



POLICY OPTION  
BRIEF

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## How could strategic litigation prevent policing of humanitarianism?

MIGRATION



**ReSOMA** identifies the most pressing topics and needs relating to the migration, asylum and integration debate. Building on the identification of pivotal topics and controversies in the Discussion Policy Briefs, **ReSOMA Policy Option Briefs** put forward the policy alternatives that can fill the key gaps at EU/national level and map their support among stakeholders and researchers. In addition, they spell out which evidence is used by the advocates of these various solutions to argue for their effectiveness.

Under nine different topics, ReSOMA Policy Option Briefs capture available evidences and new analysis of the policy alternatives. They take stock of existing literature of policy solutions on asylum, migration and integration. This brief has been written under the supervision of Sergio Carrera (CEPS/EUI). Based on the Policy Option Briefs, other ReSOMA briefs outline scenarios for reform paths in the asylum, migration and integration areas in line with realities on the ground, the rule of law and human rights standards. This brief focuses on various options for strategic litigation and democratic accountability venues to stop and prevent policing of humanitarianism.

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Policy Option Brief

# How could strategic litigation prevent policing of humanitarianism?

By Lina Vosyliūtė, [Centre for European Policy Studies](#)

## INTRODUCTION

During the first year of ReSOMA, researchers focused on the phenomenon of the [Crack-down on NGOs assisting refugees and other migrants](#) (Vosyliūtė and Conte 2019 b). They relied on previous CEPS research on the impacts of EU anti-migrant smuggling policies and their effects on civil society actors, which has been referred to as *policing humanitarianism* (Carrera et al 2016, 2018 a, 2018 b, 2019). The project has also drawn on wider academic research on *criminalisation of solidarity* or *contesting fraternity* (Allsopp 2012, 2017 & 2018; Fekete 2009 & 2018; Fekete et al 2017 & 2019), on blaming the rescuers with a specific focus on SAR NGOs (Heller and Pezzani 2017; Gkliati 2016; Vosyliūtė 2018; Moreno Lax, Ghezelbash and Klein 2019; Esperti 2019; Cusumano and Villa 2019), *shrinking civil society spaces* and the rule of law challenges (Szuleka 2018; Bard et al 2016; Youngs and Echague 2017; Cox 2019), on *humanitarian smuggling* (Landry 2016 & 2017) and critical literature about the migrant smuggling 'market' (Carrera and Guild 2016; Micallef 2017; Reitano et al 2018; Zhang et al 2018; Aloyo and Cusumano 2018; Sanchez and Achilli 2019). This research, focusing on different aspects of the phenomenon, has captured the importance of framing and reframing the issues.

This research has also built on the monitoring efforts of various academics, civil society and even European agencies: PICUM (2017), Carrera et al (2018 a), Open Democracy (2018), International Race Relations (Fekete et al 2017 & 2019), European Civic Forum (2017 and 2019); the European Union Agency for Fundamental Rights (FRA 2014, 2018 a, 2018 b & 2019) provided a statistical overview of the wide-spread nature of criminal investigations and prosecutions. The ReSOMA case monitoring has identified at least 16 NGOs and associations which have been affected by the formal criminalisation or investigation of their volunteers and in total 158 individuals from 2015 up to mid-2019 have been investigated in 11 EU Member States (Conte 2019, in Vosyliūtė and Conte 2019 b).

This year, ReSOMA research has elaborated on how such NGOs and volunteers have been defending themselves in national courts (Conte and Binder 2019). [The initial discussion brief on strategic litigation](#) highlighted that European and international law arguments were used in three selected defence cases at national level – IUVENTA in Italy; Sean Binder and Sarah Mardini in Greece; Anouk Van Gestel in Belgium (Conte and Binder 2019). This brief also

described two examples of proactive strategic litigation at international level – before the International Criminal Court (ICC) and before the European Court of Human Rights (ECtHR). The Final Synthetic Policy Options Brief explores some options for strategic litigation by answering the following questions:

- How can criminalised individuals, civil society organisations frame their claims? What judicial, administrative and democratic accountability venues are available to them at the EU level?
- Which are other international and regional venues that have been or could be used to highlight the shared responsibility of the EU and its Member States for the crack-down on NGOs?
- Are there effective remedies available for judicial harassment, when a criminal prosecution amounts to persecution of civil society?
- What can be done to challenge early signs of policing (suspicion, intimidation and harassment, disciplining on other unrelated administrative offences) before they escalate into a criminal prosecution?

This ReSOMA Policy Options Brief is building on the Conclusions and Recommendations section of the [Final Synthetic report on Crackdown on NGOs assisting refugees and other migrants](#) (Vosyliūtė 2019 in Vosyliūtė and Conte 2019 b). It is enriched with inputs received during the ReSOMA Transnational Feedback Meeting with criminalised individuals, their lawyers, academics and civil society organisations (ReSOMA 2019 a) that took part in Brussels on 4 October 2019. This Policy Options Brief also responds to some of the initial insights from the ReSOMA Task Force discussion among representatives of International and EU institutions and agencies that took place on 8 November 2019 in Brussels. It contains some elaborations on concrete case studies in blue background and proposals for European Commission's guidelines – in green.

## 1. WHAT IS STRATEGIC LITIGATION?

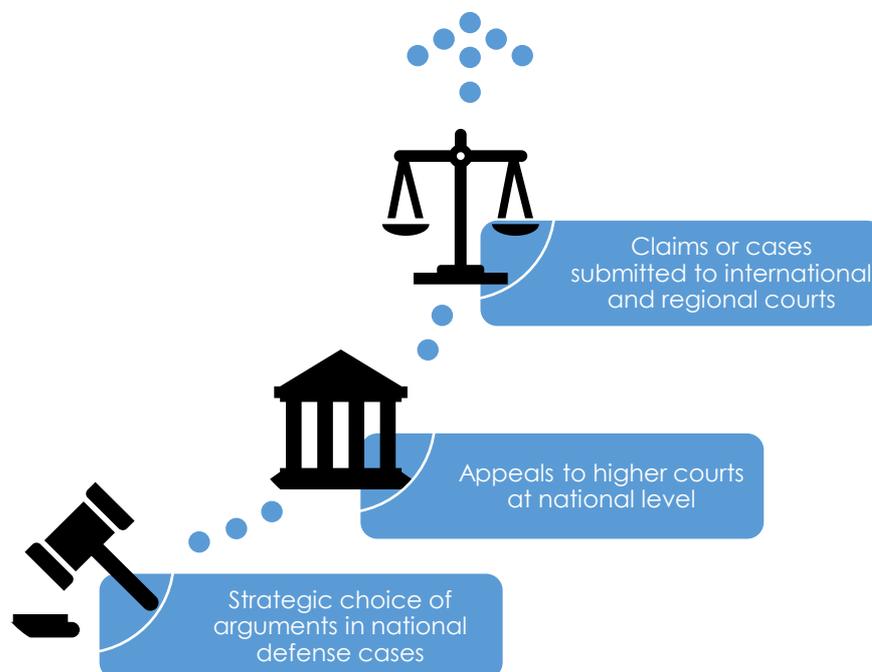
Strategic litigation is a contested term that means bringing cases that are likely to produce wider societal change beyond the individual concerned. Weiss (2015), for example, is critical that it often implies artificially constructing cases that risk sacrificing an individual's legal defence. He proposes to keep individuals' needs at the core – to listen to what individuals have been experiencing and try to address those issues, as many others are or could be in a similar situation.

Navanethem Pillay, Former UN High Commissioner for Human Rights (OSJI 2018), has asserted that we should speak of 'strategic impact litigation'. This term put emphasis on a societal impact, that is or should be "rooted in often contentious social and political struggles that shape and define how legal action is understood and what it can achieve. Litigants are more likely to generate positive results when they view litigation as one strand of a more comprehensive, and often more complicated, array of pathways to change".

In this brief, 'strategic litigation' is understood as a proactive strategy pursued by criminalised individuals and civil society organisations to stop and prevent criminalisation and wider policing of humanitarianism. Thus, it can include different legal and advocacy strategies, that are putting forward claims not only via traditional judicial avenues, but also via administrative and democratic accountability venues. In this sense, EU level presents new options that are explored in this brief.

## 1.1. What are legal strategies and venues?

Figure 1. Strategic Litigation: Legal Strategies



Source: Author, 2019.

Legal strategies involve a strategic choice of arguments in national defence cases, appeals to higher courts, or putting forward cases before international and regional courts (see Figure 1). Legal defence of these actors has and is ongoing at national courts. The main goal here is to be acquitted from hefty charges of migrant smuggling and related crimes. However, this does not always lead to effective remedies. For example, in the ongoing case of ERCI volunteers Sarah Mardini and Sean Binder, acquittal does not remedy 3 months spent in a high security prison as a pre-trial detention.

This brief maps judicial, administrative and democratic accountability venues (see Figure 2). Some of these venues are EU specific, namely the Court of Justice of the EU (CJEU), the European Court of Auditors (ECA), the European Ombudsman (EO), the European Parliament's Inquiry, the Right to Petition. It also highlights the availability of other tools at regional and international level, namely the European Court of Human Rights (ECtHR) at the Council of Europe, and the UN Courts, such as the International Criminal Court (ICC), as well as a

plethora of quasi-judicial human rights complaints mechanisms, UN special procedures and Working Groups. This brief further elaborates already used and potential legal and advocacy avenues to access justice, receive effective remedies and protect such actors at international, regional and EU level.

**Figure 2. Types of judicial, administrative and democratic accountability venues at different levels**

Judicial and quasi-judicial	Administrative & Financial	Democratic
<ul style="list-style-type: none"> <li>• National - criminal and civil courts</li> <li>• EU - Court of Justice of the European Union (CJEU)</li> <li>• Regional - European Court of Human Rights (ECtHR)</li> <li>• International - International Criminal Court (ICC); Quasi-judicial: UN human rights complaint mechanisms and Working Groups;</li> </ul>	<ul style="list-style-type: none"> <li>• National - administrative courts/procedures, equality bodies and ombudspersons</li> <li>• EU - European Ombudsman, European Court of Auditors, European Commission infringements</li> <li>• Regional - N/A</li> <li>• International - UNODC Implementation Review</li> </ul>	<ul style="list-style-type: none"> <li>• National - Parliaments</li> <li>• EU - EP inquiry; Petition before EP; EU Rule of Law Mechanism; European Citizens' Initiative;</li> <li>• Regional - CoE PACE, OSCE ODIHR, Venice Commission</li> <li>• International - UPR mechanism</li> </ul>

Note: The list is not conclusive, but only covering venues that are relevant to this topic.

