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UNIVERSITY OF GRAZ

European Master's Degree in Human Rights and Democratisation
A.Y. 2018/2019

HUMANITARIAN HUMAN SMUGGLING: THE EUROPEAN AND ITALIAN ANTI-SMUGGLING LEGISLATION

Case study of border areas in Northern Italy

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ABSTRACT

The term ‘human smuggling’ has unfortunate connotations such as criminality and fatal danger. This thesis challenges the dominant negative understanding of human smuggling by exploring underreported forms of irregular migration facilitation grounded in humanitarian reasons. Humanitarian smuggling is investigated here from an historical, philosophical, and legal viewpoint in order to capture the breadth of experiences and rationales such a complex issue entails. In particular, a combined analysis of the European and Italian anti-smuggling legislations functions to show how these regional and national frameworks tackle migrant smuggling and, especially, its humanitarian counterpart. In this sense, the recurrent criminalisation of humanitarian assistance given to irregular migrants and the increase in policing of civil society engaging with people on the move reveal grave shortcomings and deficiencies, both at the European and Italian level. This can ultimately undermine important values and fundamental rights our democratic societies are based on. A detailed analysis of three significant cases of criminalisation of humanitarianism in border areas in Northern Italy substantiates and contextualises the main arguments of this thesis.

Keywords: irregular migration, human smuggling, humanitarianism, criminalisation, Facilitators Package

ACKNOWLEDGMENTS

First and foremost, I would like to thank the whole EMA team at the University of Graz for their warm welcome and constant support throughout my stay. I especially would like to thank my supervisor, Dr. Lisa Heschl, for her precious advice and for always steering me in the right direction when needed.

I also would like to thank all those experts and committed people who gave me substantial contributions and support throughout my research and writing. To begin, I must thank Barrister Dora Zappia and Professor Luca Masera for all their initial input. Special thanks go to Romina Rekers who shared her knowledge with me as a highly qualified post-doctoral fellow. Her expertise was invaluable in developing the philosophical overview of this thesis further. I also thank Barrister Ersilia Ferrante for her passionate collaboration, and Francesco for sharing his experiences with me as an activist in Ventimiglia. Without their help, a detailed analysis of the Italian case law would not have been possible. I would also like to thank Progetto Melting Pot Europa and the Migration Policy Group for their valuable work and, especially, Stefano Bleggi, Carmine Conte, and Valentina Savazzi for their availability. Additionally, I will always remain grateful to Judge Angelica de Silvestre and the law graduate Angela Avolio for their guidance on legal matters. Finally, I wish to acknowledge the extremely helpful support provided by Anne Schindel during the last days of writing and editing.

My special thanks are also extended to my companions from the organisation Ospiti in Arrivo, with whom I shared unforgettable and highly meaningful moments between 2014 and 2015. That extraordinary experience inspired this thesis.

Finally, the greatest of thanks and love go to my parents who have always invested in my education and shaped my curious and humanitarian nature.

Grazie!

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Commission	European Commission
CSA	Civil Society Association
CSO	Civil Society Organisation
EC	European Community
ECRE	European Council on Refugees and Exiles
EP	European Parliament
EU	European Union
Facilitators Package	Council Directive 2002/90 and Framework Decision 2002/946
FRA	European Union Agency for Fundamental Rights
FRG	Federal Republic of Germany
GDR	German Democratic Republic
GIP	Giudice per le Indagini Preliminari
HRD	Human Rights Defender
IOM	International Organisation for Migration
MS	Member State
NGO	Non-Governmental Organisation
OIA	Ospiti in Arrivo
REFIT	European Commission's Regulatory Fitness and Performance Programme
SAR	Sea and Rescue
TAR	Regional Administrative Court
UN	United Nations
UN CPCJ	United Nations Commission on Crime Prevention and Criminal Justice
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UN (Smuggling) Protocol	2000 United Nations Protocol against the smuggling of migrants by land, air and sea
UNODC	United Nations Office on Drugs and Crime

GENERAL INTRODUCTION

I. Relevance of the topic and research questions

The dominant perception of migrant smuggling among the general public today reflects the mainstream narrative spread by governments and the media, often depicting smugglers as blameworthy criminals and members of highly organised transnational criminal networks who exploit their clients and expose them to fatal danger[1]. It is true, without a doubt, that this can be the case, in particular in some specific areas or on notorious migrant routes. But such a complex and multi-dimensional issue as human smuggling requires a more comprehensive approach.

A great deal of literature has thoroughly dismantled the aforementioned mainstream argument by showing that human smuggling can often be based on loose economic and social ties between the actors involved, where - as in every business - familial relations and a certain level of trust play an essential role [2].

In general, human smuggling can cover a broad spectrum of different actions and intentions. A reckless criminal exploiting their clients by taking advantage of their vulnerability is a smuggler. A formerly smuggled migrant stuck in a foreign country and

[1] See the former Director General of the International Organisation for Migration (IOM), William Lacey Swing, who often labels smugglers as 'the travel agents of death', in Rachel, Landry, *The 'Humanitarian Smuggling' of Refugees: Criminal Offence or Moral Obligation?*, (2016) Refugee Studies Centre, University of Oxford, 5; Yury Fedotov, the Executive Director of the United Nations Office on Drugs and Crime (UNODC), and the Director of IOM's Regional Office for South-Eastern Europe and Central Asia, Argentina Szabados, who, at the opening event for the creation of a Joint Platform on Countering Migrant Smuggling, stated respectively: 'We must work together to deny criminals the means and opportunity, (…), and end the impunity of smugglers.'; 'The smuggling of migrants across borders is a transnational crime and requires transnational cooperation.', Vienna 28 March 2018, at < https://www.unodc.org/unodc/en/press/releases/2018/March/unodc-and-iom-launch-new-initiative-to-counter-migrant-smuggling.html>.

[2] See Frances, Webber, *Asylum: from deterrence to criminalisation*, European Race Bulletin, Institute of Race Relations, No. 55, 2006; Matthias, Neske, *Human Smuggling to and through Germany*, (2006) International Migration, Blackwell Publishing Ltd., Vol. 44(4); Ilse, Van Liempt, Navigating Borders: Inside Perspectives on the Process of Human Smuggling into the Netherlands, IMISCOE Dissertations, Amsterdam University Press, 2007; Ali Nobil, Ahmad, *Masculinity, Sexuality and Illegal Migration: Human Smuggling from Pakistan To Europe*, Farnham, Burlington, VT: Ashgate, 2011; Gabriella, Sanchez, *Border Crossing and Human Smuggling*, Routledge Series on Borders and Crime, Routledge, 2016; Gabriella, Sanchez, *Five Misconceptions Concerning Smuggling*, (2018) Policy Brief Series, Migration Policy Centre, European University Institute; Luigi, Achilli, *The "Good" Smuggler: The Ethics and Morals of Human Smuggling among Syrians*, (2018) The Annals of the American Academy of Political and Social Science, Vol. 676, No. 1, 77-96; Stephanie, Maher, *Out of West Africa: Human Smuggling as a Social Enterprise*, (2018) The Annals of the American Academy of Political and Social Science, 676: 36-56.

engaged in the smuggling business to raise money to continue their own trip to Europe is also a smuggler. An unaccompanied minor driving a rubber boat to have their transportation fee reduced is a smuggler. An uncle facilitating the entry of his nephew to his host country is a smuggler. A man giving a ride to a girl out of a refugee camp to a safer country is a smuggler. This thesis is especially interested in a particular form of smuggling, sometimes overlooked by the media, namely 'humanitarian smuggling'[3]. While the mainstream narrative on migrant smuggling would look at the expression 'humanitarian smuggling' as an oxymoron and a contradiction in terms, the present work maintains that this phrase is descriptive of the underreported reality of many individuals throughout Europe. More- or less-close relatives, former refugees, activists, volunteers, social workers, taxi-drivers, and many others form a part of the silent crowd of humanitarian smugglers, daily assisting hundreds of people on the move, for humanitarian reasons. As Landry says in a recent work, '"[h]umanitarian smuggling" is thus a re-appropriation of the term smuggling from its abuse in the political sphere'[4].
Therefore, when approaching this work, the reader should keep this breadth of experiences and rationales in mind, in the constant effort to question 'the purely negative stereotyped identities of smugglers'[5].
This thesis, however, does not deal with the wider issue of Sea and Rescue (SAR) operations, which would entail different moral and legal considerations.

At the European Union (EU) level, the fight against human smuggling is part of a broader policy aimed at the fight against irregular migration. In May 2015, the European Commission presented an Action Plan on Migrant Smuggling in order to operationalise the 2015 EU Agenda on Migration. On that occasion, the Commission stated that it 'will seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalization of those who provide humanitarian assistance to migrants in distress'[6],

[3] Lina, Vosyliūtė, and Carmine, Conte, *Crackdown on NGOs and volunteers helping refugees and other migrants*, ReSOMA Final Synthetic Report, 2019, 33.
[4] Landry, n. 1, 5.
[5] Ibid.
[6] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Action Plan against migrant smuggling (2015 - 2020)*, COM(2015) 285 final, Brussels 27.05.2015, 3.

implicitly acknowledging the risk run by non-state actors providing help on humanitarian grounds. In 2017, however, the Commission missed its opportunity[7]. An evaluation of the EU legislation on smuggling conducted under the Commission's Regulatory Fitness and Performance Programme (REFIT) resulted in a clear step backwards. While acknowledging civil society associations' (CSAs) increasing fears of being criminalised[8], the Commission concluded that there was not enough evidence in favour of a revision of the EU *acquis* on human smuggling[9].

By contrast, the EU legal framework on migrants smuggling, the so-called Facilitators Package, presents different yet self-evident shortcomings. Among others, it includes a clause under which humanitarian aid provided by civil society organizations and individuals is exempt from criminalization. The optional nature of such a clause, however, contributes to the creation of a climate of legal ambiguity and uncertainty throughout Europe.

Several studies have been conducted on the efficacy of the Facilitators Package to tackle human smuggling and its side-effects in society[10]. They all agreed on the inadequacy of the EU *acquis* on migrant smuggling by strongly arguing that the EU piece of legislation is not 'fit for purpose'[11].

Moreover, evidence collected showed that cases of criminalisation of humanitarian aid given to migrants have escalated since the outbreak of the migration crisis in 2015 and, more generally, reported an increase in different forms of policing civil society assisting

[7] Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, PETI Committee, 2018.
[8] Ibid, 30.
[9] European Commission, *Commission Staff Working Document Executive Summary of the Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)*, SWD(2017) 120 final, Brussels 22.3.2017, 4.
[10] European Union Agency for Fundamental Rights (FRA), *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 2014; Mark, Provera, *The Criminalisation of Irregular Migration in the European Union*, CEPS Paper in Liberty and Security in Europe, n.: 80, 1-48, 2015; Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, LIBE Committee, 2016; Carrera and others, *Fit for purpose? 2018 Update*, n. 7; Vosyliūtė and Conte, n. 3.
[11] European Commission, *REFIT Executive Summary*, n. 9, 2.

people on the move[12]. Peaks of investigations, prosecutions, and restrictions have been reported in a number of countries, such as Italy, that have been confronted with disproportionate migratory inflows at the EU's external borders[13].

Simultaneously, an increasing number of international actors have raised deep concerns about the worsening situation of human rights defenders (HRDs) who help people on the move in Europe[14]. Most of them have explicitly addressed the Italian government[15]. Alongside external calls, mounting pressure demanding legislative amendments of the Facilitators Package and a more adequate European policy to tackle migrant smuggling has been built internally as well, by several actors representing the European civil society[16], and, most importantly, by one of the EU major institutions, the European Parliament (EP)[17].

In light of the aforementioned considerations and the latest developments within EU, this work raises and endeavours to answer the following research questions:

1. How has human smuggling been dealt with in the recent past? How can one morally assess humanitarian forms of human smuggling? Which role do solidary acts play in society?

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[12] Vosyliūtė and Conte, n. 3.
[13] Ibid.
[14] See, among others: Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights implications*, Issue Paper, Council of Europe, 2010; United Nations General Assembly (UNGA), *Report of the Special Rapporteur on the situation of human rights defenders*, Human Rights Council, UN Doc. A/HRC/37/51, 16.01.2018.
[15] Council of Europe Commissioner for Human Rights, *Letter: The Commissioner calls on Italy to uphold the human rights of refugees, asylum seekers and migrants*, Strasbourg 7 February 2019, available at <https://www.coe.int/en/web/commissioner/-/the-commissioner-calls-on-italy-to-uphold-the-human-rights-of-refugees-asylum-seekers-and-migrants> accessed 8 March 2019; Tommaso, Gandini, *Il rapporto ONU a cui il Governo gialloverde non vuole rispondere. L'ONU chiede da novembre di avere informazioni sulla criminalizzazione delle attività dei difensori dei diritti dei migranti, ma senza esito*, Progetto Melting Pot Europa, 27 February 2019, available at <https://www.meltingpot.org/Il-rapporto-ONU-a-cui-il-Governo-gialloverde-non-vuole.html#.XShOeugzZyx> accessed 8 March 2019; UN Human Rights Office of the High Commissioner, *Italy: UN experts condemn bill to fine migrant rescuers*, 20 May 2019, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24628&LangID=E> accessed 12 July 2019.
[16] See Carrera and others, *Fit for purpose? 2018 Update*, n. 7, 48-53.
[17] See, in particular: European Parliament, *European Parliament resolution of 18 April 2018 on progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees (2018/2642(RSP))*, P8_TA(2018)0118, 2018; European Parliament, *European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP))*, P8_TA-PROV(2018)0314, 2018.

2. What are the main shortcomings of the Facilitators Package?
   - Which are its main side effects for those individuals and civil society organisations providing humanitarian assistance to irregular migrants?
   - How can the Facilitators Package be assessed through a human rights lens?
3. How is the EU acquis on human smuggling reflected in the Italian national context?
   - How should one evaluate the Italian legislation on human smuggling? Is it in compliance with its European counterpart?
   - How have humanitarian actors been criminalised within the Italian territory and, especially, in those areas mostly confronted with extra-ordinary flows of migrants, such as its northern border areas?
   - To what extent are the fundamental rights of defenders of people on the move undermined by the increase in policing of civil society's actions?

The three research questions are investigated in three corresponding Chapters. While the first Chapter offers a historical and philosophical discussion of humanitarian acts of smuggling, the second and third Chapters conduct a more traditional legal analysis of the EU and Italian legislations on smuggling respectively. The analysis mainly focuses on humanitarian clauses exempting humanitarian assistance to migrant from criminalisation (i); the presence and definition of a financial element as a potential discriminating factor between humanitarianism and criminal smuggling (ii); the distinction between facilitation of entry, transit and stay (iii). Finally, by presenting the Italian national case, the last part of this work aims to contextualize its preceding findings and show the concrete implications for civil society of both the European and national legislations on smuggling.

II. Methodology

To address the questions outlined above, this work adopts a multidisciplinary approach and draws upon a wide range of sources.

In the first Chapter, the legal and moral complexities beyond an act of human smuggling, either commercial or grounded in humanitarian reasons, are teased out through the analysis of a few representative historical examples of facilitation of irregular migration. The analysis functions to problematize such a complex issue and single out the main

features of humanitarian smuggling. Next, humanitarian acts of smuggling are assessed through the lens of moral philosophy and, in particular, by drawing upon basic notions taken from the theories of supererogation and Contractualism. Humanitarian smuggling is associated with the broader concept of solidarity, a foundational value on which democratic societies are based.

The second Chapter briefly discusses the 2000 United Nations Protocol against the smuggling of migrants by land, air and sea (UN Protocol), with which the Facilitators Package has been compared extensively, and then the EU legislation itself. A comparative analysis between the UN Protocol and the EU Facilitators Package, however, is not the main goal of the Chapter and is conducted only as long as it is necessary in order to tease out the EU legislation's main shortcomings. A detailed legal analysis of the EU legislation on smuggling is then integrated with an overview of the main steps of the Facilitators Package's drafting process. In this phase, the interplay between national delegations, European institutions, and international organisations representing civil society is emphasised. Official statements by European institutions involved in the Facilitators Package's legislative process are recorded. To present the viewpoints of civil society organisations (CSOs), official public comments on the EU draft legislation are analysed. Then, the Facilitators Package is assessed through a human rights lens. Finally, the latest developments at the EU institutional level are presented, building upon current trends in the field.

The third and last Chapter first turns to the Italian legislation on smuggling and compares it to its European counterpart. Then, the Chapter embraces the notion of 'policing humanitarianism' developed by the 2018 report the EP's Policy Department for Citizens' Rights and Constitutional Affairs commissioned[18]. According to this report, different forms of policing civil society are shrinking people's space of action and undermining their fundamental rights. The Chapter furthers such an argument through the examination of three significant cases of criminalisation of humanitarian assistance in northern Italy. The research on case law has been informed by a range of sources and actors that, to different extents, have been concerned with the cases in question. Factual information has

[18] Carrera and others, *Fit for purpose? 2018 Update*, n. 7, abstract.

been collected from different reports and publications written by relevant agencies, organisations, and research institutes, as well as from online newspaper articles. More detailed information was gathered through the collaboration of former defendants and their lawyers. In some cases, the author had direct access to sentences, investigations, minutes of interrogatories, and other legal documents.

The case law's analysis only takes into account formal investigations and prosecutions and mostly focuses on:

- profiles, motivations, and personal background of defendants (gender, age, occupation, nationality, former migration experiences);
- prosecutors' legal reasoning and the application of the humanitarian clause;
- acts and types of conduct subject to investigations and prosecution.

This study refers to a relatively short arc of time, namely between 2016 and 2018. This time, however, is believed to be long enough to be representative of the phenomenon as most of the criminalisation cases have reportedly taken place during those years. Moreover, this research has also been spatially restricted to a specific portion of the Italian territory, namely a few border areas located in the northern region of the country. Finally, for time and space constraints, the present work only deals with a limited selection of cases. Therefore, it is neither a quantitative research nor an exhaustive list of criminalisation cases in the considered geographic region.

CHAPTER 1 | AN HISTORICAL OVERVIEW AND MORAL ASSESSMENT OF HUMANITARIAN SMUGGLING

1.1 Introduction

On the one hand, migration has always happened. On the other, migrant smuggling has existed since the first restrictions to movement between different regions of the world were put in place. Often, structural movements of people turned into illegal crossings as soon as borders between modern states and communities were created. Therefore, in history, humans have made use of smuggling to move themselves or others across borders, anytime and anywhere, regardless of restrictive migration policies and states' sovereignty concerns.

Migrant smuggling, however, has significantly evolved over time. In particular, its scope, its definition and its position in society have gone through important changes. This Chapter outlines the most relevant historical phases and presents some past examples of migrant smuggling, from the Second World War up to the present. Through this historical lens, the reader will gain a deeper understanding of the evolution of migrant smuggling and develop a more informed approach to present happenings and political developments both at the European and Italian level.

The subsequent philosophical approach aims to evaluate humanitarian smuggling through the lens of moral philosophy. It will be argued that forms of smuggling based on humanitarian grounds can be considered acts of solidarity. But the argument will go even further by also showing, through philosophical reasoning, that states have the responsibility to promote such acts of solidarity in order to safeguard the founding values of modern society and citizens' trust in the social contract.

Historical examples and philosophical arguments will reveal some of the human smuggling's inner 'moral complexities'[1], in the constant effort to problematize such a multi-dimensional and controversial issue.

[1] Rachel, Landry, *The 'Humanitarian Smuggling' of Refugees: Criminal Offence or Moral Obligation?*, (2016) Refugee Studies Centre, University of Oxford, 4.

The present work focuses on 'humanitarian smuggling', a specific form of human smuggling grounded in humanitarian reasons. Depending on the circumstances (financial gain, exploitative and deceptive means, threats to human rights violations, state of necessity, etc.), a human smuggling act can be differently categorized, as if smuggling actors were operating on a continuum, with different nuances and degrees of gravity[2]. Accordingly, humanitarian forms of smuggling can be collocated on one extremity of the continuum, where altruism and solidarity lie, in opposition to exploitation and harm.

Additionally, for the purposes of this work, the general understanding beyond the term 'smuggling' is broadened in order to include not only the physical transportation of an irregular migrant from one place to another, but more generally those acts aimed at the facilitation of one's stay (provision of food, shelter, clothing, legal advice, etc.). This is to adopt a comprehensive and coherent approach with international and national legislations on human smuggling, which often include broad definitions of the offense of smuggling[3].

1.2 Historical Overview

Throughout the 20th century, Europe has witnessed massive movements of people. In particular, the two World Wars, the rise of cruel authoritarian regimes, such as Fascism and Nazism, the polarization of global powers and the Cold War caused significant geo-political shifts and incessant flows of migrants seeking refuge, family reunification or decent living conditions. In this context, when circumstances made it impossible for those escaping to freely and legally flee a country, human smuggling 'services' were widely used.

This work proposes that three major historical phases of migrant smuggling can be identified for twentieth-century Europe as to the evolution of smuggling: the first one during the Second World War, the second throughout the Cold War, and the third one

[2] Jeroen, Doomernik and David, Kyle, *Introduction*, (2004) Journal of International Migration and Integration, 5 (3): 265–72.

[3] See, for example, the EU Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L328/17.

raging from the collapse of the Soviet bloc through the outbreak of the migration 'crisis' and up until now[4].

1.2.1 Second World War

One of the most emblematic historical precedents in this regard is the desperate attempt by the Jewish population living under the Nazi occupation to escape authoritarianism and persecution. Indeed, during the Second World War, most likely motivated by humanitarianism, sense of justice or, simply, decency, a countless number of people reportedly protected the Jews from the Nazi madness, by assisting them and facilitating their escape, regardless the fatal implications they could have faced.

Human smuggling had already amounted to a criminal offence under domestic laws much earlier than under the Nazi era, however, in the early 40s, in the eyes of most part of the world, Jewish refugees' smuggling[5] constituted an unprecedented act of heroism. Today, active Jews smugglers, such as Raoul Wallenberg, Oskar Schindler, Carl Lutz, Irena Sendler, Aimée Stauffer-Stitelmannare and many others are still celebrated and praised for their heroic acts. For instance, the conviction of Aimée Stauffer-Stitelmannare, a Swiss citizen who had smuggled 15 Jewish children from France into Switzerland in 1945, was declared null by a Swiss parliamentary commission in 2004[6]. However, only 14 years later, in February 2018, Swiss authorities interrupted Pastor Norbert Valley's Sunday service in his church in Le Locle for questioning. He had been charged with the facilitation of irregular stay of a citizen from Togo under Article 116 of the Swiss Foreigners Law, for providing him food and shelter. The man had been recently rejected his asylum request[7].

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[4] This categorization is not comprehensive but only approximate and specific to the purposes of the present work.

[5] The term 'smuggler' is deliberately used among a virtually wide range of options (escape aid, escape facilitation, migrant handling…) to contribute promoting a more neutral connotation of term which, in itself, entails a wide range of more or less praiseworthy behaviours.

