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**USING CRIMINAL LAW TO RESTRICT THE WORK OF NGOS
SUPPORTING REFUGEES AND OTHER MIGRANTS IN
COUNCIL OF EUROPE MEMBER STATES**

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Expert Council on NGO Law of the
Conference of INGOs of the Council of Europe**

The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.

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I. Introduction

1. This thematic study considers the situation of non-governmental organisations carrying out humanitarian assistance and related work in support of refugees and other migrants in Council of Europe (CoE) Member States, and the extent to which any law that criminalises NGO activity and the enforcement of such law impacts on legitimate NGO activity.
2. The study assesses the standards relating to the treatment of NGOs applicable to CoE States, including Recommendation CM/Rec(2007)14 on the legal status of non-governmental organisations in Europe, and Recommendation CM/Rec(2018)11 on the need to strengthen the protection and promotion of civil society space in Europe, and particularly the expression of grave concern about ‘abuse of criminal or civil proceedings’, and the recommendation to Member States to ‘ensure that criminal, civil and administrative laws and procedures are not applied in a way that hinders and criminalises the work of human rights defenders.’
3. The study adopts a broad interpretation of “NGOs”¹ and also takes a wide approach to “humanitarian assistance”, the latter reflecting classic humanitarian assistance work as well as protection initiatives and the promotion of social cohesion. This encompasses both short and longer-term actions taken to save lives, alleviate suffering and maintain human dignity during and after natural or man-made crises and disasters, including actions to reduce vulnerabilities and promote and protect human rights. Humanitarian assistance is governed by the key humanitarian principles of: humanity, impartiality, neutrality and independence.²
4. The phrase “refugees and other migrants” is used throughout the study in recognition that some, though not all, individuals seeking to enter Europe will meet the Refugee Convention definition of refugee,³ and an individual’s status as a refugee does not depend on a state’s confirmation of that status. According to UNHCR, ‘As a matter of

¹ This study adopts the approach taken by the *Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2017)14 on the Legal Status of Non-Governmental Organizations in Europe*, 10 October 2007, which provides at I(1)-(4): ‘For the purpose of this recommendation, NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties. NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based. NGOs can be either informal bodies or organisations or ones which have legal personality. NGOs can be national or international in their composition and sphere of operation.’

² This approach to “humanitarian assistance” is adapted from UN General Assembly, Resolution 46/182: ‘Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations’, Annex, Guiding Principles, 19 December 1991; UN General Assembly, Resolution 58/114, 5 February 2004; ICRC, ‘Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief’, 1992; The Core Humanitarian Standard on Quality and Accountability, CHS Alliance, Group URD and the Sphere Project, 2014, at: <https://corehumanitarianstandard.org/>; Council of the European Union and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission ‘European Consensus on Humanitarian Aid’, Joint Statement, 2008/C 25/01, OJ C 25, 30 January 2008.

³ UN Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), Art. 1(A)(2).

international law, a person is a refugee as soon as the criteria contained in the definition are fulfilled. Recognition of refugee status is declaratory, that is, it states the fact that the person is a refugee. A person does not become a refugee because of recognition, but is recognized because he/she is a refugee.⁴

5. The term “criminalisation” refers to the practice of state legislators to enact legislation which determines particular acts or omissions to be criminal law offences.
6. The study pursued a mixed methodological approach involving i) an analysis of international law, standards and jurisprudence governing freedom of association, and wider applicable legal frameworks where relevant to the context, including human rights law, refugee law, as well as laws which prohibit trafficking in human beings and smuggling of migrants; ii) a review of the domestic legal frameworks operating in CoE Member States; and iii) how those legal frameworks were applied in practice.
7. The analysis of international law, standards and jurisprudence was undertaken by reviewing applicable treaties and other texts binding on CoE Member States as well as declarative and other soft law instruments, jurisprudence, statements by relevant expert bodies, academic treatises and commentaries.
8. An open-ended questionnaire was developed to facilitate the collation of information on the laws and practice of CoE Member States. This was used to direct the collation of primary and secondary information. It was also circulated for input through the CoE Conference on INGOs to all CoE Member States, the membership of the Conference on INGOs, national NGOs, to relevant CoE bodies, other international and regional organisations, as well as to policy institutes, academics, legal practitioners and others with relevant expertise or experience related to the subject matter of the study. Fifteen submissions were received from CoE Member States, including three submissions from national ombudsman and human rights institutions. This was complemented by submissions received from NGOs in eighteen CoE Member States, submissions from international NGOs as well as targeted input from CoE and EU bodies, policy institutes, academics as well as other international organisations.
9. The preliminary findings of the study were considered in two sessions of the Conference of INGOs as well as in a focus group consultation with national NGO experts from key countries held in Strasbourg in October 2019. The preparation of the study also benefited from the Conference of INGOs’ May 2019 fact-finding visit to Rome, Italy on civil participation in government decision-making processes.
10. The Expert Council on NGO Law decided to carry out this thematic study in light of the increasing resort to criminalisation of NGOs supporting refugees and other migrants by some CoE Member States, and in recognition of the close relationship between criminalisation of NGOs and restrictions on civil society space.

⁴ Kate Jastram and Marilyn Achiron, *Refugee Protection: A Guide to International Refugee Law* (UNHCR and IPU, 2001) 48.

11. The Expert Council is conscious of the important analyses already undertaken in this area by NGOs themselves; policy experts; other bodies within the CoE, including in particular, the Venice Commission, the Commissioner for Human Rights, the PACE Committee on Migration Refugees and Displaced Persons and the European Court of Human Rights; the European Union (EU), in particular the Council of Ministers, the Parliament, the Commission and the EU Agency for Fundamental Rights; UN specialised agencies as well as UN human rights special procedures and treaty bodies; and Member States, their parliaments and their judiciaries and national human rights commissions, among others.⁵ These various studies and processes are reflected and have been taken into account in the preparation of this study.
12. The Expert Council has also benefited significantly from and is grateful for the information received following its call for inputs and dissemination of its questionnaire. The Expert Council is equally grateful to the team of research students based at the University of Essex, United Kingdom and others who provided crucial assistance in compiling and analysing country information and in progressing related work.

II. Contextual overview

II.1 Patterns relating to the Influx of refugees and migrants to the territories of CoE Member States

13. The number of new arrivals to Europe of refugees and other migrants has increased dramatically in 2015 and 2016, though it has tapered off progressively since then. The influx was fuelled by protracted conflicts in Syria and Iraq and other parts of Asia and Africa and the very difficult human rights contexts in countries like Afghanistan, Iran and Eritrea. It also stemmed from the general instability and economic uncertainty in many additional countries spurring the movement of people in search of a better life.
14. Efforts within Europe to share the responsibility of receiving, processing and providing durable solutions for newly arriving refugees and others in need of protection have faltered, with the European Union and many governments pursuing policies of non-entrée;⁶ taking a variety of steps in conjunction with neighbouring and transit countries to make it increasingly difficult and in some cases virtually impossible for individuals to reach Europe.
15. The absence of accessible routes for refugees and other migrants to reach Europe, and the challenges inherent in European asylum systems has led individuals to seek out increasingly dangerous, irregular and expensive pathways. This has included unsafe sea crossings across the Mediterranean and equally precarious overland routes. Sea trajectories have at various times included the Western Mediterranean route through the Spanish enclaves of Ceuta and Melilla or through the Straits of Gibraltar; the Eastern

⁵ See Annex 2, Key Reports and Documents.

⁶ James C. Hathaway and Thomas Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence', (2015) 53(2) Columbia Journal of Transnational Law 235–85.

Mediterranean and Aegean route via Turkey towards Greece or the Central Mediterranean from Libya towards Italy. Overland routes include the Western Balkan route through Macedonia via Serbia or Croatia to Hungary or Slovenia and onward to countries in Western Europe, or from Albania via Montenegro to Bosnia and Herzegovina and onward to Croatia and Slovenia. These routes continue to evolve as states erect new barriers to entry and refugees and other migrants and those assisting them seek to find new viable points of entry.

II.2 Humanitarian and related challenges facing refugees and other migrants on route and upon arrival in CoE Member States

16. Many individuals have drowned in the Mediterranean,⁷ with European States taking a *de minimus* approach to search and rescue operations, an approach with the stated aims of discouraging unsafe migrant crossings and breaking the business model of smugglers and traffickers, but which appears to simply be about discouraging migration. Others have died on land routes,⁸ with yet others still encountering extreme forms of violence at the hands of traffickers, armed criminal gangs and some state officials, including slavery, torture and sexual violence.⁹ Also, some states have participated in “push-backs”, sometimes violent, sending some very vulnerable people who presented themselves at borders back to places where they face a real risk of serious rights violations including torture, in violation of the principle of non-refoulement (Bulgaria, Croatia, France, Georgia, Greece, Hungary, Italy, Poland, Lithuania, Serbia, Spain).¹⁰ The practice of “push-backs” has been condemned by the European Court of Human Rights.¹¹
17. Those who manage to arrive in Europe often face enforced “hostile environments” or institutional neglect, fuelled by routine detention, xenophobic public rhetoric and a denial of basic services by the states concerned.¹² At times, these measures appear at

⁷ IOM estimates that 2,299 people – or 6 persons per day – have died or gone missing at sea in 2018 while trying to reach Europe. The figures for preceding years are 3,283 (2014), 4,054 (2015), 5,143 (2016) and 3,139 (2017). See, IOM, Missing Migrants Projects (<https://missingmigrants.iom.int/>).

⁸ See, IOM, Missing Migrants Projects, *ibid.* Causes for deaths in Europe are explained as: suffocation, drowning, vehicle accident, hit by train and unknown. Causes for deaths in the Mediterranean are explained as: drowning, presumed drowning, hypothermia, dehydration and unknown. UNHCR has indicated that the number of deaths recorded along land routes at Europe’s borders is 144 (2015), 72 (2016), 75 (2017), and 136 (2018). See, UNHCR, ‘Desperate Journeys: Refugees and migrants arriving in Europe and at Europe’s borders, January - December 2018’, January 2019, 6.

⁹ UNHCR, ‘Desperate Journeys: Refugees and migrants arriving in Europe and at Europe’s borders’, *ibid.*

¹⁰ EU Agency for Fundamental Rights (FRA), ‘Fundamental Rights Report 2019’, 131. See also, PACE, Committee on Migration, Refugees and Displaced Persons, ‘Pushback policies and practice in Council of Europe member States’, Doc. 14909, 8 June 2019.

¹¹ *Ilias and Ahmed v. Hungary* (GC), Application no. 47287/15, 21 November 2019; *Hirsi Jamaa and others v. Italy* (GC), Application no. 27765/09, 23 February 2012; *M.A. and others v. Lithuania*, Application no. 59793/17, 11 December 2018; *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014; *N.D. and N.T. v. Spain*, Application nos. 8675/15, 8697/15, 3 October 2017.

¹² For the United Kingdom’s version of “hostile environment”, see House of Commons Home Affairs Committee, ‘Immigration Policy: Basis for Building Consensus’, HC 500 of session 2017–19, 15 January 2018, 20: ‘Many of the measures designed to make life difficult for individuals without permission to remain in the UK were first proposed in 2012 as part of a “hostile environment policy”. The aim of the policy is to deter

least in part, to be designed to encourage migrants to move onward, yet ironically there is nowhere for them to go. The minimum of material, physical and psychological protections, such as access to food, hygiene, protection from the elements and basic medicine, necessary to guarantee the basic dignity of new arrivals is often absent. Areas in which large numbers of arrivals have congregated – including so-called “hotspots” and other places with exceptional migration flows, in countries such as France, Greece, Italy, Bosnia and Herzegovina, the Serbia/Croatia border and Turkey have particularly significant gaps in official service provision. In some cases, poor infrastructure and limited governance capacities has led local officials to feel overwhelmed.

II.3 Support supplied by NGOs and the challenges of coordination with States and Intergovernmental organisations

18. Self-funded volunteers, autonomous solidarity movements and more established civil society groups have tried to fill some of the gaps in humanitarian protection to refugees and other migrants. Non-governmental organisations (NGOs) like Médecins Sans Frontières, SOS Méditerranée, Sea Watch, ProActiva Open Arms, Jugend Rettet, Sea-Eye, PROEMAID have been involved with search and rescue at sea in the Mediterranean. A much wider array of international, national and local NGOs and solidarity groups have provided support to people on land routes, at hotspots, camps, reception and detention centres. These groups have provided, *inter alia*, emergency healthcare, food, shelter, sanitation, distribution of warm clothing and related service provision. Other NGOs and lawyers’ associations have carried out monitoring of service provision and/or assisted with migrants’ access to rights, including support for asylum claims and advocacy to address gaps in services for particularly vulnerable people.
19. Coordination between different NGOs involved in service provision, can be complicated given the array of mandates, structures and modes of operation. Large humanitarian organisations will have quite advanced structures for coordination honed by years of working in complex emergencies whereas solidarity groups staffed primarily by volunteers with much looser organisational structures may have less experience with coordination, and consequently some have been kept outside of decision-making processes, despite the valuable services they provide.
20. Originally seen as allies providing vital support to states overwhelmed by the high volume of arrivals and often underprepared by the scale, complexity and immediacy of the tasks, this constructive relationship between states and NGOs has shifted in many states as a consequence of the hardening of anti-migrant policies. Some states have begun to suggest that NGO activities, particularly those involved in helping refugees and other migrants on route, serve as a kind of “pull-factor” - that NGOs are collaborating with

people without permission from entering the UK and to encourage those already here to leave voluntarily. It includes measures to limit access to work, housing, healthcare, and bank accounts, to revoke driving licences and to reduce and restrict rights of appeal against Home Office decisions. The majority of these proposals became law via the Immigration Act 2014, and have since been tightened or expanded under the Immigration Act 2016.’ As of June 2018, the Government referred to the policy as the ‘compliant environment’ policy. See, House of Lords, ‘Impact of “Hostile Environment” Policy Debate on 14 June 2018’, Library Briefing, 11 June 2018.

smugglers and somehow encouraging new arrivals, though there does not appear to be clear evidence for that contention: ‘Suspicion alone has had the effect of harming the reputation of certain organisations, and the civil society sector as such has reported decreasing public trust and donations’.¹³

21. Other states perceive civil society solidarity and support operations as a type of threat to national security, given the impact these groups are said to be having on states’ sovereign ability to control their borders. This is particularly the case for NGOs with strong advocacy traditions who will openly voice their concerns about government policies, NGOs involved with search and rescue at sea, support at border areas, and grassroots solidarity networks, who may be less inclined to follow government policies in cases where they are perceived to conflict with humanitarian principles. NGOs that have assisted vulnerable people to reach an international border, or even have helped with the preparation of asylum claims, have been perceived as the enablers of irregular or as some states refer to it, “illegal” migration.
22. In addition to the work of NGOs, global intergovernmental organizations like UNHCR, IOM, WFP, WHO and UNICEF and regional structures such as EU missions, EU regional task forces, and EU agencies such as the European Asylum Support Office, Frontex and Europol, typically work in conjunction with local governments – at times taking a primary role in administering service provision at hotspots and camps.
23. Coordination between NGOs and intergovernmental organisations can be equally complex. Many NGOs and solidary networks contacted in the course of the research for this study raised issues and challenges relating to the work of intergovernmental organisations, particularly at hotspot centres and other places with exceptional migration flows. It is typical for intergovernmental organisations to work with local or international NGOs who serve as their project implementing partners, but typically with those providing very specific services which may be needed from time to time and not with those who are perceived as being at risk of criminalisation.
24. Given their proximity to government, some intergovernmental organisations have been less inclined to work with NGOs carrying out advocacy or who have expressed opinions contrary to government. This has fostered divisions between NGOs and intergovernmental organisations and has meant that more vocal NGOs have been restricted in their ability to access some of the places where conditions are most precarious, such as hotspots, detention and processing centres. This issue of shrinking civil space for particularly vocal NGOs is symptomatic of more generalised trends within the CoE.¹⁴

¹³ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, ‘Update Study “Fit for purpose?” The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’, Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 24.