Source: Author, 2019.

This brief illustrates the power of the narrative and rights at stake before each of these distinct yet linked avenues. Civil society actors could potentially frame their claims as EU citizens that can call for good governance and better legislation via EU administrative and democratic accountability venues. As human rights defenders and humanitarian actors they can call for tools that respect, protect and promote fundamental rights and that guidelines applicable outside the EU also apply internally. Finally, they can reframe the narrative and call for judicial and democratic accountability for restrictive and repressive policies that fall short of fundamental rights, and international law.

Since 2015, academia as well as international, regional and EU-level institutions, including courts and oversight bodies have paid increasing attention to this phenomenon of 'crack-down on NGOs'. They are prosecuted as migrant smugglers, or attacked as 'enemies of the state', or even suspected under money laundering laws, all for efforts to uphold the human dignity of refugees and other migrants or denounce overuse of police violence and other violations.

The logic of restrictive and increasingly repressive migration policies has considerably restrained the civil society mandate (FRA 2018; European Civic Forum 2019). The right to de-

fund human rights and to provide humanitarian aid to those in need in the context of migration has been narrowed. Civil society actors are key for bringing about democratic accountability for governments', EU and its agencies' (in) actions and (non)compliance with the founding EU values of rule of law, democratic institutions and fundamental rights. Therefore, the very presence of 'watchdog' civil society actors in border zones, hotspots and search and rescue zones, is a way to keep various actors accountable for respecting EU values.

## 2. WHICH APPROACHES NEED TO BE EXPLORED AT EU LEVEL?

This section further elaborates the EU-level responsibilities for stopping and preventing the crackdown on solidarity. It highlights how the national laws under which civil society has been prosecuted fall within the remit of EU law – namely the EU Facilitation Directive. Thus, national laws are subject to review by the CJEU and its correct implementation falls under the responsibility of the European Commission.

The 'vague and ambiguous' definition of facilitation-related crimes and offences and lack of fundamental rights standards within the Facilitation Directive makes correct implementation difficult. It opens the gates for misinterpretations and misuses in order to pursue other goals than those formally intended by the directive. Thus, the Facilitation Directive can be subject to CJEU review, as for example occurred with the Family Reunion Directive. In the case C-540/03, the European Parliament brought the complaint against the CJEU. The Parliament claimed that the right to family reunification of minor children of third country nationals, as enshrined in Directive 2003/86/EC, was not respected (see sub-section 2.2).

In addition, the European Commission conducted a REFIT exercise in 2017, which aims to improve Union law in light of the Better Regulation Guidelines. In this process, European citizens, academia and other actors have been very active and vocal about the very likely negative effects on humanitarian actors stemming from the optional exemption clause and the lack of for-profit motives for the designation as a crime. Academics also warned that the legal "uncertainty left" within the Facilitation Directive is not in line with the EU's commitment to Better Law Making and Good Governance, and not even with the rule of law thresholds.

A conclusion reached in the European Commission's REFIT in 2017 could itself be reviewed. The REFIT constitutes an administrative decision not to revise EU legislation; thus it can be subject to an assessment by the European Ombudsman on whether the principles of good governance have been applied. The potential human rights impacts, such as the risk of being criminalised were asserted as only being "perceived". ReSOMA research on the basis of various monitoring measures shows that these risks are real and have already materialised in 11 EU Member States, where between 2015 and 2019 more than 150 individuals have been criminalised or investigated under the national laws that fall in the area governed by the EU law (Conte 2019, in Vosyliūtė and Conte 2019 b). Some of them were working or

volunteering in at least 16 civil society organisations that are assisting refugees and other migrants.

The EU citizen's right to good governance foresees that EU citizens should be heard concerning the measures affecting them and be able to obtain an effective remedy. EU citizens have used their rights. Schmid-Porras (2017) has started a Petition before the European Parliament, that is still open. Also, EU citizens launched a European Citizens' Initiative to change this EU legislation. More than 170 civil society organisations across Europe have signed and mobilised hundreds of thousands EU citizens to sign the ECI. Although, the initiative has not managed to raise one million signatures needed and was closed by the Commission in February 2019, it inspired a new platform for cooperation among affected civil society organisations "We Are Welcoming Europe Alliance".

The European Parliament (2018 a) also called on the European Commission in July 2018 to elaborate guidelines on the humanitarian exemption clause. ReSOMA (2019 a) Transnational Feedback participants stressed that the drafting of such guidelines would be a welcome step, but it needs to be seen in perspective, as an interim measure. Lawyers on several occasions have highlighted that the EU's own laws need to be sufficiently clear and precise as to give proper interpretative weight for national courts (ReSOMA 2018 a & 2019 a). The previous research also has argued, that when laws are vague and ambiguous, they are 'bad laws' (Carrera et al 2018 a).

The subsequent section further shows that various vague 'criminal laws' are routinely used against human rights defenders and humanitarian actors, such as on money laundering, terrorism related crimes, espionage, conspiracy against the state, being part of an organised crime group, various 'public policy and public security' related clauses, but first and foremost, crimes related to migrant smuggling (Carrera et al 2018 a, 2018 b & 2019; Vosyliūtė and Conte 2019 a & 2019 b; Fekete et al 2017 & 2019; Ferstman 2019). States use such laws for suppressing vital humanitarian operations and human rights monitoring. OSCE ODIHR guidelines on human rights defenders assert that "legal provisions that directly or indirectly lead to criminalisation of such activities should be immediately amended or repealed" (OSCE, 2014, para. 24). This is also applicable to the EU institutions, which are mandated to respect, protect and promote fundamental rights. So while 'bad' national criminal laws are not a novelty, it is striking that the EU law setting minimum standards has been designed in a manner that is incompatible with rule of law standards and fundamental rights. In the long run, such laws also risk obstructing democratic accountability for wrongdoings before the EU institutions.

This leads to even more perverse effects on refugees and other migrants who are drowning at sea, or are experiencing torture, in camps in Libya, or inhuman and degrading conditions in hotspots in Greece (UN Working Group on Arbitrary Detention 2019). Often civil society organisations working in the field become witnesses of the overuse of violence by the border guards and police (Carrera et al 2019; Ferstman 2019; Fekete et al 2019). Raising human rights concerns in such situations becomes one more reason for retaliations against these

“watch-dog” organisations. For example, Greek authorities declared a rescuer and human rights activist working in Lesbos, Salam Kamal Aldeen, posing a ‘threat to public security’ and subjected him to deportation from Greece to Denmark (Publico 2019) (also see sub-section 3.3).

## 2.1. Substantive EU law: Does the EU Facilitators Package set ‘minimum standards’?

The national laws under which civil society actors have been criminalised, including members and volunteers of at least 16 NGOs fall under the scope of the EU law (Conte 2019). The Facilitators Package consists of the Facilitation Directive 2002/90 “defining the facilitation of unauthorised entry, transit and residence” and the accompanying Council Framework Decision 2002/946/JHA “on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence”.

Framework Decision 2002/946/JHA obliges Member States to sanction facilitation of entry in aggravating circumstances (when committed for financial gain, as part of a criminal organisation or when endangering life) with a sentence of “not less than 8 years”, (Article1). As it only sets ‘minimum standards’, national laws can go above and beyond. For example, the base penalty for facilitation of entry without a profit motive in Greece is up to 10 years in prison; in Italy and France, up to 5 years; in Belgium, up to 1 year (Carrera et al 2018 a:38). In case of aggravation the penalties go higher. For example, if committed as an ‘organised crime’ (when two or more people are involved), it carries a sentence of up to 20 years in Belgium, up to 15 in Italy, or if for financial gain of up to 10 years in France and Greece (in the latter case, the same as without aggravation) (Carrera et al 2018 a:41).

Cox (2019:4) highlights that the situation governed by EU law arises when EU Member States are transposing directives in light of TFEU Art. 288 (3) – “national law measures transposing a directive must comply with the EU law”. This is also applicable to EU laws adopting minimum standards, such as the Facilitation Directive 2002/90. In this case, Member States could be scrutinised for imposing “stricter rules than those required by the Directive” [Cox 2019:6]. However, the EU law needs to be sufficiently clear and precise. For example, in case C-243/16 – *Miravittles Ciuriana and Others*, the CJEU ruled that directive in question did not impose any specific obligation on the Member State, and so national rule was considered to fall outside the scope of EU law (para. 34)(Cox 2019:6).

Previous academic analysis of the Facilitators Package has highlighted that it was “unfit for purpose”, precisely for its vagueness on what it aims to achieve (Carrera et al 2016 & 2018 a). It could be very hard to argue before the CJEU that, by criminalising those acting in solidarity, Member States have imposed stricter sanctions, than those prescribed by the EU law, when Article 1.1. (a) of the Facilitation Directive 2002/90 requires that (emphasis added):

“Each Member State shall adopt appropriate sanctions on: a) any person who *intentionally assists* a person who is not a national of a Member State to enter, or transit

across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens.”

This directive requires Member States to establish “effective, proportionate and dissuasive sanctions” (Article 3) for any intentional assistance without profit motives as a crime of facilitation of entry and transit. In addition, it requires them to sanction “instigation, participation and attempt” (Article 2). But it leaves the humanitarian exemption optional for the Member States as they “may exempt” humanitarian actors, and only in the context of facilitation of entry and transit (1.2). Thus, now Member States do not have any clear obligation towards humanitarian actors. Also, the directive lacks any clear instruction to focus on criminal groups that are profiting from migrant smuggling on a large scale. Therefore, it could be hard to argue using the provisions of Facilitation Directive that Member States have stricter requirements.

