

## Position paper

# The “criminalisation” of solidarity towards migrants

20 June 2019

### Introduction: the “criminalisation” of solidarity as a threat to our democracies

In a context of stricter migration policies, activities carried out by NGOs and volunteers to ensure migrants get access to basic services and rights when the state is not delivering, are increasingly being portrayed by politicians as colluding with human smuggling and trafficking. A trend has emerged to pose obstacle, demonise, stigmatise, and criminalise humanitarian assistance to migrants throughout Europe, creating a chilling effect that results in discouraging solidarity. We refer broadly to this phenomenon as the “criminalisation” of solidarity, as it extends beyond mere judicial actions.

This issue is of great concern to Caritas Europa, as our core mission consists of promoting the human rights and dignity of all human beings, regardless of their migratory status. The principle of fraternity and solidarity is central in our activities and is being implemented on a daily basis by our members and volunteers who are helping migrants, whether it is through providing legal support and psychosocial counselling, food or shelter, among other services.

A toxic narrative on migration and those who help migrants has gained impetus in the last few years. While countering irregular migration and increasing border control has become a political priority in Europe, irregular migrants are being criminalised both in discourse and in practice. In this context, the fight against human smuggling and trafficking is used as a migration management tool for stricter migration regimes, the protection of the victims often being only a secondary concern.

The terms *smuggling* and *trafficking* are used interchangeably in political and public discourse, even though they refer to different concepts. According to the UN, “*smuggling of migrant shall mean 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*”<sup>1</sup>. It involves profit making for the smuggler but does not necessarily create a victim, or lead to violence and coercion. Indeed, the migrant resorts to the service of a smuggler in order to cross a border. On the contrary, human trafficking entails a victim; violence and coercion (e.g. forced labour or prostitution). For the UN, “*trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, [...], for the purpose of exploitation*”. Both terms are thus clearly distinct even if interlinked, and misusing them in the public discourse leads to confusion and misunderstanding of these phenomena.

The paucity of legal paths to enter Europe and increased border security results in more expensive and dangerous journeys and has boosted the smuggling industry, including for people in need of protection who are desperate to reach safety in Europe and to be reunited with their loved ones. Besides, the dysfunction of the European asylum system and the lack of solidarity between states, exemplified by the flawed Dublin system, also pushes migrants to cross intra-EU borders irregularly, risking their lives. EU politicians create a hostile environment in transit areas to push migrants out of their territory. The situation is particularly tense in areas, such as Calais, Ventimiglia, and the Serbia/Croatia border, where NGOs and volunteers are trying to fill the gaps left by states to restore migrants’ basic dignity and rights (i.e. providing food and facilities to showers). Push packs, police violence, harassment, deprivation of access to basic services and administrative tools, such as disproportionate police checks or parking fines are used to chase after migrants and to deter volunteers from

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<sup>1</sup> UN Protocol against the smuggling of migrants by land, sea and air, supplementing the UN convention against transnational organised crime, 2000, [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf).

carrying out their supportive activities. This results in creating an environment of suspicion and fuels xenophobia and negative discourses on migration. NGOs and volunteers are wrongly accused of being complicit of human smuggling due to the support they provide to irregular migrants in transit.

In addition, this criminalisation of solidarity is counterproductive in the fight against big transnational human smugglers' and traffickers' networks. Instead of wasting public resources in prosecuting innocent volunteers, the states ought to better invest their money and capacity in trying to dismantle big criminal networks that abuse migrants.

We are extremely concerned and worried by the increased criminalisation of solidarity, that puts our work and that of thousands of CSOs staff and volunteers around Europe in jeopardy. Catering to the needs and rights of migrants should be applauded instead of impeded by governments. The criminalisation of solidarity goes much beyond the issue of migration: it threatens our common European values of solidarity and human rights and risks damaging the social trust and social cohesion of our society. This is about the fundamental rights of European citizens to contribute to democracy and the fulfilment of everyone's rights.

### **NGOs and volunteers: the collateral victims of the fight against human smuggling and trafficking**

While it is impossible to gather statistics on the criminalisation of solidarity in Europe due to the variety of cases and legislation in different countries and due to the absence of monitoring tools, **a clear trend of shrinking space<sup>2</sup> for CSOs and human rights defenders supporting migrants has been emerging**, as those few examples attest.

Already back in 2012, a roundtable organised by the Council of Europe<sup>3</sup> with human rights defenders from Belgium, France and Greece highlighted increased detention, harassment, intimidation, legal proceedings and arrests of CSOs and activists. A research<sup>4</sup> in Italy, Greece, Hungary and the UK showed that more than half of the respondents witnessed an increase in policing of their activities since 2015, including intimidation, stigmatisation, suspicion and criminalisation that has led organisations and volunteers to change and adapt their work.

