

Diritto, Immigrazione e Cittadinanza

Fascicolo n. 3/2017

SOLIDARITY, SMUGGLING AND THE EUROPEAN REFUGEE CRISIS: CIVIL SOCIETY AND ITS DISCONTENTS

di Jennifer Allsopp

***Abstract:** This article considers how civil society actors assisting migrants and refugees over the course of 2015-2017 ‘European refugee crisis’ have been impacted by, and fought against, aspects of the anti-smuggling agenda of the EU and its Member States. It explores how, in resisting accusations of ‘colluding’ with smugglers and of being a ‘pull factor’ for irregular migration, civil society actors have variably framed their right to act as a form of immanent critique, as civil disobedience, or as a principled humanitarian stand against an increasingly nontransparent and militarized EU border apparatus which is justified in the name of countering the organised crime of human smuggling. The article argues that the tension between the communitarian logic of deterrence and exclusion expounded by EU institutions during the crisis on the one hand, and the will to assist and include migrants among a significant part of European civil society on the other, can be understood as part of a fundamental tension in liberal democracy writ large at the EU level.*

***Abstract:** Gli attori della società civile che tra il 2015 e il 2017 hanno fornito assistenza a migranti e rifugiati, durante la cosiddetta “crisi dei rifugiati” in Europa, si sono trovati a dover contrastare o si sono dovuti confrontare con le misure previste a livello europeo e nazionale contro il favoreggiamento del traffico di migranti e con le loro conseguenze. Di fronte alle accuse di “collusione” con gli scafisti o di essere fattori di attrazione per l’immigrazione irregolare, tali attori hanno variamente inteso le proprie condotte come una forma di critica immanente, come disobbedienza civile o come un presidio umanitario di fronte a un apparato dei confini europeo sempre più militarizzato e poco trasparente, giustificato in nome della lotta al crimine organizzato e al traffico di essere umani. L’articolo interpreta le tensioni tra la logica di deterrenza e esclusione, che ha guidato l’azione istituzionale dell’Europa durante la crisi, e la determinazione di parte della società civile a fornire assistenza e includere i migranti come una tensione fondamentale della democrazia liberale che attraversa oggi anche il livello dell’Unione europea.*

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1. Introduction



Picture credit: Author, Warsaw, 2015.

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On a research visit to the European Border and Coast Guard (Frontex) in Warsaw in 2015, I was struck by a piece of street art near to their offices. The image shows a robot wielding guns and surveillance equipment, chasing a family. The family is carrying a bag of belongings, suggesting that they are refugees. The robot is labelled FRONTEX; meanwhile the family is anonymous but assigned the identity of a heart, identifying them as human. The image (which I assumed to be the work of European activists) captured an evolving tension that was starting to be recognized and documented at the time, between the will of certain European citizens and civil society actors to assist – and by default to *include* – individuals fleeing the conflicts in North Africa and the Middle East between 2015-2017; and the perceived will of the European Union (EU) institutions and its Member States to deter – and by default to *exclude* – them.

The policing, disciplining and criminalisation¹ of citizens who act to include non-citizens into the polity (i.e. into the nation-state or, in the context of the European refugee crisis, into the EU polity) is not a new phenomenon. Indeed, it has long historical precedent. John Parks, for example, has demonstrated that the ethical and practical dilemmas concerning the citizen's right to help 'outsiders' in the context of irregular migration to the United States, has historic parallels in the evolution of liberal democracy with the criminalisation of slaves escaping from their captors and in the depiction by state authorities of those mobilizing to help fugitive slaves as 'traitors'². So while it is not new that the movement of refugees sparks a dual response of humanitarianism and securitization which often come into conflict³, the expanded mandate and activities of the EU and its Home Affairs institutions in policing irregular migration on behalf of Member States throughout the recent refugee crisis has expanded the realm, and the jurisdiction, within which this tension finds expression.

