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European values lost in the Mediterranean Sea

Pushback practice and the criminalization of SAR NGOs in a human rights perspective

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*To every single human being lost in the Mediterranean Sea
and to those survivors who remain traumatized*

To Muhammad, Khadija and Khaldiya

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 1 Universal Declaration of Human Rights

Special thanks to Alessandro Montanari.

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List of Abbreviations

1951 Refugee Convention	Convention relating to the Status of Refugees
Agency	European Border and Coast Guard Agency
a.m.	ante meridiem
Art	Article
BVMN	Border Violence Monitoring Network
CAT	Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR, Convention	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
et al	et alia
EU	European Union
EUNAVFOR MED	European Union Naval Force Mediterranean
EUROSUR	European Border Surveillance System
External Sea Borders Regulation	Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FRO	Fundamental Rights Officer
Frontex	European Border and Coast Guard Agency
Frontex Regulation	Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624
FSA	Frontex Surveillance Aircraft

IBM	Integrated Border Management
ICCPR	International Covenant of on Civil and Political Rights
IMO	International Maritime Organization
IOM	International Organization for Migration
JO	Joint Operation
MSR	Maritime Surveillance Regulation
NGO	Non-governmental organization
no	Number
nos	Numbers
OLAF	European Anti-Fraud Office
p	Page
para	Paragraph
paras	Paragraphs
SAR	Search and rescue
SAR Convention	International Convention on Maritime Search and Rescue
Schengen Borders Code	Regulation (EU) 2016/399 of 16 March 2016 on the rules governing the movement of persons across borders
SOLAS Convention	International Convention for the Safety of Life at Sea
SRR	Search and Rescue Region
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Protocol Against the Smuggling of Migrants by Land, Sea and Air	Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational organized Crime
UNHCR	United Nations High Commissioner for Refugee

UNGA

United Nations General Assembly

UNTOC

United Nations Transnational Crime Convention

Vs

Versus

Introduction

The European Union and its Member States are facing increasing challenges in managing irregular migration across its borders. Nowadays, the region of the Mediterranean Sea remains one of the most perilous migration routes worldwide, with the International Organization for Migration (IOM) reporting over 32000 migrants missing since 2014.¹ This number underscores the complex humanitarian dimension that accompanies border management in this context.

Various legal and institutional frameworks have been developed to regulate migration flows, to ensure border security and to prevent irregular migration, including instruments such as the EU “Facilitators Package”, implemented in 2002, and the establishment of Frontex in 2004. Despite these longstanding measures, current legislation and policies remain insufficient in ensuring a balanced approach between effective border control and adherence to human rights standards. This deficiency has raised concerns among international organizations, legal experts, and humanitarian actors.

The main objective of this master’s thesis is to assess the EU “Facilitators Package”, to demonstrate its legal challenges and offer an examination of the conformity with international human rights and maritime law. In order to achieve this purpose an overview over the different actors involved in SAR operations, their mandate and their impact in the Mediterranean Sea will be presented. The author’s aim is to contribute to academic and legal discussions about the challenges in the compliance of human rights in the context of SAR operations at sea and in EU’s external border management.

The thesis is structured into four main chapters, each addressing a core dimension of the legal, institutional, and humanitarian aspects of SAR and border control operations in the Mediterranean Sea. The first chapter is dedicated to the main actors in the Mediterranean Sea in the context of SAR as well as the emergence of the pushback practices. The second chapter deals with the legal framework of SAR at sea, comprising three important maritime conventions. In the following the relevance of the place of safety and the principle of non-refoulement will be assessed. Chapter three will examine the legal measures NGOs face and

¹ International Organization for Migration (IOM), Missing Migrants Project <<https://missingmigrants.iom.int>> accessed 29th July 2025

the response of the EU to the involvement of civil society. Lastly, the master's thesis will fulfill its intended objective concluding with a thorough examination of the compliance of the EU "Facilitators Package" with international human rights and maritime law.

The methodology applied in this study combines doctrinal legal analysis with qualitative empirical insights. Primary legal sources, judicial decisions, and academic literature provide the basis for assessing compliance with international obligations. Empirical material, including reports from SAR NGOs and testimonies from monitoring networks, contextualizes the legal discussion. To further enrich the analysis, an interview was conducted with a practitioner experienced in SAR operations in the Mediterranean Sea, providing practical insights on challenges faced during rescue efforts.

1. Actors and Practices in the Mediterranean Sea in SAR

The European Union and its Member States are facing serious difficulties in addressing irregular migration across the Mediterranean Sea. Within this context, the question of Search and Rescue has become a central point of tension, as different actors, ranging from state authorities and EU agencies to non-governmental organizations play decisive roles in shaping both the operational response and the broader political debate. The following sections will therefore examine the most relevant actors engaged in SAR activities in the Mediterranean Sea, considering their mandates, practices, and the ways in which their interactions contribute to the evolving dynamics of migration management in the region.

The EU Member States, followed by the European Union, through its executing agency the European Border and Coast Guard Agency Frontex, will be initially presented, continued by the description of a relevant third country, Libya, and subsequently of the role of NGOs in SAR. Once the main actors are presented, this chapter will identify the definition of pushback practices.

1.1. EU Member States

The European Union, a supranational political and economic organization, comprises 27 State Members. One of the main achievements of the European Union is the free movement of persons and goods within the union's territory. Yet by abolishing internal barriers the Union has simultaneously generated difficult new tasks at its external frontier. Since then a small number of frontline Member States are responsible for managing a shared external border. Due to the geographical circumstances few Member States are heavily involved in the external border management. In the Southern Mediterranean migration route Italy and Greece are the Member States most directly involved in the external borders management.

1.2. Frontex

The EU is executing its external border duties through the European Border and Coast Guard Agency Frontex. Frontex, with its headquarters in Warsaw, was established by the European Council upon the Council Regulation (EC) 2007/2004 of 26 October 2004. Since assuming its duties on 1st of May 2005, it has supported EU Member States in executing the operational elements of external border management by means of Joint Operations and swift border measures, risk assessment, information sharing, collaboration with non - EU states and the

repatriation of returnees.² Its establishment was initially intended to enable more effective control of the Schengen Area's external borders following the removal of internal border controls within Europe.³

Frontex currently has a workforce of more than 2500 persons coming from 29 different nations. The staff number has increased from 301 employees in 2015 up to 2233 employees in 2023.⁴ With the establishment of the standing corps, Frontex has evolved into the European Union's initial uniformed law enforcement Agency, serving as an operational division of the EU.⁵

The Agency is headed by an Executive Director who is selected by the Agency's Management Board following a suggestion from the European Commission. Hans Leijtens from the Netherlands has held this position since 1st of March 2023. According to Art 6 of Regulation (EU) 2019/1896, hereinafter the Frontex Regulation, the Agency is responsible to the European Parliament and to the Council. The Agency is also accountable to the national border guard authorities, whose representatives sit on the Management Board. The Management Board supervises the operations of the Agency by setting the budget and monitoring its implementation.

Furthermore, an autonomous Fundamental Rights Officer (FRO) reports straight to the Management Board and collaborates with the Consultative Forum which provides independent guidance to the Executive Director and the Management Board on fundamental rights issues.⁶ The FRO is in charge of the Agency's adherence to its fundamental rights responsibilities pursuant to EU and international law. The office of the Fundamental Rights Officer together with the Fundamental Rights Monitors, operate within the institution to strengthen the respect, safeguarding, and fostering fundamental rights. Moreover, the FRO is tasked with managing complaints submitted through the Frontex Complaints Mechanism and Serious Incidents Reports concerning possible infringements of fundamental rights in connection with operations of Frontex. The FRO releases yearly reports about its operations

² Regulation (EU) 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, Preamble 2

³ Nina Perkowski, 'Frontex and the convergence of humanitarianism, human rights and security' (2018) JSTOR Security Studies, 458

⁴ Frontex, 'Why us' <<https://www.frontex.europa.eu/careers/who-we-are/why-us/>> accessed 5th November 2024

⁵ Frontex, 'Who we are:Task&Mission'<<https://www.frontex.europa.eu/about-frontex/who-we-are/tasks-mission/>> accessed 11th November 2024

⁶ Frontex, 'Who we are:Structure' <<https://www.frontex.europa.eu/about-frontex/who-we-are/structure/>> accessed 11th November 2024

in order to provide information on how fundamental rights are being upheld in Frontex' operations in accordance with the Agency's Fundamental Rights Strategy.⁷

Frontex' mandate and operations are subject to the principle of subsidiarity.⁸ According to Art 5 (3) TEU the principle of subsidiarity means “in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”⁹

Additionally, the Frontex Regulation establishes a so-called shared responsibility. The European Border and Coast Guard Agency is required to carry out European integrated border management formed as a shared responsibility between the Agency and the national units in charge of border management. In essence, each EU Member State remains primarily in charge of the management of their external borders. The shared responsibility of the Frontex Regulation has its basis in Art 4(2)(j) TFEU, which sets up shared competence between the Union and the Member States in regard to the area of freedom, security and justice.¹⁰

When an EU Member State requires help in overseeing a vulnerable border area, Frontex enhances border control by sending in border guards and utilizing technical resources provided by the Member States. This coordinated support from Frontex is referred to as a Joint Operation. In Joint Operations Frontex assembles the resources from all Member States that are willing to provide border guards and technical equipment, and organize their deployment to a designated area, which could be a land or sea border or any of the international airports.

In Joint Operations, officers from Member States and Schengen-Associated Countries carry out patrols and border inspections in coordination with officers from the host country. All Joint Operations are conducted according to a legally enforceable operational plan that outlines the goals, specifies the geographic area, and establishes the duration of the operation

⁷ Frontex, Fundamental Rights at Frontex: Fundamental Rights Office
<<https://www.frontex.europa.eu/fundamental-rights/fundamental-rights-at-frontex/fundamental-rights-office/>>
accessed 11th November 2024

⁸ Regulation (EU) 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, Preamble 22

⁹ TEU [2009] OJ C 202/1, Art 5

¹⁰ Regulation (EU) 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/120; See also Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 326/47

(e.g. Specific Activity Plan Amendment no. 1 JO Coordination Points Air, Land and Sea 2022; Specific Activity Plan JO Opal Coast 2022).

The border guards sent by Member States to support Frontex-coordinated Joint Operations, known as guest officers, along with the crew of ships and aircrafts, operate under the authority of the host nation, which takes a primary operational role within its own territory. Officers participating in Joint Operations are governed by a Code of Conduct that promotes compliance with best practices in border control, maintains the highest professional standards, and upholds the fundamental rights of every human being involved.¹¹

The Regulation (EU) 2019/1896 on the European Border and Coast Guard forms the basis of Frontex.

One of the aims of the Frontex Regulation is the Integrated Border Management (IBM). It is an all-encompassing strategy for border control that consists of the whole process of travel, starting before a traveller arrives at the border and continuing after crossing it. It highlights the importance of strong collaboration among various authorities and countries, including those within the EU, Schengen Area, and neighbouring states, to ensure a balance between legitimate travel and border security. IBM encompasses risk analysis, inter-Agency cooperation, and coordination of activities to manage both entry and stay in the EU/Schengen Area in a constructive manner.¹²

In regards to search and rescue at sea, the role of Frontex is outlined in the preambles of the Frontex Regulation, defining as one of the main tasks of the Agency to provide technical and operational aid in the assistance of search and rescue activities for individuals in distress at sea.¹³ Moreover, its instituting regulation obliges the Agency to support Member States in situations that necessitate enhanced technical and operational help at external borders by organizing Joint Operations, while considering those certain scenarios may entail

¹¹ Frontex, Frontex at a Glance (2023)
<https://www.frontex.europa.eu/assets/Publications/General/Frontex_at_a_Glance.pdf> accessed on 30th December 2024

¹² Frontex, Frontex at a Glance (2023)
<https://www.frontex.europa.eu/assets/Publications/General/Frontex_at_a_Glance.pdf> accessed on 4th January 2025

¹³ Regulation (EU) 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, Preamble 3

humanitarian crises and maritime rescues, in compliance with European Union and international law.¹⁴

Despite Frontex' clear legal mandate and defined responsibilities to protect the EU's external borders and the lives of those attempting to cross them, the Agency's capacity appears to be insufficient to address the ongoing crisis in the Central Mediterranean.

1.3. Third States – Example of Libya

In order to tackle migration challenges to Italy and to ease the perceived pull-factor linked with the SAR operations conducted by the Italian Coast Guard and different NGOs, Italy launched a cooperation with the Libyan Government of National Accord. The main purpose of this agreement was to assign the coordination of SAR activities in the Central Mediterranean to Libya. In February 2017 Italy signed a Memorandum of Understanding, which was approved by the EU at the summit in Malta. After the agreement with Libya has been finalized, Italy initiated to transfer border control actions and SAR operations to the Libyan Coast Guard. In 2017, the Libyan Government of National Accord was not capable of providing the required equipment and organizational capacity in order to perform SAR operations. The Libyan Coast Guard was lacking sufficient vessels for SAR activities, as well as a Maritime Rescue Coordination Center. Aiming to fill this gap Italy supported the Libyan Coast Guard financially, provided them with patrol vessels, and provided training. The Italian MRCC started to give information about vessels in distress with the Libyan Coast Guard. NGOs were required to wait before executing SAR activities in order to let the Libyan Coast Guard to perform its tasks efficiently. Records from NGOs involved in SAR in the Central Mediterranean Sea have issued serious objections to the Libyan Coast Guard's activities in the course of SAR operations. There were reports of the Libyan Coast Guard coming close to the migrant vessels and shooting into the air, which led to panic among the migrants on board, amounting to migrants jumping into the sea.¹⁵

It is already well documented that the Libyan Coast Guard, after having intercepted the migrants in distress, handed over the survivors back to the detention centres where they are facing grave ill-treatment, violence and exploitation.¹⁶

¹⁴ Regulation (EU) 2019/1896 of the European Parliament and the Council on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295/1, Art 10

¹⁵ Diego Zambiasi, Emanuele Albarosa, 'Externalizing rescue operations at sea: The migration deal between Italy and Libya' (2025) Vol. 25 (1), Journal of Economic Geography, 41

¹⁶ International Rescue Committee <<https://www.rescue.org/uk/press-release/number-migrants-and-refugees-intercepted-sea-and-brought-back-libya-reach-all-time>> accessed 13th September 2025

1.4. NGOs

In the context of global governance and humanitarian intervention, service-oriented non-governmental organizations (NGOs) represent a critical component of civil society. This domain encompasses organized efforts that exist outside the framework of public and private institutions. Unlike state-based structures characterized by compulsory citizenship, civil society is defined by voluntary association, wherein individuals gather around shared interests, values, or needs to pursue collective objectives. When these associations assume formal or semi-formal organizational structures, they frequently manifest as NGOs.

