NEG: Decriminalizing Migrant Rescue

By Katherine Baker

***Resolved: The European Union should substantially reform its immigration policy.***

Case Summary: In the Status Quo, an EU policy called the “Facilitation Directive” contains an intentional loophole that says member states can criminalize humanitarian or rescue aid to illegal migrants or asylum-seekers. For example, it can be a crime to send a boat out to rescue a drowning migrant in the Mediterranean Sea, or to give him first aid if he swims to the shore. The Affirmative plan claims they will stop making criminals out of Good Samaritans. But that’s not the end of the story, as Negative will point out. The Good Samaritan didn’t tell the victim beforehand to jump off a cliff with the promise that he would be rescued if he started to drown. Good Samaritans wouldn’t do that, but that’s what the rescuers are doing in the Affirmative’s case. They’re not heroes, they’re Bad Samaritans aiding and abetting the very problems they claim to be solving, and creating the injuries they claim to be healing.

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Negative: Decriminalize Rescue

HARMS / SIGNIFICANCE

1. Insignificant problem

Fear of prosecution of compassionate actors is exaggerated

EUROPEAN COMMISSION, 2017. (executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

However, as of today there appears to be rather limited evidence that social workers, family

members or citizens acting out of compassion have been prosecuted and convicted for facilitation of unauthorised entry, transit or residence. According to the study commissioned by the EP, although the fear of sanction remains a great concern in some Member States, it has also decreased in others, including where no exemption on the grounds of humanitarian assistance is provided in the law (e.g. France).

Only 1/5fear prosecution for humanitarian work. And if the fear is so great, why are the number of rescues INCREASING?

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However, as of today there appears to be rather limited evidence that social workers, family members or citizens acting out of compassion have been prosecuted and convicted for facilitation of unauthorised entry, transit or residence. According to the study commissioned by the EP, although the fear of sanction remains a great concern in some Member States, it has also decreased in others, including where no exemption on the grounds of humanitarian assistance is provided in the law (e.g. France). Besides, the findings show that only one-fifth of the interviewees actually fear sanctions for their humanitarian assistance-related work with irregular migrants in situation of transit or staying on the national territory, and that only some, among those who actually reported fearing such sanctions, would associate the fear with a possible deterrent effect on providing assistance. These findings seem supported also by recent evidence from a Horizon 2020 study, showing that the number of civil society initiatives devoted to refugees and migrants has increased significantly, particularly from 2010 onwards. This development is especially strong in countries most affected by migration inflows such as Greece and Germany, which have seen clear peaks in 2013 and 2015 respectively.

Nobody rescuing a person at sea can be criminalized under EU law, and “fear” of it is based on misunderstanding the law

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Although perceived risks of being criminalised for providing humanitarian assistance must be taken into serious consideration, they do not appear to be so prominently linked to the legal framework in place as to its understanding and actual application. The lack of clarity might also stem from the fact that assistance provided in different situations is subject to different legal frameworks. In this respect, it must be stressed that domestic general criminal law provisions usually exempt from sanctions acts committed in a state of necessity to avert a danger, and that the duty of assistance at sea to anybody in distress is an obligation under international law. Nobody rescuing a person at sea can be criminalised for such behaviour, neither under European nor national legislation. In this respect, no significant evidence has been found concerning the deterrent effects of risks or fears of criminalisation perceived by ship-owners. Such fear has been nonetheless reported by the FRA, according to which "such risk for fishermen was also reported by the press following the tragedies off the Italian island of Lampedusa in October 2013". Despite requests for increased support and expression of the difficulties faced in the context of the current migratory and refugee crisis, the commercial sector is in fact actively engaging with respect to rescue at sea.

2. More Study needed

Need more study of the Facilitation Directive to determine whether evidence supports the claim of harm

EUROPEAN COMMISSION, 2017. (executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

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

SOLVENCY

1. Hard to define proper rules

No clarity of concept of humanitarian assistance

EUROPEAN COMMISSION, 2017. (executive branch of the European Union) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

Besides, under the option set out in Art. 1(2), Member States can choose not to criminalise the facilitation of unauthorised entry and transit, where the aim of the behaviour is to provide humanitarian assistance to the person concerned. As for the financial gain element, the Facilitators Package does not contain specific provisions or recitals clarifying the concept of humanitarian assistance.