In France, several people who have provided support to migrants have been prosecuted for alleged smuggling. The French law foresees criminal sanctions against the facilitation of entry and transit done on a for-profit basis or in rule of compensation. The exemption for humanitarian assistance, expanded in 2012, did not suppress the "délit de solidarité" (crime of solidarity), as several humanitarian assistance acts can still be interpreted as smuggling under a far-reaching interpretation of the law<sup>5</sup>. Migrants rights' activists, volunteers and associations are frequently harassed and intimidated in various areas, such as at the border between France and Italy, near the Italian town of Ventimiglia, for example, where migrants survive in deplorable conditions and endure violence, harassment and push backs by the police<sup>6</sup>.

In April 2018, the French town of Briançon, in the Alps bordering Italy, became the theatre of rising tension around the issue of migration. Many migrants attempted to reach France from Italy by crossing the Alps without appropriate clothing or winter gear or knowledge of the area (e.g. walking in sandals in the snow). They faced

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<sup>2</sup> Council of Europe, Recommendation CM/Rec(2018)11 of the Committee of Ministers to Member States on the need to strengthen the protection and promotion of civil society space in Europe, 28 November 2018, [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=09000016808fd8b9](https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9).

<sup>3</sup> The protection of migrant rights in Europe. Round table with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights Paris, 5 October 2012 pg. 6-8, [https://rm.coe.int/ref/CommDH\(2013\)9](https://rm.coe.int/ref/CommDH(2013)9).

<sup>4</sup> Sergio Carrera, Jennifer Allsopp and Lina Vosyliūtė, "Main Research Findings of ESRC Project on The Effects of EU's Anti-Smuggling Policies on Civil Society Actors", [http://picum.org/Documents/Others/ESCR\\_Project\\_Main\\_Findings\\_Report.pdf](http://picum.org/Documents/Others/ESCR_Project_Main_Findings_Report.pdf).

<sup>5</sup> In August 2017, the French farmer Cédric Herrou was sentenced to four months suspended prison for human smuggling by the tribunal of Aix of Provence, ruling that the assistance he gave to migrants was not covered by the humanitarian assistance exemption, as it aimed at gaining moral or political gains (activism). <https://www.gisti.org/spip.php?article5728>.

<sup>6</sup> Commission nationale consultative des droits de l'homme, "Avis sur la situation des migrants à la frontière franco-italienne", 19 Juin 2018, [http://www.cncdh.fr/sites/default/files/180619\\_avis\\_situation\\_des\\_migrants\\_a\\_la\\_frontiere\\_italienne.pdf](http://www.cncdh.fr/sites/default/files/180619_avis_situation_des_migrants_a_la_frontiere_italienne.pdf).

very dangerous conditions and several of them died from cold during the expedition. French volunteers started to patrol the mountains to prevent deaths only to be accused of colluding with the smugglers. In April, the extreme far right group *Génération identitaires* gathered in the mountain pass of l'Echelle to expose its message of hatred and prevent migrants from crossing the border. Whilst the French police did not intervene to arrest them in virtue of the French law against incitement of hatred, the police arrested and detained seven activists for 10 days. These activists, in their 20s, were taking part in a counter demonstration against *Generations Identitaires* on the Italian mountainside. The activists were prosecuted for facilitating the illegal entry of migrants as part of an “organised criminal band”, resulting in an aggravated offense for which they faced up to ten years of jail-time and a €750,000 fine. In November 2018, they were condemned to various affirmative or suspended prison sentences<sup>7</sup>.

In Paris and Calais, French authorities and police try to deter humanitarian assistance to migrants by administrative means (e.g. applying multiple car fines, preventing food distributions), and by violence, harassment, intimidation, arrest and prosecution. A research identified 600 incidents of intimidation and violence by the police against volunteers between November 2017 and July 2018 in the region of Calais<sup>8</sup>. In 2017, after harassing migrants who went to Caritas France’s office to take a shower in their installed facilities, Calais’ local authorities blocked their access to the showers and arrested several people, including a journalist and some of Caritas France’s staff<sup>9</sup>.

On the 6th of July 2018, the French Constitutional Court<sup>10</sup> declared that providing assistance to migrants, regardless of their legal status, and if not done in rule of any benefit, derives from the constitutional “principle of fraternity” and should therefore be exempted from prosecution. While this ruling gives an important positive message on solidarity, it nevertheless does not prevent prosecution of cases related to the facilitation of entry at the border, for which humanitarian exemption is not foreseen. In addition, the 2018 revision of the French law on migration and asylum has not defined what “for profit” facilitation of entry means, leaving a large room of interpretation to French courts.

The situation is the most extreme in Hungary where recent provisions<sup>11</sup> criminalise NGOs and individuals that defend asylum seekers’ and migrants’ rights and provide humanitarian assistance, under the guise of “promoting and supporting illegal migration”. People providing information and legal support to migrants on the asylum procedure, in conformity with EU law, risk fines and one year of prison. In addition, new rules further restrict the right to asylum and introduce a special tax on “immigration supporting activity”, covering media campaigns and “propaganda activities that portray immigration in a positive light”. The Venice Commission<sup>12</sup> concluded that the provisions breached several human rights, including the rights to freedom of expression and association. On the 19<sup>th</sup> of July 2018, the European Commission (EC) opened an infringement procedure against Hungary, arguing that new provisions criminalise any assistance offered to people wishing to apply for asylum or for a residence permit in Hungary, which is in breach of the EU Treaties, EU law and the EU Charter of Fundamental Rights. In January 2019, the EC announced follow-up steps of the infringement procedure before referring the case to the Court of Justice of the EU<sup>13</sup>.