Service-oriented NGOs, in particular, have assumed an increasingly prominent role in responding to societal needs left unmet by the state. Operating as essential “safety nets,” these organizations frequently intervene in contexts where governments are politically incapacitated, economically constrained, or unwilling to fulfill their obligations. Moreover, they respond to global challenges that transcend traditional conceptions of state sovereignty and responsibility.¹⁷

Humanitarian aid and support for migrants can manifest in various ways, including sea rescues, legal aid, advocacy efforts, and the provision of essential items such as food, warm clothing, housing, sanitation, and emergency medical care.¹⁸

On the 3rd of October 2013 a boat of migrants shipwrecked in front of the Island of Lampedusa, Italy, leading to the death of more than 360 individuals. This tragedy deeply moved the governmental institutions as well as civil society. This tragic event marked a shift in awareness within the government and civil society. The response of the Italian government was the launch of the operation *Mare Nostrum* in October 2013, considered to be both a humanitarian and a military operation. It was composed of the Italian Navy, Air Force, Coast Guard and various police units. The intention of this operation was to search and rescue persons in distress as well as to prosecute smugglers.

Mare Nostrum's operational area initially ranged to Libyan territorial waters. The costs were covered mostly by the Italian state budget. Although Frontex was already present in the Mediterranean Sea at that time, there was no cooperation between *Mare Nostrum* and Frontex

¹⁷ Michael Yaziji and Jonathan Doh, ‘Understanding NGO’ in *NGOs and Corporations: Conflict and Collaboration* (Cambridge University Press) 3,9

¹⁸ Council of Europe, ‘Using criminal law to restrict the work of Ngos supporting Refugees and other Migrants in Council of Europe Member States, Thematic Study prepared by Dr Carla Ferstman on behalf of the Expert Council on NGO Law of the Conference of INGOs of the Council of Europe’, CONF/EXP (2019) 1, para 18

itself. During their operations in the Mediterranean Sea, *Mare Nostrum* saved 150.000 people and brought them safely to Italian shores. Due to the lack of financial support of the EU and due to the pressure exerted by other EU Member States accusing the operation to act as a “pull factor” facilitating illegal entry in the European Union, *Mare Nostrum* ended on 31st of October 2014. As a consequence, *Mare Nostrum* has been relieved by the operation Triton, a border-control focused mission, not a humanitarian rescue mission, under the lead of Frontex launched on 1st of November 2014.¹⁹

These circumstances triggered the urge of civil society to intervene and attempt to fill the gap in search and rescue activities. A gap, which emerged from the termination of state led search and rescue operations.

1.5. Interview: “We cannot allow people die at sea while we are watching”

The aim of the interview with Alessandro Montanari is to get direct insights of experiences of search and rescue operations in the Mediterranean Sea. The intention is to learn about the personal motivation of an individual who had put his life at risk in order to save migrants' lives.

Alessandro Montanari, who operated from Rescue Craft Pilot to SAR Team Leader, has been engaged in search and rescue operations since 2018, following an extensive career as a specialist on research vessels worldwide. During his search and rescue work in the Mediterranean Sea he has directly contributed to bringing more than 2,700 individuals to safety.

Interviewer: Thank you very much for your time. I really appreciate it. I am writing my Master's thesis about the pushback practice in the Mediterranean Sea and the criminalization of search and rescue operations conducted by NGOs. I would like to ask you primarily about your personal motivation and your experiences during the search and rescue operations.

Interviewee: You are welcome. It is nice to meet you.

Interviewer: How long did you work for search and rescue NGOs and for which NGO did you work?

¹⁹ Bernd Kasperek, ‘Was war Mare Nostrum?: Dokumentation einer Debatte um die italienische Marineoperation’ (2015) movements. Journal für kritische Migrations- und Grenzregimeforschung 1 <<https://movements-journal.org/issues/01.grenzregime/11.kasperek--mare-nostrum-debatte.pdf>> accessed 12th of November 2024

Interviewee: I worked about five years there. I started in 2018 with SOS Méditerranée. This is a French organization. When I just started, we were actively working together with warships and ships of the Italian Coast Guard. We were working together and sharing information. We were actually operating together. And a few times we also had the help of a chopper, a military helicopter, which was helping us in monitoring the situation while we were performing the rescue. That was the environment, the framework of collaboration and working together. This was in the year 2018. With Salvini at the government, the Five Stars Movement, which was supposed to be liberal, the voice of the people, everything changed.

Interviewer: What motivated you to work for a SAR NGO?

Interviewee: I probably would say by my education, I would say at first I was educated that if someone needs help, you need to provide help. The sense of duty and responsibility first. Since I was young, I grew up by the sea. I was racing for the local association with sailing boats. I was also part of the assistance for the sailors if they were in trouble, we were just [intercepting] with another sailboat. I was jumping out and helping [the crew] governing the boat back. I grew up with the understanding that the sea is unforgiving. My career moved on and I became a skipper. Every seafarer has in his blood, to give help to someone who is stranded at sea. It is a verse you can write in any convention that you like, but it's a moral duty that we have, because we know what it means.

Interviewer: What gave you strength during the SAR operations?

Interviewee: Probably the people themselves. The search was actually the most horrible part of it. Because when you know they are there, but if you don't see them. We might pass by with no sights and they will die. So, in that phase, I was having a mantra. My mantra was: "if you're there, we'll see you." It's something that is trained in seamanship. You can see them [a spot] then, if you just lose it for a moment, it's very hard to spot them again, if 10 minutes passes since you lost sight, it's already too late because you will not see them anymore. Their force... When you take their hands, when they regain their strength and realize that they are alive, then you will see the energy of people that realize that they have a second life. Actually here [in the sea] they died and then you will see the strength of a new born soul.

Interviewer: How many crew members assist in a SAR operation?

Interviewee: The number of the crew members depended on the operating NGO and ship. Generally, at least two rescue boat drivers, two boat leaders, one rescuer, one rescue swimmer, one medical doctor, two nurses, two cultural mediators, deck leader, one reporter.

Interviewer: Did you also talk to the people you had rescued?

Interviewee: Yes, we had a special relation with them and especially me because I was the one who was just putting the hand in front of their face to stop them or taking their hands to bring them on board. I was just literally pulling them over myself to take them out. So between us [rescuers] and the rescued person there was a special bond of trust. They were asking me questions, we were talking, and keeping some distance, we were also “mingling” together.

I was listening to the stories that people wanted to tell. You are there, you listen, you never ask. Once during my first rescue I asked. It was a guy who just came to me and said “I also know how to drive a boat”. I said “Do you? Oh, cool.” He said, “Yes, you know, I’m a fisherman.” And I looked at him and said, “What? You’re a fisherman? But how come? Then how did you manage to jump on this boat in these waters, you knew that it was going to sink! What did you have in mind?.” He changed his face and he told me, “Yes I knew. But I preferred to die at sea rather than to stay in the detention camp [in Libya] to be beaten and tortured.” Then I realized, shut up. Don’t ask, don’t be the white guy who assumes he understands everything.

Interviewer: Which experiences did you have with Frontex?

Interviewee: We had very low interaction. They were not talking with us. But I faced representatives from the Coast Guard, and police inspectors. Frontex was visible ashore. I think they were monitoring from ashore, trying to find out who were the actual drivers of these boats.

Interviewer: Were you once subject to criminal charges?

Interviewer: Me, no never. But we have been stopped and disrupted like not being able to step out of the ship for a few days just as retaliation. Just with the excuse of customs and sanitation. [On these retaliations] we can find any solution, from the best to the worst, but we cannot allow people to die at sea while we are watching. That is not an issue that has to be discussed at sea. It has to be discussed ashore. We need to discuss it in the proper places, in the proper chambers, not at sea.

Interviewer: How did the experiences during these five years change your life today?

Interviewee: Drastically. I see the importance of life. I also came out quite damaged because it didn't do good for my head. But it also opened my eyes. I was saying, and I keep saying, once you save one life, you will not be the same. One is enough and it will change you. And then you really see that there are different problems. The approach you take, the situation of life, changes. Sometimes you also get inspired from these people. They're willing to not give up and carry on. The richness in the diversity of culture we have. We live in a society with a complete misunderstanding of the priorities and the values of things. It makes you an outsider. I will never forget those faces.

1.6. Emergence of Pushbacks

In the recent years, pushbacks have evolved into a crucial, although unofficial, component of the migration policies of EU Member States and other states worldwide. The term “pushback” initially referred to incidents that occurred along the EU borders of Hungary and Croatia with Serbia in 2016, following the closure of the Balkan route. Pushbacks have since become a symbol of border externalisation, spanning from the Greek-Turkish border all the way to the Slovenian-Italian-Austrian frontier.²⁰

There is no international legal definition of the notion “pushback”.²¹ The UN Special Rapporteur on the human rights of migrants Felipe González Morales defines pushbacks as “various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.”²²

The Border Violence Monitoring Network, an independent network that denounces pushbacks, human rights infringements and types of violence against human beings on the

²⁰ BVMN <<https://borderviolence.eu/about/understanding-pushbacks/>> accessed 4th of November 2024

²¹ European Parliament, ‘Addressing pushbacks at the EU's external borders’ (2022) <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI\(2022\)738191_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/738191/EPRS_BRI(2022)738191_EN.pdf)> accessed 4th January 2025

²² Special Rapporteur on the human rights of migrants, ‘Report on means to address the human rights impact of pushbacks of migrants on land and at sea’, A/HRC/47/30, 12 May 2021, para 34

move inside European borders, defines pushbacks as “the informal cross-border expulsion (without due process) of individuals or groups to another country.”²³

These practices reflect a systematic refusal by states to uphold their international obligations to protect human rights to refugees and migrants at border crossing. Pushbacks are a violation of migrants' fundamental rights by denying them access to protections guaranteed under both international and national laws, along with essential procedural safeguards. The practice involves actions aimed to prevent migrants from entering a state's territory or jurisdiction, denying disembarking, restricting ongoing movement, or to forcibly removing them from the country's borders.

These practices are carried out by various state entities, including regular and border law enforcement, specialized units, and military and security personnel. Additionally, these practices often involve collaboration with non-state actors, such as unidentified paramilitaries, commercial vessel operators, private security staff, and others, who operate with the state's permission, support, or tolerance.²⁴

In the following, two case scenarios have been chosen to illustrate the reality of pushback practices in the Mediterranean Sea.

1.6.1. Pushbacks in Greek Waters

On 14th of September 2024, in Greek waters, off the coast of Samos, a group of about 25 people, comprising minors and men, between 10 and 40 years old, coming from Syria and Palestine, were pushed back from Greece to Turkey by five or six Hellenic Coast Guard Officers.

The witness, who wanted to remain anonymous, stated that when the group spotted the grey vessel they expected that they would receive assistance from them. According to the respondent, the group departed from Turkey at around 2 a.m. on the night of 14th of September 2024. They reported being at sea for around six hours, reaching Greek waters by 8:00 a.m. The respondent estimated that the group was about 10 to 15 minutes away from reaching the Greek shore when a large grey vessel, operated by the Hellenic Coast Guard, approached them.

²³ BVMN <<https://borderviolence.eu/about/understanding-pushbacks/>> accessed 4th of November 2024

²⁴ Special Rapporteur on the human rights of migrants, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea', A/HRC/47/30, 12 May 2021, paras 36 and 37

The interviewee reported that the five or six men on the grey vessel wore blue uniforms with a Greek flag on the t-shirt and wearing masks that hid their faces, leaving merely their eyes visible. While shouting at the group, the men held machine guns in their hands. The five or six men took the group members onto the grey boat and forced them to sit on one side of the vessel while they were searched individually. They ordered people to act fast and threatened them with beatings if they did not act according to their orders. They took the money and phones from the group and took them inside the cabin of the vessel. Some members of the group faced physical violence as they were not acting fast enough because they did not understand the English instructions expressed by the Coast Guards. The motor of the group's boat was thrown into the sea by the men and the men forced the group to get back on their little boat. After the group was forced back onto their boat and were pushed into Turkish waters, the men from the grey vessel allegedly tossed phones and some individuals' bags into the sea while shouting at them to witness what was being done with their belongings. The group was spotted by the Turkish Coast Guards, who brought them to the Turkish shore. Despite the deportation of some of the group members back to Syria, the respondent managed to reach Samos in his second try.²⁵

On 24th of August 2020, Greek waters near to Kos, a group of 18 persons, comprising of men and minors, aged between 3 and 50, coming from Palestine, Syria, DR Kongo, and Somalia, were pushed back from Greek waters to Turkish waters by three or four men wearing black clothes with balaclavas.

A group of 18 persons, amongst them three children, departed from Bodrum at 2.30 a.m. towards the Greek island of Kos. Right after reaching the Greek waters, quite a big ship, described as “war ship” without a flag or label, which had been waiting in the dark, with three officers, came closer to the group. The respondent said that there had been two other tinier boats with Greek flag, but none of them communicated with the group. The masked individuals ordered them to halt and attempted to puncture their dinghy using an object that the respondent referred to as a long stick with a knife attached to it. They also tried to strike the group with it, but the driver was able to escape. Each member of the group insisted on going back to Turkey, so they made the drive back. The respondent stated that he fully understood the consequences of failing to escape, explaining that their belongings would have been confiscated, they would have been beaten, and ultimately they would have been returned

²⁵ BVMN, ‘Testimonies: When they first saw the grey vessel they expected they would approach to help the group’ <<https://borderviolence.eu/testimonies/september-14-2024-greek-waters-off-shores-of-samos/>> accessed 25th of January 2025

to Turkey. The responded stated “we did not want to put our children through all that so to protect them, we preferred to return directly. The ship chased us until we had returned to Turkish waters.”²⁶

1.6.2. Italy – Libya Cooperation in Maritime Interception

Starting in 2016, EU Member States and its institutions increased cooperation with Libya in order to guarantee that refugees and migrants are intercepted at sea by the Libyan Coast Guards and disembarked in Libya. Since 2016 over 60 thousand persons have been disembarked in Libya. In Libya, migrants and refugees are subjected to arbitrary detention, torture, forced disappearances, sexual abuse, exploitation and human trafficking. Italy and EU institutions have supplied Libyan maritime officials with a minimum of 16 speedboats and trained at least 477 personnel, primarily through the EU naval operation EUNAVFOR MED Sophia. Italy has also sent personnel and ships to Libya to help coordinate maritime operations and has backed the Government of National Accord in establishing a Libyan search and rescue zone. As a result, EU countries have increasingly relied on Libyan authorities to handle distress calls, fully aware that these authorities would direct private vessels to head to Libya.

