Criminalisation of Humanitarian Assistance: An Analysis of Italy, Hungary and Croatia

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Acknowledgments

Firstly, I would like to thank my mentor, Boldizsár Nagy, for his patience and guidance through this thesis writing process.

Secondly, I would like to thank all the Professors, colleagues, and faculty staff of the Legal Studies Department. Your knowledge and passion for human rights made the last academic year challenging and brilliant, all at once.

Thirdly, I would like to use this opportunity to thank my mother and father for their unconditional support. A special thank you goes to my brother Filip who taught me about the power of ambition and hard work. You are a true role model.

Lastly, I would like to thank Miguel for motivating me and supporting me every step of the way.

Executive Summary

This thesis explores the issue of criminalisation of humanitarian assistance by showing how different countries implemented restrictive national laws that stand in violation of standards set by relevant international and the EU legal framework.

As a first step of the research, this thesis explores how categorical fetishism led to the dehumanisation of refugees and other migrants, which served as a ground for further criminalisation of humanitarian assistance. Afterwards the thesis engages into the legal analysis of international refugee law, international criminal law, the laws of the sea, and the European Union's Facilitation Directive. The purpose of this legal analysis is to see whether within these laws it is possible to find provisions that prevent criminalisation of humanitarian assistance.

What distinguishes this thesis from other scholarly work, is its examination of the moral and legal entitlement of persons who provide humanitarian assistance to disobey the national laws that do not follow prescribed international and EU standards. In order to show the impact of criminalisation of humanitarian assistance, this thesis will closely explain the process of criminalisation of humanitarian assistance in Italy, Hungary and Croatia.

Introduction – "You didn't save them, you couldn't do more, or could you?"

When in 2016 reporters asked Emilia Kamvisi, 85-year-old grandmother from Lesvos, how does she feel knowing that she has been nominated for the Nobel Peace Prize, she responded; ''What did I do? I didn't do anything''.[1] During the peek of the so-called "refugee crisis" Kamvisi was among thousands of individuals that showed solidarity towards refugees. Together with Kamvisi, a Nobel Peace Prize nomination landed to Stratis Valiamos, a Greek fisherman who saved refugees from a sinking boat. When asked about his deed, Stratis replied – "People say you are a hero, but this isn't heroism, it's the normal thing to do."[2] And while individuals were receiving international recognition for their act of solidarity, the Greek government introduced new legislation[3] that forbade assistance to refugees without prior approval by the police and its Coordinating Committee.[4] Two years later, the international community still recognizes the importance of such acts. While presenting the inaugural John McCain Prize for Leadership in Public Service to two Greek Scouts, Cindy McCain stated:

> In bestowing this prize upon the People of Lesvos, we recognize the sacrifices that so many ordinary people have made to bring safety, comfort, and hope to refugees enduring desperate

[1] Karolina Tagaris, (2016) "Greek Grandmother, fisherman among Nobel Peace Prize Nominees", *Ekathimerini.com*,. Available at: http://www.ekathimerini.com/205583/article/ekathimerini/news/greek-grandmother-fisherman-among-nobel-peace-nominees, accessed on the 29th of November 2018.
[2] Ibid.
[3] "Recommendation to the General Secretariat of the Aegean and Islands-Policy Coordinating writing, coordination and evaluation of NGO's in island of Lesbos". Available at: http://www.statewatch.org/news/2016/jan/greek-doc.pdf, accessed on the 29th of November 2018,
[4] Gkliati, Mariana, (2016) "When volunteers became smugglers: The criminalization of 'Flight Helpers' in Greece", *Leidenlawblog.nl.* Available at: https://leidenlawblog.nl/articles/when-volunteers-became-smugglers-the-criminalization-of-flight-helpers-in-g, accessed on 3rd of February 2019.

> hardship. It is my sincerest wish that this award will also serve to inspire others, wherever they may be in the world, to stand up for what is right.[5]

However, one thing has changed drastically. Civil society organisations and individuals who were filling in the protection gaps made by the state are now facing criminal charges connected with alleged involvement in smuggling. Just several days before the Greek Scouts received the Prize, the Aegean Boat Report[6] published a statement of its volunteer;

> The phone rings, it's 4.30 AM…. You crawl out of bed, trying not to wake your wife and kids. You find your laptop, turn on the necessary programs whilst you try to get all the information. You ask the same question over and over again; 'How many children..? How many children..? Situation on the boat..? The boat is in Turkish waters. You call the Turkish Coastguard Command, TCG. The man on the phone is professional, he takes the information you give him and asks a few questions regarding the case. 'Thank you for your service.' You stay online to follow the information from the boat. It's usually updated every 5-8 minutes. After several follow up calls to TCG they inform you that they have found bodies in the sea. Children. Women. Men. All dead so far. It hits you like a bullet, the people you just heard are no more… their desperate cries their final breaths, their last contact with the world. You didn't save them, you couldn't do more, or could you..?[7]

[5] Nick Kampouris, (2018) "Greek Sea Scouts Accept John McCain Prize on Behalf of Lesvos", *Greece.greekreporter.com*. Available at: https://greece.greekreporter.com/2018/11/18/greek-sea-scouts-accept-john-mccain-prize-on-behalf-of-lesvos/ accessed on the 29th of November 2018,

[6] Aegean Boat Report is an NGO registered in Norway, that collects valuable information regarding the position of boats that carry refugees and migrants and upon gathering the information forwards it to the volunteers or state officials.
More details available here: https://www.facebook.com/pg/AegeanBoatReport/about/?ref=page_internal

[7] Agean Boat Report (2018) "When saving people becomes a crime". Available at: https://www.facebook.com/AegeanBoatReport/posts/460777597778683 , accessed on the 29th of November 2018.

Surprisingly, once characterized as heroes, people who are helping refugees became the victim of criminalisation of humanitarian assistance. Lack of the coordinated response to the challenges of the so-called refugee crisis by the European Union, opened the space for the Member States to implement their restrictive policies frequently depending on ''illiberal means to guarantee liberal values''.[8] These policies were justified through a discourse that turned refugees into economic migrants[9] and therefore made it easier to dehumanize them. At the same time, individuals and civil society organisations that provide support to refugees were portrayed as criminals and enemies of the sovereign states.[10] As a direct consequence, civil society organisations had to resist the trend of narrowing their field of work, the so-called ''shrinking space''[11] phenomena, often characterized as ''sinister attempt to silence civil society organizations in the name of security''.[12] So far there are many cases across the whole Europe where volunteers or individuals faced criminal charges for smuggling. Among others; three Spanish firefighters[13], a priest in Italy[14], a French farmer and

[8]Orgad, Liav, (2010)''Illiberal Liberalism Cultural Restrictions on Migration and Access to Citizenship in Europe'' Oxford University Press, p.92.

[9] Interestingly enough, in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the status of Refugees it is argued that the difference between an economic migrant and refugees sometimes is not as clear as it may be presumed. ''Behind economic measures affecting a person's livelihood there may be racial, religious or political aims or intentions directed against particular group''. *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, 2011, ,* accessed on 7th of February 2019.

[10] Farrel, Nicholas, (2017) ''Madness in the Med: how charity rescue boats exacerbate the refugee crisis'' *Sepctator.co.ok*. Available at: https://www.spectator.co.uk/2017/07/migrants-and-madness-in-the-med/, accessed on 2nd of February 2019.

[11] Eduard Nazarski, (2017) ''Shrinking space for civic space: The countervailing power of NGOs''. Netherlands Quarterly of Human Rights, Vol. 35(4) p. 272–281.

[12] Smith Helena, (2018) ''Arrest of Syrian 'hero swimmer' puts Lesbos refugees back in spotlight'' *Guardian.uk,* Available at : https://www.theguardian.com/world/2018/sep/06/arrest-of-syrian-hero-swimmer-lesbos-refugees-sara-mardini, accessed on 2nd of February 2019.

[13] Dorz Ortega, Patricia, (2018) '' Greek court acquits Spanish firemen accused of people smuggling'' *Elpais.com,* Available at: https://elpais.com/elpais/2018/05/08/inenglish/1525767878_346157.html , accessed on 2nd of February 2019.

[14] Iqbal, Nomia,(2017) ''Eritrean priest in Italy denies 'people smuggling'', *Bbc.com.* Available at: https://www.bbc.com/news/world-africa-40949062, accessed on 2nd of February 2019.

an activist[15], Socialist Party MP from Switzerland[16], and three volunteers in Greece who offered humanitarian assistance to refugees and other migrants.[17] These scenarios are the product of inconsistent policies regarding humanitarian assistance since such is Member State-dependent. Together with a larger margin of appreciation and current discourse switch, humanitarian assistance is often portrayed as an unnecessary giving of a ‘’helping hand’’ to irregular migrants, who are perceived as people with no need of protection.

Terminology wise, it is possible to make a distinction between a migrant and a refugee. However, the real question is whether that is possible in cases such as saving people from the sinking boat? The perception that the terms refugee and migrant are mutually excluding follows the faulty logic according to which migrant equals ‘’not a refugee.’’[18] Consequently, migrants are treated ‘’as if they are not worthy of our compassion’’.[19] This excluding approach overviews the fact that refugees are essentially migrants and that their legal status within Europe must not be a prerequisite of the right to protection and compassion which they deserve.[20]

[15] Agerholm, Harriet, (2018) ’ Farmer who helped migrants enter country should not have been prosecuted because he showed 'fraternity', French court rules’’, *Independent.co.uk*. Available at: https://www.independent.co.uk/news/world/europe/farmer-migrants-prosecution-france-constitutional-court-rules-fraternity-a8435771.html, accessed on 4th of February.

[16] Express.co, (2016) ‘’ MP helps African migrants enter Switzerland and supporters dub her MOTHER TERESA’’. Available at: https://www.express.co.uk/news/world/706772/MP-arrested-African-migrants-Switzerland , accessed on accessed on the 1st of December 2018.

[17] Perez-Pena, Richard, (2018) ‘’ She Was Called a Hero for Helping Fellow Refugees. Doing So Got Her Arrested.’’, *Nytimes.com*, Available at: https://www.nytimes.com/2018/09/26/world/europe/greece-migrant-aid-arrests.html, accessed on 4th of February. More information about Sarah Mardini’s case is available here: https://www.thenewhumanitarian.org/feature/2019/05/02/refugee-volunteer-prisoner-sarah-mardini-and-europe-s-hardening-line-migration?fbclid=IwAR22V8T8ju3HD1Od7blUip7_qHHOOqPk3eiVhAf9GRojGDKn72daOgc_Ey8

[18] Ruz, Camila, (2015) ‘’The battle over the words used to describe migrants’’, *Bbc.com*. Available at: https://www.bbc.com/news/magazine-34061097, accessed on 4th of February.

[19] Carling, Jorgen, (2015) ‘’Refugees are also Migrants. All Migrants Matter’’, *Law.ox.ac.uk.* Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also, accessed on 4th of February.

[20] Ibid.

The complexity of the dichotomy of these labels is further extended in practice. States are the ones responsible for determining whether individuals' claim will result in refugee status or such will not be recognized. This wrongly constructed relationship of mutual exclusiveness among the terms migrant and refugee brings us to the impossible situation where it is expected from the individuals and civil society organisations to determine who is who. However, the above-mentioned exclusiveness is not merely a product of the intention of achieving terminological clarity. It is a product of widespread tendencies to characterise the ''newly arrived people as others - people from ''over there'', who had little do with Europe itself and were strangers… to its traditions and cultures.''[21] This strict division between the terms refugee and migrant fails to encompass the complexity of current migration flows.[22] Consequently, compassion and recognition of possible persecution and the need for international protection became somewhat reserved only for the stereotyped vulnerable groups, women, children and the elderly, while young men became stranded within the narrative of faceless people that are threating the borders.[23]

Although this terminological interplay may seem irrelevant to the general public, as William Allen and Bridget Anderson rightly pointed out, the predominance of one term over the other can be an indication of a way in which the state will govern migrants and refugees.[24] More precisely, ''not

[21]Daniel Trilling, (2019) ''How the media contributed to the migrant crisis'' *Guardian.uk*. Available at: https://www.theguardian.com/news/2019/aug/01/media-framed-migrant-crisis-disaster-reporting?CMP=Share_iOSApp_Other&fbclid=IwAR1kbHLl5fuoywPpsg7aTtlDknxwoxRZGLY_kR7sOfzjIz7ux4CeZKSPaSE, accessed on 10th of August 2019.

[22] William Allen, Bridget Anderson, Nicholas Van Hear, Madeleine Sumption, Franck Düvell, Jennifer Hough, Lena Rose, Rachel Humphris & Sarah Walker (2017) '' Who Counts in Crises? The New Geopolitics of International Migration and Refugee Governance'' *Geopolitics,* 23(1), p.227.

[23]Daniel Trilling, (2019) ''How the media contributed to the migrant crisis'' *Guardian.uk*. Available at: https://www.theguardian.com/news/2019/aug/01/media-framed-migrant-crisis-disaster-reporting?CMP=Share_iOSApp_Other&fbclid=IwAR1kbHLl5fuoywPpsg7aTtlDknxwoxRZGLY_kR7sOfzjIz7ux4CeZKSPaSE, accessed on 10th of August 2019.

[24] William Allen, Bridget Anderson, Nicholas Van Hear, Madeleine Sumption, Franck Düvell, Jennifer Hough, Lena Rose, Rachel Humphris & Sarah Walker (2017) '' Who Counts in Crises? The New Geopolitics of International Migration and Refugee Governance'' *Geopolitics,* 23(1), p.217.

only do categories make some people visible while making others invisible, they also set standards and normalize practices.''[25] The amplitude of these practices is visible through social relations that are directly constructed through laws and policies focused on the governing of migration.[26] Thus, in the situation when states implement restrictive policies that do not enable persons to apply for international protection and receive protection from persecution, it does not come as a surprise that individuals and civil society organisations offer assistance to refugees to claim their rights guaranteed by the international and EU law. The legitimacy of humanitarians who are assisting refugees is rooted in the belief that due to restrictive migration policies, persons who may need international protection cannot enforce their rights. These new political circumstances motivated hundreds of individuals and civil society organisations to show solidarity with refugees and offer humanitarian assistance aware that they might be risking prosecution because of their actions.[27]

Accordingly, persons who offer humanitarian assistance to refugees ''are challenging laws that create boundaries between ''us'' and ''them''[28] and while doing so are refusing to be discouraged by deterrence policies which criminalise their acts of solidarity.[29] Given the current trend of implementation of restrictive migration policies that consequently criminalise persons who offer humanitarian assistance and a growing number of those facing prosecution, this thesis strives to answer the following research question: **Are humanitarians who are convinced that national**

[25] Ibid. p. 217.
[26] Ibid. p. 220.
[27] Liz Fekete, Frances Webber and Anya Edmond-Pettitt (2019) ''When witnesses won't be silenced'., Institute for Race Relations, p3.
Available at: http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2019/05/20104238/When-witnesses-wont-be-silenced.pdf. Accessed on 5th of August 2019.
[28] Ibid. p.3.
[29] In the Chapter I, I will further address the ways in which domestic laws and practices criminalize humanitarian assistance to refugees. According to the Report of the Independent Expert on human rights and international solidarity there are currently eleven different way in which states around the world try to deter individuals and civil society organizations from helping refugees and irregular migrants. Report of the Independent Expert on Human Rights and International Solidarity is available here: https://ap.ohchr.org/documents/dpage_e.aspx?m=153 .

laws enable access to international protection, morally and legally entitled to disregard these national laws with the claim that EU and international law requires that violation of the domestic law? While attempting to construct relevant work, the aim of this thesis will not be to advocate for the change of the existing legal framework, which is somewhat self-explanatory but to show in what way the existing international and EU legal framework can be interpreted for the purpose of decriminalising humanitarian assistance. Furthermore, what will distinguish this thesis from other scholarly work is the fact that it will look into the moral and legal entitlement of persons who provide humanitarian assistance to disobey national laws which do not follow standards set by the EU and international law. Thus, since the aim of the thesis is not to call for amending the existing laws, this thesis will present arguments why persons who assist refugees should rely on disobedience specifically in current conditions where the standards of international law are currently understood as maximum standard in policymaking in the area of protection of refugees and their human rights. Lastly, in order to offer some conceptual clarity, it is important to note that this thesis will encompass, in detail, responses of three different states, Italy, Hungary, and Croatia and the way they criminalised humanitarian assistance to refugees in entry, transit and stay, together with examples of individuals and civil society organizations who had risked prosecution or were prosecuted because of their assistance.

Chapter I: Humanitarian Assistance and the Role of Civil Society Organisations and Individuals

1.1 Methodology

This thesis contains four substantive Chapters, Introduction and a Conclusion. Chapter I will look closely into terminological interplay between the terms migrants, irregular migrants, refugees, and asylum seekers. This Chapter will show that categorical fetishism that rose during and after the so-called ''refugee crisis'' dehumanized refugees and other migrants and contributed to criminalisation of humanitarian assistance. Chapter I finishes with defining the dilemma of ''engaging''[30] or ''evading''[31] the law for the purpose of providing humanitarian assistance. This dilemma shapes the course of the rest of the thesis.

Chapter II offers a brief of relevant international and EU legal framework important for persons who provide humanitarian assistance. It starts with analysis of 1951 Convention Relating to the Status of Refugees and its following Protocol. Afterwards, Chapter II looks into the UN Smuggling Protocol, Laws of the Sea and its relevant provisions of the International Convention for the Safety of Life at Sea from 1974 (''SOLAS''), the International Convention on Maritime Search and Rescue Operations from 1978 (''SAR'') and the United Nations Convention on the Laws of Sea of 1982 (''UNCLOS''). As a last point of this analysis is the legal framework of the European Union, specifically its Facilitation Directive and accompanying Framework Decision. The goal of this Chapter is to examine whether the international and EU legal framework put an obligation on Member states to have a humanitarian assistance clause within their national legal framework. In

[30] Mari Lorena Cook, "Humanitarian Aid Is Never a Crime": Humanitarianism and Illegality in Migrant Advocacy'', Law and Society Review, Volume 45, Number 3 (2011), p. 563.
[31] Ibid.

addition, this Chapter strives to examine how can persons who provide humanitarian assistance engage with international and EU legal standards for the purpose of decriminalising it.

Chapter III of this thesis closely looks into the reasons why persons who provide humanitarian assistance are entitled to ''evade'' the law. The first subsection of this Chapter briefly explains why organisations and persons who provide humanitarian assistance are morally entitled to disregard national laws that do not follow the standards set within international and EU legal framework. After looking into moral entitlement, the following subsections of this Chapter will through examples of Italy, Hungary and Croatia and show how organisations and individuals who provided humanitarian assistance were criminalised.

At the end, Chapter IV will give a brief look into cases that are currently pending at the Court of Justices of the European Union (CJEU), European Court of Human Rights (ECtHR), International Criminal Court (ICC) and national courts. Lastly, the Conclusion of this thesis will summarize before written arguments.

While trying to offer coherent answer to the main research question, this thesis will also investigate three hypotheses:

1st Hypothesis: The everlasting conflict between the fight against smuggling and organized crime and access to international protection serves as a foundation for the criminalisation of humanitarian assistance.

2nd Hypothesis: The current EU legal framework gives too much freedom to the Member States to interpret the law and implement policies that criminalise humanitarian assistance.

3rd Hypothesis: Infringements of fundamental rights by the Member States, followed by the criminalisation of humanitarian assistance, left no other choice to humanitarians but to disobey national laws with the goal of ensuring access to rights to refugees.

While trying to find an answer to the research question I will look into the legal framework, relevant conventions, treaties and directive which address the scope of humanitarian assistance and its possible (de)criminalisation. Due to the nature of the topic of this thesis, and the fact that criminalisation of humanitarian assistance to refugees greatly impacted civil society organisations, I will also refer to their reports, testimonies and analyses. Since I do not have a legal background my approach to this topic is interdisciplinary, thus this thesis does not only deal with law but also traces a process of criminalisation of humanitarian assistance in an interdisciplinary way.

1.2 Terminology – Migrants, Irregular Migrants, Refugees and Asylum Seekers

For the purpose of the present thesis, it is crucial to address the complex terminological interplay that includes migrants, irregular migrants, refugees, and asylum seekers. However, the focus on these terms does not derive from the need to achieve categorical purity. On the contrary, it stems to show how ‘’categorical fetishism’’[32] fails to encompass the dynamic of the migration flow that reached its peak in 2015.

The term migrant after the so-called “refugee crisis” is mostly understood with a negative connotation,[33] consequently forming many misconceptions around it and its meaning. The

[32] Heaven Crawley, Dimitris Skleparis (2017)‘’ Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe’s ‘migration crisis’’. Journal of Ethnic and Migration Studies, p. 49.
[33] Taylor, Adam, (2015) “Is it time to ditch the word migrant?” *Washingtonpost.com*. Available at: https://www.washingtonpost.com/news/worldviews/wp/2015/08/24/is-it-time-to-ditch-the-word-migrant/?utm_term=.27d2f8efb4ef , accessed on the 2nd of December 2018.

International Organization for Migration (IOM) defines it as "any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence..."[34] To this, the almost self-explanatory definition often is added the presumption that a migrant is a person who voluntary decides to migrate, meaning such a decision was not made on the ground of existing external conditions. United Nations has a more comprehensive definition in which the migrant is the person who is in a foreign state for more than a year, and neither the legality nor the reasons for the act of migrations are addressed.[35]

And while the public discourse is constantly filled with terms such as irregular or more recently illegal migration[36], there is still a lack of firm recognition of the universal definition of irregular migration. According to the International Organization for Migration (IOM), such is defined as ''movement that takes place outside the regulatory norms of the sending, transit, and receiving countries.''[37] Irregular status is not a permanent condition but rather a product of the bureaucratic and legal framework of the receiving country. The complexity of the terms irregular migration and irregular migrants is further extended in cases when they do not need to be directly connected,

[34] International Organization for Migration (IOM) ''Who is migrant?'' *Iom.int*. Available at: https://www.iom.int/who-is-a-migrant, accessed on the 2nd of December 2018.

[35] International Organization for Migration (IOM), (2011), International Migration Law: Glossary on Migration. International Organization for Migration, Geneva, 2011, p. 61-62. Available at: https://publications.iom.int/system/files/pdf/iml25_1.pdf, accessed on the 27th of November 2018

[36] Forming the firm definition of the term irregular migration is made somewhat difficult because of its interchangeable use together with the term illegal migration. European Commission in 2006 defined the term of illegal migration in its "*Communication on policy priorities in the fight against illegal migration of third-country nationals*", COM (2006) 402; where illegal migration is illegal entry to the territory of the member state using false documents or through channels of organized crime such as trafficking. See Magdalena Perkowska, (2013) ''Illegal, legal, irregular or regular – who is the incoming foreigner?'' Studies in Logic, Grammae and Rethoric, Vol 45:1. . However, in the Resolution 1509 issued by the Parliamentary Assembly of the Council of Europe in Article 7 it is stated the following: "Assembly prefers to use the term "irregular migrant" to other terms such as "illegal migrant" or "migrant without papers". This term is more neutral and does not carry, for example, the stigmatisation of the term "illegal". It is also the term increasingly favoured by international organisations working on migration issues." *Parliamentary Assembly*, 2006. Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17456#, accessed on the 27th of November 2018.

[37] International Organization for Migration (IOM), (2011)International Migration Law: Glossary on Migration. International Organization for Migration, Geneva, p. 54. Available at: https://publications.iom.int/system/files/pdf/iml25_1.pdf, accessed on the 27th of November 2018.

specifically in cases when ‘’it is possible to enter irregularly in Europe and be counted within the irregular border crossing, but, when applying for asylum, be counted in the stock of persons staying legally in the EU.’’[38]

Whereas irregular migration does not have a universal definition, the refugee status[39] is firmly defined through the 1951 Refugee Convention and prescribed to the person that has ‘’well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it’’.[40]

Lastly, by applying for asylum, the individual ‘’has a right to be recognized as a refugee and receive legal protection or material assistance’’.[41] Therefore, asylum seekers are perceived as persons in need of protection with the presumption that their refugee status could be recognized.[42]

[38] Vespe, Michele, Natale, Fabrizio and Pappalardo Luca, (2017) ‘’Data sets on irregular migration and irregular migrants in the European Union’’ Migration Policy Practice, Vol. VIII, Number 2. p.27

[39] In the Chapter II, I will further discuss the nature of refugee status in current globalized world. I will refer to Gibney’s broader definition of refugees, stating that ‘’definition of a refugee as someone who requires the substitute protection of a new state because their fundamental human rights cannot or will not be protected at home’’. See Matthew Gibney (2015) ‘’Refugees and justice between states’’European Journal of Political Theory, p. 6. In addition to Gibney’s approach there are other scholars such as Michael Dummett that advocate for further broadening of the refugee status, but that will be discussed in detail within Chapter II.

[40] Article 1A, 1951 Refugee Convention. United Nations General Assembly (UN GA), ‘’Convention Relating to the Status of Refugees (‘’1951 Refugee Convention’’)(18 July 1951), UNTS Vol. 189, P. 137.

[41] USA for UNHCR, ‘’What is a refugee?’’, *Unrefugees.org*. Available at: https://www.unrefugees.org/refugee-facts/what-is-a-refugee/, accessed on the 8th of February 2019.

