

# Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU

Briefing paper

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## I. Introduction

This briefing note addresses the **criminalization of humanitarian and other support and assistance** to refugees and migrants (hereinafter “migrants”)<sup>1</sup> and the defence of their human rights (*hereinafter “criminalization”*)<sup>2</sup> in the European Union (EU). It analyses the international and EU legal framework governing this criminalization, including the international human rights law obligations of States to protect the rights of migrants and the rights of those who assist or support them.

“Criminalization”, in this context, refers to making the provision of humanitarian or other assistance a specific crime under national law, or applying criminal sanctions to individuals who provide such assistance under another legal basis. Such criminalization, as stressed by different international and European legal experts,<sup>3</sup> is a global phenomenon, also widespread in the EU. For example, the UN Special Rapporteur on Human Rights of Migrants, appointed by the UN Human Rights Council, highlighted that

“in the past several years, a toxic narrative around the role of civil society organizations that provide humanitarian assistance or other services to migrants has taken root in many countries.<sup>4</sup> [...] These smear campaigns have created a hostile environment for groups providing services to migrants.<sup>5</sup> [...] Some civil society organizations have reported that even activities such as providing food, water, medical supplies and shelter along migratory routes have been criminalized.”<sup>6</sup>

The Commissioner for Human Rights of the Council of Europe highlighted that a “worrying trend of criminalising those who save lives at sea is being perpetuated” in a 2021 Follow-Up Report, following her 2019 study on the use of criminal law to restrict the work of NGOs supporting refugees and other migrants.<sup>7</sup>

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<sup>1</sup> For the purposes of shorthand the following text will refer to “migrants,” to include both migrants and refugees, a category of persons to whom additional protective regime under refugee law is applicable.

<sup>2</sup> “Criminalisation” is used further in this paper to cover initiation of criminal and administrative proceedings against lawyers, CSOs, or volunteers, but also in a broader sense, when legislation can act as deterrence. The CJEU also stressed in a recent case against Hungary (CJEU, Case no. C-821/19, 16 November 2021), that even when a particular provision has never been used as the basis for a criminal conviction or the process has ended with an acquittal “it is in the very nature of the deterrent effect of criminal offences to discourage anyone from undertaking the activity considered to be illegal which may lead to a criminal sentence.”

<sup>3</sup> See Fundamental Rights Agency (FRA), June 2021 Update – [Search and Rescue \(SAR\) operations in the Mediterranean and fundamental rights](#), 18 June 2021; Fundamental Rights Agency (FRA), [December 2020 Update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them](#), 18 December 2020; CoE, [Using Criminal Law To Restrict The Work Of Ngos Supporting Refugees And Other Migrants In Council Of Europe Member States](#), Thematic Study prepared by Dr Carla Ferstman on behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe, CONF/EXP(2019)1, December 2019; Charles Heller and Lorenzo Pezzani, [Blaming The Rescuers Criminalising Solidarity, Re-Enforcing Deterrence](#), 2016 ; ICJ, [Civil society, criminalisation, and the Global Compact for Migration](#), 1 July 2019.

<sup>4</sup> UNSR report A/HRC/44/42 para. 66

<sup>5</sup> Ibid, para. 68.

<sup>6</sup> Ibid, para. 69.

<sup>7</sup> Council of Europe, [Follow-up report to the 2019 Recommendation by the Council of Europe Commissioner for Human Rights, ‘A distress call for human rights - The widening gap in migrant protection in the Mediterranean’](#), March 2021, p. 22. In July 2019, [the UN Human Rights Council’s Independent Expert on human rights and international solidarity](#) described a worldwide trend to suppress, intimidate, threaten, and prosecute individuals, associations and cities providing help to irregular migrants on the global level. See: HRC, Report of the Independent Expert on human rights and international solidarity, A/HRC/41/44, 16 April 2019. See also the Council of Europe thematic study on “Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe Member States” (Dec. 2019), which highlights how criminalizing NGOs affects human rights on the Council of Europe Member States.

Humanitarian assistance and support for migrants can take many forms, ranging from rescues at sea, providing legal assistance, advocacy for migrants, and providing basic necessities to migrants such as food, warm clothing, shelter, sanitation, or emergency healthcare.<sup>8</sup>

This paper will focus on **criminalization of some forms of humanitarian assistance**, in particular:

- a) the initiation of administrative and criminal proceedings against vessels or crew members engaged in Search and Rescue (SAR) activities in the Mediterranean;
- b) the initiation of administrative and criminal proceedings and the imposition of restrictions on the provision of legal aid and other support to migrants.

Criminalization of action in support of migrants, at least in the European Union, is sometimes justified by the need to counter migrant smuggling conducted by private actors and NGOs.<sup>9</sup> Therefore, this paper will also analyze the international and European legal framework concerning migrant smuggling and SAR operations.

## II. Examples of criminalization of humanitarian and other support and assistance for migrants

### II.1. The initiation of administrative and criminal proceedings against vessels or crew members engaged in SAR activities

The criminalization of the conduct of those who seek to assist migrants has a chilling effect on individuals and associations acting to provide advice, support or humanitarian assistance to migrants, or to protest against or demand accountability for violations of migrants' rights.<sup>10</sup> This criminalization not only adversely impacts those who would provide assistance, but it also undermines the rights of migrants themselves. It deprives them of vital support, and is likely to deepen their marginalisation, increase the risk of exploitation and hinder their access to justice.

In the context of pushbacks at sea, the UN High Commissioner for Human Rights stated in 2019 that the "actions by several countries in Europe to criminalise, impede or halt the work of humanitarian rescue vessels and search planes [...] have had deadly consequences for adults and children seeking safety"<sup>11</sup>.

A number of cases of administrative proceedings have been initiated in recent years in the EU, and

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<sup>8</sup> CoE, ['Using Criminal Law To Restrict The Work Of Ngos Supporting Refugees And Other Migrants In Council Of Europe Member States'](#), Thematic Study prepared by Dr Carla Ferstman on behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe', CONF/EXP(2019)1, December 2019, para 18.

<sup>9</sup> See *infra* the example concerning Hungary. See also – relating to the criminalization of migration – [General comment No. 5 \(2021\)](#) of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights (advanced unedited version), para. 4: "often, this is based on political strategies seeking to deter irregular migration rather than a commitment to uphold the rights of migrants and their families".

<sup>10</sup> In 2020, Amnesty International published a report called ["Punishing compassion, solidarity on trial in fortress Europe"](#). The report aims at mapping documented cases of criminalization of solidarity in Europe focusing on Croatia, France, Greece, Italy, Malta, Switzerland and the United Kingdom. It demonstrates how immigration and counter-terrorism legislation were used by governments to punish solidarity towards migrants. See also ReSOMA, *Crackdown on NGOs and volunteers helping refugees and other migrants*, final synthetic report, June 2019, p. 9.