In different cases, private vessels under the Italian flag brought migrants and refugees, which they had rescued at sea before, to Libya. On 30th of July 2018, the commercial ship Asso Ventotto disembarked 101 individuals it had saved in international waters in Libya, following an order from the Libyan Coast Guard.²⁷

1.6.3. OLAF Investigation into Frontex

The involvement of Pushback Practices have not been limited to EU Member States. OLAF findings that Frontex itself has been directly implicated. While participating in or conducting search and rescue operations is not among Frontex’ core interests, in practice, the Agency has been confronted with serious allegations of human rights violations during its operations in the Mediterranean Sea.

This reality is illustrated by the following report:

²⁶ BVMN, ‘Testimonies: We did not want to put our children through all that so to protect them, we preferred to return directly. The ship chased us until we had returned to Turkish waters.’ <<https://borderviolence.eu/testimonies/august-24-2020-0230-greek-waters-off-of-kos/>> accessed 26th January 2025

²⁷ Amnesty International, ‘Europe: Pushback Practices and their impact on the human rights of migrants and refugees’ <<https://www.amnesty.org/ar/wp-content/uploads/2021/05/IOR4036692021ENGLISH.pdf>> accessed 31st of January 2025

In 2020 the European Anti-Fraud Office, hereinafter OLAF, seated in Brussels, initiated an investigation against Frontex after having received information by post concerning potential inconsistencies. The issued report of 200 pages is still considered to be classified. However, a redacted version was leaked and published by two news magazines “Der Spiegel”, “Lighthouse Reports” and the website “Frag den Staat”.²⁸

The report revealed, among other claims, potential observations of unlawful pushbacks by assets utilized by Frontex, possible wrongdoing by the Agency, encompassing potential participation in and/or concealment of unlawful pushback practices and removal of the FRO of Frontex from the reporting hierarchy.

OLAF concluded that the claims against the accused individuals are substantiated. The accused hindered Frontex’ ability to completely fulfil its obligations, specifically in observing the adherence to fundamental rights in its operations at the external borders and in safeguarding and respecting fundamental rights as outlined in the CFREU.²⁹

The report revealed that the FRO was excluded from the examination of incidents with possible human rights infringements. An effective monitoring of compatibility with fundamental rights was therefore not given.

The report from OLAF disclosed that incidents with potential fundamental rights infringements were not correctly categorized by Frontex in order to prevent the involvement of the FRO, who would have been assigned to collect information on the facts and to conclude on findings.³⁰ On scene, the relocation of aerial assets was ordered to circumvent witnessing situations with possible fundamental rights violations.³¹ The investigation report contains a quote from a high-ranking officer stating “*We have withdrawn our FSA [Frontex Surveillance Aircraft] some time ago, so not to witness (...) the withdrawing of aerial surveillance served the purpose for FRONTEX to avoid witnessing incidents and alleged pushbacks by Greece, so avoiding to have to deal internally at the Agency with sensitive cases.*”³²

The report describes a variety of situations including Frontex activities related to possible infringements of fundamental rights. The report revealed that during the night between 18th

²⁸ Carlos Hanimann und Lukas Häuptli, “Vorwürfe bewiesen“: Was im geheimen Frontex Bericht steht (2022) REPUBLIK <<https://www.republik.ch/2022/10/13/vorwuerfe-bewiesen-was-im-geheimen-frontex-bericht-steht>> accessed 30th November 2024

²⁹ OLAF, CASE No OC/2021/0451/A1, 1-4

³⁰ OLAF, CASE No OC/2021/0451/A1, 18

³¹ OLAF, CASE No OC/2021/0451/A1, 3

³² OLAF, CASE No OC/2021/0451/A1, 31

and 19th of April 2020, Frontex surveillance aircraft observed an operation of the Hellenic Coast Guard taking migrants on board in order to subsequently deliberately transfer them back to their rubber boat and tow it back to Turkish territorial waters. The rubber boat was left drift with no power. Despite the fact that the staff of Frontex was well aware of the incident it did not classify it correctly. The incident was not reported as a Serious Incident to not be scrutinized by the FRO.³³

In light of the findings of OLAF, it can be concluded that Frontex has, at times, prioritised concealing unlawful pushbacks over fulfilling its search and rescue responsibilities. While the Agency's mandate encompasses both maritime border protection and the safeguarding of lives at sea, it appears to struggle in consistently upholding human rights and adhering to international legal obligations. These revelations raise serious concerns regarding the integrity and accountability of the Agency in the execution of its mandate.

³³ OLAF, CASE No OC/2021/0451/A1, 20-23

2. Legal framework of SAR at sea

The legal foundation of SAR at sea is mainly governed by three significant international conventions that have been widely approved by the international community.³⁴ Each one of them explicitly sets out the obligation to assist individuals in distress at sea. The obligation is also part of well-established customary law.³⁵

Despite the considerable influence of general international law on the international law of the sea, the latter has remained relatively insulated from developments in international human rights law. This disconnect has contributed to the isolation of key aspects of maritime law from broader humanitarian concerns.³⁶

Although states have the authority to establish rules on migration at sea, this does not exempt states from the essential obligation to assist individuals in distress at sea.³⁷

2.1. International Maritime Organization, SOLAS Convention and SAR Convention

This section briefly presents the regulatory frameworks of the SOLAS Convention and the SAR Convention, both developed under the auspices of the International Maritime Organization, hereinafter IMO.

The SOLAS Convention was adopted in 1974 and entered into force in 1980. The initial version of the SOLAS Convention was implemented in 1914 as a reaction to the Titanic tragedy.³⁸ The IMO adopted a new version of the SOLAS Convention in 1960.³⁹ While all of the EU Member States are parties to the SOLAS Convention, the EU itself did not accede to it.⁴⁰

³⁴ Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein, Brian Opeskin, 'Securization of search and rescue at sea: The response to boat migration in the Mediterranean and offshore Australia' (2018) Vol.67 (2) British Institute of International and Comparative Law

³⁵ Richard Barnes, 'The International Law Of The Sea And Migration Control' in *Extraterritorial Immigration Control* (Vol.21, 2010) 134

³⁶ Richard Barnes, 'The International Law Of The Sea And Migration Control' in *Extraterritorial Immigration Control* (Vol.21, 2010) 134

³⁷ Richard Barnes, 'The International Law Of The Sea And Migration Control' in *Extraterritorial Immigration Control* (Vol.21, 2010) 134

³⁸ International Maritime Organization, SOLAS: History of SOLAS

<<https://www.imo.org/en/KnowledgeCentre/ConferencesMeetings/Pages/SOLAS.aspx>> accessed 9th January 2025

³⁹ International Maritime Organization, Brief History of IMO

<<https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>> accessed 9th January 2025

⁴⁰ See status of the International Convention for the Safety of Life at Sea,

<<https://treaties.un.org/pages/showDetails.aspx?objid=08000002800ec37f>> accessed 8th January 2025

The SOLAS Convention is considered to be the most significant international treaty dealing with the safety of merchant shipping. It encompasses a broad number of topics, including construction standards, operational rules, and security protocols. Particularly, it addresses the responsibilities related to navigation safety and rescue obligations.⁴¹

The SOLAS Convention is subject to the IMO's tacit amendment procedure, which allows for more efficient regulatory changes regarding vessels in distress. This streamlined process enables amendments to be adopted through IMO committees without the need for lengthy negotiations and ratifications of new protocols, making treaty development faster and more efficient. A number of important provisions concerning the treatment of rescued persons have been revised through the simplified tacit amendment process.⁴²

The obligation to assist a person in distress at sea is declared in regulation 10a of the SOLAS Convention which reads that "the master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assistance of the persons in distress."⁴³

The International Convention on Maritime Search and Rescue was adopted by the IMO in 1979 and entered into force in 1985.⁴⁴ Its significance as a cornerstone in regulating international search and rescue obligations at sea lies in the fact that, prior to the adoption of the SAR Convention, no comprehensive international framework existed to govern search and rescue operations—beyond the SOLAS Convention and longstanding maritime tradition, which established the principle of providing assistance to vessels in distress.

⁴¹ Richard Barnes, 'The International Law Of The Sea And Migration Control' in *Extraterritorial Immigration Control* (Vol.21, 2010) 134

⁴² Richard Barnes, 'The International Law Of The Sea And Migration Control' in *Extraterritorial Immigration Control* (Vol.21, 2010) 138

⁴³ International Convention for the Safety of Life at Sea 1974, opened for signature 1 November 1974, (1974) 1184 UNTS 2, Regulation 10

⁴⁴ IMO, 'International Convention on Maritime Search and Rescue'
<[https://www.imo.org/en/about/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-\(SAR\).aspx](https://www.imo.org/en/about/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx)> accessed 9th January 2025

After the SAR Convention was adopted, the IMO's Maritime Safety Committee divided the global ocean into search and rescue areas, defined as SAR regions (SRR). The relevant state has to establish coordination and responsibility for search and rescue cases in the SRR.⁴⁵

Among the important articles of this convention the following ones are worth mentioning to provide an overview of this document. Art 2.1.1 of the SAR Convention obliges Member States to implement adequate infrastructures in order to provide search and rescue capability for persons in distress at sea in their coast. States that have accepted SAR responsibilities must proactively use all suitable resources to help anyone who is, or may be, in danger at sea according to Art 2.1.9. The obligation for states to ensure that assistance to any person in distress at sea, regardless of the nationality or status of such a person or the circumstances in which that person is found, is set out in Art 2.1.10.⁴⁶ Finally, the annex chapter 1 1.3.2. of the SAR Convention declare the main definition of rescue as “operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety.”⁴⁷

Besides, the binding obligation of the SAR Convention ruling that rescued persons shall be delivered to a “place of safety”, the term of “place of safety” is not precisely outlined in the SAR Convention.⁴⁸ In order to fill this gap the IMO released Guidelines on the Treatment of Persons Rescued at Sea in 2004. The Guidelines provide a definition of the “place of safety”. “A place of safety (as referred to in the Annex to the 1979 SAR Convention, paragraph 1.3.2) is a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.”⁴⁹ It is important to note that the Guidelines refer expressly to asylum seekers when stating that “The need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.”⁵⁰

⁴⁵ IMO, ‘International Convention on Maritime Search and Rescue’

<[https://www.imo.org/en/about/conventions/pages/international-convention-on-maritime-search-and-rescue-\(sar\).aspx](https://www.imo.org/en/about/conventions/pages/international-convention-on-maritime-search-and-rescue-(sar).aspx)> accessed 3th August 2025

⁴⁶ International Convention on Maritime Search and Rescue, 27 April 1979, 1405 UNTS 97, Annex Chapter 2

⁴⁷ SAR Convention Annex, para 1.3.2.

⁴⁸ Martin Ratcovich, ‘The Concept of ‘Place of Safety’: Yet Another SelfContained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?’ in *Australian Year Book of International Law* (2015) Vol. 33, p 82; see also Violeta Moreno-Lax, ‘Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligation Accuring at Sea’ (2011) Vol. 23 *International Journal of Refugee Law* 174

⁴⁹ IMO, Resolution MSC.167 (78) Guidelines on the Treatment of Persons Rescued at Sea, 6.12

⁵⁰ IMO, Resolution MSC.167 (78) Guidelines on the Treatment of Persons Rescued at Sea, 6.17

2.2. UNCLOS

The UNCLOS was adopted by the UN General Assembly in 1982 and entered into force in 1994.⁵¹ All EU Member States as well as the EU itself are party to the UNCLOS.⁵² Regarding the obligation to assist individuals in distress at sea, the EU has not issued any statement indicating that the responsibility outlined in Art 98 of UNCLOS has been transferred to the EU by its Member States. Subsequently, all EU Member States, but not the EU itself, are required to provide help to individuals in distress at sea under the UNLOS.⁵³

Art 98 1. a and b of the UNCLOS read that “every State shall require the master of a ship flying its flag... to render assistance to any person found at sea in danger of being lost; to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;... Art 98 2. every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose.”⁵⁴

People “in danger” or “distress” are the recipients of Art 98. The regulation requires “to render assistance” and “to rescue”. However, the lack of a precise definition of these words allows space for debate, especially regarding the question of when a rescue operation is needed and when it is finalized. The obligation of Art 98 is not absolute as the master of a ship has not more to do than “reasonably be expected”.⁵⁵ Therefore, if the ship is too distant to provide help, insufficiently equipped, or if other vessels are more accessible for assistance, the captain may not be obligated to offer aid. The provisions of the UNCLOS entail rather broad principles without references to search and rescue operations, therefore the UNLCOS has to be applied alongside additional legal instruments that address specific subjects such as

⁵¹ See United Nations Treaty Collection

<https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en> accessed 9th January 2025

⁵² See the status of the UNCLOS

<https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en> accessed 8th January 2025

⁵³ Roberta Mungianu, *Frontex and Non-Refoulement: The international Responsibility of the EU* (1st ed, Cambridge: Cambridge University Press, 2016), 193

⁵⁴ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), Art 98

⁵⁵ Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein, Brian Opeskin, ‘Securization of search and rescue at sea: The response to boat migration in the Mediterranean and offshore Australia’ (2018) Vol.67 (2) British

rescue responsibilities and migration control at sea, notably the SOLAS Convention and the SAR Convention.⁵⁶

2.3. Relevance of the place of safety in relation with the principle of *non-refoulement*

The UNHCR understands “a place of safety” as the “next port of call.”⁵⁷ In relation to refugee protection and the principle of non-refoulement, it is essential to interpret the concept of a “place of safety” as defined by the SAR in alignment with the stipulations of refugee law. A place can only be considered “safe” when the principle of non-refoulement is ensured.⁵⁸

In the light of EU’s legal framework, the European Parliament and the Council established in the Maritime Surveillance Regulation proceedings for disembarkation after rescues or interception of vessels. Disembarkation should generally take place in the coastal Member State.⁵⁹ In case rescue or interception on the high sea, the disembarkation should take place “[...] in the third country from which the vessel is assumed to have departed”.⁶⁰

The MSR underscores the protection of fundamental rights and the principle of non-refoulement in its Art 4 and specifically highlights the responsibility of the Member State to “take in account” the general situation of the country of disembarkation.⁶¹ The MSR also relates to the definition of the “place of safety” from IMO’s Guidelines in its document.⁶²

Once a Member State has to decide the place of disembarkation, bearing in mind the requirements of “place of safety” set out in 6.12. of the Guidelines on the Treatment of Persons Rescued at Sea of IMO, “a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met”⁶³, the legal term of the principle of non-refoulement emerges.