[42] It is important to emphasize that ‘’a person does not become a refugee by a virtue of a recognition decision because he or she is a refugee. In other words, the recognition decision is declaratory: it acknowledges and formally confirms that the individual concerned is a refugee’’. See more at UNHCR, ‘’ Refugee Status Determination Identifying who is a refugee, Self-study module 2’’, 2005, https://www.refworld.org/pdfid/43141f5d4.pdf, accessed on the 8th of February 2019.

Even though most of these terms do not have unified definition, in 2015, a great number of the media and politicians employed the narrative in which the newcomers were not portrayed as refugees[43] but rather economic migrants who were characterized as ''bogus asylum seekers.''[44] However, the use of one term over another had great implications on the status of their claims for international protection. More precisely, terms migrant and refugee became a tool for differentiation between experiences of the persons on the move and legitimacy of their claims for international protection.[45] This somewhat pervasive need to differentiate between refugees and migrants consequently led to international organizations calling for the usage of the term refugee over the term migrant, arguing that the term migrant does not encompass the experience of escaping the war or violence.[46] It became clear, even though there is no consensus on the meaning behind the term migrant, that there is an obvious bias towards the term refugee. However, this bias consequently overlooks the fact that these terms are not mutually excluding.[47] This exclusiveness led to formation of the so-called ''categorical fetishism''[48] that ''continues to treat the categories 'refugee' and 'migrant' as if they simply exist, out there, as empty vessels into which people can

[43] The use of one term over the other differentiated among states. According to the research made by the UNHCR "Both Germany (91.0%) and Sweden (75.3%) overwhelmingly used the terms refugee (flüchtling(e)/ flykting) or asylum seeker (asylsuchende(r)/asylsokande). In contrast migrant (migrante) was the most used term in Italy (35.8%) and especially the UK (54.2%). Refugee (profugo/ rifugiato) was used 15.7% of the time in Italy and 27.2% of the time in the UK. In Spain, the dominant term was immigrant (immigrante) which was used 67.1% of time whilst refugee (Refugiado) was used 12.5% of the time.'' See more at: Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries. Available at: https://www.unhcr.org/56bb369c9.pdf . Accessed on 10th of August 2019.

[44] Daniel Trilling, (2018)''Five myths about the refugee crisis'' *Guardian.uk*. Available at: https://www.theguardian.com/news/2018/jun/05/five-myths-about-the-refugee-crisis , accessed on 2nd of August 2019.

[45]Heaven Crawley & Dimitris Skleparis (2018) Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe's 'migration crisis', Journal of Ethnic and Migration Studies, p. 49.

[46] Ibid.

[47]Jørgen Carling, (2015) 'Refugees are also Migrants. All Migrants Matter'', *Law.ox.ac.uk*.Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also , accessed on 13th of August 2019.

[48] Heaven Crawley & Dimitris Skleparis (2018) Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe's 'migration crisis', Journal of Ethnic and Migration Studies, p. 49.

be placed in some neutral ordering process like a small child putting bricks into a series of coloured buckets.''[49]

Contrary to the belief according to which these two terms should be strictly distinguished, scholars Mathias Czaika and Hein de Haas argue that current migration patterns greatly differentiate from previous trends stating they are ''opposed to the assumed lower diversity and neater structuring of past migrations…''[50] These new trends led to the process of diversification of migration[51] , which indicates that existing migration categories are not strictly dived; on the contrary they mutually co-exist.[52] Thus, the migration process today consists of ''individuals [that] may change status or simultaneously fit in two (sometimes more) pre-existing categories.''[53]

Consequently, when talking about different terms used during the so-called ''refugee crisis'', what needs to be kept in mind is that the above-mentioned definitions of the term migrant do not exclude the existence of the well-founded fear of persecution. In other words, when observing current migration patterns, there should be an assumption that migrants may be refugees and may have a well-founded fear of persecution. The existence of well-founded fear should be determined in the following procedures. Insisting on the strict dichotomy between the term refugee and migrant while arguing that persons cannot fall in both categories, although the current definitions of the

[49] Ibid.
[50] Mathias Czaika, Hein de Haas, (2015) '' The Globalization of Migration: Has the World Become More Migratory'', International Migration Review, Volume 48 Number 2, p. 284. Available at: https://onlinelibrary.wiley.com/doi/full/10.1111/imre.12095
[51] Diversification of migration can have different meaning depending on the context, however Czaika and de Haas see it as: ''this would imply that growing immigrant populations have also diversified by coming from an increasingly geographically distant and diverse array of origin countries.'' Mathias Czaika, Hein de Haas, (2015) '' The Globalization of Migration: Has the World Become More Migratory'', International Migration Review, Volume 48 Number 2, p. 291.
[52] Ibid.
[53] Heaven Crawley & Dimitris Skleparis (2018) Refugees, migrants, neither, both: categorical fetishism and the politics of bounding in Europe's 'migration crisis', Journal of Ethnic and Migration Studies, p. 50.

terms state the opposite, can conflict with the system of international protection. Instead of understanding migrant and refugee as two excluding terms, the general public, international organizations, and the academia should navigate towards the understanding of the term migrant in an inclusive way, as persons who migrate, which will essentially lead to the inclusion of refugees, rather than portraying them as terminological opposition.[54]

Although this discussion about appropriateness of each term might seem as a preoccupation with nuances, it is important to note that this falsely constructed dichotomy between terms refugee and migrant served as a basis for normalization of policies that criminalized humanitarian assistance.[55] By portraying migrants as an imminent threat to society and national security and as ''not real refugees''[56] politicians and the media had no difficulties in constructing the narrative in which civil society organisations and individuals not only help the ''criminals'' but are criminals themselves due to their alleged connection with the smugglers.[57] Consequently, civil society organisations and individuals who were helping refugees found themselves in a situation in which they had to justify their motives, since in the words of Gefira, the Dutch think tank, '' whatever the motives of these

[54] Jørgen Carling, (2015) 'Refugees are also Migrants. All Migrants Matter'', *Law.ox.ac.uk*.Available at: https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/refugees-are-also , accessed on 22nd of August 2019.

[55] One of the pioneers in this process of building a discourse that vilifies migrants are for sure Hungarian media outlets which successfully built a narrative that portrayed migrants as criminals, rapists, and a direct threat to Christian identity that needs to be protected at all costs. See more here: https://www.theguardian.com/world/2018/mar/28/hungary-election-viktor-orban-far-right-stokes-migration-fears-far-from-border, accessed on 20th of August 2019. Moreover, some Hungarian journalist admitted that they have made false stories on the account of migrants, deliberately portraying them in the light that would further perpetuate this image of them as an imminent threat to society and national security. See more here: https://www.theguardian.com/world/2018/apr/13/hungary-journalists-state-tv-network-migrants-viktor-orban-government?fbclid=IwAR3BrB6emCCQfzhSJrNqztRBpejcVhvj8_V5rCmbrip27wrTShWeg4qBlSQ , accessed on 20th of August 2019.

[56] Eva Balogh, (2018) ''THE LATEST FIDESZ PROPAGANDA: THE SOROS FLEET IS ON ITS WAY'', *Hungarianspectrum.org*, Available at: https://hungarianspectrum.org/2018/06/27/the-latest-fidesz-propaganda-the-soros-fleet-is-on-its-way/, accessed at: 22nd of August 2019.

[57] Ibid.

NGOs, their behaviour is illegal, and in countries governed by a constitution, i.e., European states, crime should be prosecuted regardless of the intention of its perpetrators.''[58]

1.3 Humanitarian assistance – What does it entail?

Before offering arguments on why humanitarian assistance should be decriminalized, for conceptual clarity, it is important to describe what is understood as humanitarian assistance within this thesis.

The importance of humanitarian assistance was demonstrated throughout history, often being the last straw of salvation for individuals and minorities who have been in search of security. Stories such as the one of Sir Nicholas Winton, who arranged transportation of Jewish children with trains from Czechoslovakia to the UK to save them from the Holocaust atrocities, shaped the course of history. His acts were not a simple *ad hoc* response. On the contrary, he dedicated a substantive amount of his time and exposed himself to risk while persuading families in the UK to take the Jewish children and save them from death. Thanks to his humanitarian assistance, 669 children were saved.[59] When asked in an interview several years ago, why did he decide to help the children and coordinate such big rescue operation, Sir Winston replied – ''ethics – goodness, kindness, love, honesty decency – ethics, that is standard of life. I believe in ethics.''[60]

Broadly speaking, the first traces of codification of humanitarian assistance and humanitarian principles can be traced back to the Universal Declaration on Human Rights, which called for

[58] GEFIRA Foundation,(2016) ''Caught in the act: NGOs deal in migrant smuggling'', *Gefira.org*. Available at: https://gefira.org/en/2016/11/15/caught-in-the-act-ngos-deal-in-migrant-smuggling/#more-14995, accessed on 22nd of August 2018.
[59] Rabbi David Wolpe,(2015) ''Remembering Sir Nicholas Winton, Who Saved 669 Children From the Holocaust'', Times.com. Available at: https://time.com/3944620/sir-nicholas-winton-britains-schindler/, accessed on 22nd of August 2019.
[60] YouTube. (2016). *Sir Nicholas Winton - BBC HARDtalk*. [online] Available at: https://www.youtube.com/watch?v=NO63ajFFhDo, accessed on the 25th of August 2019.

brotherhood[61] and protection of human rights led by the principle of equality.[62] In order to define humanitarian assistance adequately in a way that will encompass all challenges of the current political situation, this thesis will refer to the definition given by the Special Rapporteur of the Human Rights Council on extrajudicial, summary, or arbitrary executions.[63] Within his report, ''Saving lives is not a crime''[64] dating from 2018, the Special Rapporteur defined humanitarian assistance as ''…acts intended to protect life, including life with dignity. This definition includes acts provided by organisations and individuals alone, and covers both assistance and protection.''[65] The Special Rapporteur referred to standards set by International Court of Justice in the case of Military and Paramilitary Activities in and against Nicaragua in which the Court reiterates that the fundamental principles of humanitarian assistance were firstly defined during the Twentieth International Conference of the Red Cross, according to which the aim of humanitarian actions is to ''to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation, and lasting peace amongst all peoples.''[66]

The broadness of the above-mentioned definition of humanitarian assistance accurately encompasses the work of individuals and civil society organizations that assist refugees and other migrants. Accordingly, the understanding of humanitarian assistance within this thesis covers the

[61] United Nations, Universal Declaration on Human Rights, Article 1. Available at: https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf, accessed on the 22nd of August 2019.
[62] Ibid.
[63]The Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions (2018) ''Solidarity is not a crime'', Seventy-third session.
Available at: https://www.ohchr.org/Documents/Issues/Executions/A_73_42960.pdf, accessed on 15th of August 2019.
[64] Ibid.
[65] Ibid. p. 4.
[66] International Court of Justice, Case concerning military and paramilitary activities in and against Nicaragua, Nicaragua v. United States, para. 242. Available at: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf, accessed on 23rd of August 2019.

acts of protecting life and human dignity and ensuring access to rights to refugees. Identified actors who provide humanitarian assistance within this scope of this thesis are international and civil society organisations, activists, and individuals who strive to reduce suffering.

Stories such as the one of Sir Nicholas Winton prove the importance of not looking the other way when witnessing human suffering that can be prevented. These acts in their nature fully comply with humanitarian principles; humanity, neutrality, impartiality, and independence.[67] The principle of humanity strives to eliminate human suffering. The principle of neutrality prescribes that humanitarian actors must not take sides in conflicts. The principle of impartiality states that actors must prioritise urgent cases and must not discriminate based on nationality, race, gender, religious belief, class, or political opinions. The last one, the principle of independence, describes humanitarian action as an independent action not directed by any political, economic, or military elites.[68] Acts of humanitarian assistance are done by individuals or organisations who do not expect any material benefits and are fully conscious of possible risks. Thus, this thesis will look into acts of civil society organisations and individuals who have assisted refugees by ‘’challenging laws that create boundaries between ‘us’ and ‘them’ and, in setting such limits, determine whose lives are worth saving and whose are not.’’[69]

[67] United Nations Office for the Coordination of Humanitarian Affairs, (2012) ‘’Humanitarian principles’’. Available at: https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf, accessed on 23rd of August 2019.
[68] Ibid.
[69] Liz Fekete, Frances Webber and Anya Edmond-Pettitt, (2019) ‘’When witnesses won’t be silenced’., Institute for Race Relations, p3.
Available at: http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2019/05/20104238/When-witnesses-wont-be-silenced.pdf. Accessed on 5th of August 2019. *Supra note* 27, p. 3.

1.4 Humanitarian Assistance Throughout the so-called ''Refugee Crisis" and After

In 2015 when Europe faced a larger influx of refugees and other migrants, it became obvious that the EU is struggling with the implementation of a unified migration policy demonstrating fragility of political cooperation. This fragility arose from an ''extremely low level of trust between Member States''[70], which consequently disabled regional cooperation and management coordination.[71] In the absence of adequate and effective response, the gap that was supposed to get filled by the Member State's interventions[72] was filled by humanitarian assistance provided by individuals, activists, civil society organisations.[73] The reluctance of the EU institutions and the Member States to offer appropriate response was particularly obvious in the case of Lesvos, where locals and tourists became first respondents to maritime arrivals and offered an on-spot support managing transport for children, women and elderly to transit centres.[74] This initial first-hand support led to the establishment of organisations that managed a significant amount of volunteers. Consequently, under the notion that ''humanity is under an obligation to intervene in the face of suffering''[75] in 2015 and 2016, we witnessed regional cooperation among different civil initiatives with the goal of filling the lifesaving gap and needs that have not been fulfilled by the state.

[70] Collet Elizabeth, Le Coz Camilla, (2018) ''AFTER THE STORM, LEARNING FROM THE EU RESPONSE TO THE MIGRATION CRISIS'' *Migartionpolicy.org,* p. 34. Available at: https://www.migrationpolicy.org/research/after-storm-eu-response-migration-crisis, accessed on 6th of February 2019.

[71] Ibid.

[72] Interestingly enough, UK was one of the countries that decided not to give any financial support to the rescue missions operating on the Mediterranean, arguing that these types of missions are a significant pull factor, since according to their perception, migrants are less hesitant to opt for a route across Mediterranean. See more at, Fekete Liz (2018) ''Migrants, borders and the criminalisation of solidarity in the EU''(Race &Class) p.67.

[73] Ibid.

[74] Hernandez, Joel, (2016)''Refugee Flows to Lesvos: Evolution of a Humanitarian Response''. *Migrationpolicy.org*. Available at: https://www.migrationpolicy.org/article/refugee-flows-lesvos-evolution-humanitarian-response, accessed on 6th of February 2019.

[75] The Institute of Race Relations, (2017)''Humanitarianism the unacceptable face of solidarity'' p.1. Available at: http://s3-euwest2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf, accessed on 6th of February 2019.

Therefore, it does not come as a surprise that these'' hot-spots'' got characterized as "magnet for the new humanitarians."[76]

The so-called ''new humanitarians'' were internally motivated by the socially constructed duty to help the ones who are struggling.[77] These groups of ''new humanitarians'' had a crucial role in forming the movement ''Refugees Welcome''[78] , through which they initially advocated for safe corridors. Later, ''Refugees Welcome'' transformed into the movement that actively worked within local communities on addressing integration issues refugees face with. Admittedly, refugee camps and reception centres were always there. What changed is the social awareness regarding the political system and the general perception that the war itself is not that far away.[79]

This engagement was noticed and later celebrated by the European institutions. The European Economic and Social Committee (the EESC) in 2016 awarded several *EESC Civil Society Prizes* to the civil society organizations, individuals, and activists who were a "helping hand" to migrants and refugees. This prize was fully focused on the issue of migration[80] but also used as a momentum to criticize the division among the Member States and lack of their response. While using this prize

[76] Healy, Hazel, (2016) ''Humanity adrift'' *Newint.org*. Available at: https://newint.org/features/2016/01/01/humanity-adrift/, accessed on 7th of February 2019.

[77] Kende Anna, Lantos Nora Anna, Belinszky Anna, Csaba Sara, Lukacs Anna (2017) ''The Politicized Motivations of Volunteers in the Refugee Crisis: Intergroup Helping as the Means to Achieve Social Change'', Journal of Social and Political Psychology, p.262. Available at: https://www.researchgate.net/publication/316946596_The_Politicized_Motivations_of_Volunteers_in_the_Refugee_Crisis_Intergroup_Helping_as_the_Means_to_Achieve_Social_Change, accessed on 7th of February 2019.

[78] Refugees Welcome became a largely spread movement across the Europe as a response to the restrictive policies of the Member States, later on this movement transformed into local advocacy group for better inclusion and integration of refugees and migrants into society. More can be found here, https://www.refugeesarewelcome.org/about-us/, accessed on 7th of February 2019.

[79]Pope-Weidmann, Marienna, (2016) ''If we win the fight to let refugees into Fortress Britain, the world will take note'' *Guardian.com*. Available at: https://www.theguardian.com/commentisfree/2016/dec/29/refugees-fortress-britain-volunteer-greece, accessed on 7th of February 2019.

[80] European Economic and Social Committee, (2017) ''How Civil society Organisations Assist Refugees and Migrants in the EU: Successful experience and promising practices from the 2016 EECS Civil Society Prize''. Available at: https://www.eesc.europa.eu/en/our-work/publications-other-work/publications/how-civil-society-organisations-assist-refugees-and-migrants-eu, accessed on 6th of February 2019.

as an advocacy tool, the EESC took the chance to emphasize the fact that "[the]EU Member States and the European institutions must assume their responsibilities towards asylum seekers, immigrants, and refugees in line with the Treaties."[81] Whereas the Member States had issues on sharing the burden, an impressive number of 284 initiatives nominated for this prize shows successful mobilization under the notion of solidarity.[82] Importance of humanitarian assistance of civil society organisations and individuals was proven through the broad spectrum of areas where they were engaged, such as; "emergency relief and rescue, legal assistance and administrative procedure, access to services, protection and integration, non-discrimination and fundamental rights, awareness-raising, mutual understanding, training and mentoring, promising practices".[83]

What was first envisioned as a temporary filling of protection gaps left by states, turned out to be a permanent placement of individuals and civil society organisations in the position of humanitarian helpers. Because of their direct work with refugees, organisations and individuals witnessed the shift in migration policies on national and EU level. Instead of focusing on the humanitarian response to the so-called ''refugee crisis'', newly implemented policies prioritized securitization of borders over humanitarian help. This policy switch on the EU level is most accurately portrayed through the fact that in the Spring of 2019 the EU stopped its only naval mission on the Mediterranean within operation Sophia and relocated the resources of the mission

[81]Ibid. p.3.
[82]Ibid. p.7.
[83]Ibid. p.9.

on air surveillance.[84] And while the EU redirected its funding on Frontex and air surveillance[85] a key international actor in the field of protection refugees, the UNHCR, reminded that:

> In the past European State vessels conducting search and rescue operations saved thousands of lives, including through disembarkations in safe ports. They should resume this vital work and temporary disembarkation schemes should urgently be established.[86]

Continuous denial of the responsibility to save peoples' lives was followed by the transformation of the EU into a silent observer of the criminalisation of humanitarian vessels who saved the lives the EU failed to save. Humanitarian vessel Iuventa that performed search and rescue operations throughout 2015 and 2016 was seized by Italian authorities in 2017, and its staff is now facing prosecution.[87] In 2018 the humanitarian vessel from Medecins Sans Frontieres, Aquarius, stopped its operations due to criminalisation of their search and rescue operations.[88] A year later, MSF decided to resume their operations, stating that ''these deaths and suffering are preventable, and as long as it continues, we refuse to sit idle.''[89] The Proactiva Open Arms, a non-governmental

[84] Deutsche Welle, (2019) '' EU 'to suspend ship patrols' on Mediterranean migrant mission'', *Dw.com*. Available at: https://www.dw.com/en/eu-to-suspend-ship-patrols-on-mediterranean-migrant-mission/a-48071670, accessed on 21st of August 2019. It is important to note that since 2014 NGO's filled in the existing gaps when it comes to SAR operations. Even though their engagement was and still is of great importance, in 2017 they firstly experienced criminalisation of SAR operations. As Jascha Galaski notes, '' Instead of smearing those that are saving lives, Europe should give them its support..'' Jascha Galaski, (2018) '' Why NGOs Have Stopped Search and Rescue Operations'', *Liberties.eu*. Available at: https://www.liberties.eu/en/news/why-ngos-have-stopped-their-search-and-rescue-operations/16294, accessed on 21st of August 2019.

[85] Daniel Howden, Apostolis Fotiadis, Antony Loewenstein, (2019) '' Once migrants on Mediterranean were saved by naval patrols. Now they have to watch as drones fly over'' *Guardian.uk*. Available at: https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu , accessed on 14th of August 2019.

[86] The UNHCR, (2019) '' UNHCR and IOM joint statement: International approach to refugees and migrants in Libya must change'', *Unhrc.org*. Available at: https://www.unhcr.org/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html , accessed on 24th of August 2019.

[87] Iuvienta 10, ''We are IUVENTA 10 – Solidarity at sea is not a crime'', Iuventa10.org. Available at : https://iuventa10.org/ , accessed on 24th of August 2019.

[88] BBC News, (2018) '' MSF ship Aquarius ends migrant rescues in Mediterranean'', *Bbc.com*. Available at: https://www.bbc.com/news/world-europe-46477158 , accessed on 24th of August 2019.

[89] Medecins San Frontieres, ''Saving Lives at Sea'', *Searchandrescue.msf.org*. Available at: http://searchandrescue.msf.org/ , accessed on 24th of August 2019.

organisation that conducted several search-and-rescue operations, Astral, Golfo Azuro, and Open Arms at the beginning of 2018 was not allowed to leave the port in Barcelona and continue its search and rescue operations in the Mediterranean and in the spring of the same year the crew faced charges for ''enabling illegal migration''[90] in Italy.[91] This year, 2019, will be remembered for the prosecution of Carola Rackete, a captain of the German humanitarian vessel Sea-watch 3.[92] The lack of structural response to the urgent situation on the Mediterranean urged two lawyers to file a complaint against the EU before the International Criminal Court. Within the complaint, they argue that the EU committed crimes against humanity since the ''EU migration policy is founded in deterrence and that drowned migrants are a deliberate element of this policy.''[93]

Whereas the situation on the Mediterranean was in focus for a longer period, the deterrence nature of the EU migration policy had taken its swing on external land borders of the EU, where a significant trend of execution of violent push backs of refugees has been recorded. Amnesty International[94], Human Rights Watch, [95] and the UNHCR[96] warned about this unlawful practice

[90] Lorenzo Tondo , Sam Jones, (2018) ''Migrant-rescue boat Open Arms released by Italian authorities'', *Guardian.uk*, Available at: https://www.theguardian.com/world/2018/apr/16/migrant-rescue-boat-open-arms-released-by-italian-authorities , accessed on 24th of August 2019.

[91] Marta Rodriguez Martinez, Oscar Valero, (2019) '' Spain blocks rescue ship from leaving Barcelona port'', Euronews.com. Available at: https://www.euronews.com/2019/01/14/spain-blocks-rescue-ship-from-leaving-barcelona-port , accessed on 24th of August 2019.

[92] Corporate Dispatch, (2019) '' Sea-Watch Captain Carola Rackete Faces Italy Prosecutor Over Migrants'', *Corporatedispatch.com*. Available at: https://corporatedispatch.com/sea-watch-captain-carola-rackete-faces-italy-prosecutor-over-migrants/ , accessed on 24th of August 2019.

[93] The Conversation, (2019) '' Migration in the Mediterranean: why it's time to put European leaders on trial'', *Theconversation.com*. Available at: https://theconversation.com/migration-in-the-mediterranean-why-its-time-to-put-european-leaders-on-trial-120851?fbclid=IwAR3t2bWt-5t1RPQsrZOzR4CqWvI5jHqMTPRvbeyN2O3CcIlUD3svjtRQFDs ,accessed on 24th of August 2019.

[94] Amnesty International, (2019) '' PUSHED TO THE EDGE -VIOLENCE AND ABUSE AGAINST REFUGEES AND MIGRANTS ALONG THE BALKANS ROUTE'', *Amnesty.org*, Available at: https://www.amnesty.org/download/Documents/EUR0599642019ENGLISH.PDF , accessed on 24th of August.

[95] Human Rights Watch, (2016) '' Bulgaria: Pushbacks, Abuse at Borders'', *Hrw.org*. Available at: https://www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders, accessed on 24th of August 2019.
Human Rights Watch, '' Croatia: Migrants Pushed Back to Bosnia and Herzegovina'', *Hrw.org*, 11th of December 2018. Available at: https://www.hrw.org/news/2018/12/11/croatia-migrants-pushed-back-bosnia-and-herzegovina , accessed on 24th of August 2019.