¹⁴ See, CoE Commissioner for Human Rights, ‘Human Rights Defenders in the Council of Europe Area: Current Challenges and Possible Solutions, Round-Table with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights, Helsinki, 13-14 December 2018’, CommDH(2019)10, 29 March 2019, para. 29. See also, FRA, ‘Challenges facing civil society organisations working on human rights in the EU’, 2017.

25. The inability for independent human rights NGOs to monitor hotspot centres and other places with exceptional migration flows has produced a gap in protection. This is a problem that has been reported in a number of countries, including Greece, Hungary and Italy.¹⁵ In Bosnia and Herzegovina, reports of ill-treatment by private guards paid by the European Union and other intergovernmental organisations,¹⁶ lack of medicines, deaths and inhuman conditions have filtered out of closed centres, and are a constant worry to solidarity groups who are unable to follow up with the centre management or the governments concerned.
26. Carrera, Mitsilegas, Allsopp and Vosyliūtė refer to the challenge of coordination between different sized NGOs, and between NGOs and intergovernmental organizations, and with government, and the resulting impact on NGO activities, in *Policing Humanitarianism*. Referring to difficulties with coordination at the “Hotspot” in Lesvos island, they note:

According [to] one EU agency, all the NGOs working in Lesvos were expected to attend coordination meetings organised by UNHCR. All the actors interviewed, from UN and EU agencies to national authorities and CSAs [civil society actors], repeated the mantra about the ‘importance to avoid overlaps and to be coordinated with other actors’. Whereas better coordination sounds a very well-intended and legitimate public policy aim, some of the CSAs attending these meetings saw such coordination as an ‘upper hand’.

An interviewee from an EU agency mentioned that they were also attending such meetings and gathering information about the number and activities of different NGOs and activists. A statutory actor meanwhile expressed a similar need to monitor the work of CSAs, stressing that ‘there are NGOs and “NGOs”!’ In this context, official calls for coordination emerged as a subtle form of policing civil society.

CSOs acknowledged cases of activists in disagreement with EU policies, doing what they felt to be humanitarian and morally right in helping migrants to leave the island in order to reach their family members in another EU Member State. In the hotspots, many CSOs, volunteers and UN actors thus came to work alongside national and EU authorities and increased monitoring of the law enforcement work. Meanwhile, several interviewees representing CSOs explained that they had been arbitrarily denied access at hotspot gates after witnessing and reporting mistreatment of migrants and refugees by the law

¹⁵ Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart, 2019), 84-86, 143-148

¹⁶ Feministički antimilitaristički kolektiv, Volonteri BiH, Inicijativa Jer me se tiče, 'No to further militarization of security forces – use the EU money to improve humanitarian conditions of the people on the move!', Open letter to Ambassador Sattler, Head of EU Delegation to BiH and EU Special Representative in BiH, 15 November 2019. The reply of Ambassador Sattler, 16 November 2019 is at: http://europa.ba/?p=66588&fbclid=IwAR3XppPx2NSGbZg1H7Au4_yY2b6pt0DCFnO5_KhI3yzA193hMH-olmf--0l+%C2%A0.

enforcement authorities. These CSOs felt ‘unwelcomed to the camps’, or even ‘not allowed to enter camps on “security” concerns’.¹⁷

27. Some NGOs have expressed concern that the EU appears to be providing significant additional aid for police and border security cooperation on controlling migration to both Member States on the outer borders of the EU and those third countries on migration routes towards Europe. Support for EU policies on border security cooperation appears to have entered into pre-accession discussions and related political and cooperation dialogues with neighbouring countries, and often at the expense of the active support of human rights.¹⁸

III. Criminalisation and Freedom of Association: The Applicable Standards

III.1 The legal basis to criminalise

28. In societies led by the rule of law, the purpose of the criminal law is to clarify the permissible standards of conduct within the society, and to punish individuals who cause harm to other individuals or to the society at large,¹⁹ through their disregard of those standards.
29. Criminal law limits the sphere of acceptable conduct in society and thereby has the potential to interfere with the enjoyment of certain rights. Therefore, in order to be consistent with the rule of law,²⁰ criminal law must be legitimate; it must have some basis in domestic law, and be enacted as part of a transparent, accountable and democratic process. The law must be adequately accessible and be formulated with sufficient precision to enable an individual to regulate his or her conduct, he or she being able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.²¹
30. If a legitimate aim for criminalisation of particular conduct can be found, it would also need to satisfy the test of being justifiable as necessary in a democratic society and it would need to be proportionate. The principle of proportionality requires the presence of convincing and compelling reasons corresponding to a pressing social need which can

¹⁷ Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart, 2019), 147 (footnotes omitted).

¹⁸ As advised by certain country experts in accession and pre-accession countries.

¹⁹ CoE Commissioner for Human Rights, ‘Issue Paper: Criminalisation of Migration in Europe: Human Rights Implications’, CommDH/IssuePaper (2010)1, 4.

²⁰ European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law, adopted by the Venice Commission at its 8th plenary session 25–26 March 2011, paras. 36, 41.

²¹ See, e.g., *N.F. v. Italy*, Application no. 37119/97, 2 August 2001; *Case of A, B AND C v. Ireland* (Grand Chamber), Application no. 25579/05, 16 December 2010, para. 220. See also, *Silver and others v United Kingdom*, App Nos 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75, A/61, (1983) 25 March 1983.

justify interference with and/or restrictions to rights.²² This entails a contextual assessment to determine whether the particular interference was ‘proportionate to the legitimate aims pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’; That a law is on the statute books but not implemented does not vitiate the interference.²³ Furthermore, the interference should not be inconsistent with a state’s international law obligations such as affording freedom of movement, the prohibition of refoulement and collective expulsion.

31. Criminalisation which is vague, or which casts an overly wide net over persons and behaviour which is outside the legitimate aim of the legislation would not be considered proportionate.

III.2 Principles relating to freedom of association and respect for the work of human rights defenders

32. The right to freedom of association is enshrined in Article 22 of the International Covenant on Civil and Political Rights and Article 11 of the European Convention on Human Rights and Fundamental Freedoms. It is also reflected in Article 12 of the Charter of Fundamental Rights of the European Union.

33. A range of additional instruments and guidelines underscore the importance of freedom of association. These include:

- *Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2018)11 on the need to strengthen the protection and promotion of civil society space in Europe*, 28 November 2018;
- Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014;
- *European Union Guidelines on Human Rights Defenders*, 2008;
- *Recommendation of the Committee of Ministers of the Council of Europe CM/REC(2017)14 on the Legal Status of Non-Governmental Organizations in Europe*, 10 October 2007;
- *The Fundamental Principles on the Status of Non-governmental Organisations in Europe*, adopted by multilateral meetings organised by the Council of Europe in 2001-2002;
- *The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)*, UN Doc. A/RES/53/144, 8 March 1999;
- *The Legal Status of Non-Governmental Organisations and their Role in a Pluralistic Democracy*, adopted at a Multilateral meeting organised by the Council of Europe on 23 - 25 March 1998.

²² *Erdođdu and İnce v. Turkey* (Grand Chamber), Application nos. 25067/94, 25068/94, European Court of Human Rights (8 July 1999), para. 47.

²³ See, *Norris v. Ireland*, Application no. 10581/83, 26 October 1988, para. 38.

34. In addition, the Expert Council on NGO Law produced the Compendium of Council of Europe Practice relating to the Right to Freedom of Association and the Position of Non-Governmental Organisations.²⁴
35. The right to freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. In its 2007 Recommendation on the Legal Status of Non-Governmental Organizations in Europe, the Committee of Ministers stressed ‘the essential contribution made by nongovernmental organizations (NGOs) to the development and realisation of democracy and human rights, in particular through the promotion of public awareness participation in public life and securing the transparency and accountability of public authorities, and of the equally important contribution of NGOs to the cultural life and social well-being of democratic societies’.²⁵
36. Freedom of association is recognised as a crucial right in any democracy. As the Grand Chamber of the European Court of Human Rights has held,

the state of democracy in the country concerned can be gauged by the way in which this freedom is secured under national legislation and in which the authorities apply it in practice. In its case-law, the Court has on numerous occasions affirmed the direct relationship between democracy, pluralism and the freedom of association and has established the principle that only convincing and compelling reasons can justify restrictions on that freedom.²⁶

III.3 The content of freedom of association vis-à-vis humanitarian NGOs’ ability to implement their mandates

37. The 1999 UN Declaration on Human Rights Defenders specifies that ‘everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels’ (Article 1). States must adopt measures to ensure this right.
38. The right to freedom of association is capable of being enjoyed individually and by the association itself in the performance of its activities and fulfilment of its mandate. And, as the OSCE/ODiHR and Venice Commission have set out, by virtue of the exercise of the freedom of association, ‘associations shall themselves enjoy other human rights, including the right to freedom of peaceful assembly, the right to an effective remedy, the right to a fair trial, the right to the protection of their property, private life and correspondence and the right to be protected from discrimination.’²⁷

²⁴ Expert Council on NGO Law, ‘Compendium of Council of Europe Practice relating to the Right to Freedom of Association and the Position of Non-Governmental Organisations’, Conf/Exp(2018)2, 30 June 2018.

²⁵ *Recommendation CM/REC(2017)14 on the Legal Status of Non-Governmental Organizations in Europe*, 10 October 2007, para. 2 of the Preamble.

²⁶ *Gorzelik & Ors v. Poland* (Grand Chamber), Application no. 44158/98, 17 February 2004, para. 88.

²⁷ Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 19.

39. There is a principle of ‘presumption in favour of the lawful formation, objectives and activities of associations’ and the principle of ‘freedom to determine objectives and activities, including the scope of operations’.²⁸ In this respect, the right to freedom of association protects both registered and unregistered associations.²⁹ Individuals involved in unregistered associations should be free to carry out any lawful activities, including the right to hold and participate in peaceful assemblies, and should not be subject to criminal sanctions for their participation in the lawful actions of such associations. This principle is also underscored by the OSCE/ODIHR and Venice Commission Guidelines: ‘All persons, natural and legal, national and non-national and groups of such persons, shall be free to establish an association, with or without legal personality.’³⁰
40. The UN Declaration on Human Rights Defenders outlines particularly the rights of individuals to form, join and participate in civil society organizations, associations or groups to promote or defend human rights, a key component of the right to association. It also articulates the importance that civil society organizations are able to freely exercise the rights to association and expression, including through activities such as seeking, obtaining and disseminating ideas and information; advocating for human rights; engaging in governance and the conduct of public affairs; accessing and communicating with international human rights bodies; and submitting proposals for policy and legislative reform at the local, national and international levels.
41. As has been noted by the Venice Commission and OSCE/ODIHR,

Freedom to act with regard to the rights and freedoms of third country nationals by democratic means, for example, by using advocacy and public campaigning, production of information materials, are the types of activities aimed at advancing democratically the issues of human rights and public interests. These activities, including specifically providing information and legal aid and assistance in relation to existing procedures for applying for asylum and on human rights-based arguments to lodge appeals and make full use of the appeal procedures (including before international bodies) are protected under international law, including the ECHR. Indeed, under international law states are obliged to ensure asylum seekers a system of effective judicial remedies.³¹

42. To enable individuals to carry out such activities, states must provide an adequate legal framework for the establishment of groups and organizations. States must take positive steps to ensure an environment that enables them to carry out their work without undue interference by the state or third parties, and ‘remove any unnecessary, unlawful or arbitrary restrictions to civil society space, in particular with regards to freedom of

²⁸ Ibid, Principles 1, 4, paras. 26, 29.

²⁹ UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’, UN Doc. A/HRC/20/27, 21 May 2012, para. 13.

³⁰ Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 28.

³¹ CoE Venice Commission and OSCE ODIHR, ‘Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which Directly Affect NGOs’, CDL-AD(2018)013, Strasbourg, 25 June 2018, para. 83.

association, peaceful assembly and expression’ and ‘ensure that the various forms of hate crime, including acts of violence, hate speech and public incitement to hatred and violence, are prohibited under national law, and take measures to prevent and combat cases of hate crime and hate speech, in particular by carrying out effective investigations with the aim of ending impunity’.³²

43. States should ‘explicitly recognise the legitimacy of human rights defenders, including NHRIs and civil society organisations, and publicly support their work, acknowledging their contribution to the advancement of human rights and the development of a pluralistic society’.³³ This is a positive obligation to guarantee the proper functioning of NGOs even when the government may not support the lawful ideas the organizations seeks to promote.³⁴ As the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has indicated, ‘The right to freedom of association obliges States to take positive measures to establish and maintain an enabling environment. It is crucial that individuals exercising this right are able to operate freely without fear that they may be subjected to any threats, acts of intimidation or violence, ... a media smear campaign, travel ban or arbitrary dismissal, notably for unionists.’³⁵ Furthermore, States must enable associations to seek, receive and use resources from domestic, foreign, and international sources.³⁶
44. In addition, there are provisions in treaties and other standard-setting texts which encourage or require States to work with NGOs in respect of a wide range of matters in order to attain the objectives of those treaties,³⁷ including in areas such as migrant smuggling³⁸ and trafficking in human beings.³⁹ For instance, in the Global Compact for

³² *Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2018)11* on the need to strengthen the protection and promotion of civil society space in Europe, 28 November 2018, Appendix I(c) and (d). See also, Appendix II(a)-(d).

³³ *Ibid*, Appendix 3(c).

³⁴ *Ouranio Toxo and Others v. Greece*, Applic. no. 74989/01, 20 October 2005, para. 37.

³⁵ UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’, UN Doc. A/HRC/20/27, 21 May 2012, para. 63.