The principle of non-refoulement, embodied in various legal documents, is part of international human rights, refugee, and customary law. The principle of non-refoulement is fundamental to the protection of asylum seekers, as it aims to ensure that refugees should not

⁵⁶ Richard Barnes, ‘The International Law Of The Sea And Migration Control’ in *Extraterritorial Immigration Control* (Vol.21, 2010) 134

⁵⁷ UNHCR, Conclusions adopted by the Executive Committee on the International Protection of Refugees (2009) No. 23 (XXXII), para 3

⁵⁸ Andreas Fischer-Lescano, Tillmann Löhr and Timo Tohidipur, ‘Border Controls at Sea: Requirements under International Human Rights and Refugee Law’(2009) Vol.21 International journal of refugee law 256

⁵⁹ MSR, Art 10(1)(a)

⁶⁰ MSR, Art 10(1)(b)

⁶¹ MSR, Art 4

⁶² MSR, Art 10(1)(c)

⁶³ IMO, Resolution MSC.167 (78) Guidelines on the Treatment of Persons Rescued at Sea, 6.12

be returned to a country they face a real risk of persecution, torture, or other serious human rights violations. The principle addresses the need of refugees to seek safety in the host country.⁶⁴ It is important to note that the principle of non-refoulement encompasses the safeguarding of asylum-seekers during instances of non-admission as well as refusal at the border.⁶⁵

The principle is applicable to everyone, regardless of their nationality, statelessness, or migration condition. It is enforced wherever a State has jurisdiction or effective control, even if this occurs outside the territory of the respective State.⁶⁶

In international human rights law the principle of non-refoulement is ensured in the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁷, the International Covenant on Civil and Political Rights⁶⁸, as well as in the International Convention for the Protection of All Persons from Enforced Disappearance⁶⁹. In European law it is included in primary law, in the CFREU⁷⁰, TFEU⁷¹, as well as in European secondary law.

The principle of non-refoulement is an important element of the 1951 Refugee Convention included in Art 33, which reads that “no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁷² Art 33 imposes a duty on states to refrain from deporting individuals or specific groups within their territory to a country when there are significant reasons to believe that the person concerned would be in danger of irreversible damage upon

⁶⁴ Seline Trevisanut, ‘The Principle of Non-Refoulement at Sea and the effectiveness of Asylum Protection’ (2008) Max Planck Yearbook of United Nations Law, 206

⁶⁵ UNHCR Executive Committee, ‘Conclusions on International Protection No. 22 (XXXII): Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981)

⁶⁶ Office of the United Nations High Commissioner for Human Rights, ‘The Principle of Non-Refoulement Under International Human Rights Law’ (2018)

<<https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>> accessed on 4th January 2025 and Roberta Mungianu, *Frontex and Non-Refoulement: The international Responsibility of the EU* (1st ed, Cambridge: Cambridge University Press, 2016) 95

⁶⁷ International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNGA Res 39/46, 1465 UNTS 85, Art 3

⁶⁸ International Covenant on Civil and Political Rights (1966) 999 UNTS 171, Art 7

⁶⁹ International Convention for the Protection of All Persons from Enforced Disappearance (2006) UNTS vol. 2716, Art 16

⁷⁰ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Art 19(2)

⁷¹ Treaty on the Functioning of the European Union (TFEU) [2012] OJ C326/47, Art 78

⁷² Convention Relating to the Status of Refugees (1951) 189 UNTS 137, Art 33

return, encompassing persecution, torture, ill-treatment or other grave human rights infringements. It is applicable to recognised refugees as well as to refugees seeking asylum.⁷³

In the ECHR the principle of non-refoulement is enshrined in Art 3. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”⁷⁴ The ECtHR has interpreted, in various cases, Art 3 ECHR as a prohibition against removing persons if there is a possibility of danger of torture or inhuman or degrading treatment or punishment.

In the cases of, inter alia, *Ahmed vs Austria*, *Ilias and Ahmed vs Hungary* and *Saadi vs Italy* the Court found that deportation, extradition or any other action to return a foreign national could potentially raise concerns under Art 3 ECHR, if there are substantial grounds to believe that the respective individual would encounter a genuine risk of being victim of treatment according to Art 3 ECHR in the destination country. Under these conditions, Art 3 ECHR entails a duty to refrain from deporting the person to that nation.⁷⁵ Therefore, the ECtHR has interpreted Art 3 ECHR, for these cases, as the prohibition of non-refoulement.

The case of *Hirsi Jamaa and Others vs Italy* is an important case in connection with interception at sea. The applicants, originating from Somalia and Eritrea, were among a group of approximately 200 migrants, who were stopped by the coastguard of the respondent state while on the high sea, specifically within the search and rescue zone of a third state party. The applicants were summarily sent back to Libya based on an agreement made between Italy and Libya, without being given a chance to request asylum. The ECtHR reiterated that the applicants' failure to request asylum or explain the dangers they encountered due to the absence of an asylum system in Libya did not relieve the respondent state of its responsibilities under Art 3 ECHR.⁷⁶

Similarly, the ECtHR has found a violation of the principle of non-refoulement according to Art 3 ECHR in a large amount of cases occurring at land and sea borders, inter alia, in *Ilias and Ahmed vs Hungary*, *M.K. and Others vs Poland*, *D.A. and Others vs Poland*, *O.M. and*

⁷³ Office of the United Nations High Commissioner for Human Rights, 'The Principle of Non-Refoulement Under International Human Rights Law' (2018) <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf> accessed on 4th January 2025 and Roberta Mungianu, *Frontex and Non-Refoulement: The international Responsibility of the EU* (1st ed, Cambridge: Cambridge University Press, 2016) 95

⁷⁴ European Convention on Human Rights (ECHR), opened for signature 4 November 1950, ETS No 5, Art 3

⁷⁵ *Ahmed vs Austria* App no 25964/1994 (ECtHR, 17 December 1996), para 39; *Ilias and Ahmed vs Hungary* App no 47287/15 (ECtHR, 21 November 2019), para 126; *Saadi vs Italy* App no 37201/06 (ECtHR, 28 February 2008), para 125

⁷⁶ *Hirsi Jamaa and Others vs Italy*, para 158 and Council of Europe/ECtHR, Guide on the case law of the European Convention on Human Rights (Immigration) (2024)

*D.S. vs Ukraine, S.S. and Others vs Hungary, Sherov and Others vs Poland, Sharifi and Others vs Italy and Greece, M.A. and Others vs Lithuania, Saadi vs Italy and Ahmed vs Austria.*⁷⁷

Therefore, the application of the principle of non-refoulement in the context of disembarkation to third countries must be considered in light of human rights deficiencies in the respective State. Due to its geographical features and the actual migration routes Libya plays a crucial role as a relevant example in the context of disembarkations to third countries.

When a coastal or flag State engages in SAR operations within the Libyan Search and Rescue Region (SRR), whether autonomously or in cooperation with the Libyan authorities, the decision concerning the disembarkation of rescued individuals triggers non-refoulement obligations as there are substantial grounds that returning the persons to Libya would expose them to treatment contravening the principle of non-refoulement.

According to the Amnesty International Report April 2024, Libya remains a country marked by widespread violations of human rights, and persistent instability, where fundamental rights and protections are neither guaranteed nor upheld. Security forces, armed groups, militias, and non-state entities conduct extensive and organized human rights breaches and abuses against refugees and migrants without facing any consequences.⁷⁸ Pursuant to IOM, in 2024, 1810 migrants died⁷⁹, and went missing at sea near the Libyan coast. A total of 15057 individuals were stopped in the Mediterranean Sea and were sent back to Libya by coastguards supported by the EU in western Libya.⁸⁰

The ECtHR had acknowledged its decision in the case of *Hirsi Jamaa vs Italy* that Libya is not a “place of safety” as it ruled that returning migrants back to Libya amounts to a breach of Art 3 ECHR. The Court determined that returning migrants to Libya would have exposed them to arbitrary detention and ill-treatment.

⁷⁷ *Ilias and Ahmed vs Hungary*, para 164; *M.K. and Others vs Poland* App nos 40503/17 and 42902/17 and 43643/17 (ECtHR, 23 July 2020), para 186; *D.A. and Others vs Poland* App no 51246/17 (ECtHR, 22 November 2021), para 70; *O.M. and D.S. vs Ukraine* App no 18603/12 (ECtHR, 15 December 2022), para 100; *S.S. and Others vs Hungary* App nos 56417/19 and 44245/20 (ECtHR, 12 January 2024), para 70; *Sherov and Others vs Poland* App nos 54029/17 and 3 others (ECtHR, 4 July 2024), para 51; *Sharifi and Others vs Italy and Greece* App no 16643/09 (ECtHR, 21 January 2015), para 181; *Hirsi Jamaa and Others vs Italy*, para 158; *M.A. and Others vs Lithuania* App no 59793/17 (ECtHR, 11 March 2019), para 115; *Saadi vs Italy*, para 149; *Ahmed vs Austria*, para 47

⁷⁸ Amnesty International, ‘Amnesty International Report April 2024 – The State of the World’s Human Rights’, 244

⁷⁹ IOM, ‘Missing Migrants Project’ <<https://missingmigrants.iom.int/region/mediterranean>> accessed 3rd August 2025

⁸⁰ Amnesty International, ‘Amnesty International Report April 2024 – The State of the World’s Human Rights’, 244

In practice, current EU coordination with Libya, particularly when operational decisions taken by EU Member States or agencies like Frontex facilitate or result in returns to unsafe territory raises significant concerns regarding the obligation to uphold the principle of non-refoulement.

Given the well-documented human rights violations and lack of adequate protection mechanisms, Libya cannot be considered a “place of safety” according to the IMO Guidelines. Consequently, any disembarkation of rescued persons in Libya may constitute a breach of the applicable legal frameworks and undermines the fundamental principles governing maritime search and rescue operations, in particular the principle of non-refoulement.

2.4. Extraterritorial application of the ECHR, *Case of S.S. and Others vs Italy*

On 6th of November 2017, Italian Maritime Rescue Coordination Center relayed a distress call from a sinking boat on the high seas off the Libyan coast to the Libyan Coast Guard, which intercepted the vessel and brought the applicants back to Libya. Italy argued its conduct was consistent with the SAR Convention. The applicants claimed before the ECtHR that the Libyan Coast Guard’s intervention, creating water turbulence, caused 20 deaths and that Italy violated Art 3 ECHR by enabling their return to Libya and exposing them to serious human rights risks.⁸¹

After seven years of court proceedings, the ECtHR issued its decision on 20th of May 2025, concerning the case of *S.S. and Others vs Italy*. The Court found the application inadmissible, ruling that Italy had not exercised extraterritorial jurisdiction under Art 1 of the ECHR towards the applicants.⁸²

Given that the legal matter of extraterritorial application of the ECHR is central to the Court’s decision, it will shortly be analysed before resorting to the ruling itself. In case the allegedly unlawful conducts occur on the high sea, an area outside states’ territory is concerned. This evoked the legal matter of the extraterritorial application of the ECHR.

The ECHR itself does not explicitly tackle the issue of extraterritoriality. In general, the application of the ECHR is prescribed by Art 1 ECHR, which states that “the High

⁸¹ *S.S. and Others vs Italy*, App no 21660/18 (ECtHR, 25 May 2025) paras 3-17

⁸² *S.S. and Others vs Italy*, App no 21660/18 (ECtHR, 25 May 2025) para 114

Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”⁸³

However, the ECtHR has long served as a crucial platform for addressing extraterritoriality, due to the broad language in the ECHR regarding its territorial applicability, and also due to the large volume of cases submitted to it, many of which implies allegations of infringements related to the Convention's extraterritorial application. These elements prompted the ECtHR to address issues of extraterritorial application more often than other human rights oversight institutions, resulting in the creation of comprehensive legal jurisprudence on the subject.⁸⁴

A state’s jurisdiction beyond its own borders can mainly be determined through one of the two case scenarios: firstly, based on the power or control that is exerted over the individual; secondly, based on the control that is genuinely exerted over the concerned foreign territory.

When the ECtHR determines that the facts of the case fall under the “jurisdiction” of a state, the state has two primary responsibilities: a negative obligation to abstain from activities not in line with the Convention and a positive obligation to ensure the protection of the rights enshrined in the Convention.⁸⁵

In the case *Loizidou vs Turkey*, the ECtHR dealt with the extraterritorial application of the ECHR and hold that “the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory.”⁸⁶ As a result of this judgment, the ECHR applies to territory occupied by state parties and over which they exercise effective control.⁸⁷ The term effective control over an area has been broadened by the Court to encompass circumstances where power does not reach the level of “effective control”, including “decisive influence.”⁸⁸ The notion was utilized by the Court in relation to a contracting state's control of a vessel—irrespective of whether it was flying its own flag⁸⁹ or a foreign ship that it had intercepted.⁹⁰

⁸³ European Convention on Human Rights (ECHR), opened for signature 4 November 1950, ETS No 5, Art 1

⁸⁴ Y. Shany, *The Extraterritorial Application of International Human Rights Law* (Leiden; : Boston : BRILL, 2020)

⁸⁵ Council of Europe/ECtHR, Guide on Article 1 ECHR (Obligation to respect human rights – Concepts of “jurisdiction” and imputability) (2024)

⁸⁶ *Loizidou vs Turkey* App no 15318/89 (ECtHR, 18 December 1996), para 52

⁸⁷ Y. Shany, *The Extraterritorial Application of International Human Rights Law* (Leiden; : Boston : BRILL, 2020)

⁸⁸ Y. Shany, *The Extraterritorial Application of International Human Rights Law* (Leiden; : Boston : BRILL, 2020); *Ilaşcu vs Moldova* App no 48787/99 (ECtHR, 8 July 2004), para 392

⁸⁹ Y. Shany, *The Extraterritorial Application of International Human Rights Law* (Leiden; : Boston : BRILL, 2020); *Hirsi Jamaa vs Italy* App no 27765/09 (ECtHR 23 February 2012), para 81-82

The case of *Hirsi Jamaa vs Italy* plays a crucial role in connection with the extraterritorial application of the ECHR. In its judgement the Court found that the incidents taking place on the high sea occurred completely on vessels of the Italian military and the crews consisted solely of Italian military personnel. In the Court's opinion, during the time from when the applicants boarded the vessels of the Italian armed forces until they were passed over to the Libyan authorities, they were consistently and solely under the de jure and de facto control of the Italian forces. The Court concluded that the incidents that amounted to the claimed infringements fall under the jurisdiction of Italy according to Art 1 ECHR.⁹¹ Thus, an extraterritorial application was affirmed.