[96] The UNHCR,(2018) '' DESPERATE JOURNEYS -Refugees and migrants arriving in Europe and at Europe's borders'', *Unhcr.org*. Available at: https://www.unhcr.org/desperatejourneys/ , accessed on 24th of August 2019.

that does not enable access to the system of international protection. Although these international organizations have a great platform for advocacy on the international level, it important to note that a significant number of smaller organisations offer direct support to refugees who have been the victims of violent pushbacks.[97] Consequently, the same local organisations struggle with the criminalisation of their work under the charges of facilitating illegal migration.[98]

The first-hand support offered by individuals and civil society organisations, later, became the foundation of humanitarian support provided both on the Mediterranean and the land borders of the EU. Simultaneously, the ones who provided humanitarian relief and solidarized with refugees found themselves in a limbo between their will to help and possible prosecution. Their acts of humanitarian assistance were publicly scrutinized because they were helping the ''rightless non-citizen, the foreigner, the sans-papiers, the perceived border-breaker.''[99] Sadly, public criticism was not the only threat to the work of individuals and civil society organisations. It was rather a trigger for further delegitimization of their work within the political sphere.[100]

[97] No Name Kitchen, Border Violence Monitoring, Centre for Peace Studies, Are You Syrious? issued several reports on illegal push backs conducet by the Croatian police. You can find more details here: https://www.cms.hr/hr/azil-i-integracijske-politike/izvjestaj-o-nasilnom-protjerivanju-izbjeglica-iz-rh-sustavno-nasilje-prema-izbjeglicama-mora-prestati.

[98] The Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, (2018) ''Solidarity is not a crime'', Seventy-third session. p.4.
Available at: https://www.ohchr.org/Documents/Issues/Executions/A_73_42960.pdf, accessed on 15th of August 2019.

[99] Liz Fekete , Frances Webber , Anya Edmond-Pettitt, (2017) ''Humanitarianims, the uneccaptable face of solidarity", The Institute of Race Relations, 2017, p.2. Available at: http://s3-eu-west-2.amazonaws.com/wpmedia.outlandish.com/irr/2017/11/10092853/Humanitarianism_the_unacceptable_face_of_solidarity.pdf , accessed on 24th of August 2019.

[100] Ibid.

1.5 What is Criminalised?

Implementation of policies primarily focused on deterring refugees from coming to the EU affected the work of individuals and civil society organisations that offered humanitarian assistance. These policies produced a political framework for implementation of repressive methods and led to phenomena of ‘’shrinking space’’ which can be defined as ‘’criminalisation, stigmatisation and de-legitimisation of so-called ‘Human Rights Defenders’ (HRDs) (a term that encompasses all actors engaged in non-violent advocacy for human rights and social justice) as well as the criminalisation of refugees' solidarity.’’[101] Following the alarming practices of criminalisation of humanitarian assistance to refugees and other migrants the Independent Expert on Human Rights and International Solidarity in his Report[102], presented on the forty-first Human Rights Council session, emphasized the urgency of addressing:

> Consequential nature of the effort that have been made by some States, regional organizations and sections of civil society to criminalise or suppress the expression of international solidarity to irregular migrants and refugees; and the serious human rights implications of those actions…[103]

The comprehensiveness of these newly implemented policies that directly derived from the intention to limit the expression of international solidarity is most adequately portrayed through the broadness of criminalised acts. However, as Fekete pointed out, the states do not necessarily

[101] Ben Hayes, Frank Barat, Isabelle Geuskens, Nick Buxton, Fiona Dove, Francesco Martone, Hannah Twomey and Semanur Karaman, (2017) ‘’On “shrinking space” a framing paper’’, *Transnational Institute*, p. 4. Available at: https://www.tni.org/files/publication-downloads/on_shrinking_space_2.pdf , accessed at 24th of August 2019.
[102] Independent Expert on Human Rights and International Solidarity, (2019) ‘’Report of the Independent Expert on Human Rights and International Solidarity – Forty-first session of the Human Rights Councils’’.
Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/108/84/PDF/G1910884.pdf?OpenElement , accessed on 26th of August 2019.
[103] Ibid. p. 2.

want to prosecute everyone who is helping refugees and other migrants. The states instead want to show that ‘’the threat of prosecution is real and imminent.’’[104] Smialowski argues that the number of persons who faced prosecution because of humanitarian assistance does not overlap with the number of persons who were convicted. On the contrary, the latter is significantly smaller.[105]

Nevertheless, there is still an indisputable fact the mere possibility of prosecution may deter people from helping, specifically in scenarios when domestic laws navigate towards, among others, criminalisation of humanitarian rescue at sea, criminalisation of providing necessities of life, or sanctuary, or criminalisation of legal aid.[106]

Admittedly, states criminalised acts that are nothing more but assisting refugees and other migrants in accessing their fundamental human rights. Prosecution of persons who saved refugees and other migrants from drowning offered them food, accommodation, or free legal aid is not just a problem characteristic for the Member States of the EU, but it became a widespread practice all around the world.[107]

What raises further concerns is the fact that the process of criminalisation of humanitarian assistance occurs through formal and non-formal methods. What is common to both is their reliance on constructed ‘’suspicion towards humanitarian actors’’[108] which is used as a tool to

[104] Liz Fekete, (2009) ‘’Europe: crimes of solidarity’’, *Race & Class, 50(4),* 2009, p.84.
[105] Eric Reidy, (2019) ’’European activists fight back against ‘criminalisation’ of aid for migrants and refugees’’, Thenewhumanitarian.org. Available at: https://www.thenewhumanitarian.org/news-feature/2019/06/20/european-activists-fight-criminalisation-aid-migrants-refugees , accessed on 26th of August 2019.
[106] Independent Expert on Human Rights and International Solidarity, (2019)‘’Report of the Independent Expert on Human Rights and International Solidarity – Forty-first session of the Human Rights Councils’’,p. 2-7.
Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/108/84/PDF/G1910884.pdf?OpenElement , accessed on 26th of August 2019.
[107] Tania Karas , (2019) "Crimes of compassion: US follows Europe's lead in prosecuting those who help migrants", *Pri.org.* Available at: https://www.pri.org/stories/2019-06-06/crimes-compassion-us-follows-europes-lead-prosecuting-those-who-help-migrants , accessed on 26th of August 2019.
[108] Sergio Carrera, Lina Vosyliute, Stephanie Smialowski, Dr Jennifer Allsopp, Gabriella Sanchez, ‘’ Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018

present humanitarian actors as accomplices in migrant smuggling. In their research, Carrera et. al. note how the process of criminalisation of humanitarian assistance is often-times based on the vague definition of migrant smuggling.[109] Legal uncertainty that arises from these vaguely constructed crime definitions opens the floor for intimidation and harassment that can play a double role; it can be a either a forerunner to formal criminalisation, or it can be understood as one of the models of non-formal criminalisation. Together with intimidation and harassment, non-formal criminalisation can be detected through rigid disciplining of actors who are active in supporting refugees and migrants.[110] While formal criminalisation ostensibly relies on stopping the work of individuals and civil society organisations by putting them under very disproportionate charges, disciplining, intimidation and harassment somewhat prepare the terrain for future formal criminalisation. In case of disciplining, individuals and civil society organisations who provide refugees and other migrants with food, clothes or medicine expose themselves to indictments or charges for acts against the public order.[111] Intimidation and harassment on the other hand is greatly depend on political circumstances and the intensity of threats received from political elites. In such political climate law enforcement bodies often-time have a higher level of discretion which means that individuals and civil society organisations become victims of arbitrary decisions which in their nature contravene the law.[112] Escalation of intimidation and harassment is visible in scenarios when police uses force and arrests individuals and representatives of civil society organisations that provide assistance to refugees and migrants.[113]

update'',European Parliament, PETI Committee, 2018, p. 23. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf

[109]Ibid. p. 23.

[110] Ibid., p.24.

[111] Ibid., p.24

[112] Ibid., p.24

[113] Ibid., p.24.

This approach to criminalisation of humanitarian assistance that acknowledges criminalisation outside its formal form represent a step forward in understanding how governments try to limit the scope of work of individuals and civil society organisations. Understanding of non-formal criminalisation of humanitarian assistance is even more important in the context of the European Union because it spreads the scope of future advocacy and shows that in this case not only the lives of refugees and other migrants are at stake, but also the freedom of speech and freedom of assembly, which are the foundations of all democratic societies. As Carrera et. al. pointed in their research; non-formal criminalisation contradicts to the rule of law since it relies on the ‘’over-stretched concept of crime.’’[114]

According to Mari Lorena Cook, as a direct consequence of formal criminalisation that manifests through restrictive domestic laws' individuals and civil society organizations that offer humanitarian assistance find themselves stranded between the choice of either ‘’*evading* or *engaging* with the law’’.[115] Both authorities and the helpers use the law for the purpose of legitimizing their acts and gaining support from the outside observers. However, the difference among them is that for the purpose of legitimizing their activities and proving that their acts do not violate the law, helpers engage with international law to affirm their actions. At the opposite end of engaging with the law stands the evasion of the law, which in this context means relying on disobedience in situation when domestic laws are understood as unfair and inhumane.[116] Accordingly, individuals and civil society organizations find themselves in a dilemma, whether the law can be their accomplice they can rely on, or their nemesis?

[114] Ibid. p.25.
[115] Mari Lorena Cook, “Humanitarian Aid Is Never a Crime”: Humanitarianism and Illegality in Migrant Advocacy’’, Law and Society Review, Volume 45, Number 3 (2011), p. 563.
[116]Ibid. p. 563 – 564.

Chapter II: Can the Law be an Accomplice?

In search of an answer to whether the law can be an accomplice to persons who offer humanitarian assistance while trying to legitimize their work, this Chapter will look into three relevant pillars of international law; international refugee law, international criminal law, and the law of the sea. These three relevant pillars serve as a ground of legitimisation of humanitarian assistance and represent a foundation for the above-mentioned process of *engaging*[117] with the law. Broadly speaking, this Chapter will demonstrate in what way international law can assist with the process of decriminalisation of humanitarian assistance, especially in the case when national laws pose restrictions in access to rights. Lastly, besides stepping into the international legal framework, this Chapter will contextualize the current EU legal framework and its (dis)ability to reshape both the narrative and Member States laws for the purpose of decriminalising humanitarian assistance.

2.1 The 1951 Refugee Convention and its Following Protocol

When it comes to the protection of refugees, the most relevant legal instrument is the 1951 Convention Relating to the Status of Refugees and its following the 1967 Protocol. These instruments laid down the grounds for recognition of the refugee status and serve as a normative framework for persons who provide humanitarian assistance.

As outlined before, current migration flows differentiate from previous migration trends and are described through mutual co-existence of several migration categories.[118] The so-called ‘’refugee crisis’’ that happened in 2015 and 2016 represented a movement of all categories within the

[117] Ibid. p. 563.
[118] Mathias Czaika, Hein de Haas, (2015) ‘’ The Globalization of Migration: Has the World Become More Migratory’’, International Migration Review, Volume 48 Number 2, p. 291.

existing migration glossary. The same ‘’crisis’’, together with current migration flows, portrays a textbook example of mixed flows that the IOM identifies as ‘’asylum seekers, refugees, trafficked persons, unaccompanied minors/separated children, and migrants in an irregular situation.’’[119] However, not all of these categories fall under the protection of the 1951 Refugee Convention. The Convention itself recognizes refugees’ as persons who have a well-founded fear of being persecuted on several grounds; their race, religion, nationality, membership of a particular social group, or political opinion.[120] Adding to these grounds, these persons should be outside of their country of nationality and should not be able to enjoy the protection of this country, i.e., a person is in the position of statelessness.[121] As Owen points out, ‘’ the normative basis of this specification of the refugee is that refugees are persons who have lost their political standing as members of a state.’’[122] Furthermore, the Convention made it possible for the states to implement ‘’geographical

[119] IOM, (2019) ‘’Glossary on Migration’’, *Iom.int*, p. 140. Available at: https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf, accessed on 29th of August 2019.

[120] Article 1 (2) The 1951 Convention Relating to the Status of Refugees. Available at: https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+167%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfece1d47, accessed on 29th of August 2019.

[121] Ibid. It is important to note that this statelesnes deffers from the notion of de jure stateless persons. As Owen points out "a feature that distinguishes the refugee is that although they formally hold a nationality (in contrast to de jure stateless persons), they are demarcated from other resident non-citizens of a state by the fact that they do not have effective possession of the rights of external citizenship – the right to diplomatic protection and the right to return. ’’See more at: David Owen, (2018) "Refugees and Responsibilities of Justice", GLOBAL JUSTICE : THEORY PRACTICE RHETORIC (11/1) p. 28.

[122] David Owen,(2018) "Refugees and Responsibilities of Justice", GLOBAL JUSTICE : THEORY PRACTICE RHETORIC (11/1) p. 27.

and temporal limits''[123] which were later on addressed by the 1967 Protocol that successfully removed those limitations and made the nature of the Convention more comprehensive.[124]

While it is rather clear that the Convention has a standard-setting power when defining who a refugee is, there are several theorists who claim that this definition should be more inclusive. These theorists argue that the definition should encompass ''victims of violence of a more generalised and indiscriminate sort; the kind of harms that result from war, natural disasters or the structural violence associated with ongoing impoverishment.''[125] Matthew Gibney notes that a refugee should be defined as a person who needs the protection of the new state since her state of membership cannot successfully fulfil its obligation to protect her human rights.[126] Although the Convention defines the distinctive nature of refugee status which accordingly leads to the exclusion of victims of more ''general insecurity''[127] Gibney calls for broadening of the scope of protection under the refugee status on persons who left their countries due to ''civil conflict or are ravaged by economic impoverishment.''[128] Michael Dummet argues that the protection grounds set in the 1951 Convention are too restrictive, more precisely, ''all conditions that deny someone the ability to live where he is in minimal conditions for a decent human life ought to be grounds

[123] ''The 1951 Convention, as a post-Second World War instrument offered the choice of limiting the scope of protection leaving the geographical limits as optional. Precisely '' The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage.'' Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR), CONVENTION AND THE PROTOCOL ON THE STATUS OF REFUGEES, p. 2. Available at: https://www.unhcr.org/3b66c2aa10.html. Accessed on the 10th of September 2019.

[124] Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR), CONVENTION AND THE PROTOCOL ON THE STATUS OF REFUGEES, p 2. Available at: https://www.unhcr.org/3b66c2aa10.html. Accessed on the 10th of September 2019.

[125] Matthew J. Gibney, (2015) "Refugees and justice between states", *European Journal of Political Theory* 0(0), p. 5.

[126] Ibid.

[127] Ibid. p. 6.

[128] Ibid. p. 6.

for claiming refuge elsewhere.''[129] Furthermore, Dummet considers the possibility of revising the obligation to explicitly prove that the persecution comes from state authorities, arguing ''that the persecution which is offered as a ground for asking for asylum need not be persecution from state authorities.''[130] Although there are significant endeavours by several theorists to amend some provisions of the Convention, as Dummet rightly pointed out, such a scenario would further jeopardize already existing grounds for protection of refugees under the Convention, primarily because several states consider current grounds too extensive.[131] As a response to these concerns one may refer to the establishment of the subsidiary protection which is given to persons who do not qualify for refugee status but cannot go to their country of origin or habitual place due to risk of suffering serious harm.[132]

Whether or not scholars stand for or against the broadening of the protection scope of the Convention becomes an issue of secondary nature, especially in circumstances when Western countries seek to protect the access to the system of international protection for ''genuine refugees'' while at the same time aim to protect the system from individuals who would ''fragrantly'' use it.[133] Determination of the genuine of fragrant nature may differ according to the understanding of what the protection grounds of the Convention ought to be. However, *de jure,* it is clear that the grounds do not encompass violence produced by the economic impoverishment or lack of decency of human life. It is the responsibility of the state to ensure the fairness of determination procedure for the refugee status by ''individually adjudicate[ing] asylum claims,''[134]

[129] Michael Dummet, (2001) "On Immigration and Refugees", Routledge: Thinking in action, p. 37.
[130] Ibid. p. 37.
[131] Ibid. p. 37.
[132] COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Aeticle 2(e).
[133] Matthew E. Price, (2009) ''Rethinking Asylum'' Cambridge University Press, p. 251.
[134] Ibid. p. 251.

and this process should guarantee the protection of persons who need international protection. Precisely this individual nature of the determination procedure ensures that persons who came in 2015 and 2016 and who keep on coming now should be understood as refugees until they individually do not go through the determination procedure that might prove differently.[135]

Matthew Price emphasizes the importance of including different views on the scope of protection of the Refugee Convention. He identifies the existing deficiencies of the current system, specifically; ''for example, requiring asylum seekers to corroborate their claims with documentary evidence helps to minimize asylum fraud, but also has the effect of denying asylum to persecuted people who are unable to provide any evidence beyond their own testimony.''[136] Thus, in need to find the optimal solution that would offer protection for all persons who require it, the above-mentioned views of different scholars advocating for widening of the protection scope of the Convention should not be bluntly discarded. On the contrary, they should be taken into consideration, due to deficiencies of the current system, and the fact that:

> The 1951 Convention has proven to be a living and dynamic instrument, and its interpretation and application has continued to evolve through State practice, UNHCR Executive Committee conclusions, academic literature and judicial decisions at national, regional and international levels.[137]

[135] This is the primary reasons why this thesis addresses all new-comers as refugees, especially in the context of humanitarian assistance. Since one of the presumptions of this thesis is that helpers are primarily assisting persons to access their right to asylum, specifically in scenarios when Member States implement restrictive policies which disable the access to the system of international protection. Thus, in those situations it is almost impossible and it is not the duty of the helper to decide whether someone's individual situations falls within the ambits of the Convention and as a result the state will recognize their refugee status.

[136] Matthew E. Price, (2009) ''Rethinking Asylum'' Cambridge University Press, p. 203.

[137] The UNHCR, (2019) ''HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS and GUIDELINES ON INTERNATIONAL PROTECTION'', *Unhcr.org*, p.9. Available at: https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html , accessed on 9th of September 2019.

2.1.1 The Importance of the Refugee Convention

The 1951 Refugee Convention as a legally binding instrument represents a nexus between ''meeting the needs of refugees and respecting the legitimate concerns of state parties.''[138] The challenge of this nexus is however to unambiguously encompass the core rights together with the refugee-specific rights that are frequently overlooked and considered as unnecessary, arguing that the standards set by human rights law can be attributed to the needs of the refugees, without any need for further accommodation.[139]

The value of the Refugee Convention arises in refugee-specific situations and conditions, of which the most distinctive one is the situation of unauthorized entry to acquire international protection. Paragraph 1 of Article 31 of the Refugee Convention reads as follows:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[140]

As James Hathaway explains, the decision not to penalize refugees arose from the need to offer a feasible solution that would prevent refugees from living under the conditions of unauthorized stay. The creators of the Convention understood that ''the threat of prosecution and punishment for the breach of general immigration laws would undoubtedly deter many unauthorized refugees

[138] James C. Hathaway, (2005) ''The Rights of the Refugees under International Law'', Cambridge University Press, p.11.
[139] Ibid. p. 13.
[140] United Nations General Assembly, (1951) ''Convention Relating to the Status of Refugees (''1951 Refugee Convention''), UNTS Vol. 189. Artcile 31.

from seeking to regularize their status.''[141] The absence of the element of prosecution and punishment is only applicable to the refugee-specific situations, and it is of presumptive nature since it applies to asylum seekers whose refugee status still has not been recognized.[142] Within the Refugee Convention Commentary, it is emphasized how important it is to understand the position of refugees and how the threshold for recognition of refugee status would be rather high if the status would be recognized only in scenarios when refugees would comply with requirements for legal entry.[143] Thus, the Refugee Convention itself sets the standard in which irregular entry does not represent a disadvantage in the process of recognition of the refugee status.

In order to contextualise the importance of the Refugee Convention within the topic of this thesis, it is important to question whether the absence of prosecution and penalization applies to persons who assist refugees. The Convention Commentary confirms that initially,'' there is no mention of persons who have assisted refugees in connection with their illegal entry or presence.''[144] The expression of interest for possible expansion of the protection scope of Article 31 to voluntary helpers and non-governmental organisations was firstly initiated by the Swiss Observers, who had a similar clause in their Aliens Act, which characterized the acts of individuals and organisations as a humanitarian duty.[145] Initially, states were reluctant to expand the meaning of Article 31, underlining that ''such amendment might encourage organizations actually to organize or promote the illegal entry of refugees (rather than simply to respond to requests for assistance).''[146] While

[141] Ibid. p. 388.
[142] Ibid. p. 389.
[143] UNHCR, (1997) COMMENTARY ON THE REFUGEE CONVENTION 1951, Published by the Division of International Protection of the United Nations High Commissioner for Refugees , Comments on Article 31, paragraph 2. Available at: https://www.unhcr.org/3d4ab5fb9.pdf. Accessed on 17th of September 2019.
[144] Ibid. Comments on Article 31 paragraph 3.
[145]James C. Hathaway, (2005) ''The Rights of the Refugees under International Law'', Cambridge University Press, p. 402.
[146] Ibid. p. 403.

the great majority of states declined the possibility of broadening the scope of Article 31, French and American representatives stated that this liberal practice should be considered as an example.[147] However, Hathaway explains that the Convention Commentary suggests that ''governments would not exercise their authority to penalize those assisting refugees to enter an asylum country absent evidence that they had acted in an exploitative way, or otherwise in bad faith.''[148]

What Convention Commentary additionally offers is an insight into the discussion for the second feature of the Convention, and that is the principle of non-refoulement addressed within Article 33 of the Convention. Prohibition of expulsion or return denotes:

> 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.[149]

The same Article poses restrictions in situations when a refugee might represent a security threat or if she has been ''convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.''[150] The principle of non-refoulement is interconnected with the standards set in Article 31, the non-penalization for illegal entry of refugees. As noted, before, a refugee will not be subject to penalization in a situation when she without delay approaches to authorities for the purpose of expressing her need to apply for international

[147] UNHCR, COMMENTARY ON THE REFUGEE CONVENTION 1951, Published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, Comments on Article 31, paragraph 3. Available at: https://www.unhcr.org/3d4ab5fb9.pdf. Accessed on 17th of September 2019.
[148] James C. Hathaway, (2005) ''The Rights of the Refugees under International Law'', Cambridge University Press, p. 405.
[149] Article 33, 1951 Refugee Convention. United Nations General Assembly (UN GA), ''Convention Relating to the Status of Refugees (''1951 Refugee Convention'')(18 July 1951), UNTS Vol. 189.
[150] Article 33, 1951 Refugee Convention. United Nations General Assembly (UN GA), ''Convention Relating to the Status of Refugees (''1951 Refugee Convention'')(18 July 1951), UNTS Vol. 189.

protection. The legal connection between these two protection scopes lies within the phrase ‘’coming directly from a territory where their life or freedom was threatened.’’[151] This criterion puts refugees who do not necessarily come from their country of origin at risk of penalization and refoulement into the territory of the last country from which they came from. Consequently, secondary movements and the possibility of them being encompassed by the grounds for protection of the Refugee Convention became a subject of much discussion. Drafters of the Convention thoroughly discussed the limits of the immunity on defined penalties for irregular entry. The main question was whether this immunity would only be applicable in situations when refugees come from their country of origin?[152] Convention Commentary more closely explains the debate behind this question and shows the reluctance of some states to allow immunity from immigration penalties to refugees who are not coming directly from the country of origin. More precisely:

> It was first proposed by the French delegation that the provision should only apply to refugees “coming direct from his country of origin but it was felt that this would limit the scope of the Article too much. The President therefore suggested that the words just quoted should be replaced by the phrase “coming direct from a territory where his life or freedom was threatened.[153]

However, Convention Commentary shows that the drafters were aware of the fact that secondary flight should not exclude refugee from the protection, specifically because the refugee can prove that she was in the risk of prosecution in ‘’the country from which secondary movement

[151] Article 31, 1951 Refugee Convention. United Nations General Assembly (UN GA), ‘’Convention Relating to the Status of Refugees (‘’1951 Refugee Convention’’)(18 July 1951), UNTS Vol. 189.
[152]James C. Hathaway, (2005) ‘’The Rights of the Refugees under International Law’’, Cambridge University Press, p. 399.
[153] UNHCR, COMMENTARY ON THE REFUGEE CONVENTION 1951, Published by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, Comments on Article 31, paragraph 5. Available at: https://www.unhcr.org/3d4ab5fb9.pdf. Accessed on 17th of September 2019.

originated…on account of race, religion, nationality, membership of a particular group…"[154] Hathaway points outs that this type of comments show that the scope that Article 31 indeed protects refugees whose secondary movement was motivated due to persecution.[155] Altogether it can be concluded that the Refugee Convention itself does not go in depth with offering arguments for encompassing the issue of criminalisation of humanitarian assistance. However, it is indicative that within the Convention Commentary, the drafters offered both for and against arguments. This *status quo* can, in some way, as Hathaway states, indicate that the drafters presumed that the government would not criminalize persons who help refugees due to humanitarian reasons. [156]

Principles laid down in Article 31, the non-penalization of refugees because of irregular entry, and Article 33, the prohibition of refoulement, serve as a ground for the deconstruction of the narrative that is used for legitimizing criminalisation of humanitarian assistance. The media and general public would oftentimes, question the legality of refugee claims due to secondary movements or irregular crossing of the border. However, the Convention and its accompanying Commentary disqualify national laws that disable access to the system of international protection and restrict humanitarian assistance.