This article documents the tension between the communitarian logic of deterrence and exclusion expounded by EU Home Affairs agencies and institutions during the European refugee crisis on the one hand, and the will to assist and include migrants among a significant part of European civil society on the other⁴. It argues that this dynamic can be

1. For further explanation and examples of these dynamics, see S. Carrera, J. Allsopp and L. Vosyliūtė (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

2. J.S. Park, *Illegal migrations and the Huckleberry Finn problem*, Chicago, Temple University Press, 2013.

3. A. Hammerstad, *UNHCR and the Securitization of Forced Migration*, in A. Betts and G. Loescher, eds. *Refugees in International Relations*, Oxford, Oxford University Press, 2011, pp. 237-260.

4. A range of ethnographic studies of civil society groups and activist movements have been published in recent years documenting these dynamics. These have mostly focused on the local and national level and framed debates in terms of access to and transformation of citizenship. See e.g. I. Stock, *Daring to care? How volunteers and civil society organisations are shaping*

understood as a fundamental tension in liberal democracy writ large at the EU level. In recent clashes between civil society actors responding to the refugee crisis and the increasingly centralized and nontransparent EU anti-smuggling apparatus, the article concludes, we may be witnessing a relatively new and poorly studied phenomenon of pan-national European citizen mobilization⁵. This development has consequences for European civil society as a whole, raising new possibilities and challenges for democratic accountability within the Union.

1.1. *Structure*

The next part of this article, Part 2, begins with an overview of the EU anti-smuggling framework and some of the criticisms that have been levelled against it. Part 3 then considers how ambiguity surrounding the legislation has led to intimidating and dissuasive policing practices vis-a-vis the work of civil society groups supporting migrants in Europe; it also details some cases of explicit criminalisation. Part 4. explores the narrative lens through which civil society actors have framed their response to policing and criminalisation and sought to counter criticisms levelled at them through appeals to both national tropes and universal values. Part 5 considers the theoretical implications of the debate in relation to solidarity and citizenship towards migrants and refugees in Europe. It highlights an escalation of the normally nationally located liberal/communitarian challenge to the EU level and argues that this is a consequence of the increasingly powerful role of EU institutions in matters of controlling irregular migration, including the fight against smuggling.

1.2. *Methodology*

The article draws on a body of research on the policing and criminalisation of the provision of humanitarian assistance to migrants and refugees within the EU conducted between 2011 and 2017 by the author and colleagues⁶ in a range of contexts including in: France, the UK, Hungary and Italy. It includes analysis of survey data gathered as part of a study commissioned by the European Parliament LIBE Committee in 2015, and of

asylum seekers access to citizenship through social support, COMCAD Arbeitspapiere, Working Papers no. 156, Germany, Bielefeld University, 2017; and the 2016 Special Issue of *Citizenship Studies* on *The Contentious Politics of Refugee and Migrant Protest and Solidarity Movements: Remaking Citizenship from the Margins* 5(20).

5. For one example of a study of supranational civil society action in context of the 'European Refugee Crisis', see M. Stierl, *A sea of struggle – activist border interventions in the Mediterranean Sea*, in *Citizenship Studies*, 2016, 20(5), pp. 561-578.

6. With special thanks to Dr Sergio Carrera and Lina Vosyliūtė for their collaboration in this research.

interviews conducted as part of an ongoing research project on social trust and the criminalisation and policing of humanitarian assistance to irregular migrants in Europe led by Dr Sergio Carrera at the Centre of European Policy Studies⁷.

2. Anti-smuggling and the European Refugee Crisis

Blocking individuals from irregularly arriving to the EU (where they are entitled under the 1951 UN Geneva Convention to seek asylum⁸) has been a priority response by EU institutions to the 2015-2017 European refugee crisis. The 2017 EU-Turkey Deal⁹ (which, among other measures, introduced new closed detention ‘hotspots’ for asylum arrivals with the condition that those refused protection will be sent back to Turkey); the growing militarisation of the Mediterranean Sea (including the deployment of NATO military vessels¹⁰ and EU-funded training of the Libyan coastguard to receive fleeing vessels back to their shores¹¹); and the erection of a border wall and posting of 20 Frontex officers on the Hungarian-Serbia external Schengen border¹² (where reports of violence and *refoulement* are among human rights investigations currently being investigated in national and international courts¹³), are just three of the most recent and controversial