³⁶ *Ibid*, para. 67. See also, UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’, UN Doc. A/HRC/23/39, 24 April 2013, paras. 8-42; *Recommendation of the Committee of Ministers of the Council of Europe CM/Rec(2018)11* on the need to strengthen the protection and promotion of civil society space in Europe, 28 November 2018, Appendix 1(i).

³⁷ See, Expert Council on NGO Law, ‘Compendium of Council of Europe Practice relating to the Right to Freedom of Association and the Position of Non-Governmental Organisations’, Conf/Exp(2018)2, 30 June 2018, para. 15.

³⁸ UN Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000, entered into force 28 January 2004). For instance, Article 14(2) provides that ‘States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct.’

³⁹ For instance, Article 5.6 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that: ‘Measures established in accordance with this article shall involve, where appropriate, non-governmental organisations, other relevant organisations and other elements of civil society committed to the prevention of trafficking in human beings and victim protection or assistance’. In addition Article 16.5 provides that: ‘Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non governmental organisations’ and Article 35 provides that: ‘Each Party shall encourage state authorities and public officials, to co-operate with

Safe, Orderly and Regular Migration, the General Assembly underlines that ‘National policies relating to integration and inclusion will be developed, as appropriate, in conjunction with relevant civil society organizations, including faith-based organizations, the private sector, employers’ and workers’ organizations and other stakeholders’.⁴⁰ It notes that ‘while recognizing the contribution of civil society, including non-governmental organizations, to promoting the well-being of migrants and their integration into societies, especially at times of extremely vulnerable conditions, and the support of the international community to the efforts of such organizations, we encourage deeper interaction between Governments and civil society to find responses to the challenges and the opportunities posed by international migration,’⁴¹ and calls for a ‘multi-stakeholder approach that includes national and local authorities, international organizations, international financial institutions, civil society partners (including faith-based organizations, diaspora organizations and academia), the private sector, the media and refugees themselves.’⁴²

45. States also have a negative obligation not to unduly obstruct the exercise of the right to freedom of association. States are duty-bound to ‘ensure that everyone can peacefully express their views without any fear.’⁴³ They must also respect the right of associations to privacy, by for example, not entering an association’s premises without advance notice. As underlined by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, independent bodies ‘have a right to examine the associations’ records as a mechanism to ensure transparency and accountability, but such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.’⁴⁴
46. Freedom of association should be implemented without discrimination of any kind. Legislation and policy concerning associations shall be uniformly applied and must not discriminate against any person or group of persons on any grounds.⁴⁵ Differential treatment on the basis of the mandate of the organisation or group, assuming that mandate is lawful, would breach freedom of association. Furthermore, membership or non-membership in an association shall not constitute grounds for the discriminatory treatment of persons.⁴⁶

non-governmental organisations, other relevant organisations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention’.

⁴⁰ UN General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration’, UN Doc. A/RES/73/195, 11 January 2019, para. 39. See also, paras. 54, 61, 69.

⁴¹ Ibid, para. 61.

⁴² Ibid, para. 69.

⁴³ UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’, UN Doc. A/HRC/20/27, 21 May 2012, para. 64. See also, Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 31.

⁴⁴ UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’, UN Doc. A/HRC/20/27, 21 May 2012, para. 65.

⁴⁵ Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 30.

⁴⁶ Ibid.

III.4 Criminalisation and restrictions on the right to freedom of association

47. Although freedom of association is not an absolute right, it can be limited, or derogated from, only under the strict conditions stipulated in human rights instruments. Article 22(2) of the ICCPR stipulates that '(n)o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others'. Similarly, Article 11(2) of the ECHR stipulates that '(n)o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others'.
48. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association has emphasised that 'only "certain" restrictions may be applied, which clearly means that freedom is to be considered the rule and its restriction the exception;⁴⁷ 'the restrictions must not impair the essence of the right ... the relation between right and restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.'⁴⁸ Similarly, OSCE/ODIHR and the Venice Commission make clear that 'the scope of these legitimate aims shall be narrowly interpreted.'⁴⁹

A. The limitation is prescribed by law

49. Any limitation, such as criminalising certain forms of association, must be prescribed by law in clear and precise terms. A limitation therefore needs to have a basis in domestic law, i.e. the disputed measure is based on a legal rule, originating from a competent (by virtue of attribution or delegation) legislative authority. According to the European Court of Human Rights, 'the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question.'⁵⁰ In addition, the legal basis needs to be accessible.⁵¹
50. Also, the rule needs to be foreseeable. A rule is "foreseeable" if it is formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to regulate his/her conduct. The law must be sufficiently clear and detailed in its terms to give citizens an adequate indication as to the circumstances in which and the

⁴⁷ UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai', UN Doc. A/HRC/20/27, 21 May 2012, para. 16.

⁴⁸ Ibid, citing to UN Human Rights Committee, 'General Comment No. 27: Article 12 (Freedom of Movement)', UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 13.

⁴⁹ Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 34.

⁵⁰ *Islam-Ittihad Association and Others v. Azerbaijan*, Applic No, 5548/05, 13 November 2014, para. 43.

⁵¹ *Khan v. UK*, Application no. 35394/97, 12 May 2000.

conditions on which public authorities are empowered to resort to an interference with the right concerned.⁵² The law must be ‘formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needs to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail.’⁵³ For instance, the Venice Commission and the OSCE/ODIHR’s commentary on Hungarian reforms to legislation noted that:

The statutory definition lays down, besides penalising the most typical conducts of this criminal offence, the possibility of sanctioning any other kind of conduct which corresponds in practice to an organising activity.” During the visit, the authorities indicated that they wished to leave the domestic courts responsible for the interpretation of the provision. However, the Commission draws attention to the limits of such a legislative approach. The current broad formulation of the provision which could include virtually any activity is not in line with the principle of legal certainty. It thereby gives the prosecution an over-broad discretion to prosecute.⁵⁴

51. In addition, the compatibility of legal norms ‘with the rule of law [must] be ensured.’⁵⁵ Restrictions must not be capable of arbitrary application.⁵⁶ The legislation ‘must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.’⁵⁷

B. The limitation has a legitimate aim

52. The interference or restriction must have a legitimate purpose, as set out in the exhaustive list of grounds of limitation in the international standards. A restriction must serve a legitimate aim such as the maintenance of national security and public safety, however, such aims cannot be interpreted in the abstract. While the aim of a particular piece of legislation may be legitimate, provisions ‘that permit interference with Convention rights must be interpreted restrictively.’⁵⁸ This requires that the State produce evidence of sufficient probity that the conduct actually risks jeopardising national security and public safety.

⁵² *De Groot v. The Netherlands*, UN Human Rights Committee, no. 578/1994, 14 July 1995, and *The Sunday Times v. UK*, Application no. 6538/74, para. 49.

⁵³ *Perinçek v Switzerland* (Grand Chamber), Application No. 27510/08, 15 October 2015, para. 131.

⁵⁴ CoE Venice Commission and OSCE ODIHR, ‘Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which Directly Affect NGOs’, [Hungary] CDL-AD(2018)013, Strasbourg, 25 June 2018, para. 73.

⁵⁵ *Belge v Turkey*, Application nos. 50171/09, 6/12/2016, 6 December 2016, para. 28.

⁵⁶ Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 109.

⁵⁷ *Islam-Ittihad Association and Others v. Azerbaijan*, Applic No, 5548/05, 13 November 2014, para. 44.

⁵⁸ *Perinçek v Switzerland*, Application No. 27510/08 (Grand Chamber), 15 October 2015, para.151.

53. The European Court of Human Rights has determined that legislation criminalising the facilitation of the unauthorised residence of an alien may serve the legitimate aim of prevention of disorder or crime.⁵⁹ However, as stressed by the Venice Commission and the OSCE/ODIHR, the legitimate aims must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from applying for asylum.⁶⁰
54. According to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.’⁶¹

C. The limitation is necessary and proportionate

55. The restriction must be necessary and proportionate. As the Special Rapporteur on the rights to freedom of peaceful assembly and of association has noted, States seeking to restrict the right to freedom of association must demonstrate a pressing social need for so doing.⁶² When such a pressing social need arises, ‘States have then to ensure that any restrictive measures fall within the limit of what is acceptable in a “democratic society”’. In that regard, longstanding jurisprudence asserts that democratic societies exist only where “pluralism, tolerance and broadmindedness” are in place. Hence, States cannot undermine the very existence of these attributes when restricting these rights.’⁶³
56. As outlined by the OSCE/ODIHR,

The word “necessity” does not mean “absolutely necessary” or “indispensable”, but neither does it have the flexibility of terms such as “useful” or “convenient”: instead, the term means that there must be a “pressing social need” for the interference. A restriction justified merely because its existence and use in practice provides a useful tool in achieving a social good is not acceptable. There must be strong justification for the law and its application.⁶⁴

⁵⁹ See *Mallah v. France*, Application no. 29681/08, 10 November 2011.

⁶⁰ CoE Venice Commission and OSCE ODIHR, ‘Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which Directly Affect NGOs’, [Hungary] CDL-AD(2018)013, Strasbourg, 25 June 2018, para. 80.

⁶¹ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families’, UN Doc. CMW/C/GC/2, 28 August 2013, para. 24.

⁶² UN Human Rights Council, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’, UN Doc. A/HRC/20/27, 21 May 2012, para. 17.

⁶³ *Ibid.*

⁶⁴ OSCE/ODIHR, ‘Note Outlining Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations’, para. 5.

57. The OSCE/ODIHR and Venice Commission Guidelines provide further that:

The principle of necessity in a democratic society requires that there be a fair balance between the interests of persons exercising the right to freedom of association, associations themselves and the interests of society as a whole. The need for restrictions shall be carefully weighed, therefore, and shall be based on compelling evidence. The least intrusive option shall always be chosen.⁶⁵

58. The UN Human Rights Committee has highlighted that ‘the principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.’⁶⁶ Public authorities need to be able to demonstrate that the measure can truly be effective to reach the legitimate aim, and that it responds to a pressing social need.⁶⁷

59. The UN Office on Drugs and Crime (UNODC), for instance, has made clear that:

increased border enforcement efforts [which would include criminalisation measures] in geographically limited areas often result in displacement of smuggling routes to different borders, smuggling methods or to other routes. If applied in isolation these measures do not reduce the number of smuggled migrants or the size of the smuggling problem.⁶⁸

It has called for a comprehensive, multi-prong approach which should include amongst the measures, limiting the demand for smugglers. In this regard, it has indicated that:

Limiting the demand for migrant smuggling can be achieved by broadening the possibilities for regular migration and increasing the accessibility of regular travel documents and procedures. Making regular migration opportunities more accessible in origin countries and refugee camps, including the expansion of migration and asylum bureaux in origin areas, would reduce opportunities for smugglers.⁶⁹

60. As was underscored in a Joint Statement by several UN Special Procedures mandate holders, ‘search and rescue operations aiming at saving lives at sea cannot represent a violation of national legislation on border control or irregular migration, as the right to life should prevail over national and European legislation, bilateral agreements and

⁶⁵ Venice Commission and OSCE/ODIHR, *Joint Guidelines on Freedom of Association*, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046, 17 December 2014, para. 35.

⁶⁶ UN Human Rights Committee, ‘General Comment No. 27: Article 12 (Freedom of Movement)’, UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 15.

⁶⁷ *Erdođdu and İnce v. Turkey* (Grand Chamber), Application nos. 25067/94, 25068/94, 8 July 1999, para. 47.

⁶⁸ UNODC, ‘Global Study on Smuggling of Migrants’, 2018, 12.

⁶⁹ *Ibid.*

memoranda of understanding and any other political and administrative decision aimed at tackling irregular migration.⁷⁰ This recognition that humanitarian assistance for migrants should not be penalised is also incorporated into the Global Compact on Migration.⁷¹ As the CoE Commissioner for Human Rights has underlined, ‘Any states’ restrictions placed on NGOs must be prescribed by law, governed by objective criteria and proportionate to the legitimate aims they seek to achieve so that their exercise can be amenable to control by the courts.’⁷²

IV. Criminalisation: the Practice

61. The perceptions of NGOs causing or contributing to a “pull-factor” and colluding with smugglers are unproven⁷³ but have affected the general climate of mistrust towards civil society in many CoE states. These perceptions have served as an important justification for criminal and related administrative measures instituted against NGOs. It has also put NGOs at risk of persecution by public authorities and had made them susceptible to public attacks and acts of vigilante violence.

IV.1 The introduction of criminal offences

62. States apply a variety of broadly consistent principles to aid with determining whether it is appropriate for a particular conduct to be criminalised. For instance in Bulgaria, factors that will be taken into account include the public danger of the act, the acceptability of its criminalisation by the population, the practical ability to detect and prosecute the act and the lesser effectiveness of other legal means of combating the conduct. Similarly, in some other countries (Croatia, Estonia, Hungary, The Netherlands, Poland, Portugal, Russia, Switzerland), the resort to criminal law follows the principle of *ultima ratio* (regulation in criminal law only if no lesser means of control is possible). *Ultima ratio* is part of the constitutional principle of proportionality. In Norway, considerations regarding criminalisation are based on the *harm principle* (whether behaviour or actions have sufficient harmful effects to be prohibited and sanctioned). The harm principle is limited by *ultima ratio*, and the principle that punishment should only be used if the

⁷⁰ Joint Communication from the Special Rapporteur on the human rights of migrants; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Special Rapporteur on the situation of human rights defenders, and the Independent Expert on human rights and international solidarity, AL ITA 4/2019, 15 May 2019, page 4.

⁷¹ UN General Assembly, ‘Global Compact for Safe, Orderly and Regular Migration’, UN Doc. A/RES/73/195, 11 January 2019, para. 24(a).

⁷² CoE Commissioner for Human Rights, ‘Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranean’, June 2019, 39. See also, OSCE, ‘Assistance to refugees in danger is an obligation, not a crime, OSCE human rights head says’, 20 June 2019.