In the case of *S.S. and Others vs Italy* the Court took a different approach in its findings. The Court declined extraterritorial jurisdiction, arguing that Italy did not exercise such effective control. It reasoned that the maritime area where the interception occurred was not under effective control of Italy. The assistance Italy gave to Libyan authorities under bilateral agreements did not amount to a situation where Libyan authorities were effectively dependent so that the area could be considered under Italy's effective control.⁹²

The judgement has been subject to criticism by legal scholars. They maintain that Italy, through the Memorandum of Understanding with Libya, supplied financial resources and operational assets such as patrol vessels, training, and technical assistance. In their view, these contributions amounted to the exercise of 'decisive influence' over the Libyan Coast Guard. The support provided by Italy profoundly affected the pushback operations, increasing interventions of the Libyan Coast Guard from just 800 operations in 2015 to 19,452 in 2017 alone. This sharp increase reflects the bilateral agreement's direct and immediate impact on pushback operation.⁹³

In the case *Hirsi Jamaa vs Italy* the Italian Coast Guard was directly involved in the pushback activities, embarking migrants onto Italian vessels before handing them over to the Libyan coastguard and thereby exercising effective control over them. On the contrary, in the case *S.S. and Other vs Italy*, Italy was not directly involved in the activities and was not in direct contact with the migrants on the vessel. Even though there was no direct involvement in the incidents by Italy, serious considerations have to be put on the relevance of the bilateral

⁹⁰ Y. Shany, *The Extraterritorial Application of International Human Rights Law* (Leiden; : Boston : BRILL, 2020); *Medvedyev vs France* App no 3394/03 (ECtHR 29 March 2010) para 66-67

⁹¹ *Hirsi Jamaa vs Italy* App no 27765/09 (ECtHR 23 February 2012), para 81-82

⁹² *S.S. and Others vs Italy*, App no 21660/18 (ECtHR, 25 May 2025) para 97

⁹³ Malak Harb, 'Externalising Migration Control' <<https://verfassungsblog.de/externalising-migration-control/>> accessed 16th September 2025

agreement between Italy and Libya. Firstly, by providing financial and operational support to Libya, it can be argued that Italy is exerting decisive influence in the rescue operations, thereby establishing extraterritorial jurisdiction. Secondly, by financing and assisting Libya, EU Member States delegate rescue operations aimed to return migrants to Libya. In doing so, they expose individuals to the risk of ill-treatment and violence and thereby violate the principle of non-refoulement under Article 3 ECHR.

By declining the extraterritorial jurisdiction in the case *S.S. and Other vs Italy* the ECtHR acknowledged and accepted the externalisation of migration control that lay within the EU Member States.

3. NGOs and Criminalization in SAR Operations

NGOs in Search and Rescue operations in the Mediterranean have become controversial in EU migration governance. NGOs have played an important role in Search and Rescue operations in the Mediterranean, particularly where state-led efforts have been reduced or ceased. Their presence has contributed to saving thousands of lives at sea, but has also generated extensive political and legal debate within the European Union.

Central to this framework is the “Facilitators Package,” which establishes the legal basis for prosecuting the facilitation of unauthorized entry, transit, or residence. While intended to target smuggling networks, its wording and its national application enables the criminalization of humanitarian assistance based on its provisions.

Understanding this tension requires an analysis of both the intentions of SAR NGOs at sea and the evolving EU legal framework. In this chapter, the focus will therefore shift to the interaction between humanitarian engagement, criminalization efforts, and the legal instruments underpinning the EU approach.

3.1. SAR NGOs

Among the first to take action, the organization Migrant Offshore Aid Station launched the ship named Phoenix in August 2014. In the following years, numerous civil society organizations have mobilized several rescue vessels and reconnaissance aircrafts, primarily in the Central Mediterranean.⁹⁴ This interference of NGOs in the SAR operations had led to a series of verbal attacks, legal undermining, and discrediting of NGOs involved in such operations, by EU interior ministers and high representatives of Frontex. The activities of humanitarian volunteers are regarded as anti-social and a “pull factor” that encourages migration.⁹⁵

These days many NGOs in the context of SAR in the Mediterranean Sea have been brought to public attention. The most known are: Open Arms, SOS Méditerranée, Médecin Sans Frontière and Sea-Watch among many other associations equipped with smaller vessels or seasonal operatively in smaller budgets.

⁹⁴ European Union Agency for Fundamental Rights, ‘Search and Rescue Operations and Fundamental Rights’ (2024) <<https://fra.europa.eu/en/publication/2024/june-2024-update-ngo-ships-sar-activities?page=2#read-online>> accessed 18th January 2025

⁹⁵ Liz Fekete, Frances Webber, Anya Edmond-Pettitt, ‘Humanitarianism: the unacceptable face of solidarity’ (2017) Institute of Race Relations, p 2

In this wide spectrum of NGOs, in the following section a slight focus will be laid on Sea-Watch's activity as an example of the actual context in the Mediterranean Sea analysis. Sea-Watch, founded in the end of 2014, is a Germany-based NGO whose guiding principle reads as follows "We are committed to a world free from borders, racism, injustice, and inequality. We envision a place where all people can live and move freely and safely, exercising self-determination. In our view, solidarity without borders implies helping all human beings in their combat for this vision."⁹⁶ The organization, financed by donations, is committed to rescue individuals and to fill the gap in the safety grid in the Mediterranean Sea. Sea-Watch actively advocates for legal pathways for refugees and demands to the responsible European Member States to take action in line with human rights obligations.⁹⁷

3.2. The EU "Facilitators Package": Legal foundations and intention

The origin of the EU "Facilitators Package" roots in the Tampere Programme 1999. This Programme is known as a special summit in Tampere, where the European Council gathered with the aim of the establishment of a region of freedom, security and justice in the EU.

The Presidency Conclusion of the Tampere Programme stressed the need to combat illegal immigration, especially by fighting those who are involved in trafficking in human beings and economic exploitation of migrants. The document calls for the introduction of legislation entailing severe measures against this grave offense.⁹⁸

The EU "Facilitators Package" is a document established as a Directive. A EU Directive is a legislative act determining an objective that EU Member States have to accomplish. However, the EU Member States stay in charge of the realization of its implementation.⁹⁹ The EU "Facilitators Package", consisting of the Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA, has been adopted by the EU in 2002. It establishes the

⁹⁶ Sea Watch, 'Über uns' <https://sea-watch.org/ueber-uns/?utm_source=GoogleAds&utm_medium=Sitelink&utm_campaign=Sitelink&utm_content=UeberUns&gad_source=1&gclid=EAIaIQobChMIu6O-6GMiwMV852DBx1xMw8fEAAYASACEgIXDPD_BwE> accessed 23rd January 2025

⁹⁷ Sea Watch, 'Über uns' <https://sea-watch.org/ueber-uns/?utm_source=GoogleAds&utm_medium=Sitelink&utm_campaign=Sitelink&utm_content=UeberUns&gad_source=1&gclid=EAIaIQobChMIu6O-6GMiwMV852DBx1xMw8fEAAYASACEgIXDPD_BwE> accessed 23rd January 2025

⁹⁸ European Council, Tampere European Council 15 and 16 October 1999 Presidency Conclusion, <https://www.europarl.europa.eu/summits/tam_en.htm#d> accessed 26th July 2025

⁹⁹ European Union, Types of legislation <https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en> accessed 27th July 2025

legal structure in order to describe the offence of unauthorized entry, transit and residence in the territory of the EU and providing the penal measures.¹⁰⁰

The Preambles of the Council Directive outline that one of the main goals of the EU is the establishment of a region of freedom, security and justice. This implies that illegal immigration must be eliminated.¹⁰¹ Steps must be taken to fight the aiding of illegal immigration both in relation to illegal border crossings and to systems that exploit human beings.¹⁰² In order to reach this defined goal, the EU “Facilitators Package” aims to provide a clear definition of the infringement to be addressed, cases of exemptions and regulations for penalties, liability of legal persons and jurisdiction.¹⁰³

As shown in the provisions of the EU “Facilitators Package” the EU document explicitly intends to combat illegal immigration as well as smuggling. It aims to deter and dismantle profit-driven smuggling networks that exploit migrants. The legal document does not encompass any provisions indicating the intention of criminalizing humanitarian assistance. However, acts of humanitarian assistance are still subject to prosecution by the national authorities of the EU Member States. Under Art 1(2) of the Council Directive, each Member State retains the discretion to refrain from imposing sanctions where the conduct defined in paragraph 1(a) is intended to provide humanitarian assistance, but the provision does not oblige them to do so.¹⁰⁴

3.2.1. Council Directive 2002/90/EC

In the following sub-chapter the first of the two documents part of the EU “Facilitators Package”, the Council Directive 2002/90/EC, will be examined.

The general infringement is stated in Art 1 (1.) of the Council Directive. It stipulates that “each Member State shall adopt appropriate sanctions on: (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of

¹⁰⁰ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹⁰¹ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Preamble 1

¹⁰² Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Preamble 2

¹⁰³ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Preamble 3

¹⁰⁴ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Art 1 (2)

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.”¹⁰⁵

The facilitation of irregular migration can encompass several different forms, including: physically moving or controlling the transport of individuals who are not entitled to enter or pass through a country where they are not citizens; creating and/or supplying counterfeit documents; organizing marriages of convenience.¹⁰⁶

The Council Directive 2002/90/EC also provides an opportunity for EU Member States to exclude humanitarian help from being criminalized.¹⁰⁷ Art 1 (2.) sets out the provision underscoring that “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.”¹⁰⁸ Art 2 obliges every EU Member State to implement the necessary actions to guarantee that the sanctions mentioned in Article 1 also apply to anyone who: instigates, assists in, or attempts to carry out an offense as outlined in Article 1(1)(a) or (b).¹⁰⁹

Only eight out of 27 EU Member States provide in their national laws an exclusion from criminalisation for facilitating unauthorized entry and/or transit aiming to offer humanitarian aid. A review of the laws in these EU Member States shows diverse national interpretations of the Directive. While all these states have transposed the Directive into domestic law, their approaches vary considerably based on legal traditions and political contexts:

Belgium and Spain have almost replicated the wording from the Directive regarding the inclusion of humanitarian aid as a justification for non-criminalisation.

Croatia provides specific exclusions for facilitating entry to protect lives, avoid injuries, deliver emergency medical care, and offer humanitarian support in line with specific laws.

¹⁰⁵ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Art 1

¹⁰⁶ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹⁰⁷ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹⁰⁸ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Art 1 (2.)

¹⁰⁹ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17, Art 2

The national law of Greece provides that captains of ships and aircrafts, along with drivers of any type of transportation, are not held criminally responsible for aiding individuals in distress at sea or for transporting those who are urging for international protection, in line with international law.

Italy implemented a general clause that does not classify as criminal the actions intended for: protecting those engaged in the activity from suffering significant harm; providing assistance and/or humanitarian aid to foreigners in Italy.

Finland considers an individual's humanitarian motivation, along with the safety conditions that the foreigner faces in their country of origin or place of permanent residence.

In France, family members and individuals offering legal, linguistic, or social help, as well as any form of assistance purely for humanitarian reasons, are not subject to criminal charges in connection with transit or residence. However, this exemption does not apply to the assistance of facilitating entry.¹¹⁰

In 2018, the French Constitutional Court ruled in its decision n° 2018-717/718 QPC that the act of assistance for humanitarian reasons comes from the constitutional principle of fraternity, irrespective of the individual's legal standing.¹¹¹

The legislation of Malta provides that criminal charges are exempted if a person aids someone in imminent danger in landing or passing through its territory with the intention of humanitarian help.¹¹²

Despite the implementation of these exemptions for humanitarian assistance in the national laws of the aforementioned states, criminalization of humanitarian aid still takes place.¹¹³ Legal measures enforced on NGOs and individuals in the EU will be briefly presented in chapter 3.4.

¹¹⁰ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹¹¹ French Constitutional Court, n° 2018-717/718 QPC (2018)

¹¹² European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹¹³ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

3.2.2. Council Framework Decision 2002/946/JHA

The present sub-chapter is dedicated to the second and last of the two documents part of the EU “Facilitators Package”, the Council Framework Decision 2002/946/JH.

The Council Framework Decision 2002/946/JHA mainly outlines the measures and penalties for the offence of facilitation of unauthorized entry, transit and residence. Art 1 (1.) of the Council Framework Decision determines that “each Member State shall take the measures necessary to ensure that the infringements defined in Art 1 and 2 of Directive 2002/90/EC are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition.”¹¹⁴

Criminal penalties may consist of seizure of the vehicle utilized in the execution of the crime, a ban on engaging in the occupational activity in which the offense occurred, and deportation. The provisions foresee a deprivation of liberty with a maximum sentence of not less than eight years in cases involving financial gain where infringements are committed in an “activity of a criminal organisation” or putting the lives of the individuals involved in the offense at risk.¹¹⁵ Each Member State must carry out the necessary steps to assert its jurisdiction over the violations mentioned in Art 1 (1.) that occur entirely or partially within its borders, perpetrated by one of its nationals or for the advantage of a legal entity based in that Member State.¹¹⁶

It is worth highlighting Art 6, which refers to international law of refugees, stating that the framework decision must be implemented without compromising the protections provided to refugees and asylum seekers under international refugee law or other human rights instruments.¹¹⁷

The provisions of the EU “Facilitators Package” resulted in discussions and urged the need for clarity. Members from civil society organizations emphasized that a broad definition of the offense creates ambiguity and undermines legal certainty, increasing the risk of criminalizing humanitarian aid provided by organizations or individuals helping irregular

¹¹⁴ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1, Art 1

¹¹⁵ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1, Art 1

¹¹⁶ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1, Art 4

¹¹⁷ Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1, Art 6

migrants. In their opinion, Member States did not express a need to refine the definition of the offense nor to establish an obligatory exemption from criminalization.¹¹⁸

3.3. UN Contribution

In the period following the European Council's Tampere summit, the United Nations also initiated efforts to address irregular migration. The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, was adopted by the UN General Assembly in 2000, and entered into force in 2004, supplementing the United Nations Transnational Crime Convention (UNTOC). The EU and all EU Member States, except Ireland, are party to the UNTOC and to the UN Protocol against the Smuggling of Migrants by Land, Sea and Air.¹¹⁹ It is considered to be the initial international document to establish a definition of migrant smuggling.¹²⁰

The purpose of the UN Protocol "[...]is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants."¹²¹ According to the UN document "'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."¹²²

The provision of the UNTOC and the UN Protocol against the Smuggling of Migrants by Land, Sea and Air do not aim to target migrants and refugees themselves or individuals who assist in their illegal entry for reasons other than financial or material gain. The aim of the crime of smuggling migrants according to Art 3 (a) of the UN Protocol is "financial or other material benefit", meaning financial advantage. The drafters incorporated this aspect to encompass the actions of organized crime groups motivated by profit, while they aimed to

¹¹⁸ European Commission, 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA', 2023/0439 (COD)

¹¹⁹ See status of the UNTOC <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=XVIII-12&chapter=18&clang=en> and see status of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=XVIII-12-b&chapter=18> accessed 15th January 2025

¹²⁰ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹²¹ United Nations, 'Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime' (2000), Art 2

¹²² United Nations, 'Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime' (2000), Art 3a

exclude the actions of those who aid migrants for humanitarian purposes or because of strong family connections. Due to the high importance of the aspect of “financial or other material benefit” in the notion of “smuggling of migrants” in international law, this aspect was included in the purpose of the smuggling of migrants offence pursuant to Art 3 of the UN Protocol as well as in Art 6 of the UN Protocol being a condition for its criminalization and as a component of the definition of organized crime group according to Art 2 UNTOC.¹²³

The facilitation offence as provided in Art 1 (1) of the Council Directive 2002/90/EC is wider than in Art 3 (a) of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air due to the fact that in the Council’s Directive a financial benefit is not a mandatory requirement of the offence of facilitation of irregular entry, transit or residence.¹²⁴

3.4. Distinguishing Smuggling from Humanitarian Assistance

This subchapter aims to offer a clear distinction between the act of smuggling and the act of humanitarian assistance.