“The stricter rules” argument could be used against Member States that criminalise the facilitation of residence and stay. Article 1.1. (b) of the Facilitation Directive 2002/90 require sanctions when there is a profit motive (emphasis added):

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

A FRA study in 2014 indicated that in 13 out of 28 EU Member States, facilitation of residence and stay without a profit factor is sufficient to establish a crime or offence: Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom (FRA 2014). These countries may be regarded as imposing stricter sanctions than required by the EU Facilitation Directive. So far, European Commission has not scrutinised any of such ‘stricter rules’ (Carrera et al 2018 a).

In practice, even in that case, the success could be very limited. The line between residence versus transit remains unclear, thus law enforcement could be still free to frame it as an issue of transit (Carrera et al 2018 b; ReSOMA 2018; ReSOMA 2019 a). Similarly, bona fide service providers – taxi drivers, landlords – risk being criminalised as the ‘financial gain’ requirement is also framed over broadly. To avoid, such situations UNODC (2017) has proposed that in line with the UN Smuggling Protocol (UN General Assembly 2000), national laws should specify ‘unjust enrichment’ or other criminal intent to benefit from vulnerability of smuggled migrants.

ReSOMA Task Force (2019b) participants have also raised questions about the efficiency and effectiveness of the EU Facilitation Directive. They argued that there are opportunity costs for using limited law enforcement resources for investigating and criminalising activities that have no clear criminal intent. Such activities of EU agencies or otherwise EU-funded operations, in turn, could be scrutinised by the European Court of Auditors, which checks

whether EU taxpayers' money is spent efficiently, and in line with EU fundamental rights requirements. Similar investigations on potential negative human rights impacts can also be carried out by the European Ombudsman when EU institutions, agencies, operations or funding is involved.

All in all, it is hard to see how a very vague framing within the Facilitation Directive on what can be considered as crimes or offences of facilitation of entry, transit, stay and residence could be used to challenge Member States for violating 'minimum standards'. This brief Directive of 1.5 pages does not contain any mentions of fundamental rights. Therefore, national laws could only be challenged for violation of other substantive EU laws, or for non-compliance with EU legal principles, values, and rights within the EU Fundamental Rights Charter, in this area 'governed by EU law'.

And indeed, the European Commission has launched infringement proceedings against Hungary for "criminalising activities in support of asylum seekers", not on the basis of EU Facilitation Directive, but for the violation of the provisions of EU Asylum Directives and the Fundamental Rights Charter.

### **European Commission: Infringement proceedings against facilitation-related provisions in the Hungarian Criminal Code on the grounds of asylum laws and fundamental rights**

The Fidesz-led Hungarian government since 2017 has passed number of laws known as the "Stop the Soros Package". This package included restrictions of academic freedom, known as Lex CEU, restrictions of freedom of assembly and association, known as Lex NGOs, requiring certain types of NGOs to register as "foreign funded". The Hungarian Criminal Law also was changed as to criminalise various types of assistance to refugees and other migrants as migrant smuggling related crimes. This legislative proposal was known as Bill N. T/333.

The Hungarian Criminal Law provisions were initially amended in 2015 to increase sanctions up to 5 years (previously 3) for the basic crime of facilitation of entry and up to 20 for the aggravated crime (previously 5) (Article 353). New additions have expanded the scope of "illegal migrant smuggling"-related and aggravated crimes to include "crimes against the border barrier" (Article 352/A; 352/B, 352/C), so as to intimidate migrants and civil society actors who assist them in the border zones (Carrera et al 2019:79-87).

In June 2018, the Fidesz-led government tabled new amendments to further expand criminal law measures to tackle other legitimate civil society activities with Bill No. T/333 (International Commission of Jurists 2018). Among other provisions aiming at preventing obtainment of legal migration status, Article 353/A has been added to designate legal aid and information to irregular migrants as crimes aiding and abetting facilitation of entry and transit in the Hungarian Criminal Code. Various international human rights bodies considered it as escalation of intimidation and a stigmatisation campaign against civil society that helps and assists migrants and asylum seekers (Venice Commission and OSCE ODIHR 2018; CoE Commissioner for Human Rights 2018).

The European Commission reacted promptly and raised concerns regarding this draft law in July 2018. On 25 July 2019, following unsatisfactory responses from the Hungarian government, the Commission decided to take Hungary to the Court of Justice of the European Union (CJEU) for “criminalising activities in support of asylum seekers”. The Commission reasoned its decision on the basis of the Asylum Procedures Directive and the Reception Conditions Directive. In the Press Release (European Commission 2019 a), it argues that: “The Hungarian legislation curtails asylum applicants' right to communicate with and be assisted by relevant national, international and non-governmental organisations by criminalising support to asylum applications.”

The Article 353/A of Hungarian Criminal Code also fall under the EU Facilitators Package. This substantive EU law, that is said to be setting ‘minimum standards’, has not been invoked among the main arguments of the Commission. Perhaps, the Commission has discovered that definition is too broad and procedural safeguards – absent. As academic research has been arguing (Carrera et al 2016, 2018 a, 2018 b & 2019; Fekete et al 2017& 2019; Vosyliūtė and Conte 2019 a & 2019 b) it does not provide a clear objective to fight the criminal migrant smuggling.

In this case, the Commission would need to ‘borrow’ the definition in Article 6 of the UN Migrant Smuggling Protocol and to explain to Hungary why its derogatory clause should not be used (UN General Assembly 2000). Conversely, provisions within the Facilitation Directive are more likely to serve Hungary's defence against Commission.

### **Hungarian Constitutional Court decision 3/2019. (III. 7.)**

Hungarian Constitutional Court has already used Facilitators Package to argue against submission made by fourteen human rights and migrant rights organisations against the ‘T/333’ (Hungarian Helsinki Committee 2019b). Hungarian Constitutional Court (2019) in its decision 3/2019. (III. 7.) AB has argued, that not only it is optional, but that Hungary was obliged to criminalise such actions, including humanitarian activities (paras 59 - 60):

“[59] The effect of the Directive covers, in principle, the obligation of establishing sanctions applicable to the wilful facilitation of unauthorised entry or transit manifested under the umbrella of humanitarian action [Article 1 (2)], except when the Member State decided on applying its national laws and practice in the cases when this conduct is aimed at humanitarian assistance. [60] The detailed examination of the relation between the Directive and Section 353/A of the Criminal Code is not required in this procedure. It is sufficient to state that the Directive obliges the Member States to impose sanctions on the facilitation of unauthorised entry, transit and stay in the scope specified therein, however it also allows the Member States to take further measures.”

Hungarian Constitutional Court has failed to uphold criminal justice safeguards and human rights standards. Therefore, the civil society organisations have submitted a case before the European Court of Human Rights – to assess the legality, proportionality and necessity of such law in ‘a democratic society’ (Hungarian Helsinki Committee 2019b).

ReSOMA (2019b) Task Force meeting participants discussed that this challenge is rooted within the double nature of the Directive. It is framed broadly as bridging the crime of “migrant smuggling” with other “crimes against state sovereignty” (ReSOMA 2019 b). For example, Hungarian government spokesman Zoltán Kovács argued when launching new Hungarian laws that have been ‘bridging’ these crimes: “The new ‘Stop Soros’ legislative package puts forth a more rigorous response by declaring illegal [sic!] immigration a grave threat to Hungary’s national security.” (Tomlinson 2019) In response to subsequent infringement proceedings they have argued that: “[...] Hungary would continue to stand by its ‘Stop Soros’ laws and the constitutional amendment banning the mandatory settlement of migrants by non-Hungarian authorities in the country” (Hungary Today 2019).

The Facilitation Directive is a ‘Pandora’s box’, as it is allowing for the creation of ‘broad’ and all-encompassing crimes without criminal intent, to stigmatise and intimidate human rights defenders at national level. This Directive is likely to feed counter-arguments against the European Commission in the pending infringement case before the CJEU (European Commission 2019 a). The vagueness left within EU Facilitators Package thus leads to legal uncertainty – on what are the EU minimum standards in this area – and raises the question of whether the EU law meets EU criteria of rule of law, and also of ‘better legislation’ and ‘better regulation’.

## **2.2. Does the EU Facilitators Package meet the criteria of ‘Better Law Making’ and ‘Better Regulation’?**

The Inter-Institutional Agreement on Better Law-Making between the Council, Commission and Parliament (2016, Article 2) contains the commitment to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty in their law-making processes. Moreover, when it comes to EU legislation, the European Parliament, Council of the European Union and European Commission have agreed on the high quality required of law making (2016, Article 3):

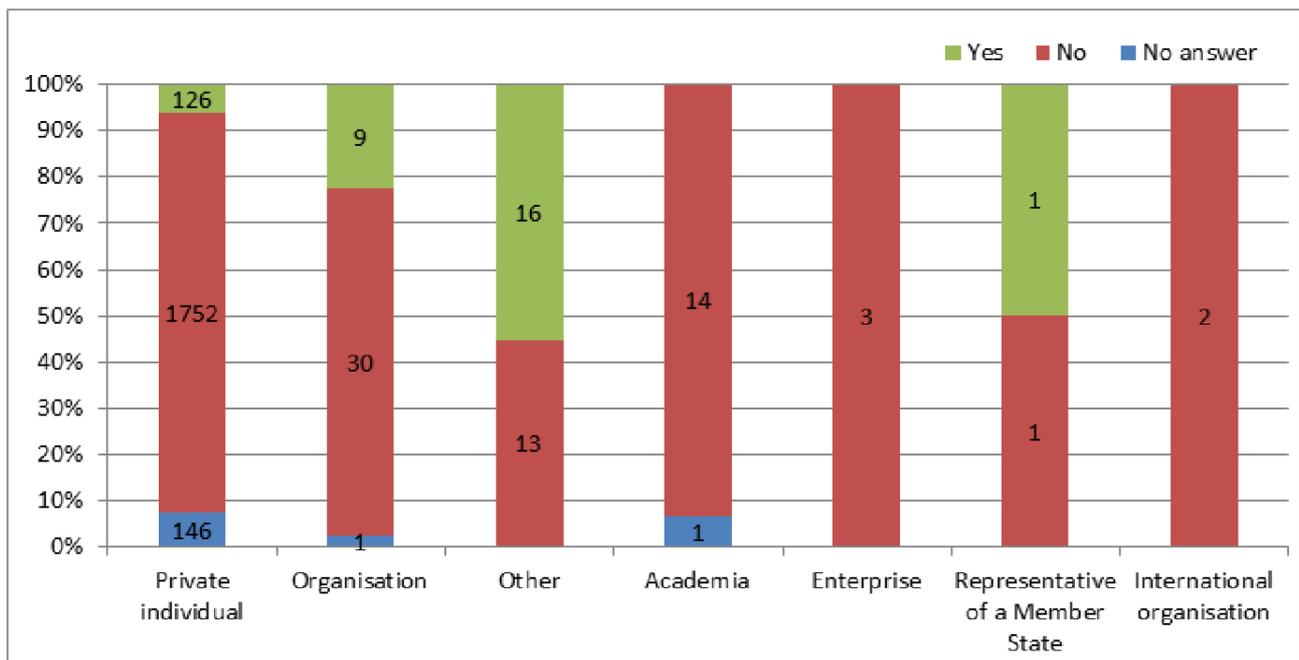
“Union legislation should be comprehensible and clear, allow citizens, administrations and businesses to easily understand their rights and obligations, include appropriate reporting, monitoring and evaluation requirements, avoid overregulation and administrative burdens, and be practical to implement.”

