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CRIMINALISATION OF IRREGULAR MIGRANTS: HOW THE CHANGING NORMATIVE FRAMEWORK AFFECTS NGOS AND INDIVIDUALS THAT PROVIDE HUMANITARIAN AID IN EUROPE

Supervisor: Prof. PAOLO DE STEFANI

Candidate: SARA TOSONI

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Criminalisation of irregular migrants: how the changing normative framework affects NGOs and individuals that provide humanitarian aid in Europe

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Introduction

The aim of this research is to examine the processes of criminalization of irregular migration and to assess how the normative framework and the political rhetoric affect individuals and NGOs that provide humanitarian assistance to undocumented migrants. All over Europe we are witnessing increasing hostility, attacks and prosecutions against civil society actors engaged in providing humanitarian assistance to migrants and advocating for their fundamental rights (as well for other forms of humanitarian aids).[1] This study will go through various phenomena of criminalization intended in its wide conceptualization, that includes all measures aimed at deterring and punishing acts of solidarity towards migrants: not only legal aspects - such as the presence of administrative or penal sanctions -, but also all political discourses, social practices and judicial prosecutions aimed at intimidating and delegitimizing humanitarian actors and their operations. In this perspective, the role of Italy as front-line State in the management of migratory flows of the central Mediterranean route, is particularly important to analyse: in recent years the approach towards migrants and supportive actors has become more restrictive and securitarian, promoting the increasing adoption of criminal measures to deal with the issue and the consequent feeding of a general climate of fear and mistrust.

In order to understand the origins of the association between irregular migration and the criminal law field, it is fundamental to look at the long-standing nexus between security and migration intrinsically rooted in European policies. In the first chapter I show how, especially since the '80s, European States started to harmonize their legislation about migration, initiating the process called "Europeanisation" of migration. As progressively reiterated in different Intergovernmental Fora, in the Schengen Agreement and in the following Programs of the European Union, migration has always been treated as a security matter: the way to ensure justice, freedom and security among European citizens was to protect them from external

[1] AMNESTY INTERNATIONAL (2019). pp.2-3. "Laws Designed to Silence: The Global Crackdown on Civil Society Organizations". Amnesty International Ltd, London.

"threats" such as international crime and "illegal" migration, and combating them through stricter border controls.[2] In fact, the achievement of the internal security has been a fundamental justification for the management of migration as part of the externalization of European security policies, through strict border controls (Frontex and Eurosur), mobility partnerships, the Schengen Visa regime and agreements with countries of origins to reduce the migratory incoming flows (such as the EU-Turkey deal of 2016 or the Memorandum between Italy and Libya of 2017). All these measures are part of a complex policy system aimed at controlling and selecting by distance the "desirable" categories of migrants entitled to reach Europe, while on the other side preventing irregular migration movements.[3] It will also be shown as the Common European Asylum System presents relevant securitarian implications that are actually functional to the policy of migration control: the collection of migrants biometric data, the interdiction of secondary movements in compliance with the Dublin regulation, and the strong emphasis on detention and removal measures. An interesting question to pose is: would it be necessary to address immigration as a security subject if the reception system was actually properly working on the ground of a responsibility-sharing mechanism among Member States? Despite the numerous criticisms directed to the Dublin Regulation and the various proposals to reform it, Member States are still unable to find a political agreement upon a more sustainable and truly communitarian management of incoming migratory flows.

After having analysed how deeply the conception of irregular migrants as a threat for the national identity and security has shaped European policies (enough to become intrinsic to the system), I would like to explore how this nexus contributed to the tendency of addressing migration issues with criminal law provisions. In the second chapter I will show and analyse the main legal instrument that the EU

[2] In line with this strategic internal/external axis, this concept was already enshrined in the Convention for the Implementation of Schengen Agreement: in order to protect the internal communitrian space, Member States had to adopt compensatory measures to improve police and justice collaboration in border controls and reception of migrants.

[3] BIGO D., GUILD E. (2010). pp. 258-259. "The transformation of European border controls" in B. Ryan and V. Mitsilegas (eds) *"Extraterritorial immigration control. Legal challenges".* Leiden: Brill.

adopted in order to fight against "illegal" migration and its facilitation. At International level, the legal standard dealing with this issue is the UN Smuggling Protocol of 2000, that provides a definition of smuggling[4] and demands each State Party to take measures in order to punish this criminal offence. The EU Facilitators Package adopted in 2002 includes the definition and the related punishments of unauthorised entry, transit and residence; it also provides for sanctions against those who facilitate such breaches, covering in this way the smuggling offence too. However, it will be deeply explained how this law does not fully comply with the provisions of the UN Smuggling Protocol, raising concerns about the legal protection of forms of humanitarian assistance towards irregular migrants. Numerous cases of "crimes of solidarity" - as called by many NGOs dealing with migrants - are indeed increasingly reported all over Europe, and encompass hostility campaigns, intimidations, prosecutions and convictions of individuals and NGOs engaged with migrants providing them basic assistance (such as offering them food or an accommodation for the night). In fact, the majority of Member States' national laws establish administrative or penal sanctions for both the facilitation of entry and stay of irregular migrants, in many cases without including exemptions for humanitarian assistance. The national cases I will report in this research - which represent just a minimum part of the overall picture - give evidence about the increasing rate of criminalization of solidarity actions (addressed as facilitation), mainly aimed at deterring civil society actors from providing humanitarian assistance to irregular migrants.

The third chapter will assess the Italian recent and current position about irregular migrants and humanitarian actors; my intention is to enunciate and analyse all recent legal, judicial and political measures adopted by national authorities concerning this issue, in order to draw an overall picture about the State attitude towards humanitarianism and the level of compliance with its human rights obligations. Even though the national legislation provides exemptions from

[4] Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air recits:
"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."

criminalization on humanitarian ground, "being irregular" is a crime under Article 10-bis to *the Testo Unico sull'Immigrazione* sanctioned with a fine, while the facilitation is punished with a fine and with imprisonment from 1 to 5 years (Art. 12). Despite the existence of a humanitarian exemption, indeed, cases of political and judicial criminalization are increasing sharply, and are dramatically showing their deterrent effects in the society. I will show how NGOs conducting search and rescue operations in the Central Mediterranean are victims of strong discredit and criminalizing campaigns aimed at reducing their operational power, as the Italian Government is "securitizing" immigration by externalizing its border controls (for example by signing the Memorandum of 2017 with Libya), and how experiences of integration and solidarity on the territory are actually obstructed and threaten - on the ground of security justifications - by public political discourses or judicial prosecutions. The overall Italian scenario concerning the protection of migrants and humanitarian actors is surely not reassuring: the intimidatory and hostile socio-political environment surrounding irregular migrants, asylum-seekers and their helpers is currently palpable. So which measures should Italy undertake in order to change and overcome this securitarian and restrictive approach towards migration? and which solutions need to be found at European level to ensure a sustainable management of migratory flows in respect of international human rights obligations?

Civil society actors play and essential role in the protection, defence and advancement of human rights in a society, especially because they often intervene to supply a lack of operational efficiency or responsibility of national States. Humanitarianism should never be undermined by State authorities and criminal provisions: also the UN Declaration on human rights defenders specifically recognizes the importance of people working individually or collectively towards the realization of human rights, and ask States to take all the necessary measures in order to protect them. The unceasing hostility towards irregular migrants and asylum seekers, addressed as enemies of States' national identity and internal public order, deserves to be studied in depth and deconstructed. I believe that the increasing attacks addressed to humanitarian actors that operate to save lives and

improve people's life conditions, reflect a deep moral and human crisis that the society is going through. Therefore, I consider fundamental to monitor the delicate situation of undocumented migrants and people assisting them, since if human rights defenders are not properly protected and free to carry out their humanitarian actions, the price in terms of human rights violations will be paid by the whole society.

CHAPTER I: The Securitization of Migration in the EU

Since its birth in the 50s, the European Union has been developing a complex institutional system able to regulate both internal and external relations, that makes it one of the most important political and economic actors among the international community. In a globalised and interdependent world, also the EU has to deal with complex international challenges and global threats (such as climate change, terrorism, social and economic inequality, transnational organised crime) cooperating with the other actors of the international scene. The EU needs a legal framework that enables it to face the world's transformations compliant with the main principles of its foreign policy: the importance of both regional and international cooperation, the promotion of human rights and democratic values, good governance, the prevention of conflicts and the fight against international crime. [5]

1.1 EU Security policies and the right to move

The main elements of the EU external activities are trade, the development of assistance and cooperation through humanitarian aid, foreign and security policy. According to the intent of this research, it is fundamental to focus on the evolution of the conception of migration (especially of third-country nationals), that has been progressively presented as a danger to public order, to the cultural identity of nationals and to the internal economical and welfare systems. Therefore, in this first part I will focus on security European policies, in order to delineate the historical development of the nexus security-migration.

The political approach that considers migration as a security issue is long-standing, and it strengthened in particular after the Twin Tower attack in September 2001. In the article "Migration and Security", Jef Huysmans and Vicky Squire explore

[5] BEKEMANS L. (2013). p.180. "Globalisation vs Europeanisation, a Human-centric Interaction". Peter
Lang International Academic Publisher, Brussels.

reasons and characteristics of the nexus between migration and security, by affirming that it can be viewed from 2 main perspectives:

- strategic analysis (that includes security and migration studies) that try to identify general laws about how migration affects security and vice versa, tending to approach the migration-security nexus in traditional terms by conceptualising the security of the State as a value to be achieved. In these studies, migration is often defined as threatening the national security;
- human security, that focuses attention on the security of the individual over that of the State. It represents therefore a shift away from the state as the subject of security, and brings into view the security of humans who migrate.[6]

However, the authors point out as both analysis risk to fall under the same perspective of security:

> By approaching security as a value or a condition to aspire to, analysts from these approaches tend to assume that migration policy can be developed in terms that increase the security of states, in terms that increase the security of migrants, or in terms that increase the security of both states and migrants. In so doing they bring free movement firmly into the field of security, thus consolidating the articulation of migration as a security threat. [7]

In this way, the general political tendency consists in a process of securitisation of migration and free movement. In the next paragraphs it will be shown the historical evolution of European policies concerning the management of migration and asylum.

1.1.1. Before Schengen

Although it is difficult to generalize about different policies and countries, it is possible to outline a common trend concerning the 1950s and the 1960s: immigrants were primarily an extra workforce in most western European countries. After the post-war years of reconstruction and economic development, many European countries were in need of flexible and cheap workforce that was actually not

[6] HUYSMANS J., SQUIRE V. (2009). pp. 5-6. "Migration and Security". In: Dunn Cavetly, Myriam and Mauer, Victor eds. *Handbook of Security Studies*. London, UK: Routledge.
[7] Ibidem. p.7.

available in the internal market. Consequently, countries like France, Belgium, Germany and the Netherlands used promotional migration policies motivated by this need, and they often directly recruited immigrants in the country of origin without necessarily regularizing them in the host country. At the time, the legal status of these third-country nationals was not primarily relevant for hosting States, which in some cases took advantage of the absence of regulations in order to make this workforce more exploitable and flexible.[8]

Migration started to become a subject of public concerns in the late 1960s and the 1970s: even though the majority of migrants were still categorized as "guest workers" on the European territory, States started to adopt more control-oriented migration policies in order to protect social and economic rights of the internal workforce. Meanwhile, the immigrant population continued to grow because of permission to immigrate on the basis of family reunion; it happened that these temporary guests progressively became permanent settlers and became more aware about the rights that they could or could not claim. During this period, migration policy was not an important issue for the European Communities.[9] Nevertheless, in 1968 a significant decision was taken with the promulgation of the Council Regulation 1612/68 which aims at ensuring that in each MS workers from the other MS receive treatment which is not discriminatory by comparison with that of national workers.[10] We are still far from conceptualizing the idea of "European citizen", since with this regulation MS nationals enjoy the right of non-discrimination exclusively for the fact that they are workers; still, it is considered as one of the first distinctions, in term of rights, between European nationals and third-country nationals.

1.1.2. Towards Schengen

The significant Europeanisation of migration policy, which means the process through which European States harmonized the legislations about migration by

[8] HUYSMANS J. (2000). pp. 753-754. "The European Union and the securitization of migration". In *the Journal of Common Market Studies,* Vol. 38, No. 5 pp. 751–77. Blackwell Publishers Ltd, Oxford (UK).
[9] Ibidem, p. 754.
[10] Council Regulation (EEC) n. 1612/68 of 15 October 1968.

considering security as a common European issue, took off in the 1980's. Even though the securitisation of migration is often associated with policy responses after 9/11, its roots can actually be traced in these years. The perception of third-country nationals changed radically in the 1970's with the economic downturn that arose concerns around social conflict and integration. The following years would have seen the collapse of communist regimes, a rising number of asylum applications and the refugee crisis caused by the civil war in Yugoslavia; all these events created a political pressure on States that were already concerned about the resistance of the Welfare system and of the cultural composition of the nation.[11]

The nexus migration-security and the following association between criminal activities and migration movements is also noticeable by looking at the Intergovernmental Fora of the time, that is to say the forms of cooperation between the 12 EC States. An example is the Trevi group, that was set up in 1976 by the EC states to counter terrorism and to coordinate policing in the EC; this form of intergovernmental coordination was composed of civil servants of the Ministries of Interior, and led to the creation of 5 working groups dealing with different security issues. The working group number 3 and afterwards the TREVI 92, that took over in 1989, dealt with combating organized crime and with the consequences of the suppression of internal borders within the EC, i.e. the possible "lack of security" on the European territory. TREVI 92 has been responsible for drawing up a programme (adopted by the TREVI ministers in Dublin in June 1990) of action on the reinforcement of co-operation in police matters and in the combat against terrorism and other forms of organised crime. The programme clearly reflected the representation of migration as a threat, dealing not only with rules of police control at the external borders, but also with "clandestine immigration", identification of undesirable aliens, and the setting up of the European Information System , which was the first step towards the one, almost identical, that would have been included in the Schengen System.[12]

[11] Ibidem. p. 756.
[12] KARAMANIDOU L. (2015). p. 41. "The Securitisation of European Migration Policies: Perceptions of Threat and Management of Risk", in "*The securitisation of migration in the Eu.*

The Ad Hoc Immigration Group (AHI), created in 1986, is one more example of intergovernmental cooperation between Member States; the 6 specialized sub-groups were devoted to the elaboration of Conventions dealing with admission/expulsion, visas, false documents, asylum, external borders, and refugees of the former Yugoslavia. During this period of strong policy-europeanisation, the intent of the EC was to harmonize the migration policy and strictly control the incoming flows of irregular migrants and asylum seekers. Indeed, the AHI worked on drafts that would have become fundamental EU Conventions in the following years (for example the Dublin Convention) ruling over the creation of EURODAC, the crossing of external borders, Family Reunification issues, and the drawing up of a common list of third countries whose nationals require entry visas and the expulsion of individuals unlawfully present on the territory. [13]

What is to be noticed, is that since 1980's immigration has been increasingly politicized through a sort of identification or confusion with the question of asylum. Politics started to consider asylum as an alternative route for the so-called "economic migrants" (people who flees their country of origin aiming at finding better social and economic life conditions). This is an additional reason why asylum is so easily connected with illegal migration. The fact that these migrants might leave their country in order to find better and fairer life conditions in Europe, in a way exclude them from the original category of "asylum seekers"; for this reason, the politics and then the public opinion started to feel these incoming migrants as a threat for the internal social and economic market.[14]

1.1.3. Schengen

In the late 1980's, the securitisation of migration became a response to the creation of a zone of free movement and the abolition of internal borders among states

Ebates after 9/11", edited by Gabriella Lazaridis G. and Khursheed W. Palgrave Macmillan, Hampshire (UK).

[13] Ibidem, p. 41.

[14] HUYSMANS J., (2000). p. 775.

joining the Schengen Area, which is a territory without internal borders within which citizens, many non-EU nationals, business people and tourists can freely circulate without being subjected to border checks. France and Germany are the two pioneering countries to take initial step as regards of free movement concept: these two countries in 1984 were the first ones to bring out the above-mentioned topic within the framework of the European Council in Fontainebleau where they all approved to define required conditions for the free movement of citizens. The Schengen Agreement - covering the gradual abolishment of the internal borders between countries and an extended control of the external borders - was signed on 14 June 1985 by the five following European countries: France, Germany, Belgium, Luxemburg, and Netherlands.

Five years later, in 1990, a Convention was signed for the concrete implementation of the Schengen Agreement. This Convention covered issues on abolition of internal border controls, definition of procedures for issuing a uniform visa, operation of a single database for all members known as SIS (Schengen Information System) as well as the establishment of a cooperating structure between internal and immigration officers.[15] The SIS is one of the most important databases used for immigration and border control in the EU. Since its launch in 1995, the majority of personal data held in the SIS concerns third-country nationals to be refused entry. The decision to report a third-country national within the SIS is based primarily on a national decision that the person is a threat to public order, public security or national security. Secondly, the decision can be based on immigration law decisions regarding the deportation, refusal of entry or removal of the person. Thus, on the basis of a SIS alert, a third-country national may be denied a visa or a residence permit, or even expelled or detained, which means that it consists of a system of mutual recognition of national decisions to refuse entry to a third-country national, rather than on the harmonisation of refusal grounds.[16]

[15] Convention Implementing the Schengen Agreement of 14 June 1985.
[16] BROWER E. (2010). p. 219. "Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States", in *Extraterritorial Immigration Control Legal Challenges*, edited by Bernard Ryan Valsamis Mitsilegas. Martinus Nijhoff Publishers, Leiden.

The Schengen Agreements of 1985 and 1990 clearly enunciated a link between internal security and threats posed by migration, by defining undocumented migrants as "illegal" and by connecting immigration and asylum with terrorism, transnational crime and border control. In the Declaration made by Ministers and the State Secretaries, included in the final part of the 1990 Convention, it is stated that "in view of the risks in the fields of security and illegal immigration, the Ministers and State Secretaries underline the need for effective external border controls".[17] Therefore, by locating the regulation of migration in an institutional framework that deals with the protection of internal security, the nexus migration-security is here officially reinforced and consolidated. In 1992, the Schengen system - regulated so far at an intergovernmental level - became part of the EU legal framework with the Treaty of Maastricht, that institutionalised these arrangements by incorporating them within the Justice and Home Affairs pillar.

1.2. Migration as a threat for security in the European discourse

The juxtaposition between the discursive construction of a secure Europe and threats coming from outside it is also reflected in the 1999 Tampere[18] Conclusions, that after reaffirming the Three Pillars of the EU (Freedom, Security and Justice), state:

> This freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. *This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes* [my italics]. These common policies must be based on principles which are both clear to our own citizens

[17] Convention Implementing the Schengen Agreement of 14 June 1985.

[18] The European Council dedicated a special meeting in Tampere, Finland, in October 1999, to the establishment of an Area of Freedom, Security and Justice. During this meeting political guidelines, including in the field of immigration, police and justice cooperation and fight against crime, were elaborated.

> and also offer guarantees to those who seek protection in or access to the European Union.[19]

The condition of freedom in the EU, is presented as a reason for seeking asylum in its territory; but while - on one hand - the statement commits to the principle of providing protection in accordance with the international humanitarian legal standards, on the other hand the preservation of the EU commitment to asylum and refugee protection requires security measures.[20] Moreover, employing the militarised language of "combating" illegal immigration and crime to enunciate security threats, the statement also recalls the audience of "our own citizens" to legitimate policy actions based on a shared understandings of threat. Consequently, immigrants, asylum-seekers and refugees are framed as a security problem which is different from a human rights-based approach that would propose human rights instruments to deal with the issue.

This link between security and freedom is reiterated in The Hague programme (2004), this time after the events of 9/11 intensified security concerns over terrorism and threats to order and democracy:

> The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof. [...] The management of migration flows, including the fight against illegal immigration should be strengthened by establishing a continuum of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism.[21]

Some scholars argue that The Hague programme was instrumental in introducing a conceptual shift in the discourse of European Union where security concerns take priority over the values of freedom and justice and the protection of human rights,

[19] Tampere European Council Conclusions, 15 and 16 October 1999. Available at: http://www.europarl.europa.eu/summits/tam_en.htm#c
[20] KARAMANIDOU L. (2015). p. 42.
[21] Council Information 2005/C 53/01. "The Hague Programme: strengthening freedom, security and justice in the European Union", (paragraph 1.7.2). Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF

which are reduced to the level of a disclaimer in the above extract. [22]

The same rhetoric has been used in the Stockholm Programme ("an open and secure Europe serving and protecting the citizen")[23], adopted in 2009 by the European Council (Justice and Home Affairs). It provides a framework for EU action on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010-2014. In the field of migration, the Programme calls for a further development and consolidation of the EU Global Approach to Migration and Mobility (an agenda on migration and asylum adopted in 2005), in particular by maintaining a balance between: promoting mobility and legal migration, optimising the link between migration and development, and preventing and combating illegal immigration. It also makes reference to the European Pact on Immigration and Asylum, underlying the need to implement the basic commitments set out in it, in particular: organizing legal migration by taking into account the reception capacities of Member States, making border controls more effective and ensuring that illegal immigrants return to their countries of origin or to a country of transit.

In a section called "a Europe of responsibility, solidarity and partnership in migration and asylum matters", after recalling for the importance of a comprehensive European migration policy, they state:

> People in need of protection must be ensured access to legally safe and efficient asylum procedures. Moreover, in order to maintain credible and sustainable immigration and asylum systems in the EU, it is necessary to prevent, control and combat illegal migration as the EU faces an increasing pressure from illegal migration flows and particularly the Member States at its external borders, including at its Southern borders.[24]

This extract highlights the inner contradiction of the European policy on migration: while it is claimed that border management and visa policies should not prevent access to protection systems, the irregular migration issue is repeatedly related to

[22] KARAMANIDOU L. (2015). p. 43.
[23] European Council Notice 2010/C 115/01. "The Stockholm Programme – an open and secure Europe serving and protecting citizens". Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:EN:PDF
[24] Ibidem, paragraph 1.1.

the priority of maintaining security and preventing crime. Moreover, the tendency of adopting a sort of double standard towards asylum seekers - who must be assured protection according to international standards - and irregular ("illegal") migrants - who are the contrary must be prevented and combated - seems to neglect the fact that often the two subjects coincide, either because many irregular migrants reach Europe in order to apply for asylum, either because the application for asylum is nowadays one of the few opportunities for undocumented migrants (also called "economic" migrants) to stay legally on the European territory and avoid criminal sanctions.

1.3. External borders

If the Schengen system represents a fundamental step for the development of the European citizenship identity through a strong and effective collaboration among Member States, it consequently entails a progressive distinction (and afterwards discrimination) in terms of rights between European citizens and third-country nationals. In order to keep a balance between freedom and security, participating Member States agreed to introduce so-called "compensatory measures". These are focused on cooperation and coordination of the work of the police and judicial authorities, mainly oriented to safeguard internal security against transnational crime networks. [25] As it will be shown in the second chapter, the Convention for the implementation of the Schengen Agreement sets a legal framework that actually leads to and fosters an interpretation of the migration phenomenon as a risk for the public security, by contributing to progressively spread a criminalizing approach towards migrants and asylum seekers.[26]

An example of compensatory measure is the fact that while having abolished their internal borders, Schengen States have also tightened controls at their common external border on the basis of Schengen rules to ensure the security of those living

[25] European Commission (2017). "Schengen, Borders & Visas, in Migration and Home Affairs". Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas_en
[26] CASELLA COLOMBEAU S. (2017). p.106. "Espace Schengen: la libre circulation en danger?", in *"Migreurop, Atlas des migrants en Europe".* Armand Colin, Paris.

or travelling in the Schengen Area. In particular, since 1999 the European Council on Justice and Home Affairs has taken several steps towards strengthen cooperation in the area of migration, asylum and security. In the border management field this led to the creation of the External Border Practitioners Common Unit - a group composed of members of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and heads of national border control services. The Common Unit coordinated national projects of Ad-Hoc Centres on Border Control. Their task was to oversee EU-wide pilot projects and common operations related to border management.[27]

1.3.1. Frontex

Border controls are an integral part of EU policies articulated in the Schengen regime, and FRONTEX, as an independent agency specifically created for enhancing the border control regime of the EU, is an example of how securitisation practices have been normalised. FRONTEX (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) was established in 2004 by the Council Regulation (EC) 2007/2004[28] with the objective of improving procedures and working methods of the Common Unit. According to its mission statement, FRONTEX (today called "European Border and Coast Guard Agency") "promotes, coordinates and develops European border management", dealing with a wide range of tasks connected with migration; in particular, they have to:

- monitor migratory flows and carry out risk analysis regarding all aspects of integrated border management;
- coordinate and organise joint operations and rapid border interventions to assist Member States at the external borders, including in humanitarian emergencies and rescue at sea;
- create a technical equipment pool for deployment in joint operations, rapid

[27] FRONTEX (2017)a. "Origin", in *Frontex. European Border and Coast Guard Agency*. Available at: http://frontex.europa.eu/about-frontex/origin/

[28] Council Regulation (EC) n. 2007/2004 of 26 October 2004.

border interventions and in the framework of migration management support teams, as well as in return operations and return interventions;

- fight organised cross-border crime and terrorism at the external borders by supporting Member States in cooperation with Europol and Eurojust;
- provide support at hotspot areas with screening, debriefing, identification and fingerprinting; establish a procedure for referring and providing initial information people who need, or wish to apply for, international protection; cooperate with the European Asylum Support Office (EASO) and national authorities. [29]

Taken all together, these tasks are central to the securitized management of migration flows in the EU: through the institutionalization of this Agency, the securitisation approach that treats illegal migration and transnational-border crimes as similar offences does not correspond to an exceptional measure anymore, but becomes a normalised ordinary practise.