In recent years NGOs and their crew members in SAR operations have been accused of smuggling migrants. Therefore, it becomes of great importance to highlight the difference between the act of smuggling migrants and the act of providing humanitarian assistance for migrants.

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, provides a definition of the term “Smuggling of migrants”. It “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...”¹²⁵

Humanitarian assistance in the context of SAR operations intends to provide assistance to migrants in distress at sea and bring them to a place of safety according to the IOM Guidelines, without any material benefit or any other reward.

The most apparent and important distinction between the act of smuggling and the act of humanitarian assistance lies in the material or financial advantage. While smuggling of migrants requires a material or financial benefit, humanitarian assistance deliberately excludes

¹²³ UNODC, ‘Understanding the Smuggling of Migrants Protocol’ (2021), p 8

¹²⁴ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

¹²⁵ United Nations, ‘Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime’ (2000), Art 3a

the profit-driven element. Furthermore, humanitarian assistance in SAR context is focusing on saving people's lives at sea and ensuring their disembarkation in a place of safety. In contrast, the aim of smuggling of migrants is to facilitate the illegal entry of an individual into a state where the individual is not a national or holds a residence permit.

3.5. Legal measures against NGOs

In 2021 the Commissioner for Human Rights of the Council of Europe emphasized that there is an alarming trend of criminalizing individuals who rescue lives at sea.¹²⁶ The Independent Expert on human rights and international solidarity of the UN Human Rights Council also underscores in his report about human rights and solidarity the repression and criminalization of human rights-based international solidarity in a number of states globally.¹²⁷

In 2019, the Independent Expert on human rights and international solidarity of the UN Human Rights Council stressed that numerous recognized international human rights law standards either prohibit or significantly limit the criminalization of humanitarian aid for irregular migrants and refugees, as well as other oppressive measures that states have used to suppress private humanitarian assistance to these individuals. He underscores that the criminalization or restriction of humanitarian aid for irregular migrants and refugees notably and unjustly violates human rights. The criminalization of these actions is unlawful according to international human rights documents. The Independent Expert urges all states to take essential actions needed to eliminate the criminalization and repression of individuals providing humanitarian aid and demonstrating solidarity with irregular migrants and refugees. Furthermore, he calls on the EU to revise its Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit, and residence and make the optional humanitarian clause according to Art 1 (2.) obligatory for all EU Member States.¹²⁸

In this regard, “criminalization” means designating the act of offering humanitarian or other forms of aid as a specific offense within national law, or imposing criminal penalties on

¹²⁶ Council of Europe, ‘A distress call for human rights The widening gap in migrant protection in the Mediterranean’ (2021), p 22

¹²⁷ HRC, Report of the Independent Expert on human rights and international solidarity, ‘Human rights and international solidarity’, A/HRC41/44, para 5

¹²⁸ HRC, Report of the Independent Expert on human rights and international solidarity, ‘Human rights and international solidarity’, A/HRC41/44, paras 32, 48 and 50 (a) and (c). Detailed explanations on Art 1 (2.) of the Council Directive 2002/90/EC will be made in chapter 4.1.2.

persons who offer such assistance under different legal grounds. This form of criminalization represents a global issue with significant prevalence across EU Member States.¹²⁹

The criminalization of humanitarian assistance not only negatively affects those who offer aid, but it also diminishes the rights of the migrants themselves. It dispossesses them of essential help, and can exacerbate their marginalization, raise the likelihood of exploitation, and obstruct their ability to seek justice.¹³⁰

In a joint statement UNHCR, UN agencies and other humanitarian organizations urge for a humanitarian approach in situations of distress at sea in compliance with the principles of solidarity and international law of the sea. The statement emphasizes that individuals or entities fulfilling the duty to render assistance must not be subjected to criminal charges.¹³¹

Following a decrease in their humanitarian activities at sea, states have started to discourage search and rescue missions conducted by NGOs that are intended to help migrants in danger. The law of the sea governs the duty of ship captains to assist individuals in distress at sea. However, it does not enshrine protection to the captains and crew of NGOs due to the absence of relevant rules. Therefore, shipmasters are not protected from legal scrutiny and from criminal charges for their actions under maritime law.¹³²

Studies have revealed that there has been an increase in the criminalization of humanitarian assistance by NGOs since 2015 in the EU. The study identified 60 cases of investigation and prosecution, primarily related to entry facilitation, across 10 Member States from 2015 to 2019, with the highest number of cases occurring in 2018. The cases primarily involve volunteers, human rights advocates, team members from boats engaged in maritime search and rescue operations, as well as family members, journalists, mayors, and religious communities.¹³³

¹²⁹ International Commission of Jurists, 'Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU' (2022), p 2

¹³⁰ International Commission of Jurists, 'Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU' (2022), 3

¹³¹ UNHCR et al. 'Distress at Sea: A Call for a Humanitarian and Precautionary Approach' (2024)

¹³² European Journal of Migration and Law, 'Rights at Sea: State Interference with Activists' Search and Rescue Operations', 81

¹³³ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

In the last years, several administrative proceedings have been launched in the EU, and they have comparable chilling effects that weaken support for migrants.¹³⁴ Since 2017, a total of 81 administrative or criminal cases have been launched by Germany, Italy, Malta, the Netherlands, and Spain, impacting search and rescue operations conducted by civil society organizations. Most of the cases concerned measures against SAR vessels, whereas one in five cases pertains to legal actions against NGO personnel operating the vessels or the crew members.¹³⁵

In the following a few examples of legal proceedings against NGOs and individuals initiated by EU State Members in the context of human smuggling and illegal immigration will be presented.

In January 2016, Kamal-Aldeen, a co-initiator of the humanitarian group Team Humanity and the owner of a rescue ship, along with four other volunteers, was detained in Lesvos in Greece for saving the lives of 51 migrants. They were accused of attempting to smuggle humans, which is punishable by a prison sentence of up to 15 years. In the end they were found not guilty of aiding irregular migrants at sea, but Kamal-Aldeen was required to post a bail of €10,000 and report once a week to the police, while the other volunteers had a bail set at €5,000. Their pre-trial conditions prevented them from exiting Greece, and after their acquittal, they were still not allowed to re-enter Greek territory.¹³⁶

Seán Binder, a volunteer involved in search and rescue operations for the humanitarian organization Emergency Response Centre International, was apprehended in Lesvos in August 2018 and remained in pre-trial custody for 106 days. He faced multiple charges, including involvement in a criminal organization, aiding illegal entry, violating state secrets, possessing an unlicensed radio, money laundering, espionage, and forgery.¹³⁷ While the criminal charge of espionage has dropped by the Greek court in 2023, the decision regarding

¹³⁴ International Commission of Jurists, 'Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU' (2022), 3-4

¹³⁵ European Union Agency for Fundamental Rights, 'Search and Rescue Operations and Fundamental Rights' (2024) <<https://fra.europa.eu/en/publication/2024/june-2024-update-ngo-ships-sar-activities?page=2#read-online>> accessed 18th January 2025

¹³⁶ Ibid 229, 4

¹³⁷ Info migrants, 'Charged with saving migrants' lives – rescuers facing criminal prosecution' <<https://www.infomigrants.net/fr/post/46298/charged-with-saving-migrants-lives--rescuers-facing-criminal-prosecution>> accessed 18th January 2025

the criminal charge of people smuggling, fraud and membership of a criminal organisation is still pending.¹³⁸

On the 12th of June 2019, the rescue boat “Sea-Watch 3” from the German search and rescue organization Sea Watch, under the leadership of the German captain Carola Rackete, rescued 53 individuals in distress at sea in international waters in the Mediterranean Sea, 35 nautical miles off the Libyan coast. Carola Rackete refused to take the rescued people back to Libya and instead, after having spent 16 days on the sea, disembarked the rescued people on the island of Lampedusa, Italy, in the night from June 28th to 29th of June, without having the consent of the Italian authorities. Captain Rackete was immediately detained for aiding illegal immigration, disruption of public order and violent resistance to a warship. On the 2nd of July, 2019, the investigating judge proclaimed the arrest inadmissible, which was upheld by the judges of the Court of Cassation on the 20th of February 2020. The Court of Cassation underlined that Carola Rackete took action in compliance with the duty to rescue individuals in distress at sea coming from the international maritime legal framework. The Tribunal of Agrigento dismissed the case against Carola Rackete in a conclusive ruling in 2021. The Tribunal of Agrigento argued that she took action in line with her obligation due to the fact that Libya cannot be classified as a “place of safety”.¹³⁹

Search and rescue operations at sea can rescue lives and can guarantee that migrants are disembarked in safety. The criminalization of search and rescue activities or of captains, members of search and rescue NGOs, who rescued the lives of persons can amount to an infringement of the principle of non-refoulement.¹⁴⁰ An expanded legal analysis regarding the criminalization of SAR activities in the context of the EU “Facilitators Package” will be given in the following chapter.

¹³⁸ The Guardian, ‘Greek court drops espionage charges against aid workers’ <<https://www.theguardian.com/world/2024/may/01/greek-court-decision-to-drop-charges-against-aid-workers-accused-of-espionage-welcomed>> accedes 28th July 2025

¹³⁹ Sea Watch, ‘Wegen Menschenrettung verklagt’ <<https://swla.eu/de/project/sea-watch-3-seized-lampedusa-carola-rackete-1/>> accessed 18th January 2025. See also International Commission of Jurists, ‘Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU’ (2022), 4-5

¹⁴⁰ International Commission of Jurists, ‘Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU’ (2022), 9

3.6. Analysis of the EU “Facilitators Package” based on the case of Kinsa

In this chapter the Case C-460/23 Kinsa (previously known as the Kinshasa case) before the CJEU will be presented. This case poses a significant challenge to European migration legislation.¹⁴¹

In response to a request for a preliminary ruling from the Tribunal of Bologna, the CJEU was tasked with assessing whether the Facilitators Package, consisting of the Directive 2002/90/EC and the Framework Decision 2002/946/JHA, along with the Italian laws that implement it, aligns with the principle of proportionality stated in Art 52 (1) of CFREU.

The concrete question is as follows: “Does the Charter of Fundamental Rights, in particular the principle of proportionality referred to in Article 52(1), read in conjunction with the right to personal liberty and the right to property referred to in Articles 6 and 17, as well as the rights to life and physical integrity referred to in Articles 2 and 3, the right to asylum referred to in Article 18 and respect for family life referred to in Article 7, preclude the provisions of Directive 2002/90/EC, in so far as they impose on Member States the obligation to provide for penalties of a criminal nature against any person who intentionally facilitates or engages in acts intended to facilitate the unauthorised entry of foreign nationals into the territory of the Union, even where the conduct is carried out on a non-profit-making basis, without providing, at the same time, an obligation on Member States to exclude from criminalisation conduct facilitating unauthorised entry aimed at providing humanitarian assistance to the foreign national?”¹⁴²

The Kinsa case concerns the trial of O.B., a Congolese woman who, in August 2019, arrived at Bologna airport with her 8-year-old daughter and 13-year-old niece. They carried counterfeit passports to travel to Italy in order to lodge an application for international protection. O.B. stayed in arrest for one day. The Congolese woman is charged with aiding the illegal immigration of the two girls and could face a maximum sentence of five years in prison. Italian law makes it illegal to engage in any activity intended to assist an undocumented foreigner in entering the country, regardless of whether the entry takes place. Additionally, the act does not have to be performed for financial gain, as outlined in the Council Directive 2002/90/EC.¹⁴³ As already explained in the chapter 3.2.1. the application of

¹⁴¹ The Kinsa case <<https://www.kinsa-case.eu/>> accessed 19th January 2025

¹⁴² Case C-460/23, Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023, Criminal proceedings against OB (Kinshasa) [OJ] C 338/12

¹⁴³ Stefano Zirulia, ‘Waiting for Kinsa: The Criminalisation of Facilitating Irregular Immigration before the CJEU’, *VerfBlog*, (2024) <<https://verfassungsblog.de/waiting-for-kinsa/>> accessed 19th January 2025

the humanitarian exemption is optional for EU Member States. Thus, the beginning of the criminal procedures was in line with the Council Directive 2002/90/EC.

On 7th of November 2024 the Advocate General from the CJEU, Richard de la Tour, delivered an opinion concerning the Kinsa case. In his view the principle of proportionality of criminal offences and penalties does not prevent the EU legislature from establishing criminalization as outlined in Art 1(1)(a) of Council Directive 2002/90/EC. He believes that there is no factor that undermines the validity of the Council Directive 2002/90/EC regarding the principle of legality in criminal offenses and penalties.¹⁴⁴ In his opinion the Advocate General did not deal with Art 52(1) of the Charter, the proportionality of restrictions with fundamental rights. He focused on the proportionality of penalties pursuant to Art 49(3) and came to the findings that permitting judges to reduce penalties for humanitarian facilitators would be enough to avoid over criminalization.¹⁴⁵

On the 3rd of June 2025 the Grand Chamber of the CJEU issued its final decision and came to the conclusion that the conduct of O.B. does not fall in the scope of application of the general offence of facilitation of unauthorised entry and that Art 1 (1)a of the Council Directive read in the light of Art 7, Art 24 and Art 52 (1) CFREU preclude national legislation criminalizing such conduct.¹⁴⁶

Firstly, the Court declined the scope of application of the general offence of facilitation of unauthorised entry pursuant to Art 1 (1)a of the EU Directive in the present case. By doing so, it was determined that the conduct of O.B. does not amount to an act of facilitation of illegal immigration, which the EU Directive aims to prevent, but rather arises from the individual's own responsibility to take care over the minors.¹⁴⁷

Secondly, the Court argued that the child's right to a family life pursuant to Art 7 CFREU in conjunction with the child's right to protection and care according to Art 24 CFREU has to be in conformity with the best interests of the child. Permitting the punishment of an individual simply for helping minors under their genuine care to enter a Member State unlawfully would compromise the very core of these fundamental rights.