[6] Frances, Webber, *Asylum: from deterrence to criminalisation*, European Race Bulletin No. 55, Institute of Race Relations, 2006, 3.

[7] Amnesty International, *Switzerland: Authorities must drop absurd charges against priest who showed compassion to asylum-seeker*, Latest News, 24 October 2018, <https://www.amnesty.org/en/latest/news/2018/10/switzerland-authorities-must-drop-absurd-charges-against-priest-who-showed-compassion-to-asylum-seeker/>, accessed 5 April 2019.

The case of the Danish Jews smuggled from Denmark to Sweden in 1943 is especially relevant for the purposes of this work. It is estimated that, after the order by Hitler to deport Danish Jews in concentration camps in September 1943, around 7.500 Danish Jews, namely 95% of the Jewish population in Denmark, managed to flee their homes and leave the country[8]. A fundamental role in this mass escape was played by thousands of ordinary Danes, members of the resistance movement and, particularly, Danish fishermen. Worth of mention is the fact that these travels were neither for free nor based on purely voluntary work. Indeed, only to secure a place on one of the fishing boats could cost around $9,000[9]. It was also reported that most of the fishermen had never run so long distances and their boats were not appropriately equipped for such trips. It is hard to ascertain whether that money had been used to make Danish Jews refugees' journeys safer or of which nature were the fishermen's motivations. However, what can certainly be argued is that those 'escape facilitation services' were highly risky and costly, and resulted in a mass rescue of innocent lives. As pointed out by Landry, '[i]t is possible that the fishermen would have been unable to provide transport if it were not for receipt of gain to cover the costs of the journey or to make up for losses from time away from their trade.'[10].

1.2.2 Cold War

In the aftermaths of the Second World War, a mass migration occurred from the Eastern European bloc westward. Ethnic Germans experienced an unprecedented exodus and were among those mostly affected by expulsions and severe emigration restrictions. From 1950, the German Democratic Republic (in German: *Deutsche Demokratische Republik*, GDR) adopted restrictive emigration measures in the attempt to curtail the massive outflow of people to the West[11]. The strengthening of border controls and the criminalisation of the *Republikflucht* (desertion from the Republic) quickly produced the desired effects. It is, indeed, estimated that, following the begin of the Berlin wall's construction in 1961 to the collapse of the Soviet bloc in 1989, only a few thousand East

[8] Ellen, Otzen, *The mass escape of Jews from Nazi-occupied Denmark*, BBC News Magazine, 8.10.2013, https://www.bbc.com/news/magazine-24427637
[9] Ibid.
[10] Landry, n. 1, 16.
[11] See art 213 of DDR 1979 penal code.

Germans made it to the West. Smuggling of East German citizens was reportedly a common practice. In this regard, the well-known case of Hasso Herschel is particularly significant.

Hasso Herschel was a German citizen from the GDR. In October 1961, two months after the construction of the Berlin Wall, he successfully smuggled himself to the West, in possession of a forged Swiss passport. Afterwards, he engaged in an activity that, under the current anti-smuggling legislations, would have clearly amounted to a prosecutable criminal conduct. Firstly, when he began digging the famous Tunnel 29 he was well aware of the high risks and dangers he and the smuggled people could have faced (unlawful act, assessment of risk). Secondly, he was not alone. According to different sources[12], he had literally set up a transnational (Federal Republic of Germany (FRG), GDR, Austria, Hungary) 'smuggling ring'[13] of drivers, diplomats and collaborators which from 1962 to 1972[14] facilitated the escape of over 1,000 East Germans through tunnels and car compartments (transnational organised network of smugglers). Last but not least, border crossing was not free. Escapees were charged pretty high travel fees, up to $8,000. Herschel, however, declared it was not about the money[15] (financial gain, presumed humanitarian motif). Today, Hasso Harschel keeps receiving praise and signs of gratitude[16].

While going through the main facts of the rescue story of Hasso Herschel, some important key elements have been emphasised. At first glance, good organisational levels and financial gain might collide with the spontaneity and genuineness of a humanitarian act; in reality, however, the boundary between good and evil are far more blurred.

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[12] David, Danelo, *When Smuggling Was Heroic*, Border Criminologies themed series on Human Smuggling, Research and Subject Groups, Faculty of Law, University of Oxford, 30 November 2015, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/11/when-smuggling>, accessed 14 April 2019;
Also: Hasso, Herschel, *My escape to West Berlin*, published on YouTube by Newseum on 12th June 2012, < https://www.youtube.com/watch?v=ErLxYPTnJWI>, accessed 14 April 2019.

[13] Danelo, n. 12.

[14] Emily, Wasik, *The Cold War 'Mole' Who Smuggled 1,000 East Germans To The West*, Parallels, National Public Radio, 9 November 2014, <https://www.npr.org/sections/parallels/2014/11/05/361787858/the-cold-war-mole-who-smuggled-1-000-east-germans-to-the-west>, accessed 14 April 2019.

[15] Ibid.

[16] Ibid.

The following case functions to further problematize the issue of migrant smuggling. So far, the considered historical examples were more or less manifestly founded on the agents' humanitarian reasons. What if the humanitarian ground is removed by the equation? Would this automatically make a human smuggling act unlawful and morally blameworthy? This was not the case in one of the most paradigmatic case law on human smuggling throughout the Cold War: a decision of the Federal Supreme Court ruling in 1977 on a case of commercial human smuggling[17]. The 'escape agent' Albert Schütz had been smuggled migrants from the GDR to the FRG charging them high travel fees. In the case in question, he had agreed with a refugee from the GDR to offer his smuggling services for a total amount of 30,000 marks. Before the Court, he made explicit the financial incentive of his work:

> 'No, it was not for humanitarian reasons. ... The reasons were that I committed myself to getting these people from one side of the border to the other. And that was my task, I was paid for it, and that was it.'[18]

The Court eventually required the smuggled person to 'pay the agreed-upon remuneration (…), as the court found the amount to be an appropriate sum for the services provided in connection with the border crossing process'[19]. The absence of a humanitarian motif and the presence of a financial gain make the present case particularly controversial. This case could easily be assessed as an unlawful and blameworthy act, warranting criminalisation. Moreover, depending on the reader's understanding of 'fair travel fee' and the specific circumstances, this smuggling service could also amount to a form of exploitation of a vulnerable. At that time, however, such a smuggling act did not constitute a crime in the FRG and even to pay dearly for it had not been considered illegitimate by such a high institution as the Federal Supreme Court[20].

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[17] Commercial human smuggling is generally understood as contraposed to its humanitarian version, always entailing some form of material gain for the smuggler.

[18] Translated by Martina Rueck, from Johannes, Stiegler, *Helfer oder Halunken. Über den diskursiven Wandel vom „Fluchthelfer" zum „Schleuser"*. (2014) In: Hinterland Magazine Nr . 27: 10-14, 12, available at < http://www.hinterland-magazin.de/artikel/helfer-oder-halunken/> accessed 14 April 2019.

[19] Tiziana, Calandrino, *Country Report Germany*, in Sara, Bellezza and Tiziana, Calandrino, *Criminalisation of flight and escape aid*, Editor borderline-europe, 2017, 139.

[20] Stiegler, n. 18, 12.

In those years in the FRG not only were the so called *Fluchthelfer* (escape helpers) exempted from being persecuted, but also they were awarded the *Bundesverdienstkreuz* (Federal Cross of Merit)[21]. In general, the position taken by the FRG during the Cold War seems to support the argument made by Julian Müller in one of his latest journal articles on the 'ethics of commercial human smuggling'[22]. While morally evaluating an act of smuggling in breach of a codified law, he comes to the conclusion that:

> '[T]hese types of actions are not wrong because they are against the law, but because they are against morality. It seems to me that whether we are obliged to follow the law or obliged to break the law is dependent on the moral status of the law (or body of laws). We might thus say that a type of action is inherently wrong if it necessarily involves breaking a morally justified law.'[23]

Was a ban to smuggle East German citizens to the West a morally justified law? In the West, it was generally believed that citizens under the oppression of Eastern authoritarian regimes had the right to leave their countries to look for safer heavens. By making legal an action which is illegal in its neighbouring country (DDR), the FRG let a value judgment prevail on legality. Indeed, as Laundry argues:

> 'Drawing on the basic pillars of legal moralism, (…) moral acts should never be crimes and (…) the moral quality of an act is critical to the question of whether or not the act should be criminal. (…) Nevertheless, in the case of smuggling prohibitions, I argue that the law risks establishing acts as criminal wrongs that are only *not* immoral, but also possibly morally compulsory.'[24]

On the one hand, it can be true that criminal law should simply provide guidance to allow people regulating their conduct and 'should not criminalise ethically defensible

[21] Ibid.
[22] Julian F., Müller, *The Ethics of commercial human smuggling*, (2018) European Journal of Political Theory, 1-19.
[23] Ibid, 4.
[24] Landry, n. 1, 12.

behaviours'[25]. On the other hand, however, the moral component embedded into an action might vary depending on the historical time and political system. During the Cold War, for example, legislation and State action were most likely deeply grounded in extremely politicised codes of values and ideologies. The present work would like to abstract the considered acts of human smuggling from highly politicised contexts and rather refer to the international human rights' body of law. Human rights violations, which have reportedly been largely committed both under the Nazi and some Soviet Unions' affiliated regimes, could justify such action as human smuggling.

1.2.3 Post 1990 to the Present

Even though SAR operations fall outside the scope of this thesis, to recall the facts involving the humanitarian vessel Cap Anamur from the 70s to the beginning of the 21st century will reveal important shifts in the understanding and legal approach to human smuggling.

The Cap Anamur Committee was founded in 1979 to address the mass exodus of the 'boat people' from Vietnam, following the end of the Vietnam War and the increasing tensions with the neighbouring countries[26]. To conduct SAR operations, they chartered the cargo ship Cap Anamur and, in few years, they managed to provide assistance and medical care to over 30,000 refugees[27]. Additionally, through the support of the government of the FRG and its population, around 10,000 boat people were brought and welcomed in Germany, the first refugees migrating to Germany from outside Europe[28]. Just two decades later, in 2004, the Cap Anamur II and its crew found themselves operating within another humanitarian crisis, the exodus of migrants from Northern African coasts to Europe through the Mediterranean Sea route. On 20 June 2004, the crew was warned about the presence of a rubber boat in distress carrying 37 migrants. They promptly rescued the migrants taking them on board and headed to Sicily. However, right before the entry into the harbour of Empedocles (Sicily), the Italian authorities denied the boat's

[25] Ibid, 6.
[26] Cap Anamur German Emergency Doctors, History, <https://www.cap-anamur.org/en/ueber-uns/geschichte/> accessed 14 April 2019.
[27] Webber, n. 6, 6.
[28] Deutschland.de, published on 7 December 2016 <https://www.deutschland.de/en/topic/politics/peace-security/the-boat-people-and-their-children> accessed 14 April 2019.

access to Italian territory. Only after 23 days spent at sea, Cap Anamur II was permitted to dock, under a strong public pressure. The vessel's captain and its first officer were immediately arrested and charged with facilitation of illegal entry[29].

The Cap Anamur case clearly shows the dramatic change of the way state actors have dealt with human smuggling in the recent past. Over only two decades, to facilitate the escape of either 'desperately poor' or 'persecuted'[30] has evolved from a heroic to a prosecutable act. Today, vessels of Non-Governmental Organisations (NGO) involved in SAR operations in the Mediterranean and Aegean Sea are labelled and treated by democratic governments and institutions as dangerous 'pull-factor(s)'[31] for irregular migration. Additionally, to fight against migrant smugglers has reportedly become the European institutions and government's priority, in their struggle to handle irregular migrants' flows[32]. Criminalisation of individuals and CSOs providing aid to irregular migrants on humanitarian grounds is one of the most dramatic (intended) implication of the current migration policy. However, what has led governments to such a radical change? How come escape facilitation from poverty, human rights violations and authoritarian regimes is now criminalised by alleged democratic states? A few steps within this historical development can be identified.

Firstly, the collapse of the Soviet bloc in 1989 caused in the central region of Europe the first refugee crisis after the Second World War[33], fostering 'new fears and security concerns in the Western world'[34]. Secondly, throughout the 90s, due to the emergence of new migrant routes causing an incessant inflow of migrants to Europe (from Northern African countries through the Mediterranean Sea and from former Yugoslavian states through the Balkans and the Adriatic Sea), a great number of international meetings were held in the constant attempt to further regulate the issue of migrant smuggling[35]. Thirdly,

[29] Cap Anamur, n. 26.
[30] Müller, n. 22.
[31] Liz, Fekete , *Introduction*, in Liz, Fekete, Frances, Webber and Anya, Edmond-Pettitt, *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, 2017.
[32] See, for example, the European Agenda on Migration adopted by the Commission on 13 May 2015 and other EU-led operations of border management and enforcement such as Frontex and EUNAVFOR MED Operation Sophia.
[33] Tiziana, Calandrino, *Introduction*, in Bellezza and Calandrino, n. 19, 14.
[34] Tiziana, Calandrino and Sara, Bellezza, *General Overview: historical and legal framework from the perspective of the UN and EU since 1990*, in Bellezza and Calandrino, n. 19, 30.
[35] Ibid, 30-33.

between 2000 and 2005, some of the most important legislative tools on smuggling were adopted at the international and European level[36] ('[i]n the European context, there was no explicit policy around human smuggling until the summer of 2000'[37]). On a parallel track, from 1990 onwards, countless national legislation sanctioning human smuggling as a criminal offense were adopted[38]. Finally, to react to the increasing number of deaths on notorious migrant routes, European states, already well equipped with powerful anti-smuggling legislations, undertook a systematic battle against any sort of act of facilitation and assistance of people on the move. This quickly led to a 'process of criminalisation (which) is (…) not only legal, but also discursive.'[39]. The mainstream political discourse on smuggling ultimately depicted human smugglers as a brutal public enemy causing thousands of deaths and threatening stability of European societies. This idea can integrate the pull-factor argument[40] and essentially maintains the following misleading equation: human smuggling causes irregular migration.

1.3 A philosophical view of (humanitarian) migrant smuggling

1.3.1 Introduction

Having presented the historical overview of a number of significant acts of commercial and humanitarian human smuggling, this last section will present philosophical reasoning that will help the reader to better evaluate past and present smuggling acts.

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[36] To just cite the most relevant ones, see the UN Smuggling Protocol adopted in 2000, entered into force in 2004, the Faciliation Package adopted by the EU in 2002.

[37] Ilse, Van Liempt, *A Critical Insight into Europe's Criminalisation of Human Smuggling*, (2016) European Policy Analysis, Swedish Institute for European Policy Studies, 3. As Van Liempt makes clear, 'a high profile smuggling case' involving several European countries most likely accelerated the negotiations for a legislative proposal on smuggling at the European level. On 18 June 2000, 58 Chinese migrants had died suffocating in the back of a lorry, found at the British port of Dover (the Dover incident).

[38] See the following contributions in Bellezza and Calandrino, n. 19: Carla, Küffner, *Country Report Austria*, 116-117, for a schematic account on the codification of the offence of human smuggling under penal law in Austria; Tiziana, Calandrino, *Country Report Germany*, 141-146, on the development of the offence of smuggling in Germany from 1990; Lucia, Borghi and Alberto, Biondo, in collaboration with Judith Gleitze, *Country Report Italy*, 183-185, for a summary on the legal framework on facilitation of irregular migration in Italy; George, Maniatis, *Country Report Greece*, 212-217, on development of the legal framework on smuggling from 1991 in Greece.
See also Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, LIBE Committee, 2016, Annex 2 on the implementation of the Facilitation Package in 8 selected member states, 93-113.

[39] Calandrino and Bellezza, n. 19, 28.

[40] Cfr footnote n. 31.

In the last century, philosophers largely discussed the morality of immigration[41]. Their main focus, however, was about the states' possibility to regulate cross-border movements of people, in the exercise of their territorial sovereignty. Scholars and practitioners have mainly focused their attention '"on the morality of border controls" while mostly ignoring issues concerning the morality of border crossing.'[42]. Therefore, unlike irregular migration, the ethics of migrant smuggling has been generally overlooked within academic literature[43].

Even though irregular migration and human smuggling are strictly interrelated, the author would like to distinguish between them, just the way *jus ad bellum* and *jus in bello* are connected as well as separated legal regimes. Human smuggling should be morally evaluated as a distinct phenomenon, irrespective of the legality and the morality of border crossing. Indeed, even though irregular migration is permitted, other conditions have to be met in order for a smuggling act to be morally permissible. Thus, since irregular migration is not the focus of this analysis, this section of the thesis will assume that irregular migration is permissible.

This assumption does not underestimate the importance of the debate on irregular migration, sovereignty and border management and it is exclusively intended to narrow down the scope of this analysis to the issue of migrant smuggling. Assuming the permissibility of irregular migration is also intended to prevent this debate to be injected with arguments and considerations of a political nature.

Finally, it is noteworthy to remind the reader that SAR operations are outside the scope of this analysis as they would entail different considerations and legal and moral obligations.

[41] See, for example, the two most recent accounts on the morality of migration, as cited in Müller, n. 22, 2: David, Miller, *Strangers in Our Midst: the Political Philosophy of Immigration*, Harvard University Press, 2016, and Joseph, Carens, *The Ethics of Immigration*, Oxford University Press, 2013.
[42] Müller, n. 22, 2.
[43] Ibid.

1.3.2 Humanitarian smuggling as an act of solidarity and its role in society

When dealing with human smuggling, scholars have drawn upon various legal, social and philosophical notions[44]. This thesis embraces the view of those who have related the act of offering irregular migrants humanitarian assistance to the concept of solidarity[45].

Humanitarian smuggling is an act of solidarity: such acts of solidarity and the capacity to empathize with another person are fundamental requirements for building a just and democratic society. In order to support this argument, the following section will draw upon the basic notions of the philosophical theories of supererogation and Contractualism below.

Supererogation

Solidarity is not a legal concept. However, an act grounded in solidarity can amount to a mitigating circumstance within proceedings. Thus, it can be said that, in law, solidarity is relevant insofar as it constitutes the grounds on which one's action is founded.

In philosophy, respectively, the closest concept to an act of solidarity would most likely be supererogation, despite the fact that, according to the Stanford Encyclopedia of Philosophy, a clear definition of supererogatory acts is still disputed among schools of philosophers[46]. This thesis, however, identifies and selects from the philosophical debate some general criteria a supererogatory act should meet that are subsequently applied to the present case.

Solidarity can be considered a supererogatory act insofar as that act meets the following conditions. The act should be:

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[44] Landry, n. 1, 6.

[45] Just to cite a few: Frances, Webber, *Asylum: from deterrence to criminalisation*, European Race Bulletin, Institute of Race Relations, No. 55, 2006; Jennifer, Allsopp, *Contesting fraternité: vulnerable migrants and the politics of protection in contemporary France*, Refugees Studies Centre, Oxford Department of International Development, University of Oxford, 2012; Mark, Provera, *The Criminalisation of Irregular Migration in the European Union*, CEPS Paper in Liberty and Security in Europe, n.: 80, 1-48, 2015; Annica, Ryngbeck, *Criminalisation of Humanitarian Assistance to Undocumented Migrants in the EU: A Study of the Concept of Solidarity*, Master Thesis, Mälmo University, 2015; Liz, Fekete, Frances, Webber and Anya, Edmond-Pettitt, *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, 2017; Liz, Fekete, *Migrants, borders and the criminalisation of solidarity in the EU*, (2018) Race&Class, Institute of Race Relations, 1-19.

[46] David, Heyd, 'Supererogation', *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/spr2016/entries/supererogation/>

- Voluntary or, at the very least, not (strictly) required: there seems to be a general consensus in classifying supererogatory acts as that category of actions 'that go "beyond the call of duty."'[47]. In this regard, most of the individuals committed to providing humanitarian assistance to migrants would likely agree that an obligation to help people in distress exists, as if it was a 'duty'. Technically speaking, however, solidarity acts are by definition optional in nature. There is neither external (law) nor internal (rationality, morality) obligation to perform an act of solidarity. Even though people can feel obliged to perform an act of solidarity, they would hardly expect others to do the same[48]. In short, to force an act of solidarity would inevitably distort its very essence.
- Of a particularly moral value: a supererogatory act cannot be simply good, or blameless, but it should have a particularly moral value. According to the Stanford Encyclopedia of Philosophy, the source of a supererogatory act's value is both related to its good consequences and its optional nature (see previous point). Typically, the good is 'other-regarding'[49] and of an altruistic nature. In this sense, an act of solidarity is by definition aimed at concretely improving the other(s)' situation holding, therefore, a higher standard of moral value. This is precisely the case when it comes to humanitarian assistance to migrants.
- Praiseworthy to do but not blameworthy not to do: among the various definitions of supererogation, this one can definitely apply to the object of this work. To give a lift to a child out of a refugee camp or to provide humanitarian assistance to a person on the move stranded at a foreign border is praiseworthy as long as one does something 'extra', beyond their duties. Yet people might morally accept such acts as praiseworthy and still refrain from performing them for whatever reason. Nobody could reasonably blame them.

To sum up:

a. Humanitarian human smuggling can be considered acts of solidarity;
b. Acts of solidarity can reasonably fall under the definition of supererogation;

[47] Ibid.
[48] Ibid.
[49] Ibid.

c. Humanitarian smuggling can also fall within the class of supererogatory actions. Therefore, humanitarian smuggling can be a morally good, though not required, act.

Contractualism

At this stage, some questions might arise: how can we contextualize supererogatory acts? How do we deal with them in society? And what is the role of the State?

To answer these questions, the following section makes use of the philosophical framework conceptualised by one of the most recent versions of the Contractualist theory[50].

Contractualism draws on the idea of the social contract as a core element of our societies. It provides an account of the origins of moral reasoning as the foundation of society. 'The content of morality comes from the notion of an agreement between all those in the moral domain, respecting each other's equal moral importance as rational autonomous agents'[51]. In short, 'morality is based on contract or agreement'[52], entailing specific behaviours and dispositions. According to the Harvard philosopher Scanlon, the biggest contributor to the latest debates within the theory of Contractualism, moral behaviour is based on relations of mutual recognition and respect. These assumptions (moral equality, mutuality in respect and recognition) presuppose members of a community to develop a behavioural disposition toward empathy. Empathy is precisely what a solidarity act is based on.

Even though such a mutual and empathic attitude is theorised to exist only among members of the community, therefore excluding non-members like newcomer migrants, the Contractualists' approach is still relevant to this section's argument. Indeed, by conceptualizing reciprocal and empathic relations as the foundation of the social contract, their promotion within society becomes crucial. States bear the primary responsibility to defend the basis of the social contract; therefore, they should foster and protect such types of relations in society. On the contrary, criminalising an act of solidarity, either toward

[50] The theory employed in this thesis draws on the work of Thomas, Michael, Scanlon in *What we owe to each other*, Cambridge, MA: Harvard University Press, 1998.

[51] Elizabeth, Ashford, and Tim, Mulgan, 'Contractualism', *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/sum2018/entries/contractualism/

[52] Ibid.

members or non-members of the community, could negatively affect those empathic dispositions and, consequently, loosen the social connections in which the social contract is grounded.