The right to good administration is further operationalised within the EU Better Regulation Guidelines. These guidelines oblige the Commission to follow various procedural steps in law

making, such as commissioning impact assessments and evaluations to consider any negative individual, societal and economic impacts of EU legislation. In such assessments, ‘efficiency’ needs to include compliance with EU fundamental rights.

The REFIT of the Facilitators Package was conducted according to the obligations under the Better Regulation Guidelines. The public stakeholder consultation has indicated that among private individuals, organisations, academia, international organisations and also enterprises there was a consensus that the definition was not sufficiently clear nor adequate to meet the objectives (see Figure 3 below).

**Figure 3: Question 8: Is the definition sufficiently clear and adequate to meet the objectives?**



Source: European Commission (2017), 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, Staff Working Document, SWD (2017) 117 final, Brussels, 22 March, p. 52.

In the same consultation, “Insufficient protection of those protecting humanitarian assistance” has been ranked as the most pertinent concern among 1,780 individuals and also among other stakeholders – academia (14), international organisations (5), other organisations (26), even enterprise representatives (3), while only one Member State (among three participating) saw this as an issue (European Commission 2017a: 52).

The subsequent assessment carried out by CEPS also indicated that the REFIT exercise, carried out between 2016 and 2017, ignored some of the concerns raised by preceding studies. The CEPS study for the European Petitions Committee (Carrera et al 2018 a) set out a number of key challenges such as the lack of for-profit motive in criminalisation of entry and transit, the absence of a humanitarian exemption, legal uncertainty among humanitarian actors and service providers, as well as a lack of exemption for victims of smuggling, and disproportionate penalties. These have all been mentioned by FRA (2014), Carrera et. al

(2016), ICF Impact Assessment (Bozeat et al 2016), House of Lords study (2015), UNODC elaboration on Financial and Other Material Benefit requirement (2017). For example, the dedicated FRA study in 2014 elaborated how the Facilitators Package and its transposition at Member State level could be falling short of the protections offered within the EU's fundamental rights (FRA 2014).

The Facilitators Package dates to 2002, eight years before the Treaty of Lisbon and before the Fundamental Rights Charter became legally binding. Currently, the legal basis of the Facilitators Package remains unclear. Following the Treaty of Lisbon, it seemed that it falls under Chapter II on migration and borders related issues (Article 79), but not under Chapter IV on criminal matters. Facilitation, for example, is not listed in Article 83, para 1. among the "areas of crime" the Union is (or should be) fighting using criminal justice means:

"These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime."

The post-Lisbon framework has conferred new powers to the Commission in the area of criminal matters: "The new EU legislation in criminal matters was meant to move beyond *minimum approximation* towards *more harmonisation*" (Carrera et al 2018 a: 49). It also included a possibility to decriminalise or exempt certain activities and actors from criminalisation. For example, this has been achieved for the EU Anti-Trafficking Directive 2011/36/EU, which was brought from old Third Pillar instrument into the new post-Lisbon directive aimed at addressing this type of crime.

**Proposal (for guidelines/future revision): A broad exemption of humanitarian actors and human rights defenders, including activists, when there is no criminal intent**

ReSOMA (2019 a) Transnational Feedback Meeting participants highlighted that humanitarian actors should be exempted from undue policing and misguided prosecutions. The misguided prosecutions seem to be started solely on the basis of their humanitarian/human rights mandate and when there is no criminal motive (unjust enrichment and/or harm done to migrants). ReSOMA (2019 a) Transnational Feedback Meeting participants highlighted how increasingly the logic of "follow the money" or "follow the evidence" is replaced by logic "follow humanitarians and find the evidence by any means". In several instances, 'suspicion' alone has enabled undue intelligence gathering and infiltration of undercover agents into SAR NGOs (see sub-section 3.4).

ReSOMA (2019b) Task Force participants raised concerns that the status of NGO should not bar the prosecution. Indeed, the status of NGO should not be the hindrance, nor the main reason for prosecution. However, the definition of crime should be more precise than mere 'intentional assistance' for entry/transit/residence and stay into the country for third country

nationals. By definition humanitarian and human rights organisations are 'intentionally assisting' refugees and migrants. Activities of NGOs are organised, thus 'organised crime' as aggravating circumstance is routinely misused, when prosecuting 'solidarity with refugees and other migrants' (Carrera et al 2018 a, 2018 b & 2019; Ferstman 2019; Fekete et al 2017 & 2019; Vosyliūtė and Conte 2018, 2019 a & 2019 b).

**Proposal (for guidelines/future revision): To include 'unjust' enrichment requirement so as to prevent criminal investigation in activities that lack such criminal intent to profit from the vulnerability of smuggled migrants in light of the UNODC (2017) assessment**

ReSOMA (2019 a) Transnational Feedback Meeting participants confirmed that even when 'financial gain' is required, in some countries, it can be framed over broadly as any kind of help can be deemed 'material benefit'. For example, the fact that asylum seekers and migrants hosted by citizens for free were cooking or cleaning the house as a way to show their gratitude was framed as 'material benefit' in charges brought against journalist Anouk Van Gestel in Belgium (Belga Bruzz 2018 in Carrera et al 2018 a: 95). In charges brought against Pierre Mannoni, teacher in France, who gave a lift for undocumented migrant with his car without asking money, the 'financial gain' was deduced on the hypothesis that he is a 'militant activist', and the material benefit is 'advancing his cause' (ReSOMA 2019a).

Previous research has explained that the financial gain criteria should be clearly 'unjust enrichment' thus putting *bona fide* paid service providers beyond an immediate risk of criminalisation (Carrera et al 2019). For example, Europol's report (2017) asserted that the users of peer-to-peer platforms such as BlaBlaCar or AirBnB can be prosecuted for "inadvertently becoming migrant smuggler". Similar issues also can apply to taxi drivers, landlords, or even shelters that take small fee for using their services and thus forcing such providers to check the passports and visas and to communicate their clients to police or border guards (FEANTSA 2017; UNODC 2017). This often leads to discrimination of potential clients on the basis of perceived 'irregular status', ethnicity. It also leads to withdrawal of vital services that should be provided disregarding the status, such as shelters, food (FEANTSA 2017; PICUM 2017). It also leaves people vulnerable to further exploitation by human traffickers, and other criminal groups (Carrera et al 2019; UNODC 2017).

**Proposal (for guidelines/future revision): Smuggled migrants should be exempted from criminalisation in line with the UN Smuggling Protocol and the EU Anti-Trafficking Directive 2011/36/EU**

The EU Anti-Trafficking Directive 2011/36/EU is interpreted in line with the Fundamental Rights Charter and Victims Rights' Directive 2012/29/EU. Thus, the EU has set a standard that victims of human trafficking need to be exempted from criminal prosecutions, so as not to prevent them from coming forward. Victims of migrant smuggling are not exempted in the EU Facilitation Directive. ReSOMA (2019 a) Transnational Feedback Meeting participants high-

lighted the importance of EU law exempting, besides humanitarian actors, smuggled migrants in line with Article 5 of the UN Migrant Smuggling Protocol. Several examples exist of the actual and potential harm caused by the current criminalisation of smuggled migrants.

In Italy, some of lawyers were “known” about quickly releasing migrants suspected for migrant smuggling from pre-trial detention. Italian authorities routinely arrest refugees and other migrants who held compass or steered the boat at the moment of rescue. On these grounds, migrants are suspected with aiding and abetting migrant smuggling, arrested and detained pending trial. Civil society organisations later found out that “quick releases” from pre-trial detention happened when lawyers asked their clients to sign the plea of guilty. In turn, criminal charges have led to nearly automatic withdrawals of their right to seek asylum. These actions that are in violation with Article 31 of Geneva Convention. Such instances were also documented in previous CEPS research (Carrera et al 2019 a). As a reverse practice, in Greece, not-for-profit lawyers are asking criminal courts to delay investigation into migrant smuggling as a way to secure the right to asylum and non-penalisation of irregular entry in this context (ReSOMA 2019 a).

The European Commission had an opportunity to assume new powers to scrutinise Member States regarding sweeping criminal laws that fall short of fundamental rights protection within the area governed by the EU law. However, in its REFIT exercise, the Commission decided not to do so. It can be understood as act of caution in this very politically sensitive area where the public narrative has been already negatively affected by the smear campaigns against civil society (FRA 2018 a; Fekete et al 2017 & 2019; Carrera et al 2016, 2018 a, 2018 b & 2019). So far, the Commission continued to argue that there is no need for legislative change in a way that has disregarded prior evidence and the outcomes of public stakeholder consultations (European Commission 2017 a: 23):

“Based on the available quantitative and qualitative data collected through various sources, it is not possible to draw an accurate and conclusive picture on the effects of the crime definition in the Facilitators Package in general and of the humanitarian assistance exemption in particular.”

The Commission proposed that Member States need to “better implement the Facilitators Package” instead of changing the legislation. Commission suggested improving certain operational measures, such as “reinforced exchange of knowledge and good practice between prosecutors, law enforcement and civil society”. The ReSOMA Transnational Feedback Meetings (ReSOMA 2018 a & 2019 a) and Task Forces (ReSOMA 2018 b & 2019 b) returned to the issue of the overly broad definition. When it is not clear ‘what is (not) a crime of migrant smuggling’ such ‘reinforced exchange’ risks increasing surveillance of legitimate civil society activities (Carrera et al 2018 a, 2018 b & 2019; Vosyliūtė and Conte 2019 a & 2019 b).