⁷³ Eugenio Cusumano and Matteo Villa, ‘Sea Rescue NGOs: A Pull Factor of Irregular Migration?’, Policy Brief 2019/22, European University Institute, Robert Schuman Centre for Advanced Studies, Migration Policy Centre, 2019.

benefits are clearly greater than the harmful effects. Furthermore, a second purpose of punishment is the prevention of social unrest.⁷⁴

IV.2 The rationales provided to criminalise NGO actions

A. Criminalisation of migration and migrants

63. The criminalisation of aspects of the work of NGOs has been made possible firstly, because of the criminalisation of migration and migrants, themselves.⁷⁵ Even though the act of seeking asylum is lawful, and seeking entry into a country without authorisation is more appropriately considered an administrative infraction than a crime, the word “illegal” has often been used to label refugees and other migrants.⁷⁶ As was highlighted by the Special Rapporteur on the Human Rights of Migrants:

The view of migrants among many stakeholders as “illegal” is counterproductive and is not based on facts or the provisions of international law. While migrants who come to the European Union without documents are in an irregular situation (or “undocumented” or “unauthorized”), they have not committed a criminal act. The conceptualization of irregular migrants as “illegal” has undoubtedly played into the use of immigration detention. It has also had an impact on the general public’s perception of migrants, legitimizing policies that are not in line with human rights guarantees and contributing to xenophobia and discrimination.⁷⁷

64. The CoE Commissioner for Human Rights has underscored that:

The criminalisation of migration and repressive policies of detention and expulsions of foreigners seriously affect the protection of the basic social rights of irregular migrants, not least because they create a general climate of suspicion and rejection against irregular migrants among those who are supposed to provide social services. Migrants in an irregular situation are too often seen as cheats, liars, social benefits abusers or persons stealing the jobs of nationals. In such a context, law enforcement officials in charge of countering “illegal immigration” often have difficulties in recognising an irregular migrant as a victim of human rights violations and in need of protection.⁷⁸

⁷⁴ Ot.prp. nr. 90 (2003-2004), chapter 7: “Principles for criminalisation”, 6.3.4.

⁷⁵ See generally, CoE Commissioner for Human Rights, ‘Issue Paper: Criminalisation of Migration in Europe: Human Rights Implications’, CommDH/IssuePaper (2010)1.

⁷⁶ Catherine Dauvergne, *Making People Illegal: What Globalization means for Migration and Law* (Cambridge: Cambridge University Press, 2008).

⁷⁷ François Crépeau, ‘Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants’, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, UN Doc A/HRC/29/36, 8 May 2015, para. 72.

⁷⁸ CoE Commissioner for Human Rights, ‘Without papers but not without rights: the basic social rights of irregular migrants’, 20 August 2015. See also, CoE Commissioner for Human Rights, ‘Positions on the Rights of Migrants in an Irregular Situation’, CommDH/PositionPaper(2010)5, 24 June 2010.

65. It is important to recall, however, that under international law, an individual is entitled to leave any country, including their own⁷⁹ (freedom of movement) and is entitled to seek entry to any country. While a state can determine who to permit to enter, it cannot discriminate in such decisions nor can it prevent asylum seekers from claiming asylum. In respect of refugees, the UN Convention Relating to the Status of Refugees (1951) and its 1967 Protocol specifically provides, at Article 31(1), that ‘states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened...enter or are present in their territory without authorization.’ Furthermore, Article 5 of the UN Smuggling of Migrants Protocol explicitly states that ‘Migrants shall not become liable to criminal prosecution’ for having been smuggled.
66. Furthermore, the criminalisation of foreigners’ presence on the territory does not displace the obligation of states to ensure that their fundamental human rights are respected, including access to necessities for human dignity such as food, shelter and medical treatment, the right to private and family life and protection from torture, inhuman and degrading treatment or punishment.
67. When migrants’ entry into a territory is deemed “illegal”, the work of NGOs to provide much needed humanitarian support may wrongly be construed as a form of aiding or abetting or complicity in the “illegality” of the migrant situation.⁸⁰

B. The use of migrant smuggling criminal law frameworks

68. Frequently, states have used laws aimed at migrant smugglers to target those providing humanitarian support.
69. The genesis of domestic legislation criminalising NGO support to refugees and other migrants is the UN Convention Against Transnational Organized Crime and its supplementary protocols. The protocols distinguish between trafficking of persons and smuggling of migrants, the latter not involving harm to the transported persons. The UN Protocol against the Smuggling of Migrants by Land, Sea and Air is designed to prevent and combat smuggling of migrants. It defines the crime of migrant smuggling as ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’⁸¹ Parties to the Protocol are requested to criminalise the conduct of smuggling of migrants as well as the procurement of irregular stay, as well as producing, obtaining or providing fraudulent travel or identity documents for the

⁷⁹ Article 2 of Protocol N° 4 to the ECHR; Art. 12(4), ICCPR. See also, UN Human Rights Committee, General Comment no. 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999.

⁸⁰ Lina Vosyliūtė and Anne-Linde Joki, ‘Integration: The Social Inclusion of Undocumented Migrants’, ReSOMA Discussion Brief, November 2018

⁸¹ UN Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000, entered into force 28 January 2004), Art. 3(a).

purpose of enabling migrant smuggling. In respect to the element of the offence ‘financial or other material benefit’,⁸² UNODC has explained that:

The inclusion of financial or other material benefit as a constitutive element of the migrant smuggling crime is a clear indication of the Smuggling of Migrants Protocol’s focus on tackling those – particularly organized crime groups - who seek to benefit from smuggling migrants. This is also confirmed in the travaux préparatoires of the Protocol, which states 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.’⁸³

70. The threshold of ‘gain’ in the UN Smuggling Protocol is defined as obtaining, ‘directly or indirectly, a financial or other material benefit.’⁸⁴ Its intention was to target organised criminal groups acting for profit, however as has been argued, ‘this for-profit/humanitarian binary is problematic, however, as it rests on the premise that acts for gain cannot be humanitarian. An organisation could conceivably act based on “humanitarian reason” but also be compensated for doing so.’⁸⁵ This may be particularly problematic for professional staff working for humanitarian agencies, who are compensated for their work. Consequently, some have called for “financial or other material benefit” to be construed narrowly, limited to contexts of unjust enrichment or profit.⁸⁶
71. The European Union’s Facilitators Package,⁸⁷ which includes a Directive and Framework Decision, ostensibly implements the UN Smuggling Protocol and requires EU Member States to criminalise certain acts associated with smuggling and trafficking including the intentional assistance of illegal entry or transit through a Member State, and the

⁸² Ibid.

⁸³ UNODC, ‘Global Study on Smuggling of Migrants’, 2018, 18. See also, UN General Assembly, ‘Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto’, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum, UN Doc. A/55/383/Add.1, 3 November 2000, para. 92: ‘The travaux préparatoires should also indicate that the reference to “a financial or other material benefit” as an element of the offences set forth in paragraph 1 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 nongovernmental organizations.’ See also, UNODC, ‘The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol’, Issue Paper, Vienna, 2017.

⁸⁴ UNODC, ‘The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol’, Issue Paper, 2017.

⁸⁵ University of Oxford Refugee Studies Centre (RSC), ‘Decriminalising ‘Humanitarian Smuggling’, Research in Brief 6, March 2017.

⁸⁶ Lina Vosyliūtė and Carmine Conte, ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019, 19.

⁸⁷ Council of the EU, Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, OJ L 328, 5 December 2002; Council of the EU, Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (2002/946/JHA), OJ L 328, 5 December 2002.

intentional assistance of illegal stay, does not contain a mandatory exception for acts that are humanitarian in character. Article 1(1)(a) of the Facilitation Directive defining the crime of facilitation of entry and transit lacks the element of financial and other material benefit; therefore, it creates a wide scope for criminalisation and counters Article 6 of the UN Smuggling Protocol.⁸⁸ In contrast, Article 1(1)(b) of the Facilitation Directive requires a profit motive for residence and stay. States can exempt from Article 1(1)(a) acts of a humanitarian character, but they are not obliged to do so. The Directive does not define ‘intentional assistance’ of illegal entry or residence.

72. Several EU Member States have introduced humanitarian exceptions for all or part of the prohibited acts whereas the majority have not.⁸⁹ Furthermore, some states have criminalised acts relating to residence or stay, ostensibly criminalising beyond what is required by the Facilitation Directive. Where humanitarian exceptions are not in place, some states allow for the humanitarian context of the act to be taken into account in the case of necessity (Portugal) or as a form of mitigation or in sentencing (Poland, Sweden, Switzerland, United Kingdom). Some countries such as Hungary and Portugal consider acts undertaken “for profit” as aggravated circumstances for the purposes of sentencing.
73. Norway, which is bound by the 2002/90/EC Directive via its participation in the Schengen *acquis*, revoked its “financial gain” clause as a pre-condition for human smuggling in order to harmonise Norwegian law with the Directive, effectively restricting civil society space.⁹⁰ Section 108(6) of the 2008 Immigration Act was later introduced and provides that a person who provides humanitarian assistance to a foreign national who is unlawfully residing in the realm shall not be liable to a penalty for aiding and abetting unlawful residence, unless (a) the person in question has intended to help the foreign national to evade the obligation to leave the realm and (b) the assistance has made it more difficult for the authorities to implement removal of the foreign national.⁹¹ The *travaux préparatoires* specify that only under exceptional circumstances may a person be liable for penalty for providing humanitarian assistance to a foreign national who is unlawfully residing in the realm and that providing housing, food, and medical services is lawful.⁹² The law is considered vague by practitioners and scholars, providing considerable discretion to police and administrative authorities. Legal experts point out that the provision might have a chilling effect, generating a misleading impression among the public that the space for humanitarian assistance is more narrow than what was

⁸⁸ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, ‘Update Study “Fit for purpose?” The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’, Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 29.

⁸⁹ See, European Commission, ‘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), SWD (2017) 117 final’, Commission Staff Working Document, Brussels, 22 March 2017

⁹⁰ Innst. O. nr 57 (2004-2005).

⁹¹ An English translation of The Immigration Act is available at: <https://lovdata.no/dokument/NLE/lov/2008-05-15-35>

⁹² Prop. 141 L (2010-2011), available at: <https://www.regjeringen.no/no/dokumenter/prop-141-l-20102011/id649670/>

actually intended by the Parliament.⁹³ NGOs interviewed for this study, explained that the law is particularly vague in respect to the question of providing housing – a form of assistance that can be construed as obstructing deportation. Søvig⁹⁴ compares it to aiding and abetting fugitives of criminal justice to evade incarceration. In both situations, the public interest of criminalisation implies that there should be no place to hide, so the fugitive will be forced into the open. The cases are different, though, since in providing shelter and thereby hiding immigrants there is likely to be a humanitarian motive in addition to other motives. Obstruction of deportation may be seen as a (more or less deliberate) side effect of an action whose primary intent is to help vulnerable people with a place to stay. That the police has remained reluctant to take legal action against persons providing assistance to immigrants residing illegally in Norway in ways that may be covered by the criminalisation clause, means that boundaries of the law have not been clarified.

74. Those states that have introduced exceptions have adopted a mixture of often inconsistent definitions, some of them overly vague, and also inviting debate on what may constitute ‘genuine’ or ‘pure’ humanitarian assistance,⁹⁵ or what may constitute ‘financial gain’. Indeed, some of the countries in which a humanitarian exception has been adopted – such as Greece and Italy,⁹⁶ are places where criminalisation of NGO activities have been most problematic, given the narrow interpretations given to humanitarian assistance, and the application of exceptions to the humanitarian exception.
75. Even in those states that have introduced “financial benefit” requirements for smuggling clauses in order to avoid criminalising purely humanitarian work, the exception has been framed narrowly, the criminal law has been applied narrowly and lay individuals have been found to have run foul of the legislation for, for example, renting out property to refugees and other migrants. The situation of an employee paid by a humanitarian organisation (and in this respect working for financial gain) may also be precarious, given the vague provisions of many domestic laws.
76. In France, for instance, the exemption for humanitarian assistance, expanded in 2012, and further clarified by the Constitutional Court, did not fully overrule the “*délit de solidarité*,” in that facilitation of border crossings remains unlawful.⁹⁷ The September

⁹³ Karl Harald Søvig, ‘Straffansvar og straffeforfølgning av humanitære hjelpere ved ulovlig opphold’, in Johansen, Uglevik, Franco (eds), *Krimigrasjon? Den nye kontrollen av de fremmede*, Oslo: Universitetsforlaget 2013.

⁹⁴ Karl Harald Søvig, “Straffansvar og straffeforfølgning av humanitære hjelpere ved ulovlig opphold”, in Johansen, Uglevik, Franco (eds.), *Krimigrasjon? Den nye kontrollen av de fremmede*, Oslo: Universitetsforlaget 2013.

⁹⁵ See, Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp, Lina Vosyliute, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart, 2019); Lina Vosyliūtė & Carmine Conte, ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019.

⁹⁶ See European Commission, ‘Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling)’, prepared by ICF International for the European Commission, March 2016, 29-32.

⁹⁷ See, for instance the Appeal Court in Aix-en-Provence’s decisions in August and September 2017 concerning Cédric Herrou and Pierre-Alain Mannoni of Roya Citoyenne, which held that the humanitarian assistance

2018 reforms to French asylum and immigration law⁹⁸ added a "humanitarian clause", incorporated into Article L. 622-4 of the Code of Entry and Stay of Aliens and Right of Asylum. However, two limits remain. First, the new Article L. 622-4 does not extend the humanitarian clause to aid for irregular entry. Thus, aid to irregular entry remains criminalised regardless of its purpose, and even if such assistance was provided for humanitarian purposes.⁹⁹ Second, the September 2018 amendments set as a criterion of the exception the "*exclusively* humanitarian purpose" and not the "humanitarian purpose". The addition of the adverb "exclusively" could lead criminal courts to a restrictive interpretation of the exception.¹⁰⁰

77. In Greece, the humanitarian exemption is only applied to assistance to migrants in distress at sea; relief on land is not covered.¹⁰¹ The opposite appears true in Italy, where rescue activities and humanitarian assistance are only exempt for acts taking place within its territory (thus not covering acts involving an NGO supporting migrants to cross into the territory, whether by land or sea).¹⁰²

C. Organised crime, money laundering and security-related offences

78. Anti-smuggling is a predominant narrative for recent criminalisation efforts. However, it is not the only narrative. Some states have criminalised acts related to the receipt of donations of money and objects from private sources, using organised crime legislation pertaining to money laundering and fraud (Greece). For instance, in August 2018, staff members from the Emergency Response Centre International (ERCI) in Greece were arrested and charged with people smuggling, espionage and membership in a criminal organisation.¹⁰³ They have been charged with several felonies which in addition to assisting smugglers, includes espionage, membership of a criminal organisation, and money laundering and if found guilty face 25 years in prison.

exemption was limited to circumstances to ensure dignified and decent living conditions, and did not extend to assistance to refugees to evade immigration controls. See also, the Constitutional Court decision of 6 July 2018, Conseil constitutionnel, *Décision n° 2018-717/718 QPC*, 6 July 2018.

⁹⁸ Law No. 2018-778 of 10 September 2018 for controlled immigration, effective asylum and successful integration.

⁹⁹ Under the only very restrictive exception of the criminal exemption in cases of necessity, introduced by Article L. 127-7 of the Penal code, but which requires the presence of a "current and imminent" danger.

¹⁰⁰ See generally, Lina Vosyliūtė and Carmine Conte, 'Crackdown on NGOs and volunteers helping refugees and other migrants', Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019.

¹⁰¹ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 37, 41. Note, however, the prosecution of Salam Kamal-Aldeen, founder of Team Humanity for illegal transport of irregular migrants into Greek territory without authorisation, the exception not said to apply because the rescue at sea was a supposed pretext to perpetrate the crime [Global Legal Action Network (GLAN), 'Case filed against Greece in Strasbourg Court over Crackdown on Humanitarian Organisations', 18 April 2019].