Therefore, supererogatory acts hold an extremely important position in society, which is likely to be underestimated. Indeed,

> '[f]rom society's point of view, leaving a separate space for supererogatory action may strengthen mutual trust and communal bonds since it often indicates and promotes love and personal concern rather than mere respect for persons and a sense of justice.'[53]

1.4 Conclusion

This Chapter has presented various historical examples which showed the evolution of the general understanding of human smuggling, from heroic acts to criminal offences, and how differently states have dealt with human smuggling in the past, both commercial and humanitarian..

Most of the smuggling acts considered above were grounded in the agents' humanitarian reasons. This did not make those 'services' less dangerous, but a person acting in humanitarian ways would per definition refrain from making use of exploitative and deceptive means. These acts should be collocated on one end of the continuum, where praiseworthy actions lie. However, would the receipt of fees make these actions less acceptable and praiseworthy? As shown, humanitarianism and gain threshold did and can coexist. Would the reader evaluate a for-profit action based on humanitarian grounds differently?

The case law on Albert Schütz's smuggling services from GDR to FRG in the 1970s is even more controversial. The lack of a humanitarian intent not only did not make his actions unlawful, but also resulted in the official acknowledgment of the (economic) value of his services. In that circumstance, a value judgment prevailed and guided the applied law. Regardless of his deeper motives, the intent of facilitating the escape from the East

[53] Heyd, n. 46.

was considered to be sufficient to clear Albert Schütz's name and officially acknowledge his actions.

Nowadays, acts of humanitarian smuggling are more and more criminalised. Combatting human smuggling is part of the bigger European strategy to fight against irregular migration. In this way, however, states keep focusing on a fundamentally 'self-produced phenomenon'[54], instead of seriously addressing the causes of irregular migration[55].

The philosophical discussion has been proposed to make citizens and lawmakers think about the serious social implications of the criminalisation of humanitarian and solidarity acts. A legal analysis of the existing legislation on smuggling has deliberately been omitted here as it will follow in the next Chapter. The complexity of each act of human smuggling, however, can sometimes derive from the tension between legal implications and moral 'duties'. In this sense, it should never be forgot where just laws should stem from: it is 'morals [which] should precede the law, rather than the law dictating what is moral.'[56].

[54] This argument maintains a strong causal link between restrictive migration policies and the emergence of migrant smuggling networks. Accordingly, migrant smuggling would be caused precisely by those policies aimed at fighting it, in Sara, Bellezza, *Conclusion,* in Bellezza and Calandrino, n. 19, 284.

[55] See, for example, the 2015 EU Action Plan against migrant smuggling which 'identifie(s) **the fight against migrant smuggling as a priority**, to prevent the exploitation of migrants by criminal networks and reduce incentives to irregular migration', in European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Action Plan against migrant smuggling (2015 - 2020),* , COM(2015) 285 final, Brussels 27.05.2015, Introduction.

[56] Landry, n. 1, 3.

CHAPTER 2 | THE EU LEGISLATION ON THE FACILITATION OF IRREGULAR MIGRATION

2.1 Introduction

The first Chapter of this work dealt with humanitarian smuggling's moral nature and its evolution over time. This Chapter, instead, would like to provide a purely legal analysis of the EU legislation against smuggling from the time of its first draft, with a special focus on its human rights shortcomings. The aim of this work is to put these two dimensions (moral and legal) into conversation, in order to combine moral considerations to legal reasoning.

Since its creation, the EU has gradually enlarged its sphere of competences and powers in the field of irregular migration[1]. As far as migrant smuggling is concerned, the first relevant inter-governmental treaty in the European area is the 1990 Convention implementing the 1985 Schengen Agreement on the gradual abolition of checks at the member States' common borders[2]. The current EU legislation on migrant smuggling, the so called Facilitators Package formed by Directive 2002/90 and Framework Decision 2002/946, builds upon the Schengen *acquis* with the explicit aim of contrasting and sanctioning the facilitation of irregular migration to European Member States (MSs)[3].
The Facilitators Package is the result of two different but converging trends: on the one hand, great pressure was exercised on the EU for a communitarian response to the incessant migration inflow and notorious deadly smuggling cases, such as the Dover

[1] For a detailed historical overview on the process of European integration on irregular migration matters, see: Steve, Peers, *EU Justice and Home Affairs Law*, Oxford: Oxford EU Law Library, 2011 (Third Edition), ch. 7.
[2] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19.
This is not an European treaty on migrant smuggling as the European Community had no competences yet to adopt legislation on such an issue. Therefore, the Schengen Convention is rather an international treaty and represents though the first significant form of intergovernmental cooperation among European States on migrant smuggling. The Schengen Agreement and its Convention form the so called 'Schengen acquis', which became part of the EU institutional and legal framework only in 1999 with the Treaty of Amsterdam.
[3] Article 27(1) of Schengen Convention required MSs 'to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties'. This provision was repealed by the adoption of Directive 2002/90 which introduced a much stricter approach to the offence of facilitation.

incident. The Dover tragedy caused the death of 58 Chinese nationals who, after a long journey through several countries, suffocated in the back of a truck. The fact that, before arriving to the British harbour of Dover, on 18 June 2000, the lorry had managed to transit through at least five other countries[4] made it a 'high profile smuggling case'[5] capable to raise the international community of States' concern. On the other hand, the significant enlargement of the *acquis Communautaire* made it possible for the emerging European Community (EC) to draft legislation on new sectors, such as external border control, asylum and immigration policy and, in particular, in criminal matters[6].

Today, the Facilitators Package still represents the main legal framework on migrant smuggling at the European level. However, despite the harsh criticism on its inadequacy and the increasing demand to amend it by different actors, the Facilitators Package remains unaltered since the date of its adoption in late 2002.

This Chapter contains three sections: first, a general overview on the Facilitators Package's drafting process will emphasise specific human rights concerns prior to the legislation's adoption in November 2002. Indeed, clear deficiencies had emerged much earlier than the Package's transposition and implementation at the national level.

The second section constitutes a more traditional legal analysis of the EU legislation on smuggling. Special focus will be given to the extent in which human rights deficiencies can result in implementation gaps, entailing serious social implications.

The third part of this Chapter will assess the Facilitators Package through a human rights lens by taking into account well-established regional and international human rights standards.

Throughout the present Chapter, a comparative analysis between the Facilitators Package and the UN Smuggling Protocol will be set up. Such analysis, however, will be conducted

[4] Namely, Russia, Ukraine, Czech Republic, Germany and the Netherlands. From Tiziana, Calandrino and Sara, Bellezza, *General Overview: historical and legal framework from the perspective of the UN and EU since 1990*, in Sara, Bellezza and Tiziana, Calandrino, *Criminalisation of flight and escape aid*, borderline-europe, 2017, 37.

[5] Ilse, Van Liempt, *A Critical Insight into Europe's Criminalisation of Human Smuggling*, European Policy Analysis, Swedish Institute for European Policy Studies, 2016, 3.

[6] The Treaty of Amsterdam had entered into force on 1 May 1999, setting forth the enlargement of the EU powers and competences in diverse areas, including illegal immigration, and formally incorporating the Schengen and Dublin frameworks into the EU *acquis*.

as long as it is functional for the purposes of the section and does not represent one of the main goals of this work.

Finally, some recent developments in the field at the EU level will be presented.

2.2 Towards an international legal framework for human smuggling: the UN Protocol

While the EC had expanded its powers to be capable of creating binding legislation on the facilitation of irregular migration, at the international level, the first piece of legislation explicitly addressing migrant smuggling was drafted in the late twentieth century[7]. The drafting process of an international legislation on the facilitation of smuggling was carried out by a newly Vienna-based Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime and its three additional protocols[8], under the auspices of the UN Commission on Crime Prevention and Criminal Justice (CPCJ)[9]. In the drafting process, Austria and Italy were among the most active states as their geographical location made them particularly sensitive to the issue. While Austria had become 'a major transit route from the Balkans and East Europe to Germany and the EU'[10], Italian shores were increasingly confronted with incessant arrivals of migrants from the Balkans and North Africa. In December of 1998, Italy and

[7] The pieces of legislation adopted throughout the 20th century mostly dealt with trafficking in persons rather than smuggling, with a special focus on prostitution. For further details, see Jacqueline, Bhabha, *Human smuggling, migration and human rights*, Working Paper commissioned by the International Council on Human Rights Policy in occasion of the Review Meeting 'Migration: Human Rights Protection of Smuggled Persons' held in Geneva in July 25-26 2005, 2005, paras 62-65.

[8] The Vienna-based Ad Hoc Committee was founded by the UNGA in 1998. The smuggling protocol was the result of almost two years of negotiations and preliminary work and was eventually finalised in October 2000, after eleven sessions. The UNGA adopted the Convention alongside its two Protocols on trafficking and smuggling on 15 November 2000. The protocol entered into force in January 2004. For more details on the historical background and initial developments of the Protocol against the smuggling of Migrants see Natalia, Ollus, *Protocol against the smuggling of migrants by land, air and sea, supplementing the United Nations Convention against Transnational Organized Crime: a tool for criminal justice personnel*, paper presented at the 122nd international training course, European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki, 2000. Available at <https://www.unafei.or.jp/publications/pdf/RS_No62/No62_07VE_Ollus2.pdf>;
see also Anne T., Gallagher and Fiona, David, *The International Law of Migrant Smuggling*, Cambridge University Press, 2014, Chapter 1.

[9] In 1998, the UN CPCJ submitted a report to the UNGA presenting their own strategy for the development of an instrument addressing human smuggling, within the framework of transnational organised crime; see UN CPCJ, *Report on the Seventh Session (21-30 April 1998)*, UN Doc. E/CN.15/1998/11, 1998.

[10] Bhabha, n. 7, para 67.

Austria jointly submitted a proposal to the Vienna-based Ad Hoc Committee which constituted the starting point for the drafting of the UN Protocol against the smuggling of migrants by land, air and sea (UN (Smuggling) Protocol).

The draft submitted by Austria and Italy defined the 'illegal trafficking and transport of migrants' as 'a particularly heinous form of transnational exploitation of individuals in distress'[11]. In this regard, even though migrants-receiving countries, such as Austria and Italy, had prioritized the criminalisation of unauthorised border crossings on their agendas, the acknowledgement of smuggling risks and migrants' vulnerabilities paved the way for the insertions of some significant human rights provisions and protection measures into the Protocol. Article 2 of the UN Protocol made clear that its ultimate purpose was the fight and the prevention of migrant smuggling and the promotion of international cooperation among states '*while protecting the rights of smuggled migrants*' (emphasis added)[12].

The protective goal of the Protocol was explicitly included in its Statement of Purpose between February and March 2000, during the eighth session of the negotiations, due to pressure from the United Nations High Commissioner for Refugees (UNHCR) and some national delegations[13]. In this regard, the strong stance of some regional non-European groupings of states likely had a rebalancing effect on negotiations and reoriented the drafting process toward explicit human rights commitments[14]. Thus, it is especially

[11] UNGA, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy)*, UN Doc. A/AC.254/4/Add.1, 1998, Preamble.

[12] UNGA, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 2000, Article 2; see also protections of migrants inserted into the Preamble.

[13] UNGA, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, UN Doc. A/AC.254/27, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Eighth session Vienna, 21.02-3.03.2000, paras 15-18.
See also UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* [2006], United Nations publication, Sales No. E.06.V.5, 461.

[14] See the position of the Group of Latin American and Caribbean States which 'were of the view that it was important to develop a legal instrument that would effectively target smugglers while protecting the rights of migrants. Therefore the protocol must take into account the relevant United Nations instruments on protection of migrants in connection with correcting social and economic imbalances (…) it [is] important for the Migrants Protocol not to penalise migration (…) or to convey an ambiguous message to the international community that would stimulate xenophobia, intolerance and racism. The negotiation process should take into account the causes of migration and the reasons for the increasing vulnerability of

important to underline how, throughout almost the entire protocol's drafting process, migrants' protection measures and human rights concerns were raised by the various national delegations and non-state actors[15].

It can be true that a criminal law framework is not the most adequate tool to address human smuggling. Moreover, as strongly argued by Hathaway, the Smuggling Protocol may not be a satisfactory piece of legislation from a human rights perspective since 'human rights issues were viewed simply as constraints to be dealt with'[16]. Still, the drafters' timid human rights-based approach should be welcomed, despite all the licit criticisms.

As far as humanitarian assistance to migrants is concerned, the UN Protocol's definition of migrant smuggling aimed to implicitly exempt humanitarian facilitators from being criminalised. Article 3 (a) states that

> '"Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, *a financial or other material benefit*, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident' (emphasis added).[17]

This financial element was the object of long disputes among delegations[18]. In its final report, however, the Ad Hoc Committee adds an Interpretative Note, clarifying that

> 'the reference to "a financial or other material benefit" as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to

migrants.', in *Progress Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc. A/AC.254/30-E/CN.15/2000/4, 29.03.2000, para 18, as cited by Gallagher and David, n. 8, 62.

[15] See the Travaux Préparatoires with regard to the Preamble, the statement of purpose, the scope of application, the introduction of the aggravated offences, training, and the development of the so-called 'protection' article, in UNODC, *Travaux Préparatoires*, n. 13, p 453, 459, 461, 471-472, 486, 509, 520, 531-532, 537-540.
See also Gallagher and David, n. 8, Chapter 1.

[16] James C., Hathaway, *The Human Rights Quagmire of "human trafficking"*, (2008) Virginia Journal of International Law, vol. 49 No. 1, 28.

[17] UNGA, *Smuggling Protocol*, n. 12, art 3(a).

[18] UNODC, *Travaux Préparatoires*, n. 13, 463-469.

include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.'[19]

An in-dept analysis of the financial element and other relevant provisions of the UN Protocol in relation to the main provisions of the EU legislation on smuggling will be conducted in the following sections of this Chapter.

The drafting of the UN Smuggling Protocol and the Facilitators Package are simultaneous processes, involving, in many cases, the same state actors. For instance, while, at the international level, the last session of the Vienna-based Ad Hoc Committee was held in October of 2000, at the European level, two French initiatives for the development of an European anti-smuggling law had just been published in the Official Journal of the European Communities, starting a long round of negotiations among national delegations. However, while the UN Smuggling Protocol entered into force only in January 2004, the Facilitators Package was formally adopted much earlier, in November 2002, and entered into force one month later.

To conclude, even though a criminal law approach to smuggling has mostly prevailed at both the international and regional levels, the two drafting endeavours eventually resulted in two substantially different pieces of legislation. Their main discrepancies will be discussed in the following part of this Chapter.

2.3 The EU legal framework on human smuggling: the Facilitators Package

2.3.1 The Facilitators Package's drafting process

Unlike the UN Protocol, the EU acquis on smuggling constitutes a purely international criminal law measure, leaving all the rest to human rights law, labour law and, to a certain

[19] UNGA, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Addendum Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc. A/55/383/Add.1, 3.11.2000, para 88.

extent, international refugee law. This strategy resulted in loosened obligations on states 'to assume substantial protective responsibilities for nonnationals'[20].

How security concerns, such as prevention and interception of smuggled persons, has progressively prevailed on human rights and humanitarian considerations is clearly shown by the Facilitators Package's drafting process. The UN and the EU legislations' drafting processes demonstrate the extent to which the same international actors, in more or less the same lapse of time, adopted substantially different approaches to the same issue.

In June 2000, following the Dover tragedy[21], the European Council issued a statement[22], calling on the incoming French Presidency and the Commission to take steps to fight against illegal immigration and combat human smugglers[23]. The French Presidency's legislative proposal was indeed not long to coming[24]. Article 1 of the draft recited as follows:

> General offence
>
> Each Member State shall take the measures necessary to ensure that the act of facilitating intentionally, by aiding directly or indirectly, the unauthorised entry, movement or residence in its territory of an alien who is not a national of a Member State of the European Union is regarded as an offence.

[20] Bhabha, n. 7, para 53.
[21] See Chapter 1, footnote 37.
[22] European Council, *Conclusions of the Presidency*, Santa Maria de Feira, 19 and 20 June 2000, Section VI Europe and the Citizen, para 52, <http://www.europarl.europa.eu/summits/fei1_en.htm> accessed 7 May 2019.
[23] Reference was made to the Presidency Conclusions drawn in the 1999 Tampere European Council which had set, among others, the following objectives: to stop illegal immigration, to combat and sanction human smugglers, in European Council, *Presidency Conclusions*, Tampere, 15-16.10.1999, respectively points 3 and 23, < https://www.europarl.europa.eu/summits/tam_en.htm#c> accessed 7 May 2019.
[24] The Presidency of the Council of the EU was held by the French government from July to December 2000.

Additionally, the draft established the imposition of penalties to facilitators, which were expected to be 'effective, proportionate and dissuasive'[25]. An extremely limited in scope saving clause had also been inserted.

From the 'hastily drawn up French proposal'[26], three major deficiencies emerged: first, no distinction was drawn between human smuggling and trafficking; second, the saving clause was only exempting from legal prosecution either close relatives of the smuggled person or 'his spouse or the person who is known to cohabit with him'[27]; third, no further specification on length and nature of the facilitators' penalties was given with the potential effect of disseminating legal uncertainty throughout Europe and the establishment of disproportionate severe penalties.

Unsurprisingly, reactions from organisations representing civil society were immediate. In September 2000, the Brussels bureau of the UNHCR issued their comments on the proposal, de facto intervening in the drafting process[28].

First, a comparison was drawn between the French initiative and the two Draft Protocols simultaneously elaborated in Vienna on smuggling and trafficking, under the auspices of the UN CPCJ. The UNCHR pointed out how, unlike the European initiative, the UN drafting process had incorporated a saving clause in order to align itself with international human rights and refugees law's provisions[29].

Furthermore, the UNHCR explicitly suggested the EU legislator to narrow down the scope of 'draft Article 1 (General Offence) (…) to acts of "facilitating unauthorised entry and residence" committed for the purpose of *unlawfully* acquiring financial or other material benefits' (emphasis added)[30]. This element was believed by the UNHCR to be crucial to distinguish humanitarian assistance from reckless smuggling and to prevent the former from being criminalised. In this sense, worthy of note is the UNHCR phrasing of

[25] Council of the European Union, Initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence [2000] OJ C 253/01, art 2.

[26] Jonathan Aus, *Crime and Punishment in the EU: The Case of Human Smuggling*, ARENA Report, No. 6/07, Oslo: ARENA, Centre for European Studies, 2007, 28.

[27] Initiative of the French Republic, n. 25, art 4.

[28] UNHCR, *UNHCR comments on the French Presidency proposals for a Council Directive and Council Framework Decision on preventing the facilitation of unauthorised entry and residence*, Geneva 22.09.2000, https://www.refworld.org/pdfid/3ae6b33db.pdf.

[29] UNGA, *Smuggling Protocol*, n. 12, see saving clause enshrined in art 19(1).

[30] UNHCR, *UNHCR comments on the French proposal*, n. 28, para 8.

the smuggling offence, which slightly but substantially differs from the UN Protocol. While in the UN Protocol the direct or indirect obtainment of a 'financial or material benefit'[31] would be sufficient for a smuggling act to amount to a criminal offence, the UNHCR would require gain or benefit to be also unlawful. Accordingly, while the UN definition implies that any financial or material benefit makes a smuggling act unlawful in every circumstance, the UNHCR would criminalise a smuggling act as long as it generates an unlawful profit. Had the UNHCR considered the existence of smuggling acts implying *lawful* financial or material gain? The element of unjust enrichment is relevant as it problematises the conviction according to which profitable smuggling always warrants criminalisation. Therefore, according to the UNHCR wording, would a lift to a refugee family by a taxi driver charging their clients their usual transportation fee be warranting criminalisation and severe sanctions? In addition, some of the historical examples of human smuggling from Chapter 1 could also be assessed through the lens of the UNHCR interpretation. For instance, in the case of the mass escape of Danish Jews during the Nazi occupation of Denmark, the Danish fishermen who mostly operated the Jews' journeys to safety had reportedly charged them high travel fees. Under both the UN Protocol and the draft Facilitators Package the Danish escape helpers would have encountered harsh sanctions and criminal proceedings, irrespective of their humanitarian intent. For the time being, this matter will not be further elaborated, however, the financial element will be examined again throughout the Chapter.

Finally, UNHCR also suggested to broaden the exemption clause' scope to include, more generally, 'individuals who purely out of humanitarian reasons assist asylum-seekers arriving in an irregular, unauthorised manner in their efforts to seek access to territory and access to the asylum procedure'[32].

The French proposal also provoked the prompt reaction of the European Council on Refugees and Exiles (ECRE)[33]. ECRE's main concern was 'the potentially negative

[31] UNGA, *Smuggling Protocol*, n. 12, artt 3 and 6.
[32] UNHCR, *UNHCR comments on the French proposal*, n. 28, para 9.
[33] ECRE is an alliance of 41 NGOs across 41 European countries, representing civil society's commitment to defend the rights of refugees and asylum seekers throughout Europe, see ECRE Official Website, at <https://www.ecre.org/our-work/> accessed 9 May 2019.

impact of the so-called facilitators package on the humanitarian activities of NGOs'[34]. They expressed it in an official statement as follows:

> '[The] draft Directive and Framework Decision are very broad in the scope of people they seek to define as "facilitators" and will have the result of criminalizing lawyers, non-governmental organisations and church organisations which give advice to refugees. (…) ECRE cannot accept any initiative which potentially criminalizes humanitarian workers. It is a strange state of affairs that, on the eve of the 50th anniversary of the European Convention on Human Rights and Fundamental Freedoms, the European Union attempts to make criminals out of people who, like the Swede Raoul Wallenberg, facilitate the passage of people to protection.'[35] [36]

Finally, also due to such harsh reactions by organisations representing civil society's concerns, on 24 November, the French Presidency inserted in their draft a so-called humanitarian clause, to safeguard 'the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights'[37]. However, neither a restriction to the wide scope of the General Offence in Article 1, nor a specific exemption for humanitarian workers, had been formulated. After six months of negotiations, no satisfactory response to the emerging threats to humanitarianism had been reached.

Negotiations on the draft legislation were also held within the supranational parliamentary context. In mid-February, the EP passed a resolution rejecting the two French legislative initiatives[38]. Worthy of note is that at the time of the drafting of the

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[34] Aus, n. 26, 33.
[35] ECRE, *ECRE's comments on the French Presidency proposals for a Council Directive defining, and Framework Decision on preventing, the facilitation of unauthorised entry, movement and residence*, Brussels, 7.11.2000, 3, as cited in Aus, n. , 33.
[36] Raoul Wallenber was a Swedish diplomat and philanthropist. He has been one of the most active Jews escape helper during the Second World War by issuing them fraudulent passports and providing humanitarian assistance.
[37] Aus, n. 26, 34.
[38] European Parliament, *European Parliament legislative resolution on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence*, (10676/2000 - C5-0426/2000 - 2000/0820(CNS)), 15.02.2001, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P5-TA-2001-0087+0+DOC+XML+V0//EN&language=EN#BKMD-6>

Facilitators Package, the Parliament was not part of the legislative process and it 'was merely consulted on legislative proposals'[39] [40]. It could be argued that '[t]he Euro-parliamentarians' *en bloc* rejection was partly a symbolic response to the EP's political marginalisation'[41], however, the Parliament's rejection was also largely grounded in reasons of substantial nature[42]. Indeed, the EP-commissioned Ceyhun Report[43] was strongly calling for a clear distinction between 'disinterested humanitarian aiding of illegal immigration and the aiding of illegal immigration by members of criminal networks for purposes of gain'[44]. In this regard, the EP Report also included a much clearer definition of humanitarian assistance[45].

