pushbacks and collective expulsions, as well as by intimidation and violence against refugees and migrants. The previously close collaboration with local police forces and border guards turned into an open hostility. As the allegations of violations have mounted, Croatian authorities have increasingly discouraged public scrutiny of its migration practices and engaged in a targeted campaign to undermine the credibility of these reports by discrediting the organizations working on migrant and refugee rights.[72]

Are You Syrious (AyS)[73] and the Center for Peace Studies (Centar za mirovne studije, CMS)[74], the two key organizations in Croatia providing integration programmes, legal aid and advocacy on migrant rights, have come under direct attack from the country's Ministry of Interior. This has included attempts to publicly defame and delegitimize the organizations' activities by suggesting that they assisted migrants and refugees to "illegally enter" Croatia and tried to undermine the country's efforts to join the Schengen area.[75] It has also involved frequent intimidation and harassment of their staff and volunteers, some of whom were held in

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[67] Croatian Ministry of Interior Letter to Amnesty International, 8 March (received on 12 March) 2019. See also Index.hr. "Bozinovic odgovorio Vijecu Evrope o nasilju nad migrantima." 5 October 2018. https://www.index.hr/vijesti/clanak/bozinovic-odgovorio-vijecu-europe-o-nasilju-policije-nad-migrantima/2028449.aspx

[68] Report footnote #91

[69] Jutarnji list, "Merkel nahvalila Hrvatsku: 'Hrvatska policija radi odličan posao na granicama, ali postupak za Schengen je više nego jasan," 28 September 2018, available at: https://www.jutarnji.hr/vijesti/hrvatska/merkel-nahvalila-hrvatsku-hrvatska-policija-radi-odlicanposao-na-granicama-ali-postupak-za-schengen-je-i-vise-nego-jasan/7768209/

[70] Report footnote #94 and 95

[71] European Commission, Communication from the Commission to the European Parliament and the Council on the verification of the full application of the Schengen Acquis by Croatia, 22 October, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6140 and https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20191022_com-2019-497-communication_en.pdf

[72] Net.hr, "Bozinovic tesko optuzuje udruge: CMS I AyS davali novac migrantima I poticali ih na ilegalni ulazak u Hrvatsku,", 20 April 2018, https://net.hr/danas/hrvatska/ministar-bozinovic-tesko-optuzuje-udruge-cms-i-asy-davali-novac-migrantima-i-poticali-ih-na-ilegalni-ulazak-u-hrvatsku/#

[73] https://www.facebook.com/areyousyrious/

[74] https://www.cms.hr/

[75] NetHR, "Bozinovic tesko optuzuje udruge: CMS I ASY davali novac migrantima i poticali ih na ilegalni ulazak u Hrvatsku," 20 April 2018, https://net.hr/danas/hrvatska/ministar-bozinovic-tesko-optuzuje-udruge-cms-i-asy-davali-novac-migrantima-i-poticali-ih-na-ilegalni-ulazak-u-hrvatsku/

police stations without formal charges and were directly threatened because they criticized police activities at the borders.[76]

6.1.1 THE CASE OF THE CENTER FOR PEACE STUDIES AND ARE YOU SYRIOUS

Pressure on human rights defenders and organizations supporting refugees and migrants in Croatia has taken many different forms, from threats and harassment, to restrictions to their activities, and targeted public disqualification.

For CMS, the fallout due to its public criticism of the government's handling of the arrival of refugees and migrants in Croatia was the loss of access to official centres for accommodation of asylum-seekers and detention centres for foreigners. With its large network of volunteers, CMS had supported integration activities for recognized asylum-seekers for over 15 years, but abruptly lost access to the government-run centres in November 2018, when the Ministry of Interior refused to extend their mutual cooperation agreement, stating that the organizations' activities "were not adding value".[77] While the authorities insisted that the decision was not politically motivated,[78] the move came after a protracted public debate between CMS and the Ministry of Interior over the allegations of police violence at the borders, as well as the Ministry's efforts to delegitimize CMS's work by linking its activities to people smuggling.[79] More recently in 2019, the Ministry of Interior has also refused to extend its agreement with AyS, who had been managing children's integration activities in the refugee centre in Porin.[80] In both cases, the Ministry of Interior rejected political motivation for ending the contracts and stated that the activities provided by the two organizations were replicating the integration activities already being provided within the centres and were therefore no longer needed.[81] The Ministry however, added that it could under no circumstances cooperate with the organizations whose activists were "found guilty of assisting migrants in illegal crossing of the border",[82] pointing out the case initiated by the Ministry against an AyS volunteer [see below].

AyS had to fight against allegations of illegal conduct in courts. In April 2018, the Croatian Ministry of Interior[83] pressed misdemeanour charges[84] for facilitating illegal migration against an AYS volunteer who, on 21 March 2018, was present at a time when a large family from Afghanistan, including several small

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[76] Findings included herein are based on interviews with the staff of Are You Syrious? and Center for Peace Studies conducted on 11 December in Zagreb, Croatia, the organizations' Letter to the Members of the European Parliament, December 2018 (full text available to Amnesty International), as well as reports in the press (see, for example, Euractive, "Spurned by authorities, humanitarian NGOs feel unsafe in Croatia," 21 November 2018, https://www.euractiv.com/section/justice-home-affairs/news/wed-spurned-by-authorities-humanitarian-ngos-feel-unsafe-in-croatia/ or Telegram, "Mucna prica o ljudima koji pomazu migrantima I MUP-u koji trazi da se njihova udruga zabrani," 5 October, 2018, https://www.telegram.hr/price/mucna-prica-o-ljudima-koji-pomazu-migrantima-i-mup-u-koji-trazi-da-se-njihova-udruga-zabrani/).

[77] Euractiv, "Spurned by authorities, humanitarian NGOs feel unsafe in Croatia," 21 November, 2018, available at: https://www.euractiv.com/section/justice-home-affairs/news/wed-spurned-by-authorities-humanitarian-ngos-feel-unsafe-in-croatia/

[78] Jutarnji list, "MUP odbacio optužbe Centra za mirovne studije: 'Njihove tvrdnje u poptunosti su netočne i nedopustive," 12 November 2018, available at: https://www.jutarnji.hr/vijesti/hrvatska/mup-odbacio-optuzbe-centra-za-mirovne-studije-njihove-tvrde-u-potpunosti-su-netocne-i-nedopustive/8050238/

[79] Interview with CMS representatives conducted by Amnesty International in Zagreb, 11 December 2018. See also, Euractiv, "Spurned by authorities, humanitarian NGOs feel unsafe in Croatia," 21 November, 2018, available at: https://www.euractiv.com/section/justice-home-affairs/news/wed-spurned-by-authorities-humanitarian-ngos-feel-unsafe-in-croatia/

[80] Email exchange with Are You Syrious conducted by Amnesty International, 11 March 2019.

[81] Croatian Ministry of Interior, Letter to Amnesty International, 19 June, 2019.

[82] Croatian Ministry of Interior, Letter to Amnesty International, 19 June, 2019.

[83] According to Article 111 of the Croatia's Law on Misdemeanours, the public administration body which is responsible for direct implementation of or overseeing the implementation of the law that includes a specific misdemeanour is responsible for filing charges for the said misdemeanour. The same public administration body undertakes, through an authorised person, all the activities in the process as provided for by law. In this case, the Ministry of Interior, as the competent authority for the implementation of the Law on Foreigners, filed the charges against the volunteer who was accused of a misdemeanour of "assisting an illegal entry."

[84] Article 43, Para 1 of the Croatia's Law on Foreigners states that the facilitation includes "assisting or attempting to assist third country nationals in illegal crossing of the state border, or transit via state border area or after the third country national has entered Republic of Croatia illegally and does not have a right to a legal stay." Article 43, Para 2, Item 2 provides for exemptions from the facilitation of illegal entry, including: (i) the assistance referred to in Articles 116 (notifications concerning the process) and 117 (legal aid) of this Act; (ii) assistance in making an illegal crossing of the border to save lives, prevent injuries, provide emergency medical assistance and humanitarian assistance in accordance with special legislation; (iii) assistance in illegal stay on humanitarian grounds and without the intention of preventing or postponing the taking of measures for securing return."
These provisions were a result of the transposition of EU Facilitation Directive into Croatian law in 2007 and 2017. The Ministry of Interior charges against the volunteer officially quote the Directive, specifically emphasizing the fact that the definition of "assisting and facilitating illegal migration" does not include "attempt to seek or obtain financial or other material benefits" (Art 1, Para 1 of Directive) and that it also envisages penalties for 'encouraging illegal migration or attempts to assist illegal migration' (Article 2 of the Directive)." The penalties proscribed by the Croatian Law on Foreigners are aligned with the Council Framework Decision 2002/946/PUP from 28 November 2002.

children, was about to approach the Croatian police and request international protection. Observing such instances was a key part of the organization's activities, as many migrants and refugees, fearing imminent pushback once on the country's territory, request NGOs to be present when they meet the police. In this case, however, the AyS volunteer was accused of giving signals to the family in order to assist their crossing from Serbia into Croatia. According to AyS, who had shared detailed accounts, written evidence, and recorded geo-locations related to the specific event with police, the Office of the Ombudsperson and Amnesty International, the original charges were disproved by the organization during the court hearing. "We are very aware of our delicate position and the fact that our every move is under rigorous scrutiny, so we take extra precautions to ensure that everything we do is always and fully in compliance with the law and procedures. We also diligently document everything. Our volunteer that night did not violate the law. He had proactively approached police to inform them about a large family that was on Croatian territory and wishing to apply for asylum, as we had done on numerous occasions before," AyS told Amnesty International.

The family in question was that of Madina Hussiny, and was already known to the Croatian authorities. In November 2017, Madina Hussiny, a six-year-old girl from Afghanistan, was struck by a train and killed after she and her family were allegedly pushed back from the Croatian border and told to follow train tracks back into Šid in Serbia in the middle of the night.[85] Although Croatian authorities denied that the family ever entered Croatia, the incident took place in an area where human rights organizations have documented frequent and violent pushbacks.[86] Madina's family insists that they were turned back from the Croatian border minutes before her death.[87] AYS believes that the pressure and other punitive actions against their organization are in retaliation for the fact that they have supported the family in their court case against Croatian police which was initiated after Madina's death.[88]

In their official charges against AyS, the Ministry of Interior cited Article 3 of the Schengen's Border Code and the EU Facilitation Directive, arguing that AyS volunteer had intentionally "assisted migrants in the illegal crossing of the border" and recommended the highest prescribed penalty, including imprisonment, a 43,000 EUR fine and the ban of AyS' work.[89] In September 2018, however, the court issued a first instance decision finding the volunteer guilty on the grounds of "unconscious/inadvertent negligence", but rejected the recommended penalties, issuing a smaller 8,000 EUR fine. Nevertheless, AyS has challenged this decision and is still awaiting the outcome of the appeal.

The activities carried out by the organisation AyS
©Are you Syrious

By assisting the Afghan family who had already lost a child as a result of indiscriminate pushback from the Croatian border in applying for international protection, the AyS volunteer was trying to ensure that Croatia fulfilled its responsibility under international and EU law to provide the individuals with full access to asylum procedures. The broadly worded provision of facilitation of illegal entry in Croatia's Law on Foreigners, along with restrictive exemption for provision of humanitarian assistance, that does not encompass all legitimate forms of human rights action, provided a basis for the misuse of the charges by the Ministry of Interior against the AyS. In fact, in the case against the volunteer, Croatian authorities highlighted the fact that the offense of facilitation, as transposed from the EU Facilitation Directive, did not require financial benefit or material gain and explicitly exempted "legitimate" humanitarian work,[90] implying a deliberate intention of EU legislators to create space for Member States to robustly tackle illegal migration regardless of specific circumstances. The severe penalties proposed by the Ministry, including the imprisonment and deregistration of AyS, point to a

[85] Information about the case obtained through the interview conducted by Amnesty International with Are You Syrious? in Zagreb, 11 December 2018. See also: The Guardian: "'They treated her like a dog': tragedy of the six-year-old killed at Croatian border," 8 December, 2017, https://www.theguardian.com/world/2017/dec/08/they-treated-her-like-a-dog-tragedy-of-the-six-year-old-killed-at-croatian-border.
[86] Information about the case obtained through the interview conducted by Amnesty International with Are You Syrious? in Zagreb, 11 December 2018.
[87] Information about the case obtained through the interview conducted by Amnesty International with Are You Syrious? in Zagreb, 11 December 2018. See also: The Guardian: "'They treated her like a dog': tragedy of the six-year-old killed at Croatian border," 8 December, 2017, https://www.theguardian.com/world/2017/dec/08/they-treated-her-like-a-dog-tragedy-of-the-six-year-old-killed-at-croatian-border.
[88] The case is currently pending before the European Court for Human Rights.
[89] Croatian Ministry of Interior, Proposed Charges against DM filed before Police Station Vukovar, 5 April, 2018.
[90] Croatian Ministry of Interior, Proposed Charges against DM filed before Police Station Vukovar, 5 April, 2018.

deliberate intention of the authorities to silence the critics and restrict the freedom of association, but also create conditions that would broadly discourage acts of solidarity.

6.1.2 ATTEMPTS TO PENALISE SOLIDARITY AND SILENCE CRITICAL VOICES

Intimidation of NGOs by the Croatian authorities extended beyond courts. In April 2018, police issued summons to several representatives of AyS and CMS [91] and asked them to appear at a police station at the exact time of the previously announced press conference during which the activists from the organizations were supposed to speak about the undue pressures from the Ministry of Interior. "This was an obvious attempt to intimidate our staff and prevent us from speaking publicly about what we have been experiencing" AyS told Amnesty International. "Police showed up at our colleagues' private homes at night and after official working hours to deliver the summons, causing them and their families a great deal of distress."[92] The scheduled press conference did take place, but the Minister afterwards issued a statement accusing the organizations of undermining Croatia's ambition of joining the Schengen area and of encouraging illegal migration, charges often cited against NGOs working on migrant rights.

Indeed, the Ministry of Interior has often suggested that the organizations speaking for the rights of refugees and migrants are engaged in illegal activities, including facilitating irregular crossings or working with smugglers. In a letter to the Croatian Parliament,[93] Minister Božinović drew a parallel between AYS and Center for Peace Studies and Italian NGOs currently under investigation by Italian authorities and who – in his words – "have been involved in financing boats transporting tens of thousands of illegal migrants from North Africa".[94] This statement was both incorrect and tendentious. Although a public prosecutor in Sicily and various Italian authorities had publicly accused NGOs of "colluding with smugglers", no criminal charges had been brought against any of them at the time.[95] In March 2019, while addressing the increasing trend of criminalization of solidarity and proliferation of myths on migration by Hungarian authorities, the European Commission stated that "there was no evidence of NGOs working with criminal smuggling networks to help migrants enter the EU."[96] Nevertheless, the Minister continued to single out the two organisations and frequently draw links between their activities and illegal actions of smuggling groups.

6.1.3 THE CHILLING EFFECT

AYS told Amnesty International that their volunteers were being harassed and held for hours by police without formal charges and threatened with criminal prosecution if they continued speaking out about police violence at the border. The public defamation, they believe, has encouraged anonymous attacks on the organization and its staff, who had faced serious threats, including death threats and threats of violence, on social media and in person. One of these threats resulted in the Public Attorney's office having to issue a restraining order against an individual. "Our van was smashed by a cinder block and we had the windows on our office broken. Someone spray-painted insulting graffiti over our van and our centre. We have reported most of these incidents to the police, but they were never able to identify perpetrators," AyS told Amnesty International.[97]

Such blatant attempts to silence the organization and publicly disparage its work have left AyS in a precarious position – its activists and volunteers continue providing assistance to migrants and refugees in

[91] The summons were issued to four members of CMS, one member of AYS, as well as an immigration lawyer frequently working on cases of refugees and migrants.
[92] Interview conducted by Amnesty International in Zagreb, 11 December 2018.
[93] Minister of Interior letter to the Croatian MP Pedja Grbin, 29 March, Novi list, "Teške optužbe: Ministar Božinović tvrdi da su CMS and AYS u Srbiji davali migrantima novac i upute za ilegalni ulazak u Hrvatsku," 20 April, 2018, available at: http://www.novilist.hr/Vijesti/Hrvatska/TESKE-OPTUZBE-Ministar-Bozinovic-tvrdi-da-su-CMS-i-ASY-u-Srbiji-davali-migrantima-novac-i-upute-za-ilegalni-ulazak-u-Hrvatsku.
[94] NetHR, Bozinovic tesko optuzuje udruge: CMS I ASY davali novac migrantima I poticali ih na ilegalni ulazak u Hrvatsku, 20 April 2018, https://net.hr/danas/hrvatska/ministar-bozinovic-tesko-optuzuje-udruge-cms-i-asy-davali-novac-migrantima-i-poticali-ih-na-ilegalni-ulazak-u-hrvatsku/
[95] Furthermore, two parliamentary inquiries in Italy failed to uncover any wrongdoing by NGOs dedicated to rescue at sea. See: Charles Heller and Lorenzo Pezzani, Blaming the rescuers: Criminalizing solidarity, re-enforcing deterrence, 9 June 2017, https://blamingtherescuers.org/; Matteo Villa, Elena Corradi, Antonio Villafranca, Fact checking: Migrazioni 2018, 7 May 2018, www.ispionline.it/it/pubblicazione/fact-checking-migrazioni-2018-20415; Amnesty International, Europe's sinking shame: The failure to save refugees and migrants at sea, April 2015, https://www.amnesty.org/en/documents/eur03/1434/2015/en/
[96] European Commission, Facts Matter: *Debunking myths about migration*, March 2019, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_managing-migration-factsheet-debunking-myths-about-migration_en.pdf
[97] Interview conducted by Amnesty International in Zagreb, 11 December 2018.

Croatia and monitoring police activities at the border, while at the same time fighting off attempts by the authorities to delegitimize, and potentially criminalize, their work.

The misdemeanor charges against its volunteer and the Ministry of Interior's smear campaign and direct intimidation have taken a toll; some of the AYS staff and volunteers have had to stop working due to fear of reprisals and concerns for their safety and the safety of their families.

Pubic attempts to delegitimize their work and slanderous accusations by the Ministry of Interior[93] have not only made it difficult for these organizations to carry out their activities but have also significantly harmed their reputation among the public and have had a strong chilling effect on their activists and other human rights defenders. According to AyS and CMS, a concerted effort by Croatian authorities to promote the narrative of fear about people on the move and publicly challenge the credibility of NGOs supporting them has gradually turned public opinion against migrants.

"In the past, Croatian citizens used to show a great deal of generosity and solidarity with refugees and migrants; they were actively involved in providing support, including cooking meals, supplying clothes and offering them a place to shower. Even the police had shown a high degree of solidarity and fairness. "They used to work with us to support the migrants," a staff member of AyS told Amnesty International.[94]

"But all this has changed after our organization started calling out for the investigation of little Madina's death and demanding accountability from the Croatian police about the allegations of police brutality at the border. Now, the citizens who used to help are the ones who call police when they see someone of different skin colour."[95]

It is not only the public opinion in Croatia that has changed. Many volunteers and activists had to make a difficult decision no longer to work in the border area and instead focus on the integration activities or move operations of documenting pushbacks to the neighbouring Bosnia and Herzegovina. The Croatian Ministry of Interior's seemingly deliberate campaign to feed negative narratives about the two organisations and intimidate their activists and volunteers has directly affected their ability to operate in the country free of fear of reprisals.

6.1.4 CONCLUSION

Croatian authorities have discouraged public scrutiny of its migration practices and pursued a targeted campaign against organisations supporting refugees and migrants and documenting human rights violations by the Croatian police.

As allegations of violent pushbacks and collective expulsions from Croatian borders mounted, human rights defenders came under direct attack by the Ministry of Interior. This included attempts to publicly defame and delegitimise the organisations' work by accusing them of facilitating illegal migration and linking their activities with smuggling. Meanwhile, their volunteers and activists have been intimidated, harassed, held for hours by police without formal charges and threatened with criminal prosecution for speaking out about police violence.

The Ministry of Interior misused the broadly worded offense of facilitation in its Law on Foreigners to press misdemeanour charges against a volunteer who was assisting a family in applying for international protection. As in other European countries, the facilitation of irregular entry or transit in Croatia does not require material gain and, although it provides for humanitarian exemption, such exemption is so narrowly defined that it excludes wide array of activities typically performed by NGOs.

A protracted and deliberate public campaign against the organisations supporting refugees and migrants and attempts at their prosecution on facilitation charges have taken a serious reputational and psychological toll on HRDs and had a chilling effect on all those working to support refugees and those who want to call out the government for its human rights violations.

6.2. FRANCE: A HOSTILE ENVIRONMENT

Thousands of refugees and migrants have arrived in France to settle in or transit through the country over the last years. Some of them came from Italy, after crossing the Mediterranean Sea from Libya and other northern African countries; others had reached the country travelling from the Balkans, Greece and Bulgaria. According to the EU asylum system, they should have sought asylum in the first European country they entered or stayed in the country that granted them asylum in the first place.[98] However, many of those unable to apply for asylum in the country of their choice, or disillusioned with their integration prospects in the country where they live, continued moving onwards irregularly.

The reasons motivating them to undertake irregular and unsafe land journeys with a view to settle in France or transit through the country towards the UK are multiple: cultural and language ties, presence of family members, friends and community networks ready to assist them or belief in better prospects of succeeding in starting a new life. Lengthy asylum procedures, chances to get asylum or integration prospects weigh in people's decisions to engage in what in European jargon is called "secondary movements".

Regardless of their reasons, their arrival and presence at the French-Italian border and in the areas of Calais and Dunkirk in Northern France, prompted ordinary individuals, associations and networks of solidarity, to assist them and meet their needs. However, French authorities have responded to their acts of humanity and solidarity with smearing accusations, prosecutions and harassment.

6.2.1 RESCUING LIVES IN THE MOUNTAINS

Officials and human rights defenders concur that until recently, those trying to cross into France had just arrived in Italy and were simply carrying on their journey.[99] However, in the past couple of years the situation has changed and volunteers assisting refugees and migrants at the French-Italian border have noticed that most of those trying to cross the border are now motivated by fear for their future in Italy; exasperation at having waited for a long time to have their asylum claim determined, and disappointment at the lack of opportunities to integrate and find a job, even if they have been granted protection.[100]

The measures introduced by the Italian government in 2018,[101] especially the abolition of humanitarian protection status and the exclusion of asylum-seekers from the local authorities' network of reception facilities, have disillusioned many about their chances of finding a job and integrating into Italian society, and have deprived thousands of their right to access health, housing and social services, education and work, negatively affecting their wellbeing, safety and dignity. [102]

According to Paolo Narcisi of Rainbow for Africa, an NGO providing medical assistance at the border: "Migrants are very afraid now. Many had a job or were going to school. Now many of those experiences have been interrupted and they cross the border not with a plan, but to run away from Italy."[103] Davide Rostan, a Waldensian pastor in Susa confirmed the lack of hope motivating many to cross into France: "Stopping them is impossible. In the past, we tried to persuade them [to stay], when there still were opportunities." Now, all that volunteers can do is to help to reduce the risks they face during the crossing. "[We help them] because that is what they want to do, because I have nothing better to offer them, because otherwise they die."[104] For the then mayor of Oulx, Paolo De Marchis: "With the Salvini decree,[105] things have changed. In the past, we

[98] Recognized refugees should wait for a number of years in the country which first granted protection to enjoy freedom of movement, according to the EU Long-Term Residence directive. Directive 2011/51/EU of the European Parliament and the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:132:0001:0004:EN:PDF

[99] Interviewed in Clavière, Oulx, Susa and Turin in March 2019

[100] Interviewed in Clavière, Oulx, Susa and Turin in March 2019

[101] Decree-Law 4 October 2018, n. 113 was converted into Law 1 December 2018, n. 132 available at: http://www.gazzettaufficiale.it/eli/id/2018/12/03/18G00161/sg; Decree Law 113/2018 is available at: http://www.gazzettaufficiale.it/eli/id/2018/10/04/18G00140/sg

[102] Interviews conducted in Bardonecchia, Clavière, Oulx, e Susa in March 2019

[103] Interviewed in Turin in March 2019

[104] Interviewed in Susa in March 2019

[105] Law Decree 113/2018 on international protection, immigration and public security. Amnesty International has criticized the law on several grounds. Of relevance here, the abolition of humanitarian protection status is depriving thousands of people, who had their asylum request rejected and who cannot lawfully be repatriated, of a legal status which would allow them to access health, housing and social services, education and work, negatively affecting their wellbeing, safety and dignity. Furthermore, the new measures exclude asylum-seekers from the local authorities' network of reception facilities, making their integration harder to achieve. See: https://www.amnesty.org/en/documents/eur30/0237/2019/en/n/

used to see people crossing who had reasons to go to France. Now, it is people running away from the big reception centres. They are afraid… I also have my doubts trying to explain to them that in Italy things are good – here [for migrants in the local reception network] things are good, but in overcrowded centres…".[106] A view shared by the Catholic priest of Bussoleno: "What do we give them? They are 20 years old – can I tell them: stay in a reception centre for four years, and then you will be a 'clandestine'? Governments are failing these people…"[107] Anne Chavanne, a member of the board of the association *Refuge Solidaire*, which assists refugees and migrants once they reach the French side of the border, told Amnesty International she also has seen a big difference in the current situation: "Before the summer of 2017, the asylum-seekers arrived happier and more hopeful. Now, they've already spent a lot of time in Italy, between two and four years, and they do not have the same dreams anymore. They realize that it will be difficult, they are afraid of the police. They are also aware that in France, they will risk sleeping rough."[108]

Accurate figures are not available, but several thousand people are estimated to cross irregularly from Italy into France every year, using various points of the border. The mayor of Briançon estimates that between 7,500 and 8,000 people arrived from Italy to the region of Briançon from the spring of 2017 to the spring of 2019.[109] With police checks increasing at Ventimiglia, near the sea, in recent years many people have chosen to cross over the Alps. In 2018, between 5,000 and 6,000 people were estimated to have crossed at Bardonecchia and Col della Scala.[110] In the winter of 2018/2019 crossings at Bardonecchia and Col della Scala decreased, but some 15 to 20 people per day were monitored by volunteers and the authorities attempting the journey into France through the lower route at Claviere/Montgenèvre, with probably many more travelling undetected, bringing expected estimates about crossings over the Alps for 2019 to a similar or higher figure than in the previous year.[111]

The route is dangerous, especially for people who are not trained or equipped to walk in the mountains, as it involves walking through snowy paths in the dark in below-zero temperatures. People can fall in gorges and creeks, injure themselves in the dark, suffer from exhaustion, frostbites and hypothermia. Three people died in the snow in 2018, and nearly every volunteer Amnesty International interviewed on both sides of the border[112] mentioned their shock and sadness following their retrieval in May 2018.[113] For Agnès Antoine, a member of the supporting committee (*"comité de soutien")*, "their death was a turning point and showed the importance of the solidarity actions."[114]

Volunteers on both sides of the Alpine border, with support from some representatives of local authorities, started to assist refugees and migrants determined to cross in 2017.

On the Italian side of the border, an informal but well-organized network was created comprising volunteers, NGOs, the Italian Red Cross, members of the Alpine Rescue (*Soccorso Alpino*) and representatives of the churches. Some Italian authorities in the area have actively supported the network. The common aim of the volunteers and of the authorities has been to prevent deaths in the mountains: they ensure that the refugees and migrants are at least fully aware of the risks, they give them advice and maps to keep safe in the mountains, they provide them with sturdy shoes and warm clothes, and offer a bed and a meal to those who want to rest and wait for dawn before venturing out. They also assist those who get lost and must be brought back to safety.

In addition to assisting those who want to cross, the volunteers on the Italian side have also helped those who are pushed back by the French police, including many unaccompanied children.[115] In 2017 and 2018, many people caught by the French police across the border were driven back to the Italian side and left in Bardonecchia or in the small town of Clavière outdoors at night, often in the absence of a formal procedure

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[106] Interviewed in Oulx in March 2019
[107] Interviewed in Bussoleno in March 2019
[108] Interview with Briançon, 30 March 2019
[109] Interview with the Mayor of Briançon, 4 April 2019
[110] Volunteers and authorities interviewed by Amnesty International in March 2019 put the figure at 6000 in 2018. See also https://www.internazionale.it/reportage/annalisa-camilli/2019/01/17/migranti-alpi-claviere-francia
[111] Figures shared during interviews with Amnesty International in March 2019
[112] Interviews conducted in March 2019 in Oulx, Clavière, Bardonecchia and Briançon
[113] Their names were Mamadou-Alpha Diallo, from Senegal, Blessing Matthew, a young Nigerian woman, and Mohamed Fofana, 28, from Guinea Conakry, who suffered from poliomyelitis, see: https://torino.repubblica.it/cronaca/2018/05/25/news/bardonecchia_il_corpo_di_un_migrante_affiora_tra_neve_e_detriti_sul_colle_della_scala-197318905/; https://torino.repubblica.it/cronaca/2018/07/03/news/identificato_il_migrante_morto_nell_orrido_di_fre_jus_era_stato_repinto_alla_frontiera_francese-200759468/; *Dans les Alpes, la fonte des neiges révèle les corps de migrants morts en tentant de passer en France*, Le Monde, 7 June 2018 https://www.lemonde.fr/societe/article/2018/06/07/dans-les-alpes-la-fonte-des-neiges-revele-les-corps-de-migrants-morts-en-tentant-de-passer-en-france_5310861_3224.html
[114] Interview with Agnès Antoine, 31 March 2019
[115] Human Rights Watch, *The Treatment of Unaccompanied Migrant Children in the French Hautes-Alpes*, September 5, 2019 https://www.hrw.org/report/2019/09/05/subject-whim/treatment-unaccompanied-migrant-children-french-hautes-alpes

to hand people over to Italian authorities with documents detailing the reasons and the process followed in France.