<sup>11</sup> Opening statement by UN High Commissioner for Human Rights Michelle Bachelet to the 42nd session of the Human Rights Council, 9 September 2019 (cited in UN OHCHR, [Thematic Report on 'Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea'](#), May 2021, p. iv).

these have similar chilling effects of undermining the support for migrants.<sup>12</sup>

*Example: Criminalization of volunteers in search and rescue missions in Greece*

In Greece, Kamal-Aldeen, co-founder of humanitarian organization Team Humanity and owner of a rescuing boat, and four other volunteers, were arrested in Lesvos after having rescued 51 migrants on 14 January 2016.<sup>13</sup> The five were charged with attempted human smuggling, facing up to 15 years in prison, but were acquitted for assisting irregular migrants at sea on 7 May 2018.<sup>14</sup> Kamal-Aldeen was ordered to pay a bail of €10,000, with weekly reporting at a police station, and the other volunteers paid a bail of €5,000.<sup>15</sup> Their pretrial conditions barred them from leaving Greece and following their acquittal, they remain prohibited from entering the Greek territory again.<sup>16</sup> More recently, Seán Binder, a volunteer working on search and rescue missions for the humanitarian NGO [Emergency Response Centre International](#), was arrested in Lesvos and spent 106 days in pre-trial detention. He was charged with several offences including formation and membership of a criminal organisation, facilitation of illegal entry, infringement of state secrets, possession of a radio without a licence, money laundering, espionage and forgery.<sup>17</sup> If convicted, he could face up to 25 years in prison. The trial has been repeatedly delayed.<sup>18</sup>

Here, the severity of the threatened sanctions and administrative measures, such as the prohibition from leaving or entering Greek territory, is clearly capable of having a significant chilling effect on the civil society organisations committed to SAR activities. Not only there is a negative impact on the human rights of the volunteers prosecuted (including the right to freedom of movement, right to liberty), but, – given the importance and relevance of the SAR activities conducted by NGOs in the Mediterranean<sup>19</sup> – these practices could contribute to deprivation of life and manifest violations of State obligations under the international law of the sea (see *infra*) and the violation of the principle of *non-refoulement*.

*Example: Prosecution of a captain of a ship for assistance to illegal immigration in Italy*

In 2019, the German captain Carola Rackete was detained for disembarking migrants rescued at sea on the island of Lampedusa in Italy. By doing so she violated the governmental ‘security decree bis’ prohibiting access to Italian waters and forced a blockade to dock, as she refused to dock in Tripoli (Libya). She was arrested for assistance to illegal immigration, disruption of public order and violent resistance to a warship.<sup>20</sup> Her detention was judged unlawful and Rackete was ordered to be released by the tribunal of Agrigento.<sup>21</sup> The decision was upheld by the Court of Cassation on 20

<sup>12</sup> In December 2020, the EU Fundamental Rights Agency published an [update](#) to its 2018 note entitled “Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations.”

<sup>13</sup> The New-York Times. *Volunteers Who Rescued Migrants Are Cleared of Criminal Charges in Greece* (7 May 2018). <https://www.nytimes.com/2018/05/07/world/europe/greece-migrants-volunteers.html>

<sup>14</sup> T. Baster and I. Merminod (2018), “Humanitarian Workers Acquitted of ‘Crime’ of Helping Refugees”, *New Internationalist*, 10 May (<https://newint.org/features/web-exclusive/2018/05/10/humanitarian-workers-acquitted-helping-refugees>).

<sup>15</sup> European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants* (2016) and its 2018 update (2018), p. 73.

<sup>16</sup> Amnesty International, “Punishing compassion – solidarity on trial in fortress Europe”, March 2020, p. 52.

<sup>17</sup> The Irish Times, [Legality of Greek case against Irish volunteer questioned by law firm](#), 15 Nov 2021

<sup>18</sup> Al Jazeera, [I was handcuffed to a guy who had murdered two people](#), 23 Nov 2021

<sup>19</sup> Fundamental Rights Agency (FRA), *December 2021 Update – Search and Rescue (SAR) operations in the Mediterranean and fundamental rights*, 10 December 2021.

<sup>20</sup> The Guardian, [Rescue ship captain arrested for breaking Italian blockade](#), 29 June 2019; Sea Watch, [Sea-Watch and Cpt. Rackete Enforce Human Rights Where EU Fails](#), 29 June 2019.

<sup>21</sup> Tribunale di Agrigento, 2 July 2019, N.3169/19 R.G.N.R., N. 2592/19 R.G.GIP available at <http://www.vita.it/it/article/2019/07/03/carola-rackete-una-sentenza-da-studiare/152097/>

February 2020.<sup>22</sup> The tribunal considered that she had acted in accordance with the obligation to rescue persons in danger at sea stemming from international maritime law. After the first instance ruling, UN Human Rights Council experts Diego García-Sayán (Special Rapporteur on the independence of judges and lawyers), Michel Forst (Special Rapporteur on the situation of human rights defenders), Obiora C. Okafor (Independent Expert on human rights and international solidarity), Felipe González Morales (Special Rapporteur on the human rights of migrants) and Dubravka Šimonovic (Special Rapporteur on violence against women, its causes and consequences), expressed concerns in a joint statement, regarding the prosecution and the threats made against the judge of Agrigento tribunal. The UN Special Rapporteur on Human Rights Defenders added that *“this prosecution could have a chilling effect on migrant rights defenders and on civil society as a whole”*.<sup>23</sup> In addition, Matteo Salvini, then the Italian Minister of Interior, stated that the ruling was a “political judgment”, a statement which was condemned by the UN Special Rapporteur on the Independence of Judges and Lawyers<sup>24</sup>:

*“Ideological political accusations made against a judge by authorities of the executive simply for fulfilling a well-established norm of public international law establishing a duty to rescue persons in distress at sea constitute a serious breach of the principles of judicial independence and the separation of powers. The duty to respect and abide by the judgments and decisions of the judiciary constitutes a necessary corollary of the principle of separation of powers”*.

The case against Carola Rackete was definitively dismissed by the Tribunal of Agrigento at the end of 2021, in a final decision.<sup>25</sup> The Tribunal of Agrigento, in dismissing the charges against Rackete, followed the assessment of the state prosecutor that the captain acted in accordance with her duty because Tripoli could not be considered as a “place of safety”.