It has to be noticed that the securitising logic of seeing migrants as threats means that the humanitarian logic of ensuring access to refugee and human rights protection takes second place. Indeed, as claimed by numerous human rights activists and NGOs, while respect for human rights and adherence to asylum and refugee protection norms are included in the EU documents establishing FRONTEX and in other statements by the organisation its practices undermine these principles. For example, operations such as HERA, NAUTILUS and POSEIDON, involving the cooperation of FRONTEX personnel and member states' security agencies, have aimed both at preventing migrants from reaching the territory of the European Union and gathering intelligence on border movements. Therefore, not only the legality of FRONTEX border surveillance operations has been questioned for not fully adhering to international laws and human rights norms, but also by preventing arrival in EU territory and, by extension, access to protection systems, these border surveillance and control activities could result in a

[29] FRONTEX (2017)b. "Mission and Tasks", in *Frontex. European Border and Coast Guard Agency*. Available at: http://frontex.europa.eu/about-frontex/mission-and-tasks/

preventive *refoulement*.[30]

In coordination with FRONTEX activities, The European Border Surveillance system (EUROSUR) operates as a multipurpose system for cooperation between the EU Member States and FRONTEX in order to improve situational awareness and increase reaction capability at external borders. According to its mission, its aim is to prevent cross-border crime and irregular migration and contribute to protecting migrants' lives. Under the Eurosur Regulation 1052/2013, each Member State has a National Coordination Centre (NCC) which coordinates and exchanges information among all the authorities responsible for external border surveillance as well as with other NCCs and FRONTEX. In this way Eurosur enables the Member States to rapidly exchange information, ensure necessary cooperation and offer a joint response to challenges. [31]

1.4. Externalisation of European security policies

Concerning security policies, related in particular to the migration management, the control of the European borders, the sea operations and the monitoring of migratory flows in the Mediterranean are not the only forms of externalisation of security controls. With "externalisation" here we don't only mean the fact that asylum and migration policies became linked with relations with other states, but we also refer to the EU's attempt to project its territorial borders onto surrounding states and regions by exercising policies and controls beyond the EU territory. So, the expansion of externalised policies is motivated by the fact that, since migratory flows are complex and multi-faceted, the domestic and EU-level policies are insufficient in dealing with migration pressures and co-operation with other states would enhance the protection-providing and controlling capacities of the EU. "Externalised" control policies such as carrier sanctions, visa requirements and interceptions at international waters, are the most pertinent from the perspective of securitisation.[32]

[30] KARAMANIDOU L. (2015). p. 48.
[31] Regulation n. 1052/2013 of the European Parliament and of the Council of 22 October 2013.
[32] KARAMANIDOU L. (2015). p. 49.

Even though programmatic documents of the EU such as The Hague Programme, the Global Approach to Migration and the Stockholm Programme point towards the development of a system for legal migration for third country nationals (although reflecting the economic logic of providing a route for forms of migration "desirable" by MB), externalised policies have been equally aimed at preventing unauthorised migration movements. In this respect, externalised migration policies are part of the continuum of securitised migration policies, which associate migration with threats and risks that must be kept away from the territory of the Union. Examples of these policies are: readmission agreements, mobility partnerships, agreements with third Countries to reduce the departure of undocumented migrants from their territories (for example the EU-Turkey agreement of March 2016 and the agreement between Italy and Libya of 2017), and the requirements deriving from the Schengen Visa Regime.[33] In order to better understand how a relevant form of pre-selection of incoming migrants works and which criteria determine if a third-country national is a regular or irregular migrant, I believe it is useful and important to analyse the main characteristics of the Schengen Visa.

1.4.1. The Schengen Visa regime

EU nationals and nationals from those countries that are part of the Schengen area and their family members have the right to enter the territory of EU Member States without prior authorisation. They can only be excluded on grounds of public policy, public security or public health. The Regulation 810/2009 establishes the Community Code on Visas[34], by setting conditions and procedures for issuing visas for short stays (maximum of 90 days in any 180-day period) and transit through the Schengen countries. Generally, the visa application must be submitted to the consulate of the EU country concerned. EU countries may establish bilateral arrangements for representing each other for the purpose of collecting visa applications or issuing visas. A visa application may be lodged by the applicant or

[33] Ibidem, pp. 50-51.
[34] Regulation (EC) n. 810/2009 of the European Parliament and of the Council of 13 July 2009.

an accredited commercial intermediary at the earliest 3 months before the intended visit, presenting: the application form, a valid travel document, a photograph, proof of sponsorship and/or accommodation if requested by the EU country; proof of possession of travel medical insurance, if applicable. Moreover, apart from certain exceptions, the applicant must allow the collection of his/her fingerprints and pay a visa fee. After verifying the admissibility of the application, the competent authority must create an application file containing the personal information of each applicant in the Visa Information System (following the procedures set out in the VIS Regulation 767/2008). Moreover, the authority carries out a further examination of the application to check that the applicant fulfils the entry conditions as set out in the Schengen Borders Code, does not pose a risk of illegal immigration or a threat to the security of the country and intends to leave before the visa expires.

While longer than 3 months' stays are the responsibility of individual states, which can regulate this in their domestic law, short stays in the 26 Schengen States' territory are regulated by the European Regulation 539/200, called "Visa requirements for non-EU nationals"[35], that lists the non-European Union countries whose nationals must hold a visa when crossing the external border of the EU ("Annex I – negative list") or are exempt from the visa requirement ("Annex II – positive list"). These lists are regularly updated with the successive amendments to Regulation: citizens of all African, Middle-Eastern and Eastern countries (except Georgia, Israel and United Arab Emirates, Malaysia, South Korea and Japan) need to require a VISA in order to enter the Schengen territory; at the contrary, Australia, New Zealand and the whole American continent (except Guyana, Suriname, Ecuador and Bolivia), do not need a VISA. All mandatory visas must be obtained before travelling and only specific categories of third-country nationals are exempt from this requirement. The Community Code on Visas specifies that decisions on the modification of the lists are taken on the basis of a case-by-case assessment of non-EU countries to which are applied criteria such as, for example, illegal immigration, public policy and security, economic benefit (tourism and foreign trade), external relations including considerations of human rights and fundamental

[35] Council Regulation (EC) n. 539/2001 of 15 March 2001.

freedoms, as well as regional coherence and reciprocity.[36]

As Bigo and Guild say in the article "The transformation of European border controls", together with FRONTEX (especially the see operations), the Visa Schengen System is an instrument of "policy at a distance" over the circulation of people: through border controls and requirement of visa to enter the Schengen territory, the European countries exercise a form of "remote control" on migration, by indicating and consequently pre-selecting migrants who are considered "desirable"; it is not a case that the States included in the negative list, so that need to require a visa, are poor countries considered politically and economically unstable.[37] In other words externalised protection policies have become the first line controls of borders and migratory flows in Europe, since the System designates some migrants as 'undesirables' and databases like VIS (the European Visa Information System) are used to retain and share information in order to prevent their entry. [38] It is important to notice how control measures implemented in other countries, such as pre-arrival visa checks and carrier sanctions, can prevent forced migrants from reaching EU territory and accessing protection systems in a safe manner; this has significant implications in terms of human rights, especially related to the possibility to apply for asylum.

1.5. Asylum in International and European law

The way asylum is regulated under European law doesn't only represent the intention to set up a comprehensive protection system for applicants, but also an instrument to systematically control incoming migratory flows. In the next part it will be shown how the Common European Asylum System (CEAS), and in particular the Dublin Regulation, is intended to ascribe the asylum applications to one European State only in order to limit the chance to get the international

[36] Ibidem.
[37] JEANDESBOZ J. (2017). P. 78. "Le Visa Schengen et la police des étrangers" in *"Migreurop, Atlas des migrants en Europe"*. Armand Colin, Paris.
[38] BIGO D., GUILD E. (2010). pp. 258-259. "The transformation of European border controls" in B. Ryan and V. Mitsilegas (eds) *"Extraterritorial immigration control. Legal challenges".* Leiden: Brill.

protection recognised, and also to stop secondary movements of asylum seekers from one Member State to another. According to the intent of this chapter, I believe it is important to analyse the asylum system at least for two reasons: firstly because due to the external securitarian policies on migration (such as the above-mentioned borders controls and Visa System) asylum is nowadays the main and one of the few measures that undocumented migrants can apply to in order to stay on the European territory; secondly, because the numerous European regulations and Directives that rule on the CEAS show how there is legal room, especially in the current political context, to deal with asylum through a securitarian approach instead of a human rights-based one.

The centrepieces of refugee protection at international level are the United Nations Convention relating to the Status of Refugees, adopted in 1951, and its related Protocol of 1979. They are grounded in Art. 14 of the Universal Declaration of Human Rights of 1948, which recognizes the right of persons to seek asylum from persecution in other countries. Article 1.(2) of the Convention gives the definition of refugee:

> For the purposes of the present Convention, the term "refugee" shall apply to any person who: owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. […].[39]

Moreover, the Convention sets other 2 main principles: article 31 ("Refugees unlawfully in the country of refugee") requires that persons escaping persecution cannot be expected to leave their country and enter another country in a regular manner, and accordingly, should not be penalised for having entered into or for being illegally in the country where they seek asylum; and article 33 ("prohibition of expulsion or return – refoulement") states that "no Contracting State shall expel

[39] Convention relating to the Status of Refugees (1951). Art. 1(2). United Nation, Treaty Series, vol. 189, p.137. Entry into force: 22 April 1954.

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."[40]

The Convention and its Protocol have been ratified by 145 Countries, and it remains the core foundation of protection obligations owed to refugees. Indeed, by considering currents issues concerning the management of migration flows and by assessing the relevance and the capacity of the Convention to still fit for its purpose, Erika Feller (Assistant High Commissioner UNHCR) states that the main reason why refugees' rights are still often violated worldwide is a lack of States' political will in implementing the Convention itself and commit to it.[41]

At the European level, the right to asylum is protected under the European Charter of Fundamental Rights, proclaimed on 7 December 2000 by the European Parliament, the Council of Ministers and the European Commission[42]: Art. 18, enshrines the right to asylum by stating that "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.", while Art. 19 concerns the Protection in the event of removal, expulsion or extradition: "1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."[43]

1.6. The Common European Asylum System

In order to achieve a joint approach to guarantee high standards of protection for refugees among countries, since 1999 the EU has been working to create a Common

[40] Ibidem, Art. 33.
[41] FELLER E. (2011). pp. 4-5. "The Refugee Convention at 60: Still fit for its Purpose?". Available at: http://www.unhcr.org/4ddb679b9.pdf
[42] European Union (2000). "Charter of Fundamental Rights of the European Union (2000/C 364/01).
[43] Ibidem, Art. 19.

European Asylum System (CEAS) and improve the current legislative framework. From 1999 until present, several legislative measures harmonising common minimum standards for asylum were adopted. Altogether, important legal acts such as the Qualification Directive, the Family Reunion Directive, the Reception Conditions Directive and the Procedure Directive, set forth protection mechanisms intended to assure asylum seekers that: their application will be taken into account by the single responsible Member State, in the shortest time possible; that the forms of international protections are two (the status of refugee recognised under the 1951 Convention and the status of subsidiary protection); and that each asylum request will be analysed individually and in respect of the human rights norms and the international law. Moreover, these Directives include many safeguard measures such as: the right to information and to legal support; personal interviews; the right to health care; guarantees for minors, prioritising children's best interests throughout the procedure; the importance of family unit; accommodation and integration facilities; etc. Nevertheless, in order to show and understand how the CEAS is also a fundamental instrument to control (and in a way limit/discourage) immigration, the next paragraphs will analyse the measures that contain rules and practises reproducing a securitarian approach to migration policies.

1.6.1. The Dublin Regulation

The fundamental legal framework that establishes criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, is called Dublin Regulation. The Dublin regime was originally established by the Dublin Convention, which was signed in Dublin in 1990, and first came into force in 1997 for the first twelve signatories. In 2003 was adopted the Dublin II Regulation, replacing the Dublin Convention; hereafter in 2008, the European Commission proposed amendments to the Regulation, creating an opportunity for debate and reform that resulted in the adoption of the Dublin III Regulation 604/2013[44] (Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged

[44] Regulation (EU) n. 604/2013 of the European Parliament and of the Council of 26 June 2013.

in one of the Member States by a third-country national or a stateless person).

Under Chapter III, principle and criteria for determining the State's responsibility are presented with a specific order of importance that must be taken into consideration: family considerations, giving priority to family reunification (Art. 7 - 11); recent possession of a visa or a residence permit in an EU country and whether the applicant entered the EU irregularly or regularly (Art. 12 - 15). The complementary Art. 3(2), in addition, states that "where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it." Based on the criteria established by the regulation, if another State is responsible for examining the application, the regulation sets forth the transfer procedure to this State. Considering that the process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State, the Regulation indicates the obligations of the States concerning the process of taking charge and taking back (Art. 18). Moreover, it regulates the possibility to submit the taking charge request to the State considered as responsible. the requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request (Art. 21 and 22).

To summarize, the principal aim of the Regulation is to make sure that each claim got a fair examination from one Member State of the European Union ("Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible")[45]. The "first country of entry" principle (that mostly allocates the responsibility for the examination of asylum applications to the country of first irregular entry) was originally established in order to prevent two

[45] Ibidem, Art. 3(1).

phenomena: “asylum shopping”, that is the submission of the application in multiple States to seek out the best conditions, and the “refugees in orbit”, that entails transfers of refugees between Member States in absence of clear responsibility.[46] As I will show in the following section, however, the massive migratory influx of the last years has brought to light numerous dysfunctionalities of the Dublin System, which basically put the main responsibilities and costs on the shoulders of a few frontline states (such as Italy and Greece), by continuing to consider and tackle the phenomenon as a temporary emergency.

1.6.2. Eurodac

Within the EU, many instruments have been developed dealing with the use of large-scale databases and the exchange of personal data. For example, we already talked about the Schengen Information System and the Visa Information System. Another database, related to irregular migration and asylum, is Eurodac, created with the regulation n. 2725/2000 (implemented afterwards by the Regulation 603/2013). It establishes an “Automated Fingerprint Identification System” in the EU: when someone applies for asylum in any EU Country or is found to irregularly cross the borders of a MS, their fingerprints are collected and transmitted to the EURODAC central system.[47] To serve to the implementation of the Dublin Regulations - together which it makes up what is commonly referred to as the 'Dublin system'- it makes it easier to determine which Member State is responsible for examining an asylum application made in the EU.

If this mechanism is functional to the efficient determination of the responsible MS, the management of these information may arise concerns: since 2015 national police services and Europol are allowed to have access to fingerprint information part of Eurodac, as well as the information included in the VIS (since 2008). This tendency of using the biometric information represents a controlling policy aimed at marking a particular “population”, by making it very easy to identify it when necessary; and since the vulnerable position that irregular migrants are subject to,

[46] ENDERLEIN H., KOENIG N., (2016). p.16-18. “Towards Dublin IV: sharing norms, responsibility and costs”. Jacques Delors Institut, Berlin.
[47] Council Regulation (EC) n. 2725/2000 of 11 December 2000.

this whole process of control and securitization over migrants' identities could lead to unlawful practices (such as expulsions or rigid pre-selections) if the European or national contexts are particularly restrictive towards migrants' rights. Moreover, it is highly possible that Eurodac is already being used extraterritorially to check whether a visa applicant previously applied for asylum in one of the EU Member States. The use of databases such as the SIS and VIS by consular staff in third countries, in deciding on the issuing of visas, raises important issues with regard to the responsibility and accountability of EU Member State, especially concerning the respect of human rights obligations.[48]

1.6.3. The Return Directive

Directive 2008/115/EC on common standards and procedures for returning illegally staying non-EU nationals establishes a common set of rules for the return of non-EU nationals who do not or who no longer fulfil the conditions for entry, stay or residence within the territory of any EU country, and the related procedural safeguards, while encouraging the voluntary return of illegal immigrants.[49] The illegal stay is terminated in a 2-step procedure: firstly, a return decision which opens up a voluntary departure period; then, if necessary, a removal decision, possibly with detention, ending in expulsion.

Art. 6 says that - unless there are compassionate, humanitarian or other reasons not to do so, or there is a pending procedure for renewing a residence permit - an EU country must issue a return decision to the non-EU national staying illegally on its territory. If the non-EU national has a valid residence permit or equivalent from another EU country, he/she must immediately return to that country; in the same way, if another EU country takes back an illegally staying non-EU national under a bilateral agreement, that country is responsible for issuing the return decision. Art. 7, called "voluntary departure", states that the return decision may allow for a period of voluntary departure of between 7 and 30 days for the illegally staying non-EU national. In certain circumstances, this period may be extended; it may also

[48] JEANDESBOZ J. (2017). p. 86.
[49] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008.

be shortened and even not granted, namely when there is a risk that the illegally staying non-EU national: (a) will flee and thus will not be available for return; (b) has submitted a fraudulent application; or (c) poses a risk to public/national security. [50]

This part of the Directive clearly represents the already mentioned securitarian approach based on the belief that migrants in an irregular situation are to be considered as a threat. Hence, irregular migrants, such as who didn't receive the international protection or who lives on the territory with an expired stay permit, must be returned as soon as possible to his/her country of origin. Nevertheless, the return policy is facing huge problems with being effective, since it must happen on the basis of bilateral agreements with countries of origin, and this practice could take a very long time and/or not be operative (for lack of political collaboration or funds); moreover, return practices are incredibly expensive. It consequently happens that in 2017 over an estimated total of 516 115 irregular migrants who received an order to leave the soil, only 214 000 have been actually returned.[51] The issue represents a serious crisis of the system, in particular concerning the juridical situation for these migrants that, due to the increasing processes of criminalization, stay in an "illegal" position for a long time, often kept in detention during the whole wait and deprived therefore of many fundamental rights and of the possibility to conduct a decent life and be part of the community.

1.6.4. Detention

Especially under the pressure of the incoming migratory flows of 2015, the practice of detaining asylum seekers increased drastically, especially because welcoming systems - continuously acting on an emergency-based approach - were not well equipped enough to properly welcome these people. This is surely also due to a lack of political will of MS to adopt and implement alternative measures to detention, so that it has become a routine - rather than exceptional - response to the irregular entry or stay of asylum-seekers and migrants.

[50] Ibidem, Art. 7.
[51] EUROSTAT (2018). "Statistics on enforcement of immigration legislation". Available at: https://ec.europa.eu/eurostat/statistics-explained/pdfscache/37449.pdf

Rules on legitimate detention of asylum seekers by Member States are established in the Reception Conditions Directive[52] of the European Parliament and of the Council laying down standards for the reception of applicants for international protection. Even though normally a State cannot hold a person in detention for the sole reason that he or she is an applicant, Art. 8 lays down a list of 6 grounds for detention of asylum seekers to be put into place if other less coercive alternative measures cannot be applied effectively. The 3rd comma recites:

> An applicant may be detained only:
> (a) in order to determine or verify his or her identity or nationality;
> (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;
> (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;
> (d) when he or she is detained subject to a return procedure under [the Returns Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;
> (e) when protection of national security or public order so requires;
> (f) in accordance with Article 28 of [the Dublin III Regulation].[53]

Art.18, moreover, is particularly relevant since it sets forth some safeguard concerning the protection of rights such as proper housing, family life, information, legal assistance etc. Nevertheless, comma 9 states: "in duly justified cases, Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when: (a) an assessment of the specific needs of the applicant is required [...]; (b) housing capacities normally available are temporarily exhausted."[54] This part is emblematic because it represents the first European step towards an institutionalization and "extraordinary" approach that tends to consider

[52] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013.
[53] Ibidem, Art. 8(3).
[54] Ibidem, Art. 9.

the reception of asylum seekers in emergency terms, and arose many concerns about the effective capacity of States to protect these individuals.

The UNHCR, by developing a Global Strategy "to support governments to end detention of asylum seekers and refugees", firstly recalls that as seeking asylum is not an unlawful act, detaining asylum-seekers for the sole reason of having entered without prior authorisation runs counter to international law; it adds that there is evidence about the fact that not even the most stringent detention policies deter irregular migration (as some governments would wish). Working with governments and other partners, the 3 main global goals presented in this Strategy are to: end the detention of children; ensure that alternatives to detention are available in law and implemented in practice; ensure that conditions of detention (where it is necessary and unavoidable) meet international standards and secure access to places of immigration detention for UNHCR and/or its partners and carrying out regular monitoring.[55] The Detention Guidelines, written by the UNHCR in 2012, intend to provide applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention. Guideline n. 4 states that detention can only be exceptionally resorted to for a legitimate purpose and that without it detention shall be considered arbitrary, even if entry was illegal. The purposes for which detention could be legitimate are exclusively 3: to prevent absconding and/or in cases of likelihood of non-cooperation; in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; for initial identity and/or security verification (only for minimal periods).[56]

Unfortunately, even though both international and European standards lay down that the detention of asylum seekers must be legitimate, lasting the minimal period necessary for the purpose and respecting human rights standards, all over the world and also in European territory, it is becoming a common practise that States use by recalling the rhetoric of "security matters". The issue is even more worrying if we

[55] UNHCR (2014). pp. 5-7. "Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees". UNHCR, Geneva.
[56] UNHCR (2012). pp. 16-18. "Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention". Available at: https://www.refworld.org/docid/503489533b8.html

consider that the processes to analyse asylum requests often take longer than the times set out by European law, and applicants risk consequently to spend a long time excluded from the community; it becomes then difficult for them to benefit from existing support networks (both formal and informal) and to be independent, self-sufficient and fulfilled members of the community after release. The instrument of detention, strictly linked to the process of criminalization, is also becoming a very common concerning migrants in an irregular situation and - how it will be shown in the second chapter - this leads to violation of human rights and complications for NGOs to provide humanitarian aid to these people.

1.7. Dublin system: critiques and developments

The regulation has been criticized from many points of view by both political institutions and NGOs. In the article "Towards Dublin IV: sharing norms, responsibility and costs", Henrik Enderlein and Nicole Koenig seek to show some of the main Dublin's dysfunctionalities. The system, indeed, seems to have failed to prevent both the phenomena abovementioned: at first, although the aim of the policy was to uniform the asylum procedure among States, standards for status determination and reception conditions vary widely. This variation creates basically an incentive for "asylum shopping", as some asylum-seekers tend to evade registration in the country of first entry in order to move irregularly to another member state that could provide better chances of receiving asylum or more favourable conditions. Secondly, the absence of a fair responsibility sharing mechanism has led to situations of non-compliance with CEAS rules. For instance, some of the frontline states such as Italy, Greece and Croatia failed to register migrants in the EU-wide fingerprint database (Eurodac), with the consequent movement of many unregistered migrants among different states.[57] According with the authors, these implementation gaps and disparities are given by two main reasons: the fact that these standards are set by EU directives (hence they leave open the possibility to choose means and modalities to perform the legal transposition), and the lack of an effective monitoring and sanctioning mechanism to ensure

[57] ENDERLEIN H., KOENIG N., (2016). Pp. 1-3.

member state compliance.[58]

According to the European Council on Refugee and Exiles (ECRE) and UNHCR the current system fails in providing fair, efficient and effective protection. Around 2008, those refugees transferred under Dublin were not always able to access an asylum procedure. This put people at risk of being returned to persecution. The claim has been made on a number of occasions both by ECRE[59] and UNHCR,[60] that the Dublin regulation impedes the legal rights and personal welfare of asylum seekers, including the right to a fair examination of their asylum claim and, where recognised, to effective protection, as well as the uneven distribution of asylum claims among Member States. Application of this regulation can seriously delay the presentation of claims, and can result in claims never being heard. Causes of concern include the use of detention to enforce transfers of asylum seekers from the state where they apply to the state deemed responsible, also known as Dublin transfers, the separation of families and the denial of an effective opportunity to appeal against transfers. The Dublin system also increases pressures on the external border regions of the EU, where the majority of asylum seekers enter EU and where states are often least able to offer asylum seekers support and protection. [61]

These policy decisions led (and are still leading) to vary violation of human rights: Amnesty International talks about the human costs of the fortress, reporting cases of violence and push-backs at the EU borders (especially from Greece and Bulgaria to Turkey), in grave breach of the customary international law principle of *non-refoulement*. These procedures demonstrate a general failure to protect, aggravated by the increasing number of people who lose their lives trying to reach Europe by sea: according to the NGOs, this is due to the lack of legal pathways to Europe for

[58] Ibidem.
[59] EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE), (2009). "Comments on the European Commission Proposal to recast the Dublin regulation". Available at: http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Commission-proposal-to-recast-the-Dublin-Regulation_April-2009.pdf
[60] UNHCR (2009). "UNHCR's Comments on the European commission's proposal for a recast of the Dublin and Eurodac Regulations". Available at: https://www.refworld.org/pdfid/49c0ca922.pdf
[61] EU OBSERVER (2009). "Greece under fire over refugee treatment". Available at: https://euobserver.com/justice/25910

irregular migrants, and to the presence of gaps in the current regulation of search and rescue at sea.[62]

1.8. Towards Dublin IV

Human tragedies occurred at the EU's external borders, as well as the social and political tensions arising internally and among States, are leading Member States to be aware of the need for take action in order to improve migration policy in all its different aspects, in particular towards an approach more based on shared responsibilities.