¹⁰² Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 37.

¹⁰³ See, e.g., Carmine Conte and Seán Binder, 'Strategic litigation: the role of EU and international law in criminalising humanitarianism', ReSOMA Policy Brief, July 2019, 10.

79. In the United Kingdom, activists involved in peaceful protest to prevent a deportation flight from taking off at Stansted Airport were prosecuted for terror-related offences under the Aviation and Maritime Security Act, though the individuals were not deemed to have the 'grievous intent' to warrant custodial sentences, and were recognised as motivated by 'genuine reasons.'¹⁰⁴ In February 2019, five UN special rapporteurs criticised the United Kingdom government's use of terrorism related security legislation, arguing that doing so impinged on the right to peaceful protest.¹⁰⁵ Anti-deportation activists have been arrested in other CoE Member States (Iceland, Sweden).

D. Criminalisation as an extension of general crackdowns against NGOs

80. The criminalisation of humanitarian workers supporting refugees and other migrants has also been helped by the long-standing practice in certain states of using the criminal law to impede NGO activity in general; this for instance, has a long history in respect of offences linked to terrorism, national security and criminal defamation charges lodged against human rights defenders for their day-to-day work challenging governmental policies. Countering assistance to migrants is arguably, simply a new form of what is an old practice of targeting NGOs through criminalisation to restrict their behaviour.

81. In Turkey, according to several sources consulted, the general crackdown on NGOs involved in human rights protection, including deeming certain NGOs as supporters of terrorist organisations, has had a follow-on impact on several NGOs supporting refugees and migrants. The crackdowns on NGOs supporting migrants, particularly those carrying out advocacy work, has increased in recent years. According to certain NGOs supporting refugees, this stems from the government's wish not to have any negative publicity to damage the EU-Turkey deal, and also taking into account the new dynamics resulting from Turkey's intervention in Syria.

IV.3 Investigations, arrests and prosecutions

82. The majority of criminal cases analysed have related to the facilitation of entry or transit of migrants, while a lesser number of cases are related to the facilitation of stay or residence and other grounds. Ironically, a significant increase in the number of civil society arrests between 2015 and 2018 has been reported, even though the numbers of "irregular" migrants entering Europe has progressively decreased.¹⁰⁶

83. NGOs and their staff and volunteers have been investigated and some prosecuted for helping individuals to enter a state's territory without prior permission. This has included sea rescues (Greece, Italy, Malta),¹⁰⁷ despite the duty to rescue persons in distress set

¹⁰⁴ Damien Gayle, 'Stansted 15: no jail for activists convicted of terror-related offences,' *the Guardian*, 6 February 2019.

¹⁰⁵ OHCHR, 'UK must stop disproportionate use of security laws after conviction of Stansted 15, say UN rights experts', 6 February 2019.

¹⁰⁶ Lina Vosyliūtė and Carmine Conte, 'Crackdown on NGOs and volunteers helping refugees and other migrants', Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019, 32.

¹⁰⁷ See, FRA, '2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations', June 2019.

out in law of the sea conventions.¹⁰⁸ For example, in Italy, charges were brought in March 2019 against the Spanish NGO Proactiva Open Arms for enabling illegal immigration, when the organisation failed to follow the instructions of the Italian Maritime Rescue Coordination Centre to return the migrants who had been rescued, to Libya. The NGO did not want to be party to a push-back amounting to refoulement, given what was known about the situation the migrants were likely to face upon return into Libyan custody.

84. The majority of search and rescue at sea NGOs have been forced to severely restrict their work. In Greece, on 14 January 2016, Salam Kamal-Aldeen, founder of Team Humanity, which had a long history of cooperating with the Hellenic Coast Guard in rescues at sea, was arrested with others for the felony of illegal transport of irregular migrants into Greek territory without authorisation. Judges referred to their use of “rescue as a pretext” to perpetrate the crime. The boat and the rescue equipment on board were confiscated. The accused was ultimately acquitted by the Mytilene Court in Lesbos more than two years later, though the boat has not been returned.¹⁰⁹ A complaint to the European Court of Human Rights about the targeting of the NGO was pending at the time of writing.¹¹⁰ Salam Kamal-Aldeen was re-arrested by Greek authorities in December 2019 on charges related to being a “public threat”.
85. Also, individuals have been charged with criminal law offences in overland cases, such as providing a lift in a vehicle (Denmark, France, The Netherlands), or otherwise aiding to cross a border (Germany, Sweden, UK) and for complicity in attempted smuggling, by lending mobile phones and facilitating Western Union payments to migrants planning to cross a border (e.g., Belgium). Activists who have sought to alert police to the presence of vulnerable migrants have themselves been prosecuted. In Croatia, when an Afghani family was caught in a snowstorm after crossing the border from Serbia, they sent a message to Are You Syrious (AYS), a Croatian volunteer organization helping refugees. AYS volunteers immediately informed the police and sent a volunteer to the closest police station to meet the Hussiny family. The volunteer, through direct contact with the police, helped the family initiate the asylum procedure under Croatian law. The volunteer was then notified that he would be charged with assisting foreigners to illegally cross the border.¹¹¹ In Norway, three arrests were made in 2015 during the Storskog situation when Norway’s border crossing with Russia at Storskog suddenly became an unexpected entry point for more than 5,000 asylum seekers within only a few weeks. The three activists - Eirik Nielsen, Merete Eriksson and Merete Nordhus - were members of the organisation “Refugees Welcome to the Arctic,” and had driven to the reception centres in private vehicles to transport the newly arrived asylum seekers to church sanctuary in a nearby town, before they could be deported. They were placed under temporary arrest

¹⁰⁸ See, the 1974 International Convention on the Safety of Life at Sea, the 1979 Convention on Maritime Rescue and the 1982 UN Convention on the Law of the Sea.

¹⁰⁹ Lina Vosyliūtė, ‘Strategic Litigation: framing claims to stop policing of humanitarianism’, ReSOMA, Final Synthetic Policy Options Brief, (forthcoming).

¹¹⁰ Global Legal Action Network (GLAN), ‘Case filed against Greece in Strasbourg Court over Crackdown on Humanitarian Organisations’, 18 April 2019.

¹¹¹ Mayuri Anupindi, ‘Humanitarian Aid Is Never a Crime: Resisting the Repression of Aid Work’ UUSC, 30 July 2018.

and given fines of 500 Euro each under the Immigration Act section 108, paragraph 4 (a), and Nordhus an additional fine for obstruction of a public official under the Penal Code section 156. The cases were ultimately dismissed.

86. Once within the territory, NGOs and particularly autonomous solidarity movements have become targets for harassment by public officials, as well as by certain segments of society. NGO workers have been harassed while providing food, shelter and clean water in informal encampments or on the streets and certain individuals have been subjected to criminal sanctions for distributing food, providing shelter and medical care. Ancillary offences unrelated to the facilitation of entry provisions have been used arbitrarily to intimidate and sometimes prosecute caregivers in solidarity. These include offences of contempt (Article L. 433-5 of the Penal Code), insult and defamation (Article 29 of the Press Freedom Act of 29 July 1881), rebellion (Article L. 433-6 of the Penal Code) and violence against a law enforcement officer (Article 222-13 of the Penal Code).¹¹² For instance, the mayor of Calais (France) criminalised food distribution, in order to prevent a new camp from forming in the area in which the previous one had been demolished.¹¹³ The courts quickly suspended the order however, holding that the measure (deprivation of a vulnerable population of food) was not proportionate to the aim of deterring the establishment of a new camp.¹¹⁴ Also in France, NGO volunteers working for Caritas France were arrested for bringing migrants to the NGO's Calais headquarters for a shower. Similarly, NGO volunteers were arrested for distributing food in Paris and for distributing food outside of designated zones, in Italy.¹¹⁵ Laws on public order, food hygiene, safety and other grounds have been disproportionately applied against humanitarian actors (Italy, France).¹¹⁶ Individuals have also been charged with harbouring foreigners for bringing migrants home for coffee and biscuits (Denmark). A Swiss pastor who provided money and shelter to a homeless rejected asylum seeker, was charged with facilitating the person's illegal stay. There are several pending cases in Norway concerning the provision of employment to irregular migrants.
87. Staff of NGOs who have stood up for the rights of migrants have been detained, prosecuted and/or fined (Belgium, France).¹¹⁷ New rules on police surveillance introduced into the Code of Criminal Procedure in Hungary allow for suspects (in a new phase introduced to precede the preliminary phase of a criminal investigation) to be surveyed at the request of the Prosecutor.¹¹⁸ This contributes to a psychological climate

¹¹² Commission nationale consultative des droits de l'homme (CNCDH), *Avis, Mettre fin au délit de solidarité*, 18 May 2017.

¹¹³ Mayor of the City of Calais, *Arrested March 2, 2017*, online: https://www.gisti.org/IMG/pdf/arrete_2017-03-02_calais-maire.pdf. See also the letter of refusal of the solicitation of the occupation of a place for the purpose of distributing meals: https://www.gisti.org/IMG/pdf/lettre_2017-03-09_calais-maire.pdf.

¹¹⁴ Conseil d'État, 'Conditions d'accueil des migrants à Calais', décision contentieuse, 31 July (https://www.conseil-etat.fr/actualites/actualites/conditions-d-accueil-des-migrants-a-calais).

¹¹⁵ FRA, 'Fundamental Rights Report 2018', 2018, Section 6.3.3.

¹¹⁶ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 24.

¹¹⁷ CoE Commissioner for Human Rights, 'Restrictions on defenders of migrants' rights should stop', 19 December 2012.

¹¹⁸ Act XC of 2017 on the criminal procedure code, entered into force on 1 July 2018.

of fear and paranoia in the society. Also, Criminal Code amendments in Hungary have made it possible to prosecute organisations working with migrants for activities such as ‘preparing or distributing informational materials’ or ‘initiating asylum requests for migrants’.¹¹⁹ The Venice Commission and the OSCE, in commenting on Hungarian legislation amending the criminal code, underscored that:

Seeking asylum or requesting a title of residence is not a crime, and thus, it should not be a crime to support a person in this position. Whether or not in the end asylum is granted is a matter of decision of the State and not a decision taken by an NGO. Transferring this burden in the form of criminal sanctions for “getting it wrong,” about whether or not an asylum seeker has reason to fear persecution or not onto organisations effectively prevents any attempt by NGOs to assist the migrant concerned.¹²⁰

88. In Germany, new legislation to support removals of migrants from the country contemplated making information about planned removals a state secret and an offense for civil servants and NGOs to warn unsuccessful asylum seekers that deportation is imminent. The legislation (which was not ultimately adopted) had anticipated to make it possible to prosecute NGOs for disclosing such information to potential deportees. This was criticised by the CoE Commissioner for Human Rights, on the basis that, inter alia, it could have a negative impact on freedom of expression.¹²¹
89. The practice in countries like Hungary stands in stark contrast to several other countries, like Portugal, where the Law n. 115/99 of 3 August 1999 specifically recognises the role of migrants’ associations, guaranteeing their right to intervene in defence of migrants’ rights. For example, in the Portuguese Strategic Plan for Migration, the migrant NGOs are supported by the state to develop projects to prevent and combat the exploitation of immigrants in an irregular situation in the country and to cooperate with national authorities to provide a better service when dealing with administrative issues. In some areas, a close cooperation between the State and the NGOs was established. For example, the High Commissioner for Migration relies strongly on the role of the migrants’ associations to develop its activity, namely through the appointment of intercultural mediators, who are responsible for translating and providing other types of support to foreign citizens.
90. Some researchers have surmised that the harshest punishments have been reserved for those who have been most politically articulate about the refugee crisis,¹²² impeding freedom of expression and association. In some cases, the harsh manner of arrest appears to have been used to prove a wider point. For instance, when members of the Berlin-based Peng Collective were arrested for helping people to cross the border with

¹¹⁹ CoE Venice Commission and OSCE ODIHR, ‘Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which Directly Affect NGOs’, CDL-AD(2018)013, Strasbourg, 25 June 2018.

¹²⁰ CoE Venice Commission and OSCE ODIHR, ‘Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which Directly Affect NGOs’, CDL-AD(2018)013, Strasbourg, 25 June 2018, para. 72.

¹²¹ See, CoE Commissioner for Human Rights, Letter to Ms Andrea Linholz, 16 May 2019.

¹²² Liz Fekete, ‘Migrants, borders and the criminalisation of solidarity in the EU’, (2018) 59(4) *Race & Class* 65, 79.

Austria, helpers were ‘handcuffed, strip-searched and detained in “container cells” at the German-Austrian border for up to thirty-one hours.’¹²³

IV.4 The targets of criminalisation

91. While the range of people who have been investigated, charged and prosecuted has been diverse, often it is the ordinary people, the volunteers of solidarity movements that have been subjected to investigations, threats of arrests, arrests and prosecutions. For instance, Anni Lanz, the former head of *Solidarité sans frontières*, was prosecuted and fined for having helped a rejected Afghan asylum seeker return from Italy to Switzerland.¹²⁴ Volunteers have been frequently threatened with arrest in border hotspots and other places with exceptional migration flows, when supporting migrants (Bosnia and Herzegovina, France, Greece, Italy).
92. The criminalisation of volunteers at times may have to do with the legislative framework and the narrow scope of humanitarian exceptions. For instance, Section 25A of the UK Immigration Act which criminalises those bringing asylum seekers to the border for gain,¹²⁵ creates an exception for those ‘*acting on behalf of an organisation*’.¹²⁶ This may create uncertainty for volunteers who may be acting on an ad hoc basis without a contract. But it may also create confusion about the scope of the law, as assisted illegal entry into the UK contains no humanitarian exception.¹²⁷
93. Amnesty International’s reporting on Calais, France, suggests such a pattern, as a way to discourage solidarity movements: ‘For volunteers, it’s very hard. They are afraid. We give them information about security and context and it scares them. We have a lot of trouble recruiting new volunteers.’¹²⁸ Similar comments have been expressed in relation to other countries with ambiguous laws: ‘whenever you want to help someone you feel that you’ll endanger someone by asking a volunteer to help.’¹²⁹
94. NGOs may have a duty of care to the volunteers they work with – to ensure they know the law and are capable of following it, and to support them when their lawful work for

¹²³ Liz Fekete, Frances Webber and Anya Edmond-Pettitt, ‘Humanitarianism: the unacceptable face of solidarity’, Institute of Race Relations, London, 2017, 13.

¹²⁴ ‘Anni Lanz: Activist sentenced for helping rejected asylum seeker’, 21 August 2019)

(https://www.swissinfo.ch/eng/anni-lanz_activist-sentenced-for-helping-rejected-asylum-seeker/45176734).