The Bill No. T/333 in Hungary is the example, how in absence of the purpose limitation of the EU Facilitators Package, the more rigorous implementation can lead to intimidation of civil

society. The European Commission will have a new opportunity to re-evaluate its own conclusions whether the Directive 2002/90 is 'fit for purpose' before the Court of Justice of the EU (European Commission 2017a). The Hungarian Constitutional Court (2019) decision shows that this 'bad EU law' is starting to bite its 'owner'. Maybe now the Commission will reconsider that the leash of 'minimum standards' was needed, in the first place.

Experiences during organisation of the ReSOMA (2019b) Task Force indicate that European Commission DGs are constrained by the logic of 'compartmentalised' responsibilities. Different DGs have been referring back to the DG HOME unit responsible for the Facilitation Directive as 'owning the issue', including the various types of impacts it has produced on fundamental rights, rule of law, democratic institutions and security.

Empiric research has confirmed that mixing up criminal justice and migration management mandates is eroding civil society trust towards criminal justice system. It is likely to lead the ongoing crimes being unreported (Carrera et al 2019). In addition, migrants that do not receive assistance by other actors are more likely to be easy prey for human traffickers, who may abuse their vulnerability for sexual and labour exploitation, servitude, slavery and even selling their organs (Carrera et al 2018 a, 2018 b & 2019).

The lack of possibilities within the setting of the Commission for a frank exchange between the different units and DGs with their diverse approaches and interlocutors on the potential impacts of the EU legislation could be seen as one of the shortcomings. 'Better Regulation' should in this case entail the involvement of a diverse team of Commission's experts (from different DGs), so as to ensure more balanced impacts assessment.

As a way to counter the trend of criminalisation, the European Parliament (2018 a) has called on the Commission to draft guidelines exempting humanitarian actors in July 2018. As of December, 2019 Commission told media that they "continue to "gather evidence" about how these laws are being applied" (Ritchie and Cullen 2019).

### **Case study: CJEU Case C-540/03, European Parliament v Council of the European Union**

This case concerned the right to family reunification of minor children of third country nationals as enshrined in the Directive 2003/86/EC. The Parliament challenged the Commission on the basis that the protection of fundamental rights, in particular the right to respect for family life and the obligation to have regard to the interests of minor children, was not sufficiently clear in the directive and led to violations of these fundamental rights. Although, the case was rejected as inadmissible, Advocate General Kokkot, in the opinion, went on to explain the limits of the margin of appreciation for Member States, paras 22-23:

"As to that argument, the fact that the contested provisions of the Directive afford the Member States a certain margin of appreciation and allow them in certain circumstances to apply national legislation derogating from the basic rules imposed by the Directive cannot have the effect of excluding those provisions from review by the Court of their legality

as envisaged by Article 230 EC. Furthermore, a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights.”

Although the case was dismissed, the court went on to argue that in similar situations the CJEU would stand ready to review the compatibility of EU law with the Fundamental Rights Charter and other EU legal principles.

### **Case Study: European Ombudsman inquiry on human rights impacts being ‘not sufficiently addressed’ in EU-Turkey statement**

It is required under the Better Regulation Guidelines that European institutions and agencies take negative fundamental rights impacts seriously into account and attempt to mitigate them whenever possible. The European Ombudsman can also review the assessments of fundamental rights impacts and whether they have been sufficiently addressed. For example, in light of the EU-Turkey statement, the European Ombudsman received a complaint from civil society regarding potential negative human rights impacts for refugees and asylum seekers (European Ombudsman 2017).

“The complainants accused the Commission of failing to reply, or of replying inadequately, to the concerns they had expressed about the lack of an assessment of the agreement’s impact on the human rights of the asylum seekers and the migrants returned to Turkey from Greece. The Ombudsman called on the Commission to include in its future progress reports on the implementation of the agreement a separate section focusing on human rights risks and measures to reduce them.”

Similarly, the European Ombudsman has a mandate to re-assess the negative fundamental rights impacts stemming from EU law, such as a Facilitators Package and to ensure that the activities of the European Commission and EU agencies are compliant with good governance.

### 3. WHEN DOES PROSECUTION AMOUNT TO PERSECUTION? THE APPROACH OF HUMAN RIGHTS DEFENDERS

This section highlights an approach that is currently lacking when assessing the situation: the lack of internal and external coherence within EU policies regarding human rights defenders. In absence of a rule of law mechanism, it is too easily assumed that the EU and its Member States respect and protect human rights work and their own obligations under the Fundamental Rights Charter (Bard et al 2016). However, recent accounts of suspicion, intimidation and harassment, disciplining and criminalisation of humanitarian and human rights actors working in the area of migration and asylum refute this assumption.

The fact that criminal investigations against humanitarian and human rights actors have been launched within 11 EU Member States is concerning. The majority of these cases ended up in acquittal and this conversely has made it more difficult to challenge the proportionality and necessity of national laws before the European and international courts.

While a high rate of acquittals shows that the courts have been independent from political pressure, such prosecutions without sufficient evidence of criminal intent can be considered a form of judicial harassment of human rights defenders. The accused but eventually acquitted persons have the “right to reparation for unlawful arrest or detention” and “the right to reparation for violations of other human rights, including fair trial guarantees” (Amnesty International 2014: 227). Only those who have been convicted can claim compensation against miscarriages of justice under Protocol 7 to the European Convention of Human Rights.

The lack of various fair trial guarantees is a strong indicator that such cases were politicised and misguided. Amnesty International (2014) provides a detailed manual of various fair trial guarantees as established by international law. For example, if persons are pressured to self-incriminate themselves, they are not provided with translation and cannot understand, what are the charges against them, or reasons for appeals are not communicated, so that they cannot prepare their defence. The accumulation of such instances could indicate that these cases are not rooted in a criminal justice logic, but in a political narrative of ‘crimes against state sovereignty’ (Zhang et al 2018; Aloyo and Cusumano 2018; Peers 2019). This section shows how the European Parliament could ensure subsequent democratic accountability at EU level, besides the UN level measures, such as before the Committee on Civic and Political Rights and the Working Group on Arbitrary Detention.

### 3.1. EU policies regarding human rights defenders

In 2018, human rights defenders within the EU were listed for the first time among the European Parliament's Sakharov Prize nominees. They were 11 civil society organisations that conducted search and rescue in the Central Mediterranean and the Aegean (European Parliament, 2018f). This was an unprecedented message that people upholding EU fundamental rights values may be at risk of politically motivated persecutions – not only in third countries, but also in Member States. This could be a strong indication for the EU Rule of Law mechanism that Member States are disregarding EU legal principles.

At the moment, human rights defenders within the EU are a matter of concern for regional and international human rights bodies and mechanisms. Regional and international organisations, such as the Council of Europe, the Commissioner for Human Rights (2018), the UN Special Rapporteur on the situation of human rights defenders and other UN experts on human rights (i.e. UN OHCHR, 2019), have raised a number of concerns about the worsening general human rights situation within the EU. For example, they have “condemned criminalisation of migrant rescues and threats to the independence of the judiciary”.

However, the ‘human rights defenders’ issue of at the EU level have so far been perceived only as concerning countries outside of the EU, and thus placed under responsibility of the European External Action Service. The EU has appointed a Special Representative for Human Rights, developed a number of tools such as the Specialised Human Rights Guidelines, including “Ensuring Protection - EU Guidelines on Human Rights Defenders” (EEAS 2008), Human Rights and Democracy Country Strategies, Human Rights Dialogues to engage with third countries, and a special funding tool – the European Instrument for Democracy and Human Rights (EEAS 2018). The tools elaborated by the EEAS for protecting human rights and humanitarian work and also experiences of DG DEVCO, DG ECHO, could be replicated internally.

Nomination of SAR NGOs for the Sakharov freedom of thought prize was among the first signs of recognition that human rights defenders are at risk of judicial and fiscal harassment, and even physical attacks within the EU (European Parliament 2018). FRA (2018) also raised concerns about the worsening situation of civil society within the EU, referring to international documents protecting human rights defenders from smear campaigns and the general trend of ‘shrinking civil society space’. DG JUST is also devising some welcome strategic litigation funding schemes so as to enable civil society to protect itself.

Human rights defenders are essential to uphold democratic accountability. In Hungary, refugees and other migrants have been deprived food as part of Fidesz government measures to induce them to turn back to Serbia (European Commission 2019 b). Only thanks to the presence of watchdog civil society has such inhuman and degrading treatment been captured in a timely manner. In March 2019, the Hungarian Helsinki Committee (2019 a) explained that: “This is now the eighth case since August 2018 where the Hungarian Helsinki

Committee had successfully secured emergency orders (interim measures) from the ECtHR to stop Hungarian authorities from starving migrants in detention.”

This Hungarian government policy was later challenged by the European Commission (2018 b; 2019 a) in its infringement proceedings. However, should there be no ‘watchdog civil society’ at the border zones, the presumption of mutual trust and respect for fundamental rights values would have remained unchallenged and asylum seekers could also have died.

Similarly, the overuse of violence against refugees and other migrants has been reported by civil society at Schengen border zones where illegal ‘pushbacks and pullbacks’ have been used for migration management purposes (PACE 2019). For example, detailed civil society reports have covered beatings and ill-treatment at a Croatian ‘green’ border (Amnesty 2019b; Bathke 2019). Italian hotspots (Amnesty 2017) and Greek hotspots (Refugee Rights 2019) also have been denounced by number of civil society organisations for ongoing violations and overuse of force against asylum seekers. The violence is being used when dispersing squats in the mainland in Greece (New Internationalist 2019), in Calais ‘Jungle’ in France (Vigny 2018; Amnesty 2019c) and elsewhere. Such use of violence often involves attacks against volunteers and NGOs (Carrera et al 2019).