In the article "Towards Dublin IV: sharing norms, responsibility and costs" (2016), Henrik Enderlein and Nicole Koenig illustrate some proposals that aim at fair, permanent and sustainable responsibility sharing in terms of norms, migrants and costs. The solutions proposed could be summarized in 4 areas of intervention:

1. The introduction of a single and common asylum procedure, that would mean transforming the European directives in regulations having direct application in States national law, and a single asylum and subsidiary protection status; then, in case of positive decision, the beneficiary of protection would receive a European identity document recognised by all member states.
2. The establishment of a post-recognition relocation mechanism based on a fairer responsibility-sharing. The allocation of processing responsibility would respect the current Dublin's criteria, with additional operational support and financial compensation provided by EU to frontline states. The relocation process would base on a binding key and two phases: a flexible preference-matching mechanism between migrants and member states, and a following distribution of the rest of migrants through a lottery system.
3. The reinforcement of internal and external security, through a reloaded

[62] AMNESTY INTERNATIONAL (2014). "The human cost of fortress Europe. Human Rights Violation against migrants and refugees at Europe's borders". Amnesty International Ltd, London.

Frontex with an effective right to intervene, a stronger role in search and rescue and additional permanent staff. The series of terrorist attacks occurred on European soil rose concerns among citizens and institutions about the security issue linked to migratory influx (even if the identification between the two phenomena is fundamentally incorrect and unfair), so much so that some countries (such as Austria, Slovenia, Hungary, etc.) have re-established their internal borders, disrespecting the free movement granted by the Schengen Area. According with the authors, the restoration of internal border controls just produces the temporary illusion of enhanced national security, without providing any effective tool able to stop transnational crime, for which it is necessary a stronger operational cooperation at the sovra-national level.

4. A greater cooperation with origin and transit countries towards a more global responsibility-sharing. The authors propose that EU member States should provide a bigger forward-looking financial support to third States subject to humanitarian crisis, in parallel to trade-related incentives for better living conditions in this countries. Simultaneously, EU should provide safe access to protection to vulnerable migrants via humanitarian visa schemes and more accessible legal pathways for economic migrants.[63]

There are also many recent proposals coming from European institutions that address in particular the Dublin Regulation:

- The 4th of May 2016 the European Commission introduced a proposal for a "Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)". The main elements of the proposal are:
    - A new automated system to monitor the number of asylum applications received at the European level and the number of

[63] ENDERLEIN H., KOENIG N. (2016). pp. 1-3.

persons effectively resettled by each Member State. It would consist of a central system, a national interface in each Member State, and communication infrastructure between the central system and the national interface. The central system would be run by a new proposed European Union Agency for Asylum.

- A reference key to determine when a Member State is under disproportionate asylum pressure. It would be based on two criteria with equal weighting: the size of the population, and the total gross domestic product (as indicator of wealth) of a Member State.
- A fairness mechanism to address and alleviate that pressure. If the number of asylum applications made in a Member State is above 150% of the reference share, the fairness mechanism will be automatically triggered. If a Member State decides not to accept the allocation of asylum applicants from a Member State under pressure, a 'solidarity contribution' of €250 000 per applicant would have to be made. The proposal, however, has been criticized and considered inadequate by the Committee of Regions, the European Economic and Social Committee, and numerous stakeholders such as ECRE, FRA, and ICJ, in particular because it does not change the existing criteria for determining which Member State is responsible for examining an asylum application and consequently doesn't advocate a re-centring EU responsibility-allocation schemes on one key objective - quick access to asylum procedures.[64]

- Since 2009, the Parliament has consistently been calling for a binding mechanism for the fair distribution of asylum-seekers among all EU Member States (see EP resolutions of 25 November 2009, 11 September 2012, 9 October 2013, 23

[64] CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS (LIBE), (2017). "Briefing, Ue Legislation in Progress. Reform of the Dublin System". Available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI%282016%295866 39_EN.pdf.

October 2013, 17 December 2014, 29 April 2015, and 10 September 2015). [65] The last proposal approved by the European Parliament the 16th November of 2017 (with 390 votes in favour, 44 abstentions, and 175 against) had been drawn up by the Civil Liberties Committee with 43 votes in favour and 16 against. The proposed changes to the Dublin rules aim to cancel the "first country of entrance" rule and the system of redistribution of asylum seekers: the country in which an asylum seeker first arrives would no longer be automatically responsible for processing his or her asylum application. Instead, asylum seekers should be shared among all EU countries, by being swiftly and automatically relocated to another EU country. Moreover, EU member states that do not accept their fair share of asylum seekers should face the risk of having their access to EU funds reduced. Through the adoption of this proposal, the Parliament declared itself ready to negotiate with the European Council, and therefore solicited the Ministers of the Member State to take a common position about the topic and put in place the new asylum system as soon as possible.[66]

- At the European Council meeting that took place on the 28th and 29th of June 2018, the Prime Ministers of Member States agreed on important measures about the management of migration flows; in particular, it was stated that, in accordance with international law, Member States would share the effort to take care of rescued people on EU territory on a voluntary basis. Moreover, Controlled centres would be set up in the Member States in order to accelerate the distinction between irregular migrants, who will be returned, from those in need of international protection. In overall, the European

[65] Ibidem.
[66] PRESS RELEASE OF THE EUROPEAN PARLIAMENT (2017). "EP ready to start talks with EU governments on overhaul of Dublin system". Available at: http://www.europarl.europa.eu/news/en/press-room/20171115IPR88120/ep-ready-to-start-talks-with-eu-governments-on-overhaul-of-dublin-system.

> Council stressed out the importance of: enhancing the control of external borders; reducing secondary movements; assuring efficient return procedures; distinguishing, through rapid processes, between irregular migrants and those who received the status of refugees; intensifying efforts to stop smugglers operating out of Libya or elsewhere by cooperating with Countries of origin and transit.[67]

Concerning the reform of the Dublin Regulation, as specified in the Conclusions, the Council acknowledges that "a consensus [still] needs to be found", and that this consensus should be "based on a balance of responsibility and solidarity". Even though Member States agree on the need to reform the system, and many proposals arrived from different institutions (see above), the EU Governments are still not able to reach a shared position. The outcomes of the Council, nevertheless, are to be considered particularly important, since in the last years it has assumed a leading role regarding decision-making EU processes, by imposing itself as the most influence body also on an executive level - previously traditionally ascribed to the Commission. Since the Council is composed of the Member States' political leaders, it expresses - by definition - the direct national interests and positions; and since all around Europe the toleration for the migratory flows is drastically decreasing, at present it is a hard challenge to find a common solution that would match both immigrants' and States' interests.

However, by analysing the outcomes of the Council meeting of June 2018, it is possible to remark that the dominant approach is a securitarian and restrictive one: while there is no mention about the need to enhance the international protection mechanism and to reform the Dublin Regulation in a more inclusive and responsibility-sharing prospective, the political will of States seems to focus on the control of external borders and the reduction of the so-called illegal migration, by perpetrating a process of criminalisation of migration and by putting in place procedures based on an emergency approach that considers "irregular" migrants

[67] European Council (2018). pp. 3-4. "European Council meetings - Conclusions." EUCO 9/18. Available at: https://www.consilium.europa.eu/media/35936/28-euco-final-conclusions-en.pdf

exclusively as a threat.

Moreover, particularly controversial is the 6th point included in the Conclusions, that states:

> On EU territory, those who are saved, according to international law, should be taken charge of, on the basis of a shared effort, through the transfer in controlled centres set up in Member States, only on a voluntary basis, where rapid and secure processing would allow, with full EU support, to distinguish between irregular migrants, who will be returned, and those in need of international protection, for whom the principle of solidarity would apply. All the measures in the context of these controlled centres, including relocation and resettlement, will be on a voluntary basis, without prejudice to the Dublin reform.[68]

At present, since the public trust towards transnational institution is decreasing drastically, Member States are clearly reluctant to adopt solutions that, by conferring more responsibilities to the European Union in the matter of irregular migration and asylum, would reduce States' national decision-making power on the subject. Nevertheless, the simultaneous arise of sovereigntisms and nationalisms all over the European territory, which often turns into public hostility – sometimes violent – towards arriving irregular immigrants, could be considered as not the breeding ground for a voluntary intervention aiming at welcoming migrants and organizing complex operations as relocations and resettlements.

1.9. Current developments and trends

Even though the practical effects of these positions and conclusion still have to be assessed, reasonable doubts arise around the efficiency that a voluntary system would have: on one side, it risks to put an excessive weight on States that would commit and intervene, by leaving unpunished those that would reject migrants disregarding international obligations; on the other side, migrants might possibly see their fundamental rights unprotected or their asylum requests not held and analysed in accordance with international standards.

[68] Ibidem, p. 3.

Another fundamental agreement adopted at the international level and dealing with the global management of migration is the "Global Compact for Safe, Orderly and Regular Migration", adopted by 160 States at the Intergovernmental Conference held in Marrakech, Morocco on the 10th and 11th of December, 2018. The Conference is convened under the auspices of the United Nations General Assembly and is held pursuant to resolution 71/1 of September 2016, entitled "New York Declaration for Refugees and Migrants," which decided to launch a process of intergovernmental negotiations leading to the adoption of the document. The document is the first one that covers, intergovernmentally, all dimensions of international migration in a holistic and comprehensive manner. Paragraph 16 comprises 23 objectives for better managing migration at local, national, regional and global levels. Here it is relevant to notice the human rights-based approach that guides the whole document, that intends to protect the safety, dignity and human rights and fundamental freedoms of all migrants; integrate migrants - addressing their needs and capacities as well as those of receiving communities - in humanitarian and development assistance frameworks and planning; combat xenophobia, racism and discrimination towards all migrants. At the same time, it takes into consideration States' needs and interests, by recalling for the need of supports for countries rescuing, receiving and hosting large numbers of refugees and migrants, and the importance of an efficient global governance of migration. [69]

If, on one side, this document represents a fundamental positive step towards a responsibility-sharing and a rights-based approach, we should keep in mind that it is not legally binding and that its implementation will have to face strong political reluctance of/from many single States. Moreover, many European countries did not attend the international Conference, such as: Austria, Italy, Poland, Hungary, The Czech Republic, Bulgaria, Estonia, Latvia, Slovakia and Switzerland. At the same time, in addition to the consolidated securitarian approaches to irregular migration, a harsh criminalization of NGOs that provide humanitarian aid (either rescuing at

[69] IOM (2018). "The Global Compact for Safe, Orderly and Regular Migration" (GCM). Available at: https://www.iom.int/global-compact-migration

sea, either working on the European soil) it is conducted by the most anti-immigration governments (like Italy, Hungary and Poland), but also by the European Community as a whole, that is failing in finding appropriate solutions. For example, aiming to deter migrants from crossing the Mediterranean, the EU and its member states pulled back from rescue at sea at the end of 2014, leading to record numbers of deaths. Non-governmental organisations (NGOs) were forced to deploy their own rescue missions in a desperate attempt to fill this gap and reduce casualties. Today, NGOs are under attack, accused of 'colluding with smugglers', 'constituting a pull-factor' and ultimately endangering migrants.

This sadly shows how the main objective of the European migration agenda is still the one to reduce arrivals of irregular migrants (mainly by sea and through the Balkan route), in order to politically claim that the "problem of public order" has been solved. It will be shown how the increasing processes of criminalization, in theory and in practice, is leading fundamental rights of migrants and it is strongly damaging the humanitarian work of NGOs that want to provide help to these migrants.

CHAPTER II: Criminalization of Irregular Migrants and People Assisting Them

The term "criminalization" has been firstly developed in the United States context, where repressive measures developed out of a strict connection between criminal and immigration law. The criminalisation of immigration control refers to the fact that criminal law categories and processes have been integrated into immigration control, while in the same way immigration law has been included into the sphere of criminal law (such as the expulsion of migrants convicted of particular crimes). In particular, this US approach to migration refers to a strict management of removal procedures and the adoption of criminal law enforcement strategies such as preventive detention. As stated by Mark Provera, however, in the European context, criminalisation:

> embraces a much broader understanding which has included repressive action of police forces and then of judicial proceedings because a person has contravened to one or more norms of the administrative, civil or criminal code, as well as discourse, the use of immigration detention, and, importantly, is inclusive of the criminalisation of those persons acting in solidarity with irregular migrants.[70]

This wide conceptualisation aims at analysing the penalties - either administrative or criminal - set both for irregular migrants and those acting in solidarity with them. In this broad perspective, criminalization in Europe must be intended as "all the discourses, facts and practices made by the police, judicial authorities, but also local governments, media, and a part of population that hold immigrants/aliens responsible for a large share of criminal offences"[71], as Palidda said. In this regard, it is important to take into consideration that civil law measures may have similar purposes to criminal sanctions which may only be implied, such as deterrence and punishment. However, the civil/criminal distinction remains relevant, since criminal law sanctions in particular can have an impact on discourse and public

[70] PROVERA M., 2015. p. 3. "The Criminalisation of Irregular Migration in the European Union", *CEPS Papers in Liberty and Security in Europe, n. 80. February.* CEPS, Bruxelles.
[71] PALIDDA S., (2011). p.23. "Racial Criminalisation of Migrants in the 21st Century". Ashgate, Farmham.

perceptions concerning irregular migrants and the conflation of irregular migration and criminal activity.[72]

The Council of Europe in 2010 analysed with concern the increasing overlap between criminal law and immigration (administrative) law, highlighting how the crime of entry or irregular residence of the migrant does not imply harmful consequence either to individuals or to a community - a requirement that is inherent in the provisions of criminal law. Damage can be conceived only in respect of the state authority in its controlling role borders and the application of immigration rules[73]. Moreover, the use of criminal law in the migratory context, also particularly fits the State's interest in deciding who in included and who is excluded from the society, since in this domain punishment takes on a role that is no longer rehabilitative, but only exclusionary. As stressed by Stumpf, this phenomenon is not only expressed through neutralization of those foreigners who have committed crimes violating the rules common to both citizens and non-citizens; but it concerns likewise situations in which the mere administrative contravention of immigration rules itself - being undocumented - turns into a crime, with the consequence of marginalizing a much greater number of individuals.[74]

2.1 Terminology and its implications

Since the intention of this second part of the thesis is to investigate the processes of criminalization of irregular migrants and people who provide them some sorts of aid, it is useful to start by understanding how we can define this concept and who are, in specific, irregular migrants.

According to IOM, irregular migration could be defined as:

> a movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted

[72] Ibidem.
[73] GUILD E. (2010). Pp. 7-8. "Criminalisation of Migration in Europe: Human Rights Implications". Council of Europe, Strasbourg.
[74] STUMPF J., (2006). pp.377-382. "The Crimmigration crisis: Migrants, Crime and Sovereign Power" in *American University Law Review, Vol 56.* American University Law Review, Washington.

> definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country. There is, however, a tendency to restrict the use of the term "illegal migration" to cases of smuggling of migrants and trafficking in persons.[75]

As specified in the Glossary of Migration (as well as claimed by numerous agencies and NGOs dealing with migrants' rights) the term "irregular" should substitute terms like "illegal" and "clandestine", since they carry a criminal connotation and are seen as denying migrants' humanity. The terminology used in this domain deserves attention and accuracy, since it has a strong impact on how public powers orient their migration policies and on the perception of the civil society about the phenomenon. Both governmental and non-governmental organizations highlight the importance of using a correct and fair terminology. Human Rights Watch promoted the use of accurate definitions by publishing its "Guidelines for Describing Migrants"; the main concept is that the term "illegal" immigrant is problematic for several reasons:

- it is dehumanising and degrading, since it implies that these people are in a way inherently dishonest criminals with a clear intention to breach the law and threat the public good;
- the term is prejudicial and reinforces pre-existing negative attitudes toward foreign nationals;
- it fuels the view that such people have limited or no rights, when in fact they have a wide range of fundamental and human rights protected under international law that constitute obligations for the States concerned.[76]

[75] IOM (2011). p.34. "Glossary on Migration". International Organization for Migration, Geneva Switzerland.
[76] HUMAN RIGHTS WATCH (HRW), (2014). "Human Rights Watch Guidelines for Describing Migrants". Available at: https://www.hrw.org/news/2014/06/24/human-rights-watch-guidelines-describing-migrants

Equally, in the context of the "Words Matter" initiative, the Platform for International Cooperation on Undocumented Migrants (PICUM) encourages the abandon of the term "illegal" as not only the ongoing criminalisation is dehumanizing and is preventing a fair debate on migration policies, but it is also legally incorrect, since being undocumented is not an offense against persons, property or national security, so it belongs to the realm of administrative law. In any case, even in countries where violations of immigration law are considered criminal offenses, committing a criminal offense does not make a person "illegal". The use of the language is useful to take in consideration because it reflects biased conceptions that legitimate the controversial migration European policy: it seems indeed to neglect that most of irregular migrants are either people who reach Europe through long and dangerous trips because they don't have any legal path to undertake (see chapter 1), either migrants already on the European territory who have lost their status as a result of administrative reasons, misinformation or exploitation. Moreover, as PICUM warns, "labelling the entry and stay of migrants as 'illegal' often results in the automatic criminalisation of anyone who might help them: even rescuing migrants at sea or providing them with clothing and shelter can result in prosecution. Prohibiting solidarity towards undocumented migrants risks an increase in suffering and loss of life."[77]

Concretely, an irregular migrant is a person who lacks legal status in a transit or host country, owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa. Nevertheless, there are many different situations that can cause an individual to become undocumented. As specified in the Book of Solidarity, published by PICUM,

> undocumented migrants may be rejected asylum seekers, rejected candidates for family reunification, labor migrants without residence permit (foreigners who lose their labor/annex residence permit after their work contract ends), students who have lost their study permit, tourists who have overstayed their tourist visa, embassy staff who have lost their diplomatic/consular status through dismissal or other circumstances, etc.

[77] PICUM, 2017. "Words Matter, Terminology". Available at: http://picum.org/Documents/WordsMatter/Words_Matter_Terminology_FINAL_March2017.pdf

As specified in the first chapter, the economic and political difficulties to make the Return Directive be effective contribute to the increasing presence on the European territory of irregular migrants, who after the refusal of asylum or a family reunification are in a stagnant juridical situation that does not give them any possibility to stay on the territory in a legal manner. As reported by Eurostat, in 2017 almost 620 000 non-EU citizens were found to be illegally present in the EU, compared with the unprecedented levels of 2015 (peaking at 2.2 million person). These declines reflect not only a reduction in the number of irregular migrants following the exceptional migration flows of recent years, but also changes in national policies among the EU Member States.[78] The fight against irregular migration and smuggling is therefore still a priority of the European Agenda, which mainly paints it as a threat to be combatted.

In the following paragraphs it will be shown which legal instruments have been developed by the international and the European community in order to prevent and combat irregular migration and its facilitation, with a particular focus on how the EU and Member States distinguish – less or more clearly – facilitation from humanitarian assistance.

2.2 The UN Smuggling Protocol

The Protocol against the Smuggling of Migrants by Land, Sea and Air[79] has been adopted by the General Assembly resolution 55/25 in 2000 and entered into force on 28 January 2004 supplementing the UN Convention against Transnational Organized Crime (entered into force in 2003). The Protocol is the result of lengthy negotiations initiated by an Ad-hoc Committee established by the UN General Assembly in 1998 and tasked with the elaboration of the Convention and three protocols, of which the Smuggling Protocol is one. Indeed, The General Assembly

[78] EUROSTAT (2018). "Statistics on enforcement of immigration legislation". Available at: https://ec.europa.eu/eurostat/statistics-explained/pdfscache/37449.pdf

[79] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (2000). United Nations, Treaty Series, vol. 2241, p. 507; Doc. A/55/383. Entry into force: 28 January 2004.

also adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, in order to deal with the issue of trafficking in persons in the most detailed way possible. It is useful here to report the definition of trafficking provided by the UN in order to clarify the differences with smuggling; as enshrined in art. 3(a), the final definition contains three separate elements:

1) an action, consisting of: recruitment, transportation, transfer, harboring or receipt of persons;
2) by means of: threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another;
3) for the purpose of: exploitation (where it includes, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs).[80]

The difference between human trafficking and migrant smuggling is extremely important, but still unclear sometimes, since in practice the two criminal activities may overlap (for example in case smuggled migrants become victim of trafficking). Yet, there are 4 key differences that help understand:

1) consent: while victims of trafficking have not consented, smuggled migrants usually consent to that;
2) transnationality: while smuggling involves irregular border crossing and entry into another country, trafficking does not necessarily involve the crossing of a border;

[80] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000). Art. 3(a). United Nations, *Treaty Series*, vol. 2237, p. 319; Doc. A/55/383. Entry into force: 25 December 2003.

3) exploitation: if trafficked persons are victims of ongoing exploitation to generate profit for the traffickers, smugglers are usually engaged in a transaction that ends after the border crossing;
4) profit: smuggling involves the generation of profit for irregular border crossing, while trafficking involves the acquisition of profit through the ongoing exploitation of victims.[81]

The UN Protocol against smuggling deals with the problem of organized criminal groups who smuggle migrants; the Article 3 provides the definition: "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"; it also requires State Parties to make the smuggling of migrants for financial or other material benefit a criminal offence under their national laws. Additionally, the text contains safeguards in relation to the rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers. One of the key safeguards is the reference to international law, including international humanitarian human rights and refugee law in the savings clause, article 19 of the Protocol. The Protocol also includes provisions on prevention of smuggling of migrants, and on general and specific forms of cooperation and assistance for the prevention, investigation and prosecution of offences covered by the UN Convention on Transnational Organized Crime and the Protocol.

The provision that requires States Parties to punish smuggling activities is included in Art. 6(1), called "criminalization":

> 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

[81] CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M. (2016). p.22. "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants". European Union, Bruxelles.

> 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.[82]

Comma 2 establishes that attempting, participating in and instigating the committing of these actions should be considered in the same way as criminal offences, while comma 3 requires signatory countries to consider the following circumstances as adding to the severity of the criminal act (i.e. aggravating circumstances): endangering the lives or safety of the migrants concerned; inflicting inhuman or degrading treatment, including for exploitation, of such migrants.

Originally, the fundamental policy set by the Protocol focuses its strategy to combat smuggling on the act of smuggling and not on migration itself, as it also made clear by the Art. 5, that explicitly prohibits the criminalization of persons being the object of conduct of smuggling. Moreover, the reference to "financial or other material benefit" was included as an element of the definition in order to ensure that the activities of those who provide support to migrants on humanitarian grounds or on the basis of close family ties do not come within the scope of the protocol.[83] However, the insufficient or partial implementation by States Parties reveal how, at regional and national levels (as we will see concerning EU), this principle has been disregarded, not only through a constant confusion between irregular migrants and smugglers in the public discourse - with its consequent political manipulation -, but also with numerous discredit campaigns against individuals and NGOs providing humanitarian help to migrants. Considering the European case, this is also due to the fact that provisions of the EU Facilitation Directive left discretion to States with regard to the regulation of humanitarian aid provided to migrants.

[82] The UN Protocol against Smuggling (2000), Art. 6(1).
[83] GALLAGHER A. (2001). p. 996. "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis", in *Human Rights Quarterly 23, pp. 975–1004.* The Johns Hopkins University Press, USA.