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<sup>7</sup> Mediapart, “Les 7 de Briançon lourdement condamnées par le tribunal de Gap”, 13 December 2018, <https://blogs.mediapart.fr/eugenio-populin/blog/131218/les-7-de-briancon-lourdement-condamne-e-s-par-le-tribunal-de-gap>.

<sup>8</sup> Help refugees et al, “Calais: the police harassment of volunteers”, November 2017-July 2018, <https://y9w4d3a4.stackpathcdn.com/wp-content/uploads/2018/08/Police-Harassment-of-Volunteers-in-Calais-1.pdf>.

<sup>9</sup> For a detailed overview of the situation in Northern France, see also Amnesty International, “Targeting solidarity: criminalisation and harassment of people defending refugee and migrant rights in Northern France”, June 2019, <https://www.amnesty.org/en/documents/eur21/0356/2019/en/>.

<sup>10</sup> La Cimade, “La fraternité reconnue comme valeur constitutionnelle : qu’est-ce que ça change?”, 9 July 2018, [https://www.lacimade.org/la-fraternite-reconnue-comme-valeur-constitutionnelle-quest-ce-que-ca-change/?gclid=Cj0KCQjwwODIBRDuARIsAMY\\_28XN51CXH86Fys\\_XCS3XU-yO9hnLmDznKe9YTWEr1phY0tt48VeVymgaAig8EALw\\_wcB](https://www.lacimade.org/la-fraternite-reconnue-comme-valeur-constitutionnelle-quest-ce-que-ca-change/?gclid=Cj0KCQjwwODIBRDuARIsAMY_28XN51CXH86Fys_XCS3XU-yO9hnLmDznKe9YTWEr1phY0tt48VeVymgaAig8EALw_wcB).

<sup>11</sup> “The Hungarian Helsinki Committee”, <https://www.helsinki.hu/en/lexngo-2018/>.

<sup>12</sup> Venice Commission, “Joint Opinion on the Provisions of the “Stop Soros” draft Legislative Package which directly affect NGOs”, 22-23 June 2018, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)013-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e).

<sup>13</sup> European Commission, “Asylum: Commission takes next step in infringement procedure against Hungary for criminalising activities in support of asylum applicants”, 24 January 2019, [http://europa.eu/rapid/press-release\\_IP-19-469\\_en.htm](http://europa.eu/rapid/press-release_IP-19-469_en.htm).

In Spain, a law forbids the documenting (via pictures, videos) of security forces' interventions, and foresees a fine of up to €600,000<sup>14</sup>. This law restricts the room of manoeuvre of CSOs and journalists to document violence and abuses committed by security forces towards migrants, in Ceuta and Melilla for example, where pushbacks occur regularly. Following a failed investigation against her in Spain, the Spanish journalist and human rights activist, Helena Maleno, was brought to court in Morocco over allegations of collusion with traffickers due to her work to protect migrants in the Mediterranean Sea between Morocco and Spain<sup>15</sup>. She was finally acquitted in April 2019 for lack of evidence<sup>16</sup>.

The first trial of 11 volunteers and migrants, accused of smuggling and trafficking of migrants trying to reach the UK from Brussels took place in Belgium in September 2018. Three volunteers (two journalists and one social worker), sheltered migrants at their home as they had been staying in a makeshift camp in the Maximilian park. As a result, they face up to ten years imprisonment<sup>17</sup> for being complicit of smuggling, for instance, by lending their phones and facilitating Western Union payments for migrants planning to reach the UK irregularly. The volunteers were acquitted in March 2019, but the Prosecutor-General appealed the decision (the next trial is foreseen for September 2019). Many lawyers declared this move as politically motivated, with the aim of sending a warning message to volunteers, in a climate of heightened suspicion and mistrust by politicians towards volunteers supporting migrants.

Also in Nordic European and Balkan countries, citizens, including retirees, have been troubled and sometimes prosecuted for giving a lift, shelter, or a cup of tea to migrants in distress<sup>18</sup>. In Italy and Switzerland, even priests and pastors have been accused of colluding with smugglers because of their support to migrants in distress. Mussie Zerai, an Eritrean ordained Catholic priest in Italy, now living in Switzerland, and a 2015 Nobel Prize nominee, was accused by prosecutors in Trapani of assisting in illegal migration due to the work he did to help locate and rescue migrants at sea in the aftermath of the 2015 Lampedusa shipwreck<sup>19</sup>. In Switzerland, Pastor Norbert Valley has been charged with “facilitating the illegal stay” of a homeless Togolese man, whose asylum application was rejected, because he provided shelter and money to the man in need. Not only was he charged for showing humanitarian care, but he was also taken by police for further questioning during the Sunday mass service at which he was presiding. He now faces a criminal trial if indicted<sup>20</sup>.