7. Three research projects have contributed to the analysis presented in this article: (i) an historical study of the criminalisation of humanitarian assistance in France conducted by the author – see J. Allsopp, *Contesting Fraternité: Vulnerable migrants and the politics of protection in contemporary France*, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012. (ii) a study of the impacts of EU anti-smuggling laws on civil society commissioned for the European Parliament’s LIBE Committee – see S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>; and (iii) An ESRC-funded one year research project on *Anti-Smuggling Policies and their Intersection with Humanitarian Assistance and Social Trust* conducted by the Centre for European Policy Studies (CEPS) in cooperation with Queen Mary University London and PICUM (Platform for International Cooperation on Undocumented Migrants) – ongoing.

8. UN General Assembly, Convention Relating to the Status of Refugees, 28th July 1951, United Nations, Treaty Series. Volume 189, p. 137. Available at: <http://www.refworld.org/docid/3be01b964.html>.

9. Council of the EU, *EU-Turkey statement*, 18 March 2016, Press Release, 18 March. <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>.

10. NATO, *Factsheet: NATO’s Deployment in the Aegean Sea* October 2016. http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_05/20160519_1605-factsheet-aegean-sea.pdf.

11. UN Security Council, *Security Council resolution 2291 (2016) [on extension of the mandate of the UN Support Mission in Libya (UNSMIL) until 15 December 2016]*, 13 June 2016, S/RES/2291 (2016), available at: <http://www.refworld.org/docid/5761536c4.html>.

12. J.C. Juncker, Letter to Victor Orban. Obtained by Politico. September 5th 2017. Published by Politico. Available at: <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/JunckerOrbansignedletter.pdf>.

13. Oxfam, Belgrade Centre for Human Rights and Macedonian Young Lawyers Association, A dangerous ‘game’ the pushback of migrants, including refugees, at Europe’s borders, April 2017, Joint Agency Briefing Paper <https://www.oxfam.org/en/research/dangerous-game-pushback-migrants-including-refugees-europes-borders>.

acts in a raft of deterrence measures which have raised wide-ranging human rights concerns from both within and outside of the EU¹⁴.

The erection of new borders both within and around the EU (a dynamic that has come to be known as ‘Fortress Europe’¹⁵) has also been justified through the lens of combatting organised crime i.e. cracking down on migrant smuggling. The targeting of criminal networks of smugglers was a key item in the 2015 European Agenda on Migration¹⁶. Meanwhile, a body of EU policies, laws and agencies have been developed to prevent, investigate and prosecute smuggling¹⁷. Through the lens of the fight against organised crime, combatting smuggling is often framed as an end in itself¹⁸. This article nevertheless interrogates some of the humanitarian consequences of this approach.

2.1. *EU Agencies and Anti-Migrant Smuggling*

Over the last three years, various EU Home Affairs agencies have been granted extended powers to prevent human smuggling. These include Frontex (the European Border and Coast Guard Agency), Europol (the EU’s law enforcement agency), Eurojust (The EU’s judicial cooperation unit) and EASO (European Asylum Support Office). Their new mandates have been consolidated in a range of instruments including the EU Commission’s May 2015 Action Plan against Migrant Smuggling¹⁹. Among other innovations, this plan introduced a ‘multi-agency approach’ and granted EU agencies more capacity to support Member States in the investigation and prosecution of migrant smuggling networks. Meanwhile, Europol established a new European Migrant Smuggling Centre in February 2016. A range of Joint Sea and Land Operations involving diverse national and EU agencies have also taken place with the aim of combatting smuggling. These operations – including Operation Mare Nostrum which was launched in the Mediterranean Sea in 2013 and its controversial replacement by Operation Triton JO in

14. L. Pitel and L. Cendrowicz *EU-Turkey refugee deal: UN and Amnesty attack “short-sighted and inhumane” plan*, *Independent*, 6 March 2016. Available at: <http://www.independent.co.uk/news/world/europe/eu-turkey-refugee-deal-un-and-amnesty-attack-short-sighted-and-inhumane-plan-a6919966.html>.