Hard to determine financial nature of crimes

EUROPEAN COMMISSION, 2017. (executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

The cash intensive nature of the payment methods linked to smuggling makes it difficult to trace illicit financial flows and in turn to conduct investigations on the financial nature of the crime. For example, according to Europol, in 2015, less than 10% of the investigations into migrant smuggling activities produced intelligence on suspicious transactions or money laundering activities.

2. Other roadblocks not solved by the Plan

Although Laura Schack supports the AFF position, she admits in 2020 that there are many other barriers unrelated to the Facilitation Directive – and many of them are at the individual national level, not the EU as a whole

Laura Schack, 2020. (PhD researcher in Politics and Information Security at Royal Holloway, University of London; spent four months conducting field research in France, Greece and Italy.) “Humanitarian Smugglers? The EU Facilitation Directive and the Criminalisation of Civil Society” 06 July 2020. <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/humanitarian> (Note: Article on whole supports AFF. Don’t neglect to admit that.)

Investigating and prosecuting humanitarians for migrant smuggling is only one of the ways in which people helping migrants and refugees in Europe have been targeted. Various reports indicate widespread police harassment of volunteers, activists and humanitarian aid workers occurring in countries such as France, Greece, Italy and Croatia. While search and rescue NGOs have faced many accusations and charges related to human smuggling, bureaucratic and administrative sanctions have been at least as successful in hindering their work, for example in the cases of Mission Lifeline, and Sea Watch’s Moonbird plane and Sea-Watch 3 ship. Laws unrelated to the Facilitation Directive have also been used to criminalise pro-migrant civil society actors, as seen in the Stansted 15’s terrorism-related conviction in the UK, Loan Torondel’s conviction for criminal defamation in France, and Hungary’s Stop Soros law.

Facilitation Directive isn’t the real problem – NGOs are being limited on multiple fronts

David Starke, 2019. (General Director of SOS MEDITERRANEE Germany, a Search and Rescue NGO). “Shrinking humanitarian space – a fatal reality for search and rescue NGOs in the Central Mediterranean Sea” 31 Oct 2019. <https://www.friendsofeurope.org/insights/shrinking-humanitarian-space-a-fatal-reality-for-search-and-rescue-ngos-in-the-central-mediterranean-sea/>

Recently, aid workers operating from Turkey to Pakistan to Syria have experienced a shrinking, or even closing, humanitarian space. In response, researchers have sought to give an account of the obstacles faced by humanitarian actors, mostly in conflict-ridden countries or under authoritarian regimes. When focusing on Europe, there has been increased interest in the conditions under which civil Search and Rescue (SAR) organisations operate in the Central Mediterranean Sea. These humanitarian organisations have been regularly forced to defend themselves from attempts by EU member states to impede their life-saving work at sea. The actions taken by individual European politicians, prosecutors and other state authorities against their activities are well known. They range from defamation and de-legitimisation to restrictions, such as Italy and Malta’s ‘closed ports’ policies.

Governments, not Facilitation Directive, in the way of NGOs

David Starke, 2019. (General Director of SOS MEDITERRANEE Germany, a Search and Rescue NGO). “Shrinking humanitarian space – a fatal reality for search and rescue NGOs in the Central Mediterranean Sea” 31 Oct 2019. <https://www.friendsofeurope.org/insights/shrinking-humanitarian-space-a-fatal-reality-for-search-and-rescue-ngos-in-the-central-mediterranean-sea/>

Among many, there are two concrete examples that demonstrate how the humanitarian space has shrunk for SAR organisations and how, as a consequence, the Central Mediterranean route has become even more deadly for migrants and refugees. The story of the Aquarius, the former rescue ship that SOS MEDITERRANEE ran in partnership with Doctors Without Borders (MSF), provides an illustrative example. The ship operated from 2016 until late 2018, until certain political campaigns decided to impede its work. In 2018, following political pressure, the Aquarius was stripped of its flag twice in less than two months – first by Gibraltar, then by Panama. In the latter case, the Italian government had pressured Panama to delete the Aquarius from its ship registry. This was not only an active attempt to obstruct humanitarian assistance, it was also an unprecedented case of political instrumentalisation of one of the core principles guaranteed in maritime conventions, namely freedom of navigation.