¹²⁵ Note however that this is a limited exception. See, Liz Fekete, Frances Webber and Anya Edmond-Pettitt, ‘Humanitarianism: the unacceptable face of solidarity’, Institute of Race Relations, London, 2017, 21 fn 22.

¹²⁶ Section 25A(1), Immigration Act 1971. Section 25A of the Immigration Act criminalises the facilitation of entry of asylum-seekers, where the facilitator knowingly and for gain assists the asylum-seeker and knows or has reasonable cause to believe that the individual is an asylum seeker.

¹²⁷ Section 25 criminalises assisting illegal entry, whether or not for gain, whereas only 25a (bringing asylum seekers to the border) includes a humanitarian exception. See, Liz Fekete, Frances Webber and Anya Edmond-Pettitt, ‘Humanitarianism: the unacceptable face of solidarity’, Institute of Race Relations, London, 2017, 21 fn 22.

¹²⁸ Amnesty International, ‘Les actions de solidarité prises pour cible par la police’, 4 June 2019. See also, Help Refugees, ‘Calais: the police harassment of volunteers’, Study of 1st November 2017 to 1st July 2018, at: <https://helprefugees.org/wp-content/uploads/2018/08/Police-Harrassment-of-Volunteers-in-Calais-1.pdf>.

¹²⁹ Comment by NGO representative at a consultation for this study.

the NGO leads to arrest or prosecution.¹³⁰ Also, depending on the legal framework, NGOs may incur responsibility when volunteers loosely associated with them do not comply with local laws.¹³¹

95. The legislation pertaining to the criminalisation of legal entities (the NGOs themselves as opposed to the staff) varies. In those countries where this is possible, criminal acts which may be attributable to an NGO may lead to the criminal liability of the organisation itself. For instance, in Poland, on the basis of Article 16(9) of the Act of 28 October 2002 on Liability of Collective Entities for Criminal Offences, in case a natural person is convicted of a crime, and if his/her act can be attributed to a non-governmental organisation, it may eventually lead to the liability of this organisation (criminal responsibility of collective entities is in this sense secondary). Similarly, in Hungary, a conviction of a staff member of an NGO for acts intentionally aimed at or resulting in the NGO gaining benefit, could result in the NGO as such being discontinued on the basis of measures applicable to legal entities under criminal law.¹³² This contradicts the Venice Commission and OSCE/ODIHR Guidelines on Freedom of Association, according to which the individual wrongdoing of founders or members of an association should lead only to their personal liability for such acts, and not to the prohibition or dissolution of the whole association, unless the criminal act is committed by the main representatives of an organisation, through acts that are attributable to the organisation itself.¹³³

IV.5 Vigilante acts against NGOs and the response of authorities

96. The context of criminalisation has opened a space for some politicians and other political figures to use defamation and unjustified verbal attacks to portray NGOs as criminal entities colluding with human smuggling and trafficking. According to the CoE Commissioner on Human Rights, the rise of xenophobic and anti-migrant discourse in some countries has negatively impacted on the work of human rights defenders who protect and promote the rights of migrants: 'Human rights defenders are even increasingly labelled as traitors who are threatening national identity and security. They are often exposed to intimidation and abuse.'¹³⁴
97. This public backlash against NGOs and the hostile rhetoric instils distrust in NGOs and in turn has led to vigilante acts including verbal and physical attacks in certain states against private citizens helping migrants, NGOs and the migrants themselves. For instance, according to Caritas Europa, French volunteers patrolling mountain areas to assist

¹³⁰ *Dennis v Norwegian Refugee Council* (Oslo District Court, Deputy Judge Lena Skjold Rafoss, 25 November 2015); discussed in Kristin Bergtora Sandvik, 'Humanitarians in court: how duty of care travelled from human resources to legal liability', (2019) *J Legal Pluralism and Unofficial Law* 1.

¹³¹ See, Mark Restall, 'Volunteers and the Law', Volunteering England, June 2005 (<https://plantnetwork.org/wordpress/wp-content/uploads/9122/volunteers-and-the-law.pdf>). This publication deals with NGO obligations regarding safeguarding and criminal records checks, but the rationales may have wider applicability.

¹³² See, CoE Venice Commission and OSCE ODIHR, 'Joint Opinion on the Provisions of the So-Called "Stop Soros" Draft Legislative Package which Directly Affect NGOs', CDL-AD(2018)013, Strasbourg, 25 June 2018, para. 88.

¹³³ *Ibid*, para. 89. See also, Venice Commission/OSCE/ODIHR Guidelines on Freedom of Association, para. 254.

¹³⁴ CoE Commissioner for Human Rights, 'Restrictions on defenders of migrants' rights should stop', 19 December 2012.

migrants at risk of exposure were accused of colluding with smugglers. French police arrested and detained seven activists for 10 days¹³⁵ and some of the activists were prosecuted for facilitating the illegal entry of migrants as part of an “organised criminal band.” In contrast, no actions were taken against the extreme far right group *Génération identitaires* who had reportedly been antagonising the migrants and the French volunteers supporting them. Similarly, the Executive Director of a Cypriot NGO supporting migrants who was attacked as part of xenophobic violence was himself accused of a crime; the state has been accused of being slow to pursue his attackers.¹³⁶ Volunteers and staff of Croatian organisations helping migrants face regular threats and violence. They go to work carrying mace, as advised by the police, and the offices of the organisation Are You Syrious, have been frequently vandalised.¹³⁷

98. In Greece, migrants and the NGOs assisting them have become targets of extreme violence notably by members, including MPs, of the far right political party of Golden Dawn.¹³⁸ According to the CoE Commissioner for Human Rights, ‘There have been reports that the police displayed tolerance and inaction in the face of these attacks, reportedly indicative of a connection between the police and radical groups. The Greek authorities must step up their efforts to combat hate crimes, including those affecting human rights defenders.’¹³⁹
99. In many countries, there have been threats and xenophobic attacks from extremist and far-right groups against foreigners and those defending them (Bulgaria, Czech Republic, Greece, Norway, Russia). In Norway, individuals who assist migrants have been referred to in derogatory language, including “godhetstyranner” (goodness tyrants),¹⁴⁰ or persons who facilitate “snikislamisering av Norge” (“hidden islamification of Norway”).¹⁴¹ Sylvi Listhaug, Minister for the Elderly and Public Health, recently characterised Doctors Without Borders as the ‘best friends of human smugglers’, arguing that their rescue of migrants in the Mediterranean leads to more migrants trying to cross the sea.¹⁴² A range of anti-immigration websites and social media platforms use derogatory language

¹³⁵ Caritas Europa, ‘The “criminalisation” of solidarity towards migrants’, 20 June 2019.

¹³⁶ OMCT, ‘Two years after the attack on the 2010 Rainbow Festival: Justice delayed for victims of racist violence and for KISA's Executive Director’, Open letter to Cyprus' Ministry of Justice, 23 November 2012.

¹³⁷ Iva Grubisa, ‘[Spurned by Authorities, Humanitarian NGOs Feel Unsafe in Croatia](#)’, EURACTIV, 21 November 2018.

¹³⁸ CoE Commissioner for Human Rights, ‘Restrictions on defenders of migrants’ rights should stop’, 19 December 2012.

¹³⁹ CoE Commissioner For Human Rights, ‘The Protection of Migrant Rights in Europe: Round-Table with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights Paris, 5 October 2012’, CommDH(2013)9, 18 April 2013 para. 32.

¹⁴⁰ https://www.nrk.no/norge/frp-listhaug_-_godhetstyranniet-rir-norge-som-en-mare-1.12633044

¹⁴¹ https://www.abcnyheter.no/nyheter/politikk/2019/08/14/195601719/siv-jensen-vil-ikke-slutte-a-bruke-ord-som-snikislamisering?gclid=Cj0KCQjwwb3rBRDrARIsALR3XeaWUFL7vI_VQ64GPiOEN-s7WJeiCJFM6Is4QsfCh99g7rJ3qCBe6oMaAlh5EALw_wcB

¹⁴² ABC nyheter, ‘Leger uten grenser slår tilbake mot Listhaug. – Vi bidrar ikke til at flere drukner’, 3 September 2019, available at: <https://www.abcnyheter.no/nyheter/politikk/2019/09/03/195607525/leger-uten-grenser-slar-tilbake-mot-listhaug-vi-bidrar-ikke-til-at-flere-drukner>.

against migrants and politicians and nongovernmental organisations arguing to uphold their rights.¹⁴³

100. In the Czech Republic, there have been numerous verbal and physical attacks, including the 6 February 2016 attack by a group of masked people on the Prague Autonomous Social Centre, which helps refugees. They started a fire using bottle bombs and injured one of the Centre's visitors. One attacker was investigated as an administrative offence (misdemeanour).¹⁴⁴ In end 2018, a Czech activist was a target of a hate attack after she published an advertisement on Facebook looking for some lodgings for a young Afghan man. The ad was publicly shared at a Facebook page called "We do not want Islam in the Czech Republic" (the page was later deleted), together with photos of the activist, her personal information and a note about the activist's membership in the Refugee Assistance Association. As a result, the activist received hate messages both through social networks and her private phone, including their wish for the activist's throat to be slit by refugees, be thrown into a well, or be raped.¹⁴⁵ When pressed to proceed with the case, the District Prosecutor attacked the victim by noting that she was the one responsible for the assault since the overwhelming majority of Czech citizens are against Muslim migration and therefore, she should have expected the response.¹⁴⁶ The Director of the Family Centre Kašpárek, who organised collections for refugees, was threatened when her fictional funeral notice was placed on the Centre's door and red colour was poured on the door and walls. The funeral notice stated: *"We announce to the public and to all relatives and acquaintances that left-wing extremist, multiculturalist, wife and mother of a sixteen-year old son Olga Pavlů left us forever. She died in Pardubice prison after the death sentence by hanging for a particularly serious crime of treason"*.¹⁴⁷

101. Xenophobic attacks have been made worse in some countries by general crackdowns on human rights defenders and legal restrictions on their work, which have impeded NGOs from seeking protection from the state (Russia).¹⁴⁸ Many states have failed to take a clear and uncompromising stance against manifestations of intolerance, hate speech and hate-motivated violence, which contributes to an atmosphere of impunity and fosters further acts of violence.

102. In Germany, seven men and one woman were sentenced in March 2018 to 4-10 years imprisonment for founding a far-right terrorist group responsible for attempted murder

¹⁴³ For more information about the ideological background and the arguments of extremist anti-immigrant groups in Norway and globally, see *i.a.* Center for Research on Extremism at the University of Oslo, <https://www.sv.uio.no/c-rex/english/publications/>

¹⁴⁴ See https://www.lidovky.cz/domov/utok-na-komunitni-centrum-klinika.A160206_202820_In_domov_sm and <http://www.romea.cz/cz/zpravodajstvi/domaci/zharsky-utok-neonacistu-na-centrum-klinika-je-odlozen-policie-nezjistila-konkretni-pachatele>.

¹⁴⁵ In IUSTITIA. Interim Report on Bias violence/hate violence, 2018, 10 – 31 (<https://www.in-ius.cz/dwn/kvartalni-zpravy/kvarta-lni-zpra-va-o-na-sili-z-nena-visti-1.-10.-31.-12.-2018.pdf>) 7.

¹⁴⁶ *Ibid.*

¹⁴⁷ Romea, Policie obvinila muže z útoku na pardubické centrum Kašpárek, které pořádalo sbírku pro uprchlíky, 2016 (<http://www.romea.cz/cz/zpravodajstvi/domaci/policie-obvinila-muze-z-utoku-na-pardubicke-centrum-kasperek-ktere-poradalo-sbirku-pro-uprchliky>)

¹⁴⁸ CoE Commissioner For Human Rights, 'The Protection of Migrant Rights in Europe: Round-Table with human rights defenders organised by the Office of the Council of Europe Commissioner for Human Rights Paris, 5 October 2012', CommDH(2013)9, 18 April 2013, para. 31.

and bomb attacks on refugee shelters and politicians.¹⁴⁹ However, this example appears exceptional. NGOs in numerous countries have decried the absence of effective investigations into alleged abuses, capable of leading to the identification and adequate punishment of perpetrators of vigilante acts. It stands in stark contrast to the zealous targeting of certain humanitarian activists and civil society groups.

IV.6 Other phenomena associated with criminalisation: Administrative responses (including fines, regulatory infractions)

103. The boundaries between criminal and administrative sanctions are not always clear or consistent. Administration sanctions against an entity may lead to criminal proceedings against the entity's principals, or vice versa.

104. Often, criminalisation has led to greater policing of NGO activities, and a more cumbersome regulatory context. Regulations are typically vaguely framed and not uniformly implemented. The force of the regulations lies in their potential to be used at any time and the threat of sanction brandished like a 'whip' by authorities in certain countries.

105. National, and at times, local authorities have imposed rules which may be inconsistent with the humanitarian character of NGO humanitarianism and neutrality (such as requiring NGOs to sign a code of conduct including provisions to allow military and police escorts to board their rescue boats in Italy) or requiring NGOs and government service providers to report irregular migrants to the authorities when those migrants seek access to basic social rights, including medical care, food or shelter (Greece, United Kingdom). This type of policy was also debated in Norway, though it was never formally adopted.¹⁵⁰ The 'Fit for Purpose' updated study has recommended that 'public services and civil society should not be obliged to report or share information on the migration status of their users and clients'.¹⁵¹

106. Furthermore, certain states have imposed restraining orders (including orders to expel volunteers from particular locations or towns – Como, Italy) or have introduced legislation to restrict NGOs from accessing certain locations, particularly hotspots under the supervision of the Reception and Identification Service of the Ministry of Citizen Protection (Greece) or transit zones, detention or reception centres run by the state or intergovernmental organizations (Bosnia and Herzegovina, Croatia, Hungary). In Hungary, border security restraining orders introduced by the June 2018 "Stop Soros" legislative package prohibit individuals subject to certain criminal proceedings from entry

¹⁴⁹ Dresden Higher Regional Court (Oberlandesgericht Dresden), 'Urteil im Strafverfahren gegen die "Gruppe Freital" verkundet', Judgment of 7 March 2018, No. 4 St 1/16, Press release, 7 March 2018, reported in EU Fundamental Rights Agency (FRA), 'Fundamental Rights Report 2019', 91.