This shows the very important work done by human rights defenders working in the field. By the very nature ‘human rights defenders’ are challenging improper use of ‘state sovereignty’, when it contradicts international human rights law obligations. Therefore, the Commission should avoid any exclusionary or narrowing definitions, such as ‘genuine humanitarians’ versus ‘activists’, as governments not willing to uphold EU founding principles will have an easy way to avoid their responsibilities by reframing any actor as ‘overly activist’, ‘political’ and therefore not subject to humanitarian exemption.

**Proposal (for guidelines/future revision): EU humanitarian exemption needs to be in line with the UN Declaration on Human Rights Defenders of 1998**

UN Declaration on human rights defenders recognises anyone attempting to uphold human rights by peaceful and non-violent means – as broadly understood – as ‘a human rights defender’. This definition would encompass journalists, activists, political dissidents, and also private individuals.

The EU occasionally uses the term ‘human rights defenders’ for situations within Member States but referring primarily to National Human Rights Institutions and Equality Bodies, while externally they use a broader definition in line with the UN Human Rights Defenders Declaration. An overly narrow approach can negatively affect civil society space for human rights work, which of itself challenges some of the Member States’ or even the EU’s own policies.

Discussions at the ReSOMA (2019b) Task Force have shown that the humanitarian exemption risks leaving no protection for front-line activists, politically active individuals or acts in

disobedience to national policies that are violating states' commitments to international human rights law. The ReSOMA (2019 a) Transnational Feedback Meeting highlighted that civil society movements, organisations, and front-line activists in particular are often framed as an 'organised criminal group', when there are no unjust enrichment or harm motives.

The fact of being an activist should not overshadow the fact that such actors are upholding human dignity – providing food, shelter, legal advice and information. The further analysis in section 3.2. shows that it would be not proportionate nor necessary to criminalise such individuals within a democratic society.

### **3.2. Vague legal definitions pose risks to human rights defenders**

The Council of Europe and the OSCE have also developed a number of tools. The UN Declaration on human rights defenders is readily applicable to Member States and the EU institutions. The OSCE Guidelines on the Protection of Human Rights Defenders (OSCE ODIHR, 2014) proposes a threefold approach: firstly, states must respect human rights defenders and refrain from actions that interfere with their work; secondly, states must protect human rights defenders from interferences by third parties, and thirdly, that states have the obligation to promote human rights and create a conducive "legal, administrative and institutional framework" for work in the area of human rights (OSCE, 2014, para. 10). For example, the OSCE guidelines insist explicitly that:

"Any legal provisions that directly or indirectly lead to the criminalisation of activities that are protected under international standards should be immediately amended or repealed" (OSCE, 2014, para. 24). Particular attention is paid to "legal provisions with vague and ambiguous definitions, which lend themselves to broad interpretation and are or could be abused to prosecute human rights defenders for their work" (OSCE, 2014, para. 25).

Moreover, the guidelines stress that "laws, administrative procedures and regulations must not be used to intimidate, persecute and retaliate" against human rights defenders (OSCE, 2014, para. 26). And if it were to occur, states and international bodies should address the impunity and provide effective remedies – judicial independence is a prerequisite, as well as the "existence of independent and effective mechanisms to investigate complaints against the police and other state officials" (OSCE, 2014, para. 13).

The OSCE ODIHR and Venice Commission, when elucidating the 'Stop Soros' legislative package in Hungary, highlighted parameters that are also applicable to EU law: criminal law definitions need to be precise, so that they cannot be misused for other illegitimate aims; sanctions need to be proportionate and "necessary in a democratic society".

## Case Study: Joint Opinion of the OSCE ODIHR and Venice Commission regarding Bill No. T/333 in Hungary

As mentioned above, the Commission started infringement proceedings against Hungarian Bill No. T/333, but not as regards its intent that falls within the EU Facilitation Directive. The OSCE ODIHR and Venice Commission set some boundaries on the potential misuse of this law: “while in principle a legal provision concerning the criminalisation of facilitation of irregular migration may pursue a legitimate aim, it must not be misused 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”. Such an aim is not legitimate, nor can it be seen as proportional or necessary within democratic society (OSCE ODIHR and Venice Commission 2018, para: 80 in Carrera et al 2018: 104).

As discussed above, the provisions of Hungarian Criminal Law 353/A fall under the Facilitation Directive. However, Directive 2002/90 does not include any minimum standards by which to scrutinise national laws that are transposing it for instances of misuse for illegitimate aims. Therefore, EU-level institutions retain indirect responsibility for the criminalisation of some 150 EU individuals, some of whom are affiliated with at least 16 NGOs. From the perspective of EU citizens' rights and those of human rights defenders it is unacceptable that EU law remains so vague and ambiguous.

The joint opinion of the OSCE ODIHR and Venice Commission referred to the European Court of Human Rights case *Mallah v France*, to further elaborate on the necessity test. The Hungarian Criminal Law amendment was criticised for its lack of a humanitarian exception that could mean “the authorities willingly accept the risk of stigmatisation” of NGOs. In addition, there was a lack of a profit motive as the definition for a criminal activity. The OSCE ODIHR and Venice Commission (2018) concluded that therefore the sanctions proposed in this law should be deemed as not proportionate and the sanctioning of ‘information sharing’ certainly not necessary in a democratic society.

The *Mallah v France* case shows that such national criminal laws could be reviewed by the European Court of Human Rights. It also appears that the Facilitators Package, and especially the facilitation of entry and transit would not pass proportionality and necessity ‘tests’. However, it could be hard to make a case before the European Court on Human Rights regarding this EU law (see a further elaboration in section 2) and the preliminary reference procedure to the CJEU could be a better fit – the OSCE ODIHR and Venice Commission (2018) has applied such an assessment when considering the Lex NGOs as shown in the example above. The joint opinion stressed that vague provisions can be misused to target and stigmatise civil society organisations that aim to uphold the rights of migrants (OSCE ODIHR and Venice Commission 2018):

“There may be circumstances in which providing ‘assistance’ is a moral imperative or at least a moral right. As such, the provision may result in further arbitrary restrictions to and

prohibition through heavy sanctions of the indispensable work of human rights NGOs and leave migrants without essential services provided by such NGOs”.

Lawyers participating at ReSOMA (2018 a and 2019 a) Transnational Feedback Meetings have highlighted that abovementioned guidelines are not respected in the current context. The substantive EU law governing the facilitation crimes should be drafted in a way that it provides clarity on what is (not) a crime and exclude potential prosecutions of human rights defenders. In addition, there is no mechanism to prevent retaliations against human rights defenders and to offers effective remedy against judicial harassment (see sub-section 3.3).

### **3.3. Judicial harassment: when prosecution is persecution**

From the perspective of human rights defenders, once a criminal prosecution starts or other disciplinary sanctions are enacted, it is already too late. A lot of damage has already been done to the defenders, their organisations and the individuals whose rights they are trying to uphold. As research on the policing of humanitarianism shows, the very climate of suspicion and intimidation has a chilling effect and has discouraged or prevented some civil society actors from operating, while others continue to face legal battles and suffer fears for their future (Carrera et al 2018 a, 2018 b & 2019). The way cases against various civil society actors have been investigated shows that there has been a trend of disregarding some basic fair trial guarantees and due process.

Participants at the ReSOMA (2019 a) Transnational Feedback Meeting have revealed that ‘violations of fair trial guarantees’ could also indicate the politicised nature of prosecutions. Two examples from Greece and Belgium illustrate how such violations occurred.

In Greece, accusations against Team Humanity and Proem Aid volunteers back in 2017 were made on the grounds of human trafficking and later changed into ‘attempted migrant smuggling’ in the absence of incriminating circumstances. There were no people on board when the five volunteers were arrested, and the ship was in Greek waters. Although the authorities were claiming that the arrests occurred in Turkish waters, volunteers sent their geolocation at the moment of arrest to their WhatsApp group. Then the volunteers were given the Hellenic Coast Guard, who had just arrested them, as an ‘independent’ interpreter. They were pressured to sign a document written in Greek (a language they do not understand), which later appeared to be a plea of guilty for migrant smuggling.

Another case concerned one of 11 accused volunteers in Belgium. Zakia is a French-speaking Belgian citizen of Moroccan origin. While volunteering at the Maximilien park, she bought a SIM card for one of the so called ‘transit’ migrants. She was arrested by Flemish police very early in the morning and her house was searched. At the police station, she was offered an Arabic (a language she barely knows) and not a French interpreter. She was later detained for two months before the trial, while still breastfeeding her baby. For the fact that she bought a SIM card, she was charged with facilitating irregular migrants to stay and transit in order to receive profit, and for the preparation or execution of unlawful activities

of a criminal organisation (Panhuyzen 2017 in Carrera et al 2018: 95). The case is in its appeal phase now.

The individual and societal costs of such prosecutions are yet to be assessed. Participants at the ReSOMA (2019 a) Transnational Feedback Meeting have shared that some of the volunteers that have been prosecuted lost their good reputation, have difficulty to find jobs, their relationships and even marriages suffered or ended, they experienced anxiety and depression, have developed various health issues. For the rest of NGOs and volunteers working in this field these prosecutions caused a chilling effect, difficulty to recruit volunteers or staff, to fundraise for continuing their activities (Carrera et al 2018 a, 2018 b & 2019). Some smaller organisations and volunteers working in France, Greece, Hungary and Belgium have developed anxiety and uncertainty about their future. While some of them were silenced, others became even more active and outspoken. The latter are Pierre Mannoni in France, Anouk van Gestel in Belgium or Salam Kamal-Aldeen in Greece.

The ReSOMA (2019 a) Transnational Feedback Meeting indicated that the gap between investigations started and eventual convictions points to a judicial harassment. The ReSOMA (2019 a) Transnational Feedback discussion has shown that boats have been seized and confiscated by Italian and Maltese authorities pending criminal trial or on the basis of other offences. And although the trials may result in eventual acquittal, these confiscations result in actual damage and a chilling effect. Without boats, SAR NGOs cannot conduct life-saving activities or monitor the activities of other actors involved. Therefore, prosecution is a form of persecution, as it is intended to prevent humanitarian and human rights activities that are challenging the behaviour of the EU and Member States in the area of border controls and migration management.