15. M. Carr, *Fortress Europe, Dispatches from a Gated Community*, London, Hurst and Company, 2012.

16. European Commission, *A European Agenda on Migration*, Communication, COM(2015) 240 final, 13.5.2015, Brussels.

17. For a detailed account of these developments, see S. Carrera, J. Allsopp and L. Vosyliūtė, (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

18. See S. Carrera and J. Allsopp, *The Irregular Immigration Policy Conundrum: The Ineffectiveness of Expulsion and Criminalization Policies*, in F. Trauner and A. Ripoll Servent, (Eds.) *The Routledge Handbook of Justice and Home Affairs Research*, London, Routledge, 2018, pp. 70-82.

19. European Commission, *Communication (2015), EU Action Plan against migrant smuggling (2015-2020)*, COM(2015) 285 final, 27.5.2017.

2014 and Operation Sophia in May 2015 – have been criticised in terms of their commitment to human rights and prioritisation of deterring arrivals over saving lives²⁰.

Frontex has emerged as a key player in this field. The 2016 European Border and Coast Guard Regulation gives Frontex new powers to prevent and detect ‘cross-border crimes’ of migrant smuggling²¹; and Frontex officers and border guards from Member States coordinated by Frontex are deployed in certain external Schengen land and sea borders including in Greece, Italy and Hungary²².

Some EU representatives and Member States have argued that this hard-line approach to migrant smuggling is just one side of a progressive migration management strategy outlined in the 2015 European Agenda on Migration. This agenda also foresees the concentration of more resources in the ‘affected’ (refugee producing) regions through economic development programmes, coupled with the opening of ‘safe routes’ through increased resettlement programmes for individuals most vulnerable in need of international protection²³. Many NGOs have nevertheless been quick to point out the lack of progress in relation to the development of safe and legal channels²⁴. The reluctance of certain Member States to participate in proposals of a new EU resettlement programme, including the UK and Hungary among others, is a case in point²⁵.

20. See e.g. G. Bevilacqua, *Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities*, in G. Andreone (eds) *The Future of the Law of the Sea*, Cham, Switzerland, Springer International Publishing, 2017, pp. 165-189; G. Butler and M. Ratovich, *Operation Sophia in uncharted waters: European and international law challenges for the EU Naval Mission in the Mediterranean Sea*, in *Nordic Journal of International Law*, 2016, 85(3), pp. 235-259.

21. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC.

22. J.C. Juncker, Letter to Victor Orban. Obtained by Politico. September 5th 2017. Published by Politico. Available at: <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/09/JunckerOrbansignedletter.pdf>.

23. See European Commission, A European Agenda on Migration, Communication, COM(2015) 240 final, 13.5.2015, Brussels. See also UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a4.html>.

24. Amnesty International European Institutions Office et al. *No Time to Waste: NGOs Call Upon EU Institutions and Member States to Expand the Use of Safe and Legal Channels for Refugees*, 2017. Joint statement by NGOs. Brussels, 25 January 2017. Available at: <https://www.ecre.org/wp-content/uploads/2017/01/Joint-Statemen-safe-channels-25-January-2017-final.pdf>.

25. M. Dejevsky, *Think Hungary’s shock 98 per cent vote to reject EU refugee quotas makes it the exception? Think again*, *Independent*, 3 October 2016. Available at:

<http://www.independent.co.uk/voices/hungary-refugee-quota-referendum-eu-europe-turning-back-on-refugee-quotas-a7343106.html>.

Another important challenge to such policies, highlighted in the 2015 EU Action Plan against Migrant Smuggling²⁶, concerns the risk of criminalising individuals and groups who provide humanitarian assistance to vulnerable migrants. In other words, the EU anti-smuggling apparatus raises and fails to resolve a fundamental tension: how do you discern a Schindler from a smuggler, or a Good Samaritan from a criminal?