2.3 The Facilitators' Package

Both the EU acquis and the UN Smuggling Protocol place legislation concerning the smuggling of migrants within the framework of preventing irregular migration. Yet, as we saw in the previous paragraph, the Smuggling Protocol gives specific focus to protecting the rights of migrants and of those providing them with assistance; indeed, it specifically requires the presence of an element of financial gain for the concerned action to be defined as smuggling. However, this has not been entirely reflected in the EU legal framework. Following the negotiations for the UN Protocols of 2000, the French Presidency presented to the Council two legislative proposals aimed at addressing human smuggling. [84] These led to the adoption of the Facilitators' Package in 2002 that includes the Facilitation Directive[85] and the Framework Decision[86]. The Facilitation Directive (2002/90/EC) defines unauthorised entry, transit and residence and provides for sanctions against those who facilitate such breaches. The Directive intends to provide a common definition for the "facilitation of illegal immigration", by improving the application of the penal framework for preventing the facilitation of illegal immigration. Facilitation, defined in Art. 1, it is composed of two different types of behaviour:

> 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.[87]

As we can see, actions punishable under criminal law are the facilitation of entry, transit or stay of undocumented migrants on the territory of a Member State. The alarming fact is that the formulation "for financial gain" is only present in relation to the facilitation of irregular residence, while it is not mentioned with regard to

[84] CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M. (2016). p. 24.
[85] Council Directive 2002/90/EC of 28 November 2002.
[86] Council Framework Decision 2002/946/JHA of 28 November 2002.
[87] Council Directive 2002/90/EC of 28 November 2002. Art. 1.

entry or transit. So basically this means that any person who aids, abets or in any other way facilitates irregular migration shall be liable to be punished under criminal law. Moreover, entering into force, the Facilitators' Package replaced - and deviates from - the definition previously provided by the Article 27(1) of the CISA (Convention implementing the 1985 Schengen Agreement), that required Contracting Parties to impose "appropriate penalties on any person who, *for financial gain*, assists or try to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens". This shows as the Facilitators' Package is not fully in line with the provisions included in the Smuggling Protocol. Indeed, in the "Travaux préparatoires", the Ad Hoc Committee reports an interpretative note on article 3 (*subparagraph a*) that recites as following:

> the reference to "a financial or other material benefit" as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.[88]

During negotiations for the Facilitators' Package, civil society organizations exposed their concerns related to the absence of a provision aimed at protecting the humanitarian assistance provided by ONG and individuals to irregular migrants on the EU territory or at the external borders.[89] At the end, after prolonged negotiations, the Council decided to add a provision granting MS the discretion not to impose sanctions if the unique purpose of the person is to provide humanitarian

[88] UNITED NATIONS OFFICE ON DRUGS AND CRIMES, 2000. p. 469. "Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto". United Nations, Vienna.

[89] For example, PICUM in its comments on the adoption of the framework decision expresses its concerns about the adopted formulation ("for financial gain") as problematic, since the assistance to undocumented migrants provided by lawyers, teachers, doctors and social workers, for example, usually implies a financial compensation. Therefore, the organization acknowledged that the EU provisions should prevent these professionals to be prosecuted, since their job helps undocumented migrants to obtain their human rights. (see "PICUM comments on the adoption of the framework decision on strengthening the penal framework to prevent the facilitation of unauthorized entry, transit and residence", available at: http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2002/dicembre/oss-picum-decis-favoregg.html)

assistance. The provision, enshrined in the Art. 1(2) of the directive, recites: "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"[90]. Hence, if on one side this provision has been considered as a way to distinct facilitation from humanitarian aid, on the other side it entails worrying scenarios: firstly, the provision does not explicitly discourage States from punishing these behaviours (that is to say there is no obligation on States to refrain from prosecuting people who provide humanitarian help to undocumented migrants by offering them a shelf or basic necessities); secondly, the Directive does not include a definition of "humanitarian assistance", leaving considerable discretion to MS about the interpretation of the "humanitarian" concept itself, considering the elements of extent, scope and personal application of conduct.[91]

In the same way the Framework Decision ("Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence") does not include general safeguards aimed at mandatorily preventing the punishment of acts performed for humanitarian purposes, rescue at sea or in emergency situations. It mostly deals with measures that States must take to ensure the infringements defined in Art. 1 and 2 of the Directive are "punishable by effective, proportionate and dissuasive criminal penalties"[92]. Afterwards, comma 3 of Art.1 specifies that when these offences are committed for financial gain, the penalty should be custodial sentences with a maximum sentence of not less than eight years, in two cases: if they were committed as part of activity of a criminal organisation or if the lives of the subjects of the offences were endangered. Finally, as set in art. 3, also legal persons must be held liable in case they commit the crimes above-mentioned.

The Facilitators' Package has also to be read in conjunction with the EU legal framework concerning carriers' obligations. Art. 26 of the Convention

[90] Council Directive 2002/90/EC of 28 November 2002. Art. 1(2).
[91] CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M. (2016). p. 26-27.
[92] Council Framework Decision 2002/946/JHA of 28 November 2002. Art.1.

Implementing the Schengen Agreement and Council Directive 2001/51/EC[93] (supplementing art. 26) harmonises the financial penalties imposed on carriers who transport into the territories of EU countries non-EU nationals lacking the necessary admission documents (with a maximum amount not less than 5000€ and a minimum not less than 3000), and regulate the duty of carriers to return non-admitted third country nationals at their own cost (Art.2). As a result, carriers have the obligation to check passengers' travel documents and visas, refraining from carrying passengers who are not properly documented. The directive also specifies that the financial penalties do not apply in case the non-EU national is seeking international protection (Art. 4). Moreover, the Council Directive 2004/82/EC[94] imposes the obligation of carriers (Art. 3) to share details of passengers with the authorities responsible for border checks at the port of arrival. If carriers have not transmitted data, or these are incomplete or false, they are penalised.

In summary, divergences and inconsistencies between the UN Smuggling Protocol and the EU legal framework about the facilitation of irregular migration are relevant, and they mostly concerning 3 aspects[95]:

1. The financial gain element: while the UN Smuggling Protocol requires a "financial or other material benefit" as a condition for the criminalisation of procuring irregular *entry or residence* (Art. 6), the Facilitators' Package only links it to the facilitation of irregular *stay*. (Art. 1 of the Directive);
2. The humanitarian assistance issue: as specified in the Travaux Préparatoires (p. 496), the reference to financial or other material benefit for the perpetrator within the UN Smuggling Protocol is intended to exclude family members or support groups such as religious or non-governmental organisations from punishment, while Art. 1 of the Facilitation Directive leaves MS the discretion to not impose sanctions on who provide migrants humanitarian assistance;

[93] Council Directive 2001/51/EC of 28 June 2001.
[94] Council Directive 2004/82/EC of 29 April 2004.
[95] CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M. (2016). p. 28-29.

3. The safeguards for victims of smuggling: if the UN protocol, under Art. 5, explicitly prohibits the criminalisation of migrants being object of smuggling, the Framework Decision just recalls the respect of the principle of non-refoulement (Art.6) in compliance with the Refugee Convention of 1951.

By analysing this comparison, we could conclude that the Facilitators' Package presents inconsistencies compared to the UN Protocol, since it does not include clear provisions granting the protection of people who provide humanitarian assistance to irregular migrants, remaining ambiguous about the issue. This consequently entails more room for criminalization, resulting in more legal possibilities for MS to place different forms of humanitarian aid within the framework of facilitation. This is precisely what it has been happening after the adoption of the Facilitators' Package - especially after the growing incoming migratory flows of 2011 and then 2015 - in many European States that at the national level implemented the European law in a securitarian and restrictive manner.

2.3.2. The Employer Sanctions Directive

Another EU legal instrument aimed at punishing with criminal sanctions third-parties who are assumed facilitating the stay of irregular migrants on the European territory - in this case by offering an employment - is the Employer Sanctions Directive 2009/52 ("providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals")[96]. The preamble, after recalling the importance of the cooperation among MS to combat illegal migration, defines the possibility to obtain work in EU as a pull factor for illegal migration and call for the need of more measures to counter it (preamble 2). The Directive requires Member States to co-opt employers into the immigration control regime by requiring them to document their efforts to ensure they have not employed a prohibited person in a variety of ways (in particular focus on the control and the conservation of a copy of the resident permit) set out in the directive under

[96] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009.

Articles 4 et seq. The Directive contemplates financial penalties on the transgressing employer, which include proportional financial sanctions and the payment of "the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out" (Art.5). Moreover, it sets criminal penalties for continued or persistent breach or the simultaneous employment of a "significant number" of "illegally staying" third country nationals, as well as in circumstances such as exploitative work conditions or the employment of a minor (Art. 9 and 10). Other punishments can include the exclusion from public benefits or subsidies for a period of up to five years (Art. 7). As stressed out by Mark Provera, employment is broadly defined in the Directive but it does not expressly contemplate remuneration; this means that potentially it also covers voluntary work.[97] In overall, the use of criminal law to target employers may have counter-productive effects on employment and working conditions, especially in terms of guaranteeing employment security and preventing exploitation. Moreover, by dissuading employers from hiring third country nationals for fear of incurring sanctions, the Directive ultimately harm both the social trust between EU citizens and migrants, both the employment prospects of third country nationals in the EU.[98]

2.4. Member States national legislation

2.4.1. Criminalisation of migrants in an irregular situation

As reported by FRA (the European Union Agency for Fundamental Rights) in the paper "Criminalisation of migrants in an irregular situation and of persons engaging with them", almost all EU Member States punish irregular entry and stay with custodial sentences, which means that both offences trigger a return procedure. As seen in chapter 1, the Return Directive allows the detention of third-country nationals who are in an irregular situation, unless their status is regularised. The fact that Member States have national laws prescribing custodial sanctions for irregularity, give them the possibility to imprison migrants even beyond pre-

[97] PROVERA M., 2015. p. 13.
[98] PARKIN J., 2013. p.10. "The Criminalisation of Migration in Europe A State-of-the-Art of the Academic Literature and Research", *CEPS Papers in Liberty and Security in Europe, n.61, October*. CESP, Bruxelles.

removal detention as set out in the Return Directive. [99] Criminal laws and procedures are not EU competence; however, national legislations must always comply with the EU law. Concerning detention, the CJEU has stated in many cases (such as El Dridi[100] and Alexandre Achughbabian v. Préfet du Val-de-Marne[101]) that the imprisonment of a migrant in an irregular situation must not take precedence over applying the Return Directive; this means that it is not allowed to apply a custodial penalty to a migrant for irregular entry or stay, before a return decision is adopted or while it is implemented. However, many national laws separately punish irregular entry and stay with imprisonment and/or fines, so that - in spite of CJEU statements - EU Member States still apply custodial penalties to people subject to a return procedures.[102]

According to the comparative research realized by the EU Agency for Fundamental Rights in 2014, all but 3 Member States (Malta, Spain and Portugal) punish irregular entry with sanctions that exceed the coercive measures that may be taken in order to carry out the removal of the person. While 17 States[103] punish irregular entry with imprisonment and/or a fine (with a maximum of 5 years in Bulgaria), 8 countries[104] impose to pay a fine (with a maximum amount as 10 000€ in Italy). Concerning the offence of irregular stay, States applying a fine and/or imprisonment are 10[105], while 15 establish a fine only.[106] Malta, France and Spain do not punish irregular stay, but this just triggers a return procedure. Anyway,

[99] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), (2014)a. p. 3. "Criminalisation of migrants in an irregular situation and of persons engaging with them". FRA, Vienna.
[100] CJEU, Judgment case C-61/11 "Hassen El Dridi, alias Karim Soufi", 28 April 2011. ECLI:EU:C:2011:268.
[101] CJEU, Judgement case C-329/11 "Alexandre Achughbabian v. Préfet du Val-de-Marne*",* 6 December 2011, para. 40. ECLI:EU:C:2011:807.
[102] FRA (2014)a. p.4.
[103] Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Romania, Sweden and the United Kingdom.
[104] Austria, the Czech Republic, Hungary, Italy, the Netherlands, Poland, Slovakia and Slovenia.
[105] Belgium, Croatia, Cyprus, Denmark, Estonia, Germany, Ireland, Luxembourg, the Netherlands, and the United Kingdom.
[106] Austria, Bulgaria, the Czech Republic, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

depending on the Member State, both for entry or stay the fine may be converted to a custodial sentence if the migrant has no financial possibility to pay. [107]

2.4.2. Criminalisation of people engaging with irregular migrants

Facilitation of irregular entry

Both facilitation of irregular entry and of irregular stay are punished in all 28 EU Member States, with different types of sanctions. Concerning the facilitation of entry, Member States requiring that facilitation is punishable only if it is proven to be for gain or profit are just 4 (Germany, Ireland, Luxembourg and Portugal). Their laws are consequently consistent with the provision included in the UN Smuggling Protocol, while all the other 24 Member States don't mention the element of financial gain, which is often addressed as an aggravating circumstance. Moreover, a humanitarian assistance clause is often not included in national legislations: only the domestic law of 8 EU Member States explicitly recognizes (in different manners) that certain acts carried out to facilitate someone entry, only for humanitarian purposes, are not to be punished. These are:

- Austria, which rules out the assistance provided to family members;
- Belgium, which includes the humanitarian reason itself;
- Spain, that excludes from punishment the transport of an asylum seeker into the territory if he or she has already presented an asylum request and it is already processing;
- Greece, which excludes the rescue of people at sea and the transport of people in need of protection from punishment;
- Finland, that under the criminal code provides the necessity to take into consideration case-by-case the motives of the person committing facilitation and the circumstances concerning the safety of the foreigner in his/her country of origin or permanent residence;

[107] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), (2014)b. "Annex: Member States' legislation on EU irregular entry and stay, as well as facilitation of irregular entry and stay". FRA, Vienna.

- Lithuania, where facilitation as a way to face emergencies is not punishable;
- UK and Ireland, that exclude from punishment people, if part of an organization, who intend to help asylum seekers without any profit.[108]

In the other EU countries, where facilitation of entry without profit could be punished, the responsibility to protect migrants' fundamental rights, especially the right to apply for asylum, lies with the administration and domestic courts.

Facilitation of irregular stay

Facilitation of irregular stay is punishable in all EU Member States except Ireland, which is not bound by the Facilitation Directive (together with the UK and Denmark). Legislation in 13 EU States do not require a profit to punish facilitation of irregular stay[109] (this includes Lithuania and Estonia, where only the provision of housing is punishable under the national law), while the other 14 States do.[110] Concerning humanitarian assistance, 8 national legislations include exemptions to some form of aid to irregular migrants: Austria, France and Malta protect assistance provided to family members, while Belgium, Finland, France, Italy and Austria exempt the provision of humanitarian assistance in general. Germany excludes from punishment people who offer their assistance through their specific professional duties, and France exempts the provision of legal advice. Finally, the United Kingdom excludes from sanctions people who act on behalf of an association who intends to help asylum seekers without any profit. Consequently, States with the strictest legislation concerning facilitation (including no exemptions either for humanitarian assistance, nor for the facilitation of stay without any gain) are 8: Croatia, Denmark, Greece, punishing it with fine and/or imprisonment, and Estonia, Lithuania, Latvia, Romania and Slovenia, imposing a fine.[111]

[108] FRA (2014)a. p.10.
[109] Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom.
[110] Belgium, Finland, France, Malta, the United Kingdom, Austria, Italy, Germany.
[111] FRA (2014)a. p.11.

Renting accommodation

Also landlords could be subject to sanctions for renting accommodation to undocumented migrants. Cyprus, Denmark, Estonia, Greece and Lithuania explicitly punish landlords for this 'offence'; moreover, under the national laws of 11 Member States, renting an accommodation falls within the offence of irregular stay, and it is additionally punished with a fine and/or imprisonment. Forms of exemption are present in only 5 Member States: Malta and France consider the option to accommodate a close relative; Italy punishes landlords only if the take unfair advantage of migrants' vulnerable situation; Belgium excludes from punishment assistance provided for humanitarian reasons, therefore the provision of an accommodation may fall within this exception; Ireland does not apply the Facilitation Directive, so it does not punish landlords either.[112]

Case law concerning this subject vary considerably among Member States: in Italy, for example, Art. 12(5) of the Immigration Act considers renting accommodation as a crime only if the landlord takes "unfair advantage" of the migrants' situation; in 2013 the Supreme Court clarified the provision, saying that to be liable the landlord has to be conscious of imposing particularly exorbitant and onerous conditions on the migrant (which interpretation, however, still remains up to national judges in a case-by-case process).[113] Generally speaking, in recent years some Member States has adopted new laws regulating facilitation of stay, so that landlords seem to be at greater risk of punishment than the past. On the other side, migrants could be exposed to greater risk of abuse and/or exploitation for renting an informal accommodation, without contract and any guarantees; migrant women in an irregular situation are particularly vulnerable, since in return for housing they could be additionally subject to sexual abuse and exploitation.[114]

The EU Agency for Fundamental Rights, as many other institutions and NGOs, points out that when there are no exemptions to humanitarian assistance and

[112] FRA (2014)a. p. 13.
[113] Italian Court of Cassation (Penal Section). Judgment n. 597/2013, 24 April 2013.
[114] EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), (2011). p. 63. "Fundamental rights of migrants in an irregular situation in the European Union". Publications Office, Luxembourg.

criminal sanctions are not limited to actions carried out for profit, the risk that also people who support irregular migrants are targeted is higher. Moreover, although NGOs are not usually targeted by authorities, they may be uncertain concerning their actual possibility to provide support without risking a punishment. This connects to the issue of intimidation carried out towards NGOs activists through legal proceedings and arrests, as the following paragraphs will bring examples about.

2.5. The "Crime of Solidarity"

The "crime of solidarity" does not exist from a juridical point of view, neither at international nor at national level; this means that none legal framework punishes solidarity itself through specific provisions. Nevertheless, this term is nowadays extensively used especially by NGOs and the civil society that work to support migrants' fundamental rights. Therefore, "crime of solidarity" is a challenging terminology used with the intention of strongly criticize all the effects of this criminalization campaign carried out by EU Member States not only towards undocumented migrants but also towards people committing acts of solidarity to assist them. Mark Provera provides a useful definition of "acts of solidarity":

> Acts of solidarity include behaviour which assists irregular migrants either to enter or remain in the EU (which the Facilitation Directive describes as "facilitation"). Such behaviour includes providing, or assisting migrants to access, basic rights such as health care, accommodation, education, transport as well as necessities such as food and clothing. It is behaviour which might be considered humanitarian – that is, the individual or entity might consider their act to be "good" yet is otherwise subject to sanction. The EU Facilitation Directive and the laws of some Member States do contemplate "humanitarian assistance" as an exception to sanction with "financial gain" or "gain" as a determinative element warranting sanction – all three terms may be open to interpretation.[115]

The Institute of Race Relations (IRR) used this term in 2006, in a Report expressing concerns about the use of criminal law regarding the management of asylum and

[115] PROVERA M., 2015. p.5.

irregular migration, codified firstly in the Facilitators' Package. The document intends to denounce the fact that all the deterrent measures set up in those years in national legislations have also a criminalizing impact of humanitarian and solidarity actions. From deterrence to criminalisation, in these recent years not only the political rhetoric has brought to an increasing sense of fear and isolation felt by who seeks to assist asylum seekers and undocumented migrants, but also a relevant number of prosecutions have been brought against individuals. Human rights campaigners, journalists, religious leaders and lawyers are among those prosecuted for such activities as housing the destitute, providing essential goods, or advising those under threat of deportation of their legal and civil rights.[116]

2.5.1. The origins: the Frammezelle case

Only one year after the adoption of the Facilitators' Package, in 2003, Charles Frammezelle, a former teacher and humanitarian aid worker, and his colleague Jean-Claude Lenoir were judged for facilitation of irregular migration in Calais. They were part of the Collective for urgent support to refugees (C'Sur), set up to provide humanitarian assistance, distributing clothing, food and medical aid following the closure of the Red Cross camp at Sangatte in 2002. They were investigated because they decided to take in undocumented migrants from the streets of Calais and lent them their names so that they could receive money from their families. The accuse was based on the possibility that the money they received was used to pay a transport to reach the UK. The two activists were finally found guilty but not convicted on 20 August 2004 under Article 21 of the 1945 Foreigners' Law, designed to penalise those smuggling in illegal entrants (*aide au séjour d'étrangers en situation irrégulière*). The final verdict arrived in 2005, when they were convicted for "contempt of police", for protesting against police violence during roundups of migrants; they were both fined with more than €8,000, plus 1-month suspended prison sentence for Lenoir for continuing his humanitarian work.[117]

[116] WEBBER F. (2006). p. 2. "Asylum: from deterrence to criminalisation". *European Race Bulletin No. 55*. Institute of Race Relations, London.
[117] Ibidem, p. 12.

Meanwhile, in 2003, the French government adopted a law called "loi Sarkozy" ("Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité") amending the Immigration Act of 1945 and essentially hardening the conditions of entry and reception of foreigners: a file of fingerprints and photos is created from visas and checks carried out at the border; the maximum length of administrative detention is extended from 12 days to 32 days; sanctions against "smugglers" (facilitators) are intensified.[118] Interior minister Nicolas Sarkozy reassured humanitarian organisations that the changes would not penalise humanitarian organisations providing voluntary support and care for foreigners. Yet, many organizations and GISTI (Groupe d'information et de soutien des immigré-e-s) expressed their concerns and claimed that the law should thn be amended in order to provide more protection for humanitarian actions. Furthermore, following the disapproval for the new provisions adopted and the first cases, such as Fammezelle and Lenoir, 354 organisations and 20.000 individuals signed and spread a Manifesto called "Manifeste des délinquants de la solidarité", with the aim of denouncing the French policy and point out the intention to persevere with acts in solidarity with migrants. By adopting as main statement "if solidarity is a criminal offence, I demand to be indicted for this crime", those organizations were actually introducing and conceptualizing the term "crime of solidarity". [119]

2.6. National cases

After the adoption of the Facilitators' Package in 2002, cases dealing with smuggling and/or facilitation of irregular migration increased in some Member States. The process of criminalization of people engaging with undocumented migrants includes many aspects and dimensions: from administrative to penal sanctions, from police intimidation to deterrent - and sometimes threatening - institutional discourses held by political leaders. In the following paragraphs I will present and comment some recent landmark cases related to smuggling or

[118] Law n. 2003-1119 of 26 November 2003.
[119] GISTI (2003). "Manifeste des délinquants de la solidarité". Available at: https://www.gisti.org/spip.php?article834

facilitation offences that became relevant in relation to the issue of "the crime of solidarity".

2.6.1. France: Cedric Herrou case

Context and national legislation

France is in a way the birthplace of the movement that denounces the existence of "the crime of solidarity" - *delit de solidarité* - (see Frammezelle Case); NGOs committed to this campaign are therefore numerous and the literature dealing with this issue is wide. Here we will take into consideration the case of the French farmer Cedric Herrou, who helped some 200 migrants - most of them Sudanese and Eritreans - to enter France by crossing the Italian border (through the Roya Valley) and to facilitate their stay on the French territory. Since 2016 he was accused of "helping undocumented foreigners enter, move about and reside in" France, under Article L. 622-1 of the CESEDA (the Code de l'entrée et du séjour des étrangers et du droit d'asile), the main national law dealing with irregular entry, transit and stay. The provision states as following: "toute personne qui aura, par aide directe ou indirecte, facilité ou tenté de faciliter l'entrée, la circulation ou le séjour irréguliers, d'un étranger en France sera punie d'un emprisonnement de cinq ans et d'une amende de 30.000 Euros".[120] Hence, facilitators of irregular migration face a sanction up to 5 years imprisonment and 30.000 euros fine; it has to be noticed that no humanitarian exemption is included, and this has been in fact criticized and opposed by numerous NGOs working with migrants.