All those involved in the network of solidarity spoke of it as an example of collaboration between volunteers and authorities. Referring to these collective efforts at night in Clavière, another volunteer said: "We were all there with the same aim: to prevent people from dying in the cold."[116]

On the French side of the border, a similar spirit of solidarity inspired the people of Briançon to open a shelter they called "*Le Refuge*" in the summer of 2017. They started offering newcomers arriving from Italy food and shelter to rest after the crossing. The association running *Le Refuge*, called *Refuge Solidaire* welcomed 8,144 people between September 2017 and 31 November 2019. In addition to the assistance offered at *Le Refuge*, the people of Briançon have organized so-called "maraudes" – collective outings in the mountains during which volunteers go on ski or on foot in the areas near the border to reach out to refugees and migrants who may be in need of help and offer assistance, equipment, food and hot beverages. Stephanie Besson, an expert mountain guide and member of the association *Tous Migrants* explained "in December 2017, arrivals increased, and we realized that this will be dangerous in the mountains. We put signs in Eritrean, Arabic, French and English in the mountain to prevent from danger."[117]

For the Mayor of Briançon, these activities show "a willingness of the inhabitants to express their solidarity, humanity and fraternity. I am proud to see the way they took up these issues: by providing food, shelter and medical help."[118] The mayor also supported the creation of the shelter *Refuge Solidaire* by providing a space and paying the energy bills.[119]

It is a clear expression of the contradictions and unfairness caused by the Dublin system that while solidarity on the Italian side has been fostered and even encouraged by the authorities that have no interest in stopping the refugees and migrants from leaving the country, in France, the same expressions of solidarity towards the people in peril on the same mountains have been criminalized on multiple occasions, to discourage further arrivals.

6.2.1.1 DENIAL OF ACCESS TO PROTECTION AND UNLAWFUL RETURNS AT INTERNAL SCHENGEN BORDERS

Following the violent attacks of 13 November 2015 in Paris,[120] French authorities adopted measures to tighten border controls including by reinstating internal border checks and renewing this decision every six months, due to a "persistent terrorist threat".[121] In addition to reinstating internal border checks, as allowed by the Schengen Borders Code in exceptional circumstances,[122] the authorities have used a mix of old and recent security measures to reduce the number of refugees and migrants arriving at the border, especially from Italy, in particular the extension of the border strip to 20km and the practice of "random and mobile" checks by the police in this strip.[123] Furthermore, there is no facility or infrastructure at the border where people can apply for asylum. The first asylum point is beyond the 20km border area, making it virtually inaccessible for people seeking protection.

This strict border regime aimed at countering "terrorist" threats, is being misused for migration management and reducing the number of people entering France. For the Prefecture of Hautes-Alpes "the objective is to make the border hermetic, we have a strong migratory pressure."[124] In April 2018 and upon request of the Prefect, the Ministry of Interior reinforced the border additional police officers and a mobile squad of the

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[116] Interviewed in Oulx in March 2019
[117] Interview with Stephanie Besson, 4 April 2019
[118] Interview with the Mayor of Briançon, 4 April 2019.
[119] Interview with the Mayor of Briançon, 4 April 2019.
[120] On 14 November 2015, three violent attacks in Paris killed 131 people and injured 413
[121] Since 14 December 2015, French authorities renewed the reinstating of all internal borders ten times for a period of 6 months each on counter-terrorism ground. The current notification of renewal is until 30 April 2020
[122] See Article 25 of the Schengen Borders Code at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32006R0562 Article 21 of the Schengen Borders Code establishes that police powers should not bear the sole objective of border control
[123] Article 78-2 Code of Criminal Procedure and article 67 of Code on customs created by the article 19 of the Law n° 2017-1510 of October 30th, 2017. These checks may be carried out in a 20km strip along the internal borders, as well as in publicly accessible areas of ports, airports and railway and road stations open to international traffic. Identity checks may be carried out in these areas with persons whose "foreign nationality may be inferred from objective factors"
The law allowed authorities to carry identity checks without demonstrating the existence of evidence that an offense is or was being committed. The Court of Justice of the European Union (CJEU) in a Grand Chamber judgement on June 22, 2010 considered that this type of regulation was not in line with EU law since it had "an effect equivalent to border checks". The French legislator then added a limit to the practice as identity checks "cannot consist of a systematic control of the people present or circulating in the zones". See also Law of orientation and programming for internal security, LOPPSI 2, 14 March, 2011
[124] Interview with the Sous-Prefect of Briançon and the Director of services, 1 April 2019

gendarmerie. This includes the *Compagnies Républicaines*[125] (CRS) which are part of the national police with a core mission of maintaining public order.

The conflation of those security measures has considerable impact on refugees and migrants coming from Italy who are forced to take more dangerous routes and, when apprehended do not have access to asylum.

In 2018, 119 persons were denied entry in Montgenèvre and the number increased to 916 in only the first six months of 2019, in most cases for not having valid travel documents.[126] According to the Ministry of Interior, there are no asylum requests at the border.[127] From the police border station of Montgenèvre, the nearest location to apply for asylum (*Plateforme d'Accueil des Demandeurs d'Asile)*[128] is more than 100km away. The-asylum seekers coming from Italy do not have the opportunity to reach the nearest platform, as, in case they are apprehended by French police within the 20km of the border strip, the officers return them to Italy with a "refusal of entry".[129]

In 2018 and 2019 Amnesty International observed how people on the move were denied access to protection and unlawfully returned to Italy. At the police station of Montgenèvre the border police did not provide notification of refusal of entry, refused to allow the foreign national to consult someone of their choice or a lawyer, and did not secure any interpretation.[130] Furthermore, the authorities failed to ensure there were individual or in-depth examinations of each case.[131]

These practices violate the right to seek asylum and deprive individuals from the possibility of challenging any refusal of entry.[132] They are also at odds with the prohibition of penalization of asylum-seekers and refugees for irregular entry, contained in the 1951 Refugee Convention.[133] However, authorities have justified them with the reinstating of internal Schengen border checks.[134] They consider that, within the 20 km strip near the border, people apprehended by the police are in a situation of "irregular entry" and can be sent back summarily. In their opinion, the safeguards foreseen in the EU law for the return of third country nationals are not applicable. Yet, the Court of Justice of the EU has clarified that the reintroduction of border controls does not allow for a derogation of return procedures, as the concept of "internal borders" and "external borders" are mutually exclusive and cannot be equated, even if internal border control has been reintroduced.[135]

These unlawful border practices breach domestic, EU and international law, particularly, the right to seek asylum and the right to be free from collective expulsions. Furthermore, in this expanded physical border area, the police have increased opportunities to intercept people on the move and to criminalize people who

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[125] The equipment, training and mobility of the squads differentiate them from standard police officers.Border control is not in their mandate, but they can be required as additional forces.

[126] Official data provided by the Ministry of Interior disaggregated by grounds

[127] Meeting with the Directeur général des étrangers en France, Ministère de l'Intérieur, 21 January 2020

[128] According to French legislation asylum-seekers can apply for asylum at a platform for asylum-seekers (*Plateforme d'Accueil des Demandeurs d'Asile*) or at the border (asylum application procedure). For the latter, see Demander l'asile à la frontière, Office français de protection des réfugiés et apatrides https://www.ofpra.gouv.fr/fr/asile/la-procedure-de-demande-d-asile/demander-l-asile-a-la-frontiere French law recognizes other rights to asylum-seekers -such as the right to an interpreter, the right to request the assistance of a doctor and to communicate with a lawyer or any person of his choice-

[129] See Article L. 213-2 of the Code of entry and residence of foreigners and right of asylum ("Code de l'entrée et du séjour des étrangers et du droit d'asile" or CESEDA): Any refusal to enter France is subject to a reasoned written decision taken, except in the event of an asylum request. This decision is notified to the person with a mention of his/her right to warn or have notified the person he/she chose go, his consulate or the lawyer of his choice. See as well Article L. 213-8-1 of the Code of entry and residence of foreigners and right of asylum. In a case involving a Sudanese man returned from Menton to Italy, the administrative court of Nice ruled on 2 May 2018 that "no circumstance can justify the non-respect of these provisions [i.e the procedure of asylum request at the border] with regard to foreigners presenting themselves at the Franco-Italian border"

[130] Article L. 213-2, Code of entry and residence of foreigners and right of asylum

[131] Amnesty International France, field observations on 12 and 13 October 2018. Amnesty International received similar allegations in 2019, which were verified in a mission to the area in March 2019

[132] As recognized by the administrative curt in Nice in July 2019, in a case of an asylum seeker arrested in the city of Breil in France and then illegally returned to Italy "the refusal of entry (...) constitutes a serious and manifestly unlawful interference with the fundamental freedom of the right of asylum". Ruling, administrative court of Nice, 19 July 2019

[133] See chapter 5. Push-backs and collective expulsions violate the right to an effective remedy and could put people at risk, in violation of the principle of non-refoulement.

[134] Meeting with the Directeur général des étrangers en France, Ministère de l'Intérieur, 21 January 2020.

[135] In a case concerning the refusal of entry of a Moroccan national, Mr. Arib, who was checked on French territory after crossing to France from Spain, the Court of Cassation in France asked the ECJ whether an internal border at which border control had been reintroduced could be equated with an external border and whether, consequently, France could not apply the return procedure laid down in the Returns Directive. The ECJ considered that Mr. Arib was in a situation of irregular stay and declared that "there is no need to treat differently, in the light of the objective pursued by the Returns Directive, the situation of an illegally staying third-country national, apprehended in the immediate vicinity of an internal border, depending on whether or not border control has been reintroduced at that border." Court of Justice of the European Union (CJEU), Arib and Others Judgment of the Court (Grand Chamber) of 19 March 2019 ECLI:EU:C:2019:220

help them. Effectively, the authorities have expanded the possibility and scope of situations under which helpers can be accused of facilitating the irregular entry of foreign nationals.

6.2.1.2. "THE CRIME OF SOLIDARITY" UNDER FRENCH LAW

Since 2015, several human rights defenders have been criminalized, especially in the southern part of the French-Italian border for facilitation of irregular entry and transit. 73-year-old pensioner, **Martine Landry,** was charged for facilitating illegal entry, for taking two Guinean children to the police border station of Menton, to register them as minors. Her case is still pending, after the Prosecution appealed her acquittal in July 2018.[136] **Cédric Herrou**, in the valley of Roya, was convicted on appeal for facilitating the irregular circulation and entry of refugees and migrants. The Court of Cassation then partially overturned the appeal ruling.[137] **Pierre-Alain Mannoni**, who helped three exhausted women he found by the road near the Italian border in 2016, was convicted for facilitating the irregular circulation of foreign nationals. The decision was overturned by the Cassation court, which ordered a new trial.[138]

Martine Landry
© Laurent Carré

In these cases, at the time of the events, the applicable French legislation - the article L622 of the Code on Foreigners- punished anyone who, by direct or indirect aid, facilitated or attempted to facilitate the illegal entry, movement or stay of a foreign national in France, providing for penalties of imprisonment for five years and a fine up to 30,000 EUR.[139] People could be exempted from prosecution if they assisted a foreign national without status to stay without any direct or indirect compensation and when the assistance consisted in providing legal advice or catering, accommodation or medical care services intended to ensure dignity and decent conditions, or any other assistance aimed at preserving their dignity or physical integrity.

However, the cases of Cédric Herrou and Pierre-Alain Mannoni were a turning point, which triggered a change in French law, following their petition to the Constitutional Council to review the offence of facilitation.[140] In its ruling of 6 July 2018, the Constitutional Council acknowledged that the exemptions provided by law were not in line with the French constitutional principle of "*fraternité*".[141] The court considered that humanitarian exemptions should be applied to cases of irregular stay and circulation, but not to cases of facilitation of irregular entry.[142] As analysed by the lawyer in one of the cases of criminalization in the area of Briançon, Yassine Djermoune, "[i]n the ruling, the principle of "fraternity" is balanced with the objective of "fight against irregular immigration". This excludes that the aid distributed at the border may obey a logic of 'fraternity', which is, as described in the decision, acting with a humanitarian goal without consideration of the status of the person."[143]

Following the constitutional ruling, the French legislator had to amend the provision. The exemption from prosecution is now applicable to cases of assistance to circulation or stay of a foreign national when there is

[136] See Amnesty International, Martin Landry, l'acharnement judiciaire https://www.amnesty.fr/refugies-et-migrants/actualites/martine-landry-lacharnement-judiciaire and France: Acquittal of pensioner for showing compassion to children shows solidarity is not a crime, Amnesty International, 13 July 2018 https://www.amnesty.org/en/latest/news/2018/07/france-acquittal-of-pensioner-for-showing-compassion-to-children-shows-solidarity-is-not-a-crime/
[137] Following the Court of Cassation decision, the appeal Court of Lyon will hear Cedric on 11 March 2020. Le film "Libre" : témoignage sur l'engagement de Cédric Herrou, et d'autres, pour aider des réfugiés et des migrants. https://www.amnesty.fr/refugies-et-migrants/actualites/la-roya-vallee-du-sud-de-la-france-frontaliere-avec
[138] Délit de solidarité : jugé pour avoir porté secours à des demandeuses d'asile https://www.amnesty.fr/refugies-et-migrants/actualites/delit-de-solidarite-juge-pour-avoir-porte-secours
[139] Article L 622-1 of the Code of entry and residence of foreigners and right of asylum
[140] Ruling n° 2018-717/718 QPC, French Constitutional Council, 6 July 2018 https://www.conseil-constitutionnel.fr/decision/2018/2018717_718QPC.htm
[141] Article 2 of the Constitution: "The motto of the Republic is" Liberty, Equality, Fraternity " and in article 72-3, to the "common ideal of freedom, equality and fraternity"
[142] Until then, the humanitarian exemption was only applicable in cases of facilitation of irregular stay. Ruling n° 2018-717/718 QPC, French Constitutional Council, 6 July 2018.
[143] Interview with Lawyer Yassine Djermoune, 3 April 2019

no direct or indirect compensation and when the act consisted in providing legal, linguistic or social advice or support, or any other aid provided for an "exclusively humanitarian purpose".[144]

However, the principle of "fraternity" does not extend to the border as the humanitarian exemption does not apply when the person is prosecuted for assisting entry to French territory. Furthermore, by adding "exclusively" to "humanitarian purpose", French lawmakers narrowed down the type of motive that can exempt a person from prosecutions and lends itself to restrictive interpretations potentially based on ideological preconceptions. As the French Ombudsman warned the notion of "exclusively humanitarian purpose" permits situations where certain persons may benefit from the exemptions as stated in the law while others would be convicted for the same facts.[145] Importantly, the French law also criminalizes "indirect" facilitation without defining the actions constituting "indirect" facilitation.

The cases below show how human rights defenders in the area of Briançon have been prosecuted and even convicted under facilitation legislation. They also demonstrate how the current law fails to protect acts of solidarity, and how the current border control practice has expanded the scope of behaviours falling under the criminal offence of facilitation of irregular entry.

6.2.1.3 CRIMINALIZING ASSISTANCE AND RESCUE IN THE ALPS: THE CASE OF PIERRE MUMBER

Pierre Mumber
© Private

Pierre Mumber, a 55-year-old father of four living in the region of Briançon, manages a lodge while working as a mountain guide. He has been assisting refugees and migrants through the *maraudes* since 2017. "People started coming to Briançon, I was confronted with that issue, it is as simple as this. I started being involved in the network 'Welcome', offering my house as a shelter. When people arrived in front of us, it was concrete, tangible. Then we put in place the *maraudes* in the mountains on skis, to see if we met people in difficulty. My house and my free time are dedicated to that."[146]

On 6 January 2018, Pierre Mumber was in Montgenèvre, a French town on the border with Italy, on a *maraude* outing with other volunteers, walking by the snowy roads to help people in need after crossing the mountains from Italy.[147] Having come across two Nigerians, one Cameroonian and one Guinean, he was giving out tea and offering clothes when two police officers arrived. They walked the asylum-seekers to their cars, accompanied by Pierre Mumber. During the police controls, Pierre stood at a distance. After a while, two of the four asylum-seekers escaped the police's control.

On 12 October 2018, Pierre Mumber was summoned[148] for facilitating irregular stay, circulation or entry.[149] On 10 January 2019, he was convicted and sentenced to a suspended prison term of three months by the lower criminal court of Gap (*tribunal correctionnel*) for "direct or indirect assistance, facilitation or attempts to facilitate the entry of three foreign persons in an irregular situation, including K.A in this case, by accompanying them when crossing the border and by intervening directly to prevent the police officers from dismissing them."[150] According to the Prosecutor of Gap, "Pierre knew they [people on the move] would be

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[144] Article 38, Law on asylum and immigration, 10 September 2018 modifying article L622-4 4 Code of entry and residence of foreigners and right of asylum https://www.legifrance.gouv.fr/affichTexteArticle.do?idArticle=JORFARTI000037381865&cidTexte=JORFTEXT000037381808&categorieLien=id

[145] Défenseur des droits, Rapport on the rights of refugees and migrants du 14 Décembre 2018, p.67

[146] Interview with Pierre Mumber in Briançon, 29 March 2019

[147] When refugees and migrants were crossing at Col de l'Echelle, a very dangerous route, the *maraudes* had to take place on ski. As the route moved to the area around Clavière and Montgenèvre, the *maraudes* have taken place on foot, while carrying warm clothes and hot tea

[148] In "*audition libre*", the person is questioned without being formally charged on the grounds that authorities believe there are elements indicating the person may havecommitted or attempted to commit an offense. The person is informed of the offense in question, he/she is free to leave the hearing at any time and the presence of the lawyer is not required. Article 61-1 of the Code of criminal procedure https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000028991696&cidTexte=LEGITEXT000006071154

[149] Article L622-1 and 622-2, Code of entry and residence of foreigners and right of asylum

[150] Ruling, Tribunal correctionnel de Gap, 10 January 2019

sent back" and his actions intended to help the refugees and migrants to avoid the control by the police.[151] The police had claimed that he had obstructed the arrest of the refugees and migrants and that he opened the police car to help them escape, an allegation denied by him and his lawyer. A video seen by Amnesty International, which was not submitted to trial at first instance, shows that he did not open the police car. In appeal, the judges reviewed the video and acquitted Pierre Mumber, concluding that the elements provided in the police records were not accurate.[152]

Pierre Mumber should have never been charged and prosecuted: he had humanitarian motives and his purpose was to provide basic assistance -hot tea and warm clothes- to refugees and migrants. However, the judge at first instance convicted Pierre Mumber deeming that he had "no intention to drive the migrants to border control to declare their entry into the national territory and that only the identity check operation by the police ensured that people without documents could be prevented from entering the national territory, as their escape showed."[153] By holding Pierre Mumber responsible for not ensuring the migration control, the judge added an obligation not foreseen in the legal definition of facilitation. This obligation worked as a condition he had to refute to show he did not commit any criminal offence. Yet, if volunteers were to be required to take the people they assist to the police, the whole purpose of their humanitarian work would be undermined, as it would be impossible for them to approach those needing their assistance.

"I had never faced an issue with the police at 55 years-old. What shocked me was in the first interaction with them [on 6 January 2018], how the police behaved toward the people [refugees and migrants]; it was like they did not exist. You don't know what they have been through, you do not know for how long they have been walking in the snow. Sadly, asylum-seekers and refugees hide from everyone now, including us. For many nights you might not see anyone in the mountains, they are hiding. But you can see their steps on the snow along the road."[154]

By offering his help to people crossing the snowy mountains between Italy and France, Pierre Mumber tried to compensate for the manifest state's failure to fulfil its obligations to protect the physical integrity and the dignity of foreign nationals in situations of great vulnerability on its territory.

This case shows how acts of assistance can fall under the vaguely defined offence of facilitation. Moreover, the provision criminalizing the facilitation of irregular entry and its application in practice creates the presumption that any help constitutes *a priori* an offence, unless the human rights defender provides proof that they acted in the narrow remit of the humanitarian exemption. With the reintroduction of internal border checks and the expansion of the physical border, people providing basic assistance like Pierre Mumber, no longer operate within the remit of the exemption. Authorities can always consider that actions such as offering tea or warm clothes contributed, direct or indirectly, to unauthorised entry.

6.2.1.4 CRIMINALIZING PROTEST: THE CASE OF THE "BRIANÇON 7"

On 22 April 2018, some of the volunteers and groups who were supporting refugees and migrants at the border between Italy and France (see above) decided to react to a demonstration, called "Operation Defend Europe" which *Génération Identitaire*, a group advocating for an anti-human rights agenda, was organizing. At the time, about a hundred supporters of *Génération Identitaire* reached the area and hired two helicopters, an aircraft, and some off-road vehicles. Dressed in blue uniform-like jackets, they laid a large banner in the snow and stopped refugees and migrants coming from Italy through the mountains. They intended to show that the border could be closed. The organizers were later tried and convicted for offences related to the events of those days.[155]

Their arrival of *Génération Identitaire* near the border created a climate of fear in Briançon.[156] As explained by a volunteer, Mathieu Burelleir, "Defend Europe" was not an operation of communication only", it had real consequences. "The fear put us in maximum alert, all places hosting undocumented people were under

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[151] Interview with the Prosecutor of Gap, 5 April 2019.
[152] Ruling, Court of Appeal of Grenoble, 21 November 2019.
[153] Ruling, Tribunal correctionnel de Gap, 10 January 2019.
[154] Interview with Pierre Mumber in Briançon, 29 March 2019.
[155] In July 2019, the Hautes-Alps tribunal in Gap handed down a 75,000 EUR fine to the organization and sentenced three of the organizers to six months suspended prison terms and a fine of 2,000 EUR each for their activities during "Operation Defend Europe" which were carried out with the intent to create confusion in the public by performing functions that are to be carried out solely by law enforcement officials. See: Opération anti-migrants au col de l'Échelle : prison ferme requise contre des membres de Génération identitaire https://www.france24.com/fr/20190712-france-operation-anti-migrants-prison-ferme-requise-contre-membres-generation-identitaire; and https://it.euronews.com/2019/08/30/generation-identitaire-condannato-il-gruppo-di-estrema-destra-per-l-iniziativa-sulle-alpi
[156] See the Report of the Independent Expert on human rights and international solidarity, para. 25 "In many areas of the world, far right or other extremist elements of civil society have engaged in mass mobilization, group confrontation and other practices that have been aimed at, or had the effect of, intimidating or harming those who render humanitarian assistance to irregular migrants., A/HRC/41/44, point 25, 16 April 2019 http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/44

protection". [157] Anne Chavanne, a volunteer who managed the shelter *Le Refuge* in Briançon, told Amnesty International: "When their supporters arrived here, we were so scared that we slept in the shelter that night, in case something happened to the refugees and migrants we host."[158]

That same weekend, about 200 people gathered in Clavière, a small ski town in Italy on the border with France, for a conference on the "militarization" of the French-Italian border. The gathering turned into a protest against the actions of *Génération Identitaire*. The protesters decided to start marching toward the French border. French border guards did not prevent the demonstrators from crossing and they managed to reach Briançon without the police stopping them. According to the Sous-Prefect of Briançon, the demonstrators "forced their way, with almost 200 people and 20 migrants (*sic*)"[159].

On 7 July 2018, precisely one day after the constitutional ruling on the principle of *fraternité,* seven protesters - Benoit Ducos, Lisa Malapert, Mathieu Burellier, Jean-Luc Jalmain, Bastien Stauffer, Eleonora Laterza and Theo Buckmaster- were formally charged. As supporters of migrants' and refugees' rights in Europe, they had expressed their solidarity during the march.[160]

Following the trial on 8 November 2018, all seven accused were convicted.[161] Benoit Ducos, Bastien Stauffer, Eleonora Laterza, Lisa Malapert and Theo Buckmaster were each sentenced to a suspended six-month prison term. Because of additional infractions, Mathieu Burellier and Jean-Luc Jalman were both sentenced to one year of prison including eight months as a suspended sentence.[162] The appeal is still pending.

The reasoning of the court in applying the offence of facilitation of illegal entry to the demonstrators raises a number of concerns in this case.

First, the fact that the authorities can punish "indirect" facilitation of irregular entry is highly problematic, as it allows for excessive discretion by the authorities. Facilitation of irregular entry is conceived as an autonomous offence, independent of the intent to enter irregularly by the foreign national.

According to the court, the protest was a way to facilitate the unlawful entry of refugees and migrants into France. The court ruling mentions the presence of "20 foreigners" among the protesters, but it does not provide details on their status in France. According to the investigators, "protesters were perfectly organized, surrounding continuingly the individuals susceptible to be in illegal status who were easily identifiable with their black skin colour and their winter outfits despite the warm weather".[163] On the day of the protest, the authorities did not identify any participant without legal status. The day after the march, on 23 April 2018, the Prosecutor of Gap ordered a house search in the youth and cultural centre of Briançon "to look for foreigners who could have been present during the protest."[164] Ousmane Conde, a Guinean national, was found by police in the centre and found to be without a residence permit in France. He told the police that he reached France from Italy in the context of the protest. For the criminal act of facilitating illegal entry to be committed, according to the President of the Gap Tribunal, there needs to be "at least one migrant" whose entry is facilitated.[165]

The status of Ousmane Conde was determined as irregular after the protest and there is no evidence that any of the seven persons convicted assisted him to cross the border irregularly. As the President of the Gap Tribunal explained to Amnesty International, "Facilitating illegal entry is not complicity, it is an autonomous offence. There is no need for the proof that the one person without a status wanted to enter French territory. The facilitation of entry offence was not devised for cases such as this. They indirectly helped at least one foreigner to enter. As long as the 'indirect' word is in the law, it can open the doors to this kind of case."[166]

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[157] Interview with Mathieu Burellier, 31 March 2019.
[158] Interview with Anne Chavanne, 30 March 2019.
[159] Interview with the Sous-Prefect of Briançon and the Director of services, 1 April 2019
[160] Following the protest, Bastien Stauffer and Theo Buckmaster, two Swiss nationals, were arrested based on intelligence provided by the Swiss services to the French local services. Together with Eleonora Laterza, Italian national, they were placed in pre-trial detention on 24 April 2018 until the tribunal of Gap approved their request to be released on 3 May 2018. They were then put under judicial control until trial. Mathieu Burellier was also arrested following the protest but released on bail. The four others were summoned by the police in the following weeks, but they were not put in custody.
[161] Verdict on on 13 December 2018.
[162] Mathieu Burellier was also convicted for « rebellion » (article 433-6 of the Criminal code) and Jean-Luc Jalman for « voluntarily continuing to participate in a gathering after the warnings » (article 431-1 of the Criminal code) regarding another protest on 22 September 2018.
[163] Ruling, Tribunal correctionnel de Gap, 13 December 2018.
[164] Ruling, Tribunal correctionnel de Gap, 13 December 2018.
[165] Interview with the President of Tribunal de Grande Instance de Gap, 5 April 2019.
[166] Interview with the President of Tribunal of Gap, 5 April 2019.

Benoit Ducos, one of the seven convicted in relation to the protest denies any intent or plan to facilitate the entry of people: "The protesters did not plan that they would go up to Briançon, they thought they would be stopped before."[167] The President of the Gap Tribunal told Amnesty International that the law enforcement officers at the border had been "obviously powerless to prevent the protesters from advancing, they bypassed the road, there was no way to control them… the [criminal] action continued in time and space, Briançon is in the 20km area of the Schengen border."[168]

Because under French law, indirect acts are included in the facilitation offence, the "Briançon 7" were convicted out of 200 protesters for assisting irregular entry without proving a link between their participation in the march and the fact that Osmane Conde crossed the border. Furthermore, the simple presence of black persons in the protest was enough for French authorities to investigate the offence of irregular entry without evidence of their status. As Benoit Ducos put it, "they were protesters among protesters, and they were also there to defend their fundamental rights".[169]

Secondly, the case highlights how the criminal offence of facilitation of irregular entry without a material benefit requirement leaves discretion to the authorities to use the law to curb solidarity expressed through protest, and as a result, curtail freedom of expression and assembly.

The court grounded the ruling against the "Briançon 7" on the "undeniable"[170] right of the state to control its borders. The President of Gap Tribunal was explicit that, "the protest served as a mean to allow the entry of people in irregular situation, there was a logic in their action… this case is not ordinary because it's political. It [the protest] was a political manifesto to show an injustice and that was clearly claimed at the hearing. They [the demonstrators] cannot use a protest to smuggle migrants. Even if it is not normal not to be able to treat normally people seeking asylum and people freezing in the mountains…We prosecuted those with an 'active' behaviour, those who lead the protest."[171] Examples of active behaviours were holding the banners at the forefront of the protest or filming the protest and police officers. The Prosecutor of Gap, drawing a distinction between "mafia smugglers" and 'activist smugglers', agreed: "what is of interest to me is the border… It is not possible that the protest was spontaneous and there is no need for the conduct to be premeditated. They [the demonstrators] cannot help [the migrants] against the law. I cannot accept arguments that people are prosecuted for solidarity. To offer help is something different. Here there was not financial gain but an "activist" [type of] gain…. they can defend their ideas, but not by violating the law."[172] The ruling mentions, as inculpating circumstances, that during the demonstration there were "chants hostile to law enforcement officers ("everyone hates the police"), as well as communications on a Facebook page prior to the protest whose content was hostile to police and border guards.[173] For the Sous-Prefect of Briançon, the demonstrators' target is the border police, "it's philosophical, they want to open the borders."[174]

Similar views have generally been expressed by national authorities. In April 2018 the Minister of Interior distinguished three scenarios in the use of anti-smuggling laws: "the smuggling networks", "people who occasionally help migrants and should not be penalized" and "the third category of people, the most dangerous: people who call for the removal of borders, so to join *en masse* French territory irregularly, in the name of their convictions."[175]

In absence of the objective element of material gain to define the offence, the political beliefs of those convicted appear to have played a role in their prosecution. According to Yassine Djermoune one of the lawyer of the "Briançon 7", "Introducing 'financial compensation' into the law would prevent any inclination to prosecute solidarity actions."[176]

Third, the "Briançon 7" were convicted following their participation to the protest. The criminal charges and sanctions to punish protesters interfere with their rights to freedom of expression and assembly. While some

[167] Interview with Benoit Duclos, 1 April 2019.
[168] Interview with the President of the Tribunal of Gap, 5 April 2019.
[169] Le Dauphiné Libéré, Montgenèvre/Briançon : Après la manifestation de dimanche, en réaction à l'action de Génération Identitaire, 27 April 2018
[170] Ruling, Tribunal correctionnel de Gap, 13 December 2018
[171] Interview with the President of the Tribunal of Gap, 5 April 2019.
[172] Interview with the Prosecutor of Gap, 5 April 2019
[173] Ruling, Tribunal correctionnel de Gap, 13 December 2019
[174] Interview with the Sous-Prefect of Briançon and Director of services, 1 April 2019
[175] "We obviously cannot support them; it would be against all our laws. It is normal not to penalize those who, by generosity, help migrants in the street - many French people do it. But it should not be confused with the last category of people, extremely dangerous - including for migrants - and totally irresponsible" Hearing of the Ministry of Interior, Parliament http://www.assemblee-nationale.fr/dyn/15/dossiers/immigration_maitrisee_droit_asile_effectif?etape=15-AN1
[176] Interview with Lawyer Yassine Djermoune, 3 April 2019

restrictions to these rights are admissible, they need to pass a test of legality, necessity and proportionality. Yet, French authorities have failed to meet this test.