2.2 The UN Smuggling Protocol

Second relevant pillar of international law, international criminal law, indirectly addresses the issue of criminalisation of humanitarian assistance through the United Nations Protocol against the

[154] James C. Hathaway, (2005) ''The Rights of the Refugees under International Law'', Cambridge University Press, p.401.
[155] Ibid. p.402.
[156] James C. Hathaway, (2005) ''The Rights of the Refugees under International Law'', Cambridge University Press, p. 405.

Smuggling of Migrants by Land, Sea and Air[157] and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[158] In November of 2000, the UN adopted the Convention against Transnational Organized Crime, which was later on supplemented by these two protocols together with the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.[159]

The relevance of the Protocol against Smuggling of Migrants and the Protocol to Prevent Trafficking lays in their ability to offer conceptual clarity between the criminal offences understood as smuggling and trafficking. As Iselin and Adams pointed out, ‘’the difference between these phenomena have a profound impact on the way both perpetrators and victims are viewed and treated.’’[160] Consequently, their differences led to the shaping of the legal framework that differs them through four main principles: ‘’consent, transnationality, exploitation and profit.’’[161]

[157] United Nations, (2002) ‘’PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME’’.Available at: https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf. Accessed on 13th of September 2019.

[158] United Nations, (2000) ‘’PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME".
Available at: https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx. Accessed on 13th of September 2019.

[159] United Nations, (2003) ‘’ United Nations Convention against Transnational Organized Crime and the Protocols Thereto’’.Available at: https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html. Accessed on 13th of September 2019.

[160]Brian Iselin, Melanie Adams, (2003) ‘’Distinguishing between Human Trafficking and People Smuggling’’, UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, Bangkok, p. 1. Available at: https://www.embraceni.org/wp-content/uploads/2006/06/Distinguishing[1]1.pdf . Accessed on 13th of November 2019.

[161] Dr Sergio Carrera, Prof. Elspeth Guild, Dr Ana Aliverti, Ms Maria Giovanna Manieri, Ms Michele Levoy, (2016) ‘’Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’’ European Parliament, LIBE Committee, p. 22-23.

2.2.1. Applicability of the UN Smuggling Protocol

As a starting point, it will be useful to refer to the definition of smuggling and trafficking given within the two protocols. Article 3 of the Protocol on Smuggling of Migrants defines smuggling as:

> the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.[162]

Whereas criminal offence for smuggling is established in the situation when there is a gain of material benefit, the criminal offence of trafficking is defined as:

> '' the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.''[163]

In order to make the distinction between smuggling and trafficking clearer, Iselin and Adams, as a comparison between these two criminal offences took the notion of victimhood. In their understanding, trafficking relies on the exploitation of a person, which leads to human victims, making it a ''crime

[162] United Nations, (2002) ''PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME'', Article 3.
[163] United Nations, (2000) ''PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME'', Article 3.

against the person.''[164] Smuggling, on the other hand, is rather a process through which the smuggler has a facilitating role, and as a result, usually, the only victim is the state whose laws have been violated; thus, it constitutes as a ''crime against public order.''[165] Vosyliute and Conte understand smuggling as a ''paid service provided by a smuggler to a migrant in order to bypass legitimate border controls. The migrant's consent is implicit in the very definition…''[166]

The Study of the LIBE Committee of the European Parliament differentiates these criminal acts through four main principles; consent, transnationality, exploitation, and profit.[167] Starting from the principle of consent, there is an immediate difference between the two acts. There is an assumption that victims of trafficking do not give their consent, only with the possible exemption in the situation when the consent is given for the process of moving. Ultimately, victims of trafficking end up stranded in the circle of exploitation and oppression. In the case of smuggling, the main assumption is that the person is paying for the service, thus consent is a pre-requisite.[168] In regard to the second principle, transnationality, the difference is again straightforward. Human trafficking does not need to be international*, a contrario*, it can occur within one state, through the movements between the urban area and the rural areas. Opposite to this variety of locations between which the trafficking can occur, in the context of smuggling, only cross-border movements can be identified

[164] Brian Iselin, Melanie Adams, (2003) ''Distinguishing between Human Trafficking and People Smuggling'', UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, Bangkok, p. 3. Available at: https://www.embraceni.org/wp-content/uploads/2006/06/Distinguishing[1]1.pdf . Accessed on 13th of November 2019.
[165] Ibid.
[166] Lina Vosyliūtė, Carmine Conte, (2018) ''RESOMA: Crackdown on NGOs assisting refugees and other migrants'', p. 9. Available at: http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Policy%20Briefs_topic4_Crackdown%20on%20NGOs_0.pdf . Accessed on 17th of September 2019.
[167] Dr Sergio Carrera, Prof. Elspeth Guild, Dr Ana Aliverti, Ms Maria Giovanna Manieri, Ms Michele Levoy, (2016) ''Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants'' European Parliament, LIBE Committee,p. 22-23.
[168] Ibid.

as the acts of smuggling.[169] The third principle, the exploitation is far more often in the case of trafficking. To be more precise, ‘’the victim of human trafficking possesses some key attributes which make him/her attractive to the trafficker according to the intended industry for which they are being recruited.’’[170] In the case of smuggling, the smugglers provide the service that is needed, she does not necessarily go into the observation of individual characteristics.[171] Last principle, the accumulation of profit is probably the most prominent difference between these two acts. Trafficking is exemplified through continuous exploitation of the victim, while smuggling is in a great number of cases a one-time service whose price is defined by the service provider, the smuggler.[172]

However, the main question is, whether this definition of smuggling presumes criminalisation of humanitarian assistance to refugees? Within its following Protocol, there is no explicit mention of humanitarian assistance to refugees or asylum seekers, but it is indicative that it was taken into consideration during the drafting process of the Convention and its supplementing Protocols. Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crimes and the Protocols Thereto closely explain the scope of the acts that fall within the ambits of the criminal offence for smuggling. These Guidelines enact limitations of the scope, and state that the criminal offence of smuggling does not encompass ‘’those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in

[169] Brian Iselin, Melanie Adams, (2003) ‘’Distinguishing between Human Trafficking and People Smuggling’’, UN Office on Drugs and Crime, Regional Centre for East Asia and the Pacific, Bangkok, p. 5. Available at: https://www.embraceni.org/wp-content/uploads/2006/06/Distinguishing[1]1.pdf . Accessed on 13th of November 2019.
[170] Ibid.
[171] Ibid.
[172] Ibid.

the movement of refugees or asylum-seekers.''[173] Accordingly, in paragraph 19 of the Guidelines, it is suggested that ''against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum seekers''[174] there should be no criminalisation.

Ultimately, due to specific mention of humanitarian assistance within the Guidelines, it can be argued that implementation of the laws that which do not offer exemption for humanitarian assistance, and criminalise it under the spectrum of the criminal act of smuggling do not align with the purpose of the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air.

2.3. The Law of the Sea

The relevance of the law on the sea lies in the fact that during the so-called ''refugee crisis'' refugees were mostly coming through the Mediterranean. Due to the high number of persons who have lost their lives or gone missing a wide range of civil society organisations send their search and rescue crews to offer direct help to refugees and save their lives. However, instead recognizing their importance, the Member States often-times initiated criminal proceedings against them, mostly connecting their engagement with smuggling activities. Member States did not only criminalize the work of civil society organization rescue ships, but they also applied the so called ''anti-smuggling'' laws on fishermen who saved refugees from drowning. Thus, for this present

[173] United Nations Office on Drugs and Crime, (2004) ''LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO'', p. 341.
Available at: https://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf. Accessed on 19th of September 2019.
[174]Ibid. p. 333.

thesis it is important to refer to the standards set within the ambits of international law which prescribe the duty to assist persons and boats in danger at the sea.[175]

International law of the sea is constituted form the International Convention for the Safety of Life at Sea from 1974 (''SOLAS''), the International Convention on Maritime Search and Rescue Operations from 1978 (''SAR'') and the United Nations Convention on the Laws of Sea of 1982 (''UNCLOS'').

The 33rd Regulation of Chapter V of SOLAS determines the responsibility of providing assistance to persons in distress at sea, more precisely:

> The master of a ship at sea which is in a position to be able to provide assistance, on receiving a signal from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.[176]

Second relevant convention, SAR gives meaning to the search and rescue operations that fall within the ambits of international law of the sea. Accordingly, search and rescue is defined as ''

[175] Fundamental Rights Agency, (2019) ''2019 update - NGO ships involved in search and rescue in the Mediterranean and criminal investigations", *Fra.europa.eu*. Available at: https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities. Accessed on 20th of November 2019.

[176] International Maritime Organization, (1974) ''SOLAS - International Convention for the Safety of Life at Sea'',p. 494.
Available at: http://www.mar.ist.utl.pt/mventura/Projecto-Navios-I/IMOConventions%20(copies)/SOLAS.pdf
Accessed on 21st of September 2019.

the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resource.''[177] Furthermore SAR explicitly states that the ''nationality or status of such a person or the circumstances'' should be completely disregarded when in a need for assistance.[178]

The obligation to assist persons or a ship in distress is further addressed within the Article 98 of UNCLOS, where it is stated:

> 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) 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; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.
>
> 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.[179]

[177] International Maritime Organization, (1979) '' SAR Convention - INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE'', 1979. Chapter 1, Point 1.3, p. Available at: https://onboardaquarius.org/uploads/2018/08/SAR-Convention-1979.pdf. Accessed on 22nd of September 2019.
[178] Ibid. Point 2.1.10.
[179] United Nations, (1982) '' United Nations Convention on the Law of the Sea'', Article 98. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf . Accessed on 21st of September 2019.

All three Conventions laid down the standards for assisting persons in distress at sea. Their relevance lies in defining assistance as an obligation, rather than leaving it as an option that should depended on individual circumstances. As an addition to the above listed duties, amendments added to SAR Convention in 2004 prescribe that ''survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines…''[180] Furthermore the same amendments significantly reduce the possibility of the state to decline the entrance to ships who carry rescued persons.[181]

Conversely, it is rather clear that the international law of the sea sets substantial standards in assisting persons in distress setting aside the status of this person or her nationality. These standards offer legal safeguards against arbitrary criminalisation of facilitation to entry, specifically in the situation of danger or immanent threat.

2.4. European Union Legal Framework

In 1999 within the Tampere Council Conclusion the European Union set political guidelines which addressed ''the field of immigration, police and justice cooperation and fight against crime.''[182] While framing the future work within the field of immigration, stronger emphasis was put on the process of establishing Common European Asylum System[183], with the primary focus on ''[the

[180]Maritime Safety Committee, (1979) ''Resolution MSC.155(78) ADOPTION OF AMENDMENTS TO THE INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE 1979'' , 2004. p. 3. Available at: http://www.imo.org/en/OurWork/Facilitation/personsrescued/Documents/Resolution%20MSC.155-%2078.pdf . Accessed on 23rd of September 2019.

[181]Ibid.

[182] European Commission, ''Tampere Council Conclusions 1999'', Ec.europa.eu. Available at: https://ec.europa.eu/anti-trafficking/eu-policy/tampere-council-conclusions-1999_en. Accessed on 23rd of September 2019.

[183] According to the Article 78 of the Treaty of the Functioning of the European Union, Common European Asylum System entails: '' a) a uniform status of asylum for nationals of third countries, valid throughout the European Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status ;

establishment of] a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes.''[184] Almost the same goals got passed along in Council's Conclusions years after where it was stated that the EU will insist on the forceful prevention of smuggling and trafficking.[185]

The mission of tackling down smugglers and traffickers transferred into policy documents, which the European Agenda on Migration perfectly depicts. Targeting criminal smuggling networks detected as one of the areas in a need of immediate action served as a ground for building up the ''inter-agency cooperation''[186] between Europol and Frontex. European Agenda on Security

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of
managing inflows of people applying for asylum or subsidiary or temporary protection.'' See more at:
Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2008) available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2008:115:FULL&from=EN. Accessed on the 17th of September 2019.
Within the Recast Qualification Directive (Directive 2011/95/EU) the EU laid down the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. In Article 2, paragraph d) of the Directive, refugee is defined as '' a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;'' in addition paragraph g) defines eligibility for subsidiary protection as follows: '' person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;'' See more at: DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0095. Accessed on the 17th of September 2019.

[184] European Parliament, (1999) '' TAMPERE EUROPEAN COUNCIL 15 AND 16 OCTOBER 1999, PRESIDENCY CONCLUSIONS". Europal.europa.eu.
Available at: http://www.europarl.europa.eu/summits/tam_en.htm, Accessed on 23rd of September 2019.

[185] European Council, (2014) '' EUROPEA COUCIL 26/27 JUE 2014 CONCLUSIONS'' Consilium.europa.eu., p. 3. Available at: https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf . Accessed on 23rd of September 2019.

[186] European Commission, ''European Agenda on Migration'', Ec.europa.eu, 2015. p.3. Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration_en. Accessed on 23rd of September 2019.

identified as one of its goals the need to form ‘’preventive action against the facilitation of irregular migration.’’[187] Within the Agenda on Security, it is stated:

> the key lies in cooperation against the smuggling of migrants inside the EU and with third countries. The EU should make this priority in its partnership with third countries offering assistance to help key transit countries to prevent and detect smuggling activities as early as possible.[188]

The above-mentioned policy goals do not represent a substantive policy shift that arose as a result of mass influx in 2015 and 2016, *a contrario*, they reflect the standards set in early 2000’s through the so called Facilitators Package that is made from the Directive 2002/90/EC12 and its accompanying Council Framework Decision 2002/946/JHA.

2.4.1. Facilitation Directive and accompanying Framework Decision – ‘’Facilitators Package”

The EU legal framework that addresses the issue of smuggling and trafficking is reflected through the so-called Facilitators Package composed from the Directive of the Council Defining the Facilitation of Unauthorised Entry, Transit and Residence and the Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence. The aim of the Facilitators Package is to reduce irregular migration in order to protect migrants from violence and exploitation. Moreover, the Package aims at protection of ‘’Member States’ territorial integrity, social cohesion and welfare through well-managed

[187] European Commission, (2015) ‘’ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS ,The European Agenda on Security’’, Ec.europa.eu, 2015, p. 18. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/eu_agenda_on_security_en.pdf . Accessed on 24th of September 2019.
[188] Ibid. p. 18.

migration flows.''[189] For the purpose of achieving the prescribed goals the Facilitators Package supports and promotes penalization of ''aiding of unauthorized transit, entry and residence in the EU.''[190]

According to the paragraph 1 of Article 1 of the Facilitation Directive:

> Each Member State shall adopt appropriate sanctions on:
>
> (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
>
> (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.[191]

While Article 1 defines an obligation for the Member States to criminalize facilitation of irregular entry, transit and residence the Council's Framework Decision in Article 1 defines ''effective, proportionate and dissuasive criminal penalties'' for those infringements.[192] As noted, following criminal penalties should be implemented; '' confiscation of the means of transport used to commit the offence, a prohibition on practising directly or through an intermediary the occupational

[189]European Commission, (2017) '' COMMISSION STAFF WORKING DOCUMENT REFIT EVALUATION of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA)'', Europal.europa.eu. 2017, p.5. Available at: http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf Accessed on: 23rd of September 2019.

[190] Ibid.

[191] Official Journal of the European Communities, (2002) ''COUNCIL DIRECTIVE 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence'', Article 1. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0090. Accessed on 23rd of September 2019.

[192] Official Journal of the European Communities, (2002) '' COUNCIL FRAMEWORK DECISION of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence'', Article 1. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32002F0946 . Accessed on 23rd of September 2019.

activity in the exercise of which the offence was committed and deportation.''[193] Article 2 of the Facilitation Directive broadens the legal liability on the ''instigator, an accomplice and [the one who] attempts to commit an infringement as referred to in Article 1(1) (a) or (b).''[194]

Interestingly enough, in paragraph 2 of the first Article of the Facilitation Directive, it is proposed to the Member States' to exclude punitive measures in situations when assistance is offered for humanitarian reasons.[195] Precisely:

> 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.[196]

However, it is worth noting the difference between the wording of paragraph 1 and 2 of Article 1. While paragraph one prescribes and obligation for the states to implement punitive measures, paragraph 2 on the other hand servers more as a recommendation and leaves it to the States to determine whether there will be space for humanitarian assistance in their national legal framework.

The study dating from 2016 published by the LIBE Committee of the European Parliament, identifies key problematic provisions of the Facilitators Package which represent a digression from the standards set in international law, primarily the UN Smuggling Protocol. One of the main observations of the researches was the broadening of the scope of criminalisation due to the fact

[193] Ibid.
[194]Official Journal of the European Communities, (2002) ''COUNCIL DIRECTIVE 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence'', Article 2. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0090. Accessed on 23rd of September 2019. Supra note 178, Article 2.
[195] Ibid. Article 1.
[196]Ibid. Article 1.

that the Facilitators Package omits to recognize that irregularity can arise from several reasons, for example:

> refusal of an application for international protection or asylum; loss of a residence permit due to unemployment, exploitation or domestic violence; bureaucratic failures in processing residence or work permit applications, resulting in withdrawal or loss of status; as well as being born in the EU to parents who are undocumented.[197]

In the most recent study on the impact of the Facilitators Package Carrera et.al. defines several challenges within its legal framing.[198] First identified challenge is the ‘’lack of financial and other material benefit requirement for criminalisation’’[199] that was defined as a ground for determination of the criminal act of smuggling within the UN Protocol on Smuggling. As Carrera noted, the wording of the Facilitators' Package fails to provide legal certainty, since the main ground financial or material benefit does not condition the criminalisation. Consequently, Facilitators Package oversees the profit motive set in the UN Protocol on Smuggling and puts at risk family members and humanitarians who assist persons in irregular situation.[200]

As a second challenge Carrera identifies the ‘’non-obligatory exemption of the humanitarian clause.’’[201] As mentioned above the Facilitation Directive does not oblige Member States to implement a clause within their national laws that would exclude humanitarian assistance and

[197] Dr Sergio Carrera, Prof. Elspeth Guild, Dr Ana Aliverti, Ms Maria Giovanna Manieri, Ms Michele Levoy,(2016) ‘’Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’’ European Parliament, LIBE Committee, p. 24.
[198] Sergio Carrera, Lina Vosyliute, Stephanie Smialowski, Dr Jennifer Allsopp, Gabriella Sanchez, (2018)‘’ Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update’’,European Parliament, PETI Committee, p. 28. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf. Accessed on 24th of September 2019.
[199] Ibid. p. 29.
[200]Ibid. p. 29.
[201] Ibid. p. 28.

protect it from criminalisation. Furthermore, the exclusion of humanitarian assistance proposed in paragraph 2 of Article 1 of the Directive does not encompass facilitation in the process of regulation of residence which consequently broadens the spectrum of criminalisation and puts at risk organizations and individuals who provide such assistance.[202] In the research published by the LIBE Committee from 2016, it was emphasized how important it is for the Member States to exempt humanitarian assistance from criminalisation and that this exemption should be obligatory, rather than arbitrary.[203] Prior mentioned legal uncertainty with the non-obligatory exemption of humanitarian assistance caused the third challenge of the Facilitators Package, and that is ''lack of legal certainty among the humanitarian actors.''[204] Humanitarian actors are faced with confusing laws which put them in the position of constant fear of criminalisation of their work. This fear serves as a tool of discouragement and deters the ones who once provided food, shelter and other basic needs to irregular migrants.[205]

Together with the lack of inclusion of financial and material benefit the Facilitators' Package does not provide legal safeguards for smuggled migrants, which is in conflict with the standard set in the UN Smuggling Protocol. The criminalisation of smuggled migrants leads to the sixth challenge of the Facilitators Package, and that are ''disproportionate sanctions and penalties.''[206] Carrera emphasizes that the '' the Facilitators' Package provides a wide margin of discretion to Member States…creating discrepancies at the level of law enforcement across Member States.''[207] This

[202]Ibid. p. 30.
[203] Dr Sergio Carrera, Prof. Elspeth Guild, Dr Ana Aliverti, Ms Maria Giovanna Manieri, Ms Michele Levoy,(2016) ''Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants'' European Parliament, LIBE Committee, p. 47.
[204] Sergio Carrera, Lina Vosyliute, Stephanie Smialowski, Dr Jennifer Allsopp, Gabriella Sanchez, (2018)'' Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update'',European Parliament, PETI Committee, p. 31.
[205] Ibid.p. 31.
[206] Ibid. p. 29.
[207] Ibid. p. 32.

discrepancies lead to disproportional penalties which can manifest in sanctions up to 10 years in prison.[208] Accordingly, the main challenge of the Facilitators Package lays within the ''heterogeneous implementation of the Facilitators' Package by the Member States.''[209] This heterogeneousness is noticeable through the implementation of laws which promote illiberal values and which are a direct consequences of a lot of freedom given to the Member States when transposing the standards set in the Facilitators' Package in their national legal framework.[210]

Instead of determining standards that would promote humanitarian values, the Facilitators' Package set the standards few steps back. The broadness of the grounds for criminalisation led to the building of a legal framework which is focused on ''policing of humanitarianism''[211] Due to lack of preciseness of the provisions within the Facilitators Package, the Member States rely on existence of ''grey area'' for the implementation and promotion of illiberal policies that contravene with the standards set within the sphere of international law.

2.5. Conclusion

Chapter II strived to examine in what way can civil society organisations and individuals who provide humanitarian assistance *engage* with the law for the purpose of decriminalising humanitarian assistance. International Refugee Convention as it may be presumed, does not directly cover criminalisation of persons who assist refugees. The same can be said for the UN Smuggling Protocol which again does not directly mention humanitarian smuggling. However, Commentary and Guidelines of both of these important legal instruments show that the drafters *presumed* that acts of assisting refugees in for example irregular crossing, or smuggling for

[208] Ibid. p. 34.
[209] Ibid. p. 36.
[210] Ibid. p. 38.
[211] Ibid. p. 38.

humanitarian reasons would not be criminalised by the states. The importance of these Commentary and Guidelines lays in the fact that they are indicators of the purpose of the Refugee Convention and the UN Smuggling Protocol. Whereas international refugee law and international criminal laws do not explicitly mention humanitarian assistance within its provision, the international law of the sea explicitly puts an obligation of assisting persons in distress at sea no matter the status.

While international legal framework offers some opportunities to *engage*, the legal framework on the level of the European Union further closes the scope of work of civil society organisations and individuals who provide humanitarian assistance. Facilitation Directive does not follow the standards set within the UN Smuggling Protocol and by eliminating the condition of financial or material gain broadens the scope of criminalisation of assistance to persons whose status has not yet been regulated. Thus, European Union's fight against smuggling and organized crime led to implementation of laws that have an impact to the access to international protection. It is not helpful that the same Directive only suggests Member States to implement humanitarian clause within their national legal framework.

The answer to the question of whether the law can be an accomplice is multidimensional. If we look into the ambits of international refugee law, international criminal law, and international law of the sea it can be argued that they go in hand with the mission of decriminalisation of humanitarian assistance. However, on the other side there is a nemesis in the shape of the EU legal framework that broadened the scope of criminalisation and gave freedom to its Member State to recognise the importance of humanitarian assistance. Given the current political situation, it seems like majority of the Member States hardly recognised it and used the freedom for further criminalisation.

Chapter III: The Dilemma – Law as a Nemesis?

While the previous Chapter looked into the ways of *engaging* with the law, Chapter III will investigate how can civil society organisations and individuals justify their *evading* of national laws. Firstly, this Chapter will show moral grounds for disobeying national laws that criminalise humanitarian assistance. Afterwards, for the purpose of offering legal justification for *evading* the national laws the Chapter will go into the analysis of three chosen states; Italy, Hungary and Croatia. Each of these states implemented different deterrence policies and measures that put persons who provide humanitarian assistance under the risk of prosecution for facilitating irregular migration.

3.1 Moral Entitlement to Disobey National Laws

When assessing the laws that criminalise humanitarian assistance, representatives of civil society organisations and individuals who assist refugees often rely on their moral norms[212]. Their assessment is guided by their moral judgement of right and wrong, which may not be reflected in the laws implemented by their states. This discrepancy between the moral judgements and external constrains that affect migration laws and policies can indeed raise the dilemma about the just nature of these policies and institutions who implement them. Indeed, general presumption is that the ''law governs human conduct by promoting acceptable behaviour and by providing visions of norms and normality.''[213] However, the topic of this thesis proves that national laws can

[212] This thesis will rely on understanding of moral norms or morality as ''an effective guide to action in the world in which we currently live in.'' See more in: Joseph H. Carens (1996), ''Realistic and Idealistic Approaches to the Ethics of Migration'', The International Migration Review, Vol. 30, No. 1,p.1.

[213] Taugba, Basaran (2015), ''The saved and drowned: Governing indifference in the name of security'', Security Dialogue, p. 5. Available at: https://www.academia.edu/9730600/The_Saved_and_The_Drowned_Governing_Indifference , accessed on 23rd of November 2019.

criminalise acts that can be understood as moral, and as such should not fall under the scope of criminal law.