**NGOs carrying out search and rescue (SAR) operations in the Mediterranean Sea are also being accused of colluding with smugglers and creating pull factors for migrants to Europe<sup>21</sup>.** In Italy, after the government introduced a code of conduct in 2017 that restricts NGOs' SAR actions, several people and organisations have come under investigation for human smuggling and have seen their possessions/materials seized and/or destroyed<sup>22</sup>. In addition, since the Italian government prohibited SAR vessels from docking in its ports in the summer of 2018, rescue ships carrying vulnerable migrants and minors on board have been frequently held for days (or even weeks) at sea while EU governments negotiate where to disembark the rescued

<sup>14</sup> Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana, <https://boe.es/buscar/pdf/2015/BOE-A-2015-3442-consolidado.pdf>.

<sup>15</sup> S. Jones, “Spanish activist in Moroccan court over people smuggling charge”, El País, 10 January 2018, <https://www.theguardian.com/world/2018/jan/10/spanish-activist-helena-maleno-in-moroccan-court-over-people-smuggling-charge>.

<sup>16</sup> N. Castellano, “Carpetazo a la persecución judicial sobre Helena Maleno”, CadenaSer, 11 March 2019, [https://cadenaser.com/ser/2019/03/10/sociedad/1552243803\\_352891.html?ssm=fb&fbclid=IwAR1gT-DhonlcVSis3aLMSSsILXyE103-CNhFbxbRdDDg0\\_O\\_ThpeOxJmH4s](https://cadenaser.com/ser/2019/03/10/sociedad/1552243803_352891.html?ssm=fb&fbclid=IwAR1gT-DhonlcVSis3aLMSSsILXyE103-CNhFbxbRdDDg0_O_ThpeOxJmH4s).

<sup>17</sup> C. Lallemand, “Trois Belges accusées de trafic d'êtres humains après avoir aidé des migrants”, Le Vif, 5 June 2018, <http://www.levif.be/actualite/belgique/trois-belges-accusees-de-traffic-d-etres-humains-apres-avoir-aide-des-migrants/article-normal-847207.html>.

<sup>18</sup> For detailed accounts, see The Institute of Race Relations, “Humanitarianism, the unacceptable face of solidarity”, 2017, [http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism\\_the\\_unacceptable\\_face\\_of\\_solidarity.pdf](http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf).

<sup>19</sup> La Croix, “Italian prosecutors investigate priest who protects migrants”, 15 August 2017, <https://international.la-croix.com/news/italian-prosecutors-investigate-priest-who-protects-migrants/5693> and The Telegraph, “The little-known priest giving the Pope a run for Nobel Peace Prize”, 4 October 2015, <https://www.telegraph.co.uk/news/worldnews/europe/italy/11910942/The-little-known-priest-giving-the-Pope-a-run-for-Nobel-Peace-Prize.html>.

<sup>20</sup> Amnesty International, “Switzerland: Authorities must drop absurd charges against priest who showed compassion to asylum-seeker”, 10 April 2019, <https://www.amnesty.org/en/latest/news/2019/04/swiss-authorities-must-drop-charges-against-priest-who-helped-asylum-seeker/>.

<sup>21</sup> Paolo Cuttitta, “Pushing Migrants Back to Libya, Persecuting Rescue NGOs: The End of the Humanitarian Turn”, 19 April 2018, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/pushing-0>.

<sup>22</sup> Fundamental Rights Agency, “Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations”, <https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities>.

seafarers<sup>23</sup>. This toxic and chilling environment has led to a progressive withdrawal of CSOs' SAR activities in the Mediterranean Sea. This situation has been further compounded because of decisions made by EU countries to withdraw vessels from the EU anti-smuggling civil military mission, known as "Operation Sophia" in March 2019. This effectively leaves migrants attempting the dangerous journey to Europe at the mercy of ill-trained Libyan coast guards (supported by the European countries), that place those rescued into detention in Libya, devastated by civil war. Both the International Organization for Migration (IOM) and the UN refugee agency (UNHCR) have repeatedly raised concerns about the lack of rescue capacity at sea, the criminalisation of CSOs' SAR activities and the abhorrent conditions migrants are facing in Libya. They even indicated that the country cannot be considered a safe point of disembarkation<sup>24</sup>. In June 2019, international lawyers filed a 245-page legal proceeding before the International Criminal Court (ICC) against the EU, Italy, Germany and France; accusing them of crimes against humanity. The lawyers claim that they are criminally liable for the migration policies they have endorsed and carried out since 2014 in the Central Mediterranean Sea and the cooperation with Libya that has led to the deaths and abuses of many migrants<sup>25</sup>.