## II.2. The initiation of administrative and criminal proceedings and the imposition of restrictions on the provision of support to migrants

The effort of civil society to provide food, water and shelter to migrants is not only a humanitarian gesture, but also facilitates the realization of a number of human rights, which is, in the words of the Universal Declaration on Human Rights, the responsibility of “every individual and every organ of society.”<sup>26</sup> As the UN Human Rights Declaration affirms in its first article: “Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”<sup>27</sup>

Among the particular rights engaged in these efforts are the right to life (Article 2 ECHR; Article 6 ICCPR, Article 2 EU Charter), the freedom from inhuman and degrading treatment (Article 3 ECHR, Article 7 ICCPR, Article 4 EU Charter), the right to health (Article 11 ICESCR, Article 35 EU Charter) to

<sup>22</sup> Infomigrants, [Sea-Watch captain Rackete shouldn't have been arrested, Italian high court rules](#), 21 January 2020

<sup>23</sup> OHCHR, [Italy: UN experts condemn criminalisation of migrant rescues and threats to the independence of judiciary](#), 18 July 2019.

<sup>24</sup> *Ibid.*

<sup>25</sup> Avvenire, [Caso Rackete. Archiviata l'inchiesta su Carola. “Aveva il dovere di sbarcare”](#), 23 December 2021.

<sup>26</sup> UN, *Universal Declaration of Human Rights*, 1948, preamble.

<sup>27</sup> The preamble of 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* identifies not only the right, as set out in Article 1, but also a *responsibility*, namely “the responsibility of individuals, groups and associations to promote respect for [...] human rights and fundamental freedoms at the national and international levels”.

food, to health, and to water and sanitation and to an adequate standard of living (Article 12 ICESCR, Article 34 EU Charter)– The suppression or criminalization of this work can lead to severe impairments to the enjoyment of these rights.

*Example: Criminalization of provision of food and clothing, and lending of equipment to migrants in Belgium*

In **Belgium**, three Belgian citizens, journalists Anouk Van Gestel and Myriam Berghe and social worker Zakia, and a Belgian resident, Walid, were prosecuted in relation to assistance offered to migrants. Known as *le procès des hébergeurs*, prosecutions started in 2017 when twelve people were arrested for migrant smuggling and involvement in a criminal organization. Four of these people were the aforementioned citizens and a resident, and the other eight were migrants, who had helped other migrants on their journey. Anouk Van Gestel, Myriam Berghe, Zakia and Walid were accused on the basis of having hosted migrants and having provided food, clothing, lending laptops and phones. They were considered by the public prosecutor as having provided indispensable help to migrants who were in turn helping other migrants to cross Belgium to reach the UK. In December 2018 the tribunal of first instance acquitted the four individuals on the basis of humanitarian exception.<sup>28</sup> However, one of the defendants, Walid, still spent eight months in pre-trial detention. In January 2019, the public prosecutor's office appealed the decision.<sup>29</sup> In May 2021, the four were acquitted by the Court of Appeal.<sup>30</sup>

This example is emblematic of the patterns of prosecutions throughout Europe of people providing necessary material support to migrants, implementing the migrants' right to an adequate standard of living, health, food, water and sanitation and housing (art. 11 and 12 ICESCR, art. 34 EU Charter). The long time spent in pre-trial detention could also be seen as a detriment to the defendant's right to liberty. Pre-trial detention should be the exception and not the rule and will constitute an arbitrary deprivation of liberty unless narrow exceptions are met.<sup>31</sup> In this case, the humanitarian exemption (that Belgium has introduced in its legal system, see *infra*) prevented the accused from being held liable for aiding and abetting the alleged smuggling operations conducted by the hosted migrants.

Where legal assistance is criminalized, as in the case of Hungary described in the box below, it prevents migrants from accessing courts to claim their rights, or seek redress for violations. And through access to legal assistance, migrants can have further access to their rights to liberty private and family life, their right to seek asylum, their rights to education, food, water, healthcare or housing.

*Example: Criminalization of assistance to asylum seekers in Hungary*

In 2018 Hungary modified its laws concerning measures against illegal immigration. In particular, it criminalised in Hungarian national law the actions of any person who, in connection with an organised activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person knew that the application would not be accepted under that law.<sup>32</sup> At the end of 2019, the European

<sup>28</sup> Tribunal Correctionnel de Bruxelles, 12 December 2018

<sup>29</sup> La Libre. *Rebondissement dans le procès des hébergeurs de migrants: le parquet général de Bruxelles fait appel contre les acquittements* (12 January 2019). <https://www.lalibre.be/belgique/rebondissement-dans-le-proces-des-hebergeurs-de-migrants-le-parquet-general-de-bruxelles-fait-appel-contre-les-acquittements-5c39ef2cd8ad5878f0fc160d>.

<sup>30</sup> Les hébergeurs de migrants sont acquittés par la cour d'appel de Bruxelles, Rtbf, 26.1.2021, <https://www.rtbf.be/article/les-hebergeurs-de-migrants-sont-acquittes-par-la-cour-d-appel-de-bruxelles-10769611?id=10769611>.

<sup>31</sup> Human Rights Committee, General Comment No. 35, Article 9 Liberty and security of a person, para 38.

<sup>32</sup> Paragraph 353/A(1)(a) of the Criminal Code. Hungary stated that the purpose of this provision is "to suppress assistance given by way of misuse of the asylum procedure and assistance to facilitate immigration based on deception, as well as organising such activity".

Commission took action against Hungary for its failure to fulfil its obligations under EU law. The Court of Justice of the European Union, in its judgement of 16 November 2021, held that by criminalising those actions Hungary had failed to fulfil its obligations under the Procedures<sup>33</sup> and the Reception<sup>34</sup> Directives.<sup>35</sup> Reflecting on whether the new Hungarian legislation implies a restriction of the rights entailed in the EU law, the Court stated:

95. *“As regards, first, the rights deriving from Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33, while it is true that Paragraph 353/A(1)(a) and (2) and (3) of the Criminal Code does not formally prohibit persons or organisations providing assistance to applicants for international protection from accessing third-country nationals or stateless persons wishing to obtain asylum in Hungary who present themselves at the external borders of that Member State or who are placed in detention in the territory of that Member State, or from communicating with those persons, the fact remains that, by criminalising certain assistance provided at that time, that provision restricts the right to have access to those applicants and to communicate with them, those rights being expressly provided for in Article 8(2) of Directive 2013/32 and Article 10(4) of Directive 2013/33”.*