In August 2017 Cédric Herrou was convicted for facilitation of irregular migration, since he helped migrants crossing the border, housing some of them in his farm in the Roya valley in the Alps, and also giving them passages within the French territory with his own vehicle.[121] After having been already fined with 3.000€ in February 2017 for facilitation of entry and transit, few months later followed the

[120] Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA). Decree n. 2004-1248 of 24 November 2004.
[121] DAILY MAIL ONLINE (2017). "French farmer convicted for helping migrants". Available at: https://www.dailymail.co.uk/wires/ap/article-4210894/French-farmer-convicted-helping-migrants.html

second proceeding after his arrest with 150 migrants at a train station in the Riviera city of Cannes. The 8th of August 2017 the Bouches-du-Rhône appellate court gave him a four-month suspended jail sentence. Since then, Herrou became a known symbol of solidarity towards migrants, and hundreds of individuals and NGOs mobilized in his favour.[122] In 2012 was adopted a law[123] introducing an exemption for penal sanctions concerning the facilitation of stay of irregular migrants: according to Article. L 622-4 of the CESEDA people providing help necessary to safeguard the life or physical integrity of an alien in order to face an imminent and current danger, can't be subject to criminal proceedings, until the assistance is proportionate to the threat and carried out without any direct or indirect profit.[124] Nevertheless, the judges of the Bouches-du-Rhône court said that Cédric Herrou could not benefit from the exemptions provided by this law, since they considered that his help to migrants was part of a wider militant action to remove foreigners from the controls implemented by the authorities, and so his activism was itself a form of compensation for the help provided.[125]

Principle of fraternity and legislative evolution

Many NGOs, included Amnesty International and Gisti, expressed their concerns relating to this interpretation, since it does not prevent the same considerations from being adopted in case of pure humanitarian assistance. Moreover, they also accused the French law to not be compliant with international law, since: first of all, the UN Protocol against smuggling establishes that the benefit to receive in return to facilitation must be "financial or material" in order to consider it as a criminal offence; secondly, exemptions included in Article. L 622-4 only concern the

[122] Court D'appel D'aix En Provence. Judgement n. 568/2017, 8 August 2017.
[123] Law n. 2012-1560 of 31 December 2012.
[124] "Sans préjudice des articles L. 621-2, L. 623-1, L. 623-2 et L. 623-3, ne peut donner lieu à des poursuites pénales sur le fondement des articles L. 622-1 à L. 622-3 l'aide au séjour irrégulier d'un étranger lorsqu'elle est le fait : [...] 3° De toute personne physique ou morale, lorsque l'acte reproché n'a donné lieu à aucune contrepartie directe ou indirecte et consistait à fournir des conseils juridiques ou des prestations de restauration, d'hébergement ou de soins médicaux destinées à assurer des conditions de vie dignes et décentes à l'étranger, ou bien toute autre aide visant à préserver la dignité ou l'intégrité physique de celui-ci."
[125] FRANCEINFO (2018). "Loi asile et immigration : on vous explique le "délit de solidarité" envers les migrants". Available at: https://www.francetvinfo.fr/monde/europe/migrants/loi-asile-et-immigration-on-vous-explique-le-delit-de-solidarite-envers-les-migrants-et-comment-il-va-etre-assoupli_2719176.html

facilitation of stay, without mentioning the facilitation of entry and/or transit.[126] Acknowledging the increasing number of prosecutions concerning solidarity acts in 2017 (reported by GISTI),[127] the French national human rights institution (Commission nationale consultative des droits de l'homme, CNCDH) published several public statements demanding the French State to modify the provision by specifying that the action is punishable only if it implies a financial or material benefit and by extending the exemption included in Article 622-4 to the facilitation of entry and transit.[128] In December 2018, the French Court of Cassation ruled for a partial cancellation[129] of the sanctions imposed on Cédric Herrou, acknowledging for the first time the "principle of fraternity" affirmed by the French Constitutional Council on the 6th of July. The Court expressed its opinion after the criminal chamber of the Cassation Court asked for a consultation concerning the crime of facilitation of irregular migrants included in the CESEDA. The Constitutional Council recognized for the first time the constitutional value of the principle of fraternity by referring to three provisions: the Preamble of the Constitution of 1958, which first qualifies fraternity, freedom and equality the "common ideal" on which the new institutions were based; Article 2 (paragraph 4) of the Constitution, which recognizes fraternity as one of the components of the motto of the Republic and finally the first paragraph of Article 72-3 which recalls again *fraternité* as a core principle of the Republic. [130]

The recognition of a principle of fraternity consists in a turning point of the evolution of the jurisprudence regarding the issue of facilitation and the "crime of solidarity", and represents the first step for a stronger engagement in the protection of humanitarianism. The Court, indeed, highlighted the humanitarian dimension of the freedom - as a fundamental right - to help others; moreover, the court said France's parliament should adapt the law, and its ruling could reverberate across the

[126] Idem.
[127] GISTI (2018). "Quelques 'délits de la solidarité' en Europe". Available at: https://www.gisti.org/spip.php?article5594.
[128] Commission nationale consultative des droits de l'homme (2017). "Avis: mettre fin au délit de solidarité". *Journal Officiel de la République Française, n° 131 du 4 juin 2017.*
[129] Court De Cassation (Penal Section). Judgment n. 2923-2018 of 12 December 2018. ECLI:FR:CCASS:2018:CR02923.
[130] Conseil Constitutionnel. Decision n. 2018-717/718 of 6 July 2018.

European Union.[131] In France, this decision gave rise to the adoption of the asylum and immigration law n° 2018-778 of September 2018, which amends and extends Article 622-4 of 2012, by adding *l'aide à la circulation* of irregular migrants and specifying that the humanitarian nature of these acts prevent them from being prosecuted under criminal law.[132] In view of these new dispositions, entered into force in January 2019, Cedric Herrou will be judged by the appeal court of Lyon. The approach of the State seems to be changing in a more tolerant way, which is particularly important since France is considered to have one of the strictest legislation concerning facilitation. The sentence of the Constitutional Council represents therefore a breach in the legislative tendency of criminalization, giving a specific recognition to acts of solidarity towards migrants as humanitarian in nature. It will be fundamental to keep monitored the evolution of the case of Cedric Herrou and many others (like Pierre-Alain Mannoni, the teacher prosecuted for transporting and hosting three migrants, who received 2 months suspended jail sentence and his case follow a similar development of the one of Herrou), in order to observe the possible development of the intersection between facilitation and solidarity, and the role that jurisprudence can have thanks to its interpretative functions.

2.6.2. Belgium: Case of Hébergeurs

The context

Belgium, in particular Bruxelles, reports interesting examples of solidarity towards undocumented migrants, that also rose the attention of NGOs and the public opinion since some citizens acting with humanitarian aims were recently prosecuted for alleged facilitation and participation in a criminal organization trafficking in human beings. In 2017 Belgian residents started to host migrants gathered in Parc Maximilien, in front of the Immigration Office (*Office des étrangers)* in Bruxelles, since some of them didn't have a proper accommodation and were spending the nights sleeping in the park. Since 2015, after strict and hostile government policies aiming at closing some refugee centres and therefore reducing their capacity to host

[131] Idem.
[132] Law n. 778-2018 of 10 September 2018, Art. 38.

migrants, a group of activists funded a Platform in order to coordinate various activities in support of these people. Mehdi Kassou, the spokesperson of the *Plateforme citoyenne de soutien aux Réfugiés* said:

> En 2015, devant l'afflux des migrants et la politique des gouvernements belges qui fermaient des places d'accueil, un collectif citoyen s'est organisé pour leur venir en aide. La plateforme citoyenne de soutien aux réfugiés est lancée sur Facebook. [...] Des centaines sont venus dormir dans le parc Maximilien, en face de l'Office des étrangers qui met des semaines à les recevoir. Dans l'urgence, on a dressé des tentes, préparé des repas, organisé un soutien psychologique et scolaire. Dans le parc, les rafles se multipliaient, la violence aussi. Cela n'était plus tenable. Fin août, on a lancé le pari d'héberger tout le monde.[133]

So, waiting for their appointment to the Office - the one that would have allocated migrants their temporary accommodation - these people were abandoned in an emergency situation without receiving any service. The Platform firstly intervened by being present in the park and distributing tents, food, hygienic products and also organizing some educational classes. The Organization was actually already replacing the State in doing its duty, which is protect vulnerable people (mostly asylum seekers) by providing at least basic services. When the number of migrants increased, they decided to launch a solidarity campaign to which residents could take part by hosting at their place one or more migrants for one or more nights, in order to guarantee everyone a safe place where to sleep each night. Soon, the Platform reached more than 10.000 supporters, with a high participation of the civil society, that started to join the campaign and create sub-group of support in other cities, such as Liège, Charleroi and also Luxembourg. At the time (June 2018), the initiative was so well coordinated that each night the activists altogether were able to give hospitality to more than 600 migrants.[134]

[133] KASSOU M. (2018). "La révolte humanitaire des citoyens ordinaires", in *Siné Mensuel* n°76 - juin 2018. Available at: https://www.gisti.org/IMG/pdf/presse_sine-mensuel_76_juin2018.pdf
[134] Idem

National legislation and investigations

The Belgian legislation ruling the facilitation of irregular entry or stay is less strict than the French one, and it also specifically includes a humanitarian exemption. It is enshrined in Article 77 of the law of the 15th December 1980, which punishes the organization or the facilitation of irregular entry, transit or stay in the Belgian territory with a fine up to 6.000€ and/or from 8 days to one-year imprisonment. Finally, the article specifies that the mentioned sanctions do not apply when the assistance is provided for reasons "*principalement humanitaires*".[135] This provision is particularly important, since it leaves considerable elbow room to Belgian people who intend to take initiatives providing assistance to undocumented migrants (*sans-papiers*). Therefore, concerning the "emergency" of 2015, at the beginning activists' actions were seen as helpful since they were protecting fundamental rights of migrants, taking measures that are originally State's responsibility; nevertheless, after some months, tensions with the police and the judiciary arose, together with an atmosphere of intimidation and criminalisation. In October 2017 the 7th, the police carried out searches at some people's houses that ended up with the arrest of 7 people alleged to be collaborators in human trafficking. In total, there were 12 people investigated from October: two Belgian journalists (Myriam Berghe et Anouk Van Gestel), one Belgian-Moroccan social worker, a Tunisian man who is a legal Belgian resident, and seven people who are undocumented migrants. Ultimately, one person managed to reach the UK, so the judgment concerned 11 people. Since that day, 8 of them (undocumented migrants and the Tunisian man, called Walid) were imprisoned, and spent in jail some months as a preventive detention with the accused of being smugglers - Walid for example stayed in jail for 8 months.[136]

Defendants declared to be really shocked after the police aggressive searches, and the violence was immediately denounced by the *Plateforme Citoyenne de Soutien aux Réfugiés*, that considered these operations as intimidatory and part of a political

[135] Law of 15 December 1980 "sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers". Art. 77.

[136] GLOBAL VOICES (2018). "'Crimes of solidarity' in Europe multiply as 11 stand trial in Belgium for helping migrants". Available at: https://globalvoices.org/2018/09/17/crimes-of-solidarity-in-europe-multiply-as-11-stand-trial-in-belgium-for-helping-migrants/

campaign of "criminalization of solidarity" aiming at dissuading people from helping migrants.[137] The mobilization of the civil society was wide and in occasion of the first hearing, on the 6th of September 2018, three hundred people protested in front of the courthouse. The initial charge of co-operating in human trafficking and being part of a criminal organization seemed in fact to be excessive and unrealistic. The two journalists claimed several times to be sure about the fact that their actions were right and exclusively motivated by humanitarian purposes. The reasons why they were alleged for facilitation and smuggling is because some hosted migrants were found to be helping others in crossing the country toward the UK receiving a form of remuneration back. Consequently, according to the accuse, the defendants had allegedly assisted (and facilitated) 95 undocumented migrants, including 12 minors, to travel from Belgium to the UK in 2017, either by hosting them in their homes, by lending them their phones or the computer and thereby indirectly helping them cross the channel.[138]

Sentence, recommendations and developments

The trial was carried out on the 9/09/2018, and the final judgement arrived on the 12/12/2018. The correctional Tribunal of Bruxelles sentenced the migrants to prison from 12 to 40 months, for trafficking in human beings (with a suspended jail-sentence for seven of them). The Court considered that they had organized the passage of other migrants to Britain for financial gain.[139] Concerning the four hosts (hébérgeurs), they have all been acquitted from accuses: there was no evidence these people were part of an organization of smugglers. Defence lawyers claimed to have been reassured by an indictment "infinitely softer," "fairer" or "more humane" than the position taken at the stage of the investigation by the first tribunal in charge (the Flemish one of Dendermonde). Defence lawyers have raised, as the prosecution also did on Thursday, the lack of a clear migration policy in Europe and the complexity of the migration phenomenon nowadays. Judicial authorities noted that it is important to take into consideration that, due to the absence of legal

[137] BXLREFUGEES (2017). "Perquisitions chez des hébergeurs/hébergeuses". Available at: https://www.bxlrefugees.be/2018/10/08/perquisitions-chez-des-hebergeurshebergeuses/
[138] GLOBAL VOICES (2018).
[139] BX1 (2018). "Procès des hébergeurs de migrants: les quatre citoyens belges ont été acquittés". Available at: https://bx1.be/news/proces-hebergeurs-de-migrants/

pathways to reach European countries, some migrants are both exploiters and exploited in the smuggling of human beings.[140]

Hence, despite the positive ending of the trial, this event arises questions and concerns. Myriam Berghe, one of the two accused journalists, claimed: "oui, j'ai hébergé des passeurs. Mais il faut voir de quelle réalité on parle. Les douze personnes interpellées dans ce dossier n'ont rien à voir avec ce que le droit appelle des 'trafiquants d'êtres humains'. Ce sont des jeunes paumés qui essaient de survivre en devenant de petits passeurs, le temps de se payer eux-mêmes un passage."[141] In this regard, this case shows at least 3 problems relating to the ambiguous EU approach towards immigration and the tendency of progressively criminalizing solidarity:

1) The fact that the distinction between smugglers and traffickers of human beings still seems blurred and misinterpreted, also from the judicial authorities themselves (in this case the defendants are accused for *trafic d'êtres humains,* while the alleged offence concerns the potential help given to transit towards another country for financial gain, which would be smuggling for definition);
2) As also specified by some lawyers, it is important to keep in mind that the profile of the smuggler is complex and diversified: in this case, for example, we are not talking about smugglers aiming at making money out of an organized business of passages and facilitations, but of irregular migrants themselves who try to help and give suggestions to friends or family members who are going to undertake the same path through Europe. In most of the cases their intentions are not to purposely breach the law, and even though they are considered as criminals they could be actually victims of a broad system built on securitization and criminalization policies (see chapter one). In this respect, Morgane Dujmovic argues that:

[140] Idem.
[141] GLOBAL VOICES (2018).

> Le périple vers l'Europe implique souvent d'avoir recours à des groupes organisés qui tirent un profit direct de la fermeture des frontières en faisant du passage clandestin un commerce très lucratif. Les récits de migrants abandonnés en route, rackettés, pris en otage, voir soumis à des dangers mortels sont brandis par les autorités pour justifier la traque et la militarisation aux frontières de l'Europe. Or, cette politique fait a contrario fleurir l'économie du passage en créant de nouvelles prises de risque qui se répercutent sur des tarifs plus élevés et des modalités de transport plus dangereuses. Ce faisant, les institutions européennes contribuent au renforcement des "filières" qu'elles disent combattre et à la fragilisation des migrants qu'elles prétendent défendre.[142]

3) In a system when being undocumented is an offence treated with criminal law instruments, the distinction between crimes and humanitarian actions is more and more liable, enclosed in an unclear framework that provokes insecurity, distrust and disregard of fundamental rights. Consequently, people acting in solidarity with others with intentions humanitarian in nature may not only face intimidation and isolation, but also risk to be treated as criminals and prosecuted, in a scenario that seems to turn upside-down values and disvalues of a democratic society inspired to the importance of universal human rights. In this respect, for example, some literature talked about "humanitarian smuggling" to define those acts facilitating irregular entry that are morally permissible and that should consequently fall outside the scope of punishable offences under criminal smuggling prohibitions.[143]

The 3 points above are also valid as recommendations addressed to the EU approach towards irregular immigration, indicating some positive changes that should be hopefully undertaken, especially for the high ambiguity of the political institutions

[142] DUJMOVIC M. (2018). p.146. "Passeurs d'Hospitalité", in *"Migreurop, Atlas des migrants en Europe".* Armand Colin, Paris.
[143] See Landry, R. 2016. The 'humanitarian smuggling' of refugees: criminal offence or moral obligation. RSC Working Paper Series 119. Oxford: Refugee Studies Centre.

towards the protection of humanitarianism and fundamental rights. If after the judgement of acquittal of the Tribunal of Bruxelles the defenders and the civil society felt satisfied and relieved, on the 12th of January 2019 the Prosecuting Magistrate of Brussels appealed against the previous judgment and contested the acquittals of the four *hébérgeurs*, who will consequently have to go back to court for another trial. The defendants and the *Plateforme Citoyenne* express their surprise and sorrow following the decision, claiming that behind it there could be some political pressures aiming at deterring acts of solidarity towards migrant through a strong judicial signal.[144] Hoping that the future decision will finally be in-line-with the acquittals, Bruxelles has now the power and the responsibility to orient the issue of solidarity either towards criminalization or legal and social recognition. Meanwhile, the civil society showed activism and support: the collective "Solidarity is not a crime" arose from the desire to denounce this process of criminalization and it organized events of awareness, protests, and also an online crowdfunding to financially support the defendants to meet the costs of the lawsuits.[145]

2.7. Intimidations and social distrust

The atmosphere of criminalization of solidarity towards migrants in EU is not only composed of judicial prosecutions, but also of intimidations, threats, police raids and "preventive" (often arbitrary) arrests, which play a relevant deterrent effect. With the aim of keeping track of events of criminalization and intimidation towards people and NGOs that act in solidarity with migrants, the Institute of Race Relations provided a timeline charting the most important recorded cases, acknowledging increasing discriminatory and aggressive behaviours towards human rights defenders.[146]

[144] RTBF.BE (2019). "Le parquet général de Bruxelles fait appel contre le jugement des hébergeurs de migrants". Available at: https://www.rtbf.be/info/societe/detail_le-parquet-general-de-bruxelles-fait-appel-contre-le-jugement-des-hebergeurs-de-migrants?id=10116771
[145] See https://solidarityisnotacrime.org/
[146] INSTITUTE OF RACE RELATIONS (2017). p.39. "Humanitarianism: the unacceptable face of solidarity". Institute of Race Relations, London.

2.7.1. Examples: intimidations, sanctions and de-legitimation

In 2016, the Observatory for the Protection of Human Rights Defenders condemned the crackdown on civil society actors providing humanitarian assistance to migrants arriving to the Greek islands. In January, in Lesvos, five volunteer lifeguards with Proem Aid and Team Humanity Denmark were arrested by the Hellenic coast guard after responding to an SOS call at sea and charged with human smuggling and violation of weapons law (because the boat equipment included some small knife for emergency). In February, at the Idomeni border area between Greece and Macedonia, more than sixty volunteers from several countries (i.e. Austria, Germany, U.K., Switzerland, the Netherlands, Spain, Czech Republic) operating within the Dutch volunteering Organization "Aid Delivery Mission", reported to be subjected to police harassment, including threats of arrest and an arbitrary house search by armed policemen and trained dogs without a warrant or any explanation.[147] In August 2018 Sean Binder was arrested with fellow search and rescue volunteers for being involved in the facilitation of illegal entry of foreigners in the Greek territory, according to a police statement. The aid workers, part of the non-profit organization Emergency Response Centre International (ERCI), always claimed their innocence, stressing their humanitarian intentions to help migrants. Sean spent over 100 days in in pre-trial detention in a Greek jail and was finally released on bail. Here what he stated after the release: "what I did was good, how can it be a crime to pull people who are drowning out of the water, how can it be a crime to help children be children and to provide medical facilities in a refugee camp? How can that be criminal, it's not. It's necessary."[148]

Also Hungary's right-wing government campaign anti-immigration is sadly known to be very strict and intimidatory. In the latest years the Prime Minister Viktor

[147] OBS (2016). "Greece: Ongoing crackdown on civil society providing humanitarian assistance to migrants and asylum seekers". Available at: http://www.omct.org/human-rights-defenders/urgent-interventions/greece/2016/04/d23733/#_ftn4

[148] INDIPENDENT.IE (2018). "'I'm not a hero but I'm not a criminal' - Trinity graduate Sean (24) returns home after 100 days in Greek jail". Available at: https://www.independent.ie/irish-news/im-not-a-hero-but-im-not-a-criminal-trinity-graduate-sean-24-returns-home-after-100-days-in-greek-jail-37631116.html?fbclid=IwAR24JiG1dfdQUixwWIQIrCl65cYZyVoHqhRRPFTM5WLWyf5hHydIJyIiRg8

Orban strengthened borders controls, by building more than 500 km long double fence on the borders with Serbia and Croatia to block the flow of migrants who were passing through the Balkan route (highly intensified from 2015). Hungarian's borders became a dangerous place where police violence against migrants intensified, reaching the use of fired tear gas and water cannon to push back migrants in September 2015.[149] But Mr. Orban's hostility against irregular migrants extended soon over people who act in solidarity with them: the campaign called "Stop Soros" started at the beginning of 2017, and developed in a framework of planned demonization of solidarity towards migrants, that turned into institutional intimidation towards any form of humanitarianism, targeted as "illegal and criminal". Through the populist rhetoric of invoking the threat to Hungarian national security and identity, Mr. Soros - a Hungarian naturalized American financier who funds liberal projects to support democracy and human rights all over the world - has been painted as the worst national (ideological) enemy, continuously accused of supporting and facilitating "illegal" migration in order to undermine the political power. The entire hate campaign resulted in measures that limited the possibility for NGOs to receive international donations and the adoption of a law, in June 2018, aiming at introducing the crime of "facilitating illegal immigration", according with anyone could be jailed for working for or with non-governmental organisations that are involved in helping or campaigning for asylum seekers.[150] All these measures - either rhetorical or legislative - are strongly contributing to raise fears and insecurity among people who want to help migrants, with a tangible effect of deterrence that leads migrants and their supporters to harsh forms of criminal stigma and isolation.

However, the most evident and worrying criminalization campaign brought on by some EU States, is the one against NGOs leading search and rescue operations in the Mediterranean Sea. After the ending of *Mare Nostrum*, the Italian government's

[149] POLITICO (2017). "Hungary hardens immigration lines". Available at: https://www.politico.eu/article/hungarys-new-hardline-immigration-scheme-viktor-orban-refugees-migration-crisis-europe/

[150] AMNESTY INTERNATIONAL (2019). pp. 26-27. "Laws Designed to Silence: The Global Crackdown on Civil Society Organizations". Amnesty International Ltd, London.

search and rescue mission in October 2014, the death toll in the Mediterranean rose sharply. The EU's agenda priority became the militarisation of the Mediterranean in order to catch the smugglers and destroy their "business"; hence, in July 2015 it launched the EU military naval force (EUNAVFOR) which operated within the Operation Sophia, boarding, searching, seizing and destructing vessels suspected of being used for human trafficking or smuggling, with the following arrest of the alleged smugglers. Search and rescue missions were left to the NGOs, either large like Save the Children, Proactiva Open Arms, Mediterranea, Médecins Sans Frontières, either small and crowd-funded, that launched their own missions in order to save lives at sea.[151] European citizens showed a great solidarity, committing mostly on voluntary basis to fill the gap left by European institutions, constantly denouncing EU policy on immigration and actually accomplished humanitarian and human rights obligations that are firstly States' responsibility.

Nevertheless, they probably didn't imagine that soon they would have had to reckon with institutional hostility and a pervasive campaign of criminalization aiming at de-legitimising their operations and destroying the credibility of their humanitarian missions. In recent years, rescuing NGOs have been criticized and attacked by many EU national leaders (especially Italian) to constitute a "pull-factor" for undocumented migrants, to be colluded with smugglers and human traffickers and finally to take advantage of migrants in need in order to enrich their own business. Hate campaigns can be extremely damaging for NGOs that fund their operations thanks to donations of the civil society. Attacks increased in recent years, through a deterrence program made of seizures of boats, investigations and prosecution of volunteers by national authorities, that are in fact undermining the fundamental humanitarian work of NGOs. I will deepen this subject in the next chapter, focusing in particular on the role and responsibilities that Italy has been having recently, reporting the cases of the German NGO Jugend Rettet's rescue ship *Iuventa*, seized in 2017, and the one of Sea-watch 3 in 2018.

[151] INSTITUTE OF RARE RELATIONS (2017). p.10.

2.7.2. "Unintended" consequences of criminalization of people assisting migrants

After leading a survey addressed to civil society organizations in 17 Member States, the Committee of Civil Liberties, Justice and Home Affairs published a report (2016) containing the analysis of the effects of the implementation of the Facilitators Framework (criminalization) for irregular migrants and those who assist them. The Committee acknowledged that civil society organisations fear sanction for their work assisting irregular migrants, wondering if their actions could be judged as illicit, even though they all consider the assistance they provide as humanitarian in nature and connected with the protection of fundamental rights. Moreover, a fifth of civil society respondents reported the feeling that their possibility to engage in advocacy work is compromised, due to the climate of increasing criminalisation.[152] The latter influences not only irregular migrants (more vulnerable to isolation) and who help them, but also the society as a whole: it is leading to the deterioration of the social perception of migrants in general, with a rise of unfounded fears, discriminations and racism. Also city representatives express their concerns regarding the need to maintain the social cohesion of the civil society and avoid the exclusion of stigmatised vulnerable groups. Effects on social cohesion in the wide community is also due to the lack of clear humanitarian exemptions and national law often ambiguous about facilitation. Fears emerged from this criminalizing climate also undermine the social trust among the different actors of the community, reducing the efficiency of services provided to migrants.[153]

In March 2018 Michel Forst, Special Rapporteur, presented to the Human Rights Council a Report on the situation of human rights defenders of "people on the move", acknowledging that defenders work in an increasingly hostile environment characterized by the closing of civic space, and by attacks and threats. He also reports as the criminalization of defenders of people on the move reinforces the social stigma linked to an idea of threat that migrants and their "supporters" already

[152] CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M. (2016). pp. 45-50.
[153] Ibidem, pp. 55-57.

face. Moreover, prosecutions have a strong deterrent effect, making civil society organizations and private individuals more hesitant to engage with migrants or to take action in relation to the challenges they face. This is particularly harmful for irregular migrants, already marginalized and without enough means to make their voices been heard, so it becomes extremely important for them to possibly rely on local activism and advocacy made by defenders of people on the move. Finally, the Special Rapporteur recommends that States should take appropriate measures in order to protect the fundamental rights of migrants and their defenders and to publicly recognize the importance and the legitimacy of their work, condemning in a clear and public way any instance of intimidation, discrimination and reprisals against them. [154]

2.8. EU Parliament position

In recent years the European Parliament showed to be sensitive to the topic of criminalization of humanitarianism towards migrants: the Civil Liberties, Justice and Home Affairs Committee published a detailed analysis called "The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants" in 2016 - showing controversial issues, problems, direct and indirect effects of the implementation of the Directive -, and in 2018 Claude Moraes (member of the same Committee) drafted the resolution that has been adopted by the EU Parliament on the 5th of July called "Guidelines for Member States to prevent humanitarian assistance from being criminalised". The Parliament:

> 2. Expresses concern at 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;
> 3. Underlines that in line with the UN Smuggling Protocol, acts of humanitarian assistance should not be criminalised; [...]
> 5. Regrets the very limited transposition by Member States of the humanitarian assistance exemption provided for in the Facilitation Directive and notes that the exemption should be implemented as a bar to prosecution,

[154] FORST M. (2018). "World Report of the Special Rapporteur on the situation of human rights defenders". United Nations Council of Human Rights, Geneva.