Despite research demonstrating that NGOs' SAR operations do not create pull factors for irregular migration<sup>26</sup> and investigations from the Italian parliament not finding evidence of wrongdoing, EU policy makers and institutions still refrain from supporting CSOs' SAR activities. In June 2018, the European Council called on all vessels operating in the Mediterranean to not obstruct operations of the Libyan Coastguard, a hinted allusion to NGOs' SAR vessels<sup>27</sup>. The head of Frontex declared on several occasions that CSOs' SAR missions constitute a pull factor and "play the game of smugglers", an accusation echoed by far right and populist politicians such as Matteo Salvini, and more recently in April 2019 also by the French Minister of Interior. This narrative, widely disseminated via social media and mainstream media outlets, erodes public support for solidarity and trust of CSOs, many of which are assuming an essential role in strengthening our democracies and protecting human rights.

A "security decree bis", approved by the Italian government in June 2019, further reinforces the crackdown against NGO's SAR operations in the Mediterranean Sea under the pretence of fighting irregular migration. With this decree, the Italian Ministry of Interior is able to limit the activities of SAR boats at sea, including by prohibiting them from docking in Italian ports and by seizing their vessels. Fines of up to €50,000 per incident are foreseen for the captain, owner, and operator of a vessel entering Italian territorial waters without authorisation. In addition, other provisions and criminal sanctions to fight human smuggling and to restrict the right to demonstrate in general could threaten the activities of CSOs supporting migrants<sup>28</sup>.

Also in Greece, SAR operations and support to migrants is being challenged. A high profile trial took place in Lesbos concerning three Spanish firefighters who worked with the NGO Proem-Aid SAR operations in the Aegean Sea between Greece and Turkey. These three men were accused of complicity in human smuggling. After several trials, however, they were cleared of wrongdoing, barely escaping from ten years imprisonment<sup>29</sup>. The Syrian refugee Sarah Mardini, who arrived to Lesbos in 2015 and now lives in Berlin, was charged with belonging to a criminal organisation, people smuggling, money laundering, and espionage for the volunteer

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<sup>23</sup> HRW, "EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk", 25 July 2018, <https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk>.

<sup>24</sup> On the situation of migrants and refugees in Libya, see UN, "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", 18 December 2018, <https://unsmil.unmissions.org/sites/default/files/libya-migration-report-18dec2018.pdf>, for Caritas Europa position paper on disembarkation mechanisms, see <https://www.caritas.eu/disembarkation-mechanisms/>

<sup>25</sup> See The Guardian, "ICC submission calls for prosecution of EU over migrant deaths", 3 June 2019, <https://www.theguardian.com/law/2019/jun/03/icc-submission-calls-for-prosecution-of-eu-over-migrant-deaths>; and the legal proceeding submitted to the ICC, <http://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>

<sup>26</sup> Blaming the rescuers, criminalising solidarity, re-enforcing deterrence, <https://blamingtherescuers.org/report/>.

<sup>27</sup> European Council conclusions, 28 June 2018, <http://www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/pdf>.

<sup>28</sup> Il tempo, "Dai migranti alle aggressioni: cosa prevede il decreto sicurezza bis", 11 June 2019; and the "decreto sicurezza bis", <https://openonline.imgix.net/wp-content/uploads/2019/06/11190151/DECRETO-SICUREZZA-BIS-Testo-DL-27-maggio1.pdf>

<sup>29</sup> "Greek court acquits Spanish firemen accused of people smuggling", El País, [https://elpais.com/elpais/2018/05/08/inenglish/1525767878\\_346157.html](https://elpais.com/elpais/2018/05/08/inenglish/1525767878_346157.html).

work she did in Lesbos. Sarah Mardini already spent 106 days in pre-trial detention before being released on bail in December 2018. The case against her is still open and she risks up to 25 years in prison if convicted<sup>30</sup>.

**This non-exhaustive overview of cases of criminalisation of solidarity represents a real trend occurring in Europe. They are far from being isolated and exceptional cases<sup>31</sup>.** That many cases do not lead to convictions in the end does not diminish the human, psychological and financial impact these proceedings have, not to mention the lasting, warning effect it has on people considering to help and to act in solidarity with migrants in distress. A closer look at UN and EU provisions on human smuggling can shed light on the current context.

### **Global and European legislative framework on human rights defenders and smuggling**

The UN **“human rights defenders’ Declaration”** states that everyone (individually or organised in association) has the right to promote human rights and fundamental freedom and to solicit and receive resources for that purpose. The state has the responsibility to provide an enabling environment to implement those activities and *“the state shall take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, discrimination or arbitrary action against the exercise of their rights”*<sup>32</sup>. Regrettably, several laws and actions in different Member States are at odds with the UN Declaration.

The UN **protocol against the smuggling of migrants**<sup>33</sup>, ratified by all Member States but Ireland, identifies the smuggling of migrants 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”*. The protocol further details that criminal offences for smuggling (facilitation of entry and stay) can be established when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit. For the UN, **a for-profit element is thus required to qualify for smuggling and to establish a criminal offence** - a requirement intending to exclude the assistance provided to migrants by family members and support groups. Importantly, the UN protocol also states that smuggled migrants shall not become liable to criminal prosecution.