¹⁴⁴ Case C-460/23 *Kinsa*, Opinion of Advocate General Richard De La Tour (2024), paras 74 and 98

¹⁴⁵ Zirulia, Stefano: *The Legacy of Kinsa: Using Proportionality to Limit the Criminalisation of Solidarity*, *VerfBlog*, 2025/6/26, <<https://verfassungsblog.de/kinsa-judgment-proportionality/>> accessed 28th July 2025

¹⁴⁶ C-460/23 [2025], para 74

¹⁴⁷ C-460/23 [2025], para 45

In the Court's opinion criminalizing the act of the Congolese woman would result in a disproportional restriction of the rights to family life and the right of the child. Therefore, the principle of proportionality under Art 52(1) of the Charter would be infringed.¹⁴⁸

With the main elements of the Court's decision now presented, this chapter will conclude with an analysis of its implications and reflections on the reasoning and its legal context.

In the light of the issued decision of the Grand Chamber of the CJEU in June 2025 its legal effect could amount to a ground-breaking change in the facilitation of unauthorised entry, transit and residence in the EU.

The Court would have had different possibilities in the present case to answer the request for a preliminary ruling from the Tribunal of Bologna. It could have declared the EU Directive invalid in its entirety or in parts. It could have given guidance in the application of the EU Directive. Instead of engaging and confronting the legal challenges resulting from the Directive, the Court decided to declare the conduct of O.B. as not in the scope of application of the general offence of facilitation of unauthorised entry.

On the one hand the Court effectively safeguarded the humanitarian conduct from being criminalized by stating that the punishment of an individual simply for helping minors under their care to enter a Member State unlawfully would compromise the very core of the fundamental rights of Art 7 and Art 24 CFREU. On the other hand, the Court avoided challenging EU law by examining thoroughly the document of the EU Directive. Therefore, it is debatable whether the effects of the decision can be considered a turning point in EU's migration legislation.

If the Court would have made a thorough evaluation of the current version of the EU Council Directive and the Framework Decision two important legal elements may have had an important impact in the analysis of the legal document, namely the principle of legality and conformity with international law. Considerations must be given to whether the EU "Facilitators Package" in its current version is in line with the principle of legality and with the obligations under international law.

The principle of legality, set out in Art 49 (1) CFREU, entails that criminal liability must be clearly and unambiguously stated in the law. A criminal norm needs to be defined in clear and exact words and leave no space for uncertainty. Criminal norms need to be foreseeable, in the

¹⁴⁸ C-460/23 [2025], para 48

sense that it must be clear from the outset which behaviour is punishable. Applying the principle of legality to the EU “Facilitators Package”, and more precisely to the definition of the general infringement of Art 1 1. and Art 1 2. Council Directive, raises ambiguities in the application of the EU “Facilitators Package”. The optional nature of Article 1(2) of the Council Directive, which allows Member States to either impose or not to impose sanctions in cases where the conduct aims to provide humanitarian assistance, may conflict with the principle of legality. Such optionality may give rise to a conflict with the principle of legality, as it renders the legal consequences unforeseeable for the individual concerned, who cannot anticipate whether, or to what extent, the competent court will apply the exemption. In order to comply with the principle of legality the wording of the definition of the general infringement and its optional clause should be amended. Therefore, Art 1.2. of the Council Directive could be changed in the following wording, defining the exemption clause for humanitarian assistance as a mandatory provision: “In case of conducts aiming to provide humanitarian assistance, no sanctions are to be made by national authorities of the Member States”.

Secondly, the question arises whether the EU “Facilitators Package” is in line with international law. In its judgment in the joined cases C-14/21 and C-15/21, *Sea Watch vs Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Palermo and Capitaneria di Porto di Porto Empedocle*, the CJEU underlined the requirement that EU law must be interpreted in line with international law, namely the SOLAS Convention and the UNCLOS.¹⁴⁹ Through this determination, the CJEU declared that EU law, including the EU “Facilitators Package”, has to be applied in accordance with international maritime law, which has a significant impact for cases involving ship crew members in SAR operations. An exhaustive thorough analysis of the compliance of the EU “Facilitators Package” with international human rights and maritime law will be given in chapter 4.

Returning to the Kinsa case: although the Court did not expressly challenge the EU Directive, it did show a clear position towards a human rights based approach of handling with the controversial EU “Facilitators Package”. By declining the conduct of O.B. not falling within the scope of Art 1 (1)a of the EU Directive the Court may set a precedent to handle similar cases ahead.

¹⁴⁹ Joint Cases C-14/21 and C-15/21, *Sea Watch vs Ministero delle Infrastrutture e dei Trasporti, Capitaneria di Porto di Palermo and Capitaneria di Porto di Porto Empedocle* (2022) ECLI:EU:C:2022:604; See also Valsamis Mitsilegas, ‘Reforming the ‘Facilitators’ Package’ through the *Kinsa* litigation: Legality, Effectiveness and taking International Law into account’(Eurojus)

In cases involving ship crew members engaged in SAR operations, a national court could reach a similar conclusion. It may determine that the conduct of saving individuals from drowning and disembarking them in EU ports for humanitarian reasons does not constitute facilitation of illegal immigration, and thus falls outside the scope of application of the relevant offence. Additionally, the court could consider that such an interpretation would result in a disproportionate restriction of the right to life under Article 2 CFREU and the right to seek asylum pursuant to Article 18 CFREU.

It is important to note that the Court, in the *Kinsa* case, also affirmed the importance of the right to asylum under Article 18 CFREU, interpreted in conjunction with the Refugee Convention. The judgment clarified that Member States are obliged to comply with these provisions when implementing both Directive 2002/90/EC and Framework Decision 2002/946/JHA. Furthermore, the Court stressed that actions lacking legitimate justification, which serve to deter third-country nationals from seeking international protection, are likely to undermine the effectiveness of the right to asylum enshrined in Article 18 CFREU. In doing so, the Court emphasised the necessity of ensuring an actual and effective possibility to exercise the right to international protection.

In conclusion, the *Kinsa* case marks a starting point into the development in EU jurisprudence, emphasizing a human rights-oriented interpretation of the Facilitators Package. While the CJEU refrained from directly scrutinizing the Directive's validity, it set a precedent that may influence future national and EU-level decisions concerning humanitarian conduct. This judgment highlights the urgent need for legislative reform to ensure the compliance with the principle of legality and the alignment with fundamental rights and international obligations.

4. EU Law and Human Rights, “when law and morality collide”¹⁵⁰

The EU “Facilitators Package”, consisting of the Council Directive 2002/90/EC and the Council Framework Decision 2002/946/JHA, in its current version, raises concerns regarding the conformity with international human rights law as well as with international maritime law. A detailed discussion in order to analyze this topic will be provided in this chapter.

Recalling the considerations outlined in chapter 3.5., the principle of legality may be violated by the provisions of the EU “Facilitators Package”. Applying the principle of legality to the EU “Facilitators Package”, and more precisely to the definition of the general infringement of Art 1 1. and Art 1 2. Council Directive, raises ambiguities in the application of the EU “Facilitators Package”. The optional nature of Article 1(2) of the Council Directive, which allows Member States to either impose or not to impose sanctions in cases where the conduct aims to provide humanitarian assistance, may conflict with the principle of legality. Such optionality may give rise to a conflict with the principle of legality, as it renders the legal consequences unforeseeable for the individual concerned, who cannot anticipate whether, or to what extent, the competent court will apply the exemption.

As demonstrated in chapter 2., outlining the obligations stemming from international maritime law, the global legal provisions explicitly obliges that aid is offered to any individual in distress at sea. SOLAS Convention clearly entails that “The master of a ship at sea...is bound to proceed with all speed to the assistance of the persons in distress [...]”¹⁵¹ The SAR Convention obliges Member States to implement adequate infrastructures in order to provide search and rescue capability for persons in distress at sea in their coast. The provisions entail an obligation for States to ensure that assistance to any person in distress at sea is provided, regardless of the nationality or status of such a person or the circumstances in which that person is found.¹⁵² UNCLOS outlines “Every State shall require the master of a ship flying its flag... to render assistance to any person found at sea in danger of being lost; to proceed with all possible speed to the rescue of persons in distress[...]. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue

¹⁵⁰ Liz Fekete, Frances Webber, Anya Edmond-Pettitt, ‘Humanitarianism: the unacceptable face of solidarity’ (2017) Institute of Race Relations, 7

¹⁵¹ International Convention for the Safety of Life at Sea 1974, opened for signature 1 November 1974, (1974) 1184 UNTS 2, Regulation 10

¹⁵² International Convention on Maritime Search and Rescue, 27 April 1979, 1405 UNTS 97, Annex Chapter 2

service regarding safety on and over the sea [...]”.¹⁵³ These explicit obligations of international maritime law to render assistance to person in distress at sea might have no validity if Art 1 of the Council Directive is being claimed without applying the humanitarian exemption. Crew members of NGOs involved in SAR activities are performing their responsibilities in accordance with the duties of the State under international maritime norms. The punishment of this activity under Art 1 of the Council Directive would result in serious concerns regarding a violation of international maritime law.

Furthermore, the provisions of the EU “Facilitators Package” may contravene international human rights law, namely the CFREU and the corresponding rights of the ECHR.

The norms of the EU “Facilitators Package” create significant barriers for asylum seekers because they criminalize the provision of assistance to irregular migrants, including those fleeing persecution or conflict. This criminalization extends to individuals and organizations offering humanitarian aid such as transportation, shelter, or guidance, regardless of whether their intent is purely humanitarian or profit-driven. Such prosecutorial threats create significant obstacles to delivering essential humanitarian aid. Consequently, these legal provisions indirectly restrict the practical exercise of the right to asylum, since without assistance many asylum seekers cannot physically or legally reach a place where their claims can be lodged and assessed, thereby, potentially violating the right to seek asylum as stipulated in Art 18 CFREU.

Moreover, the Directive’s broad and ambiguous definitions of “facilitation” and the optional nature of exemptions for humanitarian assistance may lead to inconsistent implementation among EU Member States. Some states may apply the criminal sanctions rigorously, even against family members or volunteers, thereby creating legal uncertainty and dissuading essential acts of solidarity. This fragmentation exacerbates the obstacles asylum seekers face in navigating irregular routes, which are often their only option to reach safety.

In addition, the penalization of facilitators under the EU “Facilitators Package” can disrupt family reunifications, especially for refugees and displaced persons seeking to join close relatives after fleeing conflict or persecution. By criminalizing acts that enable family members to enter or remain in EU territory irregularly, the Directive risks infringing the right to family life protected under Art 7 CFREU. This interference with family unity further

¹⁵³ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), Art 98

compounds the humanitarian impact of the Directive, prolonging separation and exacerbating psychological and social harm for asylum seekers.

Furthermore, Art 2 of the CFREU guarantees the right to life as a fundamental human right. The provisions of the EU “Facilitators Package” risk infringing this right when they penalize ship crew members engaged in SAR operations at sea. These crew members, acting under international maritime law obligations such as those outlined in the SOLAS Convention, SAR Convention and UNCLOS, play a critical role in saving the lives of persons in distress.

Criminalizing crew members who assist irregular migrants during SAR operations may lead to delays or refusals to provide assistance, thereby increasing the risk of loss of life at sea. Such penalization runs counter to Art 2 CFREU, which protects individuals’ right to life and obliges states to take appropriate measures to safeguard it. By undermining the operational freedom of ship crews, the provisions of the EU “Facilitators Package” effectively places human lives at risk, contravening the fundamental protections guaranteed by EU law.

The EU’s criminalization framework conflicts with these international duties, creating legal uncertainty and a chilling effect that may hinder timely rescue efforts. This tension highlights a critical human rights concern: the right to life must not be subordinated to restrictive migration control policies that penalize humanitarian conduct. Thus, penalizing SAR ship crew can be seen as an indirect violation of Art 2 CFREU by compromising the protection and preservation of life in life-threatening situations.

The act of criminalizing humanitarian assistance may also not align with Art 52(1) CFREU, which states that any restrictions on the rights granted by the Charter must adhere to the principle of proportionality. Art 52 (1) CFREU reads that “any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”¹⁵⁴

The criminalization of acts of humanitarian assistance may not be proportionate as it is not necessary and doesn’t meet objectives of general interests enshrined by the EU. Search and rescue operations serve the protection of the right to life and freedoms of refugees and migrants. One of the general interests of the EU is to protect life according to Art 2 CFREU

¹⁵⁴ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Art 52 (1)

and to grant international protection to refugees as stipulated in Art 18 CFREU. The EU “Facilitators Package” may fail to achieve a fair balance in the assessment between safeguarding European borders and upholding the fundamental right to life.

The mere facultative option to exclude humanitarian assistance from penalization may contravene the principle of proportionality, as it prioritizes border protection above everything else. Therefore, it may fail to reasonably weigh the competing interests involved. In the present case the competing interests are the restriction of fundamental rights against the achievement of public interests, namely border protection.

Criminalizing humanitarian activities in connection with the facilitation of irregular migration is not necessary for the aim of safeguarding borders, and thus is not in line with the principle of proportionality according to Art 52 CFREU.

The Charter of Fundamental Rights of the European Union has the same rank as EU primary law. Primary law is the highest source of EU law and consists mainly of the founding Treaties of the EU, the TFEU and the TEU. In view of the possible violations of the above mentioned provisions, the EU “Facilitators Package” may be in breach of EU primary law and therefore, make the Council Directive 2002/90/EC and the Council Framework Decision 2002/946/JHA contrary to Union law.

As a consequence, the action of annulment according to Art 263 TFEU can be presented to the Court of Justice of the European Union by EU Member States, the Commission, the European Parliament, the Council, as well as by individuals. With this action of annulment, the claimant seeks to invalidate an act endorsed by a European Union institution, agency, office, or organization. The action of annulment is a legal process initiated at the CJEU. It allows the Court to examine the legality of actions taken by the European institutions, bodies, offices, or organizations. Therefore, the Court can invalidate the act in question if it is deemed inconsistent with EU law. Once a request for annulment is submitted to the Court of Justice, it will evaluate whether the action complies with EU law.¹⁵⁵ It may invalidate the act based on “lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.”¹⁵⁶ In the case at hand the reason to annul the Council Directive 2002/90/EC and the Council Framework

¹⁵⁵ TFEU [2012] OJ C326/47, Art 263; European Union <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0038>> accessed 10th March 2025

¹⁵⁶ TFEU [2012] OJ C326/47, Art 263; European Union <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0038>> accessed 10th March 2025

Decision 2002/946/JHA would be the infringement of the Treaties or of any rule of law relating to their application as the CFREU forms part of the EU primary law.