> to ensure that prosecution is not pursued against individuals and civil society organisations assisting migrants for humanitarian reasons;[155]

Finally, in views of these concerns, the Parliament calls on MS to transpose the appropriate humanitarian exemptions into national laws and urges the EU Commission to issue guidelines specifying which forms of "facilitation" should never be criminalised by MS, to make sure that the law is applied with clarity and uniformity.

It is possible to affirm that if the EU Parliament shows to be aware of the effects of the ongoing criminalization process, this may not apply for national Governments, that are undoubtedly showing no will to manage the migration issue in a communitarian and forward-looking way (see paragraph I.IX). The need to protect fundamental rights and humanitarian assistance is clear to the European civil society, which is launching numerous campaigns and activities in order to support not only irregular migrants, but also all the people who assist them through humanitarian actions. Human rights defenders, citizens and the EU Parliament are demanding for clearer and fairer distinctions between smugglers and people who act for humanitarian purposes, for the introduction of humanitarian exemptions in all MS national laws and for the ending of hate campaigns aiming at considering migrants as a threat to security and their defenders as criminal themselves.

[155] European Parliament (2018). Resolution n. 2018/2769 of 5 July 2018. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0314+0+DOC+PDF+V0//EN

CHAPTER III: The Italian scenario between deterrence and criminalization

Due to its strategic position in the Mediterranean Sea, Italy has been the subject of many controversial stances concerning the management of migration flows, especially in recent years, when a pronounced anti-immigration campaign has been linked to security issues and used for electoral purposes. The securitarian approach towards immigration in Italy is long-standing; yet, the public perception of the matter changes depending on the orientation of the current political power towards it. However, it is possible to notice as in very recent years the hate campaign has strengthened and a worrying criminalization rhetoric has increased, also towards individuals and NGOs providing humanitarian assistance to undocumented migrants. This chapter aims at showing and analysing some landmark cases and examples of criminalization (including all deterrent factors such as legislation, public discourses, intimidations, administrative sanctions, and penal measures) that help draw a picture of the current Italian posture towards irregular migrants, asylum seekers and who intends to help them.

3.1. Legislative Framework

3.1.1. A restrictive and securitarian approach

The Italian law that deals with immigration in a comprehensive manner is the Legislative Decree n° 286/1998, called "Consolidated text of provisions governing immigration and the status of the alien" (*Testo Unico*).[156] The first law adopted in order to regulate subjects such as entry, stay, expulsions, the right of asylum and refugees' status was called "law Martelli" (n. 39, 28th February 1990); it was amended by the law "Turco-Napolitano"[157] in 1998 - merged with the *Testo Unico* in the same year -, that rationalised the existent provisions by overcoming the emergency approach, still without producing substantial changes in matters of asylum. It also created the "Centri di Permanenza Temporanea" (CPT), where asylum seekers could be held for a period up to 30 days if they were unable to

[156] Law n. 286/1998 of 25 July 1998.
[157] Law n. 40/1998 of 6 March 1998.

provide the necessary personal information. In 2002 the law "Bossi-Fini"[158] amended the *Testo Unico* introducing restrictive measures on entry and stay of irregular migrants: the permit for residence of immigrants is strictly linked to a work contract; this means that at the entrance on the territory, the authorities must record the fingerprints of each migrant, in order to understand if he/she has a contract, otherwise he/she is considered "illegal" ("clandestini") and must be therefore returned. Undocumented migrants could be detained in the CPT for up to 60 days in order to be identified and then returned to their country of origin. The law also introduces 4-years imprisonment for persons who return after being expelled (Art. 13 "Bossi-Fini"). Moreover, an immigrant who is stopped and found with identity document but without a residence permit would be accompanied to the border and expelled immediately. The provisions concerning the immediate and forced expulsion at the borders made controversially legitimate the push back of migrants at sea, if the Military ships found them coming from countries that stipulated some agreements with Italy, as Libya did. This cost to Italy a condemn coming from the European Court of Human Rights in 2011, since forced repatriation constituted a violation of the principle of freedom from torture and inhuman treatment enshrined in Art. 3 of the European Convention on Human Rights.[159]

In Italy, the migration issue has always been treated as a problem for security and public order. After the "Bossi-Fini", this aspect became even clearer with the "security package", a group of legislative measures adopted between 2008 and 2009, under the Berlusconi Government. The whole "package" has been considered extremely restrictive and excessively based on the conception of immigration as a destabilizing factor for the society, with the result of a relevant limitation of foreigners' rights.[160] In particular, these laws included:

- the classification of "clandestinity" as an aggravating criminal circumstance (Art. 1 of the law 125/2008 amended the penal code adding to the Art. 11*bis*

[158] Law n. 18/2002 of 30 July 2002.
[159] ECtHR (2012). Application n. 27765/09. *"Hirsi Jamaa and Others v. Italy*, judgement of 23 February 2012.
[160] BIONDI DAL MONTE F., BOIANO I., DI MARTINO A., RAFFAELLI R., (2013). p.9. "The criminalization of irregular migration: law and practice in Italy". Pisa: Pisa University Press.

"l'avere il colpevole commesso il fatto mentre si trova illegalmente sul territorio nazionale")[161] and the worsening of sanctions connected to the facilitation of stay (Art. 5 of the law 125/2008);

- the introduction of the crime of providing lodgings to an immigrant without a residence permit[162];
- the expulsion for all immigrants, even EU citizens, who are sentenced to more than two years' imprisonment (Art. 235 criminal code);[163]
- the introduction of the possibility to detain migrants in the CIE (Centres of Identification and Expulsion) for a period up to 180 days, the creation of a fund to enforce return procedures and the introduction of the crime of irregularly entry or stay on the Italian territory.[164]

Finally, the law n° 129/2011 strengthened the practice of immediate forced deportation of irregular third-country nationals for public order reasons, and the extension of the maximum term of detention in a CIE from 6 to 18 months.[165]

3.1.2. Legislative criminalization

Irregular entry and stay

The crime of irregular entry and/or stay on the national territory has been introduced by the law n° 94/2009 (15th July 2009) aiming at amending some provisions of the Italian penal code within the domain of public security. The legislator added the Article 10-*bis* ("Ingresso e soggiorno illegale nel territorio dello Stato") to the *Testo Unico,* officially criminalizing the entry ("fa ingresso") and the stay ("si trattiene") of an irregular migrant with a fine from up to 10.000€:

> Salvo che il fatto costituisca più grave reato, lo straniero che fa ingresso ovvero si trattiene nel territorio dello Stato, in violazione delle disposizioni

[161] With the sentence n° 249/2010, the Italian Constitutional Court sentenced the constitutional illegitimacy of Art. 61, paragraph 11-bis of the Italian penal Code, indicating "clandestinity" as an aggravating criminal circumstance. The provisions was therefore declared inconsistent with Article 3 (principle of equality and non discrimination), and Art. 25(2) (punishment based on conduct not on personal qualities) of the Constitution.
[162] Law n. 125/2008 of 24 July 2008.
[163] Idem.
[164] Law n. 94/2009 of 15 July 2009.
[165] Law n. 129/2011 of 2 August 2011.

> del presente testo unico nonché di quelle di cui all'articolo 1 della legge 28 maggio 2007, n. 68, è punito con l'ammenda da 5.000 a 10.000 euro. Al reato di cui al presente comma non si applica l'articolo 162 del codice penale.[166]

According to this criminal provision, migrants found to be irregularly on the territory should have been taken to trial and fined to be afterwards expelled. The provision has been highly criticized by both intellectuals and legal experts, which point out the uselessness of the introduction of a penal crime, since:

- in most of the cases the imposed fine would not be effective, because migrants sentenced to pay these sanctions have no money or assets to be seized;
- it has no justification, since it overlaps completely with the administrative measure of the expulsion of the foreigner (and it is consequently double expensive). In fact, from the moment of ascertaining the irregularity two parallel procedures start, the penal and the administrative one, both aimed at expel the foreigner from the Italian territory;[167]
- the introduction of the crime aggravates the inefficiency of the penal system (and of the judges of peace), without producing real social utility.[168]

Moreover, with the sentence 78/2007 the Italian Constitutional Court had already denied that the status of irregular migrant could constitute a basis for social danger in itself.[169] The provision was therefore declared discriminatory, in contrast to the constitutional guarantee of criminal punishment only linked to material facts and not to individual conditions. Despite the criticism, the provision became law in

[166] See Article 1, paragraph 16a, law 94/2009 of 15 July 2009.
[167] SAVIO G. (2016). ASGI, "Le buone ragioni per abrogare il reato di clandestinità: un atto necessario e di onestà". Available at: https://www.asgi.it/notizie/buone-ragioni-abrogare-reato-clandestinita/
[168] ZAGREBELSKY G., RODOTA' S., and others (2009). "Appello di giuristi contro l'introduzione dei reati di ingresso e soggiorno illegale dei migranti". Available at: http://www.giuristidemocratici.it/Immigrazione_Asilo/post/20090625115421?page=1
[169] "A parere del rimettente, il cennato principio di diritto determinerebbe, in violazione del precetto costituzionale della finalità rieducativa della pena, un regime penitenziario speciale e di sfavore nei confronti di un insieme di persone condannate, vale a dire i cittadini stranieri irregolarmente presenti nel territorio dello Stato, individuati, non già sulla base di indici rivelatori di una particolare pericolosità sociale - secondo modalità già sperimentate nell'ambito dell'ordinamento penitenziario - quanto sulla scorta di un dato «estrinseco e formale», quale il difetto di titolo abilitativo alla permanenza nel territorio dello Stato."

2009; in the following years, data would have shown that this criminalization did not have an effective deterrent effect, since incoming migratory flows increased (especially in 2011 and 2015 after Middle-East political and humanitarian crises). After 5 years, with the law n° 67 of 28th April 2014, the Parliament delegated to the Government for the decriminalization of a series of crimes, including the one of *clandestinità*, within 18 months from the entry into force of the law.[170] The law prescribed to turn this crime in an administrative sanction, but it has never been enforced by the Government, with the result that irregular entry and stay in Italy is still a penal crime.[171] This shows the lack of political will of the Italian Government (both left-wing and right-wing parties) to change the criminalizing orientation towards migration, which is clearly not considered as a priority of the political agenda. At the contrary, recent legislative developments (see paragraph 3.5) confirm the tendency of considering undocumented migrants as a public threat to national security, through the implementation of intimidatory and hostile practices and the consequent disregard of the need to opt for a more human rights-based approach.

Facilitation

The facilitation of irregular migration (in Italian "favoreggiamento dell'immigrazione clandestinà") is punished under criminal law with both administrative and custodial sentences. First of all, facilitation in general terms - which includes the help that a person could give to a second individual accused of any kind of crime, favouring that he/she escapes justice, hiding or polluting the evidence of the crime committed - is punishable under Art. 378 of the Penal Code.[172] Facilitation of irregular migration is defined in details by Article 12 of the *Testo Unico* since 1998 (law "Turco-Napolitano") called "disposizioni contro le immigrazioni clandestine"; paragraph 1 punishes who promotes, organizes,

[170] See Article 2(3b), law n° 67, 28th April 2014.
[171] INNOCENTI P., 2018. "Aspettando la depenalizzazione del reato di clandestinità". Available at: http://www.liberainformazione.org/2018/06/17/aspettando-la-depenalizzazione-del-reato-di-clandestinita/
[172] See Article 378 of the Italian Penal Code.

coordinates, finances or realizes the irregular entry of undocumented migrants with a fine of € 15,000 for each person and imprisonment from 1 to 5 years:

> Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l'ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da uno a cinque anni e con la multa di 15.000 euro per ogni persona.[173]

Moreover, paragraph 3 of Art. 12 specifies that, if some specific aggravated circumstances occur[174] (such as the facilitation of entry of 5 or more people, the torture of the victims, the use of weapons, etc.) the years of imprisonment would be from 5 to 15 years. Facilitation of stay is included in paragraph 5, which punishes with a fine of 15.493€ and imprisonment up to 4 years whoever, in order to take unfair advantage of the illegal status of a foreigner, favours the stay of a him/her in the territory of the State. Through the introduction of the "unfair advantage", the legislator seems to limit the punishment to only who acts being aware of the vulnerable position of the migrant, leaving space - in a way - to acts of solidarity humanitarian in nature. Art. 5-*bis* punishes whoever would rent an accommodation in return of an "unfair" financial profit to a foreigner lacking of stay permit with a 6 months to 3-years imprisonment, and it does not include any exemption. The Supreme Court clarified the meaning of "unfair profit", saying that, to be liable, the landlord should be conscious about imposing particularly onerous and exorbitant conditions on the migrant.[175]

It is possible to notice that, while the punishment of facilitation of stay depends on the presence of a profit in return, the legislation does not require it to punish facilitation of entry (and it is therefore in breach of the international UN Smuggling Protocol); this undermines the important juridical distinction between smuggling and assistance provided with a humanitarian purpose. Nevertheless, Article 12(2)

[173] Law n. 286/1998 of 25 July 1998.
[174] Ibidem, Art. 12(3).
[175] Italian Court of Cassation (Penal Section). Judgment n. 597/2013, 24 April 2013.

of the *Testo Unico* provides an explicit exemption to first aid and humanitarian actions carried out to support migrants in need[176]; it also refers to Art. 54 of the penal code, which prevents from punishment who has committed the fact having been forced by the necessity of saving oneself or others from the current danger of serious harm to the person.[177] The existence of a humanitarian exemption is comforting but apparently not sufficient to limit or stop pervasive delegitimizing campaigns addressed to humanitarian actors who provide help, especially NGOs working with rescue at sea.

3.2. NGOs at sea: from helpers to criminals

3.2.1. The Context

The Mare Nostrum search and rescue mission (that saved more than 156,362 people in 2014) was launched by Prime Minister Letta after the large-scale shipwreck in which 359 people died off the coast of Lampedusa, on the 3rd October 2013. After the ending of the operation in October 2014, due to lack of a coordinated EU support based on a responsibility-sharing approach, the number of deaths in the Mediterranean increased again drastically.[178] In November 2014, Mare Nostrum was replaced with the Frontex-coordinated Joint Operation Triton that - in line with the adoption of the new securitarian European Agenda on Migration - was mostly focused on a militarization of border controls. Moreover, Triton had an operating budget of less than one third of that of Mare Nostrum (from 9 to 3 million per month) and a narrower patrol range that restricts its activities to Italian waters (while Mare Nostrum extended its actions until international waters). In fact, after the increasing boat tragedies occurring in the Mediterranean Sea, the United Nations High Commissioner for Refugees expressed its concerns since 2015, by defining Triton as inadequate to face the current challenges, due to its lack of resources and mandate to save lives at sea. UNHCR also called on European

[176] "Fermo restando quanto previsto dall'articolo 54 del codice penale, non costituiscono reato le attività di soccorso e assistenza umanitaria prestate in Italia nei confronti degli stranieri in condizioni di bisogno comunque presenti nel territorio dello Stato."
[177] See Article 54 of the Italian Penal code.
[178] BARAT F., HAYES B., KENNY S., MACCANICO Y., (2018). p.8. "The shrinking space for solidarity with migrants and refugees: how the European Union and Member States target and criminalize defenders of the rights of people on the move". Transnational Institute, Amsterdam.

governments to work in concert to address the issue of people fleeing wars via the Mediterranean, in order to avoid the death of hundreds people who try to reach Europe.[179]

Meanwhile, in May 2015 the EU launched the military operation Sophia "European Union Naval Force Mediterranean" (EUNAVFOR Med), aiming at disrupting the business of human smuggling and combating trafficking networks in the Central Mediterranean through the seizure of vessels engaged in the business. Even though rescues are contemplated, the clear priority of the operation is to apprehend smugglers. Recent developments concern the Operation Triton replaced in February 2018 by Operation Themis: its focus is on assisting Italy in borders control, cracking down on criminal activities, and rescue migrants, leaving the decision on disembarkation to the country coordinating a particular rescue (and not automatically to Italy as Triton "ruled"). However, none of these operations have search and rescue as their primary goal, indeed, compared to Mare Nostrum, the focus is on the protection of EU borders, and the patrol range is much more limited. [180] Meanwhile, NGOs are the sole actors operating with the priority of saving lives at sea and extending their monitoring in international waters.

3.2.2. Political hostility vs. evidence

The idea that Search and Rescue (SAR) activities carried out by NGOs were a "pull factor" for refugees was disseminated by politicians around Europe and afterwards repeated by both Frontex and European institutions, which began to make the link between life-saving operations in the Mediterranean and the increasing influx of migrants based on alleged smuggling activities. The accusation of acting as pull-factor had been already addressed to Mare Nostrum;[181] otherwise, the idea of NGs

[179] UNHCR (2015). "UNHCR urges Europe to recreate a robust search and rescue operation on Mediterranean, as Operation Triton lacks resources and mandate needed for saving lives." Available at: https://www.unhcr.org/news/press/2015/2/54dc80f89/unhcr-urges-europe-recreate-robust-search-rescue-operation-mediterranean.html

[180] SCHERER S., (2018). "In new EU sea mission, ships not obliged to bring migrants to Italy". Available at: https://www.reuters.com/article/us-europe-migrants-italy/in-new-eu-sea-mission-ships-not-obliged-to-bring-migrants-to-italy-idUSKBN1FL62M

[181] Council of The European UNION (2015). p. 37. "Final report on Joint Operation "MOS MAIORUM", n° 5474/15. European Union, Brussels.

colluding with smugglers was at the beginning confined to semi-conspirator and often far-right groups.[182] Public hostility increased after the publication of an article in the Financial Times in December 2016 by Frontex, that accused NGOs of colluding with smugglers, position that was then consolidated in its publication of Risk Analysis in 2017.[183] As reported by Médecins Sans Frontières (MSF), in late 2016 also politicians and officials in some EU Member States (especially Italy, Belgium and Austria) made serious allegations in the media, affirming that dedicated and proactive Search and Rescue operations also contribute to a deterioration of maritime safety by increasing the number of death and missing in the central Mediterranean.[184]

Trying to reply to these accusations, MSF led a comparative analysis based on periods before and after the involvement of humanitarian vessels in maritime rescue, corroborating findings with two other studies concerning migrants' mortality at sea and search and rescue operations.[185] Together, the three studies came to very similar outcomes, providing evidence against the accusations made towards NGOs. Concerning the first allegation: analysing trends in all attempted sea crossings comparing equivalent periods of Mare Nostrum, Triton-only and NGO humanitarian vessels (adjust for seasonal variations), it is possible to notice that the attempted sea crossings (which include people who died, missing, arrived and rescued by the Libyan coast guard) in the Triton-only period was already 44% higher than during Mare Nostrum, while from the Triton to the NGOs vessels period attempted sea crossings were only 1.6% higher. This shows that there is no evidence about the link between SAR operations and pull-factor dynamic.[186] Moreover, while Frontex and other actors blamed the NGO SAR assets' presence close to the

[182] See for example GEFIRA at https://gefira.org/en/2016/11/15/caught-in-the-act-ngos-deal-in-migrant-smuggling/.
[183] FRONTEX (2017). "Risk analysis for 2017". Frontex, Poland.
[184] ARSENIJEVIC J., MANZI M., ZACHARIA R. (2017). p.7. "Are dedicated and proactive search and rescue operations a "pull factor" for migration and do they deteriorate maritime safety in the Central Mediterranean?". Operational Research Unit (LuxOR), Luxembourg.
[185] See https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/border-deaths and https://blamingtherescuers.org/report/
[186] STEINHILPER E., GRUIJTERS R. (2017). "Border Deaths in the Mediterranean: What We Can Learn from the Latest Data". Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/03/border-deaths

Libyan coast for causing a shift in smugglers' practices towards more dangerous conditions of crossing, the report of "blaming the rescuers" shows that shifting strategies were already recorded by EUNAVFOR MED in 2015, and described as a consequence of the anti-smuggling operation. It is also fundamental to take into consideration the fragmented political landscape in Libya that strongly shapes the dynamics of the central Mediterranean smuggling; main changes in recent years concern the shift in composition of migrant nationalities, the increasing involvement of militias in the business, and the increasing interventions of the Libyan Coast Guard (following pressures and agreements with EU countries). All these factors have contributed to a downward spiral in the practices of smugglers and a clear deterioration of crossing conditions over 2015 and 2016; however, they have not been included in the analysis of Frontex, which mostly blamed the operate of NGOs, contributing to the toxic narrative against them.[187] Hence, relating to the second accusation, data show that the mortality rate in the central Mediterranean route is inversely proportional to the presence of SAR activities carried out by NGOs: in 2016 they have been the most important actor leading the 26% of rescues, followed by the Italian Navy (21%), the Italian Coast Guard (20%), EUNAFOR MED (17%), Frontex (8%) and merchant ships (8%). The period with the humanitarian vessels (from May 2015 to December 2016) was associated with a 59% improvement in maritime safety (decrease in number of died and missing people) compared to the Triton-only period.[188] Therefore, the important life-saving role of NGOs' SAR is undeniable:

> it appears clearly that NGO SAR vessels were not the *drivers* of shifts in smugglers' practices, but rather sought to *respond* to them. Their deployment close to the Libyan coast was made necessary by the increasingly dangerous conditions of crossing, and may have in turn consolidated some of the smugglers' new tactics – as indicated by the "parallel" developments of SAR NGO presence and the decreasing use of satellite phones. Over the period of the peak deployment of SAR NGOs however, the mortality rate was substantially reduced. Our analysis thus reveals that, contrary to the claim made by Frontex and others, SAR NGOs have made the crossing safer."[189]

[187] HELLER C., PEZZANI L. (2017). "Blaming the Rescuers: Report". Available at: https://blamingtherescuers.org/report/
[188] ARSENIJEVIC J., MANZI M., ZACHARIA R. (2017). pp. 12-14.
[189] HELLER C., PEZZANI L. (2017).

3.2.3. Investigations and de-legitimation

As seen in the previous paragraphs, Italian law does not provide a specific "rescue" exemption for facilitating entry, and in the previous decade, two main prosecutions in particular questioned Italy's compliance with the international law of the sea. The crew of the German NGO rescue ship Cap Anamur were arrested in Agrigento for bringing 37 African migrants to Sicily in June 2004, after been rescued in international waters close to Libya. They were investigated for alleged smuggling activities due to circumstances considered suspicious (like the 10-day period that separated the day of rescue from the day of communication to Italian authorities). Public Prosecutor Office accused the defendants of facilitating illegal entry with the material benefit of gaining international publicity. Defendants were finally acquitted in October 2009; they were excluded from criminal responsibility enshrined in Article 51 of the Criminal Code, since they acted under a state of necessity.[190] A similar process occurred to 7 Tunisian fishermen arrested in 2007 for bringing 44 migrants they had rescued to Lampedusa. They too were acquitted in 2009, even though the 2 captains were convicted of resistance to a public officer for ignoring orders not to enter the harbour, they were hence sentenced to prison and their boats confiscated. Even though in both cases was finally recognized the humanitarian principle of intervention, the events had a wide appeal to the general public - opening a debate about humanitarianism - and prosecutions unequivocally had a strong deterrent effect on boat rescues. [191]

After more than 10 years from Cap Anamur case, and especially in the last two years, in Italy NGOs engaged in search and rescue in the central Mediterranean have been again at the centre of aggressive discredit campaigns, being accused of collaborating with human traffickers and of being part of the migration "business" in order to enrich themselves. A landmark event is represented by the seizure of the German NGO Jugend Rettet's rescue ship *Juventa* in August 2017, when it docked at Lampedusa. The Prosecutor of Trapani Ambrogio Cartosio ordered the seizure

[190] Court of Agrigento (Criminal division). Case N. 3267/04 R.G.N.R., Judgment of 7 October 2009.

[191] EDMOND-PETTITT A., FEKETE L. , WEBBER F. (2017). p.9. "Humanitarianism: the unacceptable face of solidarity". The Institute of Race Relations, London.

of the vessel and the judiciary accused the NGO of cooperating with smugglers during three rescue operations: the first on the 10 September 2016, the second and third on 18 June 2017. The Iuventa was alleged for being used to "aiding and abetting illegal immigration" by sailing close to Libyan waters, arranging the direct handover of migrants by smugglers and also returning 3 empty boats to them for re-use. The NGO strongly denied all the accuses and it also applied for the return of the ship, but the Trapani court rejected the request in September 2017. The Prosecutor finally found that there was no evidence of collusion between the NGO and Libyan smugglers and that operations conducted by the vessel were carried out for humanitarian reasons only.[192] However, the discredit campaign and the seizure of the ship - lasted for more than one year - deeply damaged the image and the operational effectiveness of the ONG.