Doesn’t solve: False allegations are getting NGOs investigated

David Starke, 2019. (General Director of SOS MEDITERRANEE Germany, a Search and Rescue NGO). “Shrinking humanitarian space – a fatal reality for search and rescue NGOs in the Central Mediterranean Sea” 31 Oct 2019. <https://www.friendsofeurope.org/insights/shrinking-humanitarian-space-a-fatal-reality-for-search-and-rescue-ngos-in-the-central-mediterranean-sea/>

Only a couple of months later, SOS MEDITERRANEE and MSF faced yet another attack. An investigation by the Prosecutor’s Office of Catania concerning the unclassified disposal of onboard waste, with allegations of illegally profiting from it, resulted in the decision by Italian judicial authorities to request the seizure of the Aquarius. Subsequently, SOS MEDITERRANEE and MSF were forced to demobilise the Aquarius and return the vessel to its owner. It took until summer 2019 for SOS MEDITERRANEE to launch a new ship.

Lots of other policy changes needed in addition

David Starke, 2019. (General Director of SOS MEDITERRANEE Germany, a Search and Rescue NGO). “Shrinking humanitarian space – a fatal reality for search and rescue NGOs in the Central Mediterranean Sea” 31 Oct 2019. <https://www.friendsofeurope.org/insights/shrinking-humanitarian-space-a-fatal-reality-for-search-and-rescue-ngos-in-the-central-mediterranean-sea/>

As long as the EU and its member states refuse to set up a joint SAR programme in the Central Mediterranean, they at least have to ensure the civil fleet is not hindered in their efforts to fill this humanitarian gap. All administrative, political and legal campaigns against NGOs need to stop. This includes putting an end to the policy of closed ports.

DISADVANTAGES

1. Migration encouraged

Link: Encouraging smugglers

Patrick Wintour, 2017. (diplomatic editor for the Guardian) “NGO rescues off Libya encourage traffickers, says EU borders chief”27 Feb 2017 <https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief>

In his interview, Leggeri said that under maritime law everyone at sea had a duty to rescue vessels and people in distress. “But we must avoid supporting the business of criminal networks and traffickers in Libya through European vessels picking up migrants ever closer to the Libyan coast. This leads traffickers to force even more migrants on to unseaworthy boats with insufficient water and fuel than in previous years.”

Link: Majority of migrants are smuggled into Europe by criminal groups

Europol, 2016. (EU law enforcement agency) “FACILITATION OF ILLEGAL IMMIGRATION” No date given, but article references events in June 2016, so it was written then or more recently. <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/facilitation-of-illegal-immigration>

This development has had a profound impact on Europe’s criminal landscape, with criminal networks substantially increasing their involvement in migrant smuggling. More than 90 % of the migrants travelling to the EU used facilitation services. In most cases, these services were offered and provided by criminal groups.

Link: NGOs “rescues” promote more smuggling – they actively coordinate their “rescue” with smugglers and traffickers!

Prof. Antoine Pécoud and Dr. Marta Esperti, 2017. (Pécoud: Professeur de sociologie, Université Sorbonne Paris Nord – USPC; Esperti: Doctorante en sociologie, Université Sorbonne Paris Nord – USPC) “Are NGOs responsible for the migration crisis in the Mediterranean?” June 20, 2017. <https://theconversation.com/are-ngos-responsible-for-the-migration-crisis-in-the-mediterranean-79699>

According to the British newspaper, Frontex has evidence that some NGOs are in contact with smugglers and direct them towards zones where migrants have the best chance of being rescued. In other words, they claim these NGOs are accomplices to human traffickers and are therefore guilty of the crime of assisting illegal immigration. The report led Italian authorities to investigate. In May 2017, the Italian senate’s parliamentary inquiry concluded that NGOs constitute a “pull factor” and that they should cooperate more with maritime police operations. The Catania chief prosecutor nevertheless stated that there was no proof of wrongdoing.