Additionally, the Report was demanding exemptions from criminal liability for service providers to third-country nationals seeking for protection (such as commercial carriers providing transportation[46]). This proposal is of particular interest as

[39] Steve, Peers and Nicola, Rogers (ed), *Eu Immigration And Asylum Law: Text And Commentary*, Martinus Nijhoff Publishers, 2006, 48.

[40] Only with the treaty of Amsterdam, the EP gained full legislative powers, going beyond a mere consultative status. With the adoption of the Treaty of Lisbon, the ordinary legislative procedure, so-called codecision, became the main decision-making procedure in the adoption of EU, with the EP deciding together with the Council of the EU on legislative proposals by the Commission.

[41] Aus, n. 26, 39.

[42] This appears to be the interpretation given by a recent study commissioned by the EP. The study presents a detailed insight of the Parliament's concerns and objections since the draft proposal of the Facilitators Package. In Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, PETI Committee, 2018, 53.

[43] Ozan Ceyhun was a German Member of the EP who had been appointed as rapporteur by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, see European Parliament, *Report on the initiative of the French Republic with a view to the adoption of a Council Directive defining the facilitation of unauthorised entry, movement and residence, [and] on the initiative of the French Republic with a view to the adoption of a Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry and residence*, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, EP doc. A5-0315/2000 final, 25.10.2000, at < http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2000-0315+0+DOC+PDF+V0//EN>

[44] Ibid, 7.

[45] Ibid, 10.

[46] This position stands in open contradiction with the Council Directive governing carriers' liability which imposes on carriers disproportionate burdens and obligations, see Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45.

Also the UN smuggling Protocol has the same approach, requiring States to prevent a misuse of commercial carriers for smuggling purposes and carriers to verify that all passengers own the adequate and necessary travel documents, in UNGA, *Smuggling Protocol*, n. 12, art 11.

> 'Such a possibility for asylum seekers to arrive in the EU while using ordinary means of transport would eliminate or reduce the opportunities for migrant smugglers to profit from their situation.'[47]

Furthermore, in its explanatory statement, the Report affirms that '[h]arsher legislation and increased border controls have only a minimal effect on unauthorised immigration.' In general, it can be argued that the EP's position is significantly different from most of the European national delegations and institutions and that '[t]he European Parliament had already foreseen the danger of penalising humanitarian aid'[48]. Thus, it is most likely that 'parliamentary propositions in the [Ceyhun] report would have been very important to tackle the negative unintended consequences of the Facilitators' Package'[49]. Unfortunately, only much later, the EP would have acquired effective 'power and prestige as the only directly elected institution at the European level'[50]. However, the question whether a different draft would have been elaborated if the current ordinary legislative procedure had been applied has no certain answer. From the vantage point of this thesis and the argument so far, however, it seems most likely.

During the first half of 2001, under the Swedish Presidency of the Council, the negotiations were generally slowed down by a strong disagreement among the national delegations on penalties and the humanitarian clause[51]. In this regard, in March 2001, UNHCR submitted once more its observations on the draft Directive, strongly calling for a 'mandatory wording reflecting the principle that penalties should not be imposed to persons who, for exclusively humanitarian reasons, have facilitated the unauthorised entry of an asylum-seeker into the territory of a Member State'[52].

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[47] Carrera and others, *Fit for purpose? 2018 Update*, n. 42, 55.
[48] Ibid, 54.
[49] Ibid, 55.
[50] Dinan, Desmond, *Relations between the European Council and the European Parliament: Institutional and political dynamics*, European Parliamentary Research Service (EPRS), 2018, executive summary, at <http://www.europarl.europa.eu/RegData/etudes/STUD/2018/630288/EPRS_STU(2018)630288_EN.pdf >
[51] ECRE, *An Overview of Proposals Addressing Migrant Smuggling and Trafficking in Persons (ECRE Background Paper)*, 2001, available at < https://www.refworld.org/docid/3deccfd74.html> accessed 10 May 2019.
[52] UNHCR, *UNHCR Observations on the Draft Council Directive Defining the Facilitation of Unauthorised Entry, Movement and Residence and the Draft Council Framework Decision on the*

Finally, in March 2001, the Swedish Presidency made a significant step forward towards a compromise solution by substantially revising Article 1 of the draft Directive. The article's new wording 'stated that "any Member State *may* decide not to impose sanctions (…) where the aim of the behaviour is to provide humanitarian assistance to the persons concerned" (emphasis added)'[53]. Additionally, as far as criminal sanctions are concerned, the Swedish government had amended Article 1 of the draft Framework Decision by establishing 'a maximum sentence of not less than 8 years'[54].

An optional rather than mandatory humanitarian clause and more flexibility in the imposition of criminal penalties was heading the draft to its final version, capable to meet the consensus of the majority of MSs.

A political agreement was eventually reached on 29 May 2001. The Council, however, could not formally adopt the two legislative acts until November 2002, due to the ongoing national parliamentary scrutiny in some MSs[55]. The Facilitators Package was finally adopted during the Justice and Home Affairs Council meeting on 28-29 November 2002, under the Danish Presidency[56].

2.3.2 The Facilitators Package's legal analysis

Since the formal adoption of the Facilitators Package in November 2002 up to now, no substantial amendments to the legislative text have been made. This section will now present a legal analysis of the Council Directive and, to a certain extent, the Framework Decision.

To begin, one of the most controversial features of the Council Directive is the double definition of facilitation of migrant smuggling in Article 1 (a) and (b):

> 'Each Member State shall adopt appropriate sanctions on:

Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry and Residence, 12.03.2001, 2, available at <https://www.refworld.org/docid/3f2fc0c22.html> accessed 10 May 2019.

[53] Aus, n. 26, 44.

[54] Ibid.

[55] For a detailed insight into the national parliamentary scrutiny, see Aus, n. 26, 50-55.

[56] Council of the European Union, *2496th Council Meeting – Justice and Home Affairs – Brussels, 28-29 November 2002*, Council doc. 14817/02, 20, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/73439.pdf.

(a) any person who intentionally assists a person who is not a national of a Member State *to enter, or transit across*, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
(b) any person who, *for financial gain*, intentionally assists a person who is not a national of a Member State *to reside* within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.' (emphasis added)[57]

The codification of a dual definition, entry and transit on the one side, residence on the other, seems to be justified by the presence of financial gain as a specific incriminating precondition under the facilitation to reside. While the facilitation of entry or transit across a country would apparently warrant criminalisation in any circumstance, the assistance to stay would amount to a prosecutable act as long as it results in a profitable activity.
In this regard, worthy of note is the fact that, unlike the Directive, the Council Framework Decision explicitly applies the financial gain criterium to both entry and transit:

'Each Member State shall take the measures necessary to ensure that, *when committed for financial gain*, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years (…).' (emphasis added)[58]

Therefore, when facilitation to entry or transit are committed for financial gain, Article 1(3) of the Framework Decision requires MSs to impose more severe penalties. Facilitation to entry and transit for financial gain, however, are prosecutable only as long as they occur under the following aggravating circumstances: (a) affiliation to a 'criminal organisation'; (b) endangerment of 'the lives of the persons who are the subject of the offence'[59]. Therefore, even though the Framework Decision could integrate the

[57] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L328/17, art 1.
[58] 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/01, art 1(3).
[59] Ibid.

Directive's provisions and overcome its deficiencies, still, in the absence of any of the above mentioned aggravating circumstances, facilitation to entry and transit could still be prosecuted at the discretion of states.

After long disputes among state and non-state actors[60], saving clause exempting humanitarian assistance from criminalisation was included in Article 1 (2) of the Directive. It now recites as follows:

> Any Member State *may* decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.' (emphasis added)[61]

The clause has three main deficiencies: first, its optional nature leaves an excessive margin of discretion to states; second, it does not provide a clear definition of 'humanitarian assistance'; third, its scope of application is exclusively limited to Article 1 (1) (a), namely to facilitation of entry and transit. What about those humanitarian actions aimed at the facilitation of one's stay? As pointed out by UNHCR in September 2000 in their first released comments on the French proposal draft,

> 'Asylum-seekers generally rely on individuals and non-governmental organisations for information, advice and guidance (…). They are often dependent on the care and assistance of their own community or non-profit organisations during the initial period of their arrival in the asylum country'[62].

It can be true that generally organisations assisting refugees are not-for-profit however, could an individual be blamed for providing legal advice or accommodation under payment of a proportionate fee? Either on the move, or in their hosting countries, refugees might be willing to pay for the services they look for. It can be argued that,

[60] For further details, see also Rachel, Landry, *The 'humanitarian smuggling' of refugees: criminal offence or moral obligation?*, (2016) Refugee Studies Centre, University of Oxford, 10-11.
[61] Council Directive 2002/90/EC, n. 57, art 1(2).
[62] UNHCR, *UNHCR comments on the French proposal*, n. 28, para 8.

> '[Article 1 of the Directive] inaccurately assumes that instances of humanitarian assistance in terms of residence/stay can only occur in the absence of an element of financial gain. It does not contemplate instances of assistance by service providers and landlords requiring non-exploitative remuneration for their services'[63].

Therefore, the layout of Article 1 of the Directive seems to suggest that the facilitation to reside without financial gain would automatically fall outside of the scope of the smuggling offence. In other words, it can be argued that Article 1 of the Directive takes 'the threshold of gain as an implicit humanitarian exemption'[64]. Accordingly, basic for-profit service providers would fall within the smuggling offence's scope.

Overall, the Facilitators Package's wording and layout seems to suggest that, on the one hand, the gain threshold constitutes the only reasonable discriminating factor between humanitarianism and criminal exploitation; on the other hand, that lack of financial gain appears to be a smuggler's exculpatory circumstance. At first glance, such a reasoning can make a lot of sense, however, the general dichotomy between humanitarianism and financial gain can be an oversimplified approach. As Landry says in a recent publication:

> '[T]he gain threshold operates on the assumption of a for-profit/humanitarian binary, whereby actions for profit and those for humanitarian reasons are mutually exclusive. (…) This for-profit/humanitarian binary is problematic, as it rests on the premises that acts for gain cannot be humanitarian and acts not for gain cannot be criminal. (…) The legal uncertainty lies with those cases that fall in a grey area. An organisation could conceivably act based on "humanitarian reason" but also be compensated for doing so.'[65]

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[63] Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, LIBE Committee, 2016, 27. In its 2018 updated version, the study reiterates that 'the "facilitation of residence" (…) does not exempt bonafide service providers such as, for instance, land-lords, hotels and AirBnB providers, that charge smuggled migrants the same amount as any other clients, without any "unjust enrichment" motive', in Carrera and others, *Fit for purpose? 2018 Update*, n. 42, 11.

[64] Landry, n. 60, 8.

[65] Ibid.

To be precise, a careful analysis of one of the Facilitators Package's provisions seems to contemplate the existence of profitable humanitarian actions. The combination between the absence of a financial gain requirement in Article 1 (1) (a) and the saving clause in Article 1 (2) of the Council Directive could theoretically lead to an exemption from criminalisation of a for-profit activity aimed at facilitation of entry and transit[66].

In reality, however, as to the financial element and the humanitarian clause, MSs have adopted a wide range of different provisions on smuggling, often exposing humanitarian actors to criminalisation[67].

In short, a substantially clearer definition of humanitarian assistance and financial gain would be needed to overcome the Facilitators Package's vagueness and legal uncertainty. For instance, including *unjust* forms of profit in the definition of gain would narrow down the scope of the smuggling offence, so that only exploitative acts of smuggling would warrant criminalisation[68].

2.3.3 Does the EU Facilitators Package comply with human rights?

In this following section, the Facilitators Package is evaluated through a human rights lens and, in particular, from two different perspectives: smuggled migrants and facilitators. On the one hand, migrants have been broadly acknowledged to be entitled to a wide range of rights and protections regardless of their administrative status[69]. On the other hand, while facilitators are also entitled to protections, special attention should be given to safeguard humanitarian facilitators. Thus, states should be compelled to include

[66] Ibid, 10.

[67] For a comparative analysis among Members States' legislations on smuggling, see European Union Agency for Fundamental Rights, *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 2014; Mark, Provera, *The Criminalisation of Irregular Migration in the European Union*, CEPS Paper in Liberty and Security in Europe, No. 80, 2015; Carrera and others, *Fit for purpose?*, n. 63.

[68] The presence of an unjust gain is believed by the author to be useful in identifying criminal actions taking advantage of one's vulnerability and distinguishing them from more genuine smuggling acts. Other possible adjectives, identifying different nuances of unlawfulness, can be: undue, improper, unfair, unseemly, unwarranted, unjustified, disproportionate.

[69] For an insightful overview of the international and regional human rights framework in relation to undocumented migrants' rights, see Gallagher and David, n. 8, ch. 2;
See also: Platform for International Cooperation on Undocumented Migrants (PICUM), *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, PICUM, 2007.

solid frameworks granting certain human rights protections when drafting and implementing anti-smuggling legislation.

The EU's priority to combat irregular migration at the time when the Facilitators Package was drafted left this piece of legislation largely free of human rights protections. Despite long-term negotiations and strong stances by major international organisations representing civil society, security matters finally prevailed. This aspect substantially differentiates the Facilitators Package from the only global piece of legislation on smuggling of migrants, the UN Protocol.

The UN Protocol, indeed, contains several provisions expressly safeguarding smuggled migrants' rights. Two of the Protocol's most significative clauses are Articles 5 and 16. The former provides that '[m]igrants shall not become liable to criminal prosecution (…) for the fact of having been the object of [smuggling]'[70]. The latter establishes a wide protection framework and it imposes specific obligations on states. Still, while Article 16 expressly includes some core human rights (right to life, prohibition of torture and of inhuman and degrading treatment,…), this was not meant to be a comprehensive list of protected rights. As pointed out in the Protocol's *Travaux Préparatoires*, indeed, 'the provision should not be interpreted as excluding or derogating from any other rights not listed'[71].

Additionally, the Protocol's saving clause (Article 19) provides two other provisions which are of direct relevance to the purpose of this section. Article 19 (1) clearly expresses the desire to go beyond the restrictive regime of refugee law and, accordingly, to make the Protocol conform to the standards of 'international law, including international humanitarian law and international human rights law'. Article 19 (2) states that:

> 'The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory (…). The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.'[72]

[70] UNGA, *Smuggling Protocol*, n. 12, art 5.
[71] UNODC, *Travaux Préparatoires*, n. 13, 541.
[72] UNGA, *Smuggling Protocol*, n. 12, art 19(2).

As pointed out by Anne Gallagher, this provision can have important practical implications such as:

> 'operat[ing] to prohibit, for example, discriminatory treatment with a negative intent or outcome between different groups of smuggled migrants on the basis of, for example, their national or ethnic origin or indeed their status as asylum-seekers or refugees.'[73]

Unfortunately, the wide framework for protecting migrants' rights established by the UN Protocol is not reflected in the EU law. The Facilitators Package hardly makes any mention of human rights protections. An implicit right to life is acknowledged under Article 1 of the Framework Decision, which defines the endangerment of smuggled migrants' lives as an aggravating circumstance. But unlike the Smuggling Protocol[74], no other circumstance that could affect migrants' physical or mental integrity is included. Additionally, the Facilitators Package does not refer to international human rights standards except for the specific case of asylum seekers and refugees. The saving clause, which was inserted into Article 6 of the Framework Decision, provides the following nod to international law:

> 'This framework Decision shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular (…) the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.'[75]

One can see that the clause is narrowly formulated. Its scope only extends to refugees and asylum seekers and appears to exclude other smuggled migrants 'who may have a claim

[73] Gallagher and David, n. 8, 558.
[74] UNGA, *Smuggling Protocol*, n. 12, art 6(3).
[75] 2002/946/JHA, n. 58, art 6.

for protection under international human rights law'[76]. The broader category of smuggled people is not expressly entitled to any further protection under the Facilitators Package.

In addition, the EU legislation on smuggling presents serious shortcomings for facilitators as well. Throughout the text, no procedural guarantees to ensure fair trial standards are mentioned. Moreover, under Article 1 of the Framework Decision, a facilitator can be either extradited or deported.[77] Such a provision should clearly be checked by limitations and human rights protections, such as the prohibition of non-refoulement under certain life-endangering conditions. Under the same article, the Framework Decision also establishes 'custodial sentences with a maximum sentence of not less than eight years' in the presence of aggravating circumstances. Such a wording sets a minimum threshold of penalty and lacks a defined time and severity standard to limit it, which could easily lead to abuses on behalf of states and disproportionate lengths of sentences[78].

Most importantly for the focus of this thesis, the Facilitators Package also lacks the adequate human rights protections for those providing humanitarian assistance to irregular migrants. In this sense, humanitarian principles had been codified into treaty law since the origins of the law of war in the end of the eighteenth century[79] [80]. The subsequent development of the international humanitarian law regime have always engaged in a balancing exercise, between humanitarian considerations and military necessity, collateral damage and military advantage. Just like laws regulating armed conflict, legislators dealing with humanitarian needs, on the one hand, and security concerns on the other, should engage in a similar balancing act, combining universality of human rights and states' security needs.

The Facilitators Package's humanitarian clause, vague in content and optional in nature, *de facto* and *de jure* paves the way for the criminalisation of an unlimited range of

[76] Gallagher and David, n. 8, 397.

[77] The deportation measure explicitly suggests that facilitation offences can likely be committed by third country nationals.

[78] In this regard, see case study of Greece from George, Maniatis, *Country Report Greece*, Sara, Bellezza and Tiziana, Calandrino, *Criminalisation of flight and escape aid*, Editor borderline-europe, 2017, 202-240.

[79] Liz, Fekete , *Introduction*, in Liz, Fekete, Frances, Webber and Anya, Edmond-Pettitt, *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, 2017.

[80] In this sense, some authors argue that humanitarian law can be 'seen as a "precursor" or "trailblazer" of human rights and as one of their most important sources.', as cited by Oberleitner, in Gerd, Oberleitner, *Human Rights in Armed Conflict: law, practice, policy*, Cambridge University Press, 2015, 9.

humanitarian acts with alarming implications for society and the effect of undermining foundational democratic values and basic civil and political rights. In fact, legal prosecutions can act as deterrent forces for citizens to freely express and associate.[81] In this sense, the EU acquis on migrant smuggling can be seen as a failed legislative balancing act.

2.4 Latest developments at the EU level on migrant smuggling

2.4.1 Calls for amendments of the Facilitators Package's and the REFIT evaluation

Since the time of its adoption, a countless number of different actors such as scholars[82], institutions[83], and NGOs have called for amendments of the Facilitators Package and denounced its shortcomings.

In December of 2012 the Commission launched a Regulatory Fitness and Performance Programme (REFIT) aimed at 'making EU legislation lighter, simpler and less costly'[84], in part through the evaluation of existing legislation. In 2014, the Commission 'identified the evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence as one of the medium-term initiatives to assess the performance of existing EU legislation'[85]. This evaluation's main goal was assessing whether the Facilitators Package, as a major tool within the wide array of instruments to combat migrant smuggling and irregular migration, had reached its objectives and was still fit-for-purpose.[86] The REFIT evaluation of the Facilitators Package was conducted by the Commission in 2017 and it was informed by relevant reports and studies conducted between 2014 and 2016[87]. Among other findings, evidence had been collected demonstrating the Facilitators Package's negative impact on humanitarian assistance and

[81] Freedom of expression, assembly, and association are enshrined in articles 10 and 11 of the European Convention on Human Rights and articles 11 and 12 of the Charter of Fundamental Rights of the European Union.

[82] See, for example, Frances Webber, *Asylum: from deterrence to criminalisation*, European Race Bulletin, Institute of Race Relations, No. 55, Spring 2006; Fekete, Webber and Edmond-Pettitt, n. 79.

[83] See Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights implications*, Issue Paper, Council of Europe, 2010.

[84] European Commission, *Commission Staff Working Document. REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)*, SWD(2017) 117 final, 22.03.2017, 1.

[85] Ibid.

[86] Ibid.

[87] See, among the others, FRA, Criminalisation of migrants in an irregular situation and of persons engaging with them, 2014, and Carrera and others, *Fit for Purpose?*, n. 63.

the increase of different forms of policing of CSOs[88]. Except for one study which remained silent on the issue, all others recommended a legislative reform of the Facilitators Package and a narrower definition of the offence of facilitation of irregular migration[89]. In addition, there was general agreement that the introduction of a mandatory humanitarian clause was necessary[90].

Still, the outcome of the Commission's REFIT evaluation shows the limited extent to which the various findings mentioned above have been taken into account. Indeed, the Commission concludes that 'at this point in time the Facilitators Package should be maintained in its present form'. In its final sentence, the Commission states that '[t]he need for possible legislative amendments to the Facilitators Package could be re-evaluated, once the implementation of the Action Plan has reached greater maturity.'[91]

2.4.2 The European Action Plan against Smuggling 2015-2020

In 2015, the European Commission set two agendas that both, to some extent, established the fight against migrant smuggling as a major European concern. The European Agenda on Security (April 2015) and the European Agenda on Migration (May 2015) equally promoted international cooperation as a tool to fight migrant smuggling. In order to operationalise these two frameworks, the Commission presented an Action Plan against Migrant Smuggling in May 2015, endorsing a broad and comprehensive approach to effectively address such a complex issue as smuggling human beings.

Among the specific actions proposed, the Commission had promoted a '[r]evision of the EU legislation on migrant smuggling by 2016'[92]. More precisely, the Action Plan states that:

> 'The Commission will make, in 2016, proposals to **improve the existing EU legal framework to tackle migrant smuggling,** which defines the offence of facilitation of unauthorized entry and residence, and strengthen the penal framework. It will seek

[88] Carrera and others, *Fit for Purpose? 2018 Update*, n. 42.
[89] Ibid.
[90] Ibid.
[91] European Commission, *REFIT evaluation*, n. 84, 37.
[92] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Action Plan against migrant smuggling (2015 - 2020)*, COM(2015) 285 final, 27.05.2015, 4.

> to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress.' [93]

The Action Plan includes a compendium of proposals that can likely give an adequate and effective response to human smuggling, but only if implemented concurrently. In its recent evaluation endeavour, however, the Commission clearly disregards one of its core commitments under the 2015-2020 Action Plan, as if a more mature implementation stage of all the other suggested actions were more significant than a substantial legislative change.