INTERNATIONAL STANDARDS REGARDING THE RIGHT TO FREEDOM OF EXPRESSION AND ASSEMBLY

The right to freedom of expression and the right to freedom of assembly are fundamental rights.[177] can be limited under very narrow circumstances in the interest of national security or public order, but such restrictions on these rights must be necessary and proportionate.[178] For any restriction to be lawful, states must show "in specific and individualised fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".[179] The European Court of Human Rights has considered that such assessments must be supported by evidence and should not be speculative.[180] In this regard, law enforcement and judiciary authorities should consider the different elements of a protest on a case-by-case basis, including its intent.[181]

The Human Rights Committee has stressed the strong correlation and relationship between the right to freedom of peaceful assembly and the right to freedom of expression.[182] The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has also stressed that assemblies should be presumed lawful and not constituting a threat to public order.[183] In the cases of solidarity with people on the move, the right to freedom of peaceful assembly has particular relevance to the right to defend human rights.[184] As recognized by the UN Declaration on Human Rights Defenders everyone has the right to, individually and in association with others, participate in peaceful activities against violations of human rights.[185]

According to the Independent Expert on human rights and international solidarity, "the prosecution or intimidation of humanitarians who participate in or support street protests in solidarity with irregular migrants or refugees" are *prima facie* violations of this right.[186] The criminalization or suppression of protests in solidarity with irregular migrants and refugees is manifestly unjustifiable, even under any of these permissible limitations [national security or public order]."[187] .

Those In the case of the "Briançon 7", the misuse of anti-smuggling criminal charges and sanctions to punish individuals that participated in a demonstration, alongside refugees and migrants, constitutes an undue interference with their rights to freedom of expression and assembly.

Solidarity with refugees and migrants can take many forms, including public and peaceful expression of opinions and demonstrations. The demonstrators in the Briançon march wanted to express their rejection for the anti-migrant and xenophobic stunt of *Génération Identitaire*.[188] The irregular crossing by one foreign national, -which was only found out after the protest, following the house search the day after-,[189] allowed the authorities to crack down on a solidarity protest. The misuse of facilitation charges emerges from the fact that there is no evidence nor any justification in the ruling linking specifically and individually the seven

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[177] Article 19 (2) ICCPR; Article 10 ECHR. See also *Kudrevičius and Others v. Lithuania* (37553/05), European Court Grand Chamber (2015) para. 91. See also *Navalnyy v. Russia* (29580/12), European Court Grand Chamber (2018) para. 93

[178] *Bakur v. Belarus*, Human Rights Committee (2015), UN Doc. CCPR/C/114/D/1902/2009, para. 7.8; *Pugach v. Belarus*, Human Rights Committee (2015), UN Doc. CCPR/C/114/D/1984/2010, para. 7.7; *See also* Human Rights Committee, *General Comment 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, paras 21-22. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, para. 22, UN Doc. E/CN.4/1985/4

[179] Human Rights Committee, General Comment 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34, para. 35.

[180] *Alekseyev v. Russia*, European Court of Human Rights (2010), para. 86.

[181] Council of Europe MSI-INT, "Report on Freedom of Assembly and Association on the Internet", 10 December 2015, para. 60

[182] Human Rights Committee, *General Comment 34, Article 19: Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, para. 4. See also *Galina Youbko v. Belarus*, Human Rights Committee, UN Doc. CCPR/C/110/D/1903/2009 (2014)

[183] Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (2013), UN Doc. A/HRC/23/39, para. 50

[184] UN General Assembly Resolution 72/247, adopted on 24 December 2017, UN Doc. A/RES/72/247, op. 2; Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/25/55, para. 66.

[185] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Adopted by General Assembly Resolution A/RES/53/144, Articles 6 and 12

[186] Report of the Independent Expert on human rights and international solidarity, A/HRC/41/44, point 38 p.12, 16 April 2019 http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/44

[187] Report of the Independent Expert on human rights and international solidarity, A/HRC/41/44, point 38 p.13, 16 April 2019 http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/41/44. .

[188] Council of Europe MSI-INT, "Report on Freedom of Assembly and Association on the Internet", 10 December 2015, para. 60

[189] Ruling, Tribunal correctionnel de Gap, 13 December 2018.

persons convicted with the person found without status.[190] Yet, as the French law criminalizes "indirect facilitation", a protest can be punished without establishing this direct link.

Amnesty International concludes that the conviction of the "Briançon 7" for facilitation of illegal entry violates their rights to freedom of expression and to freedom of assembly.

6.2.1.5 THE CHILLING EFFECT

The individual and accumulated effects of the routine checks by the police, harassment, unfounded accusations, arrests and convictions had a significant effect on human rights defenders in the region. Some people who used to take part in the *maraudes* in the mountains have stopped doing so, fearing for the consequences, among them losing their license as mountain guides or ski trainers.

Matthieu Burellier told Amnesty International: "I do not participate in *maraudes* anymore, and I've been participating for two years. I do not want to add anything in our file before the appeal."[191] Since Pierre Mumber's conviction in first instance, Didier Bruna-Rosso, a primary school teacher who had participated in around 20 *maraudes*, including one night when he provided direct assistance to three people facing grave danger in the snowy mountains, told Amnesty International:"I'm still afraid. I don't want to lose my job. They put pressure on us, going after the helpers. Now I don't cross the border even to eat a pizza, we are afraid that they are monitoring our phones."[192]

In addition to the fear, there is the fatigue. Volunteers are regularly subject to police control or summoned to the police station. Anne Chavanne, who works with *Le Refuge* and had also experienced eight police stops while driving, told Amnesty International "we are tired, which is super hard; we are not able to give people we welcome a message of hope."[193]

Maraudes have continued thanks to the persistent solidarity of individuals. As Matthieu Burellier said, "Thankfully we have a network that is strong enough, it gives us more strength. Otherwise the *maraudes* would have stopped. And at the beginning of winter, if you condemn solidarity, the side of death is chosen."[194]

6.2.2 TARGETING SOLIDARITY IN NORTHERN FRANCE

Human rights defenders providing humanitarian assistance, and documenting and denouncing human rights violations along the French-British border, particularly in the areas of Calais and Grande-Synthe (near Dunkirk), have been operating in an environment that is complex and difficult both for themselves and the people they assist.[195] Hundreds of migrants and refugees, including adults, unaccompanied minors, and families with young children, continue to arrive to the area hoping to cross over to the United Kingdom. While waiting to make their way to the UK, they continue to live in dire conditions in tents and informal camps in the area.

The French authorities have employed a range of measures to dissuade migrants and refugees from setting up informal camps and staying in the area, such as keeping reception centres and asylum offices away from Calais and Grande-Synthe, and deliberately failing to ensure adequate access to essential services such as water and sanitation, food and shelter. A key measure is the policy of preventing the establishment of so-called "attachment points", involving the routine forcible eviction of people who sleep rough or in encampments. This policy is implemented through the deployment of large numbers of police officers, transferred from elsewhere in France, working in stints of up to one month, and trained to deal with riots and crowd control, rather than with people in need. This has led to human rights violations against migrants and refugees, including beatings, misuse of teargas sprays, and routine forced evictions.[196]

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[190] On the contrary, as expressed by authorities, the conviction of the 7 was associated to their behaviours during their protest- "their active participation"

[191] Interview with Mathieu Burellier, 31 March 2019

[192] Interview with Didier, 2 April 2019

[193] Interview with Anne, 30 March 2019. One of the stops happened in October 2017 when she had picked up two minors on the road, was stopped and brought to the police station

[194] Interview with Mathieu Burellier, 31 March 2019

[195] For more analysis on this situation, please see Amnesty International, *Targeting solidarity: Criminalization and harassment of people defending refugee and migrant rights in northern France* (Index EUR 21/0356/2019) https://www.amnesty.org/en/documents/EUR21/0356/2019/en/ and *France: Abuses and impunity continue to worsen along the French-British border despite mounting evidence* (Index: EUR 21/1585/2019) https://www.amnesty.org/en/documents/EUR21/1585/2019/en/

[196] See for example: *Human Rights Watch, "Like living in hell", Police Abuses Against Child and Adult Migrants in Calais*, 26 July 2017; Auberge des Migrants, *Rapport sur les expulsions forcées*, April 2018; Refugee Rights Europe, *Twelve Months on*, 2017; Utopia 56, Cabane Juridique, Refugee Info bus, Auberge des Migrants, *Police Violence in Calais : abusive and illegal practices by law enforcement*

As they go about their humanitarian work in supporting migrants and refugees, human rights defenders have been facing a mix of intimidation, obstacles to aid delivery, and hostility aimed at discouraging their work. The tactics are varied and have included over recent years: smearing attacks, orders and instructions imposing arbitrary restrictions as to where and when aid can be provided and by whom; frequent ID checks; numerous parking fines; abusive language; threats of arrest; assault; and in some cases, detention and prosecution on a variety of charges, including defamation, contempt, and assault. Much of the intimidation and harassment takes place when individuals witness evictions and ill-treatment of migrants and refugees, when they monitor police behaviour during evictions, or when they denounce abuses.[197] The aggressive and abusive policing has contributed to creating a climate of fear and mistrust between human rights defenders and the authorities. This has resulted in a hostile environment where those defending the rights of migrants, asylum-seekers and refugees find themselves pitted against the authorities, just for doing their legitimate work.

For example, in February 2017, *Secours Catholique* (Caritas France) worker **Mariam Guerey** was arrested in Calais on suspicion of smuggling migrants and taken to the police station along with a journalist and five teenage migrants that she was transporting in the organization's van. The arrest happened when Mariam was driving the children back to their tents, after they had taken a shower at the site of the charity. As she was being apprehended, police told her "we know who you are". She was released a few hours later without charge.[198]

Between 2017 and 2018, local humanitarian organizations started to record all incidents of abuse that they experienced. They counted 646 separate instances of police abuse against volunteers and humanitarian workers between November 2017 and June 2018, including: unjustified parking fines; photos and video recording by police officers with personal phones; frequent ID checks; body and vehicle searches; insults and threats; and several cases of assault. [199]

Another human rights defender, **Tom Ciotkowski,** was assaulted by a police officer and prosecuted on trumped up charges. At the end of July 2018, he was observing and recording with his mobile phone how a police officer (an official of the *Compagnies Républicaines de la Sécurité*, CRS) pushed and kicked a volunteer who was trying to distribute food to migrants and refugees in Calais. When Tom complained, the officer approached him and another female volunteer. Tom asked the officer for his identification number, at which point the officer struck his female colleague with a baton. When Tom asked the policeman not to hit her, he was pushed hard backwards by the same officer, falling over a metal barrier separating the pavement from the road. As Tom fell backwards, a passing lorry narrowly missed him. He was then arrested, put into custody for 36 hours, and then released after being charged with contempt and assault ("outrage et violence"). He faced trial in June 2019 and was acquitted thanks to clear video evidence which showed what happened. In May 2019 Tom filed a complaint with the police oversight body, the IGPN (*Inspection générale de la Police nationale*) against the police officer who pushed him and against other officers who provided false reports against Tom to support his arrest and prosecution. A decision is still pending.[200]

Tom Ciotkowski
© Amnesty International

Loan Torondel, who worked with L'Auberge des Migrants in Calais, was charged with defamation for an ironic tweet he posted in January 2018. The tweet included a picture of French police officers standing over a man who appears to be a migrant or a refugee sitting on his sleeping bag. The caption suggests the officers are about to take away the man's blanket in very cold temperatures.[201] While being questioned by

officers, December 2018; IGPN, IGA, IGGN, *Evaluation de l'action des forces de l'ordre à Calais et dans le Dunkerkois*, October 2017; Défenseur des Droits, *Exilés et droits fondamentaux, trois ans après le rapport Calais*, December 2018

[197] See, for example, Utopia 56, Help Refugees, Refugee Info bus, L'Auberge des Migrants, Calais : le Harcèlement policier des bénévoles, August 2018

[198] France info, « Calais : une salariée du Secours catholique et une journaliste brièvement arrêtées par la police aux frontières », 15 February 2017, www.francetvinfo.fr/monde/europe/migrants/calais-une-salariee-de-secours-catholique-et-une-journaliste-brievement-arretees-par-lapolice-aux-frontieres_2061853.html

[199] Auberge des Migrants, Utopia 56, Help Refugees, Refugee Info bus, Calais: le harcèlement policier des bénévoles, August 2018

[200] The investigation of the complaint has been sent to the Prosecutor of Boulogne sur Mer, who will take a decision regarding the prosecution. Amnesty International, "France: Trumped up charges against human rights defender must be dropped" (News 15 May 2019); "France: Acquittal of young man for showing compassion to refugees in Calais shows solidarity is not a crime" (News 20 June 2019)

[201] https://twitter.com/LoanTorondel/status/947827212153180161?s=19

the police investigating the complaint for defamation, he said he was repeatedly asked about his work and the information he published, and was warned, "be careful, we are watching you".[202]

At the time he was responsible for monitoring and publishing information about the daily evictions and excessive use of force by police against migrants and refugees. In September 2018, he was found guilty of "defamation of public officials" and sentenced to a suspended fine of 1,500 EUR, and to almost 1,000 EUR in costs and damages, which were not suspended.[203] The sentence was confirmed on appeal in June 2019.[204] Loan Torondel decided then to bring the case to the Court of Cassation to challenge the use of the criminal defamation charges, which stifle freedom of speech and intimidate those who document police abuse in France.[205]

Loan Torondel
© Benjamin Girette

In October 2019, **E.B.**[206] a 20-year-old British volunteer with the Human Rights Observer project, was assaulted by police. E.B. told Amnesty International how, on arrival in Grande-Synthe with two colleagues, she was ID checked by CRS agents, who took her passport. The CRS officers also checked the inside of their car, without providing any legal document to justify the search. One of her colleagues started filming the incident with his phone but an officer grabbed the phone, deleted the videos and photos taken, while another one held him back. E.B. then also started filming and was grabbed from the back and dragged away from the group. The officer then released and pushed her and started shaking a teargas canister. By then she had stopped filming and raised her hands. A second police officer then approached her, grabbed by the neck, and searched her pockets. She was asked for her passport again, which was still with other CRS officers who had taken it earlier for checking, and was told: "This is France, and in France you respect the police, this is not the UK!". She and the others were then let go and her passport was returned. A week later she went to the local police station to report the assault. She was told by the officers at the reception desk who took the initial information (such as the car registration number of the CRS van and police ID number of one of the officers who assaulted her) that the superiors were refusing to take the statement and tried to dissuade her from filing the complaint. According to E.B., she insisted close to an hour before they finally accepted to take the complaint. One month later, in November 2019, E.B. received a letter from the Prosecutor's office saying that the events and the information submitted in her complaint did not constitute a crime. She is currently considering whether to challenge this decision and has filed a complaint with the Ombudsperson office (*Défenseur des Droits*) and the IGPN.

6.2.3 CONCLUSION

In France, authorities have targeted human right defenders through smear attacks, police intimidation, harassment, and court proceedings, imposing undue restrictions to the right to defend human rights and violating the freedom of expression and assembly.

While in Northern France authorities have hampered aid delivery through routine identity checks, fines and other forms of police harassment, at the French-Italian border authorities have abused a combination of security measures to crack down on solidarity. Enabled by a flawed legislation on facilitation, authorities have misused the law to target human rights defenders through the courts.

French legislation is problematic and lends itself to be abused in practice. First, because facilitation without any material gain is considered as a criminal offence, which is at variance with the international definition of smuggling, that requires a material gain as a constitutive element of the offence. Secondly, the law does not

[202] Interviewed in Calais, July 2018
[203] Amnesty International, "France: Criminal conviction for a tweet will have chilling effect on migrants defenders" (News, 25 September 2018) https://www.amnesty.org/en/latest/news/2018/09/france-criminal-conviction-for-a-tweet-will-have-chilling-effect-on-migrant-rights-defenders/
[204] Amnesty International France, « Affaire Torondel: Coup dur pour la défense des droits humains en France » (News, 23 June 2019)
[205] The Court of cassation accepted the case in January 2020
[206] Interviewed by Amnesty International in December 2019

define the behaviours that constitute facilitation; however, it criminalizes direct and indirect facilitation. This allows for an expansive interpretation of the offence in practice, as authorities can decide that acts of human decency and solidarity, such as giving tea and protesting, contributed, direct or indirectly, to unauthorized entry. The lack of material gain combined with the criminalization of indirect actions of facilitation can result in criminalizing human rights defenders, potentially based on ideological preconceptions. Third, the humanitarian exemption from prosecution does not apply to cases of facilitation of irregular entry and it is also narrowly defined for cases of facilitation of irregular stay and circulation, as there needs to be an "exclusively" humanitarian purpose.

6.3 GREECE: FRIENDS TO FOES, THE CHANGING CLIMATE TOWARDS HRDS HELPING REFUGEES AND MIGRANTS

Refugees, asylum-seekers and migrants continue to attempt to reach Europe travelling from Turkey to Greece, notwithstanding EU attempts at blocking the route.[207] The maritime route through the Aegean remains to date a very dangerous one. Numerous incidents at sea, including distress situations, were reported throughout 2019.[208] International Organization for Migration (IOM) recorded 71 deaths along the Aegean route during the year, adding to the 174 deaths recorded in 2018.[209] Those who make it and are received by the Greek authorities on the islands, stay in grossly inadequate and overcrowded facilities for long periods of time.

Public perception and attitude towards NGOs working with refugees and migrants in Greece has shifted over time, reflecting the authorities' changing approach to migration policies, from welcoming HRDs and the assistance they provided to people seeking safety in Greece, to an increasing suspicion and hostility.[210]

After arrivals of refugees and migrants in the country peaked in 2015, in January 2016 a Joint Ministerial Decision imposed new registration requirements for NGOs operating in Lesvos and created a Coordination Committee for their monitoring.[211] Also, in September 2016 a Ministerial Decision created a National Registry for NGOs working on international protection, migration and social integration.[212] This came on top of a vetting procedure for rescue NGOs already introduced by the Greek Coastguard.[213]

January 2016 marked also the first use of anti-smuggling legislation against NGOs.[214] Greek law criminalises the facilitation of irregular entry of third-country nationals as well as that of transit and residence, with sanctions that place Greece at the higher end of the 'criminalisation spectrum' compared to other EU states. No material benefit is required for the commission of the offence. [215]

Spanish fire-fighters, Manuel Blanco, Julio Latorre and Jose Enrique Rodríguez, who worked in Lesvos with the rescue NGO Proem-Aid, and two rescuers of the Danish NGO Team Humanity, Mohammed Abbassi and Salam Aldeen, were accused of attempted human smuggling. They were all acquitted on 7 May 2018.[216] As their case closed, Greek authorities opened another major criminal investigation of HRDs' activities on suspicion of facilitation of irregular entry.

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[207] See Amnesty International, A blueprint for despair: human rights impact of the EU-Turkey deal, February 2017, https://www.amnesty.org/en/documents/eur25/5664/2017/en/

[208] Only between March and June 2019, Alarm Phone received 58 emergency calls in the Aegean, including 43 boats in distress, 18 of which returned to Turkey, https://alarmphone.org/en/2019/06/28/alarm-phone-aegean-report/?post_type_release_type=post.

[209] https://missingmigrants.iom.int/region/mediterranean?migrant_route%5B%5D=1377

[210] Mariana Gkliati, 'When volunteers became smugglers: The criminalization of 'Flight Helpers' in Greece', May 2016 https://leidenlawblog.nl/articles/when-volunteers-became-smugglers-the-criminalization-of-flight-helpers-in-g

[211] Joint Ministerial Decision 4151.4183/166 on the Establishment in the General Secretariat of the Aegean and Island Policy of a Coordinating Committee Registering, Coordinating and Evaluating NGOs on Lesvos island, Official Gazette, 28 January 2016, paras. 5-7, at https://www.statewatch.org/news/2016/jan/greek-doc.pdf. See Observatory for the Protection of Human Rights Defenders, World Organisation Against Torture (OMCT), Greece: Ongoing crackdown on civil society providing humanitarian assistance to migrants and asylum seekers, citing the "last minute" introduction of Art 96 to the Law No. 4368/16 (21 A'/21.02.2016), assigning "the supervision and coordination of services…to the Greek Army and Minister of Defence, in newly established army-run facilities", April 2016, https://www.omct.org/human-rights-defenders/urgent-interventions/greece/2016/04/d23733/

[212] See Ministerial Decision No. 39487/16: "Establishment of a National Register of Greek and Foreign Non-Governmental Organizations (NGOs) active in the field of international protection, migration and social integration issues". of 8 September 2016 https://www.ypes.gr/UserFiles/f0ff9297-f516-40ff-a70e-eca84e2ec9b9/apof39487-08092016.pdf

[213] Fit for purpose, above, p.68 citing an interview with national border/coast guard authorities, 9 June, 2017.

[214] According to a study, between 2015 and 2017 Greece criminalised a total of 53 people for various forms of assistance to refugees and migrants, going beyond cases of alleged facilitation of irregular entry. See: ReSOMA Final Synthetic Report Crackdown on NGOs and volunteers helping refugees and other migrants, June 2019, at: http://www.resoma.eu For instance, activists in Idomeni, at the Greece and North Macedonia border, were accused of "'inciting"' refugees to "'storm' the razor-wire fence". See: Gkliati, 'Proud to Aid and Abet', https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/05/proud-aid- and.

[215] Fit for purpose, above, p. 34

[216] Amnesty International, "Greece: 'absurd' people smuggling charges against three NGO volunteers should be dropped" https://www.amnesty.org.uk/press-releases/greece-absurd-people-smuggling-charges-against-three-ngo-volunteers-should-be

6.3.1 CRIMINALIZING ASSISTANCE ON THE SHORELINE, THE CASE OF SARAH MARDINI AND SÉAN BINDER

Sarah Mardini, a young professional swimmer from Syria, arrived on Lesvos in August 2015, after she and her sister had towed the dinghy they were travelling on. After arriving in Europe, she continued her journey towards Germany, where she obtained refugee status. Throughout 2016 and 2017 Sarah returned to Lesvos to volunteer with Emergency Response Centre International (ERCI) NGO as a trained rescuer. There, she met Séan Binder, a young deep-sea diver, and a German national living in Ireland, who also started volunteering as a rescuer for ERCI in October 2017.

ERCI provided search and rescue services and assisted refugees in Lesvos between 2015-2018, regularly passing information on arrivals to the Greek Coast Guard. Sarah Mardini and Seán Binder patrolled the Greek coasts spotting rubber boats in distress and assisted people at landing locations. On 17 February, on one such mission, 2018 they were stopped and identity-checked by the Greek police. They were found in possession of two unlicensed radios and the car they were using, a vehicle leased by ERCI, was found to have fake military plates concealed beneath its regular number plates.

Police held Sarah Mardini and Séan Binder for interrogation for 48 hours and searched their flats. Following their first arrest and questioning, police investigations continued, leading to both being arrested again on 21 August 2018.[217]

Sarah Mardini remembers that moment as a terrible blow: "I remember we testified and then the judge said 'you are going to stay under arrest until the trial'. And I just broke down in tears that day … in one second, my whole life went upside down".[218] As Séan Binder told Amnesty International:

"It was horrendous to come to the realisation that we were in prison for having done nothing more but trying to assist people and it was even more frightening to realise that that was happening to many other people across the European Union".[219]

Sarah Mardini and Seán Binder
©Amnesty International

[217] The police press release on Sarah and Sean's case dated 28 August 2018 stated that the investigation identified that six Greek nationals and 24 foreigners, were involved in the facilitation of "people-smuggling". See http://www.astynomia.gr/index.php?option=ozo_content&lang=%27..%27&perform=view&id=81285&Itemid=2129&lang=. ERCI staff member and founder Panos Moraitis, its programme director, Mirella Alexou and its field director, Nassos Karakitsos were charged. Mirella Alexou was in pre-trial detention until November 2018 while Nassos Karakitsos was also in pre-trial detention until December
[218] Interview with Sarah Mardini, August 2019
[219] Interview with Séan Binder, August 2019

The Prosecution has built a complex accusation which ties the core charge of the case, that of facilitation of irregular entry of third country nationals, aggravated by allegedly being committed as part of a criminal organization, to other allegations of money laundering, espionage, disclosure of state secrets, unlawful use of radio frequencies, forgery and fraud.[220] If convicted they face up to twenty-five years in prison.

Sarah Mardini and Seán Binder were released on bail on 4 December 2018, upon payment of €5,000 EUR each. By then, they had spent more than 100 days in pre-trial detention. After their release on bail, the Immigration Office of the Greek Police imposed an entry ban on Sarah Mardini that prevents her from re-entering into the Greek territory even for the trial. Amnesty International considers that the ban breaches Sarah Mardini's fair trial rights, including the right to a fair and public hearing, to hear and challenge the prosecution case and present a defence.[221]

The investigation rests on the charges of facilitation of irregular entry of third-country nationals. Investigators believe that ERCI members and volunteers were circulating information on the departure of refugees' boats from Turkey, including their coordinates during the journey and the place of landing, and deliberately failed to notify the competent authorities, therby preventing Turkish coastguard from pulling the boats back and the Greek Coastguards and Frontex from intercepting them. The prosecution argues that these combined behaviours amounted to assisting smuggling groups.

Sarah Mardini and Seán Binder claim they were not even in Lesvos during some of the identified incidents. No legal provision under Greek law obliges individuals to inform the authorities about the arrival of boats. At any rate, a potential omission to report such an incident does not constitute smuggling as defined under international law. Furthermore, the charges regard as criminal conduct some of the key and legitimate activities conducted by NGOs at the frontline, such as coordinating the response to migrants' arrivals or being present in an area where boats land to carry out first aid activities. According to Sarah Mardini and Seán Binder's lawyer, Clio Papapantoleon:

"Criminal law does not only punish but also has an ideological and educational aspect: it calls for compliance and indicates, not just legal, but also moral standards. Therefore, confusing smuggling with helping or saving lives is extremely dangerous… [this case] marks a change of paradigm: although members of NGOs or volunteers have been prosecuted in the past, this is the first time a whole organisation is being accused, and, surprisingly, an organisation that has collaborated closely with the Greek authorities. The Head of the NGO, the staff, and the volunteers from all around the world have been prosecuted, as well as members of others, internationally known and well respected, organisations".[222]

The Greek Law on 'Immigration and Social Integration (the Migration Code) which implements the Facilitators' Package, criminalises both the facilitation of irregular entry into the Greek territory and that of transit and residence. [223] In the context of the case, charges are brought under Article 29 and 30 of the Migration Code, sanctioning facilitation by private individuals and carriers respectively with prison sentences, for individuals, of up to 10 years and fines of a minimum of 20,000 EUR, without prejudice to possible aggravating circumstances.[224] Article 29 does not describe the conducts which are deemed criminal, simply stating that "persons who facilitate the entry or exit from the Greek territory of third-country nationals without performance of the [statutory] checks" are punishable. The facilitation charges are further aggravated, as they are considered in combination with the alleged membership of a criminal organisation.[225]

Under Greek law, the element of "material benefit" is only considered as an aggravating circumstance of facilitation, despite Greece's ratification of the UN Smuggling Protocol which considers it as a constitutive part of the crime. The exemption from punishment for humanitarian actions is also applied restrictively. According to Article 30(6) of the Migration Code, those responsible for facilitation may be exempted from

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[220] The charge of fraud was pressed in April 2019 by the Prosecutor of the Court of Appeal of Lesvos
For the charges see Greek Criminal Code: Forgery, Article 216; Violation of the State's Secrets, Article 146; Espionage, Article 148. Both Forgery and the possession of portable radios of without license were also sanctioned under separate specialised pieces of Greek legislation For the charge of money laundering see Articles 1,2,3 and 45 of law 3691/2008 on the 'Prevention and suppression of money laundering and terrorist financing and other provisions'. For an analysis of the charges see Human Rights Watch, 'Greece: Rescuers at Sea Face Baseless Accusations', November 2018, https://www.hrw.org/news/2018/11/05/greece-rescuers-sea-face-baseless-accusations

[221] UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32, https://www.refworld.org/docid/478b2b2f2.html

[222] Interview with Clio Papapantoleaon. December 2019

[223] Greece: Law No. 4251, G.G. A' 80 of 2014, Code for Immigration and Social Integration and other provisions, 1 April 2014. In November 2019, Article 30 of the law has been amended by Law No. 4637/2019 which significantly increased monetary fines for carriers. See: https://www.kodiko.gr/nomologia/document?id=579051

[224] If the act is committed with the intent to make a profit, 'by profession or habit' or through the action of 'two or more persons', it is punishable with a prison sentence of minimum 10 years and fines of 50,000 EUR as a minimum

[225] Art. 187 of the Greek Criminal Code

punishment, although not from prosecution, "in case of rescue of people at sea or transport of people in need of international protection as required by international law", or in very specific cases of facilitation of transport, irrespective of the migration status of those assisted.[226] The restrictive scope of the clause fails to protect other humanitarian activities, including "relief support on land"[227] and places an unfair burden on humanitarian workers who "cannot identify whether the individual is in need of international protection".[228]

The forgery charge in the case of Sarah Mardini and Seán Binder focuses on the fake military plate concealed under ERCI's regular number plate vehicle. The prosecution claims that this was a subterfuge for the two volunteers to access restricted military areas along the beach where refugees sometimes disembark. Amnesty International considers the charge wholly unsubstantiated. ERCI's car had the NGO logo displayed prominently on both sides of the car, which dispels any intent to deceit. Also, based on information available to Amnesty International, no evidence has been presented of them entering any restricted area. The charge appears to be particularly unfair towards volunteer humanitarian workers who generally rely on equipment made available to them and on which they have no control.