2.2. *Defining Smuggling at the EU level: The Facilitation Directive*

In law, the opacity between the criminalisation of people smuggling on the one hand, and the criminalisation of those providing humanitarian assistance on the other, is a by-product of the EU ‘Facilitator’s Package’. This legal instrument is composed of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (the Facilitation Directive)²⁷ and the Council Framework Decision 2002/946/JHA²⁸ on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

The Directive gives a common definition of the «facilitation of illegal immigration» and defines the following as infringements (own italics): (i) assisting intentionally a non-EU country national to *enter or transit* through the territory of an EU country, in breach of laws – Article 1(a); (ii) assisting intentionally, and *for financial gain*, a non-EU country national to *reside* in the territory of an EU country, in breach of laws – Article 1(b) ; and (iii) instigating, assisting in or attempting to commit the above acts – (Article 2). EU Member States are required to «adopt effective, proportionate and dissuasive sanctions» for these infringements in their national laws (Article 3).

Article 1(2) of the Directive contains an optional clause for Member States to explicitly exclude humanitarian actors from criminal sanctions. It states that:

«Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide *humanitarian assistance* to the person concerned» (own Italics).

26. European Commission, Communication (2015b), EU Action Plan against migrant smuggling (2015-2020), COM(2015) 285 final, 27.5.2017.

27. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002.

28. Council Framework Decision [2002/946/JHA](#) of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002.

However, exempting humanitarian acts from criminalisation is not part of EU law. Consequently, Member States have variably transposed this Directive into national legal frameworks²⁹. Currently, facilitating irregular entry is punished in all 28 EU Member States, yet only a quarter have a form of humanitarian safeguard in accordance with Article 1(2) including Greece, Spain and France, among other countries³⁰. Those that do employ safeguards employ different definitions. In Sweden, for example, consideration is given to whether the crime was committed for reasons of «strong human compassion»³¹. Although when it comes to those seeking asylum, the Framework Decision includes a safeguard for international protection, this has also been variably adopted by states in practice.

The Directive also does not include the requirement that there be financial or material gain in the case of facilitation of entry for the act to constitute a criminal offence. Over a quarter of Member States do not exempt non-profit acts or humanitarian assistance from criminalisation under facilitation of residence³². The nature and scope of ‘what’ humanitarian assistance actually involves is also not defined by the Directive. Neither are the potential relationships between the facilitator and the irregular migrant, which may include family members or private relationships. It has been highlighted that in placing special emphasis on imposing criminal sanctions for facilitators of stay who act «for financial gain»³³, the Directive puts at greater risk of prosecution and conviction service providers to irregular migrants and other members of society such as landlords³⁴. These legal uncertainties are exacerbated by the omission in the Facilitators’ Package of its relationship with other relevant human rights instruments at the international and regional levels which impose legal obligations on individuals and States to provide

29. S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>.

30. See European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of persons engaging with them*, March, FRA, Vienna, 2014.

Available at: <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>.

31. *Ibid.* p. 15.

32. *Ibid.* p. 16.

33. Article 1.1.b of the Directive stipulates that «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 [is] in breach of the laws of the State concerned on the residence of aliens».

34. See Section 4 *Effects of the Facilitation Directive as Implemented in Member States*, in S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015, pp. 45-61. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>.

assistance to those in need, including people facing destitution or whose lives are at risk at sea³⁵.

Of particular relevance here is the substantial ‘implementation gap’ between the 2000 UN Protocol against the Smuggling of Migrants by Land, Sea and Air³⁶ and international and EU legal frameworks on people smuggling. The UN Protocol differs from the EU legal framework in three main ways: i) the extent of the inclusion and definition of an element of «financial gain» in the description of facilitation of irregular entry, transit and stay; ii) the inclusion of an exemption of punishment for those providing humanitarian assistance; and iii) specifying safeguards for victims of smuggling.

The differences between the UN anti-smuggling framework and the EU ‘Facilitator’ Package’ on the one hand, coupled with the inconsistencies in how Member States have transposed the laws into national legislation on the other, has produced significant inconsistencies among domestic laws in relation to both the definition of the specific