2.4.3 The stance of the European Parliament and latest developments

Over the years, '[t]he European Parliament has been the main critic of the Facilitators' Package'[94]. Since 2002, the Parliament has maintained its initial stance and advocated for a revision of the EU legislation 'to protect civil society's rights'[95].

In April 2018, the EP passed a resolution on the progress of the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees, which called for the exemption of humanitarian assistance from criminalisation.[96] A few months later, likely as a reaction to the Commission's negligence on the issue, the EP raised its voice once more with another resolution, this time specifically addressing the criminalisation of humanitarian assistance.[97] First of all, the Parliament expressed its concern 'at the unintended consequences of the Facilitators Package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole'[98]. Accordingly, the resolution urged the Commission to adopt a clearer definition of smuggling, explicitly specifying which forms of facilitation should not warrant criminalisation. Additionally,

[93] Ibid, 3.
[94] Carrera and other, *Fit for Purpose?2018 Update*, n. 42, 53.
[95] Ibid.
[96] European Parliament, *European Parliament resolution of 18 April 2018 on progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees (2018/2642(RSP))*, P8_TA(2018)0118, 2018, para 19.
[97] European Parliament, *European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP))*, P8_TA-PROV(2018)0314, 2018.
[98] Ibid, 3.

the resolution called for further uniformity in the implementation of the EU acquis on smuggling to foster legal certainty at the European level. Finally, the Parliament promoted a more concerted and holistic approach to irregular migration and human smuggling, advocating for a stronger cooperation 'between actors proving humanitarian assistance and competent authorities'[99].

A few other recent developments are also noteworthy. At the international level, the UN Migration Compact included an explicit exempting clause for humanitarian assistance,[100] while the UN Special Rapporteur for Human Rights Defenders (HRDs) had issued a report specifically addressing the rights of those defending people on the move[101].

Finally, in February 2018, the EU citizens' voice reached the European institutions through the European Citizens' Initiative 'We are a welcoming Europe'[102]. After its official registration with the Commission, the Initiative's goal was to collect 1 million signatures to promote measures preventing the criminalisation of humanitarian service provisions. To conclude, it seems that '[a]t times when governments are unable to respond quickly and effectively, civil society has stepped in to guarantee people's access to fundamental rights.'[103]

2.5 Conclusion

This Chapter's legal overview on the Facilitators Package has shown the legislation's major shortcomings and its general incompliance with human rights standards. In particular, a study of the legislation's drafting process and its legal analysis has shown the institutional collision between humanitarian considerations and criminal law matters. Overall, states' will to exercise their territorial sovereignty has prevailed over any possible humanitarian consideration. In this sense, it can be argued that MSs have attempted to preserve their territorial integrity in response to being confronted more and

[99] Ibid, 4.
See also Carrera and Others, *Fit for Purpose? 2018 Update*, n. 42, p 57-58.
[100] UNGA, *Resolution adopted by the General Assembly on 19 December 2018: Global Compact for Safe, Orderly and Regular Migration*, Doc. A/RES/73/195, 11.01.2019, para 24(a).
[101] UNGA, *Report of the Special Rapporteur on the situation of human rights defenders*, Human Rights Council, UN Doc. A/HRC/37/51, 16.01.2018.
[102] Welcoming Europe Campaign, Initiative registered with the European Commission, official website available at <https://weareawelcomingeurope.eu/en/> accessed 5 June 2019.
[103] Carrera and Others, *Fit for Purpose? 2018 Update*, n. 42, 52.

more with the incorporation of the Schengen regime (and the related elimination of internal borders controls) into the EU law. The Facilitators Package's 'introduction of more or less harmonized criminal law sanctions against human smugglers throughout the Union'[104] is a case in point.

The drafting process of the EU legislation on smuggling resulted in the elaboration of a purely criminal law measure. But addressing human smuggling through criminal law does not prioritize the protection of victims' rights. The focus of a criminal piece of legislation is on the *intention* of both smugglers and smuggled, rather than their needs and safeguards. The criminal law approach, though, has its own implications. Criminal law frameworks directly and inherently contain certain specific human rights protections, such as, for example, 'witness protection schemes, non-discrimination in access to court proceedings, prohibition of forced labour or slavery like practices'[105]. The fact that none of these protections had been codified within the Facilitators Package is a meaningful and deliberate choice. Furthermore, the Facilitators Package's silence on human rights protections and its disregard of the serious implications for humanitarian facilitators is far from being legally and morally acceptable. Accordingly, the assessment of the EU legislation on smuggling through a human rights perspective cannot but result in a negative evaluation. Given that a just law would never permit morally defensible behaviours to be criminalised, the Facilitators Package constitutes a fundamentally bad[106] and unjust law.

Today, as far as irregular migration and human smuggling are concerned, the fundamentally 'territorial politics'[107] of the Union are still prevailing. The 2017 European Commission's rejection to amend the Facilitators Package is a clear case in point.

However, some of the above-mentioned recent developments stand in contrast with this stance. The most significant exception is the position of the EP, the sole directly elected organ representing European citizens. Its unique position of continuous commitment to

[104] Ibid, 79.
[105] Bhabha, n. 7, para 57.
[106] Such adjective is taken from the concluding part of Carrera and Others, *Fit for Purpose? 2018 Update*, n. 42, 106, as providing an overall evaluation of the Facilitators Package. Though not a legal expression, the adjective, in its simplicity, clearly conveys the essential inadequacy of the European law on smuggling.
[107] Ibid.

human rights seems to reveal well-preserved humanitarian principles among the citizens of Europe.

CHAPTER 3 | FACILITATION OF IRREGULAR MIGRATION AND CRIMINALISATION OF HUMANITARIANISM: THE ITALIAN CASE

3.1 Introduction

Chapter 3 is the concluding section of this work. First, Chapter 1 went through some relevant historical examples of human smuggling in order to show how states' responses and policies to tackle the issue have significantly changed over time. Second, a philosophical investigation into the morality of (humanitarian) human smuggling argued for the significance of such acts of solidarity in today's democratic societies. As stated in the concluding sentence of the Chapter, just laws should be derived from morals rather than alleged just laws dictating what is moral[1].

Chapter 2 dealt with the EU *acquis* on migrant smuggling, namely the Facilitators Package. A more traditional legal analysis of the EU legislation's main provisions highlighted its most serious criticisms and shortcomings. In particular, the Facilitators Package's potential negative impact on morally defensible actions and its overall neglect of human rights protections led to a fundamentally negative assessment of the EU anti-smuggling legislation.

By now presenting a specific national case study, the last part of this work aims to contextualize its preceding Chapters and show the concrete implications for civil society of controversial anti-smuggling policies and legislations. This Chapter will begin with a short analysis of the Italian legislation on facilitation of irregular migration and the extent to which it complies with the Facilitators Package. Then, three significant cases of criminalisation of humanitarian assistance within the Italian territory will be analysed, in the constant effort to give visibility to little ordinary acts of solidarity and humanitarianism at risk.

In general, the Italian political discourse on migrant smuggling has been dominated by the criminalisation of NGOs engaged in SAR operations in the Mediterranean Sea. Similarly, international reports have mostly focused on the efforts by the Italian authorities to hamper fishermen and NGOs' vessels and prosecute their conducts under

[1] Rachel, Landry, *The 'Humanitarian Smuggling' of Refugees: Criminal Offence or Moral Obligation?*, (2016) Refugee Studies Centre, University of Oxford, 3.

the crime of facilitation of irregular entry[2]. It is without doubt true that, compared to the legal prosecution of humanitarian action in the Mediterranean Sea, criminalisation of private individuals and small civil society organisations is a minor phenomenon in Italy. However, in terms of their legal and social implications, the latter should not be underestimated. In a rising climate of racism and fear, ordinary humanitarian helpers have been facing increasing challenges, from investigations and prosecutions to stigmatisation and marginalisation. As shown in the last part of this Chapter, the 'policing [of] humanitarianism'[3] could finally result in the breach of fundamental rights, such as freedom of association and expression, on which contemporary democratic societies are grounded.

3.2 The Italian national law on facilitation of irregular migration

Before of the entry into force of the Facilitators Package in 2002, the Italian legislation on migrant smuggling had already incorporated the main provision of the Schengen *acquis* which explicitly required MSs to sanction facilitators of irregular migration[4]. The facilitation of irregular migration was codified as a criminal offence within the Italian law in 1998 with the adoption of the Legislative Decree 286/1998[5], the so called Single Act on Immigration, namely the major piece of Italian legislation ruling on immigration and the status of foreigners[6].

[2] See, for example, FRA, *Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations*, 2018, available at <https://fra.europa.eu/en/publication/2018/ngos-sar-activities>, and FRA, *2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations*, 2019, available at < https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities>; Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs PETI Committee, 2018; Sara, Bellezza and Tiziana, Calandrino, *Criminalisation of flight and escape aid*, borderline-europe, 2017.

[3] Notion taken from Carrera and others, *Fit for purpose? 2018 Update*, n. 2.

[4] Matilde, Ventrella, *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy*, Routledge Taylor and Francis Group, 2016, 168-169.

[5] Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, Decreto Legislativo 25 Luglio 1998, n. 286.

[6] Guido, Savio, *La sentenza delle Sezioni Unite sulla qualificazione come circostanze aggravanti delle fattispecie previste dall'art. 12 co. 3 del t.u. immigrazione (2018)*, Diritto Penale Contemporaneo, section 3, available at < https://www.penalecontemporaneo.it/d/6376-la-sentenza-delle-sezioni-unite-sulla-qualificazione-come-circostanze-aggravanti-delle-fattispecie> accessed 20 June 2019.

When, in 2006, the Commission published a report on the transposition into national laws of the Framework Decision of 28 November 2002, the sole EU assessment on the implementation of the Facilitators Package since its entry into force[7], no particular issue was raised about Italian national legislation's incompliance with the EU acquis on smuggling[8]. The Report, indeed, had made clear that

> '[t]ransposition into national law does not necessarily require enactment in precisely the same words which means that, for example, appropriate and pre-existing national measures may be sufficient, as long as the full application is assured in a sufficiently clear and precise manner.'[9]

This appears to have been precisely the case when it comes to the Italian legislation on facilitation of irregular migration.

A first definition of the smuggling offence's scope and its related criminal sanctions was inserted into Article 12 of the Single Act on Immigration[10]. In the decade following its adoption, however, the article in question was modified three times, first, in 2002 by Act 189/2002[11], second, in 2004 by Act 271/2004[12] and third, in 2009 by Act 94/2009[13]. Act 189/2002, so called Legge Bossi-Fini, was adopted by a right-wing government led by

[7] European Commission, *Commission Staff Working Document. REFIT evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)*, SWD(2017) 117 final, 22.3.2017, footnote 5.

[8] In the Annex to the Report, the Commission only points out the lack of information 'on the relation between the smuggling migrant and the liability of the legal persons', in Commission of the European Communities, *Commission Staff Working Document: Annex to the Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence {COM(2006) 770 final}*, SEC(2006) 1591, Brussels, 6.12.2006.

[9] Commission of the European Communities, *Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence {SEC(2006)1591}*, COM/2006/0770 final, Brussels 6.12.2006.

[10] See Annex A. The initial definition of facilitation of irregular migration clearly distinguished between facilitation of entry and stay; moreover, it already included a humanitarian clause exempting humanitarian assistance from criminalisation.

[11] Modifica alla normativa in materia di immigrazione e di asilo, Legge 30 luglio 2002, n. 189.

[12] Conversione in legge, con modificazioni, del decreto-legge 14 settembre 2004, n. 241, recante disposizioni urgenti in materia di immigrazione, Legge 12 novembre 2004, n. 271.

[13] Disposizioni in materia di sicurezza pubblica, Legge 15 luglio 2009, n. 94.

Silvio Berlusconi. As far as Article 12 is concerned, several substantial amendments were made[14]. Worthy of note is the inclusion of an autonomous type of offence, namely the facilitation of irregular *e*migration, from the Italian territory towards another MS. Only two years afterwards, in 2004, among several other modifications, more severe penalties were introduced (from 3 years of imprisonment to 5 years for the facilitation of entry and transit). Act 94/2009 was adopted between 2008 and 2009 by another right-wing coalition led by Silvio Berlusconi within a package of legislative measures, the so-called Security Package, aimed at implementing an extremely restrictive immigration policy on the Italian territory. Among others, the Package established tougher sanctions against landlords renting accommodation to undocumented migrants for an unjust profit[15].

Over the decade following the adoption of the Single Act on Immigration in 1998, the Italian legislator's will to aggravate the facilitators' system of penalties as a deterrent is quite self-evident[16]. Since the 2009 amendments, aside from minor modifications[17], the formulation of Article 12 has remained unaltered up until today.

To begin, the analysis will focus on the distinction established by Article 12 between facilitation to entry, transit and stay.

3.2.1 Entry and transit

The most significant provisions on the facilitation of entry are contained in Article 12 (1) and (3). These provisions establish two independent types of offence: the facilitation to *im*migrate and the facilitation to *e*migrate[18]. Indeed, the definition of facilitation of irregular migration is quite comprehensive and clearly includes the assistance of inward as well as outward flows of irregular migrants.

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[14] Savio, n. 5, section 3.

[15] For an insightful evaluation of Act 94/2009 and its impact, see Massimo, Merlino, *The Italian (In)Security Package: Security vs. Rule of Law and Fundamental Rights in the EU*, Generated by the CEPS CHALLENGE programme (Changing Landscape of European Liberty and Security), 2009.

[16] Federica, Urban, *Italian Criminal Legislation as a Model for Implementing the Supranational and International Regulation for Anti-Smuggling and Anti-Trafficking* (2018), published in the three-monthly journal of Diritto Penale Contemporaneo 1/2018, 129, available at < http://dpc-rivista-trimestrale.criminaljusticenetwork.eu/it/archivio/rivista-trimestrale-1-2018>.

[17] In 2017, Act 46/2017 (Conversione in legge, con modificazioni, del decreto-legge 17 febbraio 2017, n. 13, recante disposizioni urgenti per l'accelerazione dei procedimenti in materia di protezione internazionale, nonche' per il contrasto dell'immigrazione illegale, Legge 13 aprile 2017, n. 46) inserted a further paragraph (9-septies) strenghtening the monitoring system of irregular migration.

[18] Paolo, Morozzo della Rocca, *Manuale Breve di Diritto dell'Immigrazione*, Maggioli Editore, 2013, 261.

Article 12 (1) provides that whoever performs acts aimed at facilitating the transportation[19] or the illegal entry within and into the Italian territory *as well as other states* shall be punished with imprisonment of up to 5 years and a fine of up to € 15,000 for each smuggled person[20] [21]. Even though the term 'transit' is not explicitly mentioned, the inclusion of acts aimed at the 'transportation' of foreigners seems to reflect the same concept. In addition, the facilitation to emigrate clearly implies an outward movement from Italy to another EU MS. Under this circumstance, Italy would only be a country of transit but not a final destination[22]. Actually, due to its geographic position, Italy is located on most migrants' northward migration routes[23].

It is also useful to look at the Italian jurisprudence on the interpretation of such provision. In 2010, the Italian Supreme Court, ruling on a case of facilitation of entry of Pakistani and Indian citizens into the Italian territory, stated that:

> 'Acts of transportations, though performed on restricted portions of territory within the state's national borders, can amount to a criminal offence [under Article 12 of

[19] As far as transportation is concerned, Article 12 (1) explicitly defines its facilitations under the 'promotion, management, organisation, funding or performance' of the transportation of foreigners, translated by the author.

[20] Act 94/2009 increased the length of the custodial sentence from 12 years up to 15 years.

[21] The wording of paragraph 1 entails a quite vague scope of application of such provision. No financial element is inserted and no explicit restriction is mentioned. However, as analysed below, limitations to facilitation of entry and transit exist under an explicit humanitarian clause and some aggravating circumstances.

[22] One of the main objectives of the Common European Asylum System is to limit irregular secondary movements of migrants throughout Europe and to prevent them to lodge multiple asylum application. In this regard, the Dublin Regulation establishes clear rules to determine which Member State is responsible for examining asylum applications. Save the existence of certain conditions, the Member State in which a migrant first arrives is the one in charge of the entire process and the examination of their asylum request. However, as clearly shown by data collected by Eurodac, a common dactyloscopy database tracing asylum-seekers and migrants movements within the EU, multiple asylum application is still a big issue. In 2018, out of 551,253 recorded applications, 37% (202,806) were multiple applications, namely already filed in other European countries. From European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), *Eurodac – 2018 Annual Report*, 2019.

[23] Data collected by the Ministry of Interior show relevant discrepancies between the number of arrivals by sea and the amount of asylum applications lodged on Italian territory, in particular before 2017 (data on arrivals by land are not included). See Cruscotto Statistico Giornaliero, Dipartimento per le Libertà Civili e l'Immigrazione, Ministero dell'Interno, available at <http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/documentazione/statistica/cruscotto-statistico-giornaliero> accessed 1 July 2019; see also *Quaderno Statistico per gli anni 1990-2018*, I numeri dell'Asilo, Dipartimento per le Libertà Civili e l'Immigrazione, Ministero dell'Interno, available at <http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/quaderno_statistico_per_gli_anni_1990-2018.pdf> accessed 1 July 2019.

> the Single Act of Immigration], as long as they form part of a more widely organised transnational route, aimed at smuggling irregular migrants through Italy towards other European countries.'[24]

Therefore, the Italian courts' broad interpretation of Article 12 (1) seems to make facilitation to 'transit' fall under its scope of application, alongside its entry counterpart. In this sense, the Italian legislation complies with the Facilitators Package, whose broad definition of facilitation of entry and transit generally imposes sanctions on the '[assistance to] 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 (…)'[25].

Article 12 (3) has been a disputed provision for long time. It was unclear whether it aimed at introducing a graver autonomous type of offence, or simply a list of aggravating circumstances referred to the scope of the general offence of Article 12 (1)[26]. Finally, in 2018, the Italian Supreme Court affirmed that 'paragraph 3 of article 12 of the Single Act on Immigration amounts to aggravating circumstances of the criminal offence referred to in paragraph 1 of the same article'[27].

In that circumstance, the interpretation of the Court of Article 12 (1) and (3) also confirmed that the attempt to commit the *actus reus*, namely the *mens rea* or intent, is sufficient for the crime to exist[28]. Once more, the Council Directive had taken the same approach as the Italian legislation. In Article 2, it clearly states that

> 'Each Member State shall take the measures necessary to ensure that the sanctions referred to in Article 1 are also applicable to any person who: (a) is the instigator of,

[24] 'Anche i trasporti limitati a segmenti endonazionali dei complessivi tragitti, dunque, in quanto scientemente inseriti in un più ampio percorso che, dall'estero, conduceva i clandestini prima in Italia e poi in altri Paesi europei, integrano pienamente la condotta incriminata', translated by the author. Cass. Pen., Sez. I, 6 May 2010, n. 23209, in www.altalex.com.

[25] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, art 1(1)(a).

[26] For a detailed insight about this debate, see Savio, n. 5.

[27] Translated by the author, from Cass. Pen. Sez. un., 21 June 2018, n. 40982, available at <https://www.penalecontemporaneo.it/upload/1501-cass-ssuu-40982-18.pdf> accessed 21 June 2019.

[28] Savio, n. 5, section 6.

(b) is an accomplice in, or (c) attempts to commit an infringement [of facilitation to entry, transit or stay].'[29]

3.2.2 Financial element and humanitarian clause

The definition of facilitation of entry and transit in Article 12 (1) and (3) does not include any financial element, whether under the form of a more general gain or an unjust enrichment, as precondition for criminalisation. In this regard, however, two different clauses restrict *de jure* the scope of Article 12 (1) and (3): the first exempts humanitarian assistance from criminalisation, the second introduces a financial element. The former is an explicit saving clause enshrined in Article 12 (2) (hereinafter as 'humanitarian clause'), which recites as follows:

'Without prejudice to the provisions of Article 54 of the [Italian] Penal Code, any act of help and humanitarian assistance performed in Italy in favour of foreigners in distress however present within the territory of the State, does not amount to a criminal offence.'[30]

The aforementioned humanitarian clause integrates Article 54 of the Italian Penal Code on the state of necessity, which exempts from criminalisation those agents rescuing themselves or others from an imminent and grave danger[31]. In the case of humanitarian assistance provided by individuals to migrants in distress, the existence itself and the severity of an imminent and grave danger is much more relaxed by non-strictly emergency circumstances. Therefore, the humanitarian clause gains particular significance as a protective measure for ordinary acts of assistance to irregular migrants. Moreover, the humanitarian clause's wording leaves no space for further interpretation and makes it clear that the exemption from criminalisation is not of an optional nature (in its original version, it states that humanitarian acts 'non constituiscono reato (…)'[32]).

[29] Council Directive 2002/90/EC, n. 24, art 2.
[30] Translated by the author, in Testo Unico Immigrazione, n. 4, art 12(2).
[31] Codice Penale 1930, R.D. 1398/1930, art 54.
[32] 'they do not amount to a crime (…)', translated by the author, in Testo Unico Immigrazione, n. 4, art 12(2).

However, it is disputable whether the clause applies only to Article 12 (1) or also extends to Article 12 (3), which contains the general offence of facilitation's aggravating circumstances[33]. Moreover, the parenthetical element requiring foreigners to be, in any case, already present on the territory of the State seems to refer to the facilitation of stay rather than entry[34]. Therefore, unfortunately, the formulation of the humanitarian clause can raise different interpretative issues.

The second measure restricting the scope of the provision on entry and transit is enshrined in Article 12 (3 *ter*) under one of the aggravating circumstances applicable to the facilitation of entry and transit, namely the presence of a financial gain. More precisely, Article 12 (3 *ter*) (b) establishes more severe custodial sentences and higher fines whereby facilitation of entry or transit aims at direct or indirect profit[35]. While, on the one side, any restriction to the broad scope of Article 12 (1) and (3) can be welcome, such aggravating circumstance presents different shortcomings on the other side. First, given the extensive length of custodial sentences thereby established, a more careful definition of profit, distinguishing between just and unjust gain, would be more adequate. Second, such formulation assumes the existence of a controversial dichotomy between humanitarianism and financial gain, extensively elaborated in Chapter 2.

Importantly, under the quite long list of aggravating circumstances contemplated by Article 12 (3), (3 *bis*) and (3 *ter*), a few noteworthy human rights protections are implicitly included too[36]. First, imprisonment of up to 15 years and a fine of up to € 15,000 for each smuggled person are introduced in those circumstances whereby the offence is committed, among the others, while endangering smuggled people's lives and integrity,

[33] Morozzo della Rocca, n. 17, 280.

[34] Enrico, Lanza, *La repressione penale dell'immigrazione clandestina*, published in Diritto&Diritti, October 2001, available at <https://www.diritto.it/articoli/penale/lanza.html> accessed 22 June 2019.

[35] In Testo Unico Immigrazione, n. 4, art 12(3-ter)(b).