Unfortunately, the **EU legislative package on smuggling** fails to reflect the UN protocol and leaves Member States a wide room of manoeuvre to implement laws whose side effects can threaten acts of solidarity towards migrants. In addition, it remains silent on the international obligation to rescue people at distress at sea and on SAR operations. The 2002 **facilitation directive** defines smuggling as the facilitation of unauthorised entry, transit and residence. It obliges Member States to provide sanctions for:

1. intentional assistance to enter or transit a territory irregularly (without specifying that this assistance is carried out on a for-profit basis as the UN Protocol does);
2. assistance to reside illegally on EU territory (this time specifying the financial gain purpose).

The non-binding **“humanitarian exemption”** (art 1.2) allows, but does not oblige Member States to exempt humanitarian assistance (without defining it) from sanctions in the case of facilitation of entry and transit<sup>34</sup> (but not for the facilitation of residence).

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<sup>30</sup> The new humanitarian, “Refugee, volunteer, prisoner: Sarah Mardini and Europe’s hardening line on migration”, 2 May 2019, <https://www.thenewhumanitarian.org/feature/2019/05/02/refugee-volunteer-prisoner-sarah-mardini-and-europe-s-hardening-line-migration>.

<sup>31</sup> For a comprehensive overview see Resoma, “Crackdown on NGOs assisting refugees and other migrants”, July 2018, [http://www.resoma.eu/sites/resoma/resoma/files/policy\\_brief/pdf/Policy%20Briefs\\_topic4\\_Crackdown%20on%20NGOs\\_0.pdf](http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Policy%20Briefs_topic4_Crackdown%20on%20NGOs_0.pdf) and The Institute of race relations, “When witnesses won’t be silenced: citizens’ solidarity and criminalisation”, 2019, <http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2019/05/20104238/When-witnesses-wont-be-silenced.pdf>

<sup>32</sup> Declaration on the “Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms”, 8 March 1999, art. 12.2 <https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>.

<sup>33</sup> UN Protocol against the smuggling of migrants by land, sea and air, supplementing the UN convention against transnational organised crime, 2000, [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf).

<sup>34</sup> Council directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, 28 November 2002, Art.e 1: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN>.

The accompanying 2002 **framework decision**<sup>35</sup> on the strengthening of the penal framework to prevent smuggling compels Member States to take the necessary measures to ensure the facilitation of unauthorised entry, transit, and residence are punishable by effective, proportionate and dissuasive criminal penalties (art. 1.1). While Art.6 specifies that the implementation of the framework decision should not be carried out at the expense of international, human rights and refugee laws<sup>36</sup>, the framework decision does not provide any general exemption for humanitarian assistance.

Several researches have contended that the **EU facilitation package is legally unclear - leaving Member States a wide manoeuvre of interpretation and does not provide binding safeguards to ensure that humanitarian assistance is exempted from the scope of the package**. The implementation of the EU legislation at national level can lead to acts of solidarity done on a charitable and not-for profit basis to be wrongfully conflated with human smuggling.

Research from the **Fundamental Rights Agency (FRA)**<sup>37</sup> provides a comprehensive overview of Member States' **implementation of the facilitation package and its impact**. In all EU countries, criminal law measures are being used to deter irregular migration, criminalising irregular migrants and the ones providing humanitarian support to them. Facilitation of entry and stay - with or without financial or material gain - is punishable in most Member States<sup>38</sup>. Fines can amount to €78,000 for facilitation of irregular entry and stay in the Netherlands and to up to €100,000 for facilitating irregular stay in Spain. Prison sentences can reach 14 years for the facilitation of irregular entry and stay in the UK and up to ten years for the facilitation of entry in Greece. Some Member States, such as Croatia, even punish facilitation of stay that reaps no profits. It is worth stressing that legislation that punishes the facilitation of for profit accommodation (e.g. renting a flat in the private housing market) risks punishing landlords who rent accommodation to irregular migrants. This could effectively lead to migrants being denied accommodation and pushed into destitution and homelessness<sup>39</sup>. In addition, the FRA highlights the **poor implementation of the humanitarian assistance exemption in most Member States**. This overview shows how the **implementation of the facilitation package risks unduly mixing up humanitarian assistance or services provided to irregular migrants with human smuggling**.

Similarly, an in-depth **study from the European Parliament (EP)**<sup>40</sup> **noted a substantial implementation gap between the UN Protocol and the EU facilitation package** regarding the definition of smuggling, and lamented that the facilitation of entry and stay even done without the element of “financial gain” can be considered as smuggling under EU legislation. The study further highlights the legal inconsistency in the implementation of the EU facilitation package, the absence of mandatory exemption for humanitarian assistance, and the lack of provisions to ensure the respect of the fundamental rights of smuggled migrants. The EP study warns that this puts in jeopardy the work of NGOs, associations and volunteers advocating for migrants' rights, as they may fear intimidation and sanctions. This ultimately undermines social trust and social cohesion.