Impact: Smuggling associated with serious human rights violations and deaths

EUROPEAN COMMISSION, 2017. (executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

Migrant smuggling is increasingly associated with serious human rights violations and deaths, in particular when it occurs by sea. According to the International Organization for Migration (IOM), an estimated 5 400 migrants died or were recorded as missing in 2015 worldwide. In 2016, 7,495 migrants are estimated to have lost their lives worldwide, over 68% of those (5,079) while attempting to reach Europe by sea in the Mediterranean. The United Nations High Commissioner for Refugees (UNHCR) also reports similar figures, with some 5,022 reported dead or missing in 2016, while some 361,709 refugees and migrants reached Europe by sea. In 2015, UNHCR reported 1,105,078 arrivals to Europe by sea.

Impact: Migrant smuggling = death.

Will Saletan, 2015. (writes about politics, science, technology for Slate.) “Business as Usual” SEPT 10, 2015. <https://slate.com/news-and-politics/2015/09/europes-migrant-crisis-is-explained-by-economic-globalization-smuggling-people-is-just-another-business.html>

If you don’t have that kind of money, you get cut-rate service. Instead of a seaworthy boat, you have to cross from Turkey to Greece in an inflatable dinghy with plastic paddles. You can buy life jackets, but they’re extra, so people who have to settle for this class of service generally skip them. On a big boat, the first-class migrants ride on the deck. The economy migrants ride below, in the hold. If the boat capsizes—or when something else goes wrong, such as fumes from the fuel supply, which asphyxiated more than 40 people in a single incident last month—the people in the hold are the ones most likely to die.

1. Smugglers will exploit AFF Plan

Link: Smugglers adapt to law enforcement changes

Europol, 2016. (EU law enforcement agency) “FACILITATION OF ILLEGAL IMMIGRATION” No date given, but article references events in June 2016, so it was written then or more recently. <https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/facilitation-of-illegal-immigration>

Migrant smuggling networks have proven flexible and resilient, adapting to law enforcement actions by quickly changing the routes they use to smuggle migrants to the EU. These routes are constantly diversifying and changing. More than ever before, law enforcement authorities have to rely on situational awareness and an intelligence picture that is updated in real time and that can be maintained only through effective intelligence sharing.

Link: Smugglers are well-studied on Europe’s laws

BBC, 2015. (UK-based public service broadcaster.) “Migrant crisis: Who are Africa's people smugglers?” 23 April 2015. <https://www.bbc.com/news/world-europe-32381101>

Mr Mescumi says one common misconception is to think of the smugglers as boat pilots or fishermen. "They are clever. Think of a smuggler as someone who never sleeps and spends 24 hours a day thinking about how to break into Europe. They read newspapers, study European laws, study what Frontex are doing - they will probably even read this piece." He believes that the desperation of migrants allied with the profits that smugglers stand to make means it has become an intractable problem.

Link: No paper trail

EUROPEAN COMMISSION, 2017. (executive branch of the European Union.) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

In this context, it is useful to recall that payments to migrant smugglers tend to occur in third countries of origin and transit. These are often done in cash, through the so-called hawala method - a centuries-old system, which enables the transfer of money on the basis of trust through the use of intermediary brokers operating largely without a paper trail and often outside the law - or via the use of cash couriers and other alternative banking systems.