[36] As pointed out by Urban, however, the ultimate goal of these provisions is controlling the movement of migrants to protect the public order. Urban substantiates her argument by taking into account a recent ruling by the Italian Supreme Court that referred to the provisions in question. In 2015, the court ruled that 'as to the *rationae* for criminal prosecution, the protection of migrants is not the direct object of the legal protection but, rather, its remarkable indirect effect'. The court noted that the formulation of such provisions under aggravating circumstances and not as an autonomous type of offence reveals the ultimate purpose of the legislator, namely the protection of the public interest and not the direct safeguard of migrants' rights. Reported and translated by the author from Cass. Pen., sez. III, 8 October 2015, n. 50561, as cited in Urban, n. 15, footnote 59.

and subjecting them to inhumane and degrading treatment[37]. Moreover, Article 12 (3 *ter*) relates the crime of migrant smuggling to human trafficking by imposing harsher penalties to those facilitators engaging in smuggling with the purpose of subjecting their 'clients' to sexual or labour exploitation [38]. Finally, significant reductions of penalties are established for those smuggled migrants willing to cooperate with law enforcement officials in order to prosecute their facilitators[39]. Unfortunately, however, the issue of short-term permits for those cooperating is not provided. In this regard, the Council Directive 2004/81/EC entitles victims of both trafficking and smuggling cooperating with the competent authorities of the right of a residence permit. However, while for victims of trafficking 'Member States *shall* apply [the] Directive', when it comes to smuggled people, 'Member States *may* apply [the] Directive' (emphasis added)[40]. Therefore, given such a weaker protection measure for 'victims' of illegally facilitated migration within EU law, a more comprehensive protection system at the national level would have significantly filled the gap.

Overall, as to facilitation of entry and transit, the formulation of Article 12 seems in full compliance with the Facilitators Package. First, the Italian severe regime of penalties (a maximum custodial sentence can amount to 22 years and a half) is not in contradiction with the Council Framework Decision, which only 'provides for minimum approximation'[41] of sanctions. Second, the insertion of the financial element under the offence's aggravating circumstances reflects the Facilitation Package's layout. Indeed, while the Council Directive does not include a financial element in its definition of facilitation of entry and transit[42], the Framework Decision combines the financial gain

[37] Testo Unico Immigrazione, n. 4, art 12(3)(b) and (c).
[38] Ibid, art 12(3-ter)(a). Explicit mention is made to prostitution and exploitation of minors.
[39] Ibid, art 12(3-quinquies).
[40] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19, art 3.
[41] In its final assessment, the Report states that 'there is still a considerable variety of penalties. They range from fines as minimum penalties to imprisonment of up to 15 years as maximum penalties in aggravating circumstances. However, this is not contrary to the Framework Decision, since it only provides for minimum approximation.', in Commission of the European Communities, *Commission Report on the Framework Decision*, n. 8, 7.
[42] Council Directive 2002/90/EC, n. 24, art 1(a).

with two aggravating circumstances, which are exclusively applicable to the facilitation of entry and transit[43].

By contrast, only two main discrepancies between the two pieces of legislation can be pointed out. First, the optional nature of the EU humanitarian clause is not reflected in the Italian domestic law. Second, though not explicitly aimed at the migrants' rights protection, the list of aggravating circumstances is wider at the national than the European level.

3.2.3 Stay

The subsequent part of Article 12 and, more precisely paragraphs 5 and 5 *bis*, deals with the facilitation of stay. Peculiarly, as far as stay is concerned, two distinct but interrelated types of offence are introduced by Article 12, the facilitation of irregular stay and the lease of a property to an irregular migrant.

Facilitation of irregular stay

Article 12 (5) contains the provision on facilitation of irregular stay. It recites as follows:

> 'Whoever facilitate the stay of an irregular foreigner in breach of the provisions of this Act, with the aim of making an unjust profit out of the foreigner's condition of illegality or in relation to other criminal offences enshrined in this Article, is subject to a custodial sentence up to 4 years and a fine (…). When the crime is committed by two or more people or rather facilitates the stay of five or more people, penalties are augmented (…)'[44]

Worthy of attention is the wording of the provision which restricts its scope of application to a specific form of facilitation of stay, namely those acts aimed at making an unjust profit out of the foreigner's condition of illegality. Accordingly, not every form of facilitation of stay warrants legal prosecution. Simply facilitating somebody's irregular stay is not sufficient for the crime to exist; by contrast, there has to be a specific intent aimed at making unjust profit by taking advantage of the foreigner's condition of

[43] 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/01, art 3.
[44] Translated by the author, in Testo Unico Immigrazione, n. 4, art 12(5).

illegality[45]. This substantially distinguishes the facilitation of stay from the facilitation of entry. While the latter, as defined in Article 12 (1), could virtually prosecute a wide range of conducts aimed at the facilitation of entry and transit, the former limits its scope to profiteering activities[46]. Therefore, as stated by Lanza, the criminalisation of facilitation of entry and stay seems to respond to two different ultimate goals: on the one side, the protection of public order and national interest (entry); on the other, the fight against criminal activities taking advantage of individuals in distress (stay)[47].
Though not explicitly setting up protective measures, the exemption of more genuine forms of facilitation of stay makes Article 12 (5) one of the most human rights-oriented provisions of the Italian legislation on facilitation of irregular migration.

Lease of property to an irregular migrant

Article 12 (5 *bis*) was inserted by Act 94/2009[48]. It introduced sanctions (ranging from 6 months to 3 year's imprisonment) to landlords letting out an accommodation to irregular migrants, with the aim to make an unjust profit. In other words, this provision holds landlords responsible for making sure that foreigners are in possess of a regular permit of stay before further proceeding with the formal lease agreement[49]. Worthy of attention is the clear insertion of an unjust gain as a feature of the criminal conduct. Like its more general counterpart, also Article 12 (5 *bis*) combines *actus reus* and *mens rea*, being the lease of a place itself not sufficient to amount to a crime. A guilty mind is required to make one's conduct prosecutable.

Overall, also the provision on facilitation to stay appears to be in compliance with the EU anti-smuggling legislation. Like the European Directive, the Italian legislation explicitly requires facilitation of stay to be a profitable activity in order to be subject to prosecution. However, the Italian provision makes a remarkable step forward: profit becomes unlawful as long as it is unjust, namely taking advantage of a vulnerable situation of illegality.

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[45] Rocchina, Staiano, Testo Unico commentato dell'Immigrazione (Aggiornato con le modifiche apportate dal D.L. n. 93/2013, conv. in L. n. 119/2013), eBook Altalex 2014, 31, available at <http://www.giudicepace.it/files/testounico_immigrazione.pdf>
See also Urban, n. 15, 131.
[46] Lanza, n. 33.
[47] Ibid.
[48] Elena, Bassoli, *L'immigrazione dopo il nuovo pacchetto sicurezza*, Maggioli Editore, 2009, 90.
[49] Ibid.

3.2.4 Concluding remarks

Italy, like other countries, adopts an essentially criminal law framework to combat irregular migration[50]. The severity of the penalties system imposed on facilitators makes the Italian legislator's intentions clear: to punish and deter as harshly as possible migrants' facilitators to combat and reduce irregular migration.

This works is mainly focused on humanitarian forms of facilitation of irregular migration. In this regard, it is no doubt true that such a severe criminal approach can clash with ordinary forms of humanitarian assistance to irregular migrants. However, the criminalisation of humanitarian assistance can still be regarded as a side effect of a 20-year-old legislation which, at the time of its adoption, aimed at providing exemplary punishments for reckless smugglers by land and by sea. Therefore, the Italian legislator's *bona fide* is out of discussion in this work. By contrast, what raises a lot of concern are the most recent political developments at the Italian, as well as European level, which, increasingly careless of fundamental rights, weaponize laws against migrants and those supporting them.

3.3 Policing Humanitarianism: Case Study Of Border Areas In North Italy

This section provides a short study of a minor but extremely significant phenomenon, namely the criminalisation of individuals and small CSOs in border areas in the Northern region of Italy. This analysis is relevant for the purposes of this work as it shows the (unintended?) implications of highly questionable legislation and policies on irregular migration at the European and national level.

Since 2015, in Italy, like in other MSs, an increasing number of individuals and CSOs have reported countless threats, restrictions, investigations, criminal charges, and sanctions by the competent authorities[51]. As to formal investigations and prosecution on the grounds of facilitation of irregular migration, disaggregated data provided by the Migration Policy Group show an increase between 2016 and 2018[52]. More precisely, in

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[50] See Commission of the European Communities, *Commission Report on the Framework Decision*, n. 8, 7.

[51] Sergio, Carrera and others, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, LIBE Committee, 2016.

[52] See official website of Migration Policy Group, available at < https://www.migpolgroucom/index.php/publications/> accessed 2 July 2019.

2016, 2017, and 2018, the number of individuals charged with facilitation of irregular migration while providing humanitarian aid to migrants have been 18, 19 and 28 respectively[53]. It is noteworthy, however, that the research by the Migration Policy Group is limited to formal investigations and prosecutions 'falling under the material scope of the Facilitation Directive'[54]. Therefore, other types of human smuggling-related offences and forms of policing civil society are not included.

At first sight, the criminalisation of humanitarian assistance to irregular migrants within Italian territory could be quite surprising, given the presence of a humanitarian clause as well as the unjust profit element (under the facilitation of stay) in the Italian legislation described above. In this regard, a couple of clarifications are necessary. First, this work embraces the notion of 'policing humanitarianism' drawn by the 2018 report commissioned by the EP[55]. According to this approach,

> 'rather than counting convictions of humanitarian actors, it is more important to understand the systemic and escalating policing of CSAs. This notion extends beyond formal convictions on the grounds provided in the Facilitators' Package and often explains how the situation has escalated to criminal charges against civil society and other not-for-profit actors.'[56]

Accordingly, this analysis will take a broader approach and focus on formal investigations and proceedings, either administrative or criminal. Even though the chilling effect on society of different forms of policing humanitarianism such as intimidation, suspicion,

[53] Carmine, Conte, Identification and monitoring of cases in Lina, Vosyliūtė, and Carmine, Conte, *Crackdown on NGOs and volunteers helping refugees and other migrants*, ReSOMA Final Synthetic Report, 2019.
As pointed out by Conte, these data are cumulative and some of those cases are still open. Over the considered lapse of time, a total of 38 individuals were charged with facilitation of irregular migration. In most cases, grounds for prosecution were linked to facilitation of entry and stay, while only a restricted number of cases was grounded on accusation of facilitation of stay. Finally, it is worthy to note that many cases took place in South of Italy and are likely linked to SAR operations in the Mediterranean Sea.
[54] Ibid, 19.
[55] Carrera and others, *Fit for Purpose? 2018 Update*, n. 2.
[56] Ibid, 22.

harassment and disciplining is hereby acknowledged[57], these measures will not be taken into account, due to space constraints.

Moreover, the present work will not limit its scope to those cases strictly falling under the material scope of the Facilitators Package and Article 12 of the Single Act on Immigration. The present work will also include judicial cases based on grounds other than facilitation of entry, transit and stay, such as illegal occupation. However, all types of offences hereby considered are strictly related to the provision of humanitarian assistance to irregular migrants which, *de facto*, facilitates one's journey or temporary stay. Therefore, an interrelation between the offences in question and the material scope of the European and Italian legislation on smuggling can be found.

Finally, as pointed out by other reports, there are significant statistical gaps on prosecution and conviction rates both at the European and national levels.[58] In particular, in Italy

> '[t]here are no publicly available statistics about the prosecution and conviction of people charged with facilitation of irregular immigration. (…) There is no disaggregation based on types of offences.[59]

Most importantly, despite the presence of a humanitarian clause, there appears to be 'no data available on the invocation of the humanitarian exemption'[60] during criminal trials by courts and prosecutors.

To conclude, in the effort to contribute to filling the aforementioned statistical gap, the present work will analyse three different significant cases of criminalisation of humanitarian assistance to irregular migrants in northern Italy.

3.3.1 Case 1: Ospiti in Arrivo

As documented by different sources, between 2014 and 2015, the Western Balkans became a major transit route for an unprecedented inflow of migrants making their way to Europe[61]. According to Frontex, in 2015 alone, over 764,000 detentions for illegal

[57] Ibid.
[58] See, in particular, Carrera and others, *Fit for purpose?*, n. 50.
[59] Ibid, 82.
[60] Ibid, 86.
[61] Countless local and international organisations and institutions have documented the increasing inflow of migrants making their way to Europe through the Western Balkan route. Just to cite few, see the short

border crossing were reported from the borders with Western Balkan countries[62]. In December 2015, Italian local sources reported the presence of 3,391 newcomers in the border region Friuli Venezia Giulia, 3,143 of which coming from the Western Balkan route[63].

Out of a sudden, local administrations found themselves overwhelmed and unprepared to cover the basic needs of newly arrived persons. Therefore, like in many different areas throughout Europe, private individuals stepped in to fill in 'the gap in basic services for upholding human dignity'[64].

This was precisely the case when *Ospiti in Arrivo* (Incoming Guest, hereafter OIA) a small non-for-profit organisation, was funded in late 2014[65]. The organisation is located in Udine, a small city in the north-eastern region of Italy which, among others, has seen considerable numbers of refugees arriving via the Balkan route and, in particular, from the east-northern Alps[66].

From the date of its creation, OIA has actively supported newly arrived migrants in distress in Udine and, in few months, a significant number of volunteers had joined the organisation. At the beginning, OIA's voluntary work mainly consisted in the collection and distribution of food, clothes, blankets, and sleeping bags. Volunteers used to bring first aid to migrants directly on the spot, lacking the organisation of permanent offices. Between end of 2014 and the first months of 2015, most newly arrived persons used to sleep rough, either in public spaces or parks, and many of them had encamped in abandoned buildings. Soon, the organisation began to provide legal advice, Italian classes, translation services and started to engage in lobbying and advocacy activities to

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report published by the European Parliamentary Research Service in January 2016 at Velina, Lilyanova, *The Western Balkans: Frontline of the migrant crisis*, European Parliamentary Research Service, 2016; see also the UNCHR official website at <https://www.unhcr.org/news/latest/2015/6/557afd4c6/refugees-migrants-western-balkans-route-increasing-risk-unhcr.html> accessed 23 June 2019.

[62] Frontex Risk Analysis Unit, *Risk Analysis for 2016*, European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX), 2016, 19.

[63] Regione Friuli Venezia Giulia, *Rapporto Immigrazione 2016*, 2016, 28.

[64] Vosyliūtė and Conte, n. 52, 44.

[65] For further details on the organisation and its history, see the official website at https://ospitinarrivo.org/.

[66] In an Italian online newspaper, in May 2015, Udine had been defined as the 'last stop of the Balkan route', Brusini, Chiara, *Profughi, con la "rotta balcanica" il Friuli Venezia Giulia è la Lampedusa del Nord*, IlFattoQuotidiano, 11 May 2015, available at <https://www.ilfattoquotidiano.it/2015/05/11/profughi-con-la-rotta-balcanica-il-friuli-venezia-giulia-e-la-lampedusa-del-nord/1623670/> accessed 23 June 2019.

raise awareness on the issue among local institutions and civil society[67]. Indeed, until April 2015, no first aid reception centre was available in town for refugees and asylum seekers[68]. Finally, in June 2016, 7 OIA volunteers were informed by the competent authorities that, after 2 years of investigations, they had been charged with facilitation of irregular migration and illegal occupation of properties.

The types of conduct which, among others, were subject to enquiry by the local police were a few international calls from people on the move received by a couple of volunteers, the first aid assistance provided in alleged illegally occupied private buildings, car rides given by the volunteers to irregular migrants within the city of Udine and the provision of private accommodations[69].

Only three out of seven volunteers had been charged with facilitation of irregular migration, namely the president of the organisation, its translator, an Afghan young man with a former migration experience, and his fiancé, an extremely active volunteer. First, their official accusation amounted to facilitation of entry (Article 12 (3) Single Act on Immigration), however, the charge was later requalified under facilitation of stay (Article 12 (5) Single Act on Immigration)[70]. According to the investigators, their alleged criminal activity was integrated by the presence of a form of profit. In few words, the three defendants had been accused of having set up an organised criminal machinery aimed at facilitating the stay of newcomer irregular migrants. Allegedly, they communicated with people on the move to plan their stay in Italy, whereby first aid and assistance were provided. Eventually, the organisation's translator was suspected to have manipulated several interviews within the competent ministerial organ responsible for evaluating the asylum requests, where he used to work as an interpreter[71].

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[67] Camilli, Annalisa, *In Friuli-Venezia Giulia chi aiuta i migranti è lasciato solo*, Internazionale, 18 May 2017, available at <https://www.internazionale.it/reportage/annalisa-camilli/2017/05/18/accoglienza-migranti-friuli-venezia-giulia> accessed 12 July 2019.

[68] See press release on June 10th 2016 on Ospiti in Arrivo's official website, immediately after the notification of the conclusion of investigations on the organisation's work, available at <https://ospitinarrivo.org/3377/indagini-su-ospiti-in-arrivo/>.

[69] From notice of conclusion of preliminary investigations, Procura della Repubblica presso il Tribunale di Udine, Avviso di Conclusione delle Indagini Preliminari, N. 8950/13 R.G.N.R., 24 May 2016. Files are with the author.

[70] From the prosecutor's motion for dismissal, Procura della Repubblica, Tribunale di Udine, Richiesta di Archiviazione, N. 8950/13 R.G.N.R., 1 February 2017. Files are with the author.

[71] Conclusion of preliminary investigations, n. 68.

After examining the case, the prosecutor requested its dismissal. Regarding the charge of facilitation of stay, the prosecutor, in her motion for dismissal, argued that the provision of aid and support carried out by the volunteers seemed to be often extemporaneous and improvised. Moreover, the presence of a financial gain had never been proved and, in general, the facts and conducts of the volunteers had blurred the line between humanitarian action and criminal activity[72]. Worthy of note is also the prosecutor's viewpoint about the reaction of local institutions. According to her, over the lapse of time in question, the extra-ordinary inflow of migrants was perceptible to the entire population of the city of Udine. In that emergency circumstance, 'local institutions proved their temporary but significant incapability to address the phenomenon'[73]. In addition, the prosecutor also argued that there was no sufficient evidence regarding the organisation's translator accusation, given that several asylum requests by him directly translated were finally rejected[74]. Moreover, coming to the accusation of illegal occupation, the prosecutor again invoked a likely humanitarian motive behind the volunteers' actions[75]. To support her argument, the prosecutor affirmed that, despite the presence of the defendants in the illegally occupied places, there was not enough evidence to ascribe the intention of carrying out the squatting directly to the volunteers. Overall, however, no explicit mention to Article 12 (2) had been made by the prosecutor.

In February 2017, the Giudice per le Indagini Preliminari (GIP), namely the judge who carries out the pre-trial phase to decide on whether to refer the case to a court, accepted the dismissal of the case[76]. The judge stated that, as far as facilitation of stay is concerned, not only was the unjust profit lacking, but the volunteers were also drawing from their personal resources to carry out their activities. Therefore, in the judge's legal reasoning, the lack of a financial element as an essential component of the crime prevailed on purely humanitarian considerations. However, it can no doubt be argued that the presence of an unjust profit could amount to an implicit humanitarian exemption.

[72] Ibid, 962.
[73] Translated by the author, in ibid.
[74] Ibid.
[75] Ibid.
[76] Decreto di Archiviazione, fascicolo n. RGNR 9850/13-509/17 GIP. Files are with the author.

3.3.2 Case 2: NoBorders

The experience of the NoBorders group on the north-western border of Italy significantly differs from the previous in terms of the number of people involved and the variety of measures adopted by the local authorities to hamper the group's activities. Additionally, humanitarian assistance provided by NoBorders is peculiar as almost exclusively addressed to people on the move, not intending to stay nor settle in Italy. Ventimiglia, a 24,000 inhabitants municipality located on the Italian-French border, is where the activism of NoBorders started in 2015.

Ventimiglia and its surrounding area have been a common transit zone towards other MSs since the outbreak of the migration crisis. In 2014 alone, it is estimated that 170,100 migrants disembarked on Italian shores[77], however, in the same year, only 64,625 applications for asylum were reported[78]. Unreported flows of migrants and their lack of identification and registration at the external borders of the EU were precisely the reason why, in April 2015, the European Commission introduced the so called 'hotspot approach' in the European Agenda on Migration[79]. The EU newly adopted strategy aimed at assisting frontline members states in fulfilling their obligations under EU law and, therefore, swiftly proceeding with the identification, registration and fingerprinting of incoming migrants.

However, the turning point effectively hindering the northward movement of refugees through the French-Italian border was the French unilateral decision to restore border controls at its frontier with Italy on 11 June 2015[80]. Since then, the French *gendarmerie*, every time they could prove that incoming migrants had transited across Italy,

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[77] *Cruscotto Statistico al 31 dicembre 2016*, Cruscotto Statistico Giornaliero, Dipartimento per le Libertà Civili e l'Immigrazione, Ministero dell'Interno, available at <http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/cruscotto_statistico_giornaliero_31_dicembre.pdf> accessed 24 June 2019.

[78] Quaderno Statistico, n. 22.

[79] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a European Agenda on Migration*, COM(2015) 240 final, Brussels, 13.5.2015.

[80] *Francia blocca la frontiera con l'Italia. Ue:" Nessun dietrofront su quote"*, la Repubblica, 12 June 2015, available at < https://www.repubblica.it/esteri/2015/06/12/news/francia_blocca_frontiere_ue_avanti_con_redistribuzione_-116732997/>

implemented a systematic push back policy[81]. Out of a sudden, a considerable amount of people on the move found themselves stranded in the small border town of Ventimiglia, with no access to basic services. As reported by the director of the local Caritas, '[i]n the summer of 2015, we found 200 people on the streets, literally overnight'[82]. In June 2015, the first *Presidio Permanente* (permanent camp) was set up by the NoBorders volunteers, to provide first aid assistance to around 200 migrants attempting to cross the border at the time[83].

On their website, the NoBorders volunteers define the beginning of their activism as 'a voice, joining the migrants' voices, to make them louder, in the effort to build a more just and welcoming Europe'[84]. Moreover, as to the provision of food, the service looked like a concerted humanitarian action putting together local farmers and volunteers in order to collect food donations and set up a permanent field kitchen capable to serve meals on a daily basis[85]. The informal camp soon became a shelter and reference point for all those willing to cross the border.

The reaction of the local administration was prompt. On August 11th 2015, the maire of Ventimiglia, leading a left-wing administration, released an ordinance prohibiting the unauthorised distribution of food and drinks to migrants in public areas[86]. A few weeks later, because of the mounting tensions and the incessant clashes between the police and activists, the entire camp area was cleared[87].