An answer to the conflict between moral norms and laws that criminalise acts that are perceived as moral can be found within the theory of legal moralism[214]. According to legal moralism, acts which follow moral norms should not be crimes.[215] In other words, ‘’the immorality of an act of type A is sufficient reason for the criminalisation of A, even if A does not cause someone to be harmed.’’[216] However, it must be noted that not all acts understood as moral should be protected from criminalisation. The morality of an act serves as an ‘’indicator of behaviours that should be criminalised.’’[217]

Defining migration laws and policies according to moral norms can be challenging, especially because these moral norms might not be applicable within the current context. As guidance in defining immorality of laws which criminalise humanitarian assistance to refugees, one might look into the realistic approach to morality.[218] According to Joseph H. Carens realistic approach to

[214] It is important to note that as any other theory there is no universal approach to legal moralism. Thomas Sobrik Petersen discusses variations of definitions of legal moralism that can be found through literature. The first definition states ‘’ If the conduct of type A is regarded as (or is) immoral,then the state ought to criminalize A.’’ The second definition says: If the conduct of type A is regarded as (or is) immoral, then the state has a reason to criminalize A.’’ Third definition refers to the harm principle, ‘’ If the conduct of type A is regarded as (or is) immoral,then the state has a sufficient reason to criminalize A, even though A-type conduct does not cause (or risk causing) someone to be harmed.’’ Lastly, the fourth definition is the one that Petersen presents as the most comprehensive one: ‘’ If the conduct of type A is regarded as (or is) immoral,this can provide a sufficient reason for the state to criminalize A, even though A-type conduct does not cause (or risk causing) someone to be harmed.’’ See more at: Thomas Sobrik Peterson, (2011), ‘’What is Legal Moralism?’’, p. 83-87. Available at: https://www.researchgate.net/publication/268184086, accessed on 23rd of November 2019.

[215] Rachel Landry, (2016), "The ‘humanitarian smuggling’ of refugees Criminal offence or moral obligation?", Refugee Studies Centre, Working Paper Series No. 19, p. 12.

[216] Thomas Sobrik Peterson, (2011), ‘’What is Legal Moralism?’’, p. 81. Available at: https://www.researchgate.net/publication/268184086_What_is_Legal_Moralism , accessed on 23rd of November 2019.

[217] Rachel Landry, (2016), "The ‘humanitarian smuggling’ of refugees Criminal offence or moral obligation?", Refugee Studies Centre, Working Paper Series No. 19, p. 12.

[218] Joseph H. Carens (1996), ‘’Realistic and Idealistic Approaches to the Ethics of Migration’’, The International Migration Review, Vol. 30, No. 1,

morality ‘’wants to avoid too large a gap between the *ought*[219] and the *is* and focuses on what it is possible given existing realities.’’[220] This tension between *ought* and *is* serves as a ground for understanding of the response of civil society organisations and individuals who try to change current policies and risk criminalisation.

Realistic approach takes into consideration three different realities: ‘’institutional, behavioural and political.’’[221] All of them play a significant role in defining migration laws and policies. Institutional reality within the context of this thesis, is that sovereign states indeed have a right to shape their own laws and policies and decided who can come on their territory.[222] However, states are also under international law obliged to protect refugees.[223] Failure to comply with international law and its obligation to protect refugees can motivate civil society organisations and individuals to disobey these laws and engage in resolving the tension between the *ought* and *is*.[224] To illustrate, when the state denies access to the system of international protection by penalising refugees for illegal entry or when it violates the principle of non-refoulement, civil society organisations and individuals can indeed insist that the state fulfils its obligations and disobey laws which criminalise their assistance to refugees. Realistic approach to morality presumes that states have a right to shape their own migration regimes. However, civil society organisations and individuals can argue that they are morally obliged to disregard these national laws since they are not in accordance with

[219] Ought within this context is understood as can. Thus, it means that realistic approach to morality seeks to find out what is the discrepancy between what can be done and what is actually done. See more in: Joseph H. Carens (1996), ‘’Realistic and Idealistic Approaches to the Ethics of Migration’’, The International Migration Review, Vol. 30, No. 1,p.156.
[220] Ibid. p. 156.
[221] Ibid. p. 158.
[222] Ibid. p. 158.
[223] With the presumption that the state is a party to the 1951 Refugee Convention, which all of the countries selected for the analysis in this thesis are.
[224] Joseph H. Carens (1996), ‘’Realistic and Idealistic Approaches to the Ethics of Migration’’, The International Migration Review, Vol. 30, No. 1, p. 158.

the EU and international law. In this case, these actors are not relying on their ‘’highest ideals’’[225] or the ‘’fundamental transformation of our social arrangements’’[226], they are simply relying on the standards set within the law. Their belief of what *ought* to be done does not depart from what *is* possible to be done. Paradoxically, they find themselves in the risk of criminalisation when trying to fill in the gaps that the state was responsible for in the first place.

Assistance to refugees can be observed through the ethical dilemma of ‘’what we owe to people in need’’[227] which was addressed by Peter Singer. Singer’s example shows how we should help to persons in need no matter the distance and/or nationality especially if such acts do not pose a significant danger[228] for us.[229] Civil society organisations and individuals who assist refugees on the Mediterranean and risk prosecution assess that the saved lives are more important than their possible prosecution, or in other words the danger of prosecution does not deter them from helping.

[225] Ibid. p. 167.
[226] Ibid. p. 167.
[227] Peter Singer, (1997) "The Drowning Child and the Expanding Cricle", New Internationalist. Available at: https://www.utilitarian.net/singer/by/199704--.htm , accessed on 24th of November 2019.
[228] This is an interesting point specifically in to context of search and rescue operations on the Mediterranean. A great number of individuals who volunteered on humanitarian vessels on the Mediterranean are facing charges for facilitation of irregular migration. One of them is Pia Klemp. In one of her public appearences Pia stated the following: ‘’ I'm part of a generation that grew up asking their grandparents, 'What did you do against it?’ And I've come to realize that I'm part of a generation that will have to answer the very same question to their grandchildren. We will not be intimidated, and we will continue to fight for a world in which we want to live in, for a world in which everyone is given a chance to live. … We can create change, and we can make a difference, and we did, for every single person that we have rescued it was worth the effort, and we would all do it again. Not despite knowing the consequences, but even more so because of that. We fought in and for solidarity at sea, and now we are taking on the legal battle. Solidarity is not a crime, and we will fight to prove it.’’
Pia’s words confirm that the risk of prosecution does not stand a chance next to the importance of saving people from drowning. In the context of her work possible criminalisation is not perceived as danger, but as a result of unjust laws and policies which are immoral and not in accordance with the existing EU and international legal framework. See more at: Youtube, (2019) ‘’Why I fight for solidarity | Pia Klemp | TEDxBerlin" [online] Available at: https://www.youtube.com/watch?v=-7V1zNNfc_Q , accessed on the 1st of November 2019.
[229][229] Peter Singer, (1997) "The Drowning Child and the Expanding Cricle", New Internationalist. Available at: https://www.utilitarian.net/singer/by/199704--.htm , accessed on 24th of November 2019.

For realistic approach to morality except institutional reality, equally important is behavioural. Behavioural reality is visible through commonly shared moral standards.[230] The underlining idea is that ‘’moral norms should not stray too far from what most actors are willing to do much of the time.’’[231] Protection of refugees from persecution could be understood as an accepted norm.[232] Civil society organisations and individuals who provide humanitarian assistance to refugees seek to assure access to the international protection regime. Thus, what they ask for does not stray too far from current standards, which are supported by law. Indeed, it is hard to imagine that community would be against saving people from drowning. At the same time organisations that save persons on the Mediterranean from drowning face prosecution for their actions. This criminalisation can have far-reaching consequences and it can greatly impact moral norms. As Basaran points out ‘’legal sanctions not only endanger the duty to rescue but also signal changes to the normative landscape, authorizing the creation of distinctions in humanity, defining who falls within the scope of the norm and hence who is worthy of rescue and who is not.’’[233] By criminalising persons who provide humanitarian assistance the state represents them and the persons to whom they are assisting as wrong-doers.

Last reality that is important for understanding the immorality of laws that criminalise humanitarian assistance is the political reality. When assessing the (im)morality of laws, or morality of their own claims, individuals who provide assistance must take into consideration ‘’what policy options are politically feasible…leaving aside policies that have no chance of

[230] Joseph H. Carens (1996), ‘’Realistic and Idealistic Approaches to the Ethics of Migration’’, The International Migration Review, Vol. 30, No. 1, p. 158.
[231] Ibid.
[232] Ibid.
[233] Ibid.

adoption.''[234] As mentioned before, persons who assist refugees believe that states have the obligation to admit them and protect them from persecution. Obligation to admit refugees, according to Carens, can rise from three different reasons: ''causal connection, humanitarian concern, and the normative presuppositions of the state system.''[235] Casual connection attributes responsibility to the state to admit refugees ''because the actions of our own state have contributed in some way to the fact that the refugees are no longer safe in their home country.''[236] Second reason why states are obliged to admit refugees is due to humanitarian reasons. Refugees are escaping persecution and are in a need of a safe place, and as long as other states have an ability to provide that safety they should do so.[237] The last, but not the least important reason for admitting refugees arises from the fact that the world in which we live in is organised in sovereign states whose systems sometimes fail. In such situations ''states have a duty to admit refugees that derives from their own claim to exercise power legitimately in a world divided into states.''[238] Whatever the reason for admitting refugees individuals who provide assistance to refugees find the most applicable to their state, one thing is sure, if the state is the party to relevant conventions than they must implement policies in accordance with them. It would be hard to argue that claims for obeying the standards that the state accepted before have no chance of being adopted, since they already should be part of the national legal framework. Although states might prohibit assisting refugees while accessing the system of international protection, it could be argued that individuals who provide assistance to refugees indeed have a moral obligation to do so. Their acts do not represent

[234] Joseph H. Carens (1996), ''Realistic and Idealistic Approaches to the Ethics of Migration'', The International Migration Review, Vol. 30, No. 1, p.159.
[235] Joseph H. Carens, (2013) ''The Ethics of Migration'', Oxford Political Theory p.195.
[236] Ibid. p. 195.
[237] Ibid. p. 195.
[238] Ibid. p. 196.

policies which have no chance of adoption, but rather policies which states should have already implemented.

Realistic approach to morality serves as a test for claims of civil society organisations and individuals who provide humanitarian assistance to refugees, and who argue that they are morally entitled to disobey national laws that are not in line with the standards set within the EU and international law. This ‘’test’’ shows that what organisations and individuals think the states *ought* to do is not irrational and driven by ideals, but rather obligations that states have to fulfil.

3.2 Case of Italy: Criminalisation of Humanitarian Assistance at Sea

The arrival of bigger a number of refugees and other migrants in 2015 through the Mediterranean caught the EU by surprise, or at least that was the impression. Although humanitarian aid is an essential part of most of the foreign policies of Member States, the so-called ‘’refugee crisis’’ showed that the EU does not have effective common crisis management mechanisms that could adequately respond to new challenges. On the contrary, the EU failed to appropriately customize its policies and coordinate the Member State’s responses to this ‘’new’’ emergency.[239] Even though it seemed as there were no indications about the significant flow of refugees and other migrants coming, migration experts have been warming for years about the change of migration flows due

[239] Fulvio Attinà, (2017)‘’ Italy and the European Migration Crisis’’ in The age of Uncertaint, Global Scenarios and Italy" edited by Alessandro Colombo and Paolo Magri p. 153.
Available at: https://www.ispionline.it/it/EBook/2017_Report_ENG/The_Age_of_Uncertainty.pdf , accessed on the 2nd of November 2019.

to ‘’population growth, low incomes and structural unemployment’’[240] together with the Arab Spring and the falling of the Gaddafi’s regime.[241]

All these events did not alert the EU to change its policies and to develop an appropriate response. Between 2011 and 2013, the EU relied on the police border controls and the implementation of the Schengen Border Code by the Member States. In October 2013, Italy decided to launch its search and rescue operation under the name of Mare Nostrum.[242] After Italy took the initiative, in 2014, the EU launched a ‘’comprehensive approach to migration’’[243] that relied on the mission Triton and suppression of migrant smuggling.[244] The beginning of 2015 and after is marked with the lack of cooperation on the Member States level, which turned Greece and Italy into hot-spots.[245] These policy changes, specifically the lack of it in 2015 when the number of arrivals of refugees and other migrants reached its peak, serve as a context for understanding further developments within Italy and its legislation.

Italy’s geographical importance profiled her, together with Greece, in one of the main countries of first arrival for refugees and other migrants.[246] According to IOM’s statistic, approximately 487,911 refugees and other migrants came to Italy in the period from 1st of January 2015 until

[240] Pietro Castelli Gattinara, (2017) " The refugee crisis in Italy as a crisis of legitimacy", Contemporary Italian Politics, Volume 9, Issue 3. p. 319.
[241] Fulvio Attinà, (2017)‘’Italy and the European Migration Crisis’’ in The age of Uncertaint, Global Scenarios and Italy" edited by Alessandro Colombo and Paolo Magri, p. 154.
Available at: https://www.ispionline.it/it/EBook/2017_Report_ENG/The_Age_of_Uncertainty.pdf , accessed on the 2nd of November 2019.
[242] Ministero Della Difesa, ‘’Mare Nostrum Operation’’, *Marina.difesa.it,* Available at: http://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx, accessed on 3rd of November 2019.
[243] Fulvio Attinà, (2017) ‘’Italy and the European Migration Crisis’’ in The age of Uncertaint, Global Scenarios and Italy" edited by Alessandro Colombo and Paolo Magri, p. 154.
Available at: https://www.ispionline.it/it/EBook/2017_Report_ENG/The_Age_of_Uncertainty.pdf , accessed on the 2nd of November 2019.
[244] Ibid. p. 155.
[245] Ibid. p. 155.
[246] Pietro Castelli Gattinara, (2017) " The refugee crisis in Italy as a crisis of legitimacy", Contemporary Italian Politics, Volume 9, Issue 3. p. 319.

November 2019.[247] A high number of arrivals was unfortunately followed by a high number of lost lives. In 2014, upon the end of the rescue operation, Mare Nostrum, around 1000 merchant ships, assisted refugees and other migrants in the Mediterranean and saved approximately 50,000 lives.[248] Operation Triton, through which the EU prioritized protection of borders over saving human lives, urged different civil society and international organisations to organise search and rescue operations, especially since the death tolls rose up to 1 ,400 people in only one month like it was the case in April of 2015.[249] These high death tolls prompted the German non-governmental organisation Sea-Watch to purchase and deploy humanitarian vessels whose mission started in the Spring of 2015.[250] The Sea Watch's initiative was later on followed by the Jugend Rettet, Medecins Sans Frontieres, Migrant Offshore Aid Station, Mission Lifeline, ProActiva Open Arms, PROEMAID, Refugee Rescue, Save the Children, Sea-Eye, SOS Mediterranee and Medecins Sans Frontieres.[251] Humanitarian vessels would usually operate in two ways, depending on their size. Bigger vessels would conduct full search and rescue operations and would take refugees and other migrants to safe ports, while smaller vessels would provide refugees and other migrants with life jackets while waiting for further assistance from other ships.[252] The importance of these search and rescue operations conducted by humanitarian vessels lays in the fact that they go as far as

[247] IOM, ''Flow Monitoring Europe'', *Migration.iom.int*. Available at: https://migration.iom.int/europe?type=arrivals, accessed on the 2nd of November 2019.
[248] International Chamber of Shipping, (2015) ''Large Scale Rescue Operations at Sea'', (2015), *Missingmigrants.iom.int*. p.2. Available at: http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/large-scale-rescue-at-sea.pdf?sfvrsn=30, accessed on 3rd of November 2019.
[249] Iom, (2019) ''Missing Migrants – tracking deaths along migratory routes". Available at: https://missingmigrants.iom.int/region/mediterranean, accessed on 3rd of November 2019.
[250] Sea Watch, ''The Ship'', *Sea-watch.org*. Available at: https://sea-watch.org/en/project/the-ship/, accessed on 3rd of November 2019.
[251] European Union Agency for Fundamental Rights (FRA), (2018) ''Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations '' *Fra.europa.eu*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf, accessed on 3rd of November, 2019.
[252] Eugenio Cusumano, (2016) ''How NGOs took over migrant rescues in the Mediterranean" , *Euobserver.com*, Available at: https://euobserver.com/opinion/134803 , accessed on 3rd of November 2019.

‘’20km and 50km of Libya upon authorization of the Italian Maritime Rescue Coordination Centre (MRCC).’’[253] In comparison with the range of search and rescue operations from humanitarian vessels, the Triton’s Operation range was initially confidential[254] with speculations of 30 miles range.[255] After reinforcing and investing additional resources for operation Trition, the EU launched operations Sophia in 2015[256], and later in 2018 the Operation Themis that substituted operation Triton. These Frontex led operations sparked discontent among Member States, particularly Italy and Malta because of disembarkation agreements and consequently led to reduction of SAR operations and significant relying on Libyan Coast Guard.[257]

Involvement of the Libyan Coast Guard in SAR operations started after signing a Memorandum of Understanding with Italian Government for ‘’covering various areas, including the fight against irregular migration and trafficking in human beings.’’[258] The European Union Agency for Fundamental Rights (FRA) emphasized that this type of bilateral agreement follows the strategy used by Spain who has a similar agreement in Morocco and represents a potential violation of the principle of non-refoulement.[259] It is worth noting that the EU financed and trained Libyan Coast

[253] Ibid.
[254] European Parliament, (2015) ‘’Parliamentary Questions’’, (2015), *Europal.europa.eu*, Available at: http://www.europarl.europa.eu/doceo/document/P-8-2014-008016-ASW_EN.html, accessed on 3rd of November 2019.
[255] Asylum Information Database, (2014) ‘’OPERATION MARE NOSTRUM TO END - FRONTEX TRITON OPERATION WILL NOT ENSURE RESCUE AT SEA OF MIGRANTS IN INTERNATIONAL WATERS", (2014), Asylumineurope.org. Available at: https://www.asylumineurope.org/news/13-10-2014/operation-mare-nostrum-end-frontex-triton-operation-will-not-ensure-rescue-sea , accessed on 3rd of November 2019. Information on the range of the operation Triton can be found here: Nikolaj Nielsen, ‘’Frontex transparency dispute goes to EU court", *Euobserver.com*, Available at: https://euobserver.com/migration/145186, accessed on 3rd of November 2019.
[256] European Commission, (2016) "EU OPERATIONS in the MEDITERRANEAN SEA’’, Ec.europa.eu. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/securing-eu-borders/fact-sheets/docs/20161006/eu_operations_in_the_mediterranean_sea_en.pdf, accessed on 23rd of November 2019.
[257] Sergio Carrera and Roberto Cortinovis, (2019) ‘’ Search and rescue, disembarkation and relocation arrangements in the Mediterranean - Sailing Away from Responsibility?’’, CEPS Paper in Lberty and Security In Europe, No. 2019-10. p. 7.
[258] European Union Agency for Fundamental Rights (FRA), (2018) ‘’Fundamental Rights Report 2018’’, *Fra.europa.eu.* p.127.Available at:
[259] Ibid.

Guard for the goal of them taking over the SAR operations from European vessels.[260] The proof of this arrangement came in a letter written by the Director General of DG Home at the European Commission, Paraskevi Michou in which he stated that '' despite the fact that it [Italy] cannot be considered a "neighbouring MRCC" because it [Italy] does not border the Libyan SRR, [it] is supporting the Libyan Coast Guard a lot in particular in acting during the SAR event as a "communication relay".''[261]

3.2.1 Code of Conduct

Failure of the European Union to coordinate between Member States and offer an adequate response to the so-called ''refugee crisis'' served as a fertile ground for implementation of laws and policies that criminalised organisations who were engaged in SAR operations. As Basaran pointed out, ''over the last decades an increasing number of laws, regulations and practices on national, regional and international levels have effectively discouraged rescue at sea and encouraged seafarers to look away, leading to the incremental institutionalization of a norm of indifference to the lives of migrants.''[262]

In the context of Italy, these pressures on organisations that conducted SAR operations became more prominent in 2017, when the application of the ''Code of Conduct'' (the Code) started and fuelled prosecution of staff of humanitarian vessels under the charges of facilitation of irregular

[260] EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS, (2019). Available at: http://www.statewatch.org/news/2019/jun/eu-letter-from-frontex-director-ares-2019)1362751%20Rev.pdf, accessed on 23rd of November 2019.
[261] Ibid.
[262] Tuguba Basaran (2014), '' Saving Lives at Sea: Security, Law and Adverse Effects'', European Journal of Migration and Law 16 (2014), p. 367.

immigration and smuggling.[263] The drawing of the Code was initially proposed within the Action plan on the Central Mediterranean Route of the European Commission.[264] European Commission advised the Italian government to define the rules for better coordination with humanitarian search and rescue vessels and set priorities of the EU concerning the situation on the Central Mediterranean. Among other priorities, the European Commission advised Italy to ''swiftly implement the ongoing feasibility study of the Italian Coast Guard regarding the Libyan SAR capacity with a view to accelerating the establishment of a fully operational MRCC in Libya as this would allow Libya to take over responsibility for the organisation/coordination of a significantly higher number of SAR operations than is the case today.''[265] Thus the role of the Code was to put additional administrative barriers and limit the scope of work of humanitarian vessels, for the purpose of profiling Italy as communication channel for SAR operations conducted by the Libyan Coast Guard.

Even before the final version of the Code was released, international organisations such as Amnesty International and Human Rights Watch warned about the ''limitations of Libyan authorities to respond to situations of distress at sea or to intervene in a safe and humane way.''[266] They also referred to the report of the High Commissioner for Human Rights, who documented

[263] Article 12 of the Immigration Law, Legislative Decree 92/2008 defines the facilitation of irregular entry as: '' whoever, … promotes, manages, organises, finances, or transports foreigners in the territory of the State or commits other acts meant to ensure illegal entry into the territory of the State, or of another State of which the person is not a citizen or has no permanent residence, shall be punished.''However paragraph 2 of the same Article provides a humanitarian clause: '' relief efforts and humanitarian assistance offered in Italy to foreigners in need, irrespective of their stay status in the territory of the State, do not constitute crimes.'' See more in Italian Immigration Law, Legislative Decree 92/2008, Article 12. Available at: https://www.refworld.org/pdfid/58c2aa5e4.pdf, accessed on 23rd of November 2019.

[264] European Commission, (2017) '' Action plan on measures to support Italy, reduce pressure along the Central Mediteranian route and increase solidarity'', p. 2. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170704_action_plan_on_the_central_mediterranean_route_en.pdf, accessed on 4th of November 2019.

[265] Ibid.

[266] Human Rights Watch, (2017) ''EU: Shifting Rescue to Libya Risks Lives'', (2017) *Hrw.org*. Available at: https://www.hrw.org/news/2017/06/19/eu-shifting-rescue-libya-risks-lives, accessed on 4th of November 2019.

severe cases of abuses against migrants in Libya.[267] Most importantly, Libya is not a party to the 1951 Refugee Convention, and irregular migration is criminalised under their Law for Combating Irregular Migration according to which ‘’“illegal migrants” will be put in jail and condemned to forced labour in jail or a fine of 1000 Libyan dinars and be expelled from the Libyan territory after serving their sentence.’’[268]

The Code of Conduct contains thirteen rules that regulate the work of humanitarian vessels, and the failure to comply with those rules would result in ‘’the adoption by the Italian Authorities of measures addressed to the relevant vessels, in compliance with applicable domestic and international law and as required in the public interest of saving human lives while guaranteeing shared and sustainable reception of migration flows.’’[269] Lack of precision in defining possible consequences of not signing the Code rises the issue of legal uncertainty.