96. *“Second, as regards Article 22(1) of Directive 2013/32, although the risk of being convicted of a criminal sentence does not apply to asylum seekers themselves, Paragraph 353/A(1)(a) of the Criminal Code, read in conjunction with Paragraph 353/A(2) and (3) thereof, also restricts the effectiveness of the right, afforded to asylum seekers under Article 22(1), to be able to consult, at their own expense, a legal adviser or other counsellor, since that provision of criminal law is liable to discourage such persons from providing such services to asylum seekers. Furthermore, such criminalisation also limits the right to respond to the requests of asylum seekers which those service providers derive indirectly from Article 22(1) of Directive 2013/32”.*

It should be noted that while it is true that before the CJEU judgment this particular provision had not been used as the basis for a criminal conviction, in the opinion of the Court:

108. *“... that fact is not a decisive factor in assessing whether [the provision] entails a deterrent effect restricting the rights guaranteed by the provisions of EU law ... it is in the very nature of the deterrent effect of criminal offences to discourage anyone from undertaking the activity considered to be illegal which may lead to a criminal sentence”.*

This is an example of the use of national legislation to hold criminally liable those who provide support to migrants, in order to create a chilling effect on NGOs, lawyers and others engaged in providing assistance to migrants. As the CJEU stated, the very existence of the criminal offences and the threat of their application can have a serious deterrent effect, which is not in line with EU law. Such offences are also contrary to guarantees of access to justice and remedies guaranteed under international human rights law.

<sup>33</sup> Article 8(2) of the Procedures Directive, on the access of applicants for international protection to organisations and persons providing advice and counselling to them, and Article 22(1) of that directive, on the right to legal assistance and representation at all stages of the procedure.

<sup>34</sup> Article 10(4) of the Reception Directive, on the access, inter alia, of legal advisers or counsellors and persons representing relevant non-governmental organisations to detention facilities.

<sup>35</sup> CJEU, Case no. C-821/19, 16 November 2021.

### III. International and EU law

#### III.1 International human rights law

Whereas States are permitted under international law to regulate entry on their territory, they are at the same time bound by obligations under international law to uphold the human rights of migrants, in common with all other persons within their jurisdiction.<sup>36</sup>

Individuals that may enter or reside in the territory of a State when not authorized to do so should not be the subject of criminal sanction. The UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) recently reiterated that “irregular entry, stay or exit may constitute at most administrative offences and should never be considered criminal offences as they do not infringe fundamental legally protected values, and as such are not crimes per se against persons, property or national security. In accordance with that, migrants should never be classified or treated as criminals on the basis of their irregular migration status.”<sup>37</sup>

**Any number of human rights of migrants may be engaged, where those assisting them are criminalized. Some of rights most vulnerable to abuse risk include**

- The right to life (art. 6 ICCPR, art. 2 ECHR, art. 2 EU Charter)
- The right to freedom from cruel, inhuman or degrading treatment (art. 7 ICCPR, art. 3 ECHR, art. 4 EU Charter)<sup>38</sup>
- The right to liberty (art. 9 ICCPR, art. 5 ECHR, art. 6 EU Charter)
- Freedom of movement (art. 12 ICCPR, art. 2 of Protocol No. 4 to the ECHR, art. 45 EU Charter)
- The non-refoulement principle (art. 2 ICCPR, art. 1 ECHR, art. 3 CAT, art. 4 and 18 EU Charter)
- The right to adequate standard of living, (art. 12 ICESCR, art. 34 EU Charter)
- The right to health (art. 11 ICESCR, art. 35 EU Charter)
- The right to food (art. 11 ICESCR, art. 24(2)(c) and 27(3) CRC, art. 12(2) CEDAW, art. 25(f) and 28(1) CRPD)
- The right to water and sanitation (art. 11 and 12 ICESCR).
- The right to adequate housing (art. 34 EU Charter, art. 11 ICESCR, art. 28(1) CRPD).
- The right to private and family life (art. 23 ICCPR, art. 8 ECHR, art. 7 EU Charter)
- Access to justice and the right to an effective remedy for violations of human rights, (art. 2(3), 14 ICCPR, art. 6, 13 ECHR, art. 47, 51 & 53 EU Charter, art. 4 & 19 TEU), including the right to legal advice (art. 14(3)(d) ICCPR, art. 6(3)(c) ECHR)<sup>39</sup>
- Freedom from discrimination, equality and equal protection of the law (ICCPR articles 2(1) and 26 ICCPR, ICESCR article 2(2), art. 14 ECHR, art. 21 EU Charter).

**The rights of human rights defenders and humanitarian assistance providers most frequently engaged include:**

- Freedom of movement (art. 12 ICCPR, art. 2 of Protocol No. 4 to the ECHR, art. 45 EU Charter)
- Right to liberty (art. 9 ICCPR, art. 5 ECHR, art. 6 EU Charter)
- Freedom from cruel, inhuman or degrading treatment (art. 7 ICCPR, art. 3 ECHR, art. 4 EU Charter)
- The right to private and family life (art. 23 ICCPR, art. 8 ECHR, art. 7 EU Charter)

<sup>36</sup> See *Moustaquim v. Belgium*, ECtHR, Application No. 12313/86, Judgment of 18 February 1991, para. 43; *Chahal v. United Kingdom*, ECtHR, GC, Application No. 22414/93, Judgment of 15 November 1996, para. 73; *Ahmed v. Austria*, ECtHR, Case No. 71/1995/577/663, Judgment of 17 December 1996, para. 38.

<sup>37</sup> General comment No. 5 (2021) of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *op. cit.*, para. 36.

<sup>38</sup> This right being engaged where lack of humanitarian assistance leaves people destitute.

<sup>39</sup> *M.S.S. v. Belgium and Greece*, ECtHR, para. 318.

- Access to justice and the right to an effective remedy for violations of human rights, (art. 2.1, 14 & 26 ICCPR, art. 6, 13 ECHR, art. 47, 51 & 53 EU Charter, art. 4 & 19 TEU)
- The right to freedom of association (art. 22 ICCPR, art. 11 ECHR, art. 12 EU Charter)
- The right to freedom of assembly (art. 21 ICCPR, art. 11 ECHR, art. 12 EU Charter)

### *Principle of non-refoulement*

Search and rescue at sea can ensure that people are disembarked in safety. Criminalization of such search and rescue operations or of captains, officers and crew members who brought people to safety can lead to the violation of the principle of *non-refoulement*.