It has been demonstrated that the EU “Facilitators Package” in its current version may violate provisions of the CFREU. Thus, it may be contrary to EU primary law. As a consequence, an action of annulment according to Art 263 TFEU before the CJEU may be possible in order to invalidate the Council Directive 2002/90/EC and the Council Framework Decision 2002/946/JHA.

The European Commission’s new proposal for a Directive of the European Parliament and of the Council 2023 to revise the EU “Facilitators Package” in order to amend the legislation that has been in place since 2002, was presented in 2023. The European Commission’s new proposal appears not to be a positive development towards an anti-criminalization of solidarity. Although (6) of the recitals stating that “providing help for unauthorized entry, transit, or residence in the European Union should be considered a criminal offense if there is a connection to a real or anticipated financial or material gain”, it continues that that “this behavior should also be made a crime, as it is very likely to inflict severe damage on the third-country nationals affected by the offense or on others, regardless of whether there is any financial gain or promise of such gain involved.”¹⁵⁷ (6) of the recitals of the new proposal explicitly refers to the financial aspect, which is not necessary for an act to be criminalized.

Lastly, the new proposal does not entail the exemption of humanitarian assistance in its definition of a “criminal offence” in Art 3. Admitting the problems concerning the potential criminalization of humanitarian aid, the European Commission conducted the first extensive evaluation of the “EU Facilitators Package” in 2017. The evaluation underscored especially the deficiency of legal certainty. A Resolution on guidelines for Member States to circumvent humanitarian aid from being criminalized was endorsed by the European Parliament in 2018.¹⁵⁸

In the guidelines for EU Member States to circumvent humanitarian help from being criminalized the EU Parliament raises worries about the unintended effects of the Facilitators Package on individuals offering humanitarian aid to migrants. The guidelines underscore that

¹⁵⁷ European Commission, ‘Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA’, 2023/0439 (COD)

¹⁵⁸ European Commission, Communication from the Commission: Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence [2020] OJ C 323/01

according to the UN Protocol Against Smuggling of Migrants by Land, Sea and Air actions of humanitarian aid must not be criminalized. Furthermore, the EU Parliament urges EU Member States to implement the humanitarian assistance exemption outlined in the Facilitation Directive and calls on the Commission to establish instructions for Member States that clarify which types of facilitation should not be subject to criminalization, aiming to promote consistency and precision in the application of the existing legal framework.¹⁵⁹

Considering the new proposal and the guidelines encouraging EU Member States to circumvent humanitarian assistance provided by European institutions, the EU is clearly aware of the lack of precision of the EU “Facilitators Package”, resulting in contradictions in the application in conjunction with international maritime law and international human rights law. This recognition of inherent inconsistencies indicates a growing awareness within EU institutions, which could pave the way for constructive amendments to ensure a more coherent and rights-respecting framework.

4.1. Outlook – A Step Forward

EU migration policies are currently shaped by a tension between political priorities and legal obligations. The increasing emphasis on border security has resulted in fragmented policies, inconsistent application of international law, and the marginalisation of humanitarian Search and Rescue actors.

The EU is facing a pivotal moment in migration governance. On the one hand, the majority of EU Member States is confronted by a significant rise of right wing parties, amounting to the introduction of restrictive legislation on migration. On the other hand, the ongoing climate change with all its consequences will result in an influx of migrants attempting to reach Europe.

The New Pact on migration and asylum, adopted by the Council of the EU in 2024 after four years of negotiations, may serve as an indication of the direction in which the EU is heading. The New Pact enters into force in 2026. The New Pact serves as a plan concerning the reception and integration system for asylum seekers and refugees in order to establish a common asylum system. The pact is built on four main pillars, consisting of secure external

¹⁵⁹ European Parliament, ‘Guidelines for Member States to prevent humanitarian assistance from being criminalised’, resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP)) [2020] OJ C118/21

borders, fast and efficient procedures, effective system of solidarity and responsibility, and embedding migration in international partnerships.¹⁶⁰

The first pillar of the new pact regarding the securitization of external borders is consistent with previous directives. The focal point is to intensify border controls leading to faster proceedings with a maximum duration of 12 weeks for the examination of asylum requests. Asylum seekers must stay near the frontier or in a transit zone until the decision of their asylum application is processed. Main criticism of this new measure is that fast asylum proceedings can amount to higher refusal quotes caused by limited time for a profound assessment of the applications. Furthermore, the fact that asylum seekers having to stay near the frontier or in transit sectors may have a negative impact for a proper integration as the isolation of these zones reduce possibilities for social integration.

The pillar of an effective system of solidarity and responsibility includes measures which require member states to take responsibility for a share of the refugees, with the extent of this obligation being allocated based on each country's economic capacity and population size. In case a member state rejects to accept the quota, the state can choose to allocate resources toward the integration or repatriation of individuals whose asylum claims have been denied. Alternatively, they may offer frontline help through specialized knowledge or practical aid. The new measures have been criticized due to the fact that new rules do not exempt the initial-entry countries from their obligation to handle the influx of asylum seekers, as they continue to be solely responsible for dealing with asylum applications.

The pillar of embedding migration in international partnerships may amount to possible security issues. The procedure intends to progressively engage “safe” third countries into migration management, following the EU's existing partnership. Additionally, it seeks to stop the movement of “irregular” migrants from third countries, support their possible repatriation, and combat the activities of smugglers. In order to reach these goals the collaboration with Frontex will be strengthened. The lack of detailed information in the terms of these procedures are subject to criticism. The New Pact on migration and asylum does not specify the exact steps needed to make cooperation attractive for third countries.¹⁶¹

¹⁶⁰ European Commission, ‘Pact on Migration and Asylum’ <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en#understanding-the-pact-and-its-implementation>accessed 19th September 2025

¹⁶¹ Giuseppe Gambazza, ‘The EU New Pact on Migration and Asylum: policies and discourses for a ‘fresh start’’, (2024) *Space and Polity*, Vol 28, 289

The provisions of the New Pact on Migration and Asylum adopt a strongly externalised approach, effectively limiting the ability of individuals to exercise their right to seek asylum on EU territory, thereby constraining the protection guaranteed under Article 18 of the EUCFR. Furthermore, the new rules compelling asylum seekers to stay near the border or in transit zones waiting for their decisions may put asylum seekers in even worse conditions.

Beside the negotiations on the New Pact on Migration and Asylum, in November 2023, the European Commission published its new proposal for a Facilitation Directive of the European Parliament and of the Council. It stipulates that the intention of the Directive is not to penalize third-country nationals for being smuggled, for helping relatives, or for providing humanitarian aid to third-country nationals, as long as these actions are in line with legal requirements. New provisions were implemented in the new proposal stating that providing help for unauthorized entry, transit, or residence in the European Union should be considered a criminal offense if there is a connection to a real or anticipated financial or material gain. New provisions in recitals were introduced in the proposal, stipulating that assistance with unauthorized entry, transit, or residence in the European Union should be treated as a criminal offense where it is linked to an actual or anticipated financial or material benefit. In addition, such conduct is to be penalized even in the absence of financial gain, insofar as it is deemed likely to cause serious harm either to the third-country nationals concerned or to others. Notably, Art 3 of the new proposal does not entail the exemption of humanitarian assistance, while the Preamble (7) of the new proposal exempts criminalization in case of “assistance among family members or the provision of humanitarian assistance or the support of basic human needs”.¹⁶²

Once again, the EU in its new proposal of the EU “Facilitators Package” missed the chance to address explicit provisions to exempt humanitarian assistance from criminal prosecution. The new proposal introduces minimal changes and fails to make a clear statement on activities aiming to provide humanitarian assistance.

It would be illusionary trying to find ways to decrease migration across the Mediterranean Sea. Instead, the following considerations aim to give proposals to ensure that migration and SAR policies are ethical, legally compliant, and operationally effective:

¹⁶² European Commission, ‘Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA’, 2023/0439 (COD)

To begin with, the EU “Facilitators Package” must be revised to include an explicit humanitarian exemption that protects NGOs, volunteers, and civil society actors from prosecution when assisting persons in need. This would provide a definition to identify clearly the act of smuggling from the act of humanitarian assistance.

Clarity is needed on the definition of “place of safety” for disembarkation. EU legislation must prohibit disembarkation in third countries like Libya, where well-documented risks of torture, arbitrary detention, and human rights abuses exist. This would align EU policy with ECHR jurisprudence, notably *Hirsi Jamaa and Others vs Italy*, where Italy’s practice of returning migrants to Libya was found to violate the principle of non-refoulement.

Two policy innovations merit adoption to complement structural reforms:

Firstly, expanding legal migration pathways through accessible visa regimes for work, study, and humanitarian entry can reduce irregular migration. Expanding complementary legal pathways, such as resettlement, humanitarian admission, and sponsorship programmes, would offer safer alternatives to irregular migration, not only for those in need of international protection but also for individuals with legitimate socio-economic reasons to migrate.

Secondly, establishing NGO involvement in SAR through Standard Operating Procedures with state actors would enhance coordination, information sharing, and the clear assignments of roles without undermining the independence of NGOs. This cooperation could reduce duplication, ensure compliance, and optimise life-saving operations. EU-level shared funding could support NGOs without compromising impartiality or straining national budgets.

Ultimately, security and solidarity must be seen not as opposing aims but as mutually reinforcing pillars of responsible governance.

Conclusion

After presenting the main actors in the Mediterranean Sea in SAR context, the pushback practice and the involvement of the Agency, the main relevant legal maritime documents, the relevance of the “place of safety” in relation with the principle of non-refoulment have been outlined. Finally, in the main part of the thesis’, the author has depicted the paradox of the criminalization of humanitarian assistance in the course of search and rescue operations conducted by NGOs.

The EU “Facilitators Package”, consisting of the Council Directive 2002/90/EC and Council Framework Decision 2002/946/JHA has been thoroughly analyzed. It was concluded that the provision’s mere optional nature of Art 1 (2.) Council Directive 2002/90/EC, excluding criminalization in case of humanitarian help, does not align with the principle of proportionality according to 52(1) CFREU as it prioritizes border protection above everything else.

In the analysis it has been argued that the EU “Facilitators Package” fails to achieve a fair balance assessment between safeguarding European borders and upholding the fundamental right to life. Migrants’ right to life as well as refugees’ right to asylum must never be compromised merely for the sake of border protection. Criminalizing humanitarian activities in connection with the facilitation of irregular migration is not necessary for the aim of safeguarding borders, and thus is not in line with the principle of proportionality.

Furthermore, it has been reasoned that the EU “Facilitators Package” may collide with a range of fundamental rights. The possible criminalization of humanitarian assistance may lead to detention or legal consequences for individuals providing assistance, which may violate the right to liberty and security according to Art 6 CFREU. Furthermore, the provisions of the EU “Facilitators Package” may be a barrier for asylum-seekers as the provisions criminalize assistance to irregular migration. This could deter individuals from providing humanitarian aid or support to those in need, and potentially violates the right to seek asylum as stipulated in Art 18 CFREU. Additionally, the stipulations of the EU “Facilitators Package”, penalizing facilitators, can disrupt family reunifications, particularly for those fleeing conflict or persecution, thereby violating the right to family life as protected under Art 7 CFREU.

As a consequence, consideration should be given to the possibility of amending the EU “Facilitators Package” or pursuing an action for annulment under Article 263 TFEU before the CJEU.

Based on this broad enumeration, it has been demonstrated that the EU “Facilitators Package”, as currently drafted, violates the provisions of the CFREU, and therefore, it is contrary to EU primary law. As a consequence, consideration should be given to the possibility of amending the EU “Facilitators Package” or pursuing an action for annulment under Article 263 TFEU before the CJEU as it can invalidate the Council Directive 2002/90/EC and the Council Framework Decision 2002/946/JHA due to an infringement of the Treaties or of any rule of law relating to their application.

The EU, whose core values include freedom, democracy, respect for human dignity, equality, the rule of law and respect for human rights, may face challenges to its credibility when enforcing laws like the EU “Facilitators Package” as it is currently shaped.

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 1 Universal Declaration of Human Rights

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A l'espoir

*Vous avez eu l'espoir à une vie meilleure
Vous avez tout laissé derrière vous
Vous n'avez pris qu'une foto de vos chères
L'espoir était comme un étoile dans ce chemin cruel
Priant pour que ce chemin ne soit pas mortel
Mais le chemin mortel est devenu réalité pour trop de gens
L'espoir à une vie meilleure ne meurt jamais
L'espoir brille dans les étoiles jusqu'à l'infini pour vous
L'espoir à une vie meilleure*

Abstract

The thesis analyses the criminalization of SAR NGOs, which consistently contribute with their operation to the rescue of migrants and refugees crossing the Mediterranean Sea since 2014. In order to provide an overview of the situation in the Mediterranean Sea, the different actors involved will be presented. It will be demonstrated that the European Border and Coast Guard Agency, Frontex, is confronted with grave human rights violations during their operations, namely the involvement in unlawful pushback practices.

The criminalization of SAR NGOs is primarily based on the EU “Facilitators Package”, a EU Directive, which will be thoroughly examined in the course of the work. The thesis concludes with the analysis demonstrating serious concerns regarding the conformity of the EU’s “Facilitators Package” with international human rights law and with international maritime law. At the end an outlook will aim to provide possible alternatives in migration legislation.

Abstrakt

Die Arbeit analysiert die Kriminalisierung von SAR-NGOs, die seit 2014 mit ihren Einsätzen beständig zur Rettung von Migranten und Flüchtlingen beitragen, die das Mittelmeer überqueren. Um einen Überblick über die Situation im Mittelmeer zu geben, werden die verschiedenen beteiligten Akteure vorgestellt. Es wird aufgezeigt, dass die Europäische Grenz- und Küstenwacheagentur Frontex bei ihren Einsätzen mit schweren Menschenrechtsverletzungen konfrontiert ist, insbesondere mit der Beteiligung an unrechtmäßigen Pushbacks.

Die Kriminalisierung von SAR NGOs basiert in erster Linie auf dem „Schleuser-Paket“ der EU, einer EU-Richtlinie, die im Laufe der Arbeit eingehend untersucht wird. Die Arbeit schließt mit einer Analyse, die ernsthafte Bedenken hinsichtlich der Vereinbarkeit des „Schleuser-Paket“ der EU mit internationalen Menschenrechtsnormen und dem internationalen Seerecht aufzeigt. Am Ende wird ein Ausblick gegeben, der mögliche Alternativen in der Migrationsgesetzgebung aufzeigen soll.