The charges of espionage and disclosure of state secrets rely on the use of unlicensed radios for listening to communications of the Greek Coast Guard and Frontex, and on the use of this information for unlawful activities. Amnesty International understands that there is no evidence of any communication with refugee boats aimed at helping them elude border controls and therefore takes issue with the use of criminal provisions to tackle the mere failure to obtain radio licenses. Furthermore, volunteers use the means provided to them and can hardly be expected to check whether law and regulations about licencing have been abided by the organization they volunteer for. Amnesty International also understands that the radio frequencies in question were not encrypted and could be, and in fact were, listened to by other NGOs to communicate with the Greek Coast Guard.[229]

The charge of money laundering is linked to fundraising activities that the two volunteers carried out for ERCI. In the view of the Prosecution, Sarah Mardini unlawfully exploited her profile and story as a Syrian refugee to this end. To Amnesty International's knowledge, both the evidence presented so far and the police investigations into Sarah Mardini and Seán Binder's bank accounts have not uncovered any wrongdoing. However, the accusation risks undermining trust in NGOs and their ability to fundraise, a critical activity for many civil society organisations. Raising funds is not only a legitimate activity that NGOs routinely undertake, but "is an inherent element of the right to freedom of association".[230]

The final indictment on their case is currently pending. At the time of writing, the investigation is ongoing, leaving Sarah Mardini and Seán Binder in a legal limbo that has lasted already almost two years. While waiting for the investigation to be concluded, they are trying to have a normal life. As Sarah explained,

"It's like a big conflict that we live in right now and we try to swim our way through normal life but it's hard… It felt like a game of chess and we are just pieces in it and they [the authorities] are just playing with us. But at the

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[226] Through an amendment brought by Law No. 4332/2015, the humanitarian exemption under Article 30(6) was expanded to include cases of facilitation of transport aimed at ensuring that the third country national is presented to the relevant authorities and entered in the relevant protection or other procedures, provided that the police and coastguard authorities have been informed. As observed by Emmanuel Melissaris, the amendment was aimed at overcoming the onerous requirement whereby, for the humanitarian exemption to apply, the individuals transported must be 'in need of international protection', exempting behaviours aimed at facilitating the assessment of the third-country national's migration status. The introduction of this exception benefitted volunteers working with asylum-seekers, refugees and migrants in Greece and allowed the acquittal of-some of them in 2015. See: Emmanuel Melissaris, Legal dehumanising: on the arrest of refugee solidarity activists, 27 January 2016, at: https://www.opendemocracy.net/en/can-europe-make-it/legal-dehumanising-on-arrest-of-refugee-solidarity-activists/
Commentators have interpreted this provision to cover, even if it does not explicitly state it, the provision of temporary shelter when there are reasons of emergency such as provision of shelter to shipwreck survivors following their rescue. See Gasteratou A, The offences of irregular entry and exit of foreign nationals from the country and their transport under the Law 4251/2014, October 2016, available at: https://repo.lib.duth.gr/jspui/bitstream/123456789/10876/1/Gasteratou.pdf.

[227] Carrera et al. p.37

[228] Carrera et al. p. 41

[229] Similar considerations on the charges can be found in the detailed analysis in the Expert Report provided in support of the Mardini-Binder case before the Greek Courts. See: 'Expert report on the compatibility of the charges against Seán Binder and Sara Mardini with domestic and international law', submitted to the judicial authorities in July 2019. On file with Amnesty International

[230] A 2013 report of the Observatory for the protection of HRDs observed the 'increased stigmatization and undue restrictions in relation to access to funding and resources for civil society organizations'. The report relies , on the opinions of various UN bodies, including the Special Rapporteur on HRDs who noted how the prevention of money-laundering and terrorist financing are 'in many cases […] merely rhetorical [justifications] and the real intention of Governments is to restrict the ability of human rights organizations to carry out their legitimate work in defence of human rights' (p.25). Observatory for the protection of HRDs (International Federation for Human Rights (FIDH) and World Organisation Against Torture (OMCT SOS-Torture Network), Violations of the right of NGOs to funding: from harassment to criminalisation, 2013 Report, p.5, 13, 25 available at:
http://www.fidh.org/IMG/pdf/obs_2013_human_rights_defenders_english.pdf citing: UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders, UN Document A/64/226, August 4, 2009, paragraph 94

end of the day, we have lives. We are people. It is a lot of emotional exhaustion, time money and just for no reason".[231]

6.3.2 NEW MEASURES RESTRICTING HRDS' ACTIVITIES

From 2019, the hostility of the authorities towards NGOs deepened further. In November, a new law on international protection introduced limits to NGOs' access to reception and detention places, requiring that they obtain a prior certification by the Ministry of Citizen Protection.[232] The authorities also announced the creation of task forces of police and immigration officers and officials from the Ministry of Labour and that of Finance to inspect NGOs activities.[233] In November 2019, upon Greece's announcement about the establishment of closed detention centres, the deputy defence minister Alkiviadis Stefanis told media that "only those [NGOs}…that meet the requirements will stay and continue to operate in the country".[234] Eventually, in February 2020, the Greek Parliament passed a new law which formally established the requirements for the registration of members and staff of NGOs working on migration in a Registry under the Ministry for Immigration and Asylum.[235] Upon the adoption of the law, the Greek Government's spokesman, Stelios Petsas, commented on the registry requirements, saying that it will list "members, staff and partners of organisations, so there is transparency and responsibility, as many NGOs may have helped decisively [...] but others operated in a faulty and parasitic manner."[236]

Within the framework of these developments, in December 2019, the CEO of Danish NGO Team Humanity, Salam Aldeen, was taken into custody and threatened with deportation from Greece. Two months before, he had been listed in the Greek national list of "undesired foreigners" (EKANA), having been considered to pose a threat to national security, and subjected to a re-entry ban which prohibits him from entering Greece for three years. Aldeen was not notified by the Greek authorities of the decision to include him in EKANA. He was never informed of the reasons for the listing and the national security grounds for the decision remain secret despite calls of human rights organizations urging authorities to disclose the grounds and information to Aldeen and allow him to defend himself effectively.[237] On 31 December, Aldeen returned to Denmark, effectively being forced to abandon his humanitarian work.

In addition to targeting specific defenders, Greek authorities' recent and general remarks against NGOs reveal, at a minimum, a lack of understanding of NGOs and HRD's role and right to operate. Their views on NGOs and HRDs are not consistent with EU and international standards. The EU Asylum Procedures Directive explicitly acknowledges NGOs role, noting that requiring Member States to provide information to asylum-seekers "only through the services of qualified lawyers" would be "disproportionate" and they "should therefore have the possibility to use the most appropriate means to provide such information", including through NGOs.[238] The Directive also provides for NGOs' right to access detention facilities and border crossing points under Article 8.[239] The newly introduced restrictions on NGOs risk creating an undue interference in their operations, undermining their independence and could, in turn, undermine asylum-seekers' rights to access protection procedures effectively.[240]

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[231] Interview with Sarah Mardini, August 2019

[232] See Law No. 4636/2019 on International Protection and other provisions, at Article 66. In November, steps were also taken to urge NGOs to register under the 'National Register of Greek and Foreign Non-Governmental Organizations (NGOs) active in the field of international protection, migration and social integration issues', established back in 2016 (See footnote 2018). While the criteria considered for NGOs' registration are left unspecified in the law, on 26 November 2019, the Ministry for Citizens protection announced a 10-day deadline for NGOs to register: https://www.thenationalherald.com/271063/greeces-refugee-migrant-ngos-face-ban-unless-registered/

[233] CNN Greece, 'New data on NGO certification and licensing - What the government plans', Nov 2019, https://www.cnn.gr/news/ellada/story/198332/nea-dedomena-stin-pistopoiisi-kai-adeia-leitoyrgias-ton-mko-ti-sxediazei-i-kyvernisi

[234] "The Guardian, 'Greece to replace island refugee camps with 'detention centres', Nov 2019, https://www.theguardian.com/global-development/2019/nov/20/greece-to-replace-island-refugee-camps-with-detention-centres

[235] Article 191 of Law 4662/2020, "National Mechanism for the Management of Crises and Tackling Dangers, Restructure of the General Secretariat of Civil Protection, Upgrading the system for volunteering on civil protection, reform of the Fire Brigade and other provisions" available at: https://www.e-nomothesia.gr/kat-politike-prostasia-psea-pallaike-amyna/nomos-4662-2020-phek-27a-7-2-2020-2.html.

[236] See Petsas' declaration in Euractiv, Greece passes new law to better monitor NGOs dealing with migration, 5 February 2020, https://www.euractiv.com/section/justice-home-affairs/news/greece-passes-new-law-to-better-monitor-ngos-dealing-with-migration/

[237] Based on phone interviews and email exchanges with Salam Aldeen lawyer, Mr Nikolaos Kaptanis, in December 2019. Amnesty International, *Amnesty calls on Greece to urgently disclose the evidence for the proposed deportation of human rights defender helping refugees in Lesvos*, 19 December 2019, at: https://www.amnesty.org/download/Documents/EUR2516122019ENGLISH.pdf

[238] Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, Recital no 22. See also Article 21 and 22,

[239] See above, Article 8

[240] Greece: Amnesty International submission on the proposed changes to the Greek Law on international protection, Oct 2019, p. 7, at: https://www.amnesty.org/en/documents/eur25/1280/2019/en/

6.3.3 CONCLUSION

Greek authorities have misused criminal and administrative provisions to effectively obstruct the action of HRDs.

They have misused facilitation charges against HRDs, enabled by legislation on facilitation of irregular entry, which is problematic both in its formal aspects and application in practice. First, the facilitation of irregular entry without any material gain is treated as a criminal offence and not as an administrative infringement. Secondly, Greek law is at variance with the international law definition of smuggling, in that it treats the aim to obtain a "financial or other material benefit" as an aggravating circumstance rather than as a constitutive element of the crime. Furthermore, the scope of the exemption from punishment for acts committed with a humanitarian purpose, the humanitarian exemption, is so narrowly defined that it excludes a wide array of activities performed by NGOs and HRDs. Also, while exempting from punishment, the provision fails to bar the prosecution of HRDs for their human rights work. In so doing, it also fails to protect HRDs from long judicial proceedings that have significant material, reputational and psychological impact on their lives. Finally, and more generally, the failure to define which behaviours constitute facilitation means that Greek law lends itself to being misused to target an open-ended array of behaviours commonly conducted by HRDs working with refugees, as the case of Sarah Mardini and Seán Binder exemplifies.

Greek authorities have also pressed other criminal charges that affect HRDs' ability to raise funds and have equally imposed administrative requirements, which unduly limit the rights and operations of NGOs and HRDs, which are protected by the right to freedom of assembly and association.

6.4 ITALY: RESCUING LIVES AT SEA IN THE CENTRAL MEDITERRANEAN

Between 2015 and 2018, NGO vessels rescued over 118,000 people in distress in the central Mediterranean.[241] NGO ships rescuing refugees and migrants have arguably become the most visible symbol of solidarity towards people fleeing war, persecution and poverty. Because of their success in saving lives and of the visibility and powerful imagery of their action, they have also been at the receiving end of attempts by the authorities to restrict and punish their activities and of virulent smear campaigns and denigration by politicians, representatives of institutions, commentators and anti-immigration groups.

Most NGOs began taking to the sea in 2015,[242] after two major shipwrecks claimed over 1,200 lives between 12 and 19 April 2015, at a time when Italy had stopped its life-saving Operation Mare Nostrum and therefore left a significant gap in rescue capacity in the central Mediterranean. By the end of 2016, 13 vessels and a couple of surveillance aircrafts were being operated by NGOs, including Médecins Sans Frontières (MSF), Save the Children, the Spanish Proactiva Open Arms, the French SOS Mediterranée and several German NGOs such as Sea-Watch, Jugend Rettet and Sea Eye.[243] More organizations joined in subsequent years. The number of rescue vessels has since been fluctuating, with some ceasing operations or being substituted due to operational decisions or as a result of criminal investigations involving their seizure, and with a few new ones starting their operations later on, such as the vessel of Italian NGO Mediterranea.[244]

According to the available evidence, rescue NGOs have consistently operated in compliance with the law of the sea and, during rescue operations, under the coordination and under the instructions of the Italian or, more rarely, the Maltese coastguard. [245] The involvement of NGOs in rescue activities has been shown to have reduced the mortality rate associated with crossings. In addition, NGOs have contributed to improving the overall quality of rescues, effectively taking on many of the rescues that would otherwise have been carried out by less suitable commercial vessels, often using rescue boats specially designed and equipped for refugees and migrants' rescues, with well-trained staff, including medics on board.[246] Patrolling waters at a distance of 20-30 nautical miles from Libya's coast, where most of the refugee and migrants' boats run into difficulty, NGO vessels have ensured considerably greater safety at sea in an area of the central Mediterranean which would have otherwise remained largely unpatrolled, filling the gap in search and rescue capacity left by state authorities.[247] This became particularly evident in 2016, when the pattern of departures from Libya changed, with smugglers sending out to sea numerous boats at the same time, using boats which were even less seaworthy and more overcrowded than in the past, often with nobody on board provided with a satellite phone to call for help. These new smugglers' methods stretched the Italian coastguard and Maltese authorities' coordination and rescue capacity to the limit.

The different scenario was not met by states with the necessary increase in resources focusing specifically on search and rescue operations where they were needed.[248] Instead, European leaders shifted their attention towards ways of preventing departures from Libya and reducing the number of people reaching Europe. In June 2016, EUNAVFOR MED's mandate was expanded to include training of the Libyan coastguard and Navy to increase their capacity to intercept refugees and migrants and bring them back to Libya. In January 2017, the European Commission's joint communication on "Migration on the Central Mediterranean route - Managing flows, saving lives" set out the EU plan to cooperate with Libya on migration.[249] It included a commitment to assist the Libyan authorities in establishing a Maritime Rescue

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[241] Italian coastguard data, https://www.guardiacostiera.gov.it/en/Documents/search-and-rescue-activity/search-and-rescue-activity-and-migratory-flows-in-central-mediterranean-sea.pdf; and https://www.guardiacostiera.gov.it/en/Pages/search-and-rescue.aspx

[242] The NGO MOAS started operating in 2014 alongside Italian operation Mare Nostrum

[243] https://openmigration.org/en/analyses/how-the-humanitarian-ngos-operate-at-sea/

[244] https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities

[245] Amnesty International examined NGOs role and impact in the reduction of the mortality rate in *Europe: A perfect storm: The Failure of European Policies in the Central Mediterranean,* 6 July 2017, Index: EUR 03/6655/2017 https://www.amnesty.org/en/documents/eur03/6655/2017/en/ Even though deaths at sea increased in 2016, when the presence of NGOs increased, a closer, month-by-month look at the trend of deaths compared with the presence of NGOs vessels, showed that deaths were higher before NGOs presence picked up in 2016 and went down when more NGOs vessels were at sea

[246] *Europe: A perfect storm: The Failure of European Policies in the Central Mediterranean,* 6 July 2017, Index: EUR 03/6655/2017 https://www.amnesty.org/en/documents/eur03/6655/2017/en/

[247] For a detailed analysis of the role on NGOs between 2015 and June 2017, and of the changing scenarios in the central Mediterranean see *Europe: A perfect storm: The Failure of European Policies in the Central Mediterranean,* 6 July 2017, Index: EUR 03/6655/2017 https://www.amnesty.org/en/documents/eur03/6655/2017/en/

[248] For an analysis of the changes in the central Mediterranean in 2016, see *Europe: A perfect storm: The Failure of European Policies in the Central Mediterranean,* 6 July 2017, Index: EUR 03/6655/2017 https://www.amnesty.org/en/documents/eur03/6655/2017/en/

[249] Joint Communication of the European Commission to the European Parliament, European Council and the Council on Migration on the Central Mediterranean route - Managing flows, saving lives, at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-

Coordination Centre and to support the provision to the Libyan coastguard with additional patrolling assets and ensure their maintenance. On 3 February 2017, the European Council meeting in Malta adopted a Declaration including support for Italy's bilateral efforts to cooperate with Libya to control migration.[250] The path was set: Europe had decided that refugees and migrants had to be contained in Libya, despite the real risks of human rights abuses they would suffer there. By this time, the presence of NGO vessels trying to rescue refugees and migrants fleeing from Libya to disembark them in Europe had become an obstacle to the implementation of EU leaders' strategy to keep them there.

6.4.1 CRIMINALIZATION OF SEA RESCUE NGOS: A SMEAR CAMPAIGN

The language used by officials to refer to sea rescue NGOs started changing towards the end of 2016. Representatives of institutions, politicians and commentators started raising suspicions about the role and motives of NGOs, suggesting that the very presence of their vessels near Libyan territorial waters and their methods of operating encouraged departures, fuelling the smuggling trade and ultimately contributing to the rising death toll at sea, albeit not providing any evidence for such claims. Insinuations were made about direct contacts between the NGOs and smuggling networks. Question were raised over the source of their funds to finance search and rescue activities.[251]

Allegations casting doubts over the role of NGOs were initially made in confidential Frontex documents from late 2016, later reported in a Financial Times article of December 2016.[252] In these documents, Frontex claimed that NGOs' methods of operating were facilitating the smugglers' activities (for example, operating close to Libyan territorial waters; using powerful light beams visible from afar; and not collecting relevant evidence from refugees and migrant boats). The Frontex documents strongly implied that rescues were being carried out directly by NGOs and were therefore potentially pre-arranged between the NGOs and the smugglers. In February 2017, Frontex director stated in interviews that NGOs constituted a pull-factor for people in Libya, that they were not cooperating sufficiently with law enforcement agencies in combatting smuggling and trafficking, and that they had contributed to smugglers using cheaper and more dangerous rubber boats rather than the wood fishing vessels that were used in the past – ignoring the fact that one of the main aims of the EUNAVFOR MED operation was the destruction of smugglers' boats.[253]

Although Frontex later changed the tone of the initial statements on NGOs, their attempt in September 2019 at contracting a surveillance company to monitor social media activities of NGOs in the context of departures of refugees and migrants from Africa towards Europe indicates that the agency continues to view NGOs not as performing a legitimate function that state and interstate institutions are required to protect but as adversaries potentially implicated in irregular border crossings. After being challenged by privacy right groups, the call for tender was cancelled.[254] Similar activity by the European Asylum Support Agency (EASO) was challenged by the European Data Protection Supervisor on grounds of lacking any legal base.[255]

Also in February 2017, the public prosecutor of Catania, Sicily, soon to become one of the most vituperative critics of rescue NGOs, announced that his office had opened an investigation, without identifying any suspects or a specific criminal conduct, but aimed at looking into the methods of operating of NGOs and into their financial sources, as he suspected potential collusion with smugglers. He refrained, however, from detailing the evidence supporting his suspicions.

Meanwhile, Italian politicians, such as high-profile representatives of political parties Movimento Cinque Stelle and Lega Nord (now Lega), also began questioning the role and real agenda of NGOs operating at sea. In a particularly damaging comment, the former Minister of Economic Development, Labour and Social Policies (and current Minister of Foreign Affairs), of the Movimento Cinque Stelle, described rescue NGOs as

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do/policies/european-agenda-migration/proposal-implementationpackage/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf

[250] http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/

[251] Italy: Losing the Moral Compass: Innuendoes against NGOs which Rescue Lives in the Central Mediterranean, 28 April 2017, Index: EUR 30/6152/2017 https://www.amnesty.org/en/documents/eur30/6152/2017/en/

[252] EU border force flags concerns over charities' interaction with migrant smugglers, FT, https://www.ft.com/content/3e6b6450-c1f7-11e6-9bca-2b93a6856354

[253] Italy: Losing the Moral Compass: Innuendoes against NGOs which Rescue Lives in the Central Mediterranean, 28 April 2017, Index: EUR 30/6152/2017 Italy: Losing the Moral Compass: Innuendoes against NGOs which Rescue Lives in the Central Mediterranean, 28 April 2017, Index: EUR 30/6152/2017 https://www.amnesty.org/en/documents/eur30/6152/2017/en/
See also https://www.internazionale.it/notizie/annalisa-camilli/2017/04/22/ong-criminalizzazione-mediterraneo

[254] https://privacyinternational.org/long-read/3288/privacywins-eu-border-guards-cancel-plans-spy-social-media-now

[255] https://edps.europa.eu/sites/edp/files/publication/19-11-12_reply_easo_ssm_final_reply_en.pdf

"taxis of the sea," implying that they were rescuing people who are not really at risk of drowning.[256] Such accusations followed narratives that were being pushed by a number of commentators, in particular in TV shows run on national channels owned by former Prime Minister Silvio Berlusconi, a key ally of Lega Nord.

Against this background, in Italy, three parliamentary inquiries looked into the role of rescue NGOs in the Mediterranean, and their potential collusion with smugglers. Representatives of rescue NGOs, of the Italian coastguard and navy, and public prosecutors were invited to give evidence, among others.[257] The NGOs vigorously denied all the allegations of collusion with smugglers and offered numerous elements to explain the way in which they operated and how they financed their work. Their contribution towards saving lives at sea was acknowledged by the Head of the Italian coastguard and by the Commander of EUNAVFOR MED, who also added that NGOs were part of a system of relations among international and national maritime authorities, which included regular meetings to coordinate activities.[258]

However, some of the officials who gave evidence to the parliamentary committees made undermining statements against rescue NGOs, without providing any evidence of wrongdoing, thus continuing to fuel suspicion about their activities.[259]

The statements of Catania's public prosecutor were arguably the most damaging, while at the same time lacking detail and substance. The public prosecutor justified the lack of evidence by referring to undisclosed information which could not be submitted as evidence in court, making it impossible for NGOs to rebut allegations about coordination between Libyan smugglers and NGOs. He also repeatedly referred to "substantial" funds received by NGOs to finance their rescue activities, to the presence of people who "do not correspond to the characteristics of a philanthropist" among the staff of NGOs, and to the possible existence of motives[260]As the parliamentary inquiries continued and media reported on them, on 27 April 2017, interviewed on national television, Catania's public prosecutor alleged that some NGOs might be aiming to destabilize the Italian economy to benefit from this.[261]

The parliamentary inquiries did not unearth any evidence to support the allegations that NGOs were implicated with smugglers or benefitting from their activities unlawfully. Yet, the baseless allegations and insinuations by several high-level authorities offered a hook to certain media to disseminate biased and unsubstantiated messages linking rescue NGOs with allegations of criminal conduct, obscure funding and secret agendas, contributing to the wider smear campaign against NGOs that continue to undermine the image of rescue NGOs to this day.

While concluding that there was no evidence of any wrongdoing by NGOs, the Senate's parliamentary inquiry nonetheless recommended adopting restrictive measures for the operations of NGOs' vessels, arguing that they constituted a new category of vessels at sea. According to the Senate, NGOs vessels were neither commercial nor state ships, but constituted a third category, performing a systematic rescue at sea activity which required a framework of clear rules. A certification or registration system was proposed, and more

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[256] https://www.huffingtonpost.it/entry/quando-luigi-di-maio-disse-che-le-ong-sono-taxi-del-mare-la-polemica-con-saviano_it_5cc1ebf2e4b0aa856c9e8ee3

[257] Indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative, Senato, 4ª Commissione permanente
http://leg17.senato.it/service/PDF/PDFServer/BGT/1023441.pdf

http://leg17.senato.it/leg/17/BGT/Schede/ProcANL/ProcANLscheda37920.htm (elenco audizioni)

http://leg17.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=1022318&part=doc_dc (audizione Cartosio e Tarondo)

Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione. This Committee heard the public prosecutor of Catania and several representatives of NGOs in March and April, http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/30/indag/c30_confini/2017/03/22/indice_stenografico.0041.html
Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migranti e sulle risorse pubbliche impegnate. This Committee heard the Commander of Operation Sophia, Rear Admiral Credendino in April 2017, http://www.camera.it/leg17/1058?idLegislatura=17&tipologia=audiz2&sottotipologia=audizione&anno=2017&mese=04&giorno=06&idCommissione=69&numero=0082&file=indice_stenografico

[258] See the transcript of the hearing of the head of the Italian coastguard Maritime Rescue Coordination Centre at the Senate defence committee at: http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=1022010; see also the transcript of the hearing of the head of EUNAVFOR MED operation at the same committee at:
http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=1011982

[259] See for example, Frontex Director's statements, Legislatura 17ª - 4ª Commissione permanente - Resoconto sommario n. 220 del 12/04/2017 http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=1013350&part=doc_dc

[260] Legislatura 17ª - 4ª Commissione permanente - Resoconto sommario n. 227 del 03/05/2017, http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=1021969&part=doc_dc; XVII Legislatura, Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione, Resoconto stenografico, Seduta n. 41 di Mercoledì 22 marzo 2017,
http://documenti.camera.it/leg17/resoconti/commissioni/stenografici/html/30/indag/c30_confini/2017/03/22/indice_stenografico.0041.html

[261] http://www.rainews.it/dl/rainews/media/Migranti-ad-Agora-Rai3-il-procuratore-di-Catania-Carmelo-Zuccaro-Alcune-Ong-finanziate-dai-trafficanti-e44f464e-fb75-4124-acfc-61851f6152cd.html

transparency was also recommended about their finances. Furthermore, the Senate stated that no humanitarian corridors could be allowed to transport people in Italy without the authorities' permission.[262] The road was open for the imposition of a code of conduct, which would unduly restrict the operations of rescue NGOs and put migrants and refugees at greater risk of suffering human rights abuses in Libya.

6.4.2 INSTITUTIONALISING SUSPICION: A CODE OF CONDUCT TO IMPOSE UNNECESSARY CHECKS AND UNDUE RESTRICTIONS ON RESCUE NGOS

In July 2017, the Italian government, with the support of the EU, imposed a code of conduct on NGOs engaged in sea rescue activities. The code constituted an attempt by the Italian authorities to limit the number of rescues undertaken by NGOs in order to reduce disembarkations in Italy, and also to press other EU states to share the responsibilities related to refugees and migrants' reception. In fact, the preamble of the code states that the Italian authorities' aim in rescuing migrants is the protection of the right to life, but also that rescues cannot be seen separately from "a path of sustainable reception shared with other member states" on the basis of the principle of European solidarity.[263] Along with many NGOs, Amnesty International criticized the code of conduct in a joint statement with Human Rights Watch, denouncing that it could hinder rescue operations and delay disembarkations in a safe place within a reasonable amount of time, breaching the obligations that both states and shipmasters have under the international law of the sea.[264]

The code, which continues to be applied, contains 13 requirements that NGOs are asked to meet. Some of these are a superfluous reiteration of law of the sea rules which NGOs vessels must respect anyway, as they have been doing all along. In fact, no evidence of NGOs' violating the law of the sea has emerged during the parliamentary inquiries or so far in criminal investigations. For example, the first provision of the code of conduct requires that NGOs, "in conformity with relevant international law", commit not to enter Libyan territorial waters, except in situations of grave and imminent danger which require immediate assistance, and not to hinder the search and rescue activities of the Libyan coastguard. The provision reflects law of the sea rules that allow ships to enter the territorial waters of a state to comply with the obligation to save people in distress at sea. In fact, the law of the sea limits the right of innocent passage in the territorial waters of a state only in specific circumstances which render the passage prejudicial to the peace, good order and security of the coastal state.[265] Similarly, the requirement not to switch off or delay the transmission of signals through the Automatic Identification and other systems; and the requirement to observe the obligation to keep constantly updated the competent maritime rescue coordination centre and on scene coordinator during a rescue operation are both law of the sea obligations routinely implemented by rescue NGOs.

Some other provisions of the code impose undue restrictions which are not based in the law of the sea and can hinder the life-saving activities of rescue NGOs, such as the requirement not to use light signals to facilitate the departures of refugee and migrants' boats, except when communications are necessary during search and rescue operations. While there is no evidence that NGOs have facilitated departures from Libya, NGOs may need to make themselves visible to the people in danger at sea, whose lives they set off to rescue. Similarly, the requirement that NGOs do not transfer rescued people onto other ships unless so requested by the maritime rescue coordination centre and that they return to port to disembark refugees and migrants could remove NGOs' vessels from the area where they are needed for long periods of time, leaving more people at risk of drowning.[266] Such a requirement appears guided by the intention to keep NGOs away from the area where they may be needed for long periods. Furthermore, the code requires NGOs to inform and maintain updated the flag state about the rescue operations they are engaging in, allegedly for maritime security reasons. Maintaining communications not only with the competent maritime rescue coordination centres but also with the flag state, which could be geographically remote to the area of operations, adds bureaucratical requirements at a time – during a rescue at sea – when focus and resources should be devoted only to achieve the safety of those in distress. In fact, contact with the flag state is generally not required by relevant maritime law and regulations regarding search and rescue, which aim to streamline communications as much as possible.

Other provisions in the code place undue and burdensome requirements on NGOs, which could infringe on their right to freedom of association. These include: NGOs' vessels and crews meeting specific technical

[262] http://www.senato.it/service/PDF/PDFServer/BGT/1023441.pdf
[263] "Tuttavia, l'attività di salvataggio non può essere disgiunta da un percorso di accoglienza sostenibile e condiviso con altri Stati membri, conformemente al principio di solidarietà di cui all'art. 80 del TFUE.""
[264] https://www.amnesty.eu/news/eu-draft-code-for-sea-rescues-threatens-lives-1057/
[265] Article 19 UNCLOS
[266] https://www.amnesty.eu/news/eu-draft-code-for-sea-rescues-threatens-lives-1057/

criteria to undertake mass rescue operations; NGOs' agreeing to receive on board armed police officials to carry out criminal investigations into smuggling and trafficking; NGOs' commitment to declare to the authorities of the state where the NGO is registered the sources of funding for search and rescue activities and to communicate this information to Italian authorities; NGOs agreeing to loyally cooperate with the police of the place of disembarkation, including by transferring relevant information before disembarkation; and NGOs committing to recuperate, wherever possible, the refugees and migrants' boats and their engines and to inform Frontex Triton operation and the relevant maritime authorities about this.

While many of the requirements in the code of conduct constitute unnecessary impositions on NGOs with no demonstrable rationale that they would ensure more effective rescues, other requirements could potentially place people at risk or constitute infringements of the right to freedom of association. The requirements to accept armed police on board and share information with investigators represented an insurmountable ethical obstacle to signing the code for some of the NGOs, as it effectively demanded them to compromise on their neutrality, independence and impartiality.

The Italian government asked NGOs to sign the code of conduct by 31 July 2017, or, as the text of the code indicates, they would be considered to be operating outside the lawful framework of rescue at sea, with potential consequences for their safety at sea.[267] Media reports related statements from Ministry of the Interior officials indicating that the vessels of the NGOs which had not signed the code could be subjected to all safety checks that the authorities would deem necessary and could be impounded.[268] Of the NGOs which were active in the central Mediterranean at the time, Moas, Proactiva, Save the Children, and Sea-Eye signed or announced their signature by the deadline, while SOS Mediterranée signed later in August 2017 after the Ministry of Interior agreed that an addendum clarifying some of the clauses could be attached to the code.[269] Jugend Rettet, MSF and Sea-Watch refused to sign. In a long letter addressed to the Minister of Interior, MSF motivated its refusal in detail and stressed that some of the requirements of the code constitute a threat to the organization's independence, neutrality and impartiality.[270] In October 2017, Sea-Watch also signed, also attaching a clarificatory addendum to the code.[271]

By September 2017, four NGOs – Moas, MSF, Save the Children and Sea-Eye - suspended their operations in the central Mediterranean due to concerns for the safety of their crews and that they would not have been able to perform their activities consistently with their mission.