The principle of non-refoulement, prohibiting States to transfer anyone to a country where he or she faces a real risk of persecution or serious violations of human rights, is a fundamental principle of international law and one of the strongest limitations on the right of States to control entry into their territory and to expel aliens as an expression of their sovereignty.<sup>40</sup>

It has its origin in international refugee law<sup>41</sup> and international regulations on extradition.<sup>42</sup> In refugee law, the principle has existed since 1933 and it is now clearly a provision of customary international law binding all States.<sup>43</sup>

#### Article 33 Geneva Refugee Convention "Prohibition of expulsion or return ("refoulement")

1. 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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

In international human rights law, the legal basis of the principle of non-refoulement lies in the obligation of all States to recognise, secure and protect the human rights of all people present within their jurisdiction,<sup>44</sup> and in the requirement that a human rights treaty be interpreted and applied so as to make its safeguards practical and effective.<sup>45</sup>

The principle prohibits States from transferring or returning individuals, in any manner whatsoever, to a country where they would face a risk of persecution or serious human rights violations. The principle

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<sup>40</sup> ICJ, Practitioners Guide No 6, updated edition.

<sup>41</sup> Article 33, Geneva Refugee Convention

<sup>42</sup> Article 9, International Convention Against the Taking of Hostages, adopted on 17 December 1979 by G.A. Res. 146 (XXXIV), UN GAOR, 34th Session, Supp. No. 46, UN Doc. A/34/46; Article 3, European Convention on Extradition, adopted on 13 July 1957; Article 5 of the European Convention on the Suppression of Terrorism, adopted on 27 January 1977.

<sup>43</sup> Article 3, Convention relating to the International Status of Refugees, League of Nations, adopted on 28 October 1933. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 15.

<sup>44</sup> See, Article 1 ECHR, Article 2 ICCPR, Article 1 ACHPR, and Article 1 ACHR. The Convention against Torture expressly provides for the principle of non-refoulement in its Article 3.

<sup>45</sup> See, for example, *Soering v. United Kingdom*, ECtHR, Plenary, Application No. 14038/88, 7 July 1989, para. 87

protects all migrants on the territory of the State but also at the borders (“whether in States’ territorial waters, or the high seas”).<sup>46</sup>

The Court of Justice of the European Union (CJEU) has also recognised the principle of *non-refoulement*, specifically under article 4 (prohibition of torture and inhuman or degrading treatment or punishment) and 18 (right to asylum) of the EU Charter.<sup>47</sup> The UN High Commissioner for Refugees Executive Committee underlines that “interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.”<sup>48</sup>

The European Court of Human Rights (ECtHR) has held that the principle of *non-refoulement* protects “the fundamental values of democratic societies”<sup>49</sup> amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to life,<sup>50</sup> and fundamental aspects of the rights to a fair trial<sup>51</sup> and to liberty.<sup>52</sup>

#### *Access to justice, right to legal assistance*

When legal assistance to migrants is criminalized, this will affect the right to access to justice and to legal assistance. Availability of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.<sup>53</sup>

The UN Special Rapporteur on the human rights of migrants emphasized that “under international law, States have a duty to protect migrants at all stages of the migratory process and to provide them with access to justice to obtain redress for any discriminatory treatment or human rights violations that they experience. Effective access to justice includes as guarantees of due process the right to legal aid and legal representation, the right to information and to an interpreter, the right to consular assistance, and access to remedies and redress. In addition, firewall protections are essential mechanisms that allow migrants to exercise their human rights without fear of being reported to the immigration authorities.”<sup>54</sup>

In *M.S.S. v Belgium and Greece*, the European Court for Human Rights found that Greece had violated article 13 ECHR, which provides for the right to an effective remedy, taken in conjunction with article 3 ECHR because of the deficiencies in the asylum procedure, including lack of access to information

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<sup>46</sup> See *Conclusion No. 19 (XXXI) Temporary Refuge*, ExCom, UNHCR, 31<sup>st</sup> Session, 1980, para. (a); *Conclusion No. 22*, UNHCR, para. (II-A-2). UNHCR, General legal considerations: search-and-rescue operations involving refugees and migrants at sea, <https://www.refworld.org/pdfid/5a2e9efd4.pdf>, para. 1.

<sup>47</sup> CJEU, *Abubacarr Jawo v. Bundesrepublik Deutschland*, C-163/17, Judgment 19 March 2019 para. 85; CJEU, *N.S. v. Secretary of State for the Home Department*, C-411/10 & C-493/10, Judgment, 21 December 2011, para. 106.

<sup>48</sup> UNHCR, General legal considerations: search-and-rescue operations involving refugees and migrants at sea, <https://www.refworld.org/pdfid/5a2e9efd4.pdf>, para. 2; ExCom Conclusion No. 97 (LIV), 2003, para (a)(iv).

<sup>49</sup> *Saadi v. Italy*, ECtHR(GC)Application No. 37201/06, Judgment of 28 February 2008, para. 127; *Chahal v. the United Kingdom*, ECtHR, Application No. 70/1995/576/662, Judgment 11 November 1996, para. 79.

<sup>50</sup> *Bader and Kanbor v. Sweden*, ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48

<sup>51</sup> See, *Othman (Abu Qatada) v. the United Kingdom*, ECtHR, Application No. 8139/09, Judgment of 17 January 2012.

<sup>52</sup> See, for example, *Z and T v. United Kingdom*, ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006.

<sup>53</sup> The right to legal counsel or legal assistance is recognised as a component of the right to a fair trial or the right to equality before the courts, in article 6(3)(c) of the ECHR, or article 14(3)(d) of the ICCPR. The right to legal assistance, designates a broader concept, extending beyond the right to legal representation for persons deprived of liberty or undergoing a criminal trial, and including also assistance with the rights or procedures available to migrants, or assistance with written or in-person proceedings before administrative or judicial authorities.

<sup>54</sup> *Report of the Special Rapporteur on the human rights of migrants*, A/73/178/Rev.1 (2018) para. 71.

and to legal aid, followed in the applicant's case by the risk of his expulsion to Afghanistan without any serious examination of the merits of his asylum application and without any access to an effective remedy.<sup>55</sup>

### *Right to liberty and security of a person*

Security and liberty of the person is protected by article 9 of the ICCPR, article 5 ECHR and article 6 of the EU Charter. According to international legal standards, arbitrary arrest, detention and unlawful deprivation of liberty are prohibited. The arbitrariness of the situation should be determined taking into account elements such as inappropriateness, injustice, lack of predictability, due process, reasonableness, necessity and proportionality.<sup>56</sup>

Grounds and procedures for deprivation of liberty must be prescribed by law and preserve the right to liberty of the person.<sup>57</sup> Deprivation of liberty without adequate legal basis or incompatible with specific requirements is unlawful.<sup>58</sup> States must provide access to a judge promptly to assess the legality and necessity of detention.<sup>59</sup> In case of unlawful detention, the judge must order release of the person.<sup>60</sup> Anyone should be able to access a judge to question lawfulness of the detention (*habeas corpus*)<sup>61</sup> and be provided with compensation in case of unlawful or arbitrary arrest or detention.<sup>62</sup>

## III.2. The law of the sea

International law, both conventional and customary, imposes on States and shipmasters the duty of rescuing and assisting people in distress at sea,<sup>63</sup> "(...) regardless of the nationality or status of such a person or the circumstances in which the person is found."<sup>64</sup> The international treaties, which comprise the UN Convention on the Law of the Sea (UNCLOS), the International Convention on Salvage, the International Convention for the Safety of Life at Sea (SOLAS), or the International Convention on Maritime Search and Rescue (SAR Convention), have been complemented by guidelines developed by the International Maritime Organization (IMO) and – as provided in the SAR Convention – States parties must respect and follow them in search and rescue operations. In the laws of some States, failure to discharge a legal duty to rescue people in distress at sea may carry criminal liability.<sup>65</sup>

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<sup>55</sup> *M.S.S. v Belgium and Greece*, ECtHR, Application No. 30696/09, Judgment of 21 January 2011, paras 301 et 319.