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[81] Davide Maria, De Luca, *Cosa sta succedendo a Ventimiglia, spiegato*, ilpost, 20 June 2015, available at <https://www.ilpost.it/2015/06/20/cosa-succede-ventimiglia/>

[82] Maurizio, Marmo, as cited in Giulia, Capitani, *Nowhere But Out. The failure of France and Italy to help refugees and other migrants stranded at the border in Ventimiglia*, Oxfam Briefing Paper published by Oxfam International, 2018, 6, available at <https://www.oxfamitalia.org/wp-content/uploads/2018/06/bp-nowhere-but-out-refugees-migrants-ventimiglia-150618-en_update.pdf> accessed 24 June 2019.

[83] Ibid.

[84] *Facciamo il punto: sul presidio in frontiera e sulla solidarietà attiva*, Presidio Permanente NoBorders Ventimiglia, monthly archives: June 2015, 19 June 2015, available at <https://noborders20miglia.noblogs.org/post/2015/06/> accessed 24 June 2019.

[85] Ibid, Staffetta Eat the rich in supporto al Presidio No Border Ventimiglia, 23 June 2015.

[86] Fekete, Frances, Webber and Anya, Edmond-Pettitt, *Humanitarianism: the unacceptable face of solidarity*, Institute of Race Relations, 2017, 40, 46-47.
In April 2017, because of the mounting opposition to the decree and following sanctions to several volunteers infringing the ban, the ordinance was finally revoked. See Thomas, Mackinson, *Ventimiglia, vietato dare cibo e acqua ai migranti. Solo la mobilitazione costringe il sindaco Pd a revocare l'ordinanza*, IlFattoQuotidiano, 23 April 2017, available at < https://www.ilfattoquotidiano.it/2017/04/23/ventimiglia-vietato-dare-cibo-e-acqua-ai-migranti-solo-la-mobilitazione-costringe-il-sindaco-pd-a-revocare-lordinanza/3538898/>

[87] Capitani, n. 81, 6.

In the following months, makeshift shelters were built and systematically cleared by the police in different spots of the area. Eventually, migrants settled under a flyover just outside Ventimiglia in extremely precarious conditions. In May 2016, a priest from Ventimiglia of Colombian nationality began to coordinate a group of around 200 volunteers to better organise migrants' reception and fulfil their basic needs[88]. The priest described their initiative as follows:

> 'There were local Italians, but also people from France, the UK and the United States. The Red Cross from Monaco came, a group of Muslims from Nice, Vietnamese volunteers, boy scouts from Monte Carlo. It was an extraordinary experience: so many different people helping people in need. We served up to 1,000 meals per day'[89].

In July 2016, most migrants were lodged in Roja Camp, a transit centre newly opened and run by the Red Cross. Soon, however, the camp proved not to have sufficient capacity to host all homeless migrants and makeshift camps and occupations continued, alongside humanitarian aid and protests by NoBorder activists.

Within a year, many different forms of threats, violence, intimidations were reported by NoBorders volunteers[90]. Many activists were charged with a quite wide range of crimes, from rebellion, resisting arrest, roadblock and interruption of public service to illegal occupation and unauthorised manifestation[91]. The most common measure was of administrative nature, namely the issue of expulsion orders, banning volunteers from the town of Ventimiglia and its surrounding municipalities for 3 years of time[92].

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[88] Ibid, 7.
[89] Don Rito Alvarez, as cited in ibid.
[90] A restricted group of No Borders volunteers wrote a timeline covering all events occurred to NoBorders volunteers between July 2015 and September 2016. The report, called *Da quassù la Terra è bellissima, senza frontiere né confini*, has never been published and remains a non-public document. Files are with the author.
[91] Ibid.
[92] Giulia, Destefanis, *Ventimiglia, foglio di via per chi aiuta i migranti*, Genova.Repubblica, 20 September 2015, available at <https://genova.repubblica.it/cronaca/2015/09/20/news/ventimiglia_foglio_di_via_per_chi_aiuta_i_migranti-123270051/>
See also Fekete, Webber and Edmond-Pettitt, n. 85.

In this regard, worthy of note are the arguments posed by the Regional Administrative Court (TAR), accepting the appeal against 6 expulsion orders to NoBorders volunteers[93]. The 6 volunteers had been issued in different occasions likewise expulsion orders from the town of Ventimiglia and its surroundings for three years. More precisely, one claimant was banned from Ventimiglia alone[94], another one received an order which also included five bordering municipalities[95], the remaining four bans extended to a wider area, covering 16 different municipalities of the area[96]. In all cases, the activists, due to their participation to the NoBorders movement, were defined as dangerous individuals, threats to society[97]. The court openly disagreed with such ascription of dangerousness as it believed the volunteers' borderline conducts to be isolated events always circumscribed to the NoBorders movement's activity, rather than habitual and recurring behaviours. Despite the allegations of crimes such as illegal occupation, the court rather focused on the overall behaviour of the claimants and the absence of previous convictions. In most of the cases, the court took into account the claimants' personal profiles, their jobs and voluntary work (among others, a drama teacher, a student, two social workers). In one case, the court made an explicit reference to the humanitarian grounds behind the defendants' alleged criminal actions[98]. Therefore, the TAR found that the expulsion orders were neither a proportionate nor appropriate measure to the alleged dangerous conducts ascribed to the volunteers. Most importantly, in its judgements, the court finally invoked fundamental rights. According to the TAR, the volunteers' affiliation to the

According to the NoBorders reports, between August 2015 and September 2016, n. 47 expulsion orders were issued by the local administration, in NoBorders, *Da quassù la Terra è bellissima, senza frontiere né confini*, n. 89.

[93] The six sentences are available on the website of the volunteers' lawyer, Alessandra Ballarini, at <https://www.alessandraballerini.com/giurisprudenza/reato-di-soliedarieta>

[94] T.A.R. Liguria, Sezione I, 26 February 2016, n. 202/16.

[95] T.A.R. Liguria, Sezione I, 13 July 2017, n. 605/17.

[96] T.A.R. Liguria, Sezione I, 13 July 2017, n. 606/17; T.A.R. Liguria, Sezione I, 13 July 2017, n. 607/17; T.A.R. Liguria, Sezione I, 13 July 2017, n. 608/17; T.A.R. Liguria, Sezione I, 13 July 2017, n. 609/17.

[97] The accusation refers to the provisions of articles 1 and 2 of the Legislative Decree 6 September 2011 n. 159, defining those individuals that, by virtue of their recurring dangerous conducts, can be subject to an expulsion order lasting up to three years from those municipalities whereby they do not reside, pursuant to Article 2 of the decree.

[98] See T.A.R. Liguria, Sezione I, 26 February 2016, n. 202/16. In this case, the claimant had been charged twice with accusation of illegal occupation. Precisely in virtue of these allegations, the local administration ascribed the claimant of *pericolosità sociale* (social dangerousness), warranting the issue of the expulsion order.

NoBorders movement amounted to nothing beyond than one's legitimate exercise of the constitutional rights to freely express and associate. The expulsion orders were eventually declared illicit and annulled[99].

In addition, this investigation could access a recent judgement by the Court of Imperia regarding the infringement of six expulsion orders by likewise NoBorders activists. While expulsion orders are an administrative measure, its non-compliance amounts to a crime. In that circumstance, three of them were acquitted as their expulsion orders has been previously annulled by the administrative court; the remaining three were sentenced to respectively one, two, and three months of imprisonment[100]. Save one of them, they had all been issued an expulsion order in May 2016, when the police entered a local parish church whereby a considerable number of migrants had been lodged, with the support of the group and the parish priest[101].

The acquittal of most of the NoBorders defendants is of particular significance when it comes to assess the behaviour of the local administration while copying with the activism of civil society, genuinely supporting people on the move.

In 2018, the NoBorders case was given great visibility by the UN Special Rapporteur on the situation of HRDs while expressing his deep concern about the increasingly hostile environment in which defenders of people on the move work[102]. In his report, regarding people on the move in border areas, the Rapporteur explicitly refers to the NoBorders case as follows:

> 'Access to people on the move in border areas is often controlled by military authorities, who simultaneously are unable to meet the needs of people on the move in these areas and restrict access and humanitarian assistance to them. In a number of countries, the authorities have ordered soup kitchens to be closed, rescue boats to be impounded and temporary accommodation to be demolished. (…) Defenders seeking to provide humanitarian assistance to people on the move without State

[99] On this case, see Yasha, Maccanico and Others, *The shrinking space for solidarity with migrants and refugees: how the European Union and Member States target and criminalize defenders of the rights of people on the move*, Transnational Institute, 2018.
[100] Tribunale di Imperia, Sezione Penale, 4 June 2019, Sentenza n. 716/19.
[101] Ibid.
[102] UNGA, *Report of the Special Rapporteur on the situation of human rights defenders*, Human Rights Council, UN Doc. A/HRC/37/51, 16.01.2018, para 19.

> permission within these spaces are subject to criminalization (despite the suffering that this generates) and the clear protections that international human rights law offers such activities. In Italy, for example, some defenders working in border areas have been issued a *foglio di via*, an order to leave the town and not to return there for a specified period.'[103]

Today, while the situation at the Italian-French border has not significantly improved[104], several other NoBorder trials are still on going[105].

3.3.3 Case 3: Felix Croft

On July 22 2016, Felix Croft, a 28-year-old French citizen, was arrested and charged with facilitation by the Italian police while transporting a Sudanese family to France[106]. Given the circumstances and type of crime's allegation, the Croft case is of particular significance for the purposes of this work. First, it is a case of prosecution by Italian authorities for attempted humanitarian smuggling directly falling under the Italian jurisdiction. Second, the court explicitly invoked the humanitarian clause pursuant to Article 12 (2) of the Single Act of Immigration in order to finally clear the defendant of his charges.

To begin, at the time of his arrest, Croft acted as a private individual and not as a member of any humanitarian organisation. As emerges also from the minutes of his interrogatory[107], Croft had already become interested in social issues promoted by organised movements[108], however, on different occasions, he described his actions as an individual initiative to support volunteers providing humanitarian assistance to migrants at the border[109]. This aspect of Croft's action was crucial in the court's judgment.

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[103] Ibid, para 52.
[104] Capitani, n. 81.
[105] *Ventimiglia. A processo i "no borders" dei Balzi Rossi*, laRepubblica, 18 June 2019, available at <https://ricerca.repubblica.it/repubblica/archivio/repubblica/2019/06/18/ventimiglia-a-processo-i--no-borders-dei-balzi-rossiGenova05.html>
[106] Fekete, Webber and Edmond-Pettitt, n. 85, 15.
[107] From minutes of Croft's interrogatory. Files are with the author.
[108] See, in particular, Tribunale di Imperia, Sezione Penale, 27 April 2017, Sentenza n. 446/17, 2.
[109] Andrea, Giambartolomei, *Félix Croft, assolto a Imperia l'attivista che tentò di portare una famiglia di migranti in Francia: "Gesto umanitario"*, IlFattoQuotidiano, 27 April 2017, available at <https://www.ilfattoquotidiano.it/2017/04/27/felix-croft-assolto-il-passeur-accusato-di-aver-portato-in-francia-una-famiglia-di-migranti/3547221/>

The Croft case can be put in the same context as the NoBorders'. In July 2016 the transit centre run by the Red Cross had just been opened, however, the reception effort carried on by different parishes still constituted an important contribution to accommodate homeless people on the move[110].

According to his declarations, Croft had heard about the Sudanese family from a volunteer and decided to visit them[111]. The family was currently hosted in the parish church San Secondo, together with other migrants, aided by a group of volunteers[112]. Apparently, after having heard their dramatic story, Croft, moved by the desire to help them, decided to transport them to France, the family's next destination[113]. When asked by the prosecutor about his future intentions once in France, he answered 'I had no project, nothing planned, I only knew I had to feed them and give them the possibility to wash themselves'[114]. Moreover, Croft had been told by the family that they would have had to leave soon their temporary accommodation because, due to the limited reception capacity in the area, they had to rotate with incoming migrants and families.

The court took into due account the circumstances ruling at that time and the extra-ordinary presence of migrants in the area. In particular, the court gave special consideration to the recently signed Memorandum for Understanding between the Italian and the Sudanese governments[115] and the subsequent collective expulsion of 48 Sudanese citizens at the end of August 2016, likely in breach of international law[116]. Following the agreement, Sudanese police could be deployed at the border, to cooperate in identifying Sudanese migrants and, subsequently, proceed with their repatriation.

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[110] Capitani, n. 81, 7.
[111] From minutes of Croft's interrogatory. Files are with the author.
[112] Tribunale di Imperia, n. 107, 2.
[113] During his interrogatory he said 'I don't know how to exactly express what I felt, however it was clear to me what I should have done, which was my position', translated by the author, in Tribunale di Imperia, n. 107, 3.
[114] Ibid.
[115] Pietro, Barabino, *Migranti, "notte in cella e legati in aereo". Parlano gli espulsi dall'Italia al Sudan. E il Viminale tace*, IlFattoQuotidiano, 31 August 2016, available at < https://www.ilfattoquotidiano.it/2016/08/31/migranti-notte-in-cella-e-legati-in-aereo-parlano-gli-espulsi-dallitalia-al-sudan-e-il-viminale-tace/3003577/>
[116] Pietro, Barabino, *Migranti, prima espulsione di gruppo: 48 presi a Ventimiglia e rispediti in Sudan. "Ma Khartoum viola diritti umani"*, IlFattoQuotidiano, 24 August 2016, available at <https://www.ilfattoquotidiano.it/2016/08/24/migranti-prima-espulsione-di-gruppo-48-presi-a-ventimiglia-e-rispediti-in-sudan-ma-khartoum-viola-diritti-umani/2993664/>

The court also examined the request of requalification of the crime ascribed to the defendant. After his arrest, Croft was charged with facilitation of irregular entry pursuant to Article 12 (3) (a) of the Single Act of Immigration. As analysed above, Article 12 (3) contains a list of aggravating circumstances and harsher penalties applicable to the crime of facilitation to entry enshrined in Article 12 (1). In the case in question, the first aggravating factor is applied, namely the facilitation of entry of 5 or more people (Article 12 (3) (a)). However, the defence argued that a literal interpretation of the wording of such aggravating circumstance would restrict its scope to the facilitation into Italy but not into another state's territory[117]. The court, by rejecting the defence's claim, considered Article 12 (3) as an aggravated form of facilitation of entry into Italy *as well as other states*. To substantiate its position, the court also referred to the European legislation on smuggling which more generally requires states to sanction the facilitation 'to enter, or transit across, the territory of a Member State'[118]. Therefore, according to the court, Article 12 (3) (a), was applicable to the case in question.

Finally, it is highly interesting for the purpose of this work to emphasise the court's legal reasoning which determined the acquittal of Croft. Unsurprisingly, the court applied Article 12 (2), namely the humanitarian clause. However, as far as the humanitarian nature of Croft's act, the court ruled as follows:

> 'In light of the interpretations provided by the international law, an action can amount to humanitarian help only as long as it is collective. In other words, humanitarian aid means an act of solidarity, performed by private or governmental organisations, aimed at protecting those principles as enshrined in the Universal Declaration of Human Rights. In this sense, typical acts of humanitarian assistance are those carried out by the volunteers working for temporary reception services in local parish churches, such as the church of San Secondo.'[119]

[117] See the wording of paragraph 3, letter a): '[the crime is aggravated if] the illicit facilitated the irregular entry or stay in the territory of the State of 5 or more people', translated by the author. The defence based its argument on the lack of an explicit reference to 'other state' under the aggravating circumstance.
[118] Council Directive 2002/90/EC, n. 24, art 1(a).
[119] Translated by the author, in Tribunale di Imperia, n. 107, 7.

Therefore, having excluded the purely humanitarian hypothesis, the court considered all the available elements on which Croft could have grounded his decision: the informal nature of the reception centre, the lack of identification of the family, their lack of access to the asylum procedure, their imminent forced leaving from the centre without no other safe place to stay and the threat to be deported by the Italian authorities to Sudan[120]. According to the court, the combination of these considerations convinced Croft about the presence of an imminent and grave danger, a circumstance ruled by Article 54 of the Italian Penal Code on the state of necessity, whose reference is explicitly included in the humanitarian clause[121]. In this regard, the court had already argued against the non-applicability of the state of necessity for the lack of an imminent grave threat to the integrity of the Sudanese family. However, pursuant to article 59 (4) of the Italian Penal Code, the defendant's perception of threat is sufficient to clear his intentions of the related allegations[122]. The court argued that Croft could have mistakenly presumed the presence of some specific circumstance warranting his unlawful behaviour. Therefore, while Croft's conduct would still amount to a crime, his understanding of the circumstances could clear his allegations. Indeed, he believed that his act was the only feasible option ruling at the time.

For different reasons, this case is of great significance. First, it is one of the few reported cases where a court invoked the humanitarian clause in a case of humanitarian facilitation of irregular migration[123]. Second, the application of the humanitarian clause in the present case implicitly assumes its applicability to the allegation of facilitation of entry and transit too[124]. Third, the judgement resulted in the acquittal of the humanitarian facilitator.

Overall, however, the legal reasoning of the court in the Croft case is questionable. Even though the humanitarian clause was invoked in the court's judgement, however, it did not

[120] Ibid, 8.
[121] Cfr footnote 30.
[122] Article 59 (4) of the Italian Penal Code recites as follows: 'if one mistakenly believes their conduct to be justified as not to amount to a crime, this will be rules in their favour'.
[123] To the best of the author's knowledge, as far as the application of the humanitarian clause is concerned, there is no such other case of this kind. However, the invocation of the humanitarian clause can be found within trials involving NGOs conducting SAR operations in the Mediterranean Sea. For example, see the pre-trial phase against the Spanish NGO ProActiva Open Arms, in Procura della Repubblica presso il Tribunale di Palermo, Direzione Distrettuale Antimafia, Richiesta di Archiviazione, Proc. n. 9039/17 R.G.N.R. mod. 44, 28 May 2018, 6. The case was finally dismissed in June 2018.
[124] Cfr footnote 32.

seem to have been fully applied. Indeed, the court's arguments on the collective nature of a humanitarian act and the reference to the presumed state of necessity, namely the incipit of the humanitarian clause, revealed a general hesitant approach by the court in considering Croft's purely humanitarian intentions. The Court's reasoning, moreover, is clearly at odds with the UN Declaration on HRDs which states that

> '[e]veryone has the right, *individually* and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.' (emphasis added)[125]

Accordingly, 'human rights defenders can be any person or group of persons working to promote human rights'[126]. Given that, for their remarkable action in defence of irregular migrants' rights, 'humanitarian facilitators' could without doubt fall under the category of HRDs, the UN definition could definitely apply to the case in question.

Finally, in January 2018, the prosecutor filed an appeal against the court's decision in first instance[127]. In that circumstance, Croft issued the following declaration to a local newspaper: 'son of an American father and a French mother, also my family has a migration background. I have always acted in compliance with the founding principles of our societies, freedom, equality and fraternity, the Geneva Convention and the Universal Declaration of Human Rights'[128].

3.4 Conclusion

The present Chapter has brought the focus of the analysis from the European to the Italian national level to show how, regarding the facilitation of irregular migration, the EU *acquis*

[125] UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144, 8.03.1999, art 1.

[126] UN Human Rights Office of the High Commissioner, *Who is a defender*, available at <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx> accessed 3 July 2019.

[127] Redazione, *Passeur per solidarietà, la Procura presenta ricorso in Appello*, 23 January 2018, available at < https://www.riviera24.it/2018/01/passeur-per-solidarieta-la-procura-presenta-ricorso-in-appell-276194/>

[128] Ibid.

is reflected in domestic systems. In this sense, an examination of the Italian legislation on smuggling reveals full compliance with its European counterpart.

Article 12 (2) of the Single Act on Immigration contains a comprehensive humanitarian clause, compulsory in nature, exempting humanitarian assistance to migrants in need from criminalisation. Nevertheless, formal investigations and prosecutions have been conducted by Italian authorities against defenders of irregular migrants' rights, either on grounds of facilitation of irregular migration or other types of offences.

In this regard, in their recent report, Carrera and other authors broadly elaborated on the effects of policing civil society actors[129]: they argue that various forms of policing civil society, from intimidation to formal prosecutions, can have serious implications for the safeguarding of the fundamental rights of all (migrants, defenders, civil society), the rule of law, democracy, and societal trust[130]. This work fully embraces this argument and, in the light of the philosophical considerations outlined in Chapter 1, furthers it thorough the analysis of three representative cases of criminalisation within the Italian territory.

In virtue of their strong activism in defending irregular migrants' rights, humanitarian helpers can without doubt be elevated to the internationally protected category of HRDs[131]. At this point, however, it is important to note that, within the EU, unlike the international level, there is no legal framework for the protection of HRDs. More precisely, in 2004, the EU adopted a non-binding tool for the protection of HRDs, the EU Guidelines on HRDs, but significantly limited its geographical scope to its external action[132]. In light of the increasing repression and criminalisation of defenders of people on the move *within* the EU, the lack of an internal protective mechanism for HRDs is an unacceptable shortcoming.

[129] Carrera and others, *Fit for Purpose? 2018 Update*, n. 2.
[130] Ibid. See in particular 88-105.
[131] See, in particular, the 1999 UN Declaration on HRDs and the UN Special Rapporteur on the situation of HRDs.
[132] Wolfgang Benedek, *EU Engagement with Human Rights Defenders*, in Jan, Wouters and others, *The European Union and Human Rights: Law and Policy*, Oxford University Press, 2019, Chapter 22.

At the Italian level, the situation is aggravated by the governmental fight against NGOs conducting SAR operations in the Mediterranean Sea and a widespread political narrative demonising migrants and those engaging with them[133].

In the meantime, however, recent developments at the European level reveal timid glimmers of hope. In 2018, for the first time, HRDs within the EU were enlisted among the candidates for the EP's Sakharov Prize. 11 CSOs that conducted SAR operations in the Mediterranean and Aegean Sea appeared among them[134]. This was a unique institutional message acknowledging '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, when they are disregarding EU legal principles'[135].

[133] In the last year, the Italian government issued two legislative decrees to significantly tighten its migration policy. In particular, the government's latest legislative initiative, though not officially adopted yet, clearly intends hampering the SAR operations conducted by NGO vessels in the Mediterranean Sea. For further details see Zirulia, Stefano, *Decreto Sicurezza-Bis: Novità e Profili Critici*, Diritto Penale Contemporaneo, 18 June 2019, available at <https://www.penalecontemporaneo.it/d/6738-decreto-sicurezza-bis-novita-e-profili-critici> accessed 12 July 2019

[134] Vosyliūtė and Conte, n. 52, 42.

[135] Ibid.

GENERAL CONCLUSION

Throughout this thesis, the concept of humanitarian smuggling has been thoroughly analysed from different perspectives. An historical overview of a number of representative cases of human smuggling has shown how, over time, an extraordinary variety of profiles of human smugglers has emerged, causing the most disparate reactions by local institutions and authorities. Prior to the end of the Cold War, an 'escape helper' facilitating the emigration from highly repressive regimes was not only legally accepted but also socially commended by most Western democracies[1]. As shown by the Albert Schutz case, the same line of reasoning was applied not only to purely humanitarian acts of smuggling, but also to the commercial facilitation of border crossing due to the high moral value of the offered service. The approach to human smuggling by state authorities dramatically changed as, after the collapse of the Soviet bloc, the biggest refugee crisis after the Second World War erupted. The continuous inflow of migrants and notorious smuggling incidents brought European countries to identify the fight against human smuggling as a key element to combat irregular migration. Therefore, time, legislation, political context, and social circumstances can make someone a hero today and a felon tomorrow.