### **Case Study: Escalations against Salam-Kamal Aldeen in Greece**

Salam Kamal-Aldeen was initially arrested on 14 January 2016 with four other volunteers of Team Humanity and PROEM AID. Salam Kamal-Aldeen was eventually acquitted at the Mytilene Court in Lesbos in May 2018. However, the Hellenic Coast Guard has not returned the boat to Mr Kamal-Aldeen and keeps using it for their activities, which is also not in line with the right to effective remedies when a person was found innocent. The very fact that there has been no conviction has likely led to the rejection of this submission by the one-judge formation without any additional explanation. It is even harder to challenge the very process of 'persecution' when it is deemed that criminal justice has been done at national level.

In April 2019, a first case was submitted to the European Court of Human Rights by Salam Kamal-Aldeen, founder of Team Humanity, one of the SAR NGOs. With Help of Global Legal Action Network, he accused Greece over the crackdown on NGOs rescuing refugees at sea. This case "challenges Greek's abuse of power to arbitrarily prosecute and expose Salam to a minimum ten years' imprisonment, only to suspend his life-saving activities"

(GLAN 2019). As Salam Kamal-Aldeen explained in his testimony before the European Parliament in 2018, his life was put on hold while awaiting the trial – he could not leave country and therefore his rights to family life and a good reputation were violated.

In December 2019, Salam Kamal-Aldeen, who is a long-term resident in Denmark of Moldovan and Iraqi parents has been enlisted in the EKANA 'Hellenic Database for Unwanted Foreigners' as a "threat to public security" and issued a deportation order (Publico 2019). EKANA is established as part of the 3386/2005 law and it is linked with the EU's Schengen Information System (SIS) database. However, Salam has never been informed about his enlistment, nor presented the reasons why Greek authorities deem him threat to 'public security'. This case indicates the ongoing and escalating nature of judicial harassment, when even acquittal of the criminal court does not guarantee protection from future retaliations on humanitarian and human rights activities.

### **Case Study: European Parliamentary Inquiry, as a tool to ensure democratic accountability for misguided prosecutions**

Back in 2006, the EP established a Temporary Committee (TDIP) to investigate the "alleged involvement of European countries in the programme of CIA renditions" (Cirlig 2016). The European Parliament its follow-up resolution in 2015 on "the US Senate report on the use of torture by the CIA" called for an inter-Committee inquiry (European Parliament 2015, para. 10):

"Instructs its Committee on Civil Liberties, Justice and Home Affairs, with the association of its Committee on Foreign Affairs, and in particular its subcommittee on Human Rights, to resume its inquiry on 'alleged transportation and illegal detention of prisoners in European countries by the CIA' and to report to plenary within a year [...]" A subsequent study concluded that the inquiry was not sufficiently followed through by other EU institutions (Cirlig 2016). However, the inquiry itself has constituted an opportunity for parliamentary scrutiny and democratic accountability.

A similar European Parliament inquiry could be launched to investigate the cases of judicial harassment and stigmatisation of human rights and humanitarian actors working in the area of migration and asylum. At the moment there is no mechanism at the EU level to challenge cases that ended up in acquittals. However, from the perspective of human rights defenders this is not an effective remedy – such cases create chilling effects for human rights and humanitarian work. Therefore, at least democratic accountability could be provided as a form of remedy.

In Italy, for example, the Italian Senate (Repubblica 2017) held a hearing of the Italian Prosecutor who claimed to the media to have evidence that SAR NGOs had been communicating with smugglers in Libya. During the inquiry in the senate, the Prosecutor admitted that he was not in possession of such evidence but that this was rather a hypothesis. It seems from the FRA (2018 b) overview into SAR NGO investigations that a number of investigations

subsequently started in Italy against SAR NGOs are based on a similar hypothesis. In the meanwhile, boats remain confiscated, activities halted.

### **3.4. From suspicion to intimidation: a positive obligation to counter smear campaigns and avoid stigmatisation**

As mentioned above, analysis of the Facilitators Package has concluded that indeed its vagueness and the ambiguity between “what is not a crime of facilitation of entry, transit residence and stay” and what it does aim to address, a crime of migrant smuggling, ends up giving a ‘carte blanche’ for prosecuting ‘crimes against state sovereignty’ that aim to persecute human rights defenders, target watchdog organisations, political opposition, activism, and prevent actions of peaceful civil disobedience.

Bringing more clarity to what EU law is attempting to do is essential as EU institutions and agencies are increasingly becoming operational in spaces where civil society is upholding the rights of refugees and other migrants. Legal certainty is needed for better oversight and monitoring of Member States and also to avoid stigmatisation of human rights defenders by EU-level institutions and agencies that are tasked with criminal justice and protection of borders.

The FRA (2018 b) has raised serious concerns about the worsening situation for civil society within the EU, paying particular attention to various persecutions of SAR NGOs and other legislative and institutional attacks against civil society organisations assisting refugees and other migrants. FRA (2018 a) also highlighted the importance of countering smear campaigns that shed suspicion on civil society conducting SAR operations.

Earlier CEPS research (Carrera et al 2018 a, 2018 b & 2019) has shown how the suspicion has escalated to intimidation, harassment, disciplining and eventual criminalisation. For instance, Frontex (2017) has singled out SAR NGOs among all the actors conducting SAR. This Frontex Risk Assessment that was subsequently leaked to the media (Vosyliūtė 2018), and it fed into smear campaigns against SAR NGOs. Yet existing academic evidence has been consistent in showing no correlation between SAR activities and irregular migration (Carrera et al 2019; Moreno Lax, Ghezelbash and Klein 2019; Villa and Cusumano 2019).

On the basis of the ‘pull factor’ theory, the Code of Conduct has targeted SAR NGOs. It added additional obligations for ‘search and rescue’ when international maritime law obliges all vessels to perform such operations, be they merchant tankers, fishing boats, or tourist yachts. However, the ‘pull factor’ theory and stigmatisation of civil society keeps informing the policy loop. For example, the recent Malta Declaration by four Ministers of Interior also includes passages that unduly stigmatise the legitimate activities of civil society including search and rescue, and also “boat spotting” or “showing the light” to migrant boats as a pull factor (Carrera and Cortinovis 2019 b & 2019 c). This theory has also been heavily challenged by the statistical analysis of Villa and Cusumano (2019).

### **Case study: Frontex predictive intelligence gathering**

In September Frontex (2019) launched a public tender for private companies and consultancies for “the provision of social media analysis services concerning irregular migration trends and forecast (as part of pre-warning mechanism)”.

The terms of reference foresee that the aim for this tender is help in allocating resources EU and national border guards as well as law enforcement personnel. The wording of this tender implied undue suspicion of civil society along with migrants and their communities as being ‘pull factors’ (Frontex 2019:4):

“The report will thus need to include data and analysis of relevant actors using social media: migrants; traffickers/smugglers; civil society and diaspora communities in destinations (EU).”

After journalists made their inquiries and Privacy International has submitted concerns on data protection grounds, this call was halted (Fanta 2019). This shows how data privacy law could be used as a shield from undue policing. In addition, this example, raises the question whether human rights impacts have been assessed and whether Frontex has internal capabilities to prevent stigmatisation of civil society. It also shows, that EU and national law enforcement would benefit from guidelines to respect and protect human rights defenders in their work.

### **Case study: National law enforcement practices**

The infiltration of undercover agents is another method used that contradicts the presumption of innocence, and also the right to good reputation. For example, in the case of the Save the Children ship Vos Hestia an Italian undercover agent was infiltrated. He was posing as security guard appointed by the ship owner. His task was to gather evidence of misconduct of the crew so that ship could be seized:

“In late October, Italian police officers boarded the Vos Hestia while it sat in port in Catania, Sicily. They seized computers, documents and phones in order to investigate ‘alleged illicit conduct committed by third parties’. The ship’s captain was later told he was under investigation. The same day, Save the Children said it was suspending its mission in the Mediterranean.” Also, subsequently, Matteo Salvini called for assigning €3 million for undercover agents to supervise SAR NGOs (King 2019). It is questionable on what basis such operations are selecting certain categories of civil society actors and whether it does not constitute stigmatisation.

ReSOMA (2019 a) Transnational Feedback Meeting participants have mentioned that besides being monitored they are often not protected. In situations in Calais, Ventimiglia and Briançon, civil society actors providing humanitarian assistance experienced ongoing intimidation and harassment by police and far-right groups. The fact that attacks by vigilante groups were not properly investigated has also raised concerns about the lack of protection for civil society from the rule of law perspective (Ferstman 2019; Civic Space Watch 2019).

## 4. HUMANITARIAN PROTECTION AND CRIMES AGAINST HUMANITY

Humanitarian protection is an obligation on Member States. Gaps in addressing humanitarian needs should be filled by the EU and its Member States in cooperation with civil society, but when such gaps remain unaddressed civil society should be respected and protected in providing humanitarian aid and assistance. If states 'knowingly' and 'systematically' hinder humanitarian activities carried out by civil society, it can lead to crimes against humanity.

In order to show that states may be acting with good will, but are 'overwhelmed' or 'unable', humanitarian exemptions at EU and national level are needed to protect humanitarian actors. Such actors need to be protected from incrimination for crimes of migrant smuggling, solely on the basis of their humanitarian mission. Otherwise, such incrimination indirectly leads to suspensions and withdrawals of such operations, which can have serious consequences: lives lost, people being tortured or treated inhumanely (Moreno Lax, Ghezelbash and Klein 2019; Carrera et al 2019; Carrera and Cortinovia 2019 b & 2019 c).

In legal theory, customary and international human rights and humanitarian law should always be above and guide the development of substantive law, such as laws prosecuting migrant smuggling or administrative decrees raising the bar for search and rescue activities. While states are sovereign in controlling and checking who is coming into their territory, they are not free to do whatever it takes to restrict or repress irregular migration and prevent asylum seekers from filing applications (Diaz Crego 2019):

"Article 19(1) of the EU Charter and Article 4 of Protocol 4 to the ECHR prohibit collective expulsions of third country nationals, i.e., measures compelling non-nationals to leave a country as a group, except if their personal circumstances are individually assessed and they are able to put forward their arguments against expulsion (e.g., ECtHR, *Khlaifia and others v Italy*). To comply with these requirements, Member States must assess the particular circumstances of each case and grant returnees a possibility to intervene in the procedure, even if the proposed Article 22 obliges them to issue 'standardised' return decisions."