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<sup>35</sup> Council framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence, of 28 November 2002, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946&from=en>.

<sup>36</sup> The Art. 6 of the framework decision mentions particularly Art. 31.1 of the 1951 Geneva Refugee Convention “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 authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”; and Art. 33.1 on non-refoulement “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”, <https://www.unhcr.org/3b66c2aa10>.

<sup>37</sup> FRA, “Criminalisation of migrants in an irregular situation and of persons engaging with them”, March 2014 <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>.

<sup>38</sup> The fact that facilitation of entry can be punishable even without financial gains is contrary to the UN protocol on smuggling that punishes only for-profit facilitation of entry.

<sup>39</sup> Cyprus, Denmark, Estonia, Greece and Lithuania have legislative provisions explicitly punishing (fine/imprisonment) landlords for renting a flat to irregular migrants.

<sup>40</sup> European Parliament, “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants”, 2016, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL\\_STU\(2016\)536490\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf).

An **updated EP study from 2018**<sup>41</sup> confirms these previous findings and provides an extensive list of cases of criminalising acts of solidarity throughout Europe. The study highlights the deterioration in public discourse on issues pertaining to migrants and the support provided by CSOs, including in the Central Mediterranean Sea. It also warns against the detrimental long-term impact this can have on social trust, democracy and the rule of law more generally. The authors contend that the criminalisation of solidarity goes much beyond migration and risks damaging the core values of European societies enshrined in the Lisbon Treaty and in the EU Charter of Fundamental Rights, such as freedom of expression and association. To counter that risk, the report underscores the need to set up instruments that can promote and uphold EU values and the rule of law and to offer political and financial support to CSOs in Europe; which often play a watchdog role in defending and promoting democracy and the rule of law.

With the **EU action plan against migrant smuggling** (2015-2020), the European Commission (EC) announced that it would launch reform proposals to the facilitation package to ensure that appropriate criminal sanctions are put in place, while also avoiding the risk of criminalising those who provide humanitarian assistance to migrants in distress<sup>42</sup>. In March 2017, the EC concluded an evaluation<sup>43</sup> of the facilitation package, stating that while “*fears about perceived risks of criminalisation have been reported*”, reform was not needed. The EC nevertheless highlighted that only seven Member States (Belgium, Greece, Spain, Finland, Italy, Malta, and the UK) had transposed the voluntary “humanitarian exemption” into legislation.

### **European and global calls to protect solidarity and migrants’ rights**

In light of the increasing criminalisation of solidarity in the Central Mediterranean Sea and elsewhere in Europe, the **EP voted a resolution**<sup>44</sup> in June 2018 that calls the EC to adopt guidelines for Member States to **prevent humanitarian assistance from being criminalised**, specifying which forms of facilitation should not be criminalised. The EP deplored the “*unintended consequences of the facilitators package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole*”. The resolution reaffirms that in line with the UN Smuggling Protocol, acts of humanitarian assistance should not be criminalised and Member States are called upon to transpose the humanitarian assistance exemption. It further calls to set up adequate systems to monitor the implementation of the EU facilitators package (e.g. the number of people arrested, judicial proceedings initiated and convictions). In April 2018, the EP had already called for the non-criminalisation of humanitarian assistance, for greater SAR capacities for people in distress, and for the acknowledgement of support provided by private actors and NGOs in carrying out rescue operations at sea and on land<sup>45</sup>.

Meanwhile, 163 states adopted the **Global Compact for Safe, Orderly and Regular Migration**<sup>46</sup> in December 2018, committing to take actions to save lives at Sea (art. 8); strengthen the transnational response to migrants’ smuggling while protecting the victims (art. 9); and to provide access to basic services and human rights for migrants, regardless of their migration status (art. 15). The latest provision is very important as it reinforces the “**firewall**” principle, which foresees that service providers should not be required to report on the undocumented migrants they encounter when providing assistance (e.g. provision of emergency shelter, food, healthcare and other necessities).

<sup>41</sup> European Parliament, “Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update”, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf).

<sup>42</sup> European Commission, “EU Action Plan against migrant smuggling (2015 -2020)”, 27 May 2015, pg.3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0285&from=EN>.

<sup>43</sup> European Commission, Refit evaluation of EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package, 22 March 2017, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322\\_-\\_refit\\_evaluation\\_of\\_the\\_eu\\_legal\\_framework\\_against\\_facilitation\\_of\\_unauthorised\\_entry\\_transit\\_and\\_residence\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf).

<sup>44</sup> European Parliament, “Motion for a resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised”, 29 June 2018, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2018-0314+0+DOC+PDF+V0//EN>.

<sup>45</sup> European Parliament, “Motion for a resolution on progress on UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees”, 11 April 2018, recommendation 19, p.9, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2018-0184+0+DOC+PDF+V0//EN>.