The first Chapter of this work also endeavoured to demonstrate how acts based on solidary and humanitarian reasons play a fundamental role in democratic societies. First, humanitarian assistance was associated with the broader concept of solidarity as well as, in philosophy, supererogation. Having acknowledged solidarity acts as the foundation of the social contract, states were identified as guarantors of such agreements at the base of today's societies. Therefore, by criminalising solidarity, states inevitably undermine the foundations of modern democracies. This argument was subsequently substantiated by the endorsement of the notion of 'policing humanitarianism', developed by the 2018 report commissioned by the EP's Policy Department for Citizens' Rights and Constitutional Affairs. In line with the philosophical considerations of Chapter 1, this

[1] Tiziana, Calandrino, *Country Report Germany*, in Sara, Bellezza and Tiziana, Calandrino, *Criminalisation of flight and escape aid*, Editor borderline-europe, 2017, 139.

approach maintained that different forms of policing civil society can negatively affect fundamental rights, such as freedom of expression and association.

In this regard, the detailed analysis of three meaningful cases of criminalisation of humanitarian assistance in border areas of Northern Italy reveals the important role played by CSOs and raises legitimate concerns about the safeguarding of fundamental freedoms. In the OIA case, the acknowledgment by the prosecutor of the significance of the organisation's activities to fill the gap caused by the inability of the local institutions to react to the extra-ordinary inflow of migrants in town is especially meaningful. In some proceedings, the rights to freedom of thought and association were explicitly invoked by judicial organs to clear defendants of their charges[2]. Finally, the Croft case is extremely significant for the purposes of this work as the court explicitly invoked the Italian humanitarian clause to acquit the accused. The court's legal reasoning, however, reveals a strict interpretation of such a clause and, therefore, an unambiguously timid approach to the application of the humanitarian exemption.

Overall, the analysis of Italian case law showed a variety of different ways to hinder and prosecute humanitarianism and shrink the space in which civil society could act. In the cases in question, alongside formal investigations and criminal proceedings, private individuals and members of humanitarian organisations also were subjected to severe administrative measures such as expulsion orders for providing humanitarian assistance to people on the move.

Moreover, a legal analysis of the EU *acquis* on migrant smuggling revealed several shortcomings which can be summarised as follows:

- Overall, the Facilitators Package establishes a purely criminal law framework which made security concerns prevail over human rights and humanitarian considerations;
- Unlike the UN Protocol on Smuggling, the Facilitators Package is completely void of human rights protections for migrants as well as facilitators;
- Despite the numerous calls for amendments, the Facilitators Package's humanitarian clause is still optional in nature, too vaguely defined and limited in

[2] See Chapter 3, NoBorders case study above.

scope. This can easily spread legal uncertainty and cause the criminalisation of a broad range of acts of assistance given to irregular migrants based on humanitarian grounds;

- A financial gain element only applies to the facilitation of stay. This approach controversially assumes a 'threshold of gain as an implicit humanitarian exemption'[3]. The lack of an *unjust* financial element can lead to the criminalisation of morally defensible acts of smuggling.

Finally, a legal analysis of the most relevant provisions of the Italian legislation on smuggling teased out the following points:

- The Italian legislation on smuggling is fully compliant with its European counterpart;
- A compulsory humanitarian clause is present but its formulation still raises different interpretative issues;
- As to the facilitation of entry and transit, the provisions' formulation could lead to the imposition of severe penalties on a wide range of conducts. Instead, regarding stay, the introduction of an *unjust* form of enrichment seems to exempt from criminalisation more genuine forms of facilitation to reside;
- A list of implicit human rights protections can be surmised from the Italian legislation on smuggling.

To conclude, due to the legislative shortcomings and the restrictive political reaction to irregular migration, both at the European and Italian level, HDRs and humanitarian actors have significantly stepped in to fill the gap in protection of migrants' fundamental rights. A substantial revision of the Facilitators Package (mandatory humanitarian clause, narrower definition of facilitation of irregular migration, introduction of human rights clauses…) is only one of the necessary measures within a wider array of concerted actions to uphold human dignity[4]. As suggested by the recently adopted EP resolution, competent authorities should cooperate in a constructive way with civil society actors engaging in

[3] Rachel, Landry, *The 'Humanitarian Smuggling' of Refugees: Criminal Offence or Moral Obligation?*, (2016) Refugee Studies Centre, University of Oxford.
[4] Lina, Vosyliūtė, and Carmine, Conte, *Crackdown on NGOs and volunteers helping refugees and other migrants*, ReSOMA Final Synthetic Report, 2019.

humanitarian assistance to migrants, rather than criminalising and hampering them. Finally, in light of the findings of this thesis, protection of HRDs should be enhanced within the EU to foster the fundamental humanitarian actions of those actors 'who try to embody the ideal of the Universal Declaration of Human Rights of creating a world free from fear and want'[5].

[5] UNGA, *Report of the Special Rapporteur on the situation of human rights defenders*, Human Rights Council, UN Doc. A/HRC/37/51, 16.01.2018, para 23.

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Cass. Pen. Sez. un., 21 June 2018, n. 40982

Tribunale di Imperia, Sezione Penale, 4 June 2019, Sentenza n. 716/19

ANNEX A | Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero, Decreto Legislativo 25 Luglio 1998, n. 286, Articolo 12

Disposizioni contro le immigrazioni clandestine.

1. Salvo che il fatto costituisca più grave reato, chiunque, in violazione delle disposizioni del presente testo unico, promuove, dirige, organizza, finanzia o effettua il trasporto di stranieri nel territorio dello Stato ovvero compie altri atti diretti a procurarne illegalmente l'ingresso nel territorio dello Stato, ovvero di altro Stato del quale la persona non è cittadina o non ha titolo di residenza permanente, è punito con la reclusione da uno a cinque anni e con la multa di 15.000 euro per ogni persona. (1)

2. Fermo restando quanto previsto dall'articolo 54 del codice penale, non costituiscono reato le attività di soccorso e assistenza umanitaria prestate in Italia nei confronti degli stranieri in condizioni di bisogno comunque presenti nel territorio dello Stato.

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

a) il fatto riguarda l'ingresso o la permanenza illegale nel territorio dello Stato di cinque o più persone;

b) la persona trasportata è stata esposta a pericolo per la sua vita o per la sua incolumità per procurarne l'ingresso o la permanenza illegale;

c) la persona trasportata è stata sottoposta a trattamento inumano o degradante per procurarne l'ingresso o la permanenza illegale;

d) il fatto è commesso da tre o più persone in concorso tra loro o utilizzando servizi internazionali di trasporto ovvero documenti contraffatti o alterati o comunque illegalmente ottenuti;

e) gli autori del fatto hanno la disponibilità di armi o materie esplodenti. (2)

3-bis. Se i fatti di cui al comma 3 sono commessi ricorrendo due o più delle ipotesi di cui alle lettere a), b), c), d) ed e) del medesimo comma, la pena ivi prevista è aumentata. (3)

3-ter. La pena detentiva è aumentata da un terzo alla metà e si applica la multa di 25.000 euro per ogni persona se i fatti di cui ai commi 1 e 3:

a) sono commessi al fine di reclutare persone da destinare alla prostituzione o comunque allo sfruttamento sessuale o lavorativo ovvero riguardano l'ingresso di minori da impiegare in attività illecite al fine di favorirne lo sfruttamento;

b) sono commessi al fine di trarne profitto, anche indiretto. (4)

3-quater. Le circostanze attenuanti, diverse da quelle previste dagli articoli 98 e 114 del codice penale, concorrenti con le aggravanti di cui ai commi 3-bis e 3-ter, non possono essere ritenute equivalenti o prevalenti rispetto a queste e le diminuzioni di pena si operano sulla quantità di pena risultante dall'aumento conseguente alle predette aggravanti. (5)

3-quinquies. Per i delitti previsti dai commi precedenti le pene sono diminuite fino alla metà nei confronti dell'imputato che si adopera per evitare che l'attività delittuosa sia portata a conseguenze ulteriori, aiutando concretamente l'autorità di polizia o l'autorità giudiziaria nella raccolta di elementi di prova decisivi per la ricostruzione dei fatti, per l'individuazione o la cattura di uno o più autori di reati e per la sottrazione di risorse rilevanti alla consumazione dei delitti. (18)

3-sexies. All'articolo 4-bis, comma 1, terzo periodo, della legge 26 luglio 1975, n. 354, e successive modificazioni, dopo le parole: "609-octies del codice penale" sono inserite le seguenti: "nonché dall'articolo 12, commi 3, 3-bis e 3-ter, del testo unico di cui al decreto legislativo 25 luglio 1998, n. 286,". (18)

[3-septies. In relazione ai procedimenti per i delitti previsti dal comma 3, si applicano le disposizioni dell'articolo 10 della legge 11 agosto 2003, n. 228, e successive modificazioni. L'esecuzione delle operazioni è disposta d'intesa con la Direzione centrale dell'immigrazione e della polizia delle frontiere. (17) (6)]

4. Nei casi previsti dai commi 1 e 3 è obbligatorio l'arresto in flagranza. (7)

4-bis. Quando sussistono gravi indizi di colpevolezza in ordine ai reati previsti dal comma 3, è applicata la custodia cautelare in carcere, salvo che siano acquisiti elementi dai quali risulti che non sussistono esigenze cautelari. (15) (16)

4-ter. Nei casi previsti dai commi 1 e 3 è sempre disposta la confisca del mezzo di trasporto utilizzato per commettere il reato, anche nel caso di applicazione della pena su richiesta delle parti. (15)

5. Fuori dei casi previsti dai commi precedenti, e salvo che il fatto non costituisca più grave reato, chiunque, al fine di trarre un ingiusto profitto dalla condizione di illegalità dello straniero o nell'ambito delle attività punite a norma del presente articolo, favorisce la permanenza di questi nel territorio dello Stato in violazione delle norme del presente testo unico, è punito con la reclusione fino a quattro anni e con la multa fino a euro 15.493 (lire trenta milioni). Quando il fatto è commesso in concorso da due o più persone, ovvero riguarda la permanenza di cinque o più persone, la pena è aumentata da un terzo alla metà. (14)

5-bis. Salvo che il fatto costituisca più grave reato, chiunque a titolo oneroso, al fine di trarre ingiusto profitto, dà alloggio ovvero cede, anche in locazione, un immobile ad uno straniero che sia privo di titolo di soggiorno al momento della stipula o del rinnovo del contratto di locazione, è punito con la reclusione da sei mesi a tre anni. La condanna con provvedimento irrevocabile ovvero l'applicazione della pena su richiesta delle parti a norma dell'articolo 444 del codice di procedura penale, anche se è stata concessa la sospensione condizionale della pena, comporta la confisca dell'immobile, salvo che appartenga a persona estranea al reato. Si osservano, in quanto applicabili, le disposizioni vigenti in materia di gestione e destinazione dei beni confiscati. Le somme di denaro ricavate dalla vendita, ove disposta, dei beni confiscati sono destinate al potenziamento

delle attività di prevenzione e repressione dei reati in tema di immigrazione clandestina. (13)

6. Il vettore aereo, marittimo o terrestre, è tenuto ad accertarsi che lo straniero trasportato sia in possesso dei documenti richiesti per l'ingresso nel territorio dello Stato, nonché a riferire all'organo di polizia di frontiera dell'eventuale presenza a bordo dei rispettivi mezzi di trasporto di stranieri in posizione irregolare. In caso di inosservanza anche di uno solo degli obblighi di cui al presente comma, si applica la sanzione amministrativa del pagamento di una somma da euro 3.500 a euro 5.500 per ciascuno degli stranieri trasportati. Nei casi più gravi è disposta la sospensione da uno a dodici mesi, ovvero la revoca della licenza, autorizzazione o concessione rilasciata dall'autorità amministrativa italiana inerenti all'attività professionale svolta e al mezzo di trasporto utilizzato. Si osservano le disposizioni di cui alla legge 24 novembre 1981, n. 689. (8)

6-bis. Salvo che si tratti di naviglio militare o di navi in servizio governativo non commerciale, il comandante della nave è tenuto ad osservare la normativa internazionale e i divieti e le limitazioni eventualmente disposti ai sensi dell'articolo 11, comma 1-ter. In caso di violazione del divieto di ingresso, transito o sosta in acque territoriali italiane, notificato al comandante e, ove possibile, all'armatore e al proprietario della nave, si applica a ciascuno di essi, salve le sanzioni penali quando il fatto costituisce reato, la sanzione amministrativa del pagamento di una somma da euro 10.000 a euro 50.000. In caso di reiterazione commessa con l'utilizzo della medesima nave, si applica altresì la sanzione accessoria della confisca della nave, procedendo immediatamente a sequestro cautelare. All'irrogazione delle sanzioni, accertate dagli organi addetti al controllo, provvede il prefetto territorialmente competente. Si osservano le disposizioni di cui alla legge 24 novembre 1981, n. 689, ad eccezione dei commi quarto, quinto e sesto dell'articolo 8-bis. 138. (20)

7. Nel corso di operazioni di polizia finalizzate al contrasto delle immigrazioni clandestine, disposte nell'ambito delle direttive di cui all'articolo 11, comma 3, gli ufficiali e agenti di pubblica sicurezza operanti nelle province di confine e nelle acque territoriali possono procedere al controllo e alle ispezioni dei mezzi di trasporto e delle cose trasportate, ancorché soggetti a speciale regime doganale, quando, anche in relazione a

specifiche circostante di luogo e di tempo, sussistono fondati motivi di ritenere che possano essere utilizzati per uno dei reati previsti dal presente articolo. Dell'esito dei controlli e delle ispezioni è redatto processo verbale in appositi moduli, che è trasmesso entro quarantotto ore al procuratore della Repubblica il quale, se ne ricorrono i presupposti, lo convalida nelle successive quarantotto ore. Nelle medesime circostanze gli ufficiali di polizia giudiziaria possono altresì procedere a perquisizioni, con l'osservanza delle disposizioni di cui all'articolo 352, commi 3 e 4, del codice di procedura penale.

8. I beni sequestrati nel corso di operazioni di polizia finalizzate alla prevenzione e repressione dei reati previsti dal presente articolo, sono affidati dall'autorità giudiziaria procedente in custodia giudiziale, salvo che vi ostino esigenze processuali, agli organi di polizia che ne facciano richiesta per l'impiego in attività di polizia ovvero ad altri organi dello Stato o ad altri enti pubblici per finalità di giustizia, di protezione civile o di tutela ambientale. I mezzi di trasporto non possono essere in alcun caso alienati. Si applicano, in quanto compatibili, le disposizioni dell'articolo 100, commi 2 e 3, del testo unico delle leggi in materia di disciplina degli stupefacenti e sostanze psicotrope, approvato con decreto del Presidente della Repubblica 9 ottobre 1990, n. 309. (9)

8-bis. Nel caso che non siano state presentate istanze di affidamento per mezzi di trasporto sequestrati, si applicano le disposizioni dell'articolo 301-bis, comma 3, del testo unico delle disposizioni legislative in materia doganale, di cui al decreto del Presidente della Repubblica 23 gennaio 1973, n. 43, e successive modificazioni. (10)

8-ter. La distruzione può essere direttamente disposta dal Presidente del Consiglio dei Ministri o dalla autorità da lui delegata, previo nullaosta dell'autorità giudiziaria procedente. (11)

8-quater. Con il provvedimento che dispone la distruzione ai sensi del comma 8-ter sono altresì fissate le modalità di esecuzione. (11)

8-quinquies. I beni acquisiti dallo Stato a seguito di provvedimento definitivo di confisca sono, a richiesta, assegnati all'amministrazione o trasferiti all'ente che ne abbiano avuto l'uso ai sensi del comma 8 ovvero sono alienati o distrutti. I mezzi di trasporto non

assegnati, o trasferiti per le finalità di cui al comma 8, sono comunque distrutti. Si osservano, in quanto applicabili, le disposizioni vigenti in materia di gestione e destinazione dei beni confiscati. Ai fini della determinazione dell'eventuale indennità, si applica il comma 5 dell'articolo 301-bis del citato testo unico di cui al decreto del Presidente della Repubblica 23 gennaio 1973, n. 43, e successive modificazioni.

9. Le somme di denaro confiscate a seguito di condanna per uno dei reati previsti dal presente articolo, nonché le somme di denaro ricavate dalla vendita, ove disposta, dei beni confiscati, sono destinate al potenziamento delle attività di prevenzione e repressione dei medesimi reati, anche a livello internazionale mediante interventi finalizzati alla collaborazione e alla assistenza tecnico-operativa con le forze di polizia dei Paesi interessati. A tal fine, le somme affluiscono ad apposito capitolo dell'entrata del bilancio dello Stato per essere assegnate, sulla base di specifiche richieste, ai pertinenti capitoli dello stato di previsione del Ministero dell'interno, rubrica "Sicurezza pubblica".

9-bis. La nave italiana in servizio di polizia, che incontri nel mare territoriale o nella zona contigua, una nave, di cui si ha fondato motivo di ritenere che sia adibita o coinvolta nel trasporto illecito di migranti, può fermarla, sottoporla ad ispezione e, se vengono rinvenuti elementi che confermino il coinvolgimento della nave in un traffico di migranti, sequestrarla conducendo la stessa in un porto dello Stato. (12)

9-ter. Le navi della Marina militare, ferme restando le competenze istituzionali in materia di difesa nazionale, possono essere utilizzate per concorrere alle attività di cui al comma 9- bis. (12)

9-quater. I poteri di cui al comma 9-bis possono essere esercitati al di fuori delle acque territoriali, oltre che da parte delle navi della Marina militare, anche da parte delle navi in servizio di polizia, nei limiti consentiti dalla legge, dal diritto internazionale o da accordi bilaterali o multilaterali, se la nave batte la bandiera nazionale o anche quella di altro Stato, ovvero si tratti di una nave senza bandiera o con bandiera di convenienza. (12)

9-quinquies. Le modalità di intervento delle navi della Marina militare nonché quelle di raccordo con le attività svolte dalle altre unità navali in servizio di polizia sono definite

con decreto interministeriale dei Ministri dell'interno, della difesa, dell'economia e delle finanze e delle infrastrutture e dei trasporti. (12)

9-sexies. Le disposizioni di cui ai commi 9-bis e 9-quater si applicano, in quanto compatibili, anche per i controlli concernenti il traffico aereo. (12)

9-septies. Il Dipartimento della pubblica sicurezza del Ministero dell'interno assicura, nell'ambito delle attività di contrasto dell'immigrazione irregolare, la gestione e il monitoraggio, con modalità informatiche, dei procedimenti amministrativi riguardanti le posizioni di ingresso e soggiorno irregolare anche attraverso il Sistema Informativo Automatizzato. A tal fine sono predisposte le necessarie interconnessioni con il Centro elaborazione dati interforze di cui all'articolo 8 della legge 1° aprile 1981, n. 121, con il Sistema informativo Schengen di cui al regolamento CE 1987/2006 del 20 dicembre 2006 nonché con il Sistema Automatizzato di Identificazione delle Impronte ed è assicurato il tempestivo scambio di informazioni con il Sistema gestione accoglienza del Dipartimento per le libertà civili e l'immigrazione del medesimo Ministero dell'interno. (19)

(1) Comma da ultimo così sostituito dall'art. 1, comma 26, lett. a), L. 15 luglio 2009, n. 94.
(2) Comma da ultimo così sostituito dall'art. 1, comma 26, lett. b), L. 15 luglio 2009, n. 94.
(3) Comma così sostituito dall'art. 1, comma 26, lett. c), L. 15 luglio 2009, n. 94.
(4) Comma così sostituito dall'art. 1, comma 26, lett. d), L. 15 luglio 2009, n. 94.
(5) Comma inserito dall'art. 11, comma 1, lett. c), L. 30 luglio 2002, n. 189 e, successivamente, così modificato dall'art. 5, comma 2, L. 14 febbraio 2003, n. 34, a decorrere dal giorno successivo a quello della sua pubblicazione nella G.U.
(6) Comma abrogato dall'art. 9, comma 11, lett. c), L. 16 marzo 2006, n. 146.

(7) Comma da ultimo così modificato dall'art. 1, comma 26, lett. e), L. 15 luglio 2009, n. 94.

(8) Comma così modificato dall'art. 1, comma 1, lett. b), D.Lgs. 7 aprile 2003, n. 87.

(9) Comma così sostituito dall'art. 2, comma 2, D.Lgs. 13 aprile 1999, n. 113.

(10) Comma così sostituito dall'art. 1, comma 1, D.L. 4 aprile 2002, n. 51 convertito, con modificazioni, dall'art. 1, L. 7 giugno 2002, n. 106.

(11) Comma inserito dall'art. 1, comma 1, D.L. 4 aprile 2002, n. 51 convertito, con modificazioni, dall'art. 1, L. 7 giugno 2002, n. 106.

(12) Comma inserito dall'art. 11, comma 1, lett. d), L. 30 luglio 2002, n. 189.

(13) Comma così modificato dall'art. 1, comma 14, L. 15 luglio 2009, n. 94.

(14) Comma così modificato dall'art. 5, comma 01, D.L. 23 maggio 2008, n. 92, convertito, con modificazioni, dalla L. 24 luglio 2008, n. 125.

(15) Comma inserito dall'art. 1, comma 26, lett. f), L. 15 luglio 2009, n. 94.

(16) La Corte costituzionale, con sentenza 12-16 dicembre 2011, n. 331 (Gazz. Uff. 21 dicembre 2011, n. 53 - Prima serie speciale), ha dichiarato l'illegittimità costituzionale del presente comma, nella parte in cui - nel prevedere che, quando sussistono gravi indizi di colpevolezza in ordine ai reati previsti dal comma 3, è applicata la custodia cautelare in carcere, salvo che siano acquisiti elementi dai quali risulti che non sussistono esigenze cautelari - non fa salva, altresì, l'ipotesi in cui siano acquisiti elementi specifici, in relazione al caso concreto, dai quali risulti che le esigenze cautelari possono essere soddisfatte con altre misure.

(17) Comma inserito dall'art. 1-ter, comma 1, lett. e), D.L. 14 settembre 2004, n. 241, convertito, con modificazioni, dalla L. 12 novembre 2004, n. 271 .

(18) Comma inserito dall'art. 11, comma 1, lett. c), L. 30 luglio 2002, n. 189.

(19) Comma aggiunto dall' art. 18, comma 1, D.L. 17 febbraio 2017, n. 13, convertito, con modificazioni, dalla L. 13 aprile 2017, n. 46.

(20) Comma inserito dall'art. 2, comma 1, D.L. 14 giugno 2019, n. 53.

Cfr. Cassazione penale, SS.UU., sentenza 24 settembre 2018 n° 40982.