A similar episode happened to the Spanish NGO Proactiva Open Arms which was also involved in a dangerous circumstance with the Libyan coastguard: on 15th March the IMRCC alerted the boat Open Arms about a shipwreck in international waters, 73 nautical miles from the Libyan coast. They responded and rescued 117 people from a first dinghy and found a second empty one. They were ready to rescue other 101 passengers from a third boat when the Libyan coastguard intervened, threatening to shoot the crew if they didn't "return" the migrants to them. Seen the unlawful threatening methods and considering the high risk of human rights violations, Open Arms refused to turn over the 218 rescued people to the Libyan coastguard, which left after two hours stand-off.[193] After docking at Catania on 18th March, the vessel was seized by the Italian authorities, headed by Prosecutor Zuccaro; shortly after, the captain, the mission leader and the Director of the NGO were accused by the judiciary of criminal conspiracy and of facilitating illegal migration. In April 2018, the judge of preliminary investigations of Ragusa ordered that the ship be returned to Proactiva Open Arms and ruled that the organization's actions were legitimate affirming that Libya were not respecting fundamental rights, and so migrants would have been at risk of human rights violations. Yet, the

[192] OHCHR (2018). p. 3. "Communication Report, AL ITA 2/2018". Geneva, Switzerland.
[193] BARAT F., HAYES B., KENNY S., MACCANICO Y., (2018). p. 11.

crew remained under investigations until June 2018, when Zuccaro dropped all charges against the NGO; investigations conducted against the NGO Sea-Watch 3 after the disembarkation of 47 migrants in Sicily ended with the same conclusions from the judiciary. [194]

Very recently (November 2018) also Aquarius, the search and rescue vessel of the NGOs SOS Méditerranée and Médecins sans Frontières, has been seized and the crew accused from the Catania Prosecutor of irregular waste disposal at sea. Once again, all accuses have been dropped by the Tribunal in February 2019. [195] So far, the absence of evidence related to the accuses addressed to different SAR NGOs seem suggest that behind all these obstructive measures there are clear political strategies (which, as it will be shown, reflect also Italian international policies). Workers and volunteers of NGOs are all expressing their disappointment and their exhaustion given by unceasing attacks which perfectly show the criminalization tendency in Italy and Europe towards humanitarianism. Karline Kleijer (supervisor of emergencies for MSF) claimed:

> Medici senza Frontiere condanna con forza la decisione delle autorità giudiziarie italiane di sequestrare la nave Aquarius per presunte irregolarità nello smaltimento dei rifiuti di bordo. Una misura sproporzionata e strumentale, tesa a criminalizzare per l'ennesima volta l'azione medico-umanitaria in mare. Dopo due anni di indagini giudiziarie, ostacoli burocratici, infamanti e mai confermate accuse di collusione con i trafficanti di uomini, ora veniamo accusati di far parte di un'organizzazione criminale finalizzata al traffico di rifiuti. È l'estremo, inquietante tentativo di fermare a qualunque costo la nostra attività di ricerca e soccorso in mare.[196]

3.3. Recent legislative and political measures

[194] OHCHR (2018). p.3.
[195] See https://www.medicisenzafrontiere.it/news-e-storie/news/tribunale-del-riesame-nessun-traffico-illecito-di-rifiuti-sulla-nave-aquarius/?utm_source=nuovi&utm_medium=email&utm_campaign=nl-277&utm_content=&url_map=calltoaction
[196] MEDECINS SANS FRONTIERES, (2019). "Sequestro nave Aquarius. Inquietante e strumentale attacco per bloccare azione salvavita in mare". Available at: https://www.medicisenzafrontiere.it/news-e-storie/news/sequestro-nave-aquarius-inquietante-e-strumentale-attacco-per-bloccare-azione-salvavita-in-mare/

The attempt to criminalise and prevent the rescue activities of the NGOs, for most of whom has been impossible to continue their activities since summer 2017, should be viewed as part of a dual strategy by Italian and EU authorities to close off the central Mediterranean route from migrants, in a wide process of both externalization of border controls (see for instance the EU-Turkey deal of 2016 to return irregular migrants coming from the Balkan route) and the adoption of restrictive measures on the internal territory.

3.3.1. Externalization: The Memorandum between Libya and Italy

In line with the EU agenda of migration aimed at externalising border control and limiting migratory flows through agreements between countries of transit and destination, in February 2017 Italy signed a Memorandum of Understanding (MoU) with Libya on "development cooperation, illegal immigration, human trafficking, fuel smuggling and reinforcement of border security". The agreement, characterized by a prominent securitarian character, presents 3 main aspects which rose the concerns of Special Rapporteurs and Working Groups of the Office of the High Commissioner for Human Rights:

1) the Italian support for the creation of temporary reception centres for "clandestine" immigrants, under the exclusive control of the Libyan Ministry of Home Affairs. Not only this provision simplifies the complex migratory phenomenon by categorizing all migrants (also asylum-seekers) as undocumented, but also exclude any type of international monitoring presence;
2) the externalisation of borders aimed at stopping migratory movements towards Europe, which seems disregarding the documented human rights violations and abuses suffered by migrants in Libya, included victims and potential victims of trafficking. Through another communication to Italy[197], the OHCHR specifically addressed the risk for possible returns of migrants in violation of the principle of *non-refoulement*. The international community is aware that the ongoing conflict and insecurity in Libya have

[197] OHCHR (2017)a. "Communication report, UA ITA 1/2017". Geneva, Switzerland.

led to collapse of the rule of law since 2011, with increasing deterioration of human rights standards. Therefore, concerns are expressed about how MoU may result in increasing *refoulements*, condemning migrants to remain in conditions such as slavery, exploitation, arbitrary detention and torture;

3) the investments of Italian funds to support Libya in border control activities, headed by the border guard and the coast guard of the Ministry of Defence. These activities also include the fight against human trafficking and search and rescue operations. Related to this aspect, the OHCHR rises worries about the fact that Italy is *de facto* delegating SAR at sea to a State that may currently lack the capacity to properly carry out this duty in respect of human dignity and international standards.[198]

Hence, both human rights NGOs[199] and UN institutions express worries in relation to these measures of externalization, affirming that the European Union, and in this case Italy in particular, is not respecting its human rights obligations, since - due to its unstable political and social situation - Libya is not to be considered a third safe country at the moment; moreover, the general securitarian and criminalizing attitude towards undocumented migrants disregard the presence among them of (potential) asylum-seekers, entitled of fundamental rights under international law that States must respect and protect.

3.3.2. Code of Conduct

The enhancement of Libyan intervention for border control and SAR activities has a flip side: the de-legitimation and "rationalization" of humanitarian NGOs at sea, which resulted in an effective obstruction of their actions. On 4th July 2017, during the session of the European Commission, Italian Minister of the Interiors Minniti proposed a Code of Conduct for NGOs involved in rescue at sea. Together with other securitarian measures (such as supporting Libyan authorities, reducing the migratory pressure, financing the hotspot system and enforcing return procedures with more efficiency), the Action Plan adopted in that date by the European

[198] OHCHR (2017)b. pp. 2-3. "Communication report, AL ITA 4/2017". Geneva, Switzerland.
[199] AMNESTY INTERNATIONAL (2017). "Libya's dark web of collusion: abuses against Europe-bound refugees and migrants". Amnesty International Ldt, London.

Commission ("on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity") asked to the Italian Government to draft the Code in consultations with both the Commission and NGOs.[200]

Therefore, the Italian Government implemented the Code of Conduct on NGOs, imposing the deadline for the signature on the 31st July of the same year. The provisions that concern the most NGOs are:

- the commitment not to enter Libyan territorial waters (except in situations of imminent and grave danger requiring immediate assistance, but without interfering with Libyan SAR operations);
- the obligation not to make any communication or send light signals to promote the departure and embarkation of vessels carrying migrants, and in order to avoid contacts with potential smugglers or traffickers;
- the importance to declare to the competent authorities where the NGO is registered and all sources of financing for their rescuing activity;
- commitment to receive on board judicial police officers aiming at gathering information and evidence for investigations related to migrant smuggling and/or trafficking in human beings.[201]

NGOs believe the code represents a criminalization of their operations in the Mediterranean, and it also but also implies serious human rights concern. The OHCHR reported that:

> Some organizations, such as Médecins sans Frontières and Jugend Rettet, refused to sign the agreement on the grounds that it would grant Italian authorities additional power to control the work of NGOs and contribute to the smear campaign against them. As a result of the implementation of the Code of Conduct, most NGOs active in SAR operations have had to halt their activities and reported several episodes of intimidation and attacks against civil rescue organisations in Libyan territorial waters and on the high sea, as

[200] European Commission (2017)a. "Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity". European Commission, Bruxelles.
[201] Code of Conduct for NGOs undertaking activities in migrants' rescue operations at sea (2017). Available at: https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf

> well as against vessels carrying migrants. The absence of NGO vessels in the Mediterranean Sea has also led to an increasing information gap with regards to the situation of migrants at sea. Based on figures released by IOM, it is clear that the probability to drown while attempting to cross the Mediterranean Sea is much higher in 2018 than it was in previous years.[202]

Also ASGI (Associazione per gli Studi Giuridici sull'Immigrazione) condemns the initiative that is bringing to the adoption of the Code of Conduct, since it recognizes that it is part of a broader strategy aimed at blaming NGOs for exercising an active promotion of human rights in the context of migrations. In a paper focused on an analysis of the Code, ASGI firstly specifies as even if it was framed as a "voluntary" and "agreed" instrument, the top-down genesis of the document shows that in reality it consists in an attempt at exercising regulatory power by political authorities. Indeed, it also contains a threat of sanction (like the denial of access to Italian ports) for the boats of those NGOs which refuse to sign it or comply with it. Finally, they show how many rules contained in the Code are actually against international law provisions (especially the law of the sea), like for example the prohibition to foreign vessels to enter Libyan territorial waters and - which is possible if the purpose is to provide assistance to ships and people in danger, and the presence of Italian officials on foreign boats, which are under exclusive jurisdiction of the flag State.[203]

3.3.3. A political arm wrestling with Europe

As analysed in the previous paragraphs, the criminalization of the humanitarian work carried out by NGOs at sea has been successful, due to both discredit rhetorical campaigns led by political institutions and European agencies, both through jurisdictional accuses and investigations (none of whom has produced evidence). In particular, after the adoption of the Code of Conduct, the issue of NGOs boats leading SAR operations has been subject to a heavy political manipulation by the Italian Government, both for internal electoral purposes, both in order to challenge Europe with strong political messages.

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[202] OHCHR (2018). p. 4.

[203] ASGI (2017). "Position paper on the proposed 'Code of Conduct for NGOs involved in migrants' rescue at sea". Available at: https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf

In June 2018, the Italian Minister of the Interior and the Minister for Transport denied the docking of the humanitarian vessel Aquarius at Italian ports. The ship was carrying more than 600 migrants who were rescued at sea, including 123 unaccompanied minors, seven pregnant women and 11 children. Finally, after seven days at sea, the Aquarius was allowed to dock in Valencia (Spain). The Italian Government later declared the closure of all Italian ports for NGOs conducting SAR operations flying foreign flags. Moreover, on 28 June 2018 Italy and Malta denied NGO vessels (Open Arms, Sea Watch and Lifeline) access to dock at their ports, also if they were only in need of refuel or supplies.[204] Obviously, this decision led to a drastic reduction of search and rescue activities, significantly raising the risk of migrant deaths. In January 2019 also the German Sea-Watch carrying 47 migrants was refused to dock either in Italy and Malta; the crew and the rescued stayed on the boat for 19 long days, waiting to receive the authorisation to dock in a safe harbour, until when 7 European States agree to distribute migrants among their territories.[205] Many other examples could be made concerning similar occurrences.

However, the "closed harbours" policy has been also endorsed to prohibit the docking of a vessel of the Italian coastguard: on 20th August 2018, the ship Ubaldo Diciotti arrived at the port of Catania with 177 migrants on board. The migrants were rescued days earlier in an area of Malta's responsibility, but since the State has not signed some important international conventions (like International Convention on maritime search and rescue of 1979, SAR, and the International Convention for the Safety of Life at Sea of 1974, SOLAS), its coastguard is not obliged to intervene. Consequently, the vessel Diciotti was not allowed to dock following a dispute between Malta and Italy on whose responsibility they were. After docking in Catania, the people aboard the ship were blocked from disembarking directly on the orders of the Minister of the Interior Matteo Salvini. Based on the statements of the minister, the whole situation was "used" as leverage to put pressure and challenge the European Union to support Italy and engage in a

[204] OHCHR (2018). p.4.
[205] CAMILLI A., (2019). "I porti sono aperti, la SeaWatch attracca a Catania". Available at: https://www.internazionale.it/bloc-notes/annalisa-camilli/2019/01/31/seawatch-catania

management of migration based on shared responsibilities. After two days, prosecutors from Agrigento visited the vessel and decided to open an investigation – also against the Minister of the Interior, for abuse of office and aggravated abduction of people. The 27 unaccompanied minors were allowed to disembark that same evening, while the others could only leave 10 days after, when Ireland, the Catholic Church, and Albania agreed to accept the migrants on their territories.[206]

The need for institutional EU solutions

The most concerning aspect of this episode is that the formal reason why the Italian Government decided to act in that way was the intention to send a strong signal to the European Union, in order to show that Italy is "not willing anymore" to deal with the migration issue without receiving a fair support from the other European States. However, if it is true that Italy has always been subjected to a relevant burden due to its geographical position (together with Spain, Malta and Greece), and that a European policy based on solidarity among Member States is absolutely needed, the vulnerable condition of migrants should never be used as a pretext to hold and win the political arm wrestling that Italy is doing with the EU institutions. Such important issue must be discussed and solved at European level, and not with unilateral (and unlawful) decisions aiming at raising the internal electoral consent. Moreover, migrants cannot be used as a justification to disrespect human rights and international obligations: first of all, rescued migrants have the international right to reach a safe harbour as soon as possible, also to be able to potentially apply for asylum; secondly, as specified by ASGI, a generally accepted customary international rule provides to foreign vessels in distress the right to entry the ports of any State. Moreover, a ship in distress entering a port has to be considered as exempt from local laws, including also criminal law.[207]

Hence, if on one hand Italy is pushing limits about EU responsibility concerning the management of irregular migration by adopting securitarian and criminalizing measures (that finally endanger both migrants and humanitarian actors), the

[206] OHCHR (2018). p.5.
[207] ASGI (2017)b.

European Union is failing in providing a comprehensive approach aimed at sharing responsibility and solidarity among Member States, mostly because national Governments are still considering migrants either as a burden or a threat for the national identity and security. In particular, the method adopted during the European Council of June 2018 is showing all its inefficiency: the reception of migrants and asylum seekers on voluntary basis is bringing political uncertainty and leading to fundamental rights violations. Moreover, when dealing with this issue it is fundamental to start from an accurate analysis that takes into account the deep complexity of current migratory flows. For instance, it seems inappropriate and misleading the attempt to treat irregular migration and smuggling as separate issues, on the ground of a rhetoric that wants to separate "victims" from "criminals". Reality is much more intricate; so for example:

> Contacts between NGOs and the smuggling operators may happen in order to ensure the exact location of the migrants to be rescued. Humanitarian operations to save lives should not be characterised as assisting the smugglers. Just like the Red Cross is not accused of assisting the enemy when discussing with all parties to a conflict in order to identify prisoners of war, assist injured soldiers or reunite family members from whichever side.[208]

Also the European Union Agency for Fundamental Rights (FRA) remarks the recent trend of criminalizing NGOs engaged in SAR operations by the States of South Europe (especially Italy and Greece); in particular, it makes clear that legal actions against NGOs and volunteers based on domestic administrative or law must be always implemented in compliance with the international, Council of Europe, EU fundamental rights law and refugee law standards. This requires making the delicate and fundamental distinctions between real smugglers and those who engage to enforce the human rights moral imperative of saving lives at sea. It is important that national authorities and courts find a right balance between international and EU law, and the national interest of controlling and coordinating incoming migratory flows.[209] For example, the UNHCR guidance on search and

[208] HELLER C., PEZZANI L. (2017)

[209] EUROPEAN UNION AGENCY OF FUNDAMENTAL RIGHTS (2018). "Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations". Available at: https://fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities

rescue operations at sea of 2017,[210] which includes the non-penalisation of those taking part in humanitarian assistance activities, gives useful guidance in this regard.

3.4. Cases of internal obstruction towards humanitarian assistance and solidarity

The general hostile environment spreading in Italy towards migrants and people acting in solidarity with them is not only evident in relation to the criminalizing policies against NGOs working at sea, but also by looking at the antagonistic positions that some local and national authorities are taking towards associations and individuals who assist migrants. By considering the examples that I will present in the following paragraphs, it is possible to affirm that the attitude of Italian authorities denotes a general hostile and securitarian inclination towards experiences of integration of migrants or advocacy for their fundamental rights.

3.4.1. Ventimiglia

In August 2016, the Mayor of Ventimiglia Enrico Ioculano issued a municipal decree banning "non-authorized people" to provide migrants and asylum seekers with food or water. Ventimiglia, near to the French border, has always been (as many other borderlands) a place with a high number of migrants and a tense environment due to the presence Italian and French authorities controlling the border to prevent secondary movements. The provision ("divieto di distribuzione e/o somministrazione di alimenti e bevande nelle aree pubbliche da parte di persone non autorizzate") was specifically addressing volunteers who were offering food and water to migrants, recalling that their actions were not in respect of hygienic norms, and so that migrants could possibly risk food poisoning ("tossinfezione alimentare").[211] The decree established that, under Article 650 of the Penal Code,

[210] See UN High Commissioner for Refugees (UNHCR), 2017. "General legal considerations: search-and-rescue operations involving refugees and migrants at sea", November 2017. Available at: https://www.refworld.org/docid/5a2e9efd4.html

[211] Municipal Decree n° 129/2016 (Secretary of Mayor of Ventimiglia). Available at: http://ventimiglia.trasparenza-valutazione-merito.it/web/trasparenza/storico-atti/-/papca/display/3163879?p_auth=OyiirGR4

the infringement of those provisions were punishable with a fine up to 206€ and 3 months imprisonment. Moreover, the decree authorized only the Red Cross facility outside the town to provide basic services to migrants, but the informal camp was closed in the same period, after that the Minister of Interior Angelino Alfano visited the city and remarked the temporary mandate of the centre.[212]

Meanwhile, in May and July 2016, No Borders activists supporting an informal camp near the Red Cross camp were banished from the town by the local police chief emanating a *foglio di via* (requiring not to enter Ventimiglia for 3 years on) for more than 25 people who were protesting in solidarity with migrants.[213] Amnesty International condemned both these restrictive and criminalizing measures, considered excessive, both the decree aimed at deterring basic and fundamental forms of help and solidarity.[214] Moreover, in March 2017, three French activists of the association Roy Citoyenne were reported and brought to the police station for giving food to migrants who gathered in the city.[215] Many NGOs and exponents of the civil society (like Amnesty, MSF, Libera, Alex Zanotelli, etc.) reacted by signing an appeal[216] condemning this evident criminalization of solidarity and organizing some demonstrations in Ventimiglia. Following several protests, the Mayor of Ventimiglia decided to repeal the decree[217] and the charges brought against the French volunteers were dropped.

2.4.2. Udine and Como

On 13th June 2016, 7 volunteers operating with the NGO "Ospiti in arrivo" (incoming guests) in Udine - near the borders with Slovenia and Croatia - were accused of facilitating the irregular stay of undocumented migrants. The

[212] EDMOND-PETTITT A., FEKETE L., WEBBER F. (2017). p. 16.
[213] Ibidem.
[214] AMNESTY INTERNATIONAL (2016). "Ventimiglia: deplorevoli le iniziative assunte dalle autorità nei confronti di migranti e volontari". Available at: https://www.amnesty.it/ventimiglia-deplorevoli-le-iniziative-assunte-dalle-autorita-nei-confronti-di-migranti-e-volontari/
[215] EDMOND-PETTITT A., FEKETE L., WEBBER F. (2017). p.17.
[216] PEPINO L., DAHON R., REVELLI M., HERROU C.and Others. (2017). "Per la solidarietà, contro l'intolleranza". Available at: http://roya06.o.r.f.unblog.fr/files/2017/04/ventimiglia-30-aprile-appello-e-adesioni.pdf
[217] Municipal Decree n° 85/2017 (Secretary of Mayor of Ventimiglia). Available at: http://ventimiglia.trasparenza-valutazione-merito.it/web/trasparenza/storico-atti/-/papca/display/3163869?p_auth=EDH3muI1

humanitarian association had always been active in providing basic support to migrants in need, especially after the higher incoming flows of 2013. These volunteers were investigated because they were occupying public places, operating in an abandoned factory that became a place where homeless people and irregular migrants used to spend their nights; moreover, the "unfair profit" - according with the allegations of the Udine Public Prosecutor - was represented by the possibility to receive donations from the population ("5 per mille"), which is actually one of the few means that a NGO has to financially support its initiatives.

"Ospiti in arrivo" decided to launch an online petition to denounce the criminalization of voluntary work and solidarity, organizing a crow-finding to financially support the legal expenses of the trial,[218] with an appeal[219] that reminds the one included in the "Manifeste des délinquants de la solidarité" of 2003 (see paragraph II.V.I). The association received a wide support from the civil society and many NGOs, showing that the public opinion shared the humanitarian values of the solidarity acts towards migrants and indigents. In May 2016 the NGO received a notice of completion of preliminary investigations, and in March 2017 the magistrate Emanuele Lazzaro has accepted the request of the Public Prosecutor Claudia Danelon ordering the dismissal of the proceedings, emphasizing in its provision the considerable activism of the members of the NGO, the absence of unjust profit and of evidence concerning the responsibility of volunteers in relation to the occupation of the buildings. The magistrate also recognized that the aims of the association were humanitarian in nature, and that actually their actions were

[218] RAVELLI G. (2016). "Solidarietà ad Ospiti in Arrivo: arrestateci tutti!". Available at: https://www.change.org/p/governo-italiano-solidariet%C3%A0-ad-ospiti-in-arrivo-arrestateci-tutti

[219] "Se donare soccorso, vestiti, scarpe, coperte e cibo a persone abbandonate per strada dalle istituzioni [...] è un reato, allora noi tutti ci dichiariamo pubblicamente colpevoli. Arrestateci tutti! Se accogliere e accompagnare alla Caritas i richiedenti asilo è un reato, allora siamo tutti complici. Arrestateci tutti! Se fornire 'precise indicazioni sulla procedura di riconoscimento dello status di rifugiato' è favoreggiamento dell'immigrazione clandestina allora tutti noi avvocati, mediatori, giuristi, attivisti, giornalisti, operatori delle varie organizzazioni e associazioni di volontariato siamo colpevoli. Arrestateci tutti!"

facing the incapacity of the institutions to cope with the arrival of asylum seekers in Udine.[220]

2.4.3. Riace

On 1 July 1988, 300 migrants (in majority Kurds) arrived on the shores of Riace, an underpopulated village in Calabria. The Mayor Domenico Lucano, founding the association Città Futura ("city of the future"), began integrating these migrants into the community using abandoned spaces and focusing on providing jobs and opportunities to learn Italian. In 2006, the village received funds from the Region and launched a programme for urban renewal. Abandoned houses and shops were renovated for usage by the newcomers and a system of waste recycling was put into place. Since then, an economy of artisanal workshops has begun to flourish in Riace. The approach, which has been studied and appreciated all over the world as the "Riace model", has proven to be beneficial for both the hosting community, revitalized by economic and cultural activities, and the newcomers, who could express their potentiality by working in specific sectors.[221]

Domenico Lucano was arrested on 2 October 2018 as part of an investigation initiated by the Locri prosecutor eighteen months before. The precautionary measure of house arrest was ordered for preliminary investigations by the judge Domenico Di Croce. The accusation was to facilitate illegal immigration and to organize fraudulent custody of the waste collection system to two cooperatives in the area. As made clear by a note published by the Public Prosecutor of Locri, the allegation of facilitating irregular migration was based on irregularities of the national funds that Riace was receiving for hosting asylum-seekers, and some telephone tappings that revealed the intention of the Mayor to organize a marriage ("marriage of convenience") between a citizen of Riace and an asylum-seeker to

[220] OSPITI IN ARRIVO (2017). "Archiviato il procedimento sui volontari di Ospiti in Arrivo". Available at: https://ospitinarrivo.org/4109/archiviato-procedimento-sui-volontari-ospiti-arrivo/

[221] OSCE (2017). "A Global village". Available at: https://www.osce.org/magazine/334986

give her the chance to stay on the Italian territory.[222] Beside the administrative irregularities - upon which only the judiciary can rule-, what matters in the scope of this study is the hostility that some public political figures showed to the Mayor and to the Riace experience in overall.