The Code of Conduct rises several concerns. One of them is the question of its legal nature.[270] The legal nature depends on the number of parties that signed the Code and the legal order under which it was adopted.[271] Since the Code is signed by the crew of the humanitarian vessels, this would mean that it is a unilateral document and since there are no duties prescribed to Italian authorities, but only to humanitarian vessels, it seems as if the Code serves as a declaration.[272] The Code itself is not binding within the scope of international law, but the failure of implementation

[267] United Nations Human Rights Office of the High Commissioner, (2016) “DETAINED AND DEHUMANISED” REPORT ON HUMAN RIGHTS ABUSES AGAINST MIGRANTS IN LIBYA’’, *Refworld.org*. Available at: https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf, accessed on 4th of November 2019.
[268] Global Detention Project, (2015) ‘’Immigration Detention in Libya’’, p.5. Available at: https://www.refworld.org/pdfid/5567387e4.pdf, accessed on 23rd of November 2019.
[269] Code of Conduct, (2017) p.6. Available at: https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf
[270] Kristof Gombeer and Melanie Fink, ‘’ Non-Governmental Organisations and Search and Rescue at Sea’’ (2018), Maritime Safety and Security, Issue 4, p. 6. Ibid. p.7.
[271] Ibid. p.7..
[272] Ibid. p.7.

of the commitments prescribed within it makes the humanitarian vessels liable under the Italian national legal framework.[273]

The first rule of the Code prescribes the following:

> in accordance with relevant international law, commitment not to enter Libyan territorial waters, except in situations of grave and imminent danger requiring immediate assistance and not to obstruct Search & Rescue by the Libyan Coast Guard: with a view not to hinder the possibility for the competent National Authorities to intervene in their territorial waters, in compliance with international obligations.[274]

Legal dilemma that can be identified within this provision is the possibility of the Italian authority to limit the movement of humanitarian vessels within the Libyan territorial waters. According to Article 17 of UNCLOS, ''ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.''[275] Article 18 of UNCLOS defines the nature of passage mentioned above, and it should be ''…continuous and expeditious…includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.''[276] When talking about the search and rescue operations conducted by the humanitarian vessels, one must keep in mind that these are private vessels that have the right to operate on the territorial water to save lives. Article 19 of UNCLOS confirms that search

[273] Ibid. p.7.
[274] Code of Conduct, (2017) p.2.
Available at:
https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf
[275] United Nations, (1982) '' United Nations Convention on the Law of the Sea'', 1982, Article 17. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf . Accessed on 4th of November 2019.
[276] Ibid. Article 18.

and rescue operations fall under the scope of innocent passage which is defined as ‘’not prejudicial to the peace, good order or security of the coastal State.’’[277]

In addition to UNCLOS, within SAR Convention it is stated that ‘’a Party should authorize, subject to applicable national laws, rules, and regulations immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of searching for the position of maritime and rescue operations.’’[278] This quick look into the relevant legal framework shows that Italian authorities cannot forbid humanitarian vessels to enter into Libyan territorial waters,

Further concerns are raised with regards to the commitment of executing orders and informing competent Maritime Rescue Co-ordination Centres (MRCC).[279] Indeed, Article 2 of UNCLOS confirms that the sovereignty of the state ‘’extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’’[280] However, sovereignty of the state does not include high seas as it is stated in Article 89 of UNCLOS. Precisely ‘’no State may validly purport to subject any part of the high seas to its sovereignty.’’[281] Article 92 of UNCLOS reiterates that while ships are one the high seas, they are subject only to the jurisdiction of their own flag.[282] As Gombeer and Fink rightly pointed

[277] Ibid. Article 19.
[278] International Maritime Organization, (1979) ‘’ SAR Convention - INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE’’, .point 3.1.2.
Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201405/volume-1405-I-23489-English.pdf Accessed on 4th of November 2019.
[279] Code of Conduct, (2017) p.4.. Available at:
https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf
[280] United Nations, (1982) ‘’ United Nations Convention on the Law of the Sea’’, Article 2(1). Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Accessed on 4th of November 2019.
[281] United Nations, ‘’ (1982)’’ United Nations Convention on the Law of the Sea’’, Article 89. Available at: https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf. Accessed on 4th of November 2019.
[282] Ibid. Article 92.

out, ‘’SAR instructions issued by national authorities to foreign private vessels beyond the territorial sea can only be considered as ‘requests for cooperation’, reminding foreign vessels to comply with their obligations under the domestic law of the flag state concerning the duty to assist.’’[283]

Even though relevant provisions of UNCLOS show that Italian MRCC can instruct foreign humanitarian vessels only within Italian territorial waters, there is still a question of what type of instructions can the MRCC give in the first place. According to Article 98 of UNCLOS and section 4.3. of SAR Conventions, immediate action must be taken in situation when there are people in danger at sea. However, what is specifically worrying in the context of this Code of Conduct and its negative implications on protection of human rights are incidents in which humanitarian vessels were given the instruction not to assist or wait with the assistance. In these situations, search and rescue operation was taken over by thy Libyan Coast Guard, who put the lives of refugees and other migrants at risk.[284]

The second type of instructions which is the most relevant for the current situation on the Mediterranean are instructions regarding the disembarkation. According to the 2004 amendments to the SAR Convention, disembarkation can be done only at places where refugees and other migrants will be saved and safe from possible persecution.[285] Thus, the issue of disembarkation is closely connected with the non-violation on the principle of non-refoulement. Protection of refugees and other migrants who were saved from the sea was also recognized by the Parliamentary

[283] Kristof Gombeer and Melanie Fink, (2018)‘’ Non-Governmental Organisations and Search and Rescue at Sea’’, Maritime Safety and Security, Issue 4, p.17.
[284] Kristof Gombeer and Melanie Fink, (2018) ‘’ Non-Governmental Organisations and Search and Rescue at Sea’’ , Maritime Safety and Security, Issue 4, p. 19.
[285] Kristof Gombeer, (2017) ‘’ HUMAN RIGHTS ADRIFT? ENABLING THE DISEMBARKATION OF MIGRANTS TO A PLACE OF SAFETY IN THE MEDITERRANEAN’’, Forthcoming, Vol. X, Irish Yearbook of International Law, p.8.

Assembly who in 2011 established that the ‘’the notion of place of safety should not only be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights.’’[286] Since the implementation of the Code, the issue of disembarkation of humanitarian vessels to Italy became a central topic. The captain of the humanitarian vessels Sea Watch, Carola Rackete together with 47 other applicants requested from the ECtHR to indicate an interim measure to the Italian Government ‘’which would have required that they be allowed to disembark in Italy from the ship Sea-Watch 3.’’[287] The ECtHR decided not to indicate an interim measure but ‘’indicated to the Government that it was relying on the Italian authorities to continue to provide all necessary assistance to those persons on board Sea-Watch 3 who are in a situation of vulnerability as a result of their age or state of health.’’[288]

The relevant case law of the ECtHR confirms that the commitments set within the Code of Conduct are violating human rights. In the case *Hirsi Jamaa and Others v. Italy* the Court ruled that applicants were under jurisdiction of Italy, due to the fact that the vessel was under the Italian flag on the high sea, and that their removal to Libya was in violation of the prohibition of collective expulsion, together with the violation of their right to effective remedy. Most importantly, the Court concluded that Italian authorities exposed refugees and other migrants to the risk of ill-treatment due to the fact that a number of reports confirmed inhumane and degrading treatment of refugees and other migrants in Libya.[289]

[286] COE Parliamentary Assembly,(2011) ‘’The interception and rescue at sea of asylum seekers, refugees and irregular migrants’’, Resolution 1821/2011, 22nd Sitting, §5.2.
[287] European Court of Human Rights, (2019) ‘’The Court decides not to indicate an interim measure requiring that the applicants be authorised to disembark in Italy from the ship Sea-Watch’’. Available at: 3ttps://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-6443361-8477507&filename=Rackete%20and%20Others%20v.%20Italy%20-%20request%20for%20interim%20measure%20refused%20in%20the%20case%20of%20Sea%20Watch%203.pdf, accessed on 24th of November 2019.
[288] Ibid.
[289] CASE OF HIRSI JAMAA AND OTHERS v. ITALY *(Application no. 27765/09)*

Even though the rules prescribed within the Code of Conduct do not follow the standards set in international law, the application of the Code continues. In fact, since its application, several organisations that coordinate humanitarian vessels faced prosecution, and their vessels were and still are confiscated. The prosecution of humanitarian vessels upon the implementation of the Code of Conduct showed that the primary goal of the Conduct was to limit the work of humanitarian vessels and to ‘’launch of formal prosecutions based on unfounded allegations of facilitating irregular and human smuggling.’’[290] It is somewhat indicative that the ECtHR did not indicate an interim measure for the emergency disembarkation of refugees to Italian ports. This hesitation shows that governments

3.2.2 The Perpetrator: Humanitarian Vessels

In 2018, Fundamental Rights Agency published a report on the humanitarian vessels which were involved in search and rescue operations on the Mediterranean and were under criminal investigation.[291] At the time six different organisations that organized humanitarian search and rescue operations were under suspicion of facilitation of irregular migration and the violation of the Code of Conduct. In June of this year, 2019, the FRA again published an updated report on prosecuted humanitarian vessels and these currently are; ‘Mare Jonio’ (operated by Mediterranea Saving Humans), ‘Sea Watch 3’ (operated by Sea Watch), ‘Open Arms’ (operated by ProActiva

[290] Sergio Carrera and Roberto Cortinovis, (2019) ‘’ Search and rescue, disembarkation and relocation arrangements in the Mediterranean ‘’ CEPS Paper in Liberty and Security, No. 2019-10. p. 1.
[291] European Union Agency for Fundamental Rights (FRA),(2018) ‘’Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations ‘’ *Fra.europa.eu.* Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf accessed on 3rd of November, 2019. https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf

Open Arms), 'Iuventa' (operated by Jugend Rettet), Médecins Sans Frontières (no vessel, only staff subject to investigations).[292]

The prosecution of Iuventa's former crew members under the charges of facilitating irregular migration started shortly after the introduction of Italian Code of Conduct. Iuventa's crew together with the crew of humanitarian vessels from Doctors Without Borders refused to sign the Code of Conduct arguing that the Code is illegal and will significantly affect their work.[293] Several days after the deadline for signing the Code of Conduct has passed the Iuventa vessel got confiscated by Italian authorities in Lampedusa and the crew was accused for ''having colluded with smugglers during three different rescue operations: the first on the 10 September 2016, the second and third on 18 June 2017''[294] and the ''possession of firearms.''[295] Within the indictment Italian authorities claimed that Iuventa crew executed handover of refugees and other migrants from the smugglers.[296] However, these charges seem to be disproportionate and have been showed as false according to the investigation made by the Forensic Oceanography.[297] According to their investigation ''the Iuventa crew did not return empty boats to smugglers, as they were accused of having done. Nor do they appear to communicate with anyone potentially connected with smuggling networks, as the Italian authorities suggested they had.''[298] Nevertheless in April of

[292]European Union Agency for Fundamental Rights (FRA), (2019) ''Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations '' *Fra.europa.eu.* Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-ngos-search-rescue-mediterranean-table-2_en.pdf, accessed on 5th of November 2019.

[293] Blaming the Rescuers, (2018),''The Iuventa Case'' *Blamingtherescures.org.* Available at: https://blamingtherescuers.org/iuventa/ , accessed on 5th of November 2019.

[294] Ibid.

[295] Carmine Conte and Sean Binder, ''Strategic litigation: the role of EU and international law in criminalising humanitarianism'' (2019), ReSoma, Point 2.1. Available at: http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Discussion%20Policy%20Briefs%20-%20Strategic%20Litigation.pdf, accessed on 5th of November 2019.

[296] Ibid.

[297]Forensic Arhitecture, ''THE SEIZURE OF THE IUVENTA", Forensic-architecture.org. Available at: https://forensic-architecture.org/investigation/the-seizure-of-the-iuventa, accessed on 5th of November 2019.

[298] Ibid.

2018 the Supreme Court of Cassation confirmed the confiscation of the ship, and the case is still pending.[299]

Somewhat similar scenario happened to the humanitarian vessel Open Arms who got confiscated after saving 218 refugees and other migrants and refusing to hand them over to the Libyan Coast Guard due to the principle of non-refoulement.[300] After the operation ‘’the ship’s captain, the mission leader, and the director of the Spanish NGO have been accused of criminal conspiracy and aiding illegal immigration by the same prosecutor who had accused NGOs before the seizure of the Iuventa.’’[301] Furthermore, together with these charges the prosecutor charged them with the violation of the Code of Conduct, which in his understanding is ‘’legally binding for anyone contacting the Rome MRCC.’’[302] In April of 2018 the Criminal Court of Ragusa confirmed the decision of the pre-trial judge to release the ship. However, the accusations for disobedience are still pending.[303]

The case of prosecution of the Iuventa and Open Arms vessels are not the only examples, but they clearly illustrate the impact and the role of the Italian Code of Conduct. Prosecution of humanitarian search and rescue vessels are a part of larger campaign whose primary goals it to de-delegitimize individuals and civil society organisations who provide humanitarians assistance to

[299] European Union Agency for Fundamental Rights (FRA), (2019) ‘’Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations ‘’ *Fra.europa.eu*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-ngos-search-rescue-mediterranean-table-2_en.pdf, accessed on 5th of November 2019

[300] Marina Petrillo, Lorenzo Bagnoli And Claudia Torrisi, (2018) ‘’The prosecutor’s case against the rescue ship Open Arms", Openmigration.org. Available at: https://openmigration.org/en/analyses/the-prosecutors-case-against-the-rescue-ship-open-arms/, accessed on 5th of November 2019.

[301] Ibid.

[302] Ibid.

[303] European Union Agency for Fundamental Rights (FRA), (2019)‘’Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations ‘’ *Fra.europa.eu*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-ngos-search-rescue-mediterranean-table-2_en.pdf , accessed on 5th of November 2019

refugees. The proportion of these measures was also addressed by the institutions of the Council of Europe. The Commissioner for Human Rights of the Council of Europe expressed her concern for ‘’recent measures hampering and criminalising the work of NGOs who play a crucial role in saving lives at sea, banning disembarkation in Italian ports, and relinquishing responsibility for search and rescue operations to authorities which appear unwilling or unable to protect rescued migrants from torture or inhuman or degrading treatment.’’[304]

It is rather obvious that the Code of Conduct does not align with the standard set within the international legal framework. However, the fact that Italy is still not held accountable for criminalisation of humanitarian assistance shows again that the EU has failed to recognize the seriousness of the situation on the Mediterranean. In the face of people suffering and drowning, humanitarian principles need to have advantage over politically driven decision-making.

3.3 Case of Hungary:

In 2015, due to its geographical position, Hungary became one of the central transit countries of land migration towards other countries of the European Union. During the so-called ‘’refugee crisis’’ before the closure of Hungarian borders, Hungary was a crossroad for Eastern and South-eastern routes through which refugees, and other migrants were coming to the midland of the EU.[305] The bigger number of refugees and other migrants coming to Hungary was used to fuel national discontent. The government systematically attributed them the label of terrorists or an

[304] Ibid.
[305] IOM, ‘’Migration Issues in Hungary" (2017), *Iom.hu*. Available at: http://www.iom.hu/migration-issues-hungary , accessed on the 6th of November 2019.

imminent threat to the Hungarian economic welfare system, culture, and identity.[306] Even before the arrival of refugees and other migrants, the government started its campaign that ‘’demonized migrants as a threat to national security, irrespective of personal motivation.’’[307] This political climate allowed the government to build fences and apply restrictive migration laws without any public unrest. Instead of offering prompt response and a place of safety for refugees Hungary opted for an approach that primarily relied on the securitization of migration and a narrative that categorized this wave of refugees and other migration as an attempt of invasion. With the intention of further closing of Hungarian borders, in 2015, the Hungarian government published a questionnaire that served as a national consultation[308] on immigration.[309] In May of the same year, the government sent out 8 million questionnaires to get ‘’citizen’s opinion on whether there should be scope for immediately deporting migrants who prove to have morally abused the European rules which encourage illegal migration.’’[310]

[306] András Szalai Gabriella Gőbl, (2015) ‘’ Securitizing Migration in Contemporary Hungary’’, CEU Centre for EU Enlargement Studies, p.2. Available at: https://cens.ceu.edu/sites/cens.ceu.edu/files/attachment/event/573/szalai-goblmigrationpaper.final.pdf, accessed on 5th of November 2019.
[307] Ibid.
[308] It is important to note that this was not the first time that the Hungarian Government relied on this type of National Consultation. In 2011, right within the process of writing the new constitution the Government send out a questionnaire to its citizens whose opinion on the provisions of the new constitution was expected to be given within 12 questions. Interestingly, the questionnaire was not formed in a way that would leave space for comments and critiques from Hungarian citizens.
The questionnaire sent out in 2015 on the topic of migration had also been criticized by Hungarian social scientist who argued that the questionnaire is unprofessional and does not meet the standards because of its manipulative questions. Furthermore, the questionnaire was criticized by the European Parliament as well, where MEP’s stated that ‘’the content and the language used in this particular consultation is "highly misleading, biased, and unbalanced; establishing a biased and direct link between migratory phenomena and security threats’’. European Parliament, ‘’ Hungary: MEPs condemn Orbán’s death penalty statements and migration survey"(2015) Europal.europa.eu.
More is available here’’ : https://www.europarl.europa.eu/news/en/press-room/20150605IPR63112/hungary-meps-condemn-orban-s-death-penalty-statements-and-migration-survey accessed on 5th of November.
[309] Website of the Hungarian Government, ‘’National consultation on immigration to begin" (2015) Kormany.hu, Available at: https://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin , accessed on 5th of November.
[310] Ibid.

As Nagy pointed out ‘’Hungary, once an eminent member of the club in field of asylum, made a U-turn and became the renegade, who destroys its own asylum system and threatens the EU-wide mechanism with blocking measures of solidarity.’’[311] The ‘’beginning of the end’’ for Hungarian asylum system started with amendments to the Hungarian asylum law that violated fundamental human rights. The first group of amendments to asylum legislation made Serbia a safe third country and expedited the asylum determination procedure.[312] The Hungarian Helsinki Committee at the time warned that the categorization of Serbia as a safe third country contradicts the guidelines of the UNHCR. Furthermore, the amendments made to the Asylum Act made all asylum applications of persons who had prior been to safe third countries inadmissible. As the HHC pointed out, ‘’as over 99% of asylum-seekers enter Hungary at the Serbian-Hungarian border section, this will mean the quasi-automatic rejection at first glance of over 99% of asylum claims, without any consideration of protection needs.’’[313] What was most worrying is the fact that through these amendments, Hungary deliberately violated its obligation under the 1951 Refugee Convention, which prescribes the protection of refugees from refoulement. By not allowing refugees who came from Serbia to seek international protection in Hungary, the Government would be removing people to Serbia where they cannot access the system of international protection, which consequently puts them at ‘’risk of chain refoulement.’’[314]

In addition to identifying Serbia as a safe third country, new amendments included criminalisation of the border crossing at the 175 km long fence with Serbia, with the possibility of imprisonment

[311] Boldizsár Nagy, (2017) ‘’ Renegade in the Club – Hungary’s Resistance to EU Efforts in the Asylum Field’’, Osteuroparecht, Fragen zur Rechtsentwicklung in Mittel- und Osteuropa sowie den GUS-Staaten 63. Jahrgang, Heft 4|2017, p. 413.
[312] Hungarian Helsinki Committee, (2015) ‘’ BUILDING A LEGAL FENCE – Changes to Hungarian asylum law jeopardise access to protection in Hungary’’ Helsinki.hu. Available at: http://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf , accessed on 5th of November 2019.
[313] Ibid. p.2.
[314] Ibid. p 2.

up to 3 years[315]; deprivation of liberty of asylum seekers through the implementation of the so-called transit zones established during the ''crisis situation''[316] and widened the scope of criminalisation of facilitation of illegal entry[317].

In December of 2015, the European Commission issued a letter of notice to Hungary with the information that the Commission will start the infringement procedure against Hungary and will refer Hungary to the Court of Justice of the European Union due to non-compliance with the EU law.[318] European Commission expressed discontent with the following practices; establishment of transit zones at the external borders that do not comply with the requirements defined within Article 43 of the Asylum Procedures Directive that states that the period spent within these border and transit zones should not exceed more than four weeks.[319] The reception conditions do not match the standard defined within the Reception Conditions Directive.[320] And the return procedure is against the criteria set with the Return Directive and does not respect the non-refoulement principle.[321] In 2016 the government had another round of changes through which they limited the

[315] Boldizsár Nagy, (2017) '' Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field'', *Osteuroparecht*, Fragen zur Rechtsentwicklung in Mittel- und Osteuropa sowie den GUS-Staaten 63. Jahrgang, Heft 4|2017, p.414.
[316] Ibid. p.415.
[317] Ibid. p. 415.
[318] European Commission, (2018) ''Migration and Asylum: Commission takes further steps in infringement procedures against Hungary" . Available at: https://europa.eu/rapid/press-release_IP-18-4522_en.htm , accessed on the 5th of November 2019.
[319]DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 43. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=en ,accessed on 5th of November 2019.
[320] European Commission,(2018) ''Migration and Asylum: Commission takes further steps in infringement procedures against Hungary". Available at: https://europa.eu/rapid/press-release_IP-18-4522_en.htm , accessed on the 5th of November 2019.
[321] Ibid.

stay in reception centres to 30 days for persons who were recognised international protection and stopped any financial support that refugees were receiving.[322]

Indeed, instead of respecting the minimum grounds for protection of refugees' rights, Hungarian government opted for another approach, which can, according to Nagy be categorized in six categories; denial, deterrence, obstruction, punishment, free riding and breaching superior law.[323] Hungary has been continuously denying that persons coming during, and after the so-called ''refugee crisis'' indeed were persons in a need of protection. That denial was followed by deterrence policy which relied on implementation of sanctions against actors who provided support to refugees.[324] Deterrence policy goes hand in hand with intentional obstruction of to the system of international protection by not giving access to the procedure, or relying on detention.[325] Relying on punishment became the main mechanism of Hungarian response to migration, from punishing illegal entrance to expulsion from the whole territory of the EU because of minor offence.[326] Since the beginning of the bigger migration flow towards the EU, it was evident that policies implemented by Hungary do not align with the EU idea of burden sharing and solidarity, and turned itself into a free-rider. Lastly, and for the context of this thesis the most important approach to the so-called ''refugee crisis'' is the breach of superior law. It is obvious that amendments both to the asylum legislation and the Hungarian criminal Code stand in violation of standard set within the EU and international law.[327]

[322] Boldizsár Nagy, (2017) '' Renegade in the Club – Hungary's Resistance to EU Efforts in the Asylum Field'', *Osteuroparecht*, Fragen zur Rechtsentwicklung in Mittel- und Osteuropa sowie den GUS-Staaten 63. Jahrgang, Heft 4|2017, p. 417.
[323] Boldizsár Nagy, (2016), '' Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation'', German Law Journal, 17 (2016) 6, p. 1052.
[324] Ibid.
[325] Ibid.
[326] Ibid.
[327] Ibid.

The policy of deterring that targeted actors who provided assistance to refugees took its turn in 2018 when the widening of the scope of criminalisation of migration and consequently humanitarian assistance reached its peak in 2018.

For a better understanding of the context, it is essential to note that the Hungarian government has been systematically targeting civil society organisations and was on the mission of shrinking the scope of their work since 2013. Hostile environment towards foreign-funded civil society organisation intensified in 2014 when the government started an open campaign against organisations which received money through EEA/Norway grants.[328] The government's action did not stop at the public campaign but went a step further and led to audit controls and police raid in the office of Oktoras, the responsible organisation for grant distribution.[329] In 2015 the Central Buda District Court ruled ''that the search and seizures carried out by the National Investigation Bureau were unlawful because, according to the Hungarian law, the suspicion of criminal activities had not been established.''[330] However, the government continued with its attempts to discredit the work of the foreign-funded organisations.[331] In the coming years, instead of attacking organisations that gained funding over Norwegian funds, the Hungarian government found a new enemy, George Soros. The rhetoric surrounding the work of civil society organisations did not

[328] Małgorzata Szuleka, (2018) '' First victims or last guardians? The consequences of rule of law backsliding for NGOs: Case studies of Hungary and Poland'', CEPS Paper in Liberty and Security in Europe,p. 12. Available at: https://www.ceps.eu/ceps-publications/first-victims-or-last-guardians-consequences-rule-law-backsliding-ngos-case-studies/ , accessed on 5th of November 2019.

[329] Ibid.

[330] Free Hungary, (2015) ''Court condemns police raid on independent NGO Ökotárs headquarter was illegal'' *Freehungary.hu*. Available at: http://freehungary.hu/index.php/56-hirek/3589-court-condemns-police-raid-on-independent-ngo-oekotars-headquarter-was-illegal , accessed on 5th of November 2019.

[331] Hungarian Helsinki Committee, (2017) '' TIMELINE OF GOVERNMENTAL ATTACKS AGAINST HUNGARIAN CIVIL SOCIETY ORGANISATIONS''
Available at:
http://www.helsinki.hu/wpcontent/uploads/Timeline_of_gov_attacks_against_HU_NGOs_17112017.pdf , accessed on 5th November 2019.

change drastically. On the contrary, the Hungarian government threated to ‘’sweep out NGOs funded by the Hungarian-born financier and philanthropist George Soros.’’[332]

The peak of governmental attacks against civil society organisation, which among other things, provide legal assistance to refugees, came in the summer of 2018, when the government approved the so-called ‘’Stop Soros’’ package of legislation.

3.3.1 The Law

On World Refugee Day, the 20th of June 2018, the Hungarian Parliament adopted amendments that criminalized assistance to refugees and other migrants.[333] This criminalisation is a product of the so-called Stop Soros package that includes the changes of the Hungarian Criminal code and the changes of the tax law that targets explicitly organisations which cover the topic of migration.[334]

The changes within the Hungarian Criminal Code served as a ground for further harassment of civil society organisations with a particular focus on the ones providing humanitarian assistance to refugees and other migrants. In the words of the Hungarian Parliament, the purpose of proposed and later on approved amendments was to ‘’combat illegal migration.’’[335] Changes of the Criminal Code covered Section 11 and its subheading Section 353/A, which defines punitive measures for

[332] Eduard Nazarski, (2017) "SIM Peter Baehr Lecture: Shrinking space for civic space: The countervailing power of NGOs" Netherlands Quarterly of Human Rights, Vol. 35(4) 2, p. 275.

[333]Hungarian Minister of Interior, (2018) ‘’ Bill No. T/333 amending certain laws relating to measures to combat illegal immigration’’. Available at: https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf , accessed on 5th of November.