¹⁵⁰ Bent Høie, Minister of Health and Care Services, reply to written question, Parliament's published records, <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=59598>

¹⁵¹ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 19.

and stay in certain designated areas of the country (in the 8 km wide border zone).¹⁵² This has a particular impact on NGO representatives assisting migrants. The failure to give NGOs unimpeded access is particularly worrying, given that the conditions in which migrants are often held is in breach of human rights standards and may amount to ill-treatment. In Portugal, only Médecins Sans Frontiers and the National Portuguese Refugee Council are allowed to visit migrants in airport detention centres. Several NGOs have already asked to be allowed to enter in these areas, without success.¹⁵³ In Austria, NGOs have expressed concern about reported plans to move reception and pre-removal detention centres to hard-to-reach places outside cities, which would have the effect of impeding NGO monitoring and general access to provide assistance and support.¹⁵⁴ Furthermore, the new Federal Agency for the Provision of Care and Support, while clarifying state support functions, will significantly limit the opportunities for independent advice and engagement from civil society organizations in asylum and returns processes.¹⁵⁵

107. With respect to search and rescue at sea, the EU Agency for Fundamental Rights has reported – in addition to criminalisation - on the imposition of fines and the practices of seizing rescue vessels, denying the vessels permission to leave the ports due to registration issues in the flag state, and refusing to allow rescue vessels with vulnerable migrants on board to enter the port area and disembark.¹⁵⁶ A “security decree bis”, approved by the Italian government in June 2019 prohibited such boats from docking in Italian ports and allowed for the seizing their vessels. Fines of up to €50,000 per incident were foreseen for the captain, owner, and operator of a vessel entering Italian territorial waters without authorisation.¹⁵⁷ Restrictions of port access have also been problematic in Malta and Spain. Arrests have been made arbitrarily for improper registration of ships carrying out rescues (Malta) and improper disposal of waste (Italy).

108. Sometimes, new, stricter requirements have been imposed which have impeded NGO search and rescue activities. For example, in the Netherlands, in September 2018 a new regulatory framework concerning registration and safety certification requirements was announced for ships owned by humanitarian organisations.¹⁵⁸ Organisations that were

¹⁵² Hungary, Act No. VI of 2018 on the amendment of certain laws in relation to measures against illegal migration (*2018. évi VI. törvény egyes törvényeknek a jogellenes bevándorlás elleni intézkedéssel kapcsolatos módosításáról*), 28 June 2018.

¹⁵³ Provedor de Justiça, Annual Report 2018 (http://www.provedor-jus.pt/site/public/archive/doc/MNP_2018.pdf).

¹⁵⁴ See, OHCHR, ‘Report of mission to Austria focusing on the human rights of migrants, particularly in the context of return 15-18 October 2018’, para. 63.

¹⁵⁵ Ibid. The Austrian Parliament adopted the law on 20 June 2019. In accordance with the new procedure, contracts between the government and civil society service providers will be cancelled.

¹⁵⁶ FRA, ‘Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations’, October 2018. See also, FRA, ‘2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations’, June 2019.

¹⁵⁷ *Decreto-Legge Recante Disposizioni Urgenti In Materia Di Ordine E Sicurezza Pubblica*, (<https://openonline.imgix.net/wp-content/uploads/2019/06/11190151/DECRETO-SICUREZZA-BIS-Testo-DL-27-maggio1.pdf>)

¹⁵⁸ Registratie en certificering zeeschepen van organisaties met ideële doelstellingen, 26 September 2018 (<https://www.rijksoverheid.nl/documenten/kamerstukken/2018/09/26/registratie-en-certificering-zeeschepen-van-organisaties-met-ideele-doelstellingen>); Search and Rescue operations op de Middellandse

already registered were given one year to comply,¹⁵⁹ however, the Minister for Infrastructure and Water decided that to mitigate risks, the transitional period would not be applicable to ships that “consistently bring drowning migrants on board”. The organization Sea-Watch was informed that they (as a ship that “consistently bring drowning migrants on board”) had to meet all safety regulations with immediate effect.¹⁶⁰ Sea-Watch argued that these amendments were targeted at stopping its operations,¹⁶¹ and Dutch courts ruled that this directive violated the principle of legal certainty and that Sea-Watch should have been given a transitional period to comply.¹⁶² In early May 2019, a court in The Hague ruled that the ship could resume its operations.¹⁶³

109. In Spain, new protocols were introduced by the Directorate General of Merchant Marine under the Development Ministry designed to regulate, and in practice impede, the work of search and rescue NGOs. On 27 June 2017, the Directorate General wrote to the captain of the Open Arms boat indicating that all search and rescue operations require the prior approval of the authority responsible for the search and rescue (SAR) zone. The correspondence further stipulated that any consequential breaches during the navigation of the ship, will constitute infractions against maritime security or maritime traffic, punishable with fines of up to 901,000 and 300,000 euros, respectively.¹⁶⁴ In January 2019, the Directorate General denied permission to the Spanish Proactiva Open Arms search and rescue boat to leave the port, and conduct its mission in the central Mediterranean. This was in response to decisions by Italy and Malta to close their ports to rescued migrants, the Spanish authorities holding that this would require the boat to navigate for long distances.¹⁶⁵ Only several months later was the ship allowed to leave

Zee: Bestuurlijk Signaal, 24 September 2018

(<https://www.rijksoverheid.nl/documenten/rapporten/2019/01/17/bestuurlijk-sigitaal-search-and-rescue-operations-op-de-middellandse-zee>).

¹⁵⁹ ‘Reddingschip Sea-Watch mag voorlopig weer uitvaren na winst rechtszaak’, 7 May 2019

(<https://www.nu.nl/bootvluchtelingen/5878713/reddingschip-sea-watch-mag-voorlopig-weer-uitvaren-na-winst-rechtszaak.html>).

¹⁶⁰ Uitwerking beleidswijziging veiligheid van schepen van organisaties met ideële doelstellingen, 1 April 2019

(<https://www.rijksoverheid.nl/documenten/kamerstukken/2019/04/01/uitwerking-beleidswijziging-veiligheid-van-schepen-van-organisaties-met-ideele-doelstellingen>); Sea-Watch E.V. v. De Staat Der Nederlanden (Het Ministerie Van Infrastructuur En Waterstaat), ECLI:NL:RBDHA:2019:4548 - Rechtbank Den Haag, 7 May 2019 (<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:4548>)

¹⁶¹ Prakken D’Oliveira, ‘Sea-Watch starts proceedings against Dutch State’, 25 April 2019 (<https://www.prakkendoliveira.nl/en/news/2019/sea-watch-starts-proceedings-against-dutch-state>)

¹⁶² Prakken D’Oliveira, ‘Judge determines in preliminary relief proceedings that Sea-Watch may continue to sail’, 7 May 2019 (<https://www.prakkendoliveira.nl/en/news/2019/judge-determines-in-preliminary-relief-proceedings-that-sea-watch-may-continue-to-sail>)

¹⁶³ Prakken D’Oliveira, ‘Sea-Watch starts proceedings against Dutch State’, 25 April 2019

(<https://www.prakkendoliveira.nl/en/news/2019/sea-watch-starts-proceedings-against-dutch-state>); Sea-Watch E.V. v. De Staat Der Nederlanden (Het Ministerie Van Infrastructuur En Waterstaat), ECLI:NL:RBDHA:2019:4548 - Rechtbank Den Haag, 7 May 2019 (<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:4548>)

¹⁶⁴ Ministerio de Fomento, Director de la Marina Mercante, Comunicación del Director General de la Marina Mercante al Buque “OpenArms”, 27 June 2019 (https://www.scribd.com/document/415348809/Carta-del-Director-de-la-Marina-Mercante-al-Open-Arms#download&from_embed).

¹⁶⁵ See, ECRE, ‘Spain: Open Arms Search and Rescue Vessel Denied Permission to Conduct Mission’, 18th January 2019.

the port for a restricted mission – distributing humanitarian aid to migrants in Greece; it was not permitted to navigate to the areas around the Libyan search and rescue zone.¹⁶⁶

110. Some NGOs have faced large fines for giving food, providing showers or erecting shelters for migrants (Greece), or for monitoring or protesting against state policies. In some countries, humanitarian assistance has been virtually banned for persons who are not in the official asylum system (Serbia). In other countries, NGOs involved in support of migrants have been targeted for government financial audits, tying up their work (Hungary). In Hungary, a special tax was introduced on immigration supporting activity, covering media campaigns and propaganda activities that portray immigration in a positive light,¹⁶⁷ a practice which the Venice Commission has determined breached the rights to freedom of expression and association.¹⁶⁸ In Spain, legislation was introduced to forbid the documentation of security forces' interventions, forcing fines up to 600,000 euros in case of breach.¹⁶⁹
111. In North Macedonia, under the former government, fourteen organisations were investigated for supporting illegal activities. The organisations were required to proceed all documentation, including funding contracts with foreign funders, officially translated into local language. This resulted in huge costs and time to produce the necessary materials. Eventually the investigation was halted.
112. The requirement for NGOs to register is a common, and usually justifiable practice in most countries. However, at times the process of registration has been made particularly cumbersome, or made inaccessible to certain groups, constituting another type of bar on legitimate NGO activity (Greece). Tax officials have attended at community centres working with migrants in Athens and on the islands and imposed arbitrary fines for failing to comply with new procedures not communicated in advance. A Swiss NGO was fined 20,000 euro because they were not able to produce their registration documents at the time of an unscheduled visit.
113. For instance, the Croatian Ministry of the Interior refused to extend the cooperation agreement to run a centre for asylum seekers with the NGO Center for Peace Studies. The decision had the effect of banning the organisation from asylum centres and prevented their volunteers, who had been teaching refugees Croatian and providing integration services and legal advice for years, from continuing their work.¹⁷⁰ In Turkey, international NGOs are required to update their registration every year, failing which they must cease operations.

¹⁶⁶ 'Spain reluctantly allows Open Arms to leave port with aid supplies for migrants', The Local/AFP, 17 April 2019.

¹⁶⁷ Act No. XLI of 2018 on the amendment of certain taxation laws and other acts related to taxation, and on the special migration tax ([2018. évi XLI. törvény az egyes adótörvények és más kapcsolódó törvények módosításáról, valamint a bevándorlási különadóról](#)), 25 July 2018, Article 253.

¹⁶⁸ [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)013-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e). See also, the infringement proceedings lodged against Hungary by the European Commission https://europa.eu/rapid/press-release_IP-19-469_en.htm

¹⁶⁹ Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudad <https://boe.es/buscar/pdf/2015/BOE-A-2015-3442-consolidado.pdf>

¹⁷⁰ Iva Grubisa, '[Spurned by Authorities, Humanitarian NGOs Feel Unsafe in Croatia](#)', EURACTIV, 21 November 2018.

V. Key Findings

114. This study has sought to consider the situation of NGOs carrying out humanitarian assistance and related work in support of refugees and other migrants in Council of Europe (CoE) Member States, and the extent to which any law that criminalises NGO activity and the enforcement of such law impacts on legitimate NGO activity.

115. Ultimately, the study finds that the laws criminalising NGO activity and the enforcement of such laws impact significantly on legitimate NGO activity, negatively affecting freedom of association and related human rights. The laws themselves are vague and the way in which they have been applied lack legal certainty. While they pursue the legitimate aim of countering migrant smuggling, the limitations placed on lawful NGO activities are not necessary or proportionate. Thus, even though freedom of association is not an absolute right, the criminalisation of NGOs humanitarian activities in support of refugees and other migrants in order to prevent migrant smuggling is not a legitimate, necessary or proportionate basis for tackling this ill. There are more effective and less intrusive routes to achieve the aim.

116. The main findings of the study can be summarised as follows:

The situation of NGOs

117. The influx of refugees and other migrants has spurred many self-funded volunteers, autonomous solidarity movements and more established civil society groups to action. Not only have they worked to fill some of the urgent gaps in humanitarian assistance and protection, they also sought to demonstrate solidarity and a common humanity, and to counter xenophobic and insular nationalist narratives prevalent in many CoE Member States. This reaction to abject suffering reflects the humanitarian imperative simply to provide assistance wherever it is needed. That civil society actors have shown solidarity in the face of these protection gaps is natural and appropriate and consistent with the ethos of European citizenship.

118. Many NGOs feel abandoned by the failure of governments and certain intergovernmental organizations to demonstrate clear support for their mandates and their commitment to addressing the needs of people in clear need. Instead of explicitly acknowledging the importance of their work and actively supporting it by providing an enabling environment, the work of NGOs has been thwarted by many governments. In addition to criminalisation, some NGOs have been publicly smeared in the media, some have received threats and others have been kept outside of decision-making processes, and restricted in their ability to access vulnerable migrants to carry out their work.

119. The policies and practices of governments have restricted civil society space. The threats of prosecution and actual arrests and prosecutions as well as the associated administrative measures that have been implemented have had a chilling effect on the legitimate work of NGOs. Regardless of the outcome, the initiation of criminal proceedings and indeed the prospect of criminal sanctions has served to discourage

solidarity, impede NGOs from pursuing their mission and diminish their operational capacity and in some cases abort their work. It has also caused reputational harm.¹⁷¹

120. This has had a knock-on effect on the persons and communities the NGOs have committed to support - vulnerable refugees and other migrants. The combination of the shrinking civil society space and hostile environment policies in place in many states has put vulnerable refugees and other migrants in the worst possible situations in which their lives, health and dignity are at constant risk.

The extent to which any law that criminalises NGO activity and the enforcement of such law violates freedom of association and related rights

Prescribed by law

121. Many of the CoE states under review apply the principle of *ultima ratio* or similar when determining whether it is appropriate for particular conduct to be criminalised. Nevertheless, the laws criminalising aspects of NGO assistance to refugees and other migrants adopted by the majority of states under review have tended to be vague, unclear and imprecise, open to misuse and arbitrary application. In practice, the threat of arrest has been used as a form of harassment,¹⁷² to undermine civil society space. Criminalisation has led to greater policing of NGO activities, with regulations vaguely framed and not uniformly implemented. This has resulted in arbitrary application of the law in certain countries.

122. An obvious challenge for EU Member States is the Facilitators Package including the Directive which the EU has refrained from updating and revising to address the 'significant inconsistencies, divergences and grey areas', despite calls 'for a review of the legislative framework, greater legal certainty and improved data collection on the effects of the legislation.'¹⁷³ A 2016 evaluation of the Facilitators Package described that it 'has not been effective in creating legal certainty over the distinction between facilitation of unauthorised entry, transit and residence and humanitarian assistance.'¹⁷⁴

¹⁷¹ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 24.

¹⁷² See generally, Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart, 2019).

¹⁷³ See, Sergio Carrera, Elspeth Guild, Ana Aliverti, Jennifer Allsopp, Maria Giovanna Manieri, Michele Levoy, '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, PE 536.490, 2016, abstract. See also, Lina Vosyliūtė & Carmine Conte, 'Crackdown on NGOs and volunteers helping refugees and other migrants', Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019.

¹⁷⁴ European Commission, 'Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling)', prepared by ICF International for the European Commission, March 2016, 22.

Legitimate aim

123. On its face, the legislation tends to serve the legitimate aim of countering the smuggling of migrants, which falls within one of the Article 11(2) of the European Convention on Human Rights stipulated requirements for restrictions to freedom of association: the prevention of disorder or crime.