As a 2018 European Parliament study noted, the imposition of the code of conduct "institutionalised suspicion and introduced exceptional rules solely for civil society"; it also "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 state, intimidation and arrests of the staff and seizures of boats, so that life-saving humanitarian operations would not continue."[272]

Amnesty International opposed the imposition of the code of conduct from the start because it contains unnecessary restrictions on HRDs' activities, favours interceptions by the Libyan coastguard and shelters the Libyan coastguard from having witnesses to its operations. Moreover, the organization considers the code of conduct to be redundant and potentially dangerous as it can delay the course of search and rescue operations, and to unduly infringe on the right to freedom of association of NGOs.

Over two and a half years on, Amnesty International remains concerned about the impact that the code of conduct has on NGOs and their ability to save lives, and is further concerned that purported breaches of the code of conduct – which is not a source of law - have been regarded by some prosecutors as a potential additional incriminating element to boost the prosecution of the crews of rescue NGOs for facilitating irregular migration.[273]

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[267] https://www.interno.gov.it/it/notizie/codice-condotta-ong-terzo-incontro-viminale; https://www.repubblica.it/cronaca/2017/07/31/news/migranti_msf_non_firma_codice_ong-172058967/

[268] https://www.agi.it/cronaca/ong_codice_condotta_governo_non_firmano-1999389/news/2017-08-01/

[269] https://www.interno.gov.it/it/notizie/codice-condotta-salvataggio-dei-migranti-arriva-firma-ong-sos-mediterranee

[270] https://www.medicisenzafrontiere.it/news-e-storie/news/codice-di-condotta-la-lettera-di-msf-al-ministro-dellinterno/

[271] https://sea-watch.org/en/sea-watch-comes-to-an-agreement-concerning-the-code-of-conduct/

[272] Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants, 2016, https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf

[273] The Catania judge for preliminary investigations, in its decree validating the impounding [sequestro preventivo] of the *Open Arms* in March 2018, on file at Amnesty International, argued that the infringement of the code's provisions reveals the refusal to operate within the framework outlined by Italy and thus renders the conducts leading to the irregular entry of foreign nationals in Italy contrary to Article 12 of the Italian Immigration Act (pp 13-14 of the decree). Against such reasoning, and arguing instead for the irrelevance of compliance with the code of conduct in relation to criminal liability, see Luca Masera, http://questionegiustizia.it/rivista/2018/2/l-incriminazione-deisoccorsi-inmare-dobbiamo-rassegnarci-aldisumano-_549.php

6.4.3 CRIMINAL INVESTIGATIONS AGAINST RESCUE NGOS

According to the public prosecutor of Catania, "NGOs are not the enemy. Prosecutors are not after NGOs."[274] Yet, since 2017, at least 13 criminal investigations have been opened in Sicily against them.[275] Why have prosecutors decided to pursue this strategy to combat people smuggling (while, for example, overlooking the proven collusion between elements of the Libyan coastguard and smuggling networks)?[276]

Prosecutors based in Sicily have been on the frontline of the fight against people smuggling and trafficking from the coasts of north Africa for nearly a decade. At the time of Italy's humanitarian naval operation Mare Nostrum (October 2013 to October 2014), their investigative efforts were facilitated by the framework provided by the Italian Navy operation, which rendered it possible to intercept smugglers' communications and have relevant evidence almost as events unfolded.[277] In the view of Catania's public prosecutor, the ending of Mare Nostrum, whose resources and capabilities were key to obtaining evidence, coupled with new smuggling tactics, paralyzed prosecutorial action.[278] In this context the intervention of NGOs, whose main priority was rescuing people rather than assisting judicial investigation, was perceived as unhelpful. In an interview with Amnesty International, Catania's public prosecutor compared NGOs' action to the families of kidnappings' victims paying ransom – something which Italy outlawed in the 1980s to deter a surge in kidnappings. He stressed that there is a danger that the state could lose control of migration flows through the action of NGOs which could create "humanitarian corridors outside state control"; in turn, uncontrolled migration would contribute to the worsening of problems such as irregular and unprotected labour, criminality and concerns with public order, drug trafficking, and racism.[279]

While it is arguable that some investigations were probably opened because of Catania's public prosecutor's views about the role of NGOs, the significant number of investigations opened not only in Catania, but also in Agrigento, Palermo, Ragusa, and Trapani and the level of police, judicial and intelligence resources used to investigate NGOs points to more systemic issues that have contributed to the failure of the state to protect and enable human rights defenders and their life-saving activities at sea. The way in which Italian legislation defines and punishes smuggling is one significant contributing factor.

Italy's Immigration Act (Legislative decree 286/1998) contains provisions that constitute the implementation of the Facilitators' Package. Article 12 of Italy's Immigration Act, which punishes conducts aimed at facilitating the irregular entry of a foreign national into the territory of the state, is the provision which has been used to criminalize rescue NGOs in most cases.[280] For the crime to be committed, Article 12 requires

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[274] Interviewed in Catania in February 2019

[275] These include: two investigations for facilitation of irregular migration opened in Palermo in April/May 2017 and closed in June 2018, against Jugend Rettet, Open Arms and Sea Watch; the ongoing investigation against Jugend Rettet opened in Catania and Trapani in August 2017 for facilitation of irregular migration and criminal association; the investigation against Open Arms opened in Catania and Ragusa in March 2018 for facilitation of irregular migration and criminal association; the investigation against MSF and SOS Mediterranée opened in Catania in November 2018 for trafficking in waste/ illegal waste disposal; the investigation against Sea-Watch opened in January 2019 for facilitation of irregular migration; two investigations against Mediterranea opened in March and in May 2019 in Agrigento for facilitation of irregular migration and disobeying a military ship; the investigation against Sea Watch opened in June 2019 in Agrigento for facilitation of irregular migration, disobeying the orders of a warship and violence against a warship; the investigation against Mediterranea opened in July 2019 for facilitation of irregular migration; two investigation against Open Arms and against unnamed people opened in Agrigento in August 2019 for refusal to perform due acts and facilitation of irregular immigration; the investigation against Mediterranea opened in Agrigento in September 2019 for facilitation of irregular migration; and that opened in Ragusa against Mission Lifeline also for facilitating irregular migration in September 2019. See Matteo Villa, ISPI, at https://twitter.com/emmevilla/status/1227559206649241600?s=20 and https://docs.google.com/spreadsheets/d/1a0f9T4pDIuIrW43kSG47F9xO_wSDaoZSeiiVEBwbqfM/edit#gid=0; see also Fundamental Rights Agency at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-ngos-search-rescue-mediterranean-table-2_en.pdf

[276] *Libya's dark web of collusion: Abuses against Europe-bound refugees and Migrants*, 11 December 2017, Index: MDE 19/7561/2017 https://www.amnesty.org/en/documents/mde19/7561/2017/en/

[277] Prosecutions were often frustrated by the lack of cooperation of foreign judicial authorities, for example in case of requests of extradition. Nevertheless, it was possible in some cases to identify the smugglers at the top of a network. Even then, though, the great majority of people charged with facilitation of irregular entry were refugees and migrants randomly put in charge of steering a boat by the smugglers in Libya

[278] Interviewed in February 2019 in Catania, Sicily

[279] Interviewed in February 2019 in Catania, Sicily

[280] Article 12 (1) of Italy's Immigration Act punishes conducts aimed at facilitating the irregular entry of a foreign national in the territory of the state or of another state of which the foreign national does not have citizenship or residence. The penalty foreseen for the basic offence is imprisonment from one to five years and a fine of 15,000 EUR for each person whose entry was facilitated.
Article 12 (2) of Italy's Immigration Act states that without prejudice to article 54 of the criminal code, rescue and humanitarian assistance activities carried out in Italy to help foreign nationals in need do not constitute a crime, irrespective of the circumstances of their presence on the territory. According to Article 54 of the Italian criminal code, regulating the state of necessity, one cannot be punished for having acted compelled by the necessity of saving oneself or another person from the actual danger of grave harm, as long as the danger is not of one's creation, is not otherwise avoidable and as long as the act is proportioned to the danger.
Article 12 (3) provides for aggravating circumstances of the offence, for example when the entry is facilitated for five or more people, when the facilitators are three or more, and having exposed the foreign nationals to danger or having ill-treated them. The penalty for the aggravated version of the offence is imprisonment for five to 15 years and a fine of 15,000 EUR for each person whose entry is facilitated.

the intent to carry out the conduct described in the offence, irrespective of the motive and of whether the aim is achieved. The financial or material profiting from the facilitation of irregular entry is an aggravating circumstance, rather than a constituting element of the crime. Defences such as "acting to fulfil a duty" and "acting in a state of necessity to save a person from the actual danger of grave harm" can exempt an individual from sanctioning.[281]

In April 2017, when giving evidence to the Italian Senate Defence committee, Trapani prosecutors emphasized that the interpretation of the state of necessity exemption in rescues carried out by NGOs would be the key element to decide if NGOs were to stand trial. Importantly, they noted that the exemption of state of necessity could be considered applicable not only to the risk of drowning but also to the risk of being subjected to violence in Libya.

As Amnesty International has documented in the past, refugee and migrants' boats from Libya are in most cases in distress from the moment they depart because they are generally unseaworthy, overcrowded, they lack sufficient fuel, provisions and equipment to sail in safety, and they are not operated by trained sailors.[282] This interpretation of their inherent state of distress is based not only on the many cases in which boats have suddenly deflated or capsized, but also on the Italian coastguard's interpretation of distress at sea and on a relevant EU regulation.[283] Furthermore, because a rescue operation is not concluded until disembarkation in a place of safety, actions to prevent the disembarkation of rescued refugees and migrants in a place where they would be at risk, such as in Libya, should not be subjected to prosecution and instead be deemed legitimate.

However, even though the state of necessity defence and the duty to provide life-saving assistance exonerate sea rescuers from punishment, they do not bar prosecutors from opening investigations. Indeed, NGOs' crews in Italy continue to face criminal proceedings, which take a heavy toll on the lives of those accused and can be irremediably damaging to the organizations. Some of the criminal investigations opened since 2017 were closed acknowledging that NGOs had acted in a state of necessity, but others remain open and have involved the application of measures such as the impounding or blocking of vessels in ports as part of criminal proceedings or for administrative and compliance reasons.[284]

6.4.3.1 THE CASE OF THE *IUVENTA*

The first days of August 2017 were a key moment for the implementation of EU and Italy's strategy to stop vessels departing from Libya. The deadline imposed on NGOs to sign the code of conduct was followed by Italy's deployment of a navy ship in Libyan territorial waters and of Italian navy officials on Libyan soil, upon request of the Libyan government. The aim of the operation was to further strengthen Libyan capacity to control sea borders and combat irregular sea crossings, effectively ensuring that refugees and migrants be intercepted and taken back to Libya before getting in proximity of foreign rescuers – who cannot lawfully return them to Libya.[285]

On 2 August, Trapani public prosecutors ordered the seizure of the *Iuventa,* the ship of German rescue NGO Jugend Rettet, and opened investigations against unnamed people for facilitating illegal immigration, aggravated by the number of people involved in the commission of the offence.[286] The *Iuventa* had rescued more than 14,000 people since it started operations. The *Iuventa* would operate close to Libyan territorial waters to be able to assist boats in distress as quickly as possible, including boats that had no means to send distress signals. In most cases, the Italian maritime rescue coordination centre would direct the *Iuventa*

Article 12 (3bis) provides that if two or more of the aggravating circumstances described at paragraph 3 are applicable, the punishment is increased.
Article 12 (3ter) provides for harsher penalties in case the act of facilitating entry is carried out to subject the foreign nationals to sexual or other exploitation (amounting to trafficking); or is carried out to obtain a profit, even if indirectly (amounting to smuggling). In these cases, the imprisonment can be increased by one third or be doubled and the fine is of 25,000 EUR for each person whose entry was facilitated

[281] Article 51 and 54 of the Italian criminal code

[282] *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 30 September 2014, https://www.amnesty.org/en/documents/EUR05/006/2014/en/

[283] Art. 9, 2, f of Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014, establishing rules for the surveillance of the external sea borders in the context of operations coordinated by Frontex - the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189/93, 27 June 2014

[284] Several cases have also led to investigations being opened against the authorities, including the Minister of Interior, for offences such as abuse of power, dereliction of duty and kidnapping (in relation to refusal to allow disembarkation). In March 2019, parliament voted against lifting the immunity of the former Minister of Interior thus blocking the criminal investigation against him for the alleged kidnapping of the people on board the *Diciotti* ship of the Italian coastguard, whose disembarkation was denied for days in August 2018. In February 2020, in another case of denied disembarkation of rescued people from the Italian coastguard ship *Gregoretti* in July 2019, parliament voted to allow the criminal investigation against the former Minister of Interior to proceed. The former Minister of Interior is investigated also in relation to the delayed disembarkation from the *Open Arms* in August 2019

[285] https://www.camera.it/_dati/leg17/lavori/documentiparlamentari/IndiceETesti/250/002/INTERO.pdf

[286] Under articles 81 and 110 of the Italian criminal code (which provides for aggravated penalties in case an offence is committed jointly with others), and article 12 (3) (a) and (d) and 12 (3bis) of Italy's Immigration Act (Legislative decree 286/1998)

towards boats in distress. Due to its modest size, *Iuventa* would operate by taking people on board to make them safe and wait for bigger rescue ships to arrive, which would then take them to a place of safety, usually in Italy or more rarely in Malta. Because of this role and way of operating , the *Iuventa* is seen by critics of civilian rescue in Italy as "the" 'migrant's sea taxi' - the derogatory label used by Italian anti-immigration politicians to describe rescue NGOs.[287] Jugend Rettet had declined to sign the code of conduct and its representatives believed that the authorities ordered the seizure in retaliation for their choice.[288] Prosecutors argued that the seizure was necessary as a measure to prevent further criminal conduct, after nearly a year of investigations into suspected aiding of illegal immigration.[289] At the same time, prosecutors made it clear that they believed the motives of the *Iuventa* crew to be genuinely humanitarian.[290]

In June 2018, Trapani prosecutors announced that ten former crew members of the *Iuventa* (seven German nationals, one British, one Portuguese and one Spanish), and 12 members of the crews of MSF and Save the Children's ships, and Father Mussie Zerai, a Catholic priest of Eritrean origin who assisted refugees at sea for over a decade, were being investigated for facilitating irregular migration.

Iuventa ship
©Iuventa

In the meantime, Jugend Rettet's appeals to obtain the release of the *Iuventa* were rejected first by the Tribunal of Trapani in September 2017, according to which the actions of the crew went beyond what was required by a rescue in a state of necessity; and then by the Court of Cassation on 23 April 2018, according to which Jugend Rettet had not taken adequate measures to avoid a convergence of its staff's activities with

[287] On the use of the term "sea taxi", see: https://www.ilpost.it/2017/04/27/taxi-migranti-ong/
[288] See https://iuventa10.org/ ; and https://jugendrettet.org/en/archive
[289] Sequestro preventivo, articolo 321, comma 1 e 2 cpp
[290] Immediately after the seizure of the Iuventa, the Trapani prosecutor told the media gathered at a press conference that he believed the motives of the Iuventa crew to be essentially humanitarian, with their only possible gain being in terms of image and donations, see: https://www.repubblica.it/cronaca/2017/08/02/news/migranti_codice_ong_in_vigore_fermata_nave_in_mare_per_controlli-172151820/ ; Three months earlier, in May 2017, before the Italian Senate Defence committee, Trapani prosecutors had already stated that they were excluding that NGOs had motives other than of a humanitarian nature and that they had no elements to suspect that NGOs' funding was of an illegitimate nature, see: http://leg17.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=17&id=1022318&part=doc_dc. The judge of preliminary investigations, who granted the seizure, also noted in the seizure decree that Jugend Rettet's members should not in any way be regarded as being affiliates of criminal groups operating in Libya, nor sharing neither methods nor aims with them. On file at Amnesty International

those of smugglers.[291] It is important to note, according to Italian criminal procedure, seizure requests by prosecutors are not evidence of guilt, but that prosecutors may decide to order the preventive seizure of "crime related items".[292]

The *Iuventa* crew is suspected of having colluded with smugglers in relation to three separate rescue operations, one on 10 September 2016 and two on 18 June 2017. Prosecutors allege that during these rescues the *Iuventa* crew arranged for a direct handover of refugees and migrants from the smugglers and returned to smugglers the empty boats to be reused.[293] The investigation has been described by Jugend Rettet's lawyer as "monstrous", involving the top experts of the police investigative branch (Servizio Centrale Operativo, SCO), who can use considerable powers, including to intercept communications and plant undercover agents.[294] A Ministry of Interior statement also noted that the investigation was conducted with sophisticated techniques and investigative technologies.[295]

Jugend Rettet and the *Iuventa* crew have denied all accusations. Indeed, a convincing computerized reconstruction of the three rescue incidents consistent with their version of what happened has been meticulously prepared by researchers of Forensic Oceanography and Forensic Architecture at Goldsmiths (University of London), using a variety of visual, audio and other information.[296]

The *Iuventa* crew under investigation have been in a limbo for two and half years, their lives on hold due to the pending criminal trial. As for Jugend Rettet, the situation has prevented the NGO from carrying out its mission to save people at sea and pursue its humanitarian project, and it has greatly damaged its reputation, regardless of the outcome of the proceedings.[297] Both the crew and the NGO have had to devote considerable resources towards defending themselves and trying to have the ship returned to them. This has greatly hampered their ability to continue with their humanitarian mission.

The *Iuventa* remains impounded and the *Iuventa* crew remains under investigation as of March 2020. Nobody has yet been indicted.

6.4.3.2 THE CASE OF THE *OPEN ARMS*, MARCH 2018

On 17 March 2018, Catania Antimafia prosecutors ordered the seizure of the *Open Arms*[298], which had just disembarked 218 people in the port of Pozzallo, near Ragusa. Catania prosecutors opened an investigation against the captain, the head of mission and a third representative of Proactiva, the Spanish NGO operating the *Open Arms*, for criminal association aimed at facilitating irregular migration. The allegation that the facilitation had been committed through a criminal association was required to trigger their jurisdiction over that of Ragusa prosecutors.[299]

The *Open Arms* crew's alleged criminal conduct had consisted in refusing to comply with the Libyan coastguard request to hand over the people they had just rescued - a refusal which prosecutors deemed in breach of the code of conduct and of Frontex Operation Themis agreements; and also in refusing to ask Malta permission to disembark, in breach of instructions received by Italian and Spanish authorities a refusal demonstrating, according to prosecutors, the intent to take rescued people to Italy.[300]

On 15 March 2018, the *Open Arms*, had carried out two rescue operations, taking on board 218 people. The Italian maritime rescue coordination centre had told the *Open Arms* that the Libyan coastguard had assumed coordination of the rescues. However, because the Libyan coastguard vessels were still far away, the *Open Arms* responded to Italian authorities that it would proceed towards the boats in distress to assess their situation and the medical needs of the people on board. First*, Open Arms* found a rubber boat which was taking on water and rescued over 100 people from it. Then, it put its RHIBs (speedboats) in the sea to proceed towards another rubber boat, which was about 73 nautical miles from Libya. When the *Open Arms* RHIBs reached the second rubber boat, the crew distributed lifejackets and started taking women and

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[291] https://meridionews.it/articolo/72422/sequestro-iuventa-motivazioni-della-cassazione/
[292] Article 321 of the Italian code of criminal procedure
[293] https://forensic-architecture.org/investigation/the-seizure-of-the-iuventa; https://solidarity-at-sea.org/criminalization/iuventa-seizure/
[294] Lawyer Leonardo Marino, interviewed in February 2018 and February 2019, in Agrigento
[295] http://www.interno.gov.it/it/notizie/lampedusa-sequestrata-motonave-iuventa-ong-jugend-rettet
[296] An investigation by Forensic Oceanography and Forensic Architecture
Realised with the support of Borderline Europe, the WatchTheMed platform and Transmediale, https://forensic-architecture.org/investigation/the-seizure-of-the-iuventa. The reconstruction shows, in particular, how empty boats being towed by the *Iuventa* crew were not being pushed towards Libya but towards the opposite direction. This is consistent with the crew's accounts, according to which boats were sometimes pushed away during rescues involving multiple boats, to avoid collisions
[297] http://questionegiustizia.it/rivista/2018/2/l-incriminazione-deisoccorsi-inmare-dobbiamo-rassegnarci-aldisumano-_549.php
[298] A pool of prosecutors tasked with investigating organized crime and terrorism-related offences is attached to the tribunal of the town where there is a court of appeal
[299] Under articles 110 of the Italian criminal code and article 12 (3) (a) and (b) and 12 (3bis) of the Italian Immigration Act (Law 286/1998)
[300] https://openmigration.org/en/analyses/the-prosecutors-case-against-the-rescue-ship-open-arms/

children on board the RHIBs. During this process, the Libyan coastguard arrived on the scene and requested that *Open Arms* surrender the people it was rescuing. As *Open Arms* refused, because of the prohibition to disembark people rescued at sea in an unsafe place, such as Libya, a tense negotiation ensued during which the Libyan coastguard boarded the *Open Arms* RHIBs and threatened the crew. Eventually, the Libyan coastguard left the scene and the *Open Arms* sailed back towards Europe seeking a safe place to disembark the people it had rescued.[301]

Italy refused disembarkation asking *Open Arms* to request Spain, its flag state, to formally ask for a place of safety to disembark – a requirement of the code of conduct, which *Open Arms* did. The, Italian and Spanish authorities instructed *Open Arms* to request disembarkation in Malta. Convinced that Maltese authorities would deny it, as was their common practice at the time, *Open Arms* refused to contact Malta. On 17 March, with no other viable option for disembarkation in sight, *Open Arms* entered Italian territorial waters without having been assigned a place to disembark. Eventually, the Italian authorities directed it to the port of Pozzallo (Ragusa), where it was seized on Catania prosecutors' orders soon after arrival.

Requested to validate the *Open Arms'* impounding, in March 2018 the Catania judge for preliminary investigations confirmed it, He found, however, that Catania prosecutors did not have jurisdiction over the case due to lack of evidence supporting the accusation of criminal association and transferred the proceedings to Ragusa. His decision touched on the relevance of the code of conduct for the case. The judge noted that, although the code of conduct was not a source of law whose violation could be regarded as a criminal offence, its breach was evidence of intent to operate outside the legal framework provided by Italian authorities. He also noted that rules were needed to prevent NGOs from creating autonomous humanitarian corridors outside state and international control, which could bring to situations of risk for public order and security.

In April 2018, a very different decision was delivered by the Ragusa judge for preliminary investigations when requested by Ragusa prosecutors to maintain the *Open Arms* impounded. The Ragusa judge for preliminary investigations rejected the request, interpreting the state of necessity defence broadly. The judge took into account the provisions regulating rescue at sea which require not only that people are rescued from the waters but also that they are disembarked in a place of safety.[302] The judge also based the decision on international refugee law, human rights law and the principle of *non- refoulement*. Importantly, the judge highlighted that there is no information indicating that the EU is working to create adequate places of safety where people rescued at sea by the Libyan coastguard could be received and their human rights protected. As to the refusal of the crew to seek disembarkation in Malta, the judge listed factual circumstances that justified the conduct of the crew.[303] In conclusion, the judge found that the conduct of the *Open Arms*, while amounting to disobeying the instructions of authorities, was justified by state of necessity, and for this reason released the *Open Arms.*[304]

The investigations continued and in December 2018, the prosecutor of Ragusa indicted the captain, Marc Reig Creus, and the head of mission, Ana Isabel Montes Mierand, of facilitating illegal entry and of forcing the Ministry of Interior to provide a port of disembarkation.[305] Interviewed by Amnesty International not long after the indictment, the public prosecutor of Ragusa said: "We are not sending them to trial for saving lives, but for not respecting the rules. If they had followed the Code of Conduct, they would not be on trial".[306] They are awaiting trial as of March 2020.

In May 2019, the Catania judge for preliminary investigations accepted the Antimafia prosecutors' request to dismiss the investigation for criminal association, which had in the meantime continued, for lack of evidence of any contacts between the *Open Arms* and smugglers.[307]

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[301] These events are described in the judicial decisions of the case

[302] The judge referred to Resolution MSC 167/78 of 2004 adopted by the Maritime Security Committee with SAR and SOLAS amendments, describing a place of safety as a place where the life of those rescued is not at risk and where it is possible to meet their fundamental needs; and to Resolution of the PACE 1821 of 2011 whereby the notion of place of safety must involve respect for human rights of those rescued

[303] Including the frequently uncooperative or unresponsive stance of Maltese authorities, the fact that Italy had indicated that it was available to offer a place of safety if requested by Open Arms flag state and the lack of any concrete information that Malta would have been available to allow their disembarkation

[304] Decision on file at Amnesty International

[305] The second offence is 'private violence', under article 610 of the Italian criminal code, for having disobeyed Italian authorities which had forbidden them from carrying out the rescue, for having disobeyed instructions to ask Malta to disembark there, and for having entered Italian waters, forcing Italian authorities to provide a port of disembarkation. See: https://www.rainews.it/tgr/sicilia/articoli/2018/12/sic-open-arms-procura-ragusa-violenza-privata-07b6e9a3-4419-401a-bb71-bcf717d6e865.html

[306] Interviewed in Ragusa in February 2019

[307] https://www.ilfattoquotidiano.it/2019/05/15/migranti-archiviata-inchiesta-contro-open-arms-a-catania-non-ci-sono-prove-di-contatti-tra-ong-e-scafisti/5179808/

In June 2018, prosecutors in Palermo chose not to pursue criminal investigations into two similar cases and asked for their dismissal, which was granted by the Palermo judge for preliminary investigation. The first case regarded the *Golfo Azzurro* vessel, also of the NGO Proactiva, which was suspected of collusion with smugglers during a rescue of some 220 people in May 2017, while the second case regarded a rescue in 2017, after which the *Sea-Watch* rescue vessel had directed towards Lampedusa to disembark, instead of Malta, which was arguably nearer. Palermo prosecutors observed that the criminal relevance of the cases had to be assessed in light of principles of international law, including that refugees and asylum-seekers must not be disembarked in places where their lives and rights could be at risk and that states should always facilitate the disembarkation of asylum-seekers. For the Palermo prosecutors, the NGOs' conducts were exempted from criminal liability because undertaken in the exercise of a right or a duty to save oneself or others from imminent and likely danger of grave harm. Furthermore, the NGO personnel had correctly chosen to disembark the rescued people in Italy, considering that there had been an "absolute lack of cooperation of the Maltese state in the management of those SAR events".

6.4.4 NEW LAWS TAILORED-MADE TO TARGET RESCUE NGOS

In March 2019, Italy's Minister of Interior issued a directive (an administrative circular) instructing all authorities responsible for maritime border controls to prevent entry and disembarkation in Italy of vessels that had conducted rescue operations in breach of law of the sea provisions and therefore, according to the directive, potentially threatening public order and security.[308] Other directives followed between April and May banning the entry of specific NGO vessels which had just undertaken or were about to undertake rescue operations in manners deemed to be in contravention of law of the sea provisions: the *Alan Kurdi* of German NGO Sea Eye on 4 April,[309] the *Mare Jonio* of Italian NGO Mediterranea on 15 April,[310] and the *Sea-Watch 3* of German NGO Sea-Watch on 15 May.[311] In these directives, the Minister of Interior accused NGO vessels of conducting rescue operations autonomously or of ignoring the instructions of the competent maritime authorities, including the Libyan coastguard; of exploiting search and rescue obligations for their own ends; of lending themselves to being used by smugglers for their criminal ends, thus incentivising irregular crossings; of carrying out "planned and intentional" transportation of migrants towards Europe and a "mediated" cooperation with smugglers thus of facilitating the irregular entry of unauthorized foreign nationals.[312] The directives contain no reference to people in need of protection, such as refugees.

On 15 May 2019, six UN experts wrote to the Minister of Foreign Affairs expressing grave concerns about the failure of the directives to reflect Italy's obligations under international law and about the expected impact of the directives on the safety and human rights of refugees and migrants, as well as on NGOs.[313] In their letter the UN experts observed that the approach of the then Minister of Interior towards NGOs, in the absence of any judicial decision to justify it, resulted in a politically motivated criminalization of civil society and contributed to rising xenophobia and potentially to discouraging rescue at sea by other commercial vessels. The UN experts also noted that the directives misinterpreted the law of the sea and failed to take into account the non-derogable obligation to protect the right to life: "search and rescue operations – observed the UN experts - aiming at saving lives at sea cannot represent a violation of national legislation on border control or irregular migration, as the right to life should prevail over national and European legislation, bilateral agreements and memoranda of understanding and any other political or administrative decision aimed at 'fighting irregular migration'".[314]

The UN experts also noted that the directives stigmatized migrants in distress at sea by focusing on their irregular status and alleging that potential terrorists or individuals dangerous to the security of the state could hide among migrants, without providing any factual evidence or data to substantiate the allegation. Furthermore, the directives made instrumental reference to the fight against traffickers, while deliberately failing to acknowledge the obligations towards trafficked and smuggled people contained in the relevant

[308] https://www.interno.gov.it/sites/default/files/direttiva_ministro_su_controllo_frontiere_marittime_18.03.2019.pdf
[309] https://www.interno.gov.it/sites/default/files/direttiva_4_aprile_2019.pdf
[310] https://www.interno.gov.it/sites/default/files/direttiva_del_ministro_n._141001418_15_aprile_2019.pdf
[311] https://www.interno.gov.it/sites/default/files/direttiva_15_maggio_2019.pdf
[312] https://www.interno.gov.it/sites/default/files/direttiva_del_ministro_n._141001418_15_aprile_2019.pdf
[313] The Joint Communications was sent by the Mandates of the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24568
[314] https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24568

international treaties, including the obligation to identify potential victims. For the UN experts, in light of the grave human rights violations persisting in Libya and amply proven, anybody coming from Libya should be treated as a potential victim and the delegation of search and rescue responsibilities to the Libyan coastguard, resulting in pull-backs in violation of the principle of non-refoulement, was in breach of the absolute prohibition of torture.[315]

In addition to adopting collectively with EU states, a coherent and human rights-based approach to migration by sea from Libya, the UN experts urged Italy to withdraw the directives and – importantly - encouraged judicial authorities to take their joint communication to Italy into account. They also called on Italy to halt plans to adopt legislation which would enshrine the "closed ports" policy into law.[316]

Notwithstanding the UN experts' recommendations, in June 2019, the Italian government approved Law Decree 53/2019 to implement its "closed ports" policy and prevent the disembarkation in Italy of refugees and migrants rescued at sea. The decree entered into force on 15 June and was approved by parliament with amendments (including a significant rise in the fines for rescue vessels) with Law 77/2019 in August 2019.[317]

Concerns regarding the new law as modified by parliament prompted Italy's Head of State to accompany his formal enactment of the law with a letter to the presidents of the senate and of the lower chamber urging them to ensure a review.[318] As of the end of February 2020, parliament had yet to act on the Head of State's observations.