<sup>46</sup> UN, “Global Compact for Safe, Orderly and Regular Migration”, 11 July 2018, [https://refugeesmigrants.un.org/sites/default/files/180711\\_final\\_draft\\_0.pdf](https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf).



In line with these positive developments, several **UN rapporteurs and bodies** issued a joint statement in September 2018 ahead of an informal EU summit in Salzburg. They called EU Member States **not to criminalise civil society organisations’ and human rights defenders’ acts of solidarity with migrants and to establish SAR operations**<sup>47</sup>.

## Recommendations

### At European level, Caritas Europa recommends:

- **The EC to amend the facilitation package** in order to align it with the UN protocol and ensure that humanitarian assistance is not criminalised:
  - The **“humanitarian exemption”** clause should be made compulsory and concern facilitation of entry, transit and stay. Humanitarian assistance should be clearly defined and encompass a broad definition.
  - Only **for-profit facilitation** of entry, transit and stay should be considered as smuggling and for-profit services, such as **renting out accommodation should be exempted** from the definition of facilitation of stay.
  - The EC should remind Member States of their duty under international law to **assist persons in distress at sea and NGOs’ SAR operation should be explicitly distinguished from smuggling**.
- **The EC to provide MS with guidelines on how to implement the facilitation package** without criminalising humanitarian assistance, in case there is no legislative reform. Guidelines should also provide **safeguards** to ensure that migrants and smuggled people can **access basic services and justice without being criminalised or deported**, in line with the **“firewall” principle**.
- **The EC to start infringement procedures** when EU law and the EU Charter of Fundamental Rights is infringed upon.
- **The EC to set up adequate independent monitoring and observatory mechanism** to oversee the implementation of the facilitators package and its impact on humanitarian assistance, in collaboration with multi-stakeholders alliances (CSOs, lawyers, academics, trade unions, etc.). This mechanism should allow CSOs and citizens to submit complaints and testimonies about cases of criminalisation of humanitarian assistance.
- **The EP to set up a parliamentary inquiry** to gather evidence and hear the testimonies of CSOs and EU citizens who have been victims of misguided prosecutions.
- **The EC and EU Member States to publicly acknowledge and support the humanitarian assistance** provided by NGOs and volunteers to migrants, including SAR operation.
- **The EC and EU Member States to broaden and facilitate direct access to EU funding** for CSOs and human rights defenders under the EU Multiannual Financial Framework for 2021-27, including for humanitarian assistance provided to undocumented migrants and for actions promoting EU values and the rule of law.

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<sup>47</sup> Joint communication of Special Procedures ahead of the informal summit of EU heads of state or government in Salzburg on 19-20 September 2018, p.4, [https://www.ohchr.org/Documents/Issues/SRMigrants/Comments/OL\\_OTH\\_64\\_2018.pdf](https://www.ohchr.org/Documents/Issues/SRMigrants/Comments/OL_OTH_64_2018.pdf).

- **The EC and EU Member States to implement balanced EU migration policies that include safe and legal pathways to Europe**, including resettlement and complementary pathways such as humanitarian visas, that would contribute to the reduction of human smuggling and trafficking.

**At national level, Caritas Europa recommends the EU Member States to:**

- Access, ratify and enforce the **UN protocol on smuggling**.
- Implement the **EU facilitation package** in a way that prevents the criminalisation of humanitarian assistance, and more specifically, to **implement the “humanitarian exemption”** in national legislation.
- Set up **parliamentary investigations** or an **independent ombudsperson** to document and research the cases of criminalisation of solidarity.
- Ensure that anti-smuggling and anti-trafficking operations and **prosecution focuses on big transnational networks**, instead of unduly targeting CSOs and volunteers that provide humanitarian support to migrants.
- **Promote a conducive environment** to humanitarian assistance and solidarity towards migrants and stop blurring lines between NGOs and human smugglers. Remove restrictions to civil society’s space and prevent violations of the rights of human rights defenders, including smear campaigns, threats and attacks against them, and other attempts to hinder their work, in line with the **UN human rights defenders declaration** and the 2018 **Council of Europe recommendation on CSOs’ shrinking space**<sup>48</sup>.
- **Invest in SAR operations** in line with the non-refoulement principle, support NGOs SAR activities, and open ports to facilitate disembarkation without delay.
- **Implement the “firewall” principle** to ensure that migrants can get access to basic services and humanitarian support provided by public institutions or CSOs, regardless of administrative status and without fear of being deported, and ensure that victims of smuggling and trafficking can access justice without fear or prosecution.
- **Implement the Global Compact on Migration**, including art. 8 (saving lives) and art. 15 (providing access to basic services for migrants).

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<sup>48</sup> Council of Europe, Recommendation CM/Rec(2018)11 of the Committee of Ministers to Member States on the need to strengthen the protection and promotion of civil society space in Europe, 28 November 2018, [https://search.coe.int/cm/pages/result\\_details.aspx?objectid=09000016808fd8b9](https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016808fd8b9).