<sup>56</sup> Human Rights Committee, General comment no. 35, Article 9 (Liberty and security of person), para. 12

<sup>57</sup> HRC, General Comment No 35, para. 14.

<sup>58</sup> HRC, General Comment No 35, paras 22, 44.

<sup>59</sup> HRC, General Comment No 35, para. 36;

<sup>60</sup> HRC, General Comment No 35 para. 36; ECtHR, *Ilmseher v. Germany* [GC], para 251; *Khlaifia and Others v. Italy* [GC], para 131

<sup>61</sup> HRC, General Comment No 35, para. 39; ECtHR, *Mooren v. Germany* [GC], para 106; *Rakevich v. Russia*, para 43

<sup>62</sup> HRC, General Comment No 35, para. 49-50 ; *N.C. v. Italy* [GC], para 49; *Pantea v. Romania*, § 262; *Vachev v. Bulgaria*, para 78)

<sup>63</sup> The sources of this international duty are: the United Nations Convention on the Law of the Sea (UNCLOS, 1982); the International Convention on Salvage (1989), art. 10; the International Convention for the Safety of Life at Sea (SOLAS, 1974), regulation 33.1; the International Convention on Maritime Search and Rescue (SAR Convention, 1979). The SAR Convention contains a definition of "*distress phase*": a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance (Chapter 1.11).

<sup>64</sup> Chapter 2.1.10 SAR Convention

<sup>65</sup> See for example articles 489, 490 and 1158 on the Italian *Codice della navigazione*

The duty of rescue is necessarily linked with the obligation of conducting people in distress to a *place of safety*.<sup>66</sup> This is not a separate activity but rather the required conclusion of the rescue duty.<sup>67</sup>

This international legal framework requires States to ensure that assistance be provided to any person in distress at sea, even by imposing assistance duties on the shipmasters.<sup>68</sup> Therefore, the individual agents who deal with SAR activities are acting pursuant to their duties flowing from State obligations under international law. This necessarily means that such activities may not be subject to criminal sanction. Any such criminalization would also contravene a number of further obligations that the Conventions place on the State itself and its bodies (as the Search and Rescue Mission Coordinator), such as: alerting ships in likely search areas for rescue, coordinating SAR operations and identifying a place of safe disembarkation.<sup>69</sup> The UNHCR, in its [General legal considerations](#) asserts: “the authorities of coastal States which assume responsibility for coordinating rescue operations involving merchant vessels, NGOs, or assets of other States, need to act consistently with the implementation in good faith of their obligations under international law, including international maritime law, refugee law, and human rights law.”<sup>70</sup> This also involves the mobilization of “those assets which are best able to respond in a timely and effective manner.”<sup>71</sup> From this perspective the work of NGOs seems to be of the utmost importance and they “should be allowed to carry out their life-saving missions in the Mediterranean Sea, recognizing their capacities to organize rapid-reaction rescues.”<sup>72</sup>

Chapter 2.1.10 of the SAR Convention obliges States Parties to:

“ ... ensure that assistance be provided to any person in distress at sea. They shall do so **regardless of the nationality or status of such a person or the circumstances in which that person is found.**”

Furthermore, the so-called “non-SAR considerations”, such as survivors’ status, oil spills, onscene investigations, and security or law enforcement concerns, may require attention . However, “the appropriate authorities can often handle these matters once the survivors have been delivered to a place of safety” and “national authorities other than the Rescue Coordination Centre (RCC) typically have primary responsibility for such efforts.”<sup>73</sup>

“Any operations and procedures such as **screening and status assessment of rescued persons** that go beyond rendering assistance to persons in distress **should not be allowed to hinder the provision of such assistance** or unduly delay disembarkation of survivors from the assisting ship(s).”<sup>74</sup>

<sup>66</sup> The International Maritime Organization (IMO) defines “place of safety”: “a place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are considered to terminate. It is also a place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors’ next or final destination. ” (IMO, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued At Sea*, Resolution MSC.167(78), 20 May 2004, para. 6.12). It should also be noted that “an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship” (*ibidem*, para. 6.13).

<sup>67</sup> IMO, Maritime Safety Committee, *Adoption of Amendments to the International Convention on Maritime Search and Rescue*, Resolution MSC.155(78), 20 May 2004 and the new Chapter 3.1.9 of the SAR Convention.

<sup>68</sup> Chapter 2.1.10 SAR Convention; art. 98 UNCLOS, See also the [ICJ intervention](#) (along AIRE Centre, ECRE and DCR) in *S.S. and Others v. Italy*, Application No. 21660/18, 11 November 2019.

<sup>69</sup> For a broader overview of the obligations of the coastal States see the [ICJ intervention](#) (along AIRE Centre, ECRE and DCR) in *S.S. and Others v. Italy*, 11 November 2019.

<sup>70</sup> UNHCR, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017, para. 19.

<sup>71</sup> *Ibid.* See also UNHCR’ submission in *S.S. and Others v. Italy*, Application No. 21660/18, 14 November 2019.

<sup>72</sup> UNHCR’ submission in *S.S. and Others v. Italy*, *op. cit.*, ft. 68. See also Council of Europe Parliamentary Assembly, Resolution 1872 (2012), *Lives lost in the Mediterranean Sea: Who is responsible?*, 24 April 2012, para. 13.3.

<sup>73</sup> IMO, Maritime Safety Committee, *Guidelines on the Treatment of Persons Rescued At Sea*, *op. cit.*, para. 6.19.

<sup>74</sup> *Ibid.*, para. 6.20. Starting from these two principles, some Italian scholars argue that until the conclusion of the SAR operation with the disembarkation in a place of safety the status of “survivors” prevails and temporarily excludes the relevance of their qualification as “migrants” (legal or not) or “refugees” (Cesare Pitea and Stefano Zirulia, “‘Friends, not foes’:

### III.3. International law on smuggling

Several civil society organisations, their founders, owners, employees or volunteers have been recently prosecuted for the offence of smuggling while providing assistance to migrants.