The new law amends the Immigration Act[319] by granting the Minister of Interior, jointly with the Ministers of Defence and Transports, the power to forbid or restrict vessels from entering, transiting or staying in Italian territorial waters, in case of concern for public order and security and when the vessel may be engaging in the loading and unloading of people in violation of the country's immigration laws. The new law makes reference in this regard to the Montego Bay Convention on the Law of the Sea which describes this case as constituting a prejudicial passage of a foreign vessel in territorial waters (article 19(2)(g)).[320] However, such reference conveniently overlooks that the disembarkation of people rescued at sea is allowed for by both international and domestic law, and therefore cannot be considered as an activity contrary to immigration laws.

In case of breach of the entry, transit and stay ban, the shipmaster and the ship owner are subjected to an administrative fine ranging between 150.000 and 1.000.000 EUR. In addition, the vessel is impounded.[321] Furthermore, the shipmaster can be arrested in the act if they resist or commit "violence" against a warship[322], as in the case of Carola Rackete, the first case in which the ban on entry into territorial waters was applied.[323]

6.4.4.1 THE CASE OF THE *SEA-WATCH 3*, JUNE/JULY 2019

On 12 June 2019, the *Sea-Watch 3* rescued 53 people from a rubber boat in international waters, with no lifejackets, no fuel to arrive anywhere and no one on board with sailing skills. All maritime coordination centres were notified (Italy, Malta, Libya and the Netherlands, the *Sea-Watch 3* flag-state at the time). The Libyan coastguard assumed responsibility for coordinating the operation. However, the *Sea-Watch 3*, being very near the boat in distress, proceeded to the rescue and then asked Italy, Libya, Malta and the

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[315] https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24568
[316] https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24568
[317] https://www.gazzettaufficiale.it/eli/id/2019/08/09/19A05128/sg. For an overview of the various critical aspects of the decree, see https://www.penalecontemporaneo.it/d/6738-decreto-sicurezza-bis-novita-e-profili-critici; for an analysis of the amendments made by parliament when approving the decree see https://www.open.online/2019/08/05/decreto-sicurezza-bis-cosa-prevede-e-come-e-cambiato/
[318] Recalling the constitutional requirement that a sanction must be proportionate to the nature of the conduct, he observed that it is not reasonable and not in line with the rule of law to leave to the discretion of the administration the assessment of a conduct which can lead to sanctions of the gravity provided for in the law. He also stressed that the entry ban should in any case be applied consistently with Italy's international obligations, including to rescue lives at sea. Among the issues raised, he noted that parliament had increased the minimum fine foreseen for vessels breaching the entry ban 15fold and the maximum fine 20fold compared to the initial government proposal, resulting in an administrative fine of 1 million EUR. Furthermore, the obligatory administrative confiscation of the vessel was now foreseen without the requirement that the vessel be used repeatedly for the same conduct in breach of the entry ban. He also noted that the law did not contain sufficient detail regarding the conduct to be sanctioned. See: https://www.quirinale.it/elementi/32099
[319] The new law adds Article 11(1ter) to the Immigration Act
[320] https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. For Italy's ratification of the Convention, see https://www.gazzettaufficiale.it/do/atto/serie_generale/caricaPdf?cdimg=094G0717001000101100002&dgu=1994-12-19&art.dataPubblicazioneGazzetta=1994-12-19&art.codiceRedazionale=094G0717&art.num=1&art.tiposerie=SG
[321] The decree provides for these sanctions by amending article 12 of the Immigration Law on the facilitation of irregular entry, adding article 12(6bis)
[322] Article 1100 of the Italian code of navigation
[323] The new law also provides for the transfer of competence from ordinary prosecutors to district prosecutors even of basic type of breach of Article 12 on facilitation of irregular migration, which until then was foreseen only for aggravated cases of facilitation of irregular migration, committed in criminal association

Netherlands to indicate a place of safety to disembark. Libyan authorities indicated Tripoli, in Libya, which the *Sea-Watch 3* correctly refused, because Tripoli could not be regarded as safe. In the absence of any other indication of a place of safety, the *Sea-Watch 3* proceeded north. Late on 13 June, the Italian Ministry of Interior emailed the *Sea-Watch 3* to prohibit entry into Italian waters. The following day, the "closed ports" policy became law, with the entry into force of Law Decree 53/2019. An entry ban signed by the Ministers of Interior, Defence and Transports, as required by the new Law Decree, was notified to the *Sea-Watch 3* on 15 June.

Sea-Watch 3 crew rescuing people at sea
© Chris Grodotzki / Sea-Watch.org

The situation stalled for some 10 days, while the psychological conditions of many of the refugees and migrants deteriorated and the crew became increasingly exhausted by the effort to maintain watch on the welfare of the passengers. Eleven people needing immediate medical attention were evacuated to Italy. On 26 June, the captain, Carola Rackete, decided to enter Italian waters. She ignored the halt by the border police and proceeded towards the harbour of Lampedusa, stopping just outside it. A further medical evacuation was carried out on 27 June. On 28 June, Agrigento prosecutors opened investigations against the captain for facilitation of irregular entry and refusal to obey a warship.[324] Referring to entering territorial waters on 26 June, Carola Rackete told prosecutors: "We tried for 14 days not to breach the law".[325]

In the night between 28 and 29 June, the situation on board had become unbearable for those rescued and the crew, leading the captain to take the decision to sail into the harbour. In her words to the prosecutors, describing the situation just before entering the port of Lampedusa: "Various people in my team expressed serious concerns, one of the doctors said the reactions of people on board could not be foreseen, the smallest thing could have made the situation unravel and the coordinator-host said that people were losing trust in the crew."[326]

As the *Sea-Watch 3* approached the quay, a vessel of the customs police tried to position itself between the *Sea-Watch 3* and the quay to prevent the rescue ship from docking. The manoeuvre resulted in a light collision between the two vessels (for which the captain later apologized). Carola Rackete was immediately

[324] Article 12(1) and (3)(a) of the Immigration Act and Article 1099 of the Italian code of navigation
[325] See Ordinanza sulla richiesta di convalida di arresto e di applicazione della misura cautelare, Tribunale di Agrigento, Ufficio del Giudice per le Indagini Preliminari, 2 July 2019, on file at Amnesty International
[326] See Ordinanza sulla richiesta di convalida di arresto e di applicazione della misura cautelare, Tribunale di Agrigento, Ufficio del Giudice per le Indagini Preliminari, 2 July 2019, on file at Amnesty International

arrested. Agrigento prosecutors opened a second investigation for resisting or using violence against a warship and resisting a public official.[327]

Carola Rackete was made to disembark her ship in handcuffs. A crowd had gathered at the Lampedusa harbour quay, including journalists, supporters and opponents of the *Sea-Watch 3*, which by this time had become a symbol of opposing values, solidarity on one side and anti-immigration demands on the other. As Carola Rackete disembarked her ship, flanked by police officers, cheers could be heard alongside shouts and insults against her, including violent and gender-related abuse.[328]

On 2 July, the Agrigento judge for preliminary investigations rejected the prosecutors' request to confirm Carola Rackete's arrest related to the circumstances of her entry into the harbour and set her free.[329] In her decision, the judge noted that Carola Rackete had acted consistently with international and national law obligations, which could not be restricted by an entry ban signed by the government. Indeed, the judge observed that the new prohibition to enter territorial waters[330] was not applicable in the circumstances, because the *Sea-Watch 3* had not been loading and unloading people, but was carrying people rescued at sea. According to the judge, the captain and the authorities were under an obligation to rescue and also to accompany to assistance centres the rescued people, as required by domestic and international law.[331] The judge also noted that recent Italian jurisprudence had made relevant findings regarding the unsafe situation in Libya, supporting the course of action undertaken by the captain[332]. The judge noted how the captain waited until she felt she could, before entering territorial waters, keeping Italian authorities constantly informed of the deteriorating conditions of the passengers. After entering territorial waters, she again waited for two days for the authorities to offer a solution before entering the harbour, in line with the obligation of national authorities to assist a foreign national who is found in the national territory following a rescue at sea operation.[333] With regard to the alleged criminal behaviours that had prompted the arrest, the judge concluded that there was no offence of violence against a warship[334] because the border police vessel could not be regarded as a warship when operating in national waters. As to the offence of resisting a public official,[335] the judge considered that the offensive potential of the behaviour should be greatly scaled back, and that it was justified by the fulfilment of a duty based on national and international provisions.[336] In January 2020, the Cassation court rejected the appeal of Agrigento prosecutors against the decision by the Agrigento judge of preliminary investigations regarding the lawfulness of the arrest of Carola Rackete.[337]

Recounting her experience during her last mission on the *Sea-Watch 3* to a packed European Parliament hearing of the Civil Liberties Committee, Carola Rackete said she felt treated "as if I was carrying the pest, not human beings". She said:

"After 17 days at sea I had to enter [territorial waters] as an act of necessity and responsibility towards myself and the others…I had not slept in days … we were doing suicide watches…the subtle, fundamental link between the crew and the rescued was fraying…my duty to bring them to safety was long overdue".

She also pointedly noted how "[e]very time an NGO saves lives, it is investigated, while the Libyan authorities remain unaccountable".[338]

The *Sea-Watch 3* remained docked in the port of Licata until December 2019. The impounding requested by the prosecutors for the purposes of the criminal investigation ended in September 2019, but on 2 September the NGO Sea-Watch had been notified that the ship remained under administrative seizure ordered by the Prefect of Agrigento under the new provisions of Law Decree 53/2019. A fine of 16,666 EUR was also due to be paid. Sea-Watch complained to the Prefect. According to general administrative rules, because a reply was not received within 10 days, the seizure should have ended. However, the harbour

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[327] Article 1100 of the Italian navigation code (Resistenza o violenza contro nave da guerra) and Article 337 of the Italian criminal code (Resistenza a pubblico ufficiale)
[328] https://tg24.sky.it/cronaca/2019/06/29/sea-watch-carola-rackete-video-arresto.html
[329] http://www.giurisprudenzapenale.com/2019/07/04/lordinanza-del-gip-del-tribunale-di-agrigento-nei-confronti-di-carola-rackete-sea-watch-3/
[330] Article 11ter of the Immigration Act (Law 286/98), introduced by Decree Law 53/2019

[331] Article 10 ter of the Immigration Act
[332] See the Trapani criminal tribunal ruling of 23 May 2019 in a case regarding two foreign nationals accused of resisting the decision to take them back to Libya by the captain of the ship that had rescued them and to induce him to take them to Italy instead, https://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf
[333] Article 10ter of the Immigration Act 286/98
[334] Article 1100 of the Italian navigation code
[335] Article 337 of the Italian criminal code
[336] Article 51 of the Italian criminal code
[337] http://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf
[338] Amnesty International staff attended the EP hearing

authorities denied permission to sail because the Prefect was still deciding over the seizure.[339] Sea-Watch filed a judicial complaint and in December 2019 the Palermo civil tribunal found the administrative seizure of the ship to be unlawful. The *Sea-Watch 3* left Licata to resume rescue operations on 30 December.[340]

Throughout the time the *Sea-Watch 3* was waiting to be allowed to disembark and after the disembarkation, Italy's then Minister of Interior stigmatized and demonized Carola Rackete and the NGO Sea-Watch, unleashing and in some instances hosting on his social media accounts countless vulgar, offensive, and even violent abuse against her, often of gender-related nature. Some of the abuse against her included incitement to sexual violence against her while also targeting her gender and appearance.[341] The former Minister of Interior's abuse started with relatively mild terms ("sbruffoncella") to move on to terms effectively accusing her of very serious criminal offences after the *Sea-Watch 3* entered territorial waters (she was called an "outlaw", a "pirate", an accomplice of traffickers, and was accused of attempting to kill the customs police officials). Following her release from arrest, in early July, Carola Rackete sued the former Minister of Interior for defamation, requesting that his social media profiles be switched off. At a public rally, while still in office, he said: "the German bloodsucker denounced me".[342] Subsequently, he toned down his language and described her as "the little spoilt German communist" and somebody who "ferries migrants around".[343]

Carola Rackete remains under investigation for the circumstances of her entry into territorial waters in breach of the ban and the docking manoeuvre, and also, in a separate proceeding, for facilitating irregular migration and disobeying the orders of a warship, in relation to the rescue operation.[344]

6.4.4.2 THE CASE OF THE *OPEN ARMS*, AUGUST 2019

After the case of the *Sea-Watch 3*, Italian authorities continued to use their new powers to ban the entry of rescue NGOs into territorial waters between July and early September 2019.[345] Entry bans were notified to the *Alan Kurdi* of German NGO Sea-Eye, to the *Mare Jonio* and the *Alex* of Italian NGO Mediterranea, and to the *Eleonore* of German NGO Lifeline.

Between 1 and 2 August, in two separate operations, the *Open Arms* saved from drowning 124 people, including two babies, another 30 children, and two heavily pregnant women. Many reported having endured extreme forms of abuse whilst in detention in Libya.[346] Italian authorities banned the *Open Arms* from entering Italian territorial waters. Likewise, Malta refused any responsibility to designate a safe port of disembarkation. On 10 August, the *Open Arms* rescued another 39 people, this time in the Maltese search and rescue region. Malta authorized the disembarkation of the people saved in its search and rescue region, in line with its obligations, while indicating that those rescued previously had to remain aboard. To avoid tensions onboard, which would have resulted from allowing only some of the refugees and migrants to disembark, the captain felt he had to reject the offer.[347]

With the situation on board deteriorating, the *Open Arms* sought court measures to have the over 30 children urgently disembarked and the entry ban annulled. On 14 August, the Lazio administrative tribunal granted the application, suspending the entry ban with immediate effect, in consideration of the extremely difficult conditions on board and of the deteriorating physical and psychological conditions of the rescued people.[348] The *Open Arms* headed towards Lampedusa on 15 August. Notwithstanding the judicial order to attend to the people on board was immediately effective, and regardless of the fact that six countries – France, Germany, Spain, Romania, Portugal and Luxembourg – had agreed to welcome the men, women and children on board, Italian authorities refrained from granting permission to dock for another five days, leaving the ship stranded off the Italian coast. After several medical evacuations and desperate jumps into the water, eventually the prosecutor of Agrigento ordered the urgent disembarkation of those still on board on 20

[339] https://www.rainews.it/tgr/sicilia/video/2019/10/sic-sea-watch-3-bloccata-porto-licata-decreto-sicurezza-bis-3ce9c28c-b26d-415c-a5e3-572eba285368.html
[340] https://sea-watch.org/en/sea-watch-3-free-to-sail-sea-watch-wins-appeal-in-italian-civil-court/
[341] See for example https://www.repubblica.it/cronaca/2019/07/19/news/capitan_carola_torna_in_germania-231581175/
[342] https://video.repubblica.it/dossier/migranti-2019/sea-watch-l-offesa-di-salvini-a-carola-rackete-pure-la-zecca-tedesca-mi-ha-denunciato/339929/340517
[343] See https://www.fanpage.it/cultura/tutti-gli-insulti-di-matteo-salvini-a-carola-rackete/; in September, following an interview of Carola Rackete on Italian television, a further round of gender abuse, including of a violent nature, and body shaming by Lega Nord sympathizers appeared on the official social media pages of Matteo Salvini, see https://www.open.online/2019/09/20/carola-rackete-il-body-shaming-e-i-commenti-sessisti-dei-leghisti/
[344] https://www.open.online/2020/01/20/carola-rackete-se-ne-va-in-antartide-e-dichiara-contenta-della-sentenza-di-cassazione/
[345] The fall of the first government led by Giuseppe Conte and supported by the Lega and Movimento 5 Stelle at the end of August 2019 determined a pause in the implementation of the 'closed ports' policy
[346] http://www.ansamed.info/ansamed/en/news/sections/politics/2019/08/02/open-arms-rescues-69-migrants-as-mare-jonio-ship-released_83237444-ba96-46c1-a26c-c17b0783b5e2.html
[347] https://www.amnesty.org/en/latest/news/2019/08/left-adrift-in-the-mediterranean/
[348] Decree of the Lazio administrative tribunal on file at Amnesty International

August. The standoff, the arbitrary deprivation of liberty of those on board and their unnecessary suffering lasted 19 days.

Agrigento prosecutors have opened an investigation against the former Minister of Interior for false imprisonment for the failure to allow disembarkation from the *Open Arms* following the judicial order of 14 August 2019.

6.4.5 IMPACT OF THE CRIMINALIZATION OF RESCUE NGOS

Over two and a half years after the impounding of the *Iuventa,* the attempts of the Italian government and of judicial and police authorities at proving rescue NGOs' collusion with smugglers, illegitimate funding sources and involvement in criminal associations to facilitate irregular migration and commit other offences have come to nothing.[349] Yet, the long criminal investigations and the impoundments have taken a heavy toll on NGOs and on the people working or volunteering for them. NGOs have had to use their limited resources to defend their staff and members in court and to try to get back their vessels. Their reputation has been tarnished just through smear campaigns and the airing of baseless suspicions by people in authority.

What is more, refugees and migrants have been left more vulnerable than before to dying at sea, to being intercepted and forced back to Libya to suffer more grave violations and abuses, and to endure arbitrary deprivation of liberty and unnecessary suffering while stranded at sea at times for weeks because of the introduction of the code of conduct and of "closed ports" provisions in Italian law.

These measures taken by Italy, together with the many policies already being pursued by Italy and the EU to prevent the arrival of people from Libya by outsourcing border control activities to Libyan authorities (such as the cooperation with the Libyan coastguard; the assistance with creating and managing the Libyan search and rescue region; and the withdrawal of European naval assets from the southern part of the central Mediterranean),[350] have undermined the search and rescue system which relies on the duty to save people in distress at sea without discrimination, a duty which is completed only once those rescued are delivered to a place of safety.

The cases of criminalization illustrated in this report show that human rights defenders saving lives at sea face legal uncertainty in Italy and a hostile environment to which government representatives and some public officials, including prosecutors have considerably contributed. The causes are numerous and remedying the current situation of criminalization for rescue NGOs and preventing further cases requires addressing them one by one, as suggested in the recommendations to Italian authorities at the end of this report.

[349] https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/05/15/open-arms-zuccaro-ong
[350] *Libya's dark web of collusion: Abuses against Europe-bound refugees and Migrants*, 11 December 2017, Index: MDE 19/7561/2017 https://www.amnesty.org/en/documents/mde19/7561/2017/en/

6.5 MALTA: REFUGEES, MIGRANTS AND RESCUERS IN THE DOCK

Because of Malta's proximity to African coasts and small size, the government has always been concerned about immigration. Determined to retain a huge search and rescue region which it has no means to patrol directly, it has traditionally interpreted its obligations regarding search and rescue at sea in a restrictive manner to limit the need to provide assistance and offer disembarkation on the island only to cases for which it regards itself as responsible.[351] Since the launch of Operation Mare Nostrum in 2013 and through to 2016, Malta played its part in EU naval operations to assist refugees and migrants on condition that the island would not be affected by disembarkations.

Malta's approach to NGOs' rescue at sea operations has largely followed the same approach: Malta allowed NGOs to use the island as a base for operations, accepted the occasional medical evacuations and generally provided support within the limits of its restrictive interpretation of the law of the sea. However, when Italy began to withdraw from search and rescue activities near Libyan coasts, to obstruct NGOs' efforts to continue to rescue lives at sea, and finally decided to refuse disembarkation to NGOs, Malta's stance hardened. The authorities refused to allow NGOs to disembark on the island on several occasions and took steps to obstruct their activities and dissuade them from operating in Malta. In the past year Malta has been at the forefront of efforts to agree on predictable disembarkation arrangements among EU member states[352] and has accepted the disembarkation of over 2,000 people, including rescued by NGOs, on condition that those rescued in circumstances for which Malta did not regard itself as legally responsible would be transferred elsewhere in the EU. Malta has nevertheless also contributed to prolonging the suffering of rescued refugees and migrants and of NGOs crews left stranded at sea for days on end on multiple occasions.[353]

In June 2018, Maltese authorities opened a criminal investigation against Claus Peter Reisch, the captain of the *Lifeline,* the rescue vessel of the German NGO Mission Lifeline. The *Lifeline* had remained stranded at sea for five days with no country authorizing it to dock and disembark the 234 people it had rescued in international waters, within the Libyan search and rescued region.[354] The captain had refused to hand over the rescued people to the Libyan coastguard because Libya cannot be regarded as a place of safety.[355] At the time, the Maltese Prime Minister made baseless references to the NGO's possible collusion with smugglers[356] thus joining the Italian Minister of Interior and the French President in undermining the NGO's reputation.[357] On 27 June 2018, Malta granted the *Lifeline* permission to disembark the survivors, after an agreement was reached among several European governments to receive some of the rescued refugees and migrants for processing. Shortly after, however, Maltese authorities brought criminal charges against the captain, accusing him of entering Maltese waters with a ship that had not been appropriately registered in its flag state, the Netherlands. They also impounded the ship.[358] In May 2019, Claus Peter Reisch was fined

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[351] *Between the devil and the deep blue sea: Europe Fails Refugees and Migrants in the Central Mediterranean*, 8 August 2018, Index: EUR 30/8906/2018 HYPERLINK "https://www.amnesty.org/en/documents/eur30/8906/2018/en/"https://www.amnesty.org/en/documents/eur30/8906/2018/en/ and *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 30 September 2014, HYPERLINK "https://www.amnesty.org/en/documents/EUR05/006/2014/en/"https://www.amnesty.org/en/documents/EUR05/006/2014/en/

[352] In September 2019, Malta, along with France, Germany and Italy, committed to establishing a "temporary solidarity mechanism". The mechanism aimed to facilitate predictable and "dignified" disembarkation in a place of safety for refugees and migrants rescued at sea and a fair system to ensure their relocation among EU member states. See http://www.statewatch.org/news/2019/sep/eu-temporary-voluntary-relocation-mechanism-declaration.pdf

[353] See for example the case of the *Open Arms* in March 2018, above, which refused to seek disembarkation in Malta because it was sure the authorities would have denied it, a circumstance accepted by the Ragusa judge for preliminary investigation; see also similar conclusions about the lack of chances to disembark in Malta in the cases of the *Golfo Azzurro* and of the *Sea-Watch* in 2018, also described above. Numerous other instances occurred in 2019

[354] *Between the devil and the deep blue sea: Europe Fails Refugees and Migrants in the Central Mediterranean*, 8 August 2018, Index: EUR 30/8906/2018. https://www.amnesty.org/en/documents/eur30/8906/2018/en/"https://www.amnesty.org/en/documents/eur30/8906/2018/en/

[355] Times of Malta, Handing the migrants to the Libyans was not an option: Lifeline captain interviewed, 8 July 2018, www.timesofmalta.com/articles/view/20180708/local/handing-the-migrants-to-the-libyans-was-not-an-option-lifeline-captain.683812

[356] Al Jazeera, Lifeline reaches Malta, but Europe heads into migration storm, 28 June 2018, www.aljazeera.com/indepth/features/lifelinereaches-malta-europe-heads-migration-storm-180628074507818.html

[357] ANSA, Migranti, Salvini contro Lifeline: 'E' fuorilegge, è nelle acque di Malta', 22 June 2018, www.ansa.it/sito/notizie/cronaca/2018/06/21/lifeline-la-nostra-nave-ha-bandiera-olandese_54963915-ddd9-41b6-a8b5-bad9234be673.html; Le Figaro, Lifeline : Macron accuse l'ONG de «faire le jeu des passeurs», 27 June 2018, www.lefigaro.fr/politique/lescan/2018/06/27/25001-20180627ARTFIG00095--lifeline-macron-accuse-l-ong-de-faire-le-jeu-des-passeurs.php

[358] The New York Times, Malta cracks down on a humanitarian ship that carried migrants, 2 July 2018, www.nytimes.com/2018/07/02/world/europe/malta-migrant-ships-crackdown.html

10,000 EUR for registration irregularities by Malta's Court of Magistrates.[359] While the court acknowledged that the *Lifeline* had been saving lives as required by the international law of the sea, it found Claus Peter Reisch responsible for the charges related to the registration of the ship in the Netherlands, a decision against which Claus Peter Reisch immediately appealed. The *Lifeline* remained seized in Malta pending the appeal – involving expenses for the NGO for maintaining it docked in Malta.[360]

In January 2020, Malta's Court of Criminal Appeal overturned the conviction, finding that the captain had lacked the intent to enter Maltese waters without the required ship registration.[361] The criminal prosecution against a human rights defender initiated in highly politicized circumstances was defeated, but not before having caused the lifesaving activities of a small NGO to stop for some 18 months and having put considerable financial strain on the accused and the NGO.

Also in 2018, Maltese authorities launched investigations to ascertain that the operations of other similar "entities" to the Lifeline, using Maltese ports and operating within its waters, were being conducted in accordance with international and national rules, including as to the registration of vessels.[362] As a result of these investigations, Malta prevented the vessels of NGOs Sea-Watch and Seafuchs from leaving its ports.[363] The reconnaissance aircraft *Moonbird* was also prevented from flying on several occasions since May 2018, in relation to the purported need to verify compliance with administrative rules, until a firm decision to stop it came in July 2018.[364]

6.5.1 THE *EL HIBLU 1* CASE

In March 2019 Maltese authorities arrested and prosecuted people who were acting to protect themselves and others from grave danger to their safety and lives. Three teenage asylum-seekers – one aged 15, from Ivory Coast, and two aged 16 and 19, from Guinea – were arrested upon arrival in Malta on suspicion of having hijacked the ship which had rescued them, to prevent the captain from returning them to Libya. The three youths and over 100 others had left Libya in a rubber boat and had been picked up by the merchant vessel *El Hiblu 1*.

Pending a formal indictment, the three teenagers have been charged with nine very serious offences, including under anti-terrorism legislation. Some of the offences are punishable with life imprisonment.[365] In May 2019, the UN High Commissioner for Human Rights urged Malta to reconsider the severity of the charges and expressed concern about their initial detention in a high-security section of an adult prison and the failure to appoint legal guardians for the two children before their interrogation.[366] All three teenagers were released on bail in November 2019 and remain in Malta pending the continuation of the proceedings against them.[367] A magisterial inquiry is ongoing, to compile the evidence of the case. The Attorney-General will then issue an indictment with the final charges against the accused.

Amnesty International interviewed the two younger youths in September 2019, while they were in a juvenile detention facility, and discussed the case with the Attorney-General and representatives of the Armed Forces of Malta.[368] Amnesty International has also reviewed media reports of the hearings of the magisterial inquiry

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[359] The ruling is on file at Amnesty International

[360] The request of the prosecutor to confiscate it was rejected on the ground that the ship did not belong to the accused

[361] https://www.maltatoday.com.mt/news/court_and_police/99596/mv_lifeline_captain_cleared_of_ship_registration_offences_as_appeals_court_revokes_10000_fine_#.Xina9Wj7TIV

[362] Government of Malta, Press release, 28 June 2018, www.gov.mt/en/Government/Press%20Releases/Pages/2018/June/28/PR181480.aspx

[363] Sea-Watch, Dutch government confirms correct registration and flag of Sea-Watch 3, ship still blocked in Malta, 1 August 2018, www.sea-watch.org/en/dutch-government-confirms-correct-registration-and-flag-of-sea-watch-3-ship-still-blocked-in-malta/; Sea-Watch hindered from leaving port while people drown at sea, 2 July 2018, www.sea-watch.org/en/321/

[364] Independent, Malta blocks migrant search plane from operating in Mediterranean as EU toughens stance on refugee rescues, 4 July 2018, www.independent.co.uk/news/world/europe/malta-blocks-moonbird-plane-mediterranean-refugee-crisis-ngo-sea-watch-italy-libya-eua8430756.html

[365] The charges include: act of terrorism, involving the seizure of a ship (Art.328A(1)(b), (2)(e), Criminal Code); act of terrorism, involving the extensive destruction of private property (Art.328A(1)(b), (2)(d), (k) Criminal Code); "terrorist activities", involving the unlawful seizure or the control of a ship by force or threat (Art.328A(4)(i) Criminal Code); illegal arrest, detention or confinement of persons and threats (Art.86 and 87(2) Criminal Code); illegal arrest, detention or confinement of persons for the purpose of forcing another person to do or omit an act which if voluntary done, would be a crime (Art. 87(1)(f) Criminal Code); unlawful removal of persons to a foreign country (Art.90 Criminal Code); private violence against persons (Art. 251(1) and (2) Criminal Code); private violence against property (Art.251(3) Criminal Code); causing others to fear that violence will be used against them or their property (Art.251B Criminal Code)

[366] https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24569&LangID=E

[367] An expert appointed by the court carried out further test in November and concluded that the youths are at least 19 years of age. Their lawyer is appealing this conclusion on the basis of concerns for the inadequacy of age-determination processes

[368] Malta: The El Hiblu 1 Case: Three Teenagers In The Dock For Daring To Oppose Their Return To Suffering In Libya, 23 October 2019, Index number: EUR 33/1270/2019, https://www.amnesty.org/en/documents/eur33/1270/2019/en/

and radio transcripts of the *El Hiblu 1* communications published in the media, according to which the ship was instructed by a EUNAVFOR MED Sophia aircraft to go to Libya.[369]

The two youths Amnesty International interviewed explained that, after the rescue people started falling asleep on the deck, but at about 6am the following day, when they began to wake up, they realized that they were back in front of the Libyan coastline. Scenes of despair and panic started, with many people shouting that they would rather die at sea than be returned to Libya. Many banged their fists against the sides of the ship. One of the youths interviewed by Amnesty International recounted:

"People started crying and shouting because they were afraid to go back, and some had children. They shouted: 'We don't want to go to Libya', 'We prefer to die', because if they take you back to Libya they put you in a room, they torture you, you eat only once per day. When they take women to prison, the Libyans choose the ones they like and take them by force. And some people put you in the private prison and call your family and ask to bring money to give freedom."[370]

According to the youths interviewed by Amnesty International, concerned at the reaction of the people on board, the chief officer agreed to turn the vessel towards north and said that although he had not enough fuel to go to Italy, he would take the rescued people to Malta. He then asked the 15-year-old boy from Ivory Coast, who he knew spoke good English, and the other two youths to reassure the other survivors and help him maintain calm on board for the rest of the journey.

According to the information reviewed by Amnesty International, including media reports of the evidence presented at the magisterial inquiry, at no point during the journey the rescued people engaged in violent behaviour against the crew of the *El Hiblu 1.* Despite this, the *El Hiblu 1* communicated to Maltese authorities that rescued people had taken control of the ship and had forced the crew to proceed towards Malta, despite instructions by the Maltese authorities not to do so. As the Maltese and Italian government and commentators rushed to speak of "hijacking" and "an act of piracy", Maltese authorities dispatched an AFM special operations unit, on board several speedboats and a helicopter, to intercept the *El Hiblu 1* as soon as it entered Maltese waters.