The "Riace model" represented an alternative reception pattern aiming at giving value to cultural differences and integration, and already for the strong symbolic power it had (the model was admired also abroad and Mr. Lucano became an important icon of solidarity and hospitality) it was seen with suspect by some institutions and anti-immigration parties (such as "Lega Nord"). So for instance, the chief of the League Party and Minister of Interior Matteo Salvini clearly referred to Domenico Lucano as a "zero", celebrating (inappropriately) for the accuses against him as he was one of the principle political enemy of the Government;[223] yet, even though the administrative irregularities have to been investigated, it is destabilizing to see how a personality like Lucano who were acting with humanitarian purposes and who has always been very engaged in combating the organized crime in his Region, is now treated somehow as a criminal and an enemy of the State. However, this institutional attitude has to be seen as an instrumentalization of the pending proceeding which is part of a wider hostility based on discredit and criminalization of experiences of integration. In light of this, the decision of the Minister of Interior to relocate some 200 migrants from Riace to different centres and to dismantle the SPRAR of the town seems a political act more than a practical necessity, aiming at destroying completely the proof that that sort of hospitality and integration really happened.[224] While waiting for the trial, the civil society, NGOs and also some political actors have expressed solidarity to the Mayor, in order not to let go the heritage of the multicultural functioning experience of Riace, which remains a strong symbol of solidarity among nationals and migrants.

[222] D'ALESSIO L., (2018). "Il comunicato della Procura di Locri sull'arresto di Domenico Lucano". Available at: https://www.ciavula.it/2018/10/comunicato-procura-locri-sullarresto-di-lucano/

[223] FAZIO G. (2018). "Storia breve di Domenico Lucano e del Modello Riace, la via alternativa per i migranti finita sotto accusa". Available at: https://www.agi.it/cronaca/riace_sindaco_lucano_arrestato_migranti-4439298/news/2018-10-02/

[224] ASGI (2018). "Il caso di Riace e il rispetto dei valori della Costituzione". Available at: https://www.asgi.it/notizie/il-caso-di-riace-e-il-rispetto-dei-valori-della-costituzione/

3.5. New immigration laws: a continuum between 2017 and 2018

The recent legislative provisions adopted in the domain of migration do not represent a change of direction, at the contrary they strengthen the link between migration and security and they actually imply the reduction of migrants' rights. The Law Decree of February 2017 (converted into law in April 2017) called law "Minniti-Orlando"[225] (at the time Ministers of the Interior and of Justice) and entitled "urgent provisions for the acceleration of proceedings in the field of international protection and for the fight against illegal immigration" follows a securitarian orientation towards the migration topic, which is mostly considered as a problem. The main critical points are:

1) The extension of the number of Centres of identification and Expulsion (CIE) from four to twenty, all over the national territory. The centres will be called Centres for Repatriation (CPR), with a total of 1,600 seats (Art. 19);
2) The creation of first-level courts specialized with judges who majored at the Higher School of the Magistracy. The 12 district courts created can only deal with cases of asylum application (Art.1);
3) The right to appeal after the rejection of the asylum request in first-instance is abrogated (Art. 7);
4) The abolition of the hearing: judges would take vision of the videotape of the interview of the asylum seeker before the territorial commission. (Art. 35-bis comma 8)

Even though the aim of the law seems to be the acceleration of the asylum procedures, which is undoubtedly needed, this cannot happen through a reduction of migrants' rights. NGOs and legal expert expressed their concerns in relation to the provisions, which actually imply a discrimination in rights between asylum seekers and Italian citizens, especially for the abrogation of the rights to appeal (which is in violation of the constitutional principles outlined by the Constitutional

[225] Law n. 46/2017 of 13 April 2017.

Court over the years) and the absence of a face-to-face hearing. Moreover, the elimination of the need for a hearing with the appellant is in violation of European regulations on procedures, which state that an appeal includes a complete, non-retroactive examination of all factual and legal elements (Art. 46 of Directive 2013/32/EU).[226]

In line with this 2017 law, also the Law Decree adopted in October 2018 (and converted into law 1st December 2018, n° 113) clearly places migration within the security field, as made explicit by the first part of the title "urgent dispositions in the field of asylum, immigration and public security".[227] The provisions concerning the management of asylum requests and migrants' rights reflect one more time a restrictive policy; here the main points:

- Cancellation of asylum protection on humanitarian grounds (*permesso umanitario*), which covered cases such as homosexuals fleeing countries with anti-LGBT laws; the Italian government will only grant asylum to refugees of war or victims of political persecution - in compliance with the UN Refugee Convention - and hand out special permits of a maximum one-year duration (Art. 1);
- Extension of duration of detention of migrants in the CPT for their identification, from 90 days to a maximum of 180 days (Art. 2);
- The introduction of new crimes that lead to the withdrawal of the political asylum application - after a conviction in the first instance - and to immediate expulsion. The offenses are sexual violence, theft, dealing and aggravated injuries to a public official;
- Changes in the reception of asylum seekers: the new rules weaken the network of local integration programmes attributed to the SPRAR System, that from now on can only hosts those whose asylum requests have been accepted and unaccompanied minors (Art. 12).

[226] ASGI (2017)a. "Il D.L. 13/17: le principali ragioni di illegittimità". Available at: https://www.asgi.it/wp-content/uploads/2017/03/2017_3_17_ASGI_DL_13_17_analisi.pdf
[227] Law n. 113/2018 of 1 December 2018.

Looking at these main provisions, it seems clear that there is a political will to restrict the rights and freedoms of individuals and to create new forms of social tension and discrimination: first of all, many migrants entitled of the humanitarian protection may find themselves in an unstable irregular situation; secondly, the decision to reduce the functions of SPRAR centres and give more responsibilities and seats to the extraordinary reception centres - which are either aimed at the expulsion of the individual (CPT), either they do not have the resources to guarantee good standards of reception (CAS) - risks to destroy good practices of integration, dismantling the network of workers and civil society that act in solidarity with migrants.[228]

3.6. Final Considerations

After going through recent episodes, legislative developments and the public rhetoric, it is surely possible to affirm that the Italian attitude towards migrants and NGOs dealing with them is not encouraging: the securitarian approach is highly predominant compared to a human rights-based one, the migration issue is still strongly instrumentalized by political representatives (especially in relation to ideas of "emergency", "invasion" and threat"), and individuals and NGOs acting in solidarity with migrants by providing humanitarian assistance are currently subjected to a criminalization campaign which is heavily making it harder for them to continue their activities for the protection of human rights. Investigations and verbal accuses made by politicians and judges towards NGOs leading search and rescue operations at sea is probably the most evident proof of the existence of discredit campaigns aiming at de-legitimising their activities, and it reflect the worrying tendency of giving priority to (populist) political purposes to the detriment of international and human rights obligations. If the political and judicial authorities do not clearly distinguish smugglers from helpers, keeping in mind the complexity of the current phenomenon (where many dynamics are displaying in response to

[228] ASGI (2018). "Manifeste illegittimità costituzionali delle norme del decreto-legge 4.10.2018, n° 113 concernenti permessi di soggiorno per motivi umanitari, protezione internazionale e cittadinanza". Available at: https://www.asgi.it/wp-content/uploads/2018/10/ASGI_DL_113_15102018_manifestioni_illegittimita_costituzione.pdf

inappropriate and dangerous European migration policies), the risk is to criminalize humanitarian actors and put in danger many people on the move. As specified by many Special Rapporteurs of the OHCHR concerning the Italian situation,

> We are concerned at reports alleging multiple attacks, including judicial proceedings and defamation campaigns, implemented by the authorities against migrant rights defenders, including journalists, individuals criticizing the Government for its management of migrant arrivals and civil society actors engaging in rescue operations at sea and providing life-saving humanitarian assistance on land. We are additionally concerned that these measures allegedly intend to circumscribe the activities and dissuade civil society, journalists and individual human rights defenders from carrying out their legitimate and necessary activities to provide humanitarian aid to migrants. We are deeply concerned with the "chilling effect" these attacks and measures could have on migrant rights defenders and on civil society in general. Ongoing attempts to restrict SAR operations by NGOs risk endangering thousands of lives by limiting rescue vessels from accessing the perilous waters near Libya. Smear campaigns against migrant rights defenders and NGOs as well as their criminalization further contribute to the stigmatisation of migrants and refugees, fuelling their stigmatization and reinforcing xenophobia in Italy.[229]

The "chilling effects" are already showing among the society, which is sometimes exhausted by the hostile Government policies aiming at devaluing and dismantling experiences of solidarity and integration on the territory. We saw different measures of deterrence - either administrative, penal or verbal - actualized by political institutions and judiciary authorities, addressing various volunteering experiences dealing with the provision of basic services (like in Ventimiglia), the advocacy of migrants' rights (as happened in Udine and Como), and the promotion of integration among different cultures (like the Riace and the SPRAR experiences). The feeling of being abandoned by national institutions is spreading among humanitarian actors, such as the group of volunteers part of the Baobab experience, an association born in Rome in 2015 in order to face the increasing income of migrants and the inefficiency of the national reception system. According to the website, more than 70,000 people have passed through the camps set up by the Baobab association - supported by means donated by the citizens - and received medical care, food,

[229] OHCHR (2018). p.7.

overnight accommodation, and legal assistance. They are mostly migrants in transit to other European countries or asylum seekers in Rome, where they are forced to wait about a month and a half in the street before they can access the legal practices.[230] So, even though this network of citizens supplied to the lack of efficiency of the State, the latter have often expressed its hostility towards their initiatives, in particular by authorizing continuous evacuations of the camps (they acknowledge there have been 28 in total)[231], mainly for questions of "public order", sometimes with unexpected interventions and without providing for proper alternatives and accommodations.

To conclude, even though the civil society is demonstrating to be very active and engaged in providing help to migrants, deterrence measures are adopted constantly by the authorities, that behave on the ground of hostility towards these forms of solidarity. At the contrary, these experiences should be considered useful and fundamental for the sustainability of the system, because the civil society often intervenes when the national State is not capable of coping with the situation, and by doing so it contributes to the creation of a more united, safe and human society.

[230] See https://baobabexperience.org/about-us/

[231] BAOBAB EXPERIENCE (2019). "28° sgombero di Baobab Experience – post in aggiornamento". Available at: https://baobabexperience.org/2019/01/17/28-sgombero-di-baobab-experience-post-in-aggiornamento/

Conclusions

The analysis conducted during this research makes it possible to formulate various final considerations about the increasing processes of criminalization of irregular migrants and people assisting them. In particular, I would like to draw two main kinds of conclusions: firstly, I will address some socio-cultural aspects, proposing reflections about the meaning and the consequences of the nexus between migration and security; secondly, I will present some jurisdictional considerations about the need to reform the European and Italian legal framework concerning the management of facilitation of irregular migration and forms of humanitarian assistant towards undocumented migrants.

The need for a cultural switch

It has been shown how, especially since the late '80s, the European Union promoted the building of policies aiming at strictly controlling migratory flows and combating illegal migration, using as justification the need to guarantee the internal security. The nexus migration-security has then permeated the society, strengthening the cultural believe according with migrants are mostly a threat to the national identity and economy, therefore primarily a problem to deal with. This misleading conception - still dominant in the society -, together with a general lack of knowledge (or political will to be informed) about this complex phenomenon, deeply shaped the EU and national policies concerning its management. In particular, the predominance of a securitarian approach towards migration instead of a human rights-based one, is given by the mix of a public rhetoric aimed at criminalizing irregular migration and the adoption of EU policies based on the assumption that the security of European citizens depends on a strict regulation of incoming migratory flows. Securitization of migration and its criminalization are therefore strictly linked to each other, since through the security justification authorities feel more entitled to treat the issue of irregular migration with measures belonging to the criminal sphere.

However, the adoption of criminal lens to deal with such a multifaceted phenomenon risks to reduce its complexity and disregard many fundamental aspects that should be taken into consideration in the process of policy-making. For example, the reasons why so many people in these years undertook dangerous trips to cross the Mediterranean and reach Europe in an irregular way; or the complex profile of the smuggler, which keeps "adapting" to the changing dynamics of migrants' routes; or finally the difference between big smugglers who take unfair advantage of migrants and NGOs or individuals who act in solidarity with migrants with humanitarian purposes only. In fact, concerning the criminalization issue, the problem of punishing the facilitation and consequently possibly struggle in distinguish it from humanitarian assistance, is strictly interconnected with the criminalization of irregular migration itself.

First of all, it's worth keeping in mind that the irregular status derives from a series of legal administrative circumstances and not from the singular intention of committing a crime. In this regard, the definition of an irregular migrant as "illegal" is not only dehumanizing and preventing a fair debate on migration policies, but it is also misleading and incorrect from the legal point of view, since being undocumented is not an offence against persons or national security, so it originally belongs to the domain of administrative law. Hence, I believe that the criminalization through civil or penal sanctions of irregularity itself is philosophically and juridically inappropriate and harmful, since it seems to interpret and use the punishment not in a rehabilitative way, but in an exclusionary perspective. Therefore, in Italy as in the majority of European States, a deep change of direction regarding the management of this administrative irregularity is absolutely needed, in order to remove the spectrum of threat and danger around migrants, and to leave space to engaged and genuine policies aimed at addressing the phenomenon in all its complexity and with respect to international human rights standards.

Therefore - as deeply examined in chapter II -, labelling the entry and stay of migrants as illegal results in the possible criminalisation of anyone who intends to

help them. The way this subject is addressed under EU law, as facilitation of entry and/or stay of irregular migrants on the European territory, has demonstrated to be highly controversial. Firstly, because the Facilitators Package, aimed at defining and punishing the facilitation of illegal migration, was intended to regulate and cover the smuggling subject in accordance with the UN Smuggling Protocol, but it actually does not comply with it. In fact, the Package does not specifically require the element of financial or material benefit to be punishable, which means that even who facilitates the irregular entry of a migrant for humanitarian reasons (without any gain and/or exploitation) might be punished; additionally, the provision leaves total discretion to Member States concerning the introduction of specific exemptions to the facilitation of entry if carried out for humanitarian purposes (by saying "any Member State *may decide not to impose sanctions"*, it actually does not really encourage States to take action in this direction). Clearly, this legislative situation is not sustainable and not in line with the international standards. We should deeply question this point by remembering that humanitarian assistance to human beings should never be confused or considered as a criminal offence. From this point of view, the migration management is particularly delicate and controversial: are we punished for facilitation of poverty if we offer money to a poor person? NGOs carrying out SAR operations at sea are paying the price for this alarming criminalization campaign against them: despite they are moved by the humanitarian intention of saving lives, they operate thanks to volunteers and donations, and they actually supply to the lack of European rescue operations contributing to the fundamental reduction of deaths in the Mediterranean Sea, they are strongly discredited and criminalized by politicians, journalists and some judicial authorities.

This has become particularly dramatic after the adoption of a more marked European and Italian strategy based on the externalization of borders controls. Agreements such as the EU-Turkey (2016) and the Memorandum between Italy and Libya (2017) about the control of incoming migratory flows, are integral part of the systematic European migration policy made of all the measures aimed at "selecting" by distance only specific categories of migrants entitled of accessing the European

territory (see the VISA Schengen System, the Return Directive, Frontex, the Facilitation Directive, etc.). But with these agreements in particular, based on the provision of financial support to third concerned countries in exchange of a stricter control of their borders aimed at reducing the number of irregular migrants reaching Europe, Member States put in practice a sort of criminalization of the right to move exercised by people who don't have enough means to travel legally and safely to Europe. Moreover, they present controversial and concerning aspects, since Turkey and Libya cannot be considered third safe countries at the moment, so the fact that Europe is delegating to them the management of the irregular movements of migrants and asylum seekers imply the breach of international law (principle of *non-refoulement*) and severe human rights violations.[232] This current set of things leads to the worsening of SAR NGOs working conditions, since - due to the wide and general criminalization - it became easier to address them with the accuse of being "pull factors", in a context where every rescue operation may be compromised by alleged contacts with the (criminalized) main enemies of Europe: illegal migrants and their smugglers. In this logic, rescue of lives and humanitarianism in general are under attack, in an upside-down rhetoric that is transforming the value of humanity, by turning victim and helpers in criminals.

It is extremely hard to find comprehensive and sustainable solutions for an issue that is mainly perceived as a threat and linked to the criminal sphere. Criminalization of irregular migrants, and consequently of those who engage with them, is not an answer; at the contrary, it endangers vulnerable categories and leads to human rights violations. A deep socio-cultural shift concerning the overall securitarian way that the society and the politics adopted to address the migration issue is not only desirable, but absolutely necessary to produce a fair and open debate about the topic and promote long-term sustainable policies, in respect of international human rights standards.

[232] AMNESTY INTERNATIONAL (2017).

Legal conclusions and policy recommendations

From the legal point of view, it is surely possible to draw some recommendations concerning the need to reform the current EU legal framework in this field. In particular, the Facilitators Package presents significant ambiguities and inconsistencies with International law. Its general objective was to contribute to the fight against irregular migration, by penalising the aiding of unauthorised transit, entry and residence in the EU, in relation to the United Nations Protocol against the Smuggling of migrants by land, sea and air of 2000 - that provided a common definition of migrant smuggling. The study "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants" commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee in 2016[233] (and updated in 2018) has shown the controversial aspects of the EU law. First of all, the lack of clarity of rules over the humanitarian assistance provided to migrants that is leading to worrying forms of criminalization of solidarity; secondly, the indirect or unintended repercussions that it has not just for irregular migrants and those assisting them, but also for citizens and the social cohesion of the receiving society as a whole, through the feeding of a general climate of fear and insecurity (see paragraph 2.7.2).

In this regard, both Institutional and Non-Governmental Organization call the EU Commission to modify the Facilitation Directive in order to be consistent with the UN Smuggling Protocol[234] and increasing criminalization, in particular by taking the following actions:

- the introduction of a "financial gain or other material benefit" as requirement to punish the facilitation of entry, since it is a necessary aspect

[233] CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M. (2016). "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants". European Union, Bruxelles.

[234] It is important to remember that the intention of the UN Smuggling Protocol, as explicitly specified in the *Travaux Préparatoires,* was to exclude from criminalization the activities of family members or support groups such as religious or non-governmental organizations that provide humanitarian assistance to migrants (see paragraph 2.3).

for defining and address the smuggling of migrants and consequently avoid the criminalization and the prosecutions of actors and Organizations that operate for humanitarian reasons only;

- the qualification of the financial gain element for all forms of facilitation to encompass only "unjust profit" or "unjust enrichment", in order to address exclusively smugglers with criminal intentions, and exclude activities conducted by civil society, family members, and bona fide service providers without the intention to profit of migrants;
- to make mandatory upon EU Member States the exemption of humanitarian assistance from criminalisation in cases of entry, transit and residence. Civil society actors providing humanitarian assistance to irregular migrants should be always exempted from criminalization, which should not be discretional to MS anymore;
- with specific case-by-case focus, "humanitarian assistance" should be intended and interpreted in line with the broad definitions included in the EU Fundamental Rights Charter, in the European Consensus on Humanitarian Aid[235] and in the UN Declaration on human rights defenders[236], in order to protect all groups and activists who are upholding human dignity and related fundamental rights of refugees and migrants.[237]

In overall, the entire legislative system should ensure that criminalisation is primarily justified by protection of the life, physical integrity and dignity of migrants. This means that the rationale for criminalisation should be the prevention of harm to those assisted, and not general deterrence. However, as result of an evaluation made by the European Commission in 2017 in order to assess efficiency and coherence of the Facilitators Package, the working group concluded that the legal framework should be maintained in its present form, while waiting for the

[235] European Commission's Humanitarian Aid department (ECHO), (2007). "The European Consensus on humanitarian aid".
http://ec.europa.eu/echo/files/media/publications/consensus_en.pdf
[236] UN GENERAL ASSEMBLY (1999). Resolution A/RES/53/144.
[237] CARRERA S., VOSYLIUT L., SMIALOWSKI S., ALLSOPP J., SANCHEZ G., (2018). pp.109-110. "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update". European Union, Bruxelles.

effects of the implementation of the Action Plan against migrant smuggling. So, even though concerns about the risk of criminalisation of humanitarian assistance have been assessed and reported, the Commission stated that evidence is limited and the information collected through a variety of sources do not allow to draw an accurate picture of rates of prosecutions and convictions of civil society actors facilitating irregular border crossings or transit for reasons of humanitarian assistance.[238] If the creation of a platform collecting and reporting comprehensive and comparable public data about the effects of the Facilitators Package is surely needed, the position of the Commission is here quite disappointing and inadequate; in fact, as reiterated by the European study conducted in 2018[239] and the Guidelines adopted by the EU Parliament the same year,[240] evidence about criminalization of humanitarianism is already highly reported, and the necessity to amend the provisions of the Facilitation Directive is clear and shared among institutions and the civil society.

Finally, Member States should assume a shared position about the reform of the Dublin Regulation, creating a more sustainable system based on shared responsibilities and real collaboration among all EU States. The conclusions of the Council in June 2018, establishing a system of voluntary based reception of irregular migrants and asylum seekers (see paragraph 1.8), do not represent a sustainable long-term solution; at the contrary, considering for example the cases of search and rescue NGOs waiting for days at sea for docking in a safe harbour, it is clearly leading to inefficiency and breaches of international and human rights law. The political will of States seems to focus mostly on the control of external borders and the reduction of the "illegal" migration. However, national interests and the securitarian rhetoric, still spreading and predominant among MS, must leave the place to a deep commitment of all States in sharing responsibilities and

[238] EUROPEAN COMMISSION (2017)b. "REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)". Available at: http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf

[239] CARRERA S., VOSYLIUT L., SMIALOWSKI S., ALLSOPP J., SANCHEZ G., (2018). pp.109-110.

[240] EUROPEAN PARLIAMENT (2018).

solidarity: it is not only a political necessity, but a strong moral imperative. In this perspective, many proposals of reform of the Dublin system can be taken into considerations (see paragraph 1.9); a more "European" system would also reduce the burden that border States such as Malta, Italy and Greece have to deal with in the reception and rescue of migrants, possibly leading to a change in the securitarian and criminalizing perception of migrants as a threat.

Italian case: some recommendations

The analysis conducted during this research concerning the recent and current Italian position towards irregular migration and humanitarianism, shows a progressive exacerbation of both political and judicial forms of criminalization of solidarity towards migrants. First of all, from the legislative point of view, the irregular entry and stay on the national territory is still a crime, punished under Article 10-*bis* of the *Testo Unico* with a fine from 5.000€ up to 10.000€. In spite of the numerous critics concerning its uselessness (it does not work as a deterrent) and its high justice costs, irregularity has not been decriminalized yet. Therefore, the Government should enforce as soon as possible the request of the Parliament (law n.67 of 28/04/2014) to turn this crime into an administrative sanction, in order to avoid the overlap with the expulsion measure, to unburden the justice system and to stop considering people as "illegal" and "criminals" for their administrative status. Facilitation of irregular migration is harshly punished too, with a fine up to 15.000€ and from 1 to 5 years-imprisonment (Art. 12 of *Testo Unico*); however, the same Article provides an explicit exemption to first aid and humanitarian actions carried out to support migrants in need. This shows that the discretionary power given by the Facilitation Directive about including an exception for humanitarian actors has been positively welcomed; yet, it is not refraining political and judicial authorities from prosecuting NGOs and individuals who have always acted in solidarity to migrants with humanitarian purposes only. Hence, the provision should receive more attention and be interpreted in a broad and dynamic way, otherwise many important actors - such as SAR NGOs - won't be able to operate anymore.

In practice, the overall Italian picture shows a general high criminalization trend concerning both irregular migrants and people engaging with them. There are several actions that the Italian Government should undertake in this regard:

- the obstructive criminalizing rhetoric towards SAR NGOs must immediately end, since it is turning helpers in criminals, increasing hostility towards these humanitarian actors and blocking (through prosecutions, discredit campaigns and the consequent fall of donations) their fundamental operation of rescue, leading in this way to greater death rates. Moreover, the Code of Conduct should be revised: its existence could only be justified by the purpose of assuring the protection of rescued people and supporting the NGOs in their operations, and not by the intention to restrict their intervention possibilities, exercising an intimidatory pressure based on the assumption (not supported by evidence) of existing "collaborations" with smugglers;
- as reported by many Special Rapporteurs of the OHCHR[241], the Memorandum of Understanding signed in 2017 between Italy and Libya raises great concerns about risks of human rights violation since Libya cannot be considered a safe country for asylum-seekers at the moment, and the agreement may imply violations of the *non-refoulement* principle. The life of migrants and asylum-seekers, entitled of specific rights under international law, should never be put consciously at risk by States that must respect their human rights obligations. Hence, the controversial agreement should be dismissed, unless Libya and Italy - with the support of the EU - commit in monitoring the situation periodically and make sure that no violations occur (which is highly improbable since the unstable Libya current situation);
- the Italian Government should answer to the Communication 2/2018 of the Special Rapporteurs,[242] and take concrete action to make sure that it is respecting its international human rights obligations concerning the protection of migrants rights defenders. Italy should also give information

[241] OHCHR (2017)b.
[242] OHCHR (2018).

to the OHCHR referring to the adverse implications of the new Decree on Immigration and Security on the rights of migrants, including victims or potential victims of trafficking in persons;

- finally, instead of challenging the European Union about the need to find alternative solutions by endorsing hostile unilateral measures (such as the closing of harbours to SAR NGOs), Italy should engage more in a fair and institutional debate at European level to promote the reform of the Dublin Regulation and to find a communitarian and sustainable solution to manage migratory flows, on the ground of shared responsibilities among all Member States.

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