Link: Prosecution of smugglers hampered if definition of aiding illegal immigration is narrowed as AFF wants

EUROPEAN COMMISSION, 2017. (The European Commission is the executive branch of the European Union, responsible for proposing legislation, implementing decisions, upholding the EU treaties and managing the day-to-day business of the EU.) “REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package” 22, March, 2017. <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/20170322_-_refit_evaluation_of_the_eu_legal_framework_against_facilitation_of_unauthorised_entry_transit_and_residence_en.pdf>

Since the time of adoption of the Facilitators Package and still today, the risks that such difficulties in tracing financial flows connected to migrant smuggling would disproportionately hamper the investigation and prosecution of this crime, affecting States’ legitimate interest to control borders and regulate migration flows, have been raised as a reason to avoid including a constituent financial gain element in the offence of facilitating irregular border crossing. The situation is somewhat different for the facilitation of irregular residence, which at least partially takes place on EU territory thus making financial transactions possibly easier to trace. In this case, the financial gain element is included in the definition of the offence.

Impact: People die

Will Saletan, 2015. (Will Saletan writes about politics, science, technology, and other stuff for Slate.) “Business as Usual” SEPT 10, 2015. <https://slate.com/news-and-politics/2015/09/europes-migrant-crisis-is-explained-by-economic-globalization-smuggling-people-is-just-another-business.html>

Read other stories, and you’ll see the same tragedy again and again: people stashed in compartments that were never designed for them. Fifty migrants asphyxiated in the cargo hold of a boat. Thirty-four packed into a van in which they could barely breathe. Eighty-six in a single truck. Another 50 trapped in a minibus. Twenty-six found in another truck in Austria, including three kids in danger of dying from dehydration. Another 24 found in a sealed cargo hold that had less than an hour’s worth of oxygen. And we have no idea how many have died undiscovered. Not every driver who smells something bad in his rig leaves it on the side of the road.

3. Information breakdown hampers law enforcement

Link: NGOs hindering efforts to stop smugglers

Patrick Wintour, 2017. (diplomatic editor for the Guardian) “NGO rescues off Libya encourage traffickers, says EU borders chief”27 Feb 2017 <https://www.theguardian.com/world/2017/feb/27/ngo-rescues-off-libya-encourage-traffickers-eu-borders-chief>

NGOs who rescue people in the sea off Libya are encouraging traffickers who profit from dangerous Mediterranean crossings, the head of the EU border agency Frontex has said. Speaking to Germany’s Die Welt newspaper, Fabrice Leggeri called for rescue operations to be re-evaluated and accused NGOs of ineffectively cooperating with security agencies against human traffickers. Leggeri said 40% of recent rescue operations at sea off the north African country were carried out by non-government organisations, making it impossible to check the origins of the migrants or their smuggling routes if the NGOs did not cooperate.

Brink: Europol needs all info on smugglers to succeed

Matthias von Hein, 2015. (Broadcaster for Deutsche Welle (DW), an international broadcaster based in Germany) “People smugglers profiting from plight of refugees” 03.09.2015 <https://www.dw.com/en/people-smugglers-profiting-from-plight-of-refugees/a-18692656>

"It's important that the information comes together at Europol: Information about the smuggler gangs and organized criminals in the migrants' countries of origin, in the transit countries and in the countries where the migrants end up," he said. This information would help Europol conduct coordinated investigations on the smugglers with EU member states. "We don't want to just interrupt their activities only at a certain point in the EU, or outside the EU; we want to get them in their entirety and shut them down, including the men behind the scenes,” he said.

Impact: More deaths

Matthias von Hein, 2015. (Broadcaster for Deutsche Welle (DW), an international broadcaster based in Germany) “People smugglers profiting from plight of refugees” 03.09.2015 <https://www.dw.com/en/people-smugglers-profiting-from-plight-of-refugees/a-18692656>

Here's one such number: In July alone, 107,500 migrants crossed the EU's outer borders, according to the European border security agency Frontex. Most of these people used the services of people smugglers at some point on their journey. And that leads us to other numbers: 71 dead refugees in an abandoned truck on an Austrian highway at the end of August; around 500 drowned refugees from two boats that sank off the coast of Libya at the end of August; around 800 dead after a boat filled with refugees sank in April near Lampedusa. According to the UN's agency for refugees, the UNHCR, more than 2,400 migrants have died this year so far while trying to cross the Mediterranean.

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