Amnesty International considers that the youths appear to have acted reasonably to defend themselves and the other refugees and migrants in a manner proportionate to the degree of danger that they and the others would have faced if returned to Libya. Indeed, in assessing the proportionality of actions taken, attention should be focused on the primacy of the rights that were being put at risk by the threatened disembarkation in Libya. The Criminal Court of Trapani, in Italy, has already applied this line of reasoning in a very similar case in May 2019, declaring two defendants not guilty of any offence, as they had acted in self-defence when they forced a rescue crew not to take them to Libya.[371] If any evidence of criminal behaviour emerged at trial – although it should be stressed that the three youths deny any wrongdoing – prosecuting authorities should consider the applicability of defences excluding criminal responsibility, causes of justification or mitigating circumstances for acts committed with the sole purpose of protecting themselves and others from immediate danger.

The severity of the nine charges currently laid against the three youths appears disproportionate to the acts imputed to the defendants and do not reflect the risks they and their fellow travellers would have faced if returned to Libya. The use of counter-terrorism legislation is especially problematic.

[369] Extracts from the transcripts were published in an article on the case, and verified by Amnesty International https://magazine.atavist.com/the-rescue-mediterranean-migrants-malta-europe-crisis
[370] Interviewed in September 2019 in Malta
[371] Tribunale di Trapani, Ufficio del Giudice per le Indagini Preliminari, Sentenza a seguito di giudizio abbreviato, 23 May 2019, https://dirittopenaleuomo.org/wp-content/uploads/2019/06/GIP-Trapani.pdf

6.6 SPAIN: PREVENTING SHIPS FROM SAVING LIVES IN THE CENTRAL MEDITERRANEAN

With a fragile majority – and having held two general elections in a year, accompanied by a toxic debate on migration, with the issue being increasingly exploited for political gain – in recent times the Spanish government has sought to further limit the irregular arrival of refugees and migrants. The government's strategy has pivoted around conveying a message of control of the southern border and, at the same time, disengaging from the Central Mediterranean. While authorities have publicly reiterated Spain's commitment to continue rescuing people crossing the Gibraltar Strait and the Alboran Sea, they have equally stressed that the Central Mediterranean is the responsibility of Maltese and Italian authorities. In their view, Spain is already doing its part.

However, Libya's declaration of a SAR region, heavily supported by EU Member States, and the launch by the Italian government of its "closed ports" policy dramatically changed the environment in which rescue NGOs worked in the Central Mediterranean, including NGOs operating rescue ships flying a Spanish flag. Indeed, from June 2018 the refusal by both Italy and Malta to authorize the disembarkation of people rescued in the Libyan SAR region created a "disembarkation crisis": ships rescuing refugees and migrants at sea were expected to seek and follow instructions of the Libyan Coast Guard, but since this could only instruct them to disembark people in Libya – which is contrary to international law – rescue vessels refusing to do so were left stranded at sea for weeks, with no country indicating a place of safety where to dock.[372]

Following the Spanish government's acclaimed gesture in June 2018, when it allowed the *Aquarius* rescue ship of NGO SOS Mediterranée and MSF to dock in Valencia, in 2019 Spanish authorities changed course. Authorities tried to limit the number of people either relocated or disembarked in Spain, following rescue by NGO ships flying the Spanish flag in the Central Mediterranean, including by hampering the life-saving activities of those NGOs.

Early in 2019, Spanish authorities banned the *Open Arms* and *Aita Mari* rescue ships, belonging to the NGOs Proactiva Open Arms and Salvamento Maritimo Humanitario (SMH), from operating in the Central Mediterranean. Misusing administrative law, they restricted the NGO rescue ships from operating beyond the Spanish SAR region, thus imposing a *de facto* ban on the two Spanish NGOs to carry out rescue operations in the Central Mediterranean. In so doing, they contributed to further reducing available assets with search and rescue as their primary purpose in the Central Mediterranean, a grave decision in light of the increase in the mortality rate among people attempting the crossing and the lack of state naval assets and proactive state rescue operations in the Central Mediterranean. The measure also contributed to tarnishing the NGOs' reputation, undermining the legitimacy of their activities.

6.6.1 THE CASE OF THE *OPEN ARMS*

On 8 January 2019, the Port Authority of Barcelona denied the *Open Arms* clearance to leave the harbour of Barcelona towards the Libyan SAR Region, purportedly because it lacked authorization[373] to transport a high number of people for long distances and extended periods – which she had been forced to do in the past because it had taken weeks to European governments to decide where rescued people should be disembarked. The *Open Arms* was thus banned from conducting SAR operations in the Central Mediterranean for as long as there was no agreement with the competent SAR authorities about the disembarkation of people rescued.

After being blocked in the port of Barcelona for 100 days, on 17 April, the *Open Arms* was granted permission to head towards the Aegean Sea, but only to bring humanitarian aid to the Greek islands. The ship clearance issued by the Port Authority of Barcelona stated that the ship was not allowed to return to the Central Mediterranean to conduct rescue operations and that only search and rescue operations arising during the journey to Greece were allowed. It also warned the captain that non-compliance with the terms of the authorization could be considered a breach of maritime safety and maritime traffic rules, entailing fines up to 901,000 and 300,000 EUR respectively.[374]

[372] Amnesty International, Cut Adrift, June 2019 https://www.amnesty.org/en/latest/campaigns/2019/01/cut-adrift-in-the-med/
[373] For the rules on ship clearance see Regulation of ship clearance, 18 January 2000 https://www.boe.es/eli/es/o/2000/01/18/(5)
[374] See Law 27/1997 of State Ports and the Merchant Navy. Article 312.3.b) foresees fines up to 901,000 EUR for very serious breaches of maritime safety. Section c) of that same article provides for a fine up to 300,000 EUR for very serious breaches of maritime traffic rules. The conducts considered as serious infringements of maritime safety and maritime traffic are described in article 308

After delivering humanitarian aid in Greece, the NGO announced the *Open Arms* was setting sail towards the Central Mediterranean. With a letter dated 27 June, the General Director of the Merchant Navy informed the *Open Arms* captain that the ship was not allowed to conduct search and rescue operations, or even to navigate in the area, for as long as this was not authorized by the authority competent for the relevant SAR region. Otherwise, the letter stated, the ship could face heavy fines and the removal of the captain's professional certification, for breaching the terms of the authorization. [375] The ship could also be ordered to return to port.

These requirements appear problematic on several accounts. In particular, since assisting people in distress at sea is an obligation under international law for any shipmaster – and a crucial obligation to protect the right to life – it is questionable whether a public authority can ban compliance with such obligation, beyond the specific limitations provided in international conventions regulating search and rescue. None of these subordinate compliance to such obligation, or indeed freedom of navigation, to general authorizations from SAR authorities. The letter also suggests that a rescue ship could be fined for not following instructions from the competent SAR authority, without explaining what to do when such authority does not respond to calls or when it instructs a rescue vessel to take actions that are unlawful, such as disembarking people in a place that does not qualify as place of safety – both instances frequently documented in SAR operations coordinated by the Libyan Coast Guard.

Undeterred by the letter, the NGO maintained the ship in the central Mediterranean and responded that the ship was planning to undertake observation and surveillance activities and intended to comply with international obligations.

However, tensions between the NGO and the Spanish government intensified again in August 2019, when the *Open Arms* rescued 124 people in the Central Mediterranean (see above). The rescue led to a 19-day standoff between Italy, Malta and Spain. Initially, the Spanish government refused to engage or even to ask to the European Commission to broker a solution, [376] arguing that Spain was saving lives in the Western Mediterranean daily, and that it had no responsibilities in the Central Mediterranean.[377] Spain finally offered a Spanish port to disembark those rescued. Because the *Open Arms* could not face the long journey to Spain without compromising the safety of the rescued people and crew after being stranded for 19 days, Spanish authorities sent an army vessel. However, in the meantime Italian judicial authorities ordered that the ship be allowed to disembark rescued people in Lampedusa, rendering the Spanish offer redundant.

During the standoff, the confrontation between the NGO and the government escalated, with open accusations and veiled threats of sanctions voiced by Spanish Ministers. The Minister of Works and Development stated that "I am annoyed by the standard-bearers of humanity, who never have to take a decision, who believe they are the only ones who save lives".[378] The Deputy Prime Minister insisted that "[t]he *Open Arms* has no permission to rescue" and that "no one is above the law".[379] The hostility and suspicion fostered by representatives of the government and political parties contributed to the deterioration of the public debate. Political parties' representatives accused Open Arms and rescue NGOs of colluding with smugglers, transporting "well-fed passengers" to Europe, and creating a "pull factor".

On 21 August the political party Vox, which has constantly used anti-immigration rhetoric, filed a criminal complaint against the NGO for aiding illegal migration and collaboration with smuggling criminal organizations.[380] The criminal complaint demanded the immediate seizure of the ship upon arrival to a Spanish port, the arrest of the captain and the launch of a criminal investigation of the NGO. While on 24 August the Public Prosecutor of Audiencia Nacional -a high court dealing with smuggling and trafficking offences- initiated a preliminary investigation, the investigation was finally discontinued in on 4 October.

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[375] Article 312.10 of the Law 27/1997 of State Ports and the Merchant Navy

[376] As of 14 August, no Member State had requested the European Commission to coordinate any solidarity effort. European Commission's email of 14 August, on file with Amnesty International

[377] The Deputy Prime Minister said "the government did not have any obligation"

[378] See the interview with the Minister of Works and Developments in El Pais, 12 August
https://elpais.com/politica/2019/08/10/actualidad/1565431425_999518.html?id_externo_rsoc=TW_CM

[379] See the interview with the Deputy Minister on 21 August
https://cadenaser.com/programa/2019/08/21/hoy_por_hoy/1566367569_251768.html

[380] Article 570 bis of the Spanish Criminal Code on criminal organizations
Spanish legislation criminalizes the facilitation of irregular entry, transit and stay of a foreign national into Spain (Article 318 bis of the Criminal Code), which is punished with a fine of 3 to 12 months or imprisonment of 3 months up to 1 year. The definition of the offence doesn't require that the behaviour is committed for profit. Yet, financial gain provides for harsher penalties. The Criminal Code includes a humanitarian exemption in case of facilitation of entry and transit. Actions whose only intent of is to provide humanitarian assistance are not criminally punishable. Spanish legislation on facilitation is not in line with the UN Smuggling Protocol, as profit is not a constitutive element of the offence. The humanitarian exemption is narrowly defined and the conducts that constitute facilitation are not described in the law, which risks broad interpretations of this provision

6.6.2 THE CASE OF THE *AITA MARI*

On 15 January 2019, the NGO SMH requested clearance for the rescue ship *Aita Mari* to leave the Port of Pasaia, in the Basque country, towards the Central Mediterranean. Three days later, the Port Authority denied the ship clearance. Just as for the *Open Arms*, the refusal was motivated by the lack of agreement among EU states on where to disembark people rescued in the Central Mediterranean, which could lead to dangers for the rescued people and crew and to pollution caused by delays in disembarkation.[381] The decision was in fact pre-emptive in nature, given that it was SMH's first mission and the *Aita Mari* had never conducted rescues before.

On 12 February, SMH challenged the denial of ship's clearance before the General Director of the Merchant Navy, arguing that the Spanish authorities had imposed undue requirements to the ship, not foreseen in legislation. Pending the resolution of the appeal and having invested time and money to prepare the *Aita Mari*, SMH sought to fulfil its humanitarian mission by delivering humanitarian aid in Lesvos, while being prevented from conducting proactive search and rescue operations.[382]

On 21 August the General Director of the Merchant Navy upheld the initial denial of clearance arguing that the *Aita Mari* ship needed to strike agreements with competent authorities of the SAR regions where the ship intended to operate as a requisite to operate in those regions and be granted the authorization to leave port towards the Central Mediterranean. The decision reiterated that the ship did not meet the technical requirements necessary for search and rescue operations in the absence of an agreement on disembarkation, considering the long delays previously experienced by similar NGO vessels in obtaining a place of safety. While the decision correctly points out how such delays may have breached relevant international obligations, it should be clarified that the responsibility for such breaches falls solely and squarely on the states that refused to cooperate in good faith to identify a suitable place of safety for each group of people found in distress at sea.

Only in November, ten months after asking for clearance, the *Aita Mari* performed its first rescue in the Central Mediterranean, saving 78 people that were subsequently disembarked in Pozzallo, Sicily, on 30 November. The rescue was only possible after the ship headed to the Maltese SAR region following another trip to Lesvos to deliver humanitarian aid earlier in November.[383] SMH risks fines and sanctions, despite having committed to perform SAR operations only under the coordination of competent SAR authorities.[384]

Reflecting on the obstacles and repeated delays, Daniel, from SMH, told Amnesty International:

"I feel we have been naïve. We complied with the rules. We transformed a fishing boat in three months to meet the technical requirements. Many volunteers and professionals got involved, working for free. And we only managed to set sail when the year was over. It has been very hard to see the delays, as our resources are limited. Seeing the shipwrecks while the boat was blocked… But emotionally, it seems you are doing something bad… International law is on our side; however, you see the rules of the game can change at any time. Now the legal framework is uncertain. And with the threats to fine us, it seems the flag state of the boat is not safe for the ship. You have to accept that the boat may not return to Spain".[385]

6.6.3 CONCLUSION

The cases of the *Open Arms* and *Aita Mari* rescue boats show how Spanish authorities misused national maritime administrative law regulating the granting of ship clearance to curb rescue operations conducted by NGOs in the Central Mediterranean, which in the end prevented human rights defenders from saving lives at sea. The concession of sailing clearance was made dependent upon two arbitrary requirements, not foreseen in legislation: an agreement on disembarkation in the Central Mediterranean; and conformity with

[381] Document on file with Amnesty International

[382] On 16 April SMH was granted ship clearance only to deliver humanitarian aid. The clearance didn't allow for proactive SAR for as long as there was not conformity with the requirements of the competent SAR authorities in the SAR region. It mentioned fines up to 901,000 EUR and 300,000 EUR, in case of non-compliance

[383] SMH was granted clearance to sail to Lesvos in October, after several delays in the response by authorities

[384] On 11 and 12 September, SMH had sent an email to Maltese and Italian authorities respectively to offer its assistance and to request applicable protocols in their SAR regions. Malta's response on 12 September stated that any rescue without instruction by Maltese authorities would be considered an interception on the high seas and requested SMH to inform its flag state, which would eventually be required to provide disembarkation in case of non-compliance. Italy's response on 13 September stated that rescues in the Italian SAR zone were governed by the Hamburg Convention and the IAMSAR manual and invited SMH to be aware of other SAR regions. Relevant communications are on file with Amnesty International

[385] Interview, December 2019

requirements of the competent SAR authorities. While the first is an impossible, unnecessary and disproportionate requirement for NGOs given that this obligation, as the Spanish Ombudsperson acknowledged, "rest with public authorities, not shipmasters" [386], it is uncertain how NGOs can demonstrate they comply with the second. As the *Open Arms* case illustrates, even the NGO decision to sign Italy's Code of Conduct did not appear sufficient to prove conformity. But beyond this, it is important to stress that these requirements were arbitrarily imposed by Spanish authorities and appear to be at variance with established principles under the Law of the Seas, in particular the principles of freedom of navigation in the high seas and the duty to render assistance to people in distress at sea.

Put plainly, the Spanish authorities had no issue with Spanish NGOs rescuing people in the central Mediterranean and with the lawfulness of their actions, until the Italian government started refusing the disembarkation in Italy of people rescued at sea. When this happened, rather than working with other European governments on a solution – such as the definition of a mechanism for the predictable disembarkation and relocation of people rescued in the Libyan search and rescue region, provided that no one should be disembarked in Libya – Spain decided to take a convenient shortcut and began hampering the activities of rescue NGOs, even if this meant restricting their activities in ways that are not consistent with international law and standards.

[386] "Lack of an agreement on disembarkation should not be used as an excuse to deny the authorization, nor to impose rescuers or rescued people the effects of the delays stemming from the lack of agreement or coordination on disembarkation." Letter by the Spanish Ombudsperson to SMH, 25 May 2019, on file with Amnesty International.

6.7 SWITZERLAND: NO PLACE FOR COMPASSION

For some refugees and migrants who have entered the EU through other countries, Switzerland is their desired destination; the place where they may have families or communities that can support them in starting their new lives in Europe. In recent years, people have continued attempting to cross into Switzerland from Italy, where many are living in inadequate conditions in official government centres or sleeping rough. The plight of the people fleeing conflict, persecution and poverty and seeking protection in Switzerland has moved many Swiss citizens, some of whom provided food and shelter to those in need or helped them cross the border in order to apply for asylum. However, the combination of a strict application of EU migration rules and the national legislation criminalizing such assistance led to widespread prosecutions of acts of solidarity.

Switzerland is not a member of the EU. However, as a party to the Schengen and Dublin agreements, it falls under the EU Returns Directive, which sets common standards and procedures for the return of third-country nationals who entered Member States irregularly.[387] Switzerland also applies the so-called Facilitators' Package, which has been developed in order to harmonize Member States' national legislation on combatting smuggling.[388]

6.7.1 ACCESS TO ASYLUM AND STRICT APPLICATION OF THE DUBLIN REGULATION

With all its neighbouring states being a part of the Schengen area, Switzerland does not apply any special procedure at its land borders. In principle, asylum-seekers entering from another Schengen country could freely access Swiss territory and apply for asylum. In reality, however, since 2016, Swiss border officials have reportedly summarily returned asylum-seekers from the country's southern border with Italy and denied them access to international protection.[389]

In cases when people managed to access the asylum procedure in Switzerland, many have had their claims rejected on the basis of the Dublin Regulation, which provides for the returns of people who entered a Member State irregularly to their first country of arrival in Europe, where they are required to make their asylum claims and await for status determination. Swiss authorities have eagerly and rather strictly applied the Dublin Regulation. In fact, Switzerland has made the most so-called "Dublin referrals" than any other European state. Since 2009, it has returned to other European countries more than 25,000 people , or more than 15% of all asylum applicants who have arrived in Switzerland.[390] Such strict application of the Dublin Regulation has had a significant deterring effect. The number of asylum applications in Switzerland has reached its lowest level since 2007, with 14,269 applications lodged in 2019.[391]

In cases where people's asylum claims are rejected, the immigration authorities have responsibility to examine whether the removal of the asylum seeker is lawful, reasonable and operationally possible to implement. If these conditions are not met, the asylum seeker has a right to receive a temporary admission to Switzerland (*permis F*). Asylum-seekers who have their claims denied in first instance can remain regularly in the country and have the right to appeal asylum decisions under certain conditions. However, if their appeal is rejected in final instance, they are usually issued an order to leave the country, but may remain in an irregular status if Swiss authorities are not able to enforce the return decision.[392] In both

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[387] https://www.refugeecouncil.ch/asylum-law/legal-basis/schengendublin-and-switzerland.html

[388] Commission staff working document, 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) p.7 http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf

[389] Asylum Information Database, Country report: Switzerland, p.41, 2018 update. See also article 21 of Asylum Act "persons who request asylum at the border or following their detention for illegal entry in the vicinity of the border shall normally be assigned by the competent authorities to a reception and processing centre, where they enter the same procedure as any other asylum seeker." https://www.admin.ch/opc/en/classified-compilation/19995092/index.html

[390] Le règlement Dublin et la Suisse, 11 Mai 2017 https://www.amnesty.ch/fr/themes/asile-et-migrations/docs/2017/le-reglement-dublin-et-la-suisse

[391] Statistique en matière d'asile, Décembre 2019 https://www.sem.admin.ch/sem/fr/home/publiservice/statistik/asylstatistik/archiv/2019/12.html

[392] The applicant can appeal the negative decision before the Federal Administrative Court within 30 days if the denial is substantive and within 5 days it its due to inadmissibility which includes Dublin returns. An appeal has automatic suspensive effect except for Dublin cases where the suspensive effect needs to be requested and the court decides to grant it or not. Article 55(1) Administrative Procedure Act https://www.admin.ch/opc/en/classified-compilation/19680294/index.html#a55
The removal order sets an "appropriate departure deadline" of between seven and thirty days, which can be extended for special circumstances like family or health related. For Dublin returns and previous refusal entry under the Schengen code, the removal order must be enforced immediately or within less than seven days. See also Article 64 Federal Act on Foreign Nationals and Integration https://www.admin.ch/opc/en/classified-compilation/20020232/index.html#a64d

instances, individuals who have their asylum claims rejected are placed in a precarious situation. Those rejected in the first instance are housed in underground civil defence facilities in some cantons (e.g. Zurich and Ticino) where many stay longer than three months, an arrangement which the National Commission for the Prevention of Torture (NCPT) does not consider permissible.

In the context of numerous challenges to accessing international protection or legally joining family members in Switzerland, general precariousness and, often, the prolonged irregular stay in the country, many individuals and groups in Switzerland have stepped in and tried to alleviate the hardships experienced by asylum-seekers by providing them with support to meet their basic needs. A few, however, could know that these acts of solidarity would come at a high cost, leaving them with criminal record and, in cases of those who were non-Swiss nationals, jeopardising their immigration status in the country.

6.7.2 LEGAL FRAMEWORK ON FACILITATION

In the Federal Swiss legal framework, legislation based on the Facilitators' Package criminalizes facilitation of irregular entry, transit or stay, regardless of whether the person acted out of solidarity. The Law on Foreigners provides distinct penalties for the two forms of offense; an aggravated offence, which requires an "unlawful enrichment" or material benefit and offenders "acting in association" (an offence largely aimed at smuggling networks), and the non-aggravated offense for the cases of "low severity", which involve "abetting illegal entries and exits as well as illegal stays".[393] The prescribed penalty for non-aggravated cases is a fine; while offender in aggravated cases could receive up to five years of imprisonment.

Notwithstanding the legal distinction between aggravated and non-aggravated facilitation, the Swiss law nevertheless allows for the criminalization of people who are acting to help migrants and refugees to access international protection or means of livelihood, and who may be doing so as part of a civil society network or organization, or as friends and family members of the person they are helping. The law does not provide for a humanitarian exemption, nor does it consider material benefit as a constitutive element of the offence, but only as an aggravating factor. In this respect, in addition to being in breach of international laws and standards, the Swiss legislation is also at odds with the "right to assistance when in need" clause, recognized in the Swiss Constitution.[394]

Individuals who help people in an irregular situation to access protection, shelter and means of livelihood are generally prosecuted on non-aggravated charges of facilitation to enter or stay. The main grounds that could trigger the use of facilitation charges involve hosting people without legal immigration status and assisting them to cross borders irregularly in order to enter Switzerland. In cases that involve housing, the police generally discover the situation upon arresting a person without legal status and requesting them to disclose where they live. For cases of irregular border crossing, the person helping the foreign national to cross is often arrested while trying to drive across the border.

The association of prosecutors regards breaches of Law on Foreigners (article L.116) as "mass infraction" because of the frequency of such cases and has enacted guidelines recommending harmonised sentences across the Federation. The guidelines indicate that if the person facilitates the entry of a foreign national out of an "honourable motive", they could face a monetary penalty of between 20 to 60 day-fine.[395] In such cases, the police sends a report to prosecutors who decide on a range of actions: they can convict the individual with an "immediate criminal order" (*ordonnance pénale immediate*); request the police to seek further information; send the case for trial; or close the case. Most cases that Amnesty International documented involved immediate convictions by the prosecutor, including an imposition of a fine. Those convicted have ten days to oppose the criminal order.[396] Under the Swiss procedure, in cases of non-aggravated facilitation, it is not mandatory to be defended by a lawyer.[397] However, the police have obligation to inform the accused that they have the right to a lawyer and can appoint one.

According to the General Prosecutor of Zurich, in most cases, it is the municipal police that reports on these situations and sends reports to the prosecutors if they consider that a criminal prosecution should be

[393] Article 116, al. 1a; Article 116, al. 2 and article 116, al. 3 of the Law on Foreigners (Loi sur les étrangers et l'intégration LEI)
[394] Right to assistance when in need, article 12 Swiss Constitution "Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living". https://www.admin.ch/opc/en/classified-compilation/19995395/index.html#a12
[395] The amount of the fine is decided and imposed by the Prosecutor, following the criteria of the Conférence des autorités de poursuite pénale de Suisse, Recommandations Loi sur les étrangers (art. 115 – 1119 LEtr), 22 novembre 2007.
[396] Some people decide not to appeal immediate criminal orders. In the course of this research Amnesty International interviewed four persons who were issued immediate criminal orders for hosting people without status in Switzerland, but who chose to not oppose the order and paid the fine
[397] Lawyers are only mandatory for more serious offenses. Article 130, Code of Criminal Procedure

initiated.[398] "We [prosecutors] must see if the stay is legal or illegal, as the police relies primarily on the legal status of the person. We can also request the file from the Cantonal Office of Migration."[399]

In the specific case of the city of Berne, when the Migration Service official suspects that an offense has been committed, it sends the file to the cantonal police. "In our case, we are the ones who conduct the investigation and decide whether the file should be transmitted to the prosecutor or not. I find that this role makes sense for the big cities in Switzerland, where the problem of migration is very different from the one in the countryside. In 2019, we had 200 people without status in Berne up until now. There were 18 prosecutions under art.116 [of the Law on Foreigners], but all these cases were cases of exploitation and not cases of 'crime of solidarity'."[400]

Under the Swiss criminal procedure, the prosecutor can decide not to convict the accused with an immediate criminal order. As the General Prosecutor of Zurich explained, "if the guilt of the perpetrator and the consequences of his act are not significant, the competent authority can decide not to prosecute him, refer him to the judge or to impose a [specific] sentence."[401] The Prosecutor of Vaud confirmed that there are criteria that are taken into account while deciding on specific course of action, including the duration of the irregular stay, whether the person was employed or not, the nature of the relationship between the person accommodated and the person hosting.[402] He acknowledged, however, that prosecutors do not have much room for flexibility and "must apply the law."[403]

In 2018, 962 people were convicted for facilitation of irregular entry, circulation or stay (article L116). Among them, 680 were non-Swiss nationals and 420 of them had Swiss residency status.[404] It is quite possible that the convicted non-Swiss nationals include many people who had provided assistance or helped family members or friends who did not have a legal status in Switzerland. Because they themselves live in a precarious situation or because their asylum request might be pending, they typically do not object to the "immediate criminal order" to avoid trial. For extended family members and friends of migrants and refugees, the risk of any legal process for their personal status in Switzerland is higher, which makes them more vulnerable. The high legal costs of objecting to the immediate order and instead going to trial may also explain why, non-Swiss nationals are overrepresented among those convicted for non-aggravated offence of facilitation under the Law on Foreigners.

The Swiss Federal court noted that for an act to qualify as an act of facilitation, it has to include an element of obstruction of actions by the authorities. An example of this would be an act of hiding a foreign national in order to prevent the immigration authorities from expelling them. However, in the cases that Amnesty International documented, individuals assisting refugees and migrants were not deliberately attempting to obstruct the actions of authorities. Rather, they were `defending the rights of refugees and migrants, or simply acting out of spontaneous compassion, without the intent to deceive the authorities.

6.7.3 CRIMINALIZING SHELTER: THE CASES OF PASTOR NORBERT VALLEY AND VALERIE

Norbert Valley has been a pastor for 40 years; 30 of which he spent assisting refugees and migrants. "I have never dissociated faith and social commitment. Jesus said, 'I was a stranger and you welcomed me. When you saw a stranger, you saw me'".[405]

In February 2018 during a Sunday service, Pastor Norbert Valley was taken for questioning by the police. A few months later, on 15 August 2018, he was found guilty of facilitating the illegal stay of a Togolese man whose asylum claim had been rejected. In the words of the prosecutor in the case, Pastor "facilitated illegal stay of a Togolese man through the repeated provision of shelter and food from April 2016 to September 2017" and was sentenced with a CHF 1000 fine (CHF 100 per day for 10 days).[406]

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[398] Interview with the General Prosecutor of Zurich, 6 June 2019
[399] Interview with the General Prosecutor of Zurich, 6 June 2019. The Cantonal Office of Migration can get more information on the person than what the police provided as info on the legal status. For example, where they studying or working in Switzerland before. The General Prosecutor mentioned the case of two former students without a status, his office issued them status instead of ordering deportation
[400] Interview with the Chef de l'Office communal des migrations de la ville de Berne, 7 June 2019
[401] Article 52-54, Code of criminal procedure
[402] Interview with the General Prosecutor of canton de Vaud, 4 June 2019
[403] Interview with the General Prosecutor of canton de Vaud, 4 June 2019
[404] Statistiques de la justice pénale : condamnations https://www.bfs.admin.ch/bfs/fr/home/statistiques/criminalite-droit-penal/justice-penale/personnes-condamnees.assetdetail.5366403.html
[405] Interview with Pastor Norbert Valley, 3 June 2019
[406] Penal Order, Public Prosecutor's Office August 15, 2018

Following his conviction, Pastor Norbert Valley decided to appeal this decision. In his letter to the prosecutor of the Canton of Neuchâtel he stated:

"I declare that I feel guilty of nothing in the case that you mention, regardless of the law under which you sentenced me. Something that is legal is not necessarily moral. I consider that I have only done my duty to assist a person in danger. Your decision prevents me from living my professional and pastoral commitment coherently. I am not fighting for me but to create a movement of solidarity. We are all brothers in humanity and in solidarity."[407]

Pastor Norbert provided shelter and food to Joseph,[408] a 34-year-old Togolese man who was in a situation of destitution. Joseph had lost his apartment when his asylum request was denied in 2016,[409] and was hospitalized when he learned he could not stay in Switzerland. He said to Amnesty International: "I was told to leave Switzerland, but I did not do leave because my life is still in danger in Togo. I no longer receive emergency aid. Sometimes I help the elderly to carry their groceries in exchange of a bit of money." [410]

Pastor Valley explained: "Since the 80s, I've always welcomed refugees and migrants in the Church. I did not think about Article 116 [of the Law on Foreigners], I could not imagine such thing. I have known Joseph for about four years now, he was coming to church from time to time. I told the police I helped someone in distress."[411] Despite his motivation to help others, Pastor Norbert Valley is still waiting for a decision on his appeal, which is expected in March 2020.

Helping someone in a situation of destitution is particularly risky for non-Swiss nationals. For them, helping friends and extended family members may not only entail a fine, but having a criminal record resulting from it can affect their application for refugee status or the renewal of their residence permits, and therefore, jeopardise their prospects of staying in the country. Moreover, beyond the legal costs of fines and legal fees, non-Swiss national may be reluctant to oppose fines and instead go to trial out of fear of the consequences for their status in Switzerland.