Some politicians, parties or governments exercising the mandate of 'state sovereignty' are guided by self-interested rationales and are testing the limits of the law (ReSOMA 2019b). It is for independent courts to uphold the legal hierarchy of norms. In this way, strategic litigation is one of the tools that can be used to stop or prevent criminalisation and policing of civil society actors assisting refugees and other migrants within the EU. Also, strategic litigation could reverse the actual logic, instead of prosecuting civil society for 'crimes against state sovereignty' for rescue or other activities facilitating the entry of individuals.

### **Case study: Illegal pull-backs and violation of non-refoulement - S.S. and others v Italy (No. 21660/18 – ongoing)**

On 3 May 2018, GLAN lawyers submitted this case before the European Court of Human Rights. The case concerned the 5-6 November 2017 SAR incident, when Libyan Coastguard Ras Jadir refused to cooperate in a SAR operation with Sea Watch 3. This SAR operation was coordinated by the Italian Maritime Rescue Coordination Centre (MRCC). The claim represents 17 applicants: 8 applicants who were rescued by Sea Watch; six who escaped Ras Jadir's boat and were rescued by Sea Watch 3 and brought to Italy; and two applicants who remained on Ras Jadir's boat as they were tied with ropes, beaten, subjected to detention in Libyan detention camps and under the IOM voluntary return programme transferred to Nigeria.

The applicants therefore submitted the claim on the following grounds:

Right to life (Art. 2); Prohibition of torture (Art. 3); Prohibition of slavery and forced labour (Art. 4); Right to an effective remedy (Art. 13); Prohibition of collective expulsion of aliens (Protocol 4, Art. 4).

The lawyers demonstrated that the close cooperation between Libyan and Italian authorities was aimed at restricting and repressing asylum seekers and other migrants attempting to reach Europe. The lawyers argued that states cannot engage in collective 'push-backs', 'pull-backs' and other practices that are clearly not compatible with their obligations under the Geneva Convention, European Convention of Human Rights and the EU Fundamental Rights Charter that all foresee the right to seek asylum (PACE 2019; Moreno Lax, Ghezelbash and Klein 2019). This right is effective only if individuals have the possibility to make such claims and while not all persons have such claims, and even not all the claims will meet the thresholds for receiving refugee status or subsidiary protection, they should not be returned in light of the 'non-refoulement' obligation. In the context of collective push-backs and pull-backs the states violate their obligation to respect the principle of 'non-refoulement'. Libya cannot be seen as a place of safety (Moreno Lax, Ghezelbash and Klein 2019). The case showed how the increased engagement of the Libyan Coastguard was aimed at intimidating and preventing the activities of SAR NGOs.

### **Case Study: EU and Member States brought before ICC for crimes against humanity**

Another case was submitted before the International Criminal Court (ICC) in June 2019. A Communication to the Office of the Prosecutor of the ICC, has been made "Pursuant to Article 15 of the Rome Statute". This submission was a culmination of an academic exercise, a two-year process of gathering evidence by Sciences Po Professors Omer Shatz and Iulian Branco and their students. The submission details how EU Migration Policies in the Central Mediterranean and Libya were devised in the period from 2014 to 2019. It argues (Shatz et al 2019):

"the evidence establishes criminal liability within the jurisdiction of the Court, for policies resulting in i) the deaths by drowning of thousands of migrants, ii) the refoulement of tens of thousands of migrants attempting to flee Libya, and iii) complicity in the subsequent crimes of deportation, murder, imprisonment, enslavement, torture, rape, persecution and other inhuman acts, taking place in Libyan detention camps and torture houses."

The submission highlights the responsibility of the EU and its Member States for the deaths in the Central Mediterranean, namely that Frontex Joint Operation Triton was started in order to avoid replacing Mare Nostrum, and that EU leaders have "knowingly and intentionally" created the deadliest migration route as a measure to discourage migration (Bowcott 2019).

The ICC, unlike other Human Rights Courts and bodies, involves not only institutional, but personal responsibility from leaders of governments and officials from EU institutions. If this submission is accepted, they will be called before the Court to prove that in the name of restrictive migration policies, they have not been 'knowingly and intentionally' perpetrating crimes against humanity, i.e. among other measures, by criminalising solidarity, engaging in push-backs and pull-backs, disengaging SAR missions (Carrera and Cortinovia 2019 b and c; Moreno Lax, Ghezalbash and Klein 2019; Shatz et al 2019).

**Proposal (for guidelines/future revision): The humanitarian exemption should be fashioned in reference to the European Consensus on Humanitarian Aid**

The European Consensus on Humanitarian Aid should serve as basis for defining humanitarian aid as a "needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity wherever the need arises, if governments and local actors are overwhelmed, unable or unwilling to act" (Council and the Member States, 2008). In other circumstances humanitarian actors should be also free to act, but this one is a compelling one.

ReSOMA (2019 a) Transnational Feedback participants stated that as this approach is broadly applied outside the EU there is no reason why things should be different when humanitarian crises occur inside the Union. Humanitarian actors, including local populations, and individuals are acting according to a moral imperative, when their governments or local authorities are not yet prepared or overwhelmed. Humanitarian needs are immediate and should not be subjected to *ex ante* authorisations or other registration requirements that are not required for civil society when acting outside the EU.

## 5. INSTEAD OF CONCLUSIONS

The lessons learned from academic research as well as civil society mobilisations and the contributions of international organisations illustrate the complexity of the phenomenon of the 'crackdown on NGOs'. There are multiple underlying reasons behind it, stemming from the legal uncertainty left in EU laws, national political agendas and priorities for European agencies supporting Member States. Although there is no single 'silver bullet' to stop and prevent the 'policing humanitarianism' at the EU level, EU institutions and agencies nevertheless have to assume their responsibilities for the impacts on fundamental rights in the areas of their competence. For example, how to remedy the situations when prosecution of human rights defenders amounts to persecution? How to prevent predictive policing of civil society for the mere fact they are assisting refugees and other migrants?

The EU Facilitators Package has left legal loopholes that have enabled misguided prosecutions of civil society across the EU. A quantitative overview provides the evidence that from 2015 until May 2019, there were at least 49 cases where 158 individuals were accused on the grounds of facilitation of entry and/or stay (Conte 2019 in Vosyliūtė and Conte 2019 b). Saving lives and upholding human dignity by providing food, shelter, and access to justice, at the borders or zones of transit were slowly relabelled as facilitation of entry or/and stay across at least 10 EU Member States (Vosyliūtė and Conte 2019 b; Carrera et al 2018 a, 2018 b & 2019).

While in all these areas the EU is acting on the basis of the principle of subsidiarity in the implementation and monitoring of directives, operational measures fall within and between the competence of EU institutions and national actors. Such an 'in between' situation often leads to 'shifting the responsibility' for inconvenient issues to national or local level, including for EU citizens' rights, human rights defenders and humanitarian actors filling in gaps in protection. The European Commission, as a Guardian of Treaties is entrusted to oversee and supervise how specific directives are being implemented at national level. All co-legislators – the European Commission, the European Parliament and the Council of the EU can demand and be demanded to act within the remits of Better Legislation. The CJEU and European Ombudsman can also review whether their implementation is in line with the founding EU values in Article 2 of TEU and the Fundamental Rights Charter. The European Court of Auditors can additionally investigate efficiency and effectiveness of the EU funding.

The European Parliament can also call for democratic accountability when judicial avenues are not feasible or appropriate. ReSOMA Transnational Feedback Discussion (2019 a) shows the absence of effective remedies for volunteers and NGOs that have experienced judicial harassment or misguided prosecutions.

ReSOMA research brings up several arguments where the EU should resume responsibility and adopt measures to keep civil society space free from interference during anti-migrant smuggling operations, and within the wider context of asylum, migration management and border controls:

- First, Legal certainty on what is (not) a crime of migrant smuggling should be enshrined in the EU citizens' right to good administration. In light of the Better Regulation Guidelines, EU legislators should not only provide accompanying guidelines but reconsider the outcomes of the REFIT and change the legislation, so that it would add legal certainty and be brought in line with the definition provided by the UN Migrant Smuggling Protocol.
- Second, the CJEU could check whether the European Commission should ensure rigorous monitoring of Member State (in)action under the Facilitation Directive and whether it is in line with the EU Fundamental Rights Charter. This could be further supported by inputs from independent monitoring mechanisms;
- Third, The European Parliament should launch the independent inquiry into the gap between criminal prosecutions started against humanitarians and their convictions. The cumulative violations of fair trial guarantees should be regarded as a strong indicator, that such investigations were not embedded in the criminal justice framework and that they constitute judicial harassment of human rights defenders.
- Fourth, the EU should step up responsibility to respect and protect human rights defenders acting within the Member States, in particular when they are challenging EU or Member State migration management policies and operations on the grounds of fundamental rights non-compliance. Guidelines for the law enforcement agents should preclude undue policing of civil society actors that are assisting refugees and other migrants, when there is no indication of harm and/or unjust enrichment.
- Fifth, the EU should recognise that humanitarian gaps emerge when the EU or its Member States are “overwhelmed, unable or unwilling to act” in meeting the basic needs of refugees and other migrants. By simply blocking the SAR activities conducted by NGOs, such governments risk ‘knowingly’ and systemically’ engaging in crimes against humanity. Lawyers are calling for attention to be paid to the fact that criminalising SAR and other human rights NGOs can be seen as part of a broader context of crimes against humanity. This is currently being tested before the European Court of Human Rights – case *S.S. v Italy* and the submission before the International Criminal Court (*Shatz et al 2019*).
- Sixth, the EU level supervisory institutions should put more efforts to ensure the respect for EU citizen's right to good governance and the obligation to respect, protect and promote human rights defenders, and to uphold the humanitarian principles of neutrality and impartiality.
- Seventh, the big picture requires EU institutions and national governments to step up to their own responsibilities for promoting and defending fundamental rights in the context of migration management and border controls. The EU co-legislators are responsible for ongoing monitoring of the rule of law within the EU Member States. They are responsible collegially and individually for ensuring transparency and democratic accountability for all EU policies and operations in tackling irregular migration.

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### ReSOMA - Research Social Platform on Migration and Asylum

is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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