At international level, migrant smuggling is addressed in the [Protocol](#) supplementing the UN Convention against transnational organized crime [against the Smuggling of Migrants by Land, Sea and Air](#).<sup>75</sup> All EU Member States,<sup>76</sup> as well as the EU itself, are parties to this Protocol and must therefore ensure its application. Member States must ensure application not only through national and EU legislation, but also while acting at the EU level through European institutions.

The Protocol provides that migrant smuggling consists of the support of irregular migrants for material or financial benefit.<sup>77</sup>

“Smuggling of migrants” 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 (article 3.a).

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means (article 6).

The Protocol contains a saving clause laying down that its provisions do not preclude any obligation contracted under international human rights law or international humanitarian law (art. 19.1).<sup>78</sup>

In addition, the [Interpretative notes for the official records \(travaux préparatoires\) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto](#)<sup>79</sup> and the [UNODC Legislative Guide for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air](#),<sup>80</sup> explicitly state that the requirement of an intention to obtain financial

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qualificazione penalistica delle attività delle ONG di soccorso in mare alla luce del diritto internazionale e tipicità della condotta”, in *Quaderni di SIDIBlog*, 2019, p. 74-ss.). In their opinion, the consequence of this would be that NGOs’ SAR activities could never be criminalized as operations of migrants smuggling, not only due to the existence of an humanitarian exemption (see *infra*), but primarily because under international law there is an obligation to treat people rescued at sea as survivors regardless of whether they were attempting to illegally enter the territory of a State.

<sup>75</sup> UNGA, United Nations Convention against Transnational Organized Crime A/RES/55/25, 8 January 2001.

<sup>76</sup> except for Ireland

<sup>77</sup> Protocol against smuggling, art. 3 and art. 6

<sup>78</sup> Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of nonrefoulement as contained therein.

<sup>79</sup> Para. 88.

<sup>80</sup> Paras. 32 and 66-68.

or other material benefit was provided for in the Protocol in order **to exclude support to irregular migrants solely for humanitarian, charitable, or altruistic purposes or on the basis of family ties**. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.<sup>81</sup>

The Protocol was therefore not intended to be used as a framework to criminalize assistance to migrants. It specifically sets safeguards to ensure that humanitarian action is not criminalized. In reference to border measures and sanctions on commercial carriers under the Protocol (Article 11), the *travaux préparatoires* clarify that this “does not unduly limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees”.<sup>82</sup>

### III.3.1 EU law on smuggling

#### III.3.1.1 The EU Facilitation package

Intentional assistance to migrants in EU Member States can be criminalized on the basis of the EU “Facilitators package” (2002) targeting migrant smuggling. The package includes the [Facilitation directive](#) defining the offence of assisting “illegal immigration” and the Council framework decision (2002/946/JHA) on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence.

The Directive calls upon Member States to criminalize intentional assistance to a person who is not a national of a Member State to enter, transit or reside on the territory of a Member State and intentional assistance for financial gain to non-nationals to reside within the territory of an EU Member State in breach of the laws of the State concerned.<sup>83</sup>

#### Article 1- General infringement

1. Each Member State shall adopt appropriate sanctions on:

(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.

However, the Directive allows Member States to choose not to impose sanctions on assistance to enter or transit the territory of a Member State (Article 1(a) Facilitation Directive) when there is no profitable intention and the aim is to provide humanitarian assistance:<sup>84</sup>

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 exemption clause poses several problems.

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<sup>81</sup> See the interpretative notes, para. 88.

<sup>82</sup> Para. 82

<sup>83</sup> Facilitation Directive art. 1.1 (a –b). See also, Red Cross EU, [“Protecting the humanitarian space to access and support migrants.”](#) March 2021

<sup>84</sup> Facilitation Directive art. 1.2.

First, the exemption is optional. Only eight countries have explicitly introduced the humanitarian clause. They are Belgium, Greece, Spain, Finland, Italy, Malta, Croatia and France.<sup>85</sup>

This means, for instance, that captains, shipmasters and drivers in Greece are not criminally liable for providing assistance to persons needing international protection by rescuing them at sea or transporting them.<sup>86</sup> Individuals in Malta are not criminally liable when helping someone in immediate danger to enter and/or to transit through its territory, provided that such actions are carried out to provide humanitarian assistance.<sup>87</sup> Italy exempts from criminalization activities carried out to prevent serious harm to those involved, and to rescue and/or offer humanitarian help to foreigners in its territory.<sup>88</sup>

However, despite these exemptions, prosecution of such assistance still occurs in the countries where the humanitarian exception was introduced, so the provision is not sufficient to protect individuals acting in solidarity towards migrants.

Second, the exemption does not cover facilitation of residence (Article 1(b) Facilitation Directive)<sup>89</sup> and *bona fide* service providers (e.g. taxi drivers or accommodation providers).<sup>90</sup> In addition, the Directive does not define the concept of ‘humanitarian assistance’.

The notion of migrants’ smuggling in the Directive is thus broader than the scope of the UN Smuggling Protocol. It allows for the criminalization of humanitarian assistance, which had been deliberately excluded from the Protocol on the Smuggling of Migrants.

In June 2018, the European Parliament adopted a resolution in which it “expressed concerns at the unintended consequences of the Facilitators Packages on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole”.<sup>91</sup> It noted that only a few Member States had introduced the humanitarian exception. The Parliament called on the European Commission to adopt guidelines clarifying the forms of facilitations of entry which should not be criminalized. In 2019, the Commission agreed to develop guidelines on the implementation of the Facilitators Package and to put the emphasis on the non-criminalization of humanitarian assistance to migrants.

At the global level, the issue of humanitarian exception was also stressed by the UN High Commissioner for Human Rights, who recommended in 2021 in the context of rescues at sea, that the European Union and its Member States revise EU legislation, “in particular by introducing a ‘financial or other material benefit’ requirement for classifying ‘migrant smuggling’ as a crime and an obligatory provision that expressly exempts humanitarian assistance by civil society organisations or individuals from criminalisation.”<sup>92</sup>

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<sup>85</sup> Communication from the Commission, Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, 2020/C 323/01

<sup>86</sup> REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence cit., pp. 14-15.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants* (2016) and its 2018 update (2018), p. 30.

<sup>90</sup> *Ibid.*, p. 32.

<sup>91</sup> European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised, [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0314\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0314_EN.html), para 2.

<sup>92</sup> UN OHCHR, Thematic Report on ‘Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea’, May 2021, p. 28.