This is the case for Joseph's friend, Valérie. Valérie[412], a 36-years-old Togolese hosted Joseph when he needed a place to stay. On 1 December 2017, he was helping Valérie to take groceries out of her car when police officers, who were in the area carrying out a separate operation, decided to check his status and arrested him. The police then called Valérie for interrogation and questioned her about her friendship with Joseph. They asked her to provide detailed information about him, including where he lived and what he ate.

Valérie was then convicted for facilitating the illegal stay of Joseph. She was sentenced to a suspended 10 days fine of 30 CHF and 310 CHF of legal fees. Valérie's social worker dissuaded her from appealing this conviction to avoid any potential risk to her application for refugee status.

Valérie did not know that what she did was illegal under Swiss law. "I never had a problem like this, so I did not take it seriously."[413] The young woman, who came to Switzerland after her husband was murdered in 2011, now has a criminal record, which does not allow her to obtain the residence permit (*permis B*) she needs and will delay her application for refugee status by two years.

"I did not know [that] providing help was prohibited by law and I do not find that fair. Just because Joseph's asylum request was rejected, I cannot help my friend. Our friendship is impacted. But I do not regret helping my friends."[414]

6.7.4 HELPING PEOPLE AT BORDERS: THE CASES OF ANNI LANZ AND LISA BOSIA MIRRA

Anni Lanz, 73-year-old pensioner from Basel, Switzerland, has been an activist since 1985. On 24 February 2018, Anni took M. Ashuqullah, a 30-years-old Afghan asylum-seeker, to Switzerland. He was in a

[407] Letter, Pastor Norbert Valley to the Prosecutor's office of the canton of Valais, 17 August 2017
[408] Not his real name. Name is not disclosed for confidentiality reasons
[409] Joseph had first sought asylum in Switzerland in 2012. His last application for asylum was denied in March 2016. His appeal against the decision was rejected and his request for suspensive effect dismissed. Joseph was arrested on 1 December 2017 for irregular stay and subject to a prohibition of entry on 13 March (art.115 Law on foreigners)
[410] Interview with Joseph, 3 June 2019
[411] Interview with Pastor Norbert Valley, 3 June 2019
[412] Not her real name. Name is not disclosed for confidentiality reasons
[413] Interview with Valérie, 3 June 2019
[414] Interview with Valérie, 3 June 2019

distressed psychological state and was sleeping rough in extremely cold temperatures in Italy, near the Swiss border.

M. Ashuqullah's relative had alerted Anni about M. Ashuqullah's return to Italy under Dublin rules and told her that he was not given a place in a reception centre there. Anni Lanz, who had met the man previously in a removal centre in Switzerland and concluded that he had had very serious psychological difficulties, saw no other alternative than to drive him to Switzerland, where he could be reunited with his sister. When Anni Lanz picked up Mr. M. Ashuqullah, he was sleeping rough in an area of the train station of Domodossola at the Italian/ Swiss border, in extremely cold weather, and had signs of frostbite. She took him in her car, but they were stopped at the border crossing in Gondo. "When the police questioned me, I told them he was very sick, it was very cold and that his expulsion to Italy was unlawful. A police officer told me 'the law comes before the morals'."[415]

Following the arrest, Anni Lanz was charged with facilitating irregular entry and convicted by the prosecutor's office of canton of Valais with an immediate criminal order on 23 March 2018.[416] She objected the conviction, but the lower court of Brigue confirmed it.[417] On 21 August 2019, the court of the Canton of Valais (second instance court) upheld the conviction. Anni Lanz has appealed the decision before the Federal Court and her case is pending.

By attempting to help Mr. Ashuqullah reunite with his family in Switzerland, Anni Lanz only assisted a man in acute distress, whose needs had not been met either by Italian or Swiss authorities. M. Ashuqullah suffered severe mental health problems, which had deteriorated after the death of his father, wife and child in Afghanistan. Anni Lanz explained to Amnesty International why she acted: "The doctors said he was only safe with his sister; he was in distress in Italy." Nevertheless, Swiss authorities had decided to return him to Italy despite six medical reports recommending against it due to his poor mental health, and several suicide attempts. Swiss authorities ignored these reports demanding to let him stay with his sister in Switzerland. [418]

Meanwhile, Swiss authorities forcibly deported Mr Ashuqullah back to Italy. Following her conviction, Anni Lanz visited him several times in Italy, the last time in a psychiatric facility. Since then, she has lost contact with him, does not know where he is and if his situation has improved. "He was mentally ill and sleeping in the streets while it was very cold outside. He was hospitalized five times in psychiatric facilities and attempted suicide several times. He then tried [to take his own life] again later in Italy. He's very traumatized by the war. Only with his sister, he will he get calmer. He had several medical records stating he needs to be with his sister. In Italy, no one knew which medications he needed, I had to tell them."[419]

Anni Lanz is a human rights defender; her work should not be criminalised.

"I appealed the conviction, not for the fine, but to denounce the refoulment practice. I will keep repeating it: vulnerable people and those with family should not be expelled. I am very modest, I do not ask for the moon, it is not necessary to send back [from Switzerland] the vulnerable people and those with families. We can fulfil this request."[420]

Anni Lanz
© AI Switzerland

Lisa Bosia Mirra is a 46-year-old social worker who has been defending refugees and asylum-seekers' rights for more than 20 years. She founded the NGO Firdaus, which assisted asylum-seekers in applying for

[415] Interview with Annie Lanz, 6 June 2019
[416] Anni was sentenced to 30 days fine of 50 CHF per day, an additional fine of 300 CHF and charged with the legal fees of 400 CHF
[417] Anni objected the conviction on 6 April 2018 and the lower court of Brigue confirmed the conviction on 10 December 2018 but erased the 30 days fine while increasing the additional fine of 300 CHF to 800 CHF and legal fees of 1400CHF
[418] Courrier Bezirkgericht 14 December 2018, Letter from the lawyer Guido Ehrler
[419] Interview with Anni Lanz, 6 June 2019
[420] Interview with Anni Lanz, 6 June 2019

international protection. Until she was convicted for facilitation of irregular entry, Lisa had served as an elected representative in the local parliament of Ticino, in Switzerland.

In the summer 2016, Lisa Bosia Mirra and her association assisted migrants and refugees who were rough-sleeping the park in front of the S. Giovanni station in Como, Italy, close to Swiss border. Assistance included providing food, creating files for unaccompanied minors to ensure they could access international protection in Switzerland and contacting refugees' and migrants' family members living in the country. Lisa also collected testimonies of victims of torture in Libya and documented cases of illegal pushbacks at the Swiss-Italian border.

Speaking about the situation in Como during the summer 2016, Lisa Bosia Mirra explained: "I regularly went to Como. People lived in the park and there were many vulnerable people, such as unaccompanied minors and single women or single mothers with children. The situation became more and more unbearable."[421]

With limited support and access to health care in Italy, and with the country's overcrowded facilities for minors and other vulnerable people, many asylum-seekers headed to the Como area, hoping to seek protection in Switzerland, or reunify with their family members. The already precarious situation in Como deteriorated further when Swiss border guards started to regularly send children back to Italy, even after they had asked for international protection in Switzerland, a country in which many claimed to have family members.

On 1st September 2016, Lisa Bosia Mirra was arrested at San Pietro di Stabio in Switzerland, near the border with Italy. She had assisted a 50-year-old Swiss man who was helping four Eritreans, including three children, to enter Switzerland in order to seek asylum.

In total, Lisa Bosia Mirra helped 24 young refugees and migrants, who had been stranded at the border, to enter Switzerland and seek international protection or join their relatives in other European countries. She helped some of them in Switzerland by providing shelter or reconnecting them with their families. "We did some research to find family members in Switzerland of about 30 unaccompanied children. Among the people who came, there were some who had a UNHCR paper in Egypt attesting that they were refugees recognized by the UNHCR. Some of the children we helped went to Germany to join family members and they were recognized as refugees there."[422]

On 12 April 2017, the prosecutor of the canton of Ticino issued an immediate criminal order for Lisa Bosnia Mirra for facilitating entry, exit and stay of 20 Eritrean and Syrian people whom she had helped to cross the border between Italy and Switzerland.[423] On 28 September 2017, the Bellinzona Criminal Court found her guilty of "repeated incitement to unlawful entry, exit and stay".[424] On 31 October 2019, the Locarno Court of Appeal upheld Lisa Bosia Mirra's conviction, but reduced the almost 10,000 CHF fine, issued in first instance, to 2,200 CHF.[425] The Locarno Court, in line with the jurisprudence of the Swiss Federal court, confirmed that hosting an irregular migrant for a few days in Switzerland is not punishable. It also considered that giving food to a foreigner in a difficult situation is not punishable, nor is giving medical assistance or legal advice to a migrant who is about to cross the border irregularly. Despite the court decision to reduce the fine, the conviction on charges of facilitation of irregular entry and stay remained and Lisa Bosia Mirra's now has a criminal record.[426]

Lisa Bosia Mirra's activities of protecting the rights of asylum-seekers that are guaranteed by both international and EU law, were public and legitimate. She acted to defend the rights of unaccompanied children and other vulnerable people in circumstances where Swiss and Italian authorities were failing to do so. "More than half of the refugees I saw were children and women. Everything I saw distressed me," she told Amnesty International. Despite she publicly denounced denouncing the situation at the border, including the pushbacks and denial of the right to asylum, authorities did not change course. Their inaction and their failure to guarantee the rights of people fleeing conflict, persecution or poverty, led Lisa Bosia Mirra and others like her to take initiative and help people to seek international protection or reunite with their families.

Lisa Bosia Mirra regretted, however, that neither her intentions and motivation, nor the situation in Como were taken into account during the trial:

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[421] Interview with Lisa Bosia, 4 June 2019
[422] Interview with Lisa Bosia Mirra, 4 June 2019
[423] Decreto di acusa, Procuratore Publico, Cantone Ticino, 12 April 2017
[424] Sentenza con motivazione, 28 September 2017
[425] Lisa had been condemned to a fine of 8,800 (80 days of 100 CHF) and an extra 1000 CHF fine. It has been reduced to 20 days, and the second fine has been cancelled
[426] Article 369, Swiss criminal code

"My court hearing lasted six hours. They kept the car and the laptops. They focused on the crossing [of the border]. The suffering was not taken into account in the ruling. They said I should have stopped at the border. At one point, I thought that the pictures of misery could help. But the important thing was not recorded: my motivation."[427]

Lisa Bosia Mirra paid a high price for helping the people in need, as the criminal proceedings had damaging consequences on her private and professional life. "I was targeted [and received] threats, including death threats, but I also received great support."[428] She could not find job following her conviction and was also pressured to resign from the Great Council of Ticino (Parliament of the canton of Ticino). "I was fired from my job when the ruling came. In the Parliament, I was refraining from speaking during the sessions because I felt very uncomfortable."[429]

Lisa Bosia Mirra kept contact with some of the people she helped. However, she gradually stopped her involvement with refugees and migrants despite the gratitude she continues to receive from those she had helped. "I still receive messages saying 'thank you for what you did for me'. But there are still people sleeping on the streets in Como. After my conviction, there should have been a solidarity movement saying 'me too, I did it', but there was no such action."[430]

6.7.5 CONCLUSION

Authorities in Switzerland are misusing charges of facilitation of irregular entry and stay to prosecute and penalise legitimate human rights activities, such as providing shelter, food and assisting refugees and migrants to access international protection.

While Swiss legislation differentiates between penalties for aggravated and non-aggravated facilitation, it remains problematic for several reasons. First, the Law on Foreigners does not require facilitation to include a material or financial benefit or profit to constitute a criminal offence, which is not in line with the UN Smuggling Protocol. Second, the law does not provide for a humanitarian exemption that would exclude acts of solidarity from prosecution. This leaves a great deal of space for prosecutions of human rights defenders. Due to significant discretion of prosecutors and several routes that they can take in these cases, the outcomes of these processes depend almost entirely on individual prosecutors. Third, helping friends and family members is particularly risky for non-Swiss nationals. For them, the consequence of helping those in need may not only entail a fine. The criminal record resulting from helping family members and friends in an irregular situation can affect their application for refugee' status or the renewal of residence permits. Many non-Swiss nationals may also be reluctant to appeal convictions, because of the legal fees involved and also because they fear that this can be detrimental for their future prospects in Switzerland.

[427] Interview with Lisa Bosia Mirra, 4 June 2019
[428] Interview with Lisa Bosia Mirra, 4 June 2019
[429] Interview with Lisa Bosia Mirra, 4 June 2019
[430] Interview with Lisa Bosia Mirra, 4 June 2019

6.8 UNITED KINGDOM: THE CASE OF THE "STANSTED 15"

In the United Kingdom, 15 human rights defenders, known as the "Stansted 15", took non-violent direct action to stop a charter flight due to deport 60 individuals to Nigeria and Ghana in March 2017. They said they did so because they believed that some of those due to be deported were facing unlawful removal from the UK and would have been in serious danger if returned to their countries of origin. They included a lesbian woman whose husband had threatened to kill her, a victim of human trafficking, and a Boko Haram victim. As a result of the "Stansted 15"'s action, 11 people due to be deported were allowed to stay in the UK to pursue their claims in the immigration and asylum system. As of March 2020, at least four of them had been granted the right to remain in the UK.[431] The action by the "Stansted 15" included cutting a small hole in the Stansted airport perimeter fence to gain access to the area where the deportation plane was parked, surrounding the plane, and chaining themselves to each other and a tripod they set up, without using violence or harming anyone.

On arrest, they were charged with aggravated trespass. However, four months later the charge was upgraded to "endangering safety at aerodromes" - a serious terrorism-related charge which carries a maximum penalty of a life sentence.[432] Amnesty International considers the "Stansted 15" to be human rights defenders and has argued[433] that the charges were excessive and may have been brought to discourage other activists from taking non-violent direct action in defence of human rights. Eventually, the "Stansted 15" faced trial in the autumn of 2018 and were found guilty in December.[434] During the trial the defendants were not allowed to explain to the jury the reasons why they took the action (justification defences), which may have changed the outcome of the trial. In February 2019, three of them were handed down suspended jail sentences, and the rest community orders. The fact that none of them were given a jail term is indicative that the judge did not consider them dangerous - in fact, during sentencing he recognized they were motivated by "genuine reasons".[435] As of January 2020, they were awaiting a date for their appeal to be heard in court.

After the conviction of the "Stansted 15", several UN human rights experts, wrote to the UK authorities expressing concerns at the use of such disproportionate charges and calling on them to "refrain from applying security and terrorism-related legislation to prosecute peaceful political protesters and critics of State policy who are engaged in non-violent expression, protest and political advocacy".[436]

[431] "Of the four people who have been granted the right to remain in the UK, two have been issued a residence card as a non-EEA national family member confirming a right to reside in accordance with EEA Treaty rights, one has been granted leave to remain on Human Rights grounds, and the other has been granted leave to remain following a conclusive grounds decision under the National Referral Mechanism for the identification of victims of trafficking", response by the Home Office to Parliamentary question 241011, asked by Caroline Lucas MP on 4 April 2019, www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-04-04/241011/

[432] The Aviation and Maritime Security Act, 1990. See also "Legal briefing about the nature of charge the Stansted 15 faced", 7 February 2019, by Raj Chada, Hodge, Jones and Allen Solicitors, https://www.hja.net/legal-briefing-about-the-nature-of-charge-the-stansted-15-faced/

[433] The organization wrote to the Attorney General and the Director of Public Prosecutions in September 2018, calling on them to drop the terror-related charge.

[434] Amnesty International UK, "Stansted 15: Amnesty to observe trial amid concerns for anti-deportation activists" (News, 28 September 2018); "Stansted 15 verdicts show UK authorities have used a sledgehammer to crack a nut" (News, 11 December 2018)

[435] The Guardian, "Stansted 15: no jail for activists convicted of terror-related offence", by Damian Gayle, 6 February 2019

[436] OHCHR, "UK must stop disproportionate use of security laws after conviction of Stansted 15, say UN rights experts", 6 February 2019, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24141&LangID=E

7. CONCLUSION AND RECOMMENDATIONS

European leaders have implemented strict border and migration control measures focussed on reducing departures of people from northern Africa and Turkey, on making Europe's external borders hard to access for them and on containing them in the countries of first arrival in Europe. They have often used the fight against human trafficking and smuggling, and occasionally that against 'terrorism', as justifications for exposing refugees and migrants to grave risks to their lives and safety. In the past three years, humanitarian actors who have dared to mitigate or question the human impact of these measures have found themselves in the docks in numerous European countries – their rights violated, their lives on hold waiting for criminal investigations to close and court cases to start so they can defend themselves and move on. The public and often abusive questioning of their motives by politicians, representatives of institutions and commentators nationally and at European level has undermined the very notion of solidarity, regardless of its being enshrined in the EU treaties and in the constitutional traditions of European states. The primacy of the right to life, of the right to seek asylum, of the right to live in dignity without discrimination, which all rest on the principle of solidarity among human beings, has been challenged.

European leaders should address the challenges presented by irregular migratory movements by agreeing radically new migration policies that do not compromise on the protection of the human rights of refugees and migrants. At the same time, it is urgent and fully within the grasp of European leaders to end the criminalization of human rights defenders who assist refugees and migrants. They must act immediately to prevent any further instances of criminalization of solidarity, including by changing relevant legislation through a reform of the Facilitators' Package and at national level, remedy the impact of the misuse of criminal law and of other legislation, policies and practices against human rights defenders, and work towards the full implementation of the UN Declaration on Human Rights Defenders in Europe.

TO ALL EU MEMBER STATES AND INSTITUTIONS AT EUROPEAN LEVEL

- Review the Facilitators' Package, to bring it in line with the UN Smuggling Protocol, international human rights law as well as international refugee law, and in particular: 1) introduce the element of unjust financial or other material benefit in the crime of facilitation of entry, transit and stay of a foreign national in an irregular status; and 2) decriminalize the irregular entry of a foreign national and ensure that any administrative penalty is proportioned and consistent with international human rights laws and standards. States should also consider, should the introduction of material benefit as a constitutive element of the offence of facilitation not be possible, the introduction instead of a mandatory and broadly defined humanitarian exemption clause, to bar prosecutions against individuals and groups who act peacefully to protect the human rights and dignity of refugees and migrants.
- Pending the Facilitators' Package review, request that the Commission introduce interpretative guidelines to assist national authorities with its implementation in a manner that prevents the further criminalization of solidarity. Such guidelines should urge judicial, law enforcement and other officials to assess behaviours that might come under the Facilitators' Package in light of states' international human rights law and refugee law obligations to protect refugees and migrants and human rights defenders who assist them. In particular, the guidelines should make reference to states' obligations

to ensure rescue at sea without discrimination, effective access to borders to seek protection, with no push-backs or returns to countries where people could be at grave risk to their life and safety, and they should promote the use of the international definition of smuggling in the UN Smuggling Protocol.

- The European Parliament should set up a parliamentary inquiry to investigate cases submitted for prosecution under national smuggling statutes, collect and analyse quantitative and qualitative national data concerning smuggling and/or related offences, with a view to facilitating a legislative reform that effectively prevent baseless prosecutions against human rights defenders for their acts of compassion and solidarity.
- The Commission should draft guidelines to protect HRDs inside the EU, in consultation with the Fundamental Rights Agency, including to ensure that the EU is consistent in applying safeguards to protect human rights defenders internally as it does externally.
- Train law enforcement officials, judges and prosecutors to recognize the role played by human rights defenders and to be able to identify situations in which administrative and criminal procedures could unduly restricted, sanction or undermine their legitimate activities.
- Ensure that an adequate number of vessels with search and rescue as their primary purpose are deployed along the routes taken by boats carrying refugees and migrants, including near Libyan territorial waters, for as long as departures of refugees and migrants from Libyan shores continue.
- Build upon temporary arrangements for disembarking and relocating people rescued at sea to ensure predictable and prompt disembarkation and relocation and the widest possible participation of European states in these arrangements.
- Refrain from setting policies that expand the use of detention for refugees and migrants, sanction secondary movements within the EU, and outsource border control responsibilities to countries outside Europe.
- Establish an effective solidarity and incentives-based mechanism, by overhauling the present EU asylum rules, which assign disproportionate responsibility to the state of first entry, and providing for relocation arrangements, which prioritise family reunification and other connections to a particular EU or associated country; and ensure effective implementation of common European asylum determination and reception rules to achieve fairer and equivalent protection standards.
- Allow free movement for refugees in the EU and Schengen area, by revising EU legislation limiting freedom of movement of successful asylum-seekers within the EU and establishing a system of mutual recognition of positive decisions on international protection.
- Open safe and legal routes into Europe, by offering a meaningful number of places for resettlement and alternative pathways to protection for refugees currently stranded in Libya, Turkey and other neighbouring countries; and by reviewing migration policies at national and EU level to facilitating regular pathways for would-be migrants, including by reducing legal and administrative barriers to family reunification.

TO ALL EU MEMBER STATES AT NATIONAL LEVEL

REGARDING THE REFORM OF THE CRIME OF FACILITATION OF IRREGULAR ENTRY, TRANSIT AND STAY

- Revise national legislation to ensure that an unjust financial or other material benefit is required for criminalizing the facilitation of entry, transit and stay of a foreign national in an irregular status. States could also consider the introduction or expansion of a mandatory and broadly defined humanitarian exemption clause, to bar prosecutions against individuals and groups who act peacefully to protect the human rights and dignity of refugees and migrants.
- Decriminalize the irregular entry of a foreign national and ensure that any administrative penalty is proportionate and consistent with international human rights laws and standards.

- Collect data on the prosecutions and outcomes of proceedings regarding the offence of facilitation of irregular entry, transit and stay, and on the application of the humanitarian exemption, where applicable, disaggregated by type of offence and status of the accused.

REGARDING THE PROTECTION OF HUMAN RIGHTS DEFENDERS

- Discontinue, dismiss or quash as appropriate current criminal investigations and prosecutions that target the legitimate activities of human rights defenders.
- Refrain from misusing administrative, security, public order and counter-terrorism legislation to restrict the activities of humanitarian actors assisting refugees and migrants by applying laws that do not fit the conduct that is being investigated and prosecuted.
- Ensure that no one is criminalized for exercising the right to freedom of expression, association, and assembly, nor subjected to threats, attacks, harassment, smear campaigns, intimidation or reprisals for their human rights work.
- Ensure that law enforcement officers behave according to the highest standards of policing conduct, including by refraining from unlawful acts of violence, arbitrary detention and intimidation and harassment human rights defenders.
- Thoroughly investigate any attack against human rights defenders and bring those responsible to justice.
- Implement the Declaration on Human Rights Defenders, including by publicly championing and supporting human rights defenders who assist refugees and migrants and ensuring that they can operate in a safe and enabling environment.
- Refrain from and publicly condemn verbal and physical attacks, threats and intimidation and any smearing of human rights defenders using language that stigmatizes, abuses, disparages or discriminates against them.
- Apply the principle of 'firewalls' to ensure that human rights defenders can assist refugees and migrants regardless of their irregular status without being required to gather and share personal information on them with the authorities.

REGARDING CIVILIAN RESCUE AT SEA AND COOPERATION ON MIGRATION CONTROL WITH LIBYA

- Uphold international maritime law obligations, including by refraining from penalizing shipmasters for assisting people in distress at sea; issuing clear guidelines to shipmasters to prevent the disembarkation in Libya or any other unsafe place of any people rescued at sea; and ensuring that rescue NGOs are fully included in the search and rescue system and that they can operate in a safe and enabling environment, in line with relevant international law and standards.
- Refrain from transferring to Libyan authorities the coordination of SAR operations in the central Mediterranean, unless accompanied by the offer of a place of safety where rescued people can be disembarked; from instructing vessels carrying out rescues to seek instructions from the Libyan coastguard, and from circulating messages originated by the Libyan coastguard which may lead to delays in rescue operations.
- Limit any cooperation with the Libyan coastguard and other Libyan maritime authorities to cases where their intervention is essential to prevent immediate loss of life and make it conditional on measures to mitigate against the risks of disembarkation in Libya, including by asking that they:
    - limit their search and rescue activities to Libyan waters;
    - allow search and rescue operations by civilian vessels, including boats operated by NGOs, to take place unhindered, including in the proximity and, if necessary, inside Libyan territorial waters;
    - refrain from instructing vessels not to intervene in SAR operations, whenever those vessels may be able to intervene promptly and ensure effective rescues, and from instructing them to disembark those rescued in Libya or to transfer them onto Libyan ships;

- guarantee the prompt transfer of any rescued person onto vessels able to ensure disembarkation in a place of safety, outside Libya;
- establish a mechanism to ensure solid monitoring of their conduct and operations at sea, and of an accountability process for breaches of international law.

REGARDING THE PROTECTION OF REFUGEES, ASYLUM-SEEKERS AND MIGRANTS

- Ensure that all asylum-seekers have access to fair and effective asylum procedure, including an assessment of their claims for international protection on their merit through an individualized procedure.
- Ensure safe access to territory and refrain from unlawful border control practices, such as push-backs, collective expulsions and unlawful return.
- Protect the right to live in dignity of refugees and migrants, regardless of their legal status, by ensuring unconditional provision of essential support such as food and shelter.
- Provide refugees and migrants with information on their rights, including how to complain against police misconduct, in a language they understand.

RECOMMENDATIONS SPECIFIC TO THE FOLLOWING MEMBER STATES:

TO CROATIA

- Immediately halt the violent pushbacks and collective expulsions of refugees and migrants from the Croatian territory.
- Ensure that all procedures related to returns and transfers of individuals to Bosnia and Herzegovina include the necessary human rights safeguards and guarantees, including allowing the individuals the opportunity to challenge the lawfulness of any return decision.
- Immediately instruct border police and local police to stop using force and intimidation to prevent migrants and refugees from accessing Croatian territory and promptly, effectively and impartially investigate the allegations of excessive use of force against migrants and refugees and take appropriate action against the perpetrators.

TO THE EU INSTITUTIONS WITH REGARD TO CROATIA

- Decisively call on Croatia to immediately halt pushbacks, collective expulsions and police violence at its borders and use appropriate measures - including infringement procedures - to ensure Croatia's full compliance with European Union law.
- Demand that Croatian authorities take credible steps to conduct independent, prompt and effective investigation of pushbacks, collective expulsions and violent incidents and guarantee effective remedies for such violations; and prompt the suspension of operational support given to Croatia by the European Border and Coast Guard Agency until such investigations are conducted and people arriving at the Croatian border are duly registered and given access to an individualised procedure and to asylum, if they so wish.
- Request Croatia to put in place robust and independent monitoring mechanism at its borders and in the "green border area" in order to increase police transparency and accountability.
- Urge Croatia to ensure respect for existing national monitoring and accountability mechanisms, including by the Office of the Ombudsperson, allowing for public and institutional scrutiny of Croatia's migration policies and practices.

- Put in place an effective monitoring and oversight system to ensure that the EU funding provided to Croatia for the purposes of border protection does not encourage or contribute to human rights violations.
- Suspend Croatia's full accession to Schengen Area until the country has demonstrated tangible progress in ending the unlawful practices on the borders, holding those responsible for violations to account and putting in place independent monitoring at its borders.

TO FRANCE

- Refrain from misusing the Schengen borders code and security measures to deny access to protection and unlawfully return foreign nationals to Italy.
- In public discourse and in the interpretation of the law, promote an understanding of what constitute acting for humanitarian motives that reflects the variety of expressions of solidarity towards refugees and migrants. In particular, refrain from interpreting the expression of opinions as evidence of criminal intent or as a form of material benefit.
- Ensure identity checks are carried out in line with international human rights laws and standards.
- Enable access to the asylum procedure at the border in Montgenèvre as well as in Calais and Grande-Synthe.

TO GREECE

- Continue to allow unhindered access to detention and reception places for NGOs assisting refugees and migrants.
- Ensure that registration and other administrative requirements are not used arbitrarily and do not have the effect of unduly obstructing or rendering impossible the action of HRDs and NGOs.

TO ITALY

- Repeal the 'closed ports' provisions in Law 77/2019, and amend as necessary the Immigration Act (Law 286/1998), including by abolishing the newly introduced Article 11ter, and any other related provisions in the Immigration Act and the Code of Criminal Procedure
- Withdraw the code of conduct imposed on rescue NGOs, which unduly restricts their ability to save lives at sea and is used to criminalize them.
- Amend legislation to ensure that irregular entry in the territory of the state is not treated as a criminal offence.

TO MALTA

- Employ a broader definition of distress at sea aimed at maximizing the protection of life.
- Ratify and implement the 2004 amendments to the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR Convention), according to which the government responsible for the search and rescue region in which survivors are recovered is responsible for providing a place of safety or ensuring that such a place of safety is provided.
- Drop disproportionate charges against the youths involved in the *El Hiblu 1* incident which do not reflect the nature of the acts imputed to them and consider excluding or mitigating criminal responsibility, should evidence of criminal behaviour be proven in court, in light of the grave and real danger to their life and safety from which they were trying to protect themselves and the other rescued people.

TO SPAIN

- Refrain from misusing maritime regulations to hinder the operations of rescue NGOs and uphold the principle of freedom of navigation on the high seas.

TO SWITZERLAND

- Immediately introduce the humanitarian exemption for the facilitation of irregular entry, transit and stay in the Law on Foreigners and Integration, by reviewing Article 116.

- Refrain from using information gathered during identity checks on refugees or migrants to initiate proceedings against people who provided them with assistance to protect their human rights and dignity.

AMNESTY INTERNATIONAL IS A GLOBAL MOVEMENT FOR HUMAN RIGHTS. WHEN INJUSTICE HAPPENS TO ONE PERSON, IT MATTERS TO US ALL.

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PUNISHING COMPASSION

SOLIDARITY ON TRIAL IN FORTRESS EUROPE

In recent years, human rights defenders and civil society organizations that have helped refugees and migrants have been subjected to unfounded criminal proceedings, undue restrictions of their activities, intimidation, harassment, and smear campaigns in several European countries. Their acts of assistance and solidarity have placed them on a collision course with European migration policies.

By rescuing refugees and migrants in danger at sea or in the mountains, offering them food and shelter, documenting police and border guard abuses, and opposing unlawful deportations, human rights defenders have exposed the cruelty caused by immigration policies and have become themselves the target of the authorities. Authorities and political leaders have treated acts of humanity as a threat to national security and public order, further hindering their work and forcing them to divest their scarce resources and energy into defending themselves in court.

This report shows how European governments, EU institutions and authorities have deployed an array of restrictive, sanctioning and punitive measures against individuals and groups who defend the rights of people on the move, including by using immigration and counter-terrorism regulations to unduly restrict the right to defend human rights.

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