124. However, it should be recalled that UNODC - the UN body with expertise on migrant smuggling and with responsibility for the Smuggling of Migrants Protocol – has indicated that criminalisation alone may not be the best way to tackle the phenomenon. It underscored that ‘increased border enforcement efforts [which would include criminalisation measures] in geographically limited areas often result in displacement of smuggling routes to different borders, smuggling methods or to other routes. If applied in isolation these measures do not reduce the number of smuggled migrants or the size of the smuggling problem.’¹⁷⁵ It called for a comprehensive, multi-prong approach which should include ‘broadening the possibilities for regular migration and increasing the accessibility of regular travel documents and procedures. Making regular migration opportunities more accessible in origin countries and refugee camps, including the expansion of migration and asylum bureaux in origin areas, would reduce opportunities for smugglers.’¹⁷⁶

125. Invariably however, the legitimate aim of countering migrant smuggling has been used as a route to restrict NGOs from carrying out their legitimate work and as a means to hinder persons from applying for asylum.

Necessary and proportionate

126. In the majority of cases, criminalisation is neither necessary nor proportionate. First, as already stated, UNODC recommended a range of less intrusive measures aimed at reducing the opportunities for smugglers, focused on broadening the possibilities for regular migration. Second, when enacting criminal laws to counter migrant smuggling, few states have introduced a humanitarian exception to ensure that NGO activities are not captured by criminal laws intended to repress commercial smuggling.¹⁷⁷ Those that have introduced exceptions, have tended to apply them overly narrowly.

127. Again, the trends with state legislation mirror the concerns about the EU Facilitators Package. Efforts to ensure that the Facilitators Package was the least intrusive as possible on NGOs’ legitimate activities have not succeeded as yet. Calls upon the EU to introduce

¹⁷⁵ UNODC, ‘Global Study on Smuggling of Migrants’, 2018, 12.

¹⁷⁶ Ibid.

¹⁷⁷ Lina Vosyliūtė and Carmine Conte, ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019. They conclude that ‘The facilitation of entry is criminal, even without the intent to gain profit, in 24 out of 28 EU Member States, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, Sweden and the UK’ (6).

a mandatory financial benefit clause have gone unheeded.¹⁷⁸ This recommendation stems from the threshold of 'gain' in the UN Smuggling Protocol, which is defined as obtaining, 'directly or indirectly, a financial or other material benefit.'¹⁷⁹

128. Similarly, calls to take an expansive view of "humanitarian assistance" in order to increase NGO protections have gone unheeded. It has been recommended that 'the definition of "humanitarian assistance" should encompass different forms of solidarity with refugees and other migrants, starting from SAR activities and ending with the peaceful disobedience actions of human rights defenders. ... "humanitarian assistance" should protect any basic service provision that upholds the human dignity of refugees and other migrants and/or that enables access to fundamental rights, including the right to asylum, access to justice and legal aid, and others.'¹⁸⁰

129. For all of the above reasons, the intrusions to civil society space caused by the criminalisation of their legitimate activities in support of refugees and other migrants constitutes an unjustifiable breach of freedom of association which should be promptly rectified by the concerned CoE Member States.

¹⁷⁸ See, "We are a welcoming Europe" (<https://weareawelcomingeurope.eu/en/about/>). See also, European Parliament, Resolution 2018/2769(RSP) on guidelines for Member States to prevent humanitarian assistance from being criminalised, 5 July 2018. See also, Sergio Carrera, Elspeth Guild, Ana Aliverti, Jennifer Allsopp, Maria Giovanna Manieri, Michele Levoy, '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, PE 536.490, 2016; See also, Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, "Update Study "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants", Study for the EP Petitions Committee (PETI), European Parliament, December 2018. See also, European Commission, 'Evaluation and Impact Assessment Study on a proposal for a revision of the EU legal framework related to the facilitation of irregular migration (migrant smuggling)', prepared by ICF International for the European Commission, March 2016, 74.

¹⁷⁹ UNODC, 'The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol', Issue Paper, 2017.

¹⁸⁰ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, 'Update Study "Fit for purpose?" The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', Study for the EP Petitions Committee (PETI), European Parliament, December 2018, 18

VI. Conclusions

130. It is evident that in many countries in Europe, international law and standards relating to freedom of association and the protection and promotion of civic space have not been fully guaranteed in respect of NGOs supporting refugees and other migrants. This undermines the work of these NGOs and increases the vulnerability of refugees and other migrants. This is a particular problem in countries on migration routes and in border hotspots and other places with exceptional migration flows.

131. A number of problems have emerged, as follows:

- i) In many countries, criminalisation of the work of NGOs is vague, and it is unclear the exact type of activities that are affected. This has led to uncertainty and arbitrary application of laws.
- ii) Often, criminalisation is overly broad, capturing conduct which falls outside any legitimate purpose of the legislation, and which is unnecessary and unproportionate.
- iii) The use of the word “illegal” when referring to migrants negatively impacts the general public’s perception of migrants, legitimising policies that are not in line with human rights guarantees and contributing to xenophobia and discrimination. It also contributes to public backlashes, threats and violence against NGOs supporting refugees and other migrants.
- iv) In many states, criminal acts perpetrated against NGOs supporting refugees and other migrants have not been adequately investigated or prosecuted.
- v) Criminalisation has led to greater policing of NGO activities, and a more cumbersome regulatory context.

Annex 1: Questionnaire provided to Member States of the Council of Europe, NGOs and other Experts

Background

The [Expert Council on NGO Law](#) is currently preparing a thematic study on the impact on NGO activities, particularly humanitarian efforts targeting refugees and other migrants, of changing criminal law approaches or provisions in [CoE Member States](#).

The thematic study will assess the standards applicable to CoE States, and the extent to which any law that criminalises NGO activity and the enforcement of such law impacts on legitimate NGO activity.

The practice once gathered will be assessed in the light of the applicable European standards governing freedom of association and the rights of NGOs and, in the light of this, guidelines will be developed to help States ensure that their law and practice when taking action against trafficking, smuggling and border control is consistent with those standards.

Instructions for those supplying information

We are seeking information from an array of sources in line with the questions set out below. We encourage lawyers, case workers, NGOs and others with information to communicate that information, so that the report can benefit from the widest array of inputs. We are also seeking information from Member States relating to relevant legislation and current practices.

We recognise that not all questions will be relevant to each Member State, nor will each person reviewing this questionnaire have answers to each question. We encourage those consulting the questionnaire to answer all questions which are relevant to their circumstances and within their expertise.

If you are referring to official documentation (legislation, bills, parliamentary reports, jurisprudence) we would appreciate links to the official texts.

1. Contact details

Please specify your name, title, affiliation as well as contact details [email, telephone, postal address, other]. Please specify if you would like the information you supply or your personal details to remain confidential. Please also specify if you would be happy to be contacted for any follow-up information.

2. Legal framework [actual and draft (bill) legislation and reforms to existing legislation; parliamentary debates about legislation]

1 Domestic anti-trafficking and anti-smuggling legislation [for EU States – which States have implemented an exception to [EU Directive 2002/90/EC](#) for humanitarian assistance; how is it framed; for non-EU States, please supply any domestic legislation criminalising the facilitation of unauthorised entry/transit/residence]

2 Legislation regulating the operation of nongovernmental organisations[In particular, please explain what legislation applies to regulate the comportment of NGOs; what is the consequence for an NGO which acts in contravention of domestic law or policy]

3 Broad criminal law/constitutional law question – what are the criteria used by the State to determine whether a particular conduct (act or omission) should be criminalised? For instance, in some States, the criminal law is only used to regulate behaviour if no lesser means of control is possible. Where, if anywhere, is this criteria set out? Does it appear in the constitution? Has it been the subject of litigation or parliamentary debate? How clear is it?

4 Criminal law legislation (Criminal Code; Code of Criminal Procedure)

consider i) generally whether there is a law prohibiting humanitarian assistance to migrants and ii) consider particularly whether/how the law applies to staff of organisations and/or to the organisation itself; iii) what sentences apply to persons (or organisations found guilty?); iv) Technically, is it possible under the domestic law of the State to prosecute an organisation?

5 Administrative law or regulatory frameworks – Has administrative law or regulatory frameworks (e.g., Health and Safety Legislation; Safeguarding regulations etc.) been used to stop, impede or prevent NGOs from providing assistance or support to migrants and refugees? In what ways?

6 Migration and refugee law – there is a perception that any application of the criminal law to persons or organization assisting migrants and/or refugees stems from the criminalisation of the migrants/refugees themselves – how does the law deal with people who come and cross the border without a permit? For instance, are persons who enter a country without a permit deemed to be “illegal” entrants? If an individual or an organisation helps such an illegal entrant, does this constitute aiding and abetting under the criminal law?

7 Freedom of Association and Expression – to what extent does domestic law protect against individuals and organisations who express support for migrants and refugees or join forces/meet to discuss such protection etc – how does this interact with the criminalisation?

8 Law of the Sea – (relevant for countries bordering international waters or whose vessels operate on the High Seas) – how are law of the sea provisions incorporated into domestic law; how does the obligation to assist people in distress, translate into domestic law; how does it interact with anti-trafficking/smuggling and refugee law.

3. Case examples

Please provide information on any cases, or patterns of cases, that you are aware of, which relate to the criminalisation of NGO activities in the context of humanitarian efforts targeting refugees and other migrants.

Please provide information on, inter alia:

- The charge or regulatory infraction
- The factual context in which the employee or NGO was charged
- At the pre-trial stage, what happened? Was anyone detained? For how long? Was property, equipment or data seized or destroyed?
- Procedural issues associated with how the case was handled
- The outcome of the case – the court decision; the sentence or other/additional penalty/fine/sanction;
- The short-term impact [on the migrants who were in the process of being assisted; on the accused persons (who may be NGO employees or more often, volunteers or temporary contractors with very limited employment or other protections from the NGO) and for the organizations;

- The longer term impact on the individuals concerned and the NGOs

Also consider whether criminalisation is used as a threat or whether it is something that regularly leads to prosecutions. If criminalisation is more of a threat – what are the types of consequences short of prosecution (seizure; forced stoppage of work; forced use of armed police during search and refugee operations; general hostile environment...)

Please consider:

- any criminal cases against civil society workers (individuals)
- Criminal cases against the organizations themselves
- Administrative or related proceedings against the organizations in lieu of or following criminal proceedings.

4. Cases involving vigilante acts against NGOs who assist migrants (violence; vandalism; threats...) or relates acts which may amount to “Hate Crimes”

- Please provide any factual information on any known cases
- Please explain the extent to which the State has a law against that kind of behaviour (nuisance; criminal law); are there any known instances in which vigilante attacks have been reprimanded (criminal/nuisance...)

5. Coverage by media, IGO or NGO policy reports, governments/parliaments

Please provide any links to media, intergovernmental and NGO policy reports, as well as government statements and reports.

6. Additional information?

Please provide any additional factual information relevant to this study, not already provided above.

Please provide any reflections on the context in your particular country, the reason(s) for the resort to criminalisation and any recommendations about how to resolve the underlying problems.

Annex 2: Key Reports and Documents

Sara Bellezza and Tiziana Calandrino, 'Criminalization of Flight and Escape Aid', *borderline-europe*, March 2017

Caritas Europa, 'The "Criminalisation" of Solidarity Towards Migrants', 20 June 2019

Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosyliūtė, *Policing Humanitarianism: EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart, 2019)

Sergio Carrera, Elspeth Guild, Ana Aliverti, Jennifer Allsopp, Maria Giovanna Manieri, Michele Levoy, '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, PE 536.490, 2016

Sergio Carrera, Jennifer Allsopp and Lina Vosyliūtė, 'Main Research Findings of ESRC Project on the effect of EU's anti-smuggling policies on civil society actors', CEPS, Brussels, 2017.

Sergio Carrera, Jennifer Allsopp and Lina Vosyliūtė, 'Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism', (2018) 4(3) *International Journal of Migration and Border Studies*, 236-276.

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Carmine Conte and Seán Binder, 'Strategic litigation: the role of EU and international law in criminalising humanitarianism', *ReSOMA Policy Brief*, July 2019

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

CoE Commissioner for Human Rights, 'Lives saved. Rights protected: Bridging the protection gap for refugees and migrants in the Mediterranean', June 2019

CoE Commissioner for Human Rights 'States' Duty to Protect Human Rights Defenders', 6 December 2018

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

CoE Commissioner for Human Rights, 'The Protection of Migrant Rights in Europe: Round-Table with human rights defenders organised by the Office of the Council of Europe

Commissioner for Human Rights Paris, 5 October 2012', Report, CommDH(2013)9, 18 April 2013

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

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

European Parliament Committee on Civil Liberties, Justice and Home Affairs 'Hearing on "The Implementation of the Facilitation Directive and humanitarian assistance"', 27 September 2018.

European Union Agency for Fundamental Rights (FRA), 'Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations', October 2018

FRA, '2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations', June 2019

FRA, 'Fundamental Rights Report 2019', 2019

FRA, 'Fundamental Rights Report 2018', 2018

FRA, 'Challenges facing civil society organisations working on human rights in the EU', 2018

FRA, 'Criminalisation of Migrants in an Irregular Situation and of Persons engaging with them', March 2014.

Liz Fekete, 'Migrants, borders and the criminalisation of solidarity in the EU', (2018) 59(4) *Race & Class* 65 –83

Liz Fekete, Frances Webber and Anya Edmond-Pettitt, 'Humanitarianism: the unacceptable face of solidarity', Institute of Race Relations, London, 2017.

Liz Fekete, Frances Webber and Anya Edmond-Pettitt, 'When witnesses won't be silenced: citizens' solidarity and criminalisation', Institute of Race Relations, London, 2019.

Sarah Hammerl, 'Asylum Criminalisation in Europe and its Humanitarian Implications', United Against Inhumanity, 2019

Human Rights at Sea (HRAS), 'Legal and Policy Matters Arising from the Increased Criminalisation of Civil Society Search and Rescue Activities in the Mediterranean', February 2019

Yasha Maccanico, Ben Hayes, Samuel Kenny, Frank Barat, '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, September 2018

Alexander Nabert, Claudia Torrisi, Nandini Archer, Belen Lobos and Claire Provost, 'Hundreds of Europeans 'criminalised' for helping migrants – as far right aims to win big in European elections', *Open Democracy*, 18 May 2019

UN General Assembly, 'Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Saving lives is not a crime', UN Doc. A/73/314, 7 August 2018

UNODC, 'Global Study on Smuggling of Migrants', 2018

UNODC, 'The Concept of "Financial or Other Material Benefit" in the Smuggling of Migrants Protocol', Issue Paper, 2017

Lina Vosyliūtė and Carmine Conte, 'Crackdown on NGOs and volunteers helping refugees and other migrants', Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019

Lina Vosyliūtė and Anne-Linde Joki, 'Integration: The Social Inclusion of Undocumented Migrants', ReSOMA Discussion Brief, November 2018