[334]Sergio Carrera, Lina Vosyliute, Stephanie Smialowski, Dr Jennifer Allsopp, Gabriella Sanchez,(2019) ‘’ Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update’’,European Parliament, PETI Committee, p. 63. Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf , accessed 5th of November 2019.

[335] Hungarian Minister of Interior,(2018) ‘’ Bill No. T/333 amending certain laws relating to measures to combat illegal immigration’’, p. 2. Available at: https://www.helsinki.hu/wp-content/uploads/T333-ENG.pdf , accessed on 5th of November.

the crime of ''facilitating illegal immigration.''[336] According to the first paragraph, anyone who ''conducts organizational activities''[337] to assist a person within the process of seeking international protection, and if such fails to be recognized, is subject to penalization. Furthermore, anyone who supports a person with the process of regulation of her stay will also be subject to a possible penalty.[338] Anyone who finances the actions mentioned above can be punished with up to one-year imprisonment.[339] A criminal offence shall be defined for actions that are done for financial gain, for providing support to more than one person, and even for the border monitoring activities.[340] Within these rigorous amendments, the Government criminalised the distribution of information leaflets and the building of networks.[341]

Interestingly, within the same Bill that covers changes of the Hungarian Criminal Law, access to the system of international protection was further hindered. According to amended Section 7 of the Asylum Act, the application will not be admissible if the applicant came from the third country, and anyone who is under criminal charges will not be able to stay in Hungary. However, it is worth noting that the ban from staying in Hungary applies to asylum seekers who crossed the border illegally since such is understood as a crime.[342]

Amendments of the Hungarian Criminal Code were followed by the Bill on taxation of foreign-funded organizations.[343] According to this new law on ''on the special tax on immigration''[344] civil

[336] Hungarian Criminal Code (Act 2 of 2012), Article 353A
[337] Ibid.
[338]Ibid..
[339] Ibid.
[340] Ibid.
[341] Ibid.
[342] Ibid.
[343] Excerpt from final text of Bill no. T/625 amending certain tax laws and related laws, and on the special tax on immigration as adopted by Parliament on 20 July 2018. Available at: https://www.helsinki.hu/wp-content/uploads/Special-immigration-tax-as-adopted-20-July-2018.pdf ,accessed on 5th of November 2019.
[344] Ibid. p.1.

society organisations which work on the ‘’promotion of migration’’[345] are due to pay 25% of the tax base. The law also determines which activities fall within the scope of ‘’promotion of migration’’[346] and these are; ‘’carrying out media campaigns and media seminars and participating in such activities; organising education; building and operating networks or propaganda activities that portray immigration in a positive light.’’[347]

This unique law on taxation of organisations who assist refugees and other migrants was not the first attempt of the Government to implement ‘’fiscal measures’’[348] against the civil society organisations. In 2017, the Government approved the so-called Lex NGO that was used as a tool to oppress organisations who promote fundamental rights and who receive foreign funding and ruin their credibility. This law prescribed that ‘’civil society organisations receiving at least HUF 7.2 million per year have to register as foreign-funded organisations.’’[349] In addition to this, these organisations were obliged to put the label of a foreign-funded NGO on all of their statements, publications, and websites.[350] After the approval of Lex NGO, the government also restricted access to funding over AMIF from the European Union. These restrictions gave the possibility for the Government to have full control over the project activities financed through AMIF due to their

[345] Ibid. p.1.
[346] Ibid. p. 1.
[347] Ibid. p. 1.
[348] Sergio Carrera, Lina Vosyliute, Stephanie Smialowski, Dr Jennifer Allsopp, Gabriella Sanchez, (2019) ‘’ Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update’’,European Parliament, PETI Committee, p. 61.
Available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf , accessed 5th of November 2019.
[349] Ibid. p. 62.
[350] Ibid. p. 62.

ability to ‘’directly withdraw money from the organisation’s bank account at any point during and after the project implementation period.’’[351]

It is rather clear that the Stop Soros package was deliberately made to attack civil society organisations that provide humanitarian assistance to refugees and other migrants and to deter them from their future work. The unlawful nature of newly implemented provisions is proven through the fact that they violate the EU Law, the European Human Rights Law, and the International Human Rights Law.

The amendments of the Criminal Code are proof of criminalisation of humanitarian assistance to refugees and other migrants. For example, the newly added subsection criminalises support in the process of regulating the status. New amendments criminalise ‘’organisational activities’’[352], proving that the primary goal of the newly amended Criminal Code is to criminalise nuclear activities of organisations that provide support to refugees and other migrants. What is also worrying is the criminalisation of shearing of information, preparation of leaflets that would inform refugees and other migrants about their rights.[353]

Such provisions violate the EU Law, specifically Article 8 of Directive on common procedures for granting and withdrawing international protection International Protection Procedures Directive 2013/32, which stipulates that asylum-seekers have a right for counselling.[354] Article 20 and 21 of the same Directive oblige Member states to ensure free legal assistance and provide asylum seekers

[351] European Council on Refugees and Exiles (ECRE) and UNHCR, (2018) ‘’ “Follow th€ Money’, p. 41. Available at: https://www.ecre.org/wp-content/uploads/2018/01/follow-the-money_AMIF_UNHCR_ECRE_23-11-2018.pdf , accessed on 5th of November 2019.
[352]Hungarian Criminal Code (Act 2 of 2012), Article 353A
[353] Ibid.
[354] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Article 8.

with procedural information, which should be done, according to Article 19 of the same Directive, by non-governmental organisations.[355] Also, Article 5 of the Reception Directive 2013/33 states that asylum seekers have a right to material assistance and have a right to legal aid.[356]

Newly amended provisions of the Hungarian Criminal Code violate rights guaranteed by the EU Charter of Fundamental Rights. Specifically, freedom of expression and information protected by Article 11, and freedom of assembly and association protected by Article 12. Furthermore, since Hungary deliberately denied access information to refugees and by doing so violated their right of an effective remedy defined in Article 47 of the Charter.[357]

Regarding the violation of European Human Rights Law, amendments are representing interference with the rights to freedom of expression, Article 10 of the European Convention on Human Rights, and the right of freedom of association, Article 11. These amendments and the restrictions posed by them would not pass the three-pong test that states that restrictions should be prescribed by law must pursue a legitimate aim, and must be necessary in a democratic society.[358] The application of the Open Society Justice Initiative for the European Court of Human Rights shows how the measures prescribed in the Criminal Code disproportionately restrict the work of civil society organisations. According to their application, the lack of precision within the law itself ‘’reduces foreseeability of their application.’’[359] Thus, the restrictions do not fill the criteria of

[355]Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, Article 19, Article 20, Article 21.
[356] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, Article 5.
[357] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2000/C 364/01), Article 11, Article 12, Article 47.
[358] Philip Leach (2011) ‘’Taking a Case to the European Court of Human Rights’’, Oxford University Press. Section 5.05 – 5.10
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[359] Open Society Justice Initiative, (2018) ‘’ OPEN SOCIETY INSTITUTE-BUDAPEST V. HUNGARY, EUROPEAN COURT OF HUMAN RIGHTS APPLICATION’’, paragraph 14. Available at:

being prescribed by law. Secondly, the name and the narrative around the law, which is the part of the Stop Soros package, shows that the government had illegitimate aims since it tried to dismantle organisations which assisted refugees and other migrants.[360] The third condition prescribes that these restrictions are necessary in a democratic society. In their analysis, the Open Society Initiative shows how these restrictions had a chilling effect on organisations that had a watch-dog role. The proof of disproportionality of the penalty is shown through ‘’the fact that criminal prosecution could potentially lead to the dissolution of an entire organisation even if only a small fraction of its work related to migrants' rights.’’[361] The Venice Commission as well pointed out that amendments to the Criminal Code, lack certainty and precision. Thus, they fail to fulfil the criteria of being prescribed by law.[362]

Lastly, these amendments violate the refugee specific rights guaranteed by the 1951 Convention, mentioned earlier in this thesis. Although the newly added provision to the Criminal Code does not directly criminalise refugees and other migrants, its application violates the principle of non-penalisation since it criminalises the ones who are supposed to help refugees to apply for international protection. Furthermore, the changes made to the asylum legislation violate the principle of non-refoulement. This newly added provision sets grounds for blanked denial of asylum claims from persons who arrived from Serbia or any other country and does not look into the existence of sufficient standards of protection in those countries.

https://www.justiceinitiative.org/uploads/ef281023-a31d-4e40-a808-d9350a827d34/litigation-osibudapest-hungary-20180924.pdf , accessed on 5th of November 2019.

[360] Ibid, paragraph 47.

[361] Ibid. paragraph. 22.

[362] Venice Commission Opinion, (2018) ‘’JOINT OPINION ON THE PROVISIONS OF THE SO-CALLED “STOP SOROS” DRAFT LEGISLATIVE PACKAGE WHICH DIRECTLY AFFECT NGOs (In particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration)’’ p. 18-19. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)013-e , accessed on 5th of November.

The institutions of the EU noticed the problematic nature of new amendments to the Hungarian Criminal Code. In September of 2018, the European Parliament voted to trigger Article 7 sanctions against Hungary due to, among others, ‘’concerns regarding the freedom of expression, freedom of association, fundamental rights of migrants, asylum seekers and refugees.’’[363]

In the summer of 2019, the European Commission decided to refer Hungary to CJEU because of criminalisation of civil society organisations that assist refugees and other migrants.[364] At the same time, the Commission agreed to send a letter of formal notice to Hungary ‘’concerning the non-provision of food to persons awaiting return who are detained in the Hungarian transit zones at the border with Serbia.’’[365]

Thus, the much-needed response from the relevant EU institutions did indeed come. However, the question is how many refugees and migrants in the meantime were deprived of their rights.

3.3.2 The Perpetrator: Hungarian Helsinki Committee

One of the organisations that are under the constant attack of the Hungarian government is the Hungarian Helsinki Committee. Since the late ’90s, HHC provided ‘’free-of-charge professional

[363] European Parliament,(2018) ‘’Rule of law in Hungary: Parliament calls on the EU to act" *Europal.europa.eu.* Available at: https://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act , accessed on 7th of November 2019.
[364] European Commission, (2019) ‘’Commission takes Hungary to Court for criminalising activities in support of asylum seekers and opens new infringement for non-provision of food in transit zones’’ *Ec. europa.eu* Available at: https://ec.europa.eu/commission/presscorner/detail/EN/IP_19_4260?utm_source=ECRE%20Newsletters&utm_campaign=54b1037456-EMAIL_CAMPAIGN_2019_07_26_10_32&utm_medium=email&utm_term=0_3ec9497afd-54b1037456-422315073&fbclid=IwAR2egCoG8GNZz4_5p8LrYIUYjazUH9xn0kpyz3WjSvwrnQvGAl_PTxZRAl8 , accessed on 7th of November 2019.
[365] Ibid.

legal assistance to asylum-seekers in Hungary.''[366] The government's attempt to harass civil society organisations through fiscal limitations and criminalisation of humanitarian assistance to refugees and other migrants did not bypass HHC. On the contrary, HHC was frequently the direct target of these measures.

After Lex NGO entered into force, HHC stated that they will disobey the law and will not label themselves as a foreign-funded organisation. The reason why they opted for disobedience is that the law breaches Hungarian Fundamental Law and the European Convention on Human Rights. Instead of compliance with the law, HHC decided to exhaust all available legal remedies and avoid becoming an accomplice in this ''breach of fundamental rights.''[367]

Although the Lex NGO and the Government's restrictions on AMIF forced HHC to engage in disobedience and find alternatives for future funding, HHC still managed to assist refugees and other migrants. After the approval of the Stop Soros package and the amendments to the Criminal Code, HHC was again under a new attack. Once again, HHC decided not to comply with the law, emphasizing that:

> Seeking asylum is not a crime. Providing legal assistance to asylum-seekers is not a crime either. Everyone has the right to be informed about the law and to know what to expect during legal procedures. To provide information to defenceless people on their rights, to give a free attorney to people who are unfamiliar with the law is a fully legitimate activity and is in full respect of European standards and ethics. This is one of the core mandates of the Hungarian

[366] Hungarian Helsinki Committee,(2018) '' The Hungarian Helsinki Committee's opinion on the Governments amendments to criminal law related to the sealed border''p.4. Available at: https://helsinki.hu/wp-content/uploads/modification-of-criminal-laws-16092015.pdf ,accessed on 7th of November.
[367] Ibid. p. 2.

> Helsinki Committee. Just like in the past, we will firmly and expertly give protection to all of our clients, civil society organisations and human rights in Hungary.[368]

Later on, HHC, together with Amnesty International and the Open Society Foundation, submitted a constitutional complaint about the Stops Soros package. In the spring of 2019, the Hungarian Constitutional Court decided that the Stop Soros package is constitutional. Although the Stop Soros package lacks clarity and precision, the Constitutional Court stated that criminalised ‘’organisational activities’’[369] which include the building of the network, or sharing of information materials could indeed be a crime, since ‘’courts may come to the conclusion that — among others — recruitment or intermediation may qualify as organising activities.”[370] It is somewhat paradoxical that the Constitutional Court stated that ‘’no persons selflessly assisting indigent and vulnerable persons should be penalised under the law’’[371] while at the same time announcing such law constitutional.

Until now, Hungary did not formally prosecute any organisation, or the employee of the organisation for acts of legal assistance, the building of networks or sharing information. However, the mere possibility of such scenario can have a tremendous chilling effect. Luckily, the HHC did not get intimidated and decided to disobey the law that criminalises humanitarian assistance. Their strategy of exhaustion of all legal remedies on national and EU level is yet to give results, but it is

[368] Hungarian Helsinki Committee, (2018) ‘’ HUNGARIAN GOVERNMENT MARKS WORLD REFUGEE DAY BY PASSING LAW TO JAIL HELPERS’’p. 2. Available at: https://www.helsinki.hu/wp-content/uploads/HUNGARIAN-GOVERNMENT-MARKS-WORLD-REFUGEE-DAY-BY-PASSING-LAW-TO-JAIL-HELPERS-20June2018En.pdf , accessed on 7th of November 2019.
[369] Hungarian Criminal Code (Act 2 of 2012), Article 353A
[370] Hungarian Helsinki Committee, (2019)‘’ THE CONSTITUTIONAL COURT HAS FAILED TO PROTECT HUMAN RIGHT DEFENDERS" *Helsinki.hu*, Available at: https://www.helsinki.hu/en/the-constitutional-court-has-failed-to-protect-human-right-defenders/ , accessed on 7th of November.
[371] Ibid.

indicative that their advocacy work had some effect since the European Commission referred Hungary to CJEU because of criminalisation of humanitarian assistance.

3.4 Case of Croatia: Formal and Non-formal Criminalisation of Humanitarian Assistance

The response of the Croatian government to the so-called ‘’refugee crisis’’ could be most accurately described as ’’welcoming through’’[372]. The general perception was that Croatia, at times, was a generous country that put its stability at risk while trying to help refugees and other migrants. This generosity had its limits, and it ended at the moment when Croatia started being perceived not exclusively as a country of transit.[373]

Due to a lack of state-organised assistance, several civil society organisations decided to go to the borders and inside the refugee camps and share food, tea blankets, and clothes. From this wave of organisations willing to help refugees the Welcome! Initiative was born.[374] Initially, the authorities relied on the assistance of other organisation, primarily because they were responsible for providing humanitarian aid. The closure of the Hungarian and Slovenian border, later on, followed by the change of the Croatian government re-shaped Croatian response to the so-called ‘’refugee crisis’’. The new conservative government somewhat applied the same tactic used by the past one, emphasizing that ‘’Croatia’s approach entails a humanitarian treatment of refugees in an organized manner while on the other hand, Croatia would not accept to accommodate a large number of

[372] Emina Bužinkić, (2018)‘’ Welcome to vs. Welcome Through: Crisis Mobilization and Solidarity with Refugees in Croatia as a Transit Country ‘’ in ‘’Formation and Disintegration of the Balkan Refugee Corridor: Camps, Routes and Borders in Croatian Context’’ edited by Emina Bužinkić and Marijana Hameršak , p.143. Available at: https://www.cms.hr/system/publication/pdf/115/Formation_and_Disintegration_of_the_Balkan_Refugee_Corridor.pdf , accessed on 8th of November 2019.
[373] Ibid. p. 147.
[374] Ibid. p. 147.

refugees on its territory and become a hot spot.''[375] However, actions of the, at the time, newly elected president, Kolinda Grabar Kitarović, showed that one of her priorities is to secure the borders and, if needed, appoint the army to do so.[376] From February 2016, Croatian police only allowed Iraqi and Syrian nationals to enter Croatia by official transportation, while they denied entrance to Afghans. [377] On 8 of March 2016, the Balkan Route officially closed.

Although the number of refugees and migrants started getting lower due to closed borders, it seemed that Croatia changed its approach from ''welcoming through''[378] to not welcoming at all. In the winter of 2016, the members of the Welcome! Initiative together with Are You Syrious warned about the illegal and forced push backs of refugees and other migrants from the Croatian borders with Serbia. In the report published in January of 2017, organisations emphasized that Croatian police uses violence and humiliates refugees and other migrants arbitrarily detains them, oversteps their authorities by deciding that persons cannot apply for international protection and forces people to sign the documents without any translation provided.[379] The second report on violent pushbacks published in March of the same year showed that these violent push backs are

[375]Senada Šelo Šabić, (2017) ''Humanitarianism and its Limits: The Refugee Crisis Response in Croatia'' ,Migrant Crisis: European Perspectives and National Discourses; Studien zur politischen Kummunikation, volume 13. p.99 Available at: https://books.google.hr/books?hl=en&lr=&id=PhwmDwAAQBAJ&oi=fnd&pg=PA93&dq=senada+selo+sabic+refugee+crisis&ots=XnqsHIhCkh&sig=isu4Hx-ifrYE5_WFRgdH_ZHzm88&redir_esc=y#v=onepage&q=senada%20selo%20sabic%20refugee%20crisis&f=false , accessed on 7th of November 2019.

[376] Tajana Sisgoreo, (2016) '' REFUGEE CRISIS IN CROATIA – REPORT'' , Borderline-europe.de. p.5. Available at:https://www.borderlineeurope.de/sites/default/files/background/Refugee%20Crisis%20in%20Croatia%20Report.pdf , accessed on 8th of November 2019.

[377] Ibid.

[378] Emina Bužinkić, '' Welcome to vs. Welcome Through: Crisis Mobilization and Solidarity with Refugees in Croatia as a Transit Country '' in ''Formation and Disintegration of the Balkan Refugee Corridor: Camps, Routes and Borders in Croatian Context'' edited by Emina Bužinkić and Marijana Hameršak , p.143. Available at: https://www.cms.hr/system/publication/pdf/115/Formation_and_Disintegration_of_the_Balkan_Refugee_Corridor.pdf , accessed on 8th of November 2019.

[379] Centre for Peace Studies, Are You Syrious, Welcome! Initiative,(2017) 'REPORT ON ILLEGAL AND FORCED PUSH BACKS OF REFUGEES FROM THE REPUBLIC OF CROATIA'', p. 2. Available at: http://welcome.cms.hr/wp-content/uploads/2017/01/REPORT-ON-ILLEGAL-AND-FORCED-PUSH-BACKS-OF-REFUGEES-FROM-THE-REPUBLIC-OF-CROATIA.pdf , accessed on 8th of November 2019.

not an isolated event, but rather a pattern of behaviour that includes beatings by '' batons and fists, being prevented from speaking, forced to take off their shoes and stand or kneel in the snow, police officers putting snow on their necks and shoes, police lining themselves as to face each other in the so-called tunnel formation through which the refugees were forced to pass while being beaten.''[380] After beating refugees and other migrants, Croatian police would take them towards the railway and indicate to them they should follow the railway back to Serbia.[381] After publishing the second report on violent pushbacks, Centre for Peace Studies, which is one of the members of the Welcome! Initiative lodged a criminal complaint against the Ministry of Interior and publicly called for ''cessation of all violent and unlawful conduct towards refugees on the territory of the Republic of Croatia.''[382] At the same time, the UNCHR published the first statistics regarding refugees and other migrants who were pushed back from Croatia back to Serbia. In only one week, they managed to record 137 violent pushbacks.[383] The report of the Medecins Sans Frontieres confirmed the brutality of Croatian police who even hit unaccompanied minors.[384]

Although all of the victims of police violence on Croatian borders are equally important, one of the cases, because of its tragic consequences, became a turning point with regards to the criminalisation of humanitarian assistance to refugees. In November 2017, there was a tragic death

[380] Centre for Peace Studies, Are You Syrious, Welcome! Initiative, (2017)'' THE SECOND REPORT ON UNLAWFUL AND FORCED PUSH BACKS OF REFUGEES FROM THE REPUBLIC OF CROATIA'' p. 3. Available at: http://welcome.cms.hr/wp-content/uploads/2017/08/THE-SECOND-REPORT-ON-UNLAWFUL-AND-FORCED-PUSH-BACKS-OF-REFUGEES-FROM-THE-REPUBLIC-OF-CROATIA-.pdf accessed on 8th of November 2019. Ibid. p. 4.
[381] Ibid. p.4.
[382] Centre for Peace Studies, Are You Syrious, Welcome! Initiative, (2017) '' REPORT ON THE NEW WAVE OF VIOLENCE AGAINST REFUGEES ON CROATIAN BORDERS'', p.6. Available at: http://welcome.cms.hr/wp-content/uploads/2017/05/REPORT-ON-THE-NEW-WAVE-OF-VIOLENCE-AGAINST-REFUGEES-ON-CROATIAN-BORDERS.pdf accessed on 8th of November 2019.
[383] UNHCR, (2017) '' SERBIA UPDATE, 15-21 May 2017'' p.1. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/56881.pdf , accessed on 8th of November 2019.
[384] Medecins Sans Frontieres, (2017)'' GAMES OF VIOLENCE UNACCOMPANIED CHILDREN AND YOUNG PEOPLE REPEATEDLY ABUSED BY EU MEMBER STATE BORDER AUTHORITIES''. Available at: https://www.msf.org/sites/msf.org/files/serbia-games-of-violence-3.10.17.pdf ,accessed on 8th of November 2019.

of a little girl called Madina Hussiny, who was hit by a train after she was pushed back by the Croatian police.[385] Her family came from Serbia to Croatia and saw police officers to whom they expressed their intention to apply for international protection. Police told them to follow the railways and go back to Serbia, even though it was night. A few minutes later, Madina was hit by the train.[386] Her family was sent back to Serbia the night Madina died.[387] Shortly after Madina's tragic death the Centre for Peace Studies and the lawyer of Hussiny family field criminal charges against unknown officials of the Croatian Ministry of Interior. Later on, family Hussiny managed to come back to Croatia and once again applied for international protection. On that occasion, the volunteer who informed the police about the family's presence in the Croatian territory was formally criminalised, and the family was detained. After their arrival, the Hussiny family was detained, and the ECtHR applied the interim measure and ordered prompt relies of the family from detention.[388]

Amid the growing number of testimonies of refugees and other migrants that confirm violent push backs, this practice spread from the Serbian to Bosnian borders. The fourth report published by Welcome! Initiative, Are You Syrious in cooperation with No Name Kitchen mentioned the growing number of testimonies in which refugees and other migrants claim that ''Croatian police beat them, deprived them of their values, and forced them to take off their shoes and go back to Bosnia and Herzegovina via walking on inaccessible ground. Particularly concerning is the fact

[385] Emma Graham-Harrison, (2017) '' 'They treated her like a dog': tragedy of the six-year-old killed at Croatian border'' Theguardian.com , Available at: https://www.theguardian.com/world/2017/dec/08/they-treated-her-like-a-dog-tragedy-of-the-six-year-old-killed-at-croatian-border , accessed on 8th of November 2019.
[386] Ibid.
[387] Ibid.
[388] Centar za mirovne studije, (2018) ''Europski sud za ljudska prava: Odmah promijenite postupanje prema obitelji malene Madine" Cms.hr. Available at: https://www.cms.hr/hr/policija-ministarstvo-unutarnjih-poslova-rh/europski-sud-za-ljudska-prava-odmah-promijenite-postupanje-prema-obitelji-malene-madine accessed on 8th of November 2019.

that some people, according to their own testimonies, have been returned from Croatia to the locations close to the minefields, mostly in the vicinity of Bihać and Velika Kladuša.''[389] Reports written by local civil society organisations on this unlawful practice were confirmed by reports of the UNHCR[390], Save the Children[391], Human Rights Watch[392], Amnesty International[393]. During his fact-finding mission, Special Representative of the Secretary-General on migration and refugees of the Council of Europe noted that the access to asylum is hindered due to violent push backs committed by the Croatian police.[394]

Due to constant reporting on the issue of violent push backs, Croatian civil society organisations became a target of systematic harassment and intimidation conducted by the Croatian Ministry of Interior.

3.4.1 Criminalisation Despite the Law

[389] Centre for Peace Studies, Are You Syrious, Welcome! Initiative, No Name Kitchen, (2018) '' FOURTH REPORT ON ILLEGAL PUSHBACKS OF REFUGEES FROM THE REPUBLIC OF CROATIA IN THE PERIOD FROM JUNE 2017 TO FEBRUARY 2018'', p.5. Available at: https://www.cms.hr/system/article_document/doc/504/Fourth_Report_on_Illegal_Pushbacks.pdf , accessed on 8th of November 2019.