### III.3.1.2 The Commission Guidance

On 23 September 2020 the European Commission published the “EU Pact on Migration and Asylum” and as part of it a Communication: [Commission Guidance](#) on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence.

Interestingly, the Commission decided not to amend the Facilitation Directive Article 1, but instead to issue Guidance referring to the exception from Article 1(a) allowing for desistence from imposing sanctions when it comes to humanitarian aim of the assistance. The Guidance states that:<sup>93</sup>

*In view of the general spirit and objective of the Facilitation Directive, it is clear that it cannot be construed as a way to allow humanitarian activity that is mandated by law to be criminalised, such as search and rescue operations at sea, regardless how the Facilitation Directive is applied under national law.*

*According to the international law of the sea, States have an obligation to require shipmasters flying their flag, insofar as they can do so without serious danger to the ship, the crew or the passengers, to provide assistance to people or vessels in distress at sea.*

*(...)*

*Moreover, the duty of countries to set out the obligation for shipmasters to assist any individual, vessel or aircraft in distress at sea is recognised as a principle of customary international law. Therefore, it is binding on all countries.*

*Everyone involved in search and rescue activities must observe the instructions received from the coordinating authority when intervening in search and rescue events, in accordance with general principles and applicable rules of international maritime and human rights law. Criminalisation of non-governmental organisations or any other non-state actors that carry out search and rescue operations while complying with the relevant legal framework amounts to a breach of international law, and therefore is not permitted by EU law.*

*In conclusion, when Article 1 of the Facilitation Directive criminalises the facilitation of unauthorised entry and transit, while giving Member States the possibility not to impose sanctions in cases where the purpose of the activity is to provide humanitarian assistance, it does not refer to humanitarian assistance mandated by law, as this cannot be criminalised.<sup>94</sup>*

The first Recommendation of the Commission Guidance is that:

- i) humanitarian assistance that is mandated by law cannot and must not be criminalised;
- ii) in particular, the criminalisation of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law;
- iii) where applicable, assessment of whether an act falls within the concept of ‘humanitarian assistance’ in Article 1(2) of the Directive – a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalised – should be carried out on a case-by-case basis, taking into account all the relevant circumstances.

As a final Recommendation, the Commission invites the Member States to apply the optional exception in Article 1(2) Facilitation Directive.

However, as the Commission rightly points out in its analysis, this exception is obligatory under international law. Although as an immediate measure all EU Member States should apply the exception

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<sup>93</sup> Part 3 Scope of application of Article 1, p. 5-6.

<sup>94</sup> See also the answer given by Ms Johansson on behalf of the European Commission (Question reference: [E-003513/2021](#)), 18 October 2021.

as suggested by the Commission, the wording of the Facilitation Directive that remains contradictory to international law, should also be changed.

#### III.4. Counterterrorism law and measures

Examples of legislation leading to the deprivation of vital support to migrants, can be found across Europe, either under the claimed objective to curb “illegal immigration” or “smuggling” but also as “counter-terrorism measures.”

At EU level, a potential source of criminalization of humanitarian assistance could be the [EU Directive 2017/541 on combatting terrorism](#).<sup>95</sup> The recitals 37 and 38 of the Directive stipulate that:

37. *“This Directive should not have the effect of altering the rights, obligations and responsibilities of the Member States under international law, including under international humanitarian law”.*

38. *“The provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the caselaw of the Court of Justice of the European Union”.*

Despite these provisions, many of the offences enshrined in the Directive (Article 4, Article 9, Article 11) – if broadly interpreted – “may also have a damaging impact on legitimate activities of civil society, including activities aimed at protecting human rights through the provision of humanitarian assistance.”<sup>96</sup> The UN Special Rapporteur on Counter-terrorism and Human Rights stressed in her 2019 Annual report that: “qualifying a wide range of acts as impermissible ‘support for terrorism’ (...) results in harassment, arrest and prosecution of humanitarian, human rights and other civil society actors. (...) material support provisions may also affect the work of civil society involved in supporting, inter alia, fact-finding and evidence gathering for the purpose of prosecution, promoting the right to development or providing assistance to migrants.”<sup>97</sup>

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<sup>95</sup> Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. See also ICJ, [Counter-Terrorism and Human Rights in the Courts](#), November 2020.

<sup>96</sup> ICJ, [Counter-Terrorism and Human Rights in the Courts](#), November 2020, p. 23.

<sup>97</sup> UN Doc. A/HRC/40/52, para. 22, 43-44.

#### IV. ICJ Recommendations

Legislation and practice that serves to impose criminality liability on humanitarian assistance to migrants is usually in breach of international and EU law. The ICJ recommends to the EU and its Member States the following:

##### IV.1 In relation to the the initiation of administrative and criminal proceedings against vessels or crew members engaged in (SAR) activities in the Mediterranean, and the EU Facilitation Directive

Article 1 of the **EU Facilitation Directive** leaves room for a non-human rights compliant interpretation, as described in the Commission guidance from September 2020. Therefore:

1. The ICJ recommends the revision of the EU Directive 2002/90/EC in order to introduce the strict requirement of **intention of gaining profit** and the mandatory non-criminalization of humanitarian assistance, in accordance with the UN Protocol against the Smuggling of Migrants by Land, Sea and Air.
2. The ICJ recommends that **humanitarian assistance** be defined in terms of its nature and scope in the EU Directive, on the basis of internationally recognized standards. Such definition should be worded broadly and:
  - a. Include bona fide provision of assistance to help migrants access rights such as health care, housing, clothing, food, water and sanitation, legal assistance an adequate standard of living;
  - b. Cover associations, as well as individuals.
3. The ICJ calls on all EU Member States to **introduce the humanitarian exception in their national legislation** according to the [Guidelines](#) of the European Parliament of 5 July 2018 and the Guidance of the European Commission from 23 September 2020
4. The ICJ calls on all EU Member States to refrain from criminally prosecuting individuals or organizations when engaging in humanitarian work such as rescue at sea.

##### IV.2 In relation to the initiation of administrative and criminal proceedings and the imposition of restrictions on the provision of legal aid and other support to migrants

1. The ICJ recommends to EU Member States that they take effective measures to ensure that civil society organisations can do their work **without undue interference** by the Member States, including where these organizations provide legal assistance, food , shelter, water, health care or other assistance to migrants in order to protect their human rights (such as economic and social rights, right to seek asylum or right to due process).
2. The EU and its Member States should ensure that necessary funding be made available for civil society organisations assisting migrants.
3. EU Member State authorities should refrain from criminally prosecuting individuals or organizations for conduct involving the provision of legal and other practical assistance and support to migrants.