[390] UNHCR, (2018) '' DESPERATE JOURNEYS'. Available at: https://perma.cc/M8ZW-ZJ9G , accessed on 8th of November 2019.

[391] Save the Children, ''HUNDREDS OF CHILDREN REPORT POLICE VIOLENCE AT EU BORDERS'' (2018) Available at: https://www.savethechildren.net/news/hundreds-children-report-police-violence-eu-borders , accessed on 8th of November 2019.

[392] Human Rights Watch, (2018) ''Croatia: Migrants Pushed Back to Bosnia and Herzegovina" . Available at: https://www.hrw.org/news/2018/12/11/croatia-migrants-pushed-back-bosnia-and-herzegovina , accessed on 8th of November 2019.

[393] Amnesty International, (2019) ''PUSHED TO THE EDGE VIOLENCE AND ABUSE AGAINST REFUGEES AND MIGRANTS ALONG THE BALKANS ROUTE'' . Available at: https://www.amnesty.org/download/Documents/EUR0599642019ENGLISH.PDF , accessed on 8th of November 2019.

[394] Council of Europe, (2019) ''Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Bosnia and Herzegovina and to Croatia 24-27 July and 26-30 November 2018' p. 26. Available at: https://rm.coe.int/report-of-the-fact-finding-mission-by-ambassador-tomas-bocek-special-r/1680940259 , accessed on 8th of November 2019.

Whereas in the case of Italy and Hungary, the law explicitly criminalised humanitarian assistance to refugees and other migrants, Croatian authorities opted for another strategy.

Upon the closure of the Balkan Route, the Government proposed amendments to the Foreigners Act that were aiming to criminalise giving food, clothes, or water to refugees and other migrants. The Commissioner for Human Rights of the Council of Europe expressed his concerns regarding these amendments and argued that ''the criminalisation of social and humanitarian assistance to irregularly present migrants encourages intolerance and racism as it punishes people for helping others on the basis of their immigration status.''[395] Luckily these amendments were not approved and did not become part of the current Foreigners Act. Interestingly enough, after these amendments failed, one of the new changes within the Foreigners act was the implementation of humanitarian clause. Article 43 defines exceptions from the criminalisation of the facilitation of illegal entry, and these are saving lives, urgent medical assistance, and humanitarian assistance.[396]

Currently, Article 326 of the Croatian Criminal Code sets grounds for the criminalisation of illegal entry, movement, and stay in the Republic of Croatia.[397] This provision recognizes the element of gain, which is used as a ground for the criminalisation of the facilitation of irregular entry, movement, and stay. It aligns with the standards set by Directive 2002/90/EC and UN Smuggling Protocol.

[395]Commissioner of Human Rights of the Council of Europe, NILS MUIŽNIEKS, (2016) '' REPORT BY NILS MUIŽNIEKS COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE FOLLOWING HIS VISIT TO CROATIA FROM 25 TO 29 APRIL 2016'' (2016) p.25. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?coeReference=CommDH(2016)31 accessed on 8th of November 2019.

[396] Croatian Foreigners Act (NN 130/11, 74/13, 69/17, 46/18), Article 43. Available at: https://www.zakon.hr/z/142/Zakon-o-strancima , accessed on 8th of November 2019.

[397] Croatian Criminal Code (NN 125/11 i 144/12) Article 326. Available at: https://pravosudje.gov.hr/UserDocsImages/dokumenti/Kazneni%20zakon-neslu%C5%BEbeni%20pro%C4%8Di%C5%A1%C4%87eni%20tekst.pdf , accessed on 8th of November 2019.

Criminalisation of humanitarian assistance in Croatia is specifically interesting due to the fact that criminalisation is not happening due to the law, but despite the law. In comparison with other two states, Croatian legal framework contains an exemption for humanitarian assistance. However, the judiciary failed to implement it on the only case of formal criminalisation. What is in Croatian context extremely worrying is the continuous practice of violent push backs that is perpetuated by the Croatian police. Criminalisation of organisations and individuals coincides with their public criticism of Croatian police and their execution of violent push backs. For the better understanding of the Croatian context it is important to look into the violations of international and the EU law that Croatian police is doing while conducting violent push backs.

Firstly, the practice of push backs is violating the principle of non-refoulement. Croatia is failing to comply with its obligation prescribed by the 1951 Refugee Convention. By pushing refugees back to Serbia or Bosnia, Croatian authorities do not examine a possibility of chain refoulement since refugees are expelled without any procedure and safeguards. Risk of chain refoulement due to practice of violent push backs was recognized by the Administrative Court in Switzerland which suspended the Dublin transfer to Croatia due to '' the increasing number of reports concerning the denial of access to the asylum procedures by Croatian authorities and the return of large numbers of asylum seekers to the border with Bosnia-Herzegovina, where they are forced to leave the country.''[398]

Push backs are also violating standards set within the Directive 2008/115/EC of 16 December 2008 on common standards and procedures in the Member States for returning illegally staying third-

[398] European Database of Asylum Law, (2019) "Switzerland: Suspension of Dublin transfer to Croatia due to summary returns at border with Bosnia-Herzegovina". Available at: https://www.asylumlawdatabase.eu/en/content/switzerland-suspension-dublin-transfer-croatia-due-summary-returns-border-bosnia-herzegovina , accessed on 26th of November 2019.

country nationals. According to point 8 of the Directive, Member States may ‘’return illegally staying third-country nationals, provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement.’’[399] As mentioned before, since there is no procedure in place when executing push backs, there is no assessment of the risk of chain refoulement. Testimonies of refugees and migrants showed that police often-times arbitrarily detains them, within the period of them expressing the intention for asking international protection and the push back to another country.

Point 17 of the Directive states that ‘’ third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.’’[400] Arbitrary detention of persons who seek international protection does not follow these instructions. Most importantly, point 23 of the Directive explicitly states that the application of the standards set within this Directive should not conflict with the standards prescribed by the 1951 Refugee Convention.[401] Article 5 of the Directive again confirms the principle of non-refoulement, while Article 4 of the Convention states that ‘’this Directive shall be without prejudice to more favourable provisions’’[402] such as, for example, bilateral or multilateral agreements between states.[403] Article 8 gives the Member State the possibility to ‘’adopt separate administrative or judicial decision or act ordering removal.’’[404] However, the same Article states that coercive measures of carrying out forced removal should be a measure of last resort.[405] Article 9 states that the removal should be postponed in the case of the violation of the principle of non-

[399] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, Point 8.
[400] Ibid. Point 17.
[401] Ibid. Point 23.
[402] Ibid. Article 5.
[403] Ibid. Article 4.
[404] Ibid. Article 8.
[405] Ibid. Article 8.

refoulement.[406] Most importantly, Article 13 of the Directive stipulates that ''the third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return.''[407] Furthermore, the same Article states that third-country nationals should have access to legal advice and a translator.[408]

Push backs do not only violate the standards set within the Directive 2008/115/EC mentioned above, but also violate the Schengen Border Code. Article 13 states that ''a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to procedures respecting Directive 2008/115/EC.''[409] This would mean that the return procedure has to follow the standards described above. According to Article 14 of the Schengen Code, refusal to entry will not be applicable in the situation of asylum seekers.[410]

Lastly, by conducting violent push backs, Croatia is performing collective expulsions, which are prohibited under Article 4 of Protocol No. 4 of the European Convention on Human Rights.[411] The ECtHR addressed the issue of pushbacks in the case *of N. D. and N. T. v. Spain* in which the Court decided that removal without administrative and judicial decision and assessment of individual situation constitutes collective expulsion and is in the breach of Article 4 of Protocol No. 4.[412]

[406] Ibid. Article 9.
[407] Ibid. Article 13.
[408] Ibid. Article 13.
[409] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Article 13.
[410] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), Article 14.
[411] European Convention on Human Rights, Article 4, Protocol 4, p. 37.
[412] CASE OF N.D. AND N.T. v. SPAIN (Applications nos. 8675/15 and 8697/15)

3.4.2 The Perpetrator: Are You Syrious and the Centre for Peace Studies

In 2017 when violent push backs started happening on a bigger scale, volunteers and employees of the Centre for Peace Studies and Are You Syrious started escorting refugees and other migrants to the police station to monitor asylum procedures. When volunteers and employees showed up next time at the police stations with refugees and other migrants, the police officers would intimidate them and threat with initiating legal procedures against them.[413]

After Madina's tragic death, as mentioned before, the Centre for Peace Studies and the lawyer of the Hussiny family filed criminal charges against the unknown official of the Ministry of Interior who pushed back the family, which led to the death of a little girl. Family Hussiny also submitted an application before the European Court of Human Rights.[414] Engagement of the civil society organisation regarding this case seemed to be a catalysator of further harassment and intimidation perpetrated by Croatian police.[415] At the time, the family lawyer faced a lot of pressure from the police who denied her access to her clients and called in question the signature of Madina's mother on the power of attorney. The culmination of the pressure on the family lawyer happened when the police engaged the Police National Office for the Suppression of Corruption and Organized Crime (PN USKOK) to take legal actions against the family's attorney.[416]

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[413] Amnesty International, (2019) ''PUSHED TO THE EDGE VIOLENCE AND ABUSE AGAINST REFUGEES AND MIGRANTS ALONG THE BALKANS ROUTE'' p. 20. Available at: https://www.amnesty.org/download/Documents/EUR0599642019ENGLISH.PDF , accessed on 8th of November 2019.

[414] Application no. 15670/18 M.H. and Others against Croatia lodged on 16 April 2018.

[415] Dnevnik.hr,(2018) ''Aktivisti koji brinu o migrantima iznijeli teške optužbe na račun policije: "Pokušava se zataškati njihova odgovornost", *Dnevnik.hr*, Available at: https://dnevnik.hr/vijesti/hrvatska/udruge-cms-i-are-you-syrious-policija-obilazi-nase-kuce-pozvani-smo-na-obavijesni-razgovor---514098.html accessed on 8th of November 2019.

[416] Kuća ljudskih Prava,(2018) '' Podrška Centru za mirovne studije i Are You Syrious''Kucaljudkihsprava.hr. Available at: https://www.kucaljudskihprava.hr/2018/04/18/podrska-centru-mirovne-studije-are-you-syrious/ , accessed on 8th of November 2019.

Involvement with the case of the Hussiny family led to the only example of formal criminalisation of humanitarian assistance to refugees and other migrants in Croatia. In March of 2018, Hussiny family contacted organisation Are You Syrious through Facebook.[417] They sent their location and said they are with eleven children who are freezing in the woods of the Croatian village Strošinci. Are You Syrious knew that the family is scared to approach the police, considering the tragedy that happened few months before, so they contacted the police and informed them about a family hidden in the woods that wants to apply for international protection.[418] After alarming the police, Are You Syrious contacted its volunteer Dragan Umičević who lived close by and gave him instructions to go towards the field and find a police patrol and tell them about the family. Dragan did what Are you Syrious told him to do. He found a police patrol, told them about the family, and the police told him to give the signals to the family to go out of the woods. Since Dragan was not in direct communication with them, he asked the police if he can give light signals to the family with his car, and the police approved. Shortly after the family came out of the woods, police took them to the nearest police station, and Dragan decided to follow them, making sure that asylum procedure will be done rightly.[419] Few days after Dragan found out that the Ministry of Interior made an indictment claiming that Dragan "assisted in [Madina's family's] illegal crossing of the border."[420] Interestingly, within the indictment, the Ministry also targeted the organisation, Are

[417] Statewatch, (2018) ''Criminalising solidarity: Are You Syrious? statement on politically motivated, unjust guilty verdict for our volunteer''. Available at: https://www.statewatch.org/news/2018/sep/croatia-ays-case.htm accessed on 8th of November 2019

[418] Ibid.

[419] Jasmin Klarić,(2018) ''Mučna priča o ljudima koji pomažu migrantima i MUP-u koji traži da se njihova udruga zabrani" Telegram.hr. Available at: https://www.telegram.hr/price/mucna-prica-o-ljudima-koji-pomazu-migrantima-i-mup-u-koji-trazi-da-se-njihova-udruga-zabrani/ , accessed on 8th of November 2019.

[420]Statewatch, (2018)''Criminalising solidarity: Are You Syrious? statement on politically motivated, unjust guilty verdict for our volunteer'' Available at: https://www.statewatch.org/news/2018/sep/croatia-ays-case.htm

[420] https://www.statewatch.org/news/2018/sep/croatia-ays-case.htm accessed on 8th of November 2019

You Syrious, and asked for ‘’the prohibition of work in Croatia for the legal entity.” [421] A few months later, Dragan was found guilty for ‘’unconscious negligence’’[422] and fined with 60 000 kunas fine.

While the case of Are You Syrious is an example of formal criminalisation, the Centre for Peace Studies experienced non-formal forms of criminalisation of humanitarian assistance through disciplining and intimidation. After 15 years of supporting refugees, the Ministry of Interior did not extend a contract with the Centre for Peace Studies and banned their activities from the Reception Centre in Zagreb.[423] After announcing a press conference in Zagreb on the topic of police pressures and intimidation of activists, the police sent calls to both organisations informing them that their activists need to attend a police interview.[424] Even the minister of Interior tried to portray Centre for Peace Studies and Are You Syrious as agents who help trafficking networks. For example, on one occasion, he stated that the Ministry of Interior got information from migrants that Centre for Peace Studies and Are You Syrious give them telephone numbers and maps with paths on how to cross the border.[425] However, the Ministry of Interior failed to provide proof for

[421] Ibid.

[422] When giving his decision the judge stated that although Dragan did not directly facilitate the entry of Hussiny family to Croatia. However, he should have assumed that there is a possibility that the family is not firmly in the Croatian territory, thus his actions were not legal. You can find more information here: https://www.telegram.hr/politika-kriminal/imamo-presudu-volonteru-koji-mora-platiti-60-tisuca-kuna-za-pomaganje-migrantima-dugo-nismo-citali-nesto-tako-bizarno/

[423] Iva Grubiša, (2018)‘’ Spurned by authorities, humanitarian NGOs feel unsafe in Croatia" Euroactiv.com. Available at: https://www.euractiv.com/section/justice-home-affairs/news/wed-spurned-by-authorities-humanitarian-ngos-feel-unsafe-in-croatia/ , accessed on 8th of November 2019.

[424]N1, (2018) ‘’CMS: Policija nam dolazi po kućama i zove nas na razgovor", Hr.n1info.com. Available at: http://hr.n1info.com/Vijesti/a295514/CMS-Policija-nam-dolazi-po-kucama-i-zove-nas-na-razgovor.html , accessed on 8th of November 2019.

[425] Net.hr,(2018) ‘’BOŽINOVIĆ TEŠKO OPTUŽUJE UDRUGE: CMS i ASY davali novac migrantima i poticali ih na ilegalni ulazak u Hrvatsku" Net.hr. Available at: https://net.hr/danas/hrvatska/ministar-bozinovic-tesko-optuzuje-udruge-cms-i-asy-davali-novac-migrantima-i-poticali-ih-na-ilegalni-ulazak-u-hrvatsku/ , accessed on 8th of November 2019.

such allegations. Interestingly enough, the same Minister does not believe refugees and other migrants that testified about police violence and would always bluntly disregards their testimonies.

The trend of criminalisation of humanitarian assistance to refugees is taking its turn in Croatia. More importantly, this criminalisation is happening outside its formal framework and systematically affects the work of civil society organisations and activists. It is rather evident that Croatian police is not allowing refugees and other migrants to access their existing rights. Due to these circumstances, civil society organisation through their advocacy and direct work with refugees and other migrants put themselves at risk of being criminalised.

3.5. Strategic Litigation

The consequences of criminalisation of humanitarian assistance to refugees and other migrants differ from case to case and political circumstances. However, civil society organisations stress that criminalisation of humanitarian assistance is a direct consequence of ‘’deterrence-based migration policy of the EU.’’[426] Currently, there are different cases pending on international, European, and national levels that address the issue of criminalisation of humanitarian assistance.

On an international level, Dr. Juan Branco and Omer Shatz submitted a communication to the International Criminal Court, which states that the European Union and its Member States are responsible for the drowning of refugees and other migrants on the Mediterranean.[427] Dr. Juan Branco and Omer Shatz argued that ‘’ the purpose of this communication is therefore to provide

[426] GLAN,(2019) ‘’Case filed against Greece in Strasbourg Court over crackdown on humanitarian organisations". Glanlaw.org. Available at: https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations , accessed on 8th of November 2019.

[427] Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute, EU Migration Policies in the Central Mediterranean and Libya (2014-2019). Available at: https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf accessed on 8th of November 2019.

evidence and argument that would hold the most responsible actors for what until now was framed merely as 'grave human rights violation', a conduct that 'is not in accordance with the laws of the sea' or, more commonly, a 'tragedy'. In other words, anything but what it was: a series of crimes against humanity, within the meaning of the Rome Statute, under the jurisdiction of this Court.''[428] It will be up to the International Criminal Court to decide whether the European Union's ''deterrence-based migration policy''[429] constitutes Crimes Against Humanity defined in Article 7 of the Rome Statute.

Unprecedented application with the European Court of Human Rights was submitted in April of 2019.[430] Application is submitted by Salam Kamal-Aldeen, a founder of a non-profit Team Humanity who was criminalised with Spanish firefighters for assisting refugees and other migrants in Greece.[431] Legal advisors who worked on the application emphasized that ''the Strasbourg Court has now the opportunity to condemn the growing trend in Greece and Europe of criminalising solidarity. Rescue is not a crime; it is a binding duty under international law.''[432] Furthermore, it was emphasized that ''this case raises important questions of European human rights law concerning the role of civil society in providing humanitarian assistance to people in distress.''[433]

[428] Ibid. p. 214.
[429] Ibid. p. 214.
[430] GLAN, ''Case filed against Greece in Strasbourg Court over crackdown on humanitarian organisations" (2019). Glanlaw.org. Available at: https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations , accessed on 8th of November 2019.
[431]Niki Kitsantonis, (2018) '' Volunteers Who Rescued Migrants Are Cleared of Criminal Charges in Greece", *Nytimes.com.* Available at: https://www.nytimes.com/2018/05/07/world/europe/greece-migrants-volunteers.html , accessed on 8th of November 2019.
[432] GLAN, (2019) ''Case filed against Greece in Strasbourg Court over crackdown on humanitarian organisations". Glanlaw.org. Available at: https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations , accessed on 8th of November 2019.
[433] GLAN, ''Case filed against Greece in Strasbourg Court over crackdown on humanitarian organisations" (2019). Glanlaw.org. Available at: https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations , accessed on 8th of November 2019.

On the national level, according to the research made by Open Democracy, there are more than 250 people who are currently under criminal charges because of helping refugees and other migrants.[434] The prior mentioned case against Iuventa is officially the first case where a civil society organisation who provided humanitarian vessels was accused of the facilitation of illegal entry since the beginning of the so-called ‘’refugee crisis’’. If the court decides that Iuventa's crew indeed did facilitate irregular migration, this will only prove the discrepancy between the standards set within the ambits of international law of the sea and national laws.

The shortcomings of the current EU legal framework, primarily the Facilitators Directive, are visible in the vast majority of cases in which the Member States criminalise humanitarian assistance to refugees and other migrants and characterize it as smuggling. The case of Sean Binder and Sarah Mardini, volunteers of the Emergency Response Centre International, is an example of the criminalisation of humanitarian assistance in Greece. Sara and Sean are prosecuted because of ‘’espionage, assisting human-smuggling networks, membership of a criminal organisation, and money laundering’’[435] and are facing up to 25 years in prison if the court finds them guilty. These scenarios could be avoided if the Facilitation Directive did not leave up to the Member States' discretion to implement the clause that exempts humanitarian assistance. However, what is of utmost importance is the urgency of defining what humanitarian assistance actually means, since, even when in national laws such exemption exists, it is oftentimes not recognized by the judges,

[434] Alexander Nabert , Claudia Torrisi, Nandini Archer, Belen Lobos, Claire Provost,(2019) ‘’ Hundreds of Europeans ‘criminalised’ for helping migrants – as far right aims to win big in European elections" Opendemocracy.net. Available at: https://www.opendemocracy.net/en/5050/hundreds-of-europeans-criminalised-for-helping-migrants-new-data-shows-as-far-right-aims-to-win-big-in-european-elections/ accessed on 8th of November 2019.

[435] Carmine Conte and Sean Binder, (2019) ‘’ Strategic litigation: the role of EU and international law in criminalising humanitarianism’’ (2019), ReSoma, Point 2.2. Available at: http://www.resoma.eu/sites/resoma/resoma/files/policy_brief/pdf/Discussion%20Policy%20Briefs%20-%20Strategic%20Litigation.pdf , accessed on 5th of November 2019.

or the judges find there are no grounds for an act to be understood as humanitarian assistance to refugees and other migrants, as it was the case with Croatian example.[436]

The timing in politics is critical, especially when talking about changes in the current legal framework. Although the goal of this thesis is to show why humanitarian assistance should not be criminalised, and why its criminalisation is against the standards set in international law, the changes of the current legal framework on the EU level need to be done when the timing is right. You may ask yourself whether the timing is right now? With the rise of populism and far-right parties in the several Member States who are securitizing their borders, there is a fear that starting the process of amending problematic laws could backfire. However, if hundreds of people are losing their lives on the borders of Europe, and the only thing that separates them from death are individuals and organisations assisting them at sea, on the land, and if they are in a risk of prosecution, we must ask ourselves, if not now, when?

3.6. Conclusion

This Chapter strived to show what are the reasons of civil society organisation and individuals to insist in providing humanitarian assistance even when that means possible prosecution. By analysing three different countries, with different contexts and ways of criminalising humanitarian assistance, it was shown that criminalisation goes beyond the formal process and includes disciplining, harassment and intimidation. In Italy, a catalyst for criminalisation was Code of Conduct, in Hungary the authorities engaged in thorough changes of the Criminal Code, while in Croatia the judiciary turned the ‘’blind eye’’ on the existing exemption for humanitarian assistance. The willingness of individuals and civil society organisations to disobey the national law because

[436] Ibid. point 3.2.

of its infringement of human rights shows that their moral compass has precedence over the fear of prosecution.

Conclusion

''Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has.''

(Margaret Mead)

The aim of this thesis was to show what is the motivation and what are the legal and moral grounds for disobeying the national laws which do not follow the standards set by the EU and international law.

Chapter I of this thesis deconstructed the narrative in which the term refugee and migrant are understood as mutually excluding categories, and showed the role of this narrative in the process of criminalisation of humanitarian assistance. The idea behind engaging with the categorical fetishism is to see how it impacts the access to the system of international protection. Furthermore, this chapter investigated the meaning of humanitarian assistance and the scope of its criminalisation and showed that it goes beyond the formal process of criminalisation.

Chapter II confirmed that there indeed is a conflict between the fight against smuggling and access to international protection. The UN Smuggling Protocol in its provisions does not explicitly refer to the possibility of humanitarian assistance, however its Guidelines recognise the importance of assisting from altruistic reasons. The Facilitation Directive on the other hand, by removing the element of financial gain, allowed criminalisation of humanitarian assistance and raised legal uncertainty since it enabled broad interpretation of the acts of smuggling. In addition, Chapter II looks into the 1951 Refugee Convention for the search of finding legal grounds for advocating against criminalisation of humanitarian assistance to refugees. The analysis showed that the

drafters of the Convention indeed did have in mind humanitarian assistance to refugees, however they were hesitant to put it in to the text of Convention and assumed that states will not criminalise it. In contrast to the Refugee Convention, the international law of the sea explicitly obliges assistance to any person in distress.

Chapter III demonstrated in what way Member States violate human rights and refugee specific rights, and how their deterrence policies impact the work of civil society organisations. Criminalisation of humanitarian assistance in all three countries was enabled because of the Facilitation Directive and the larger margin of appreciation given to the states when it comes to the admission of refugees and other migrants. The lack of initiative by the EU to promptly respond on the pressure civil society organisations and individuals face with, can be an indication of the EU's silent approval of such policies.

The findings of the thesis show that for the purpose of advocating against criminalisation of humanitarian assistance one will have to investigate what the drafters of the relevant international laws said but did not dare to write down. It seems as if after the Word War II it was hard to imagine that states would criminalise assisting refugees, so the drafters presupposed that such scenario would never happen. Unjustified trust in the ''good nature'' of the law makers opened the doors for criminalisation of the ''unthinkable''. As a consequence, persons who provide humanitarian assistance are trapped in legal uncertainty.

Nevertheless, the mere fact the drafters of relevant international laws thought about humanitarian assistance can be used for advocating for implementation of current legal framework in accordance to its purpose and with the respect of fundamental human rights. The process of changing the Facilitation Directive would be complicated and lengthy. Thus, instead of engaging with the

process of changing the law, the EU should engage with the process of monitoring whether the application of the Facilitation Directive on national level is in done in respect of fundamental human rights. While this type of monitoring requires political will, one thing is sure; the cases pending on international, European, and national levels show that civil society organisations and individuals will not be deterred by restrictive laws, on contrary, they will *engage* with the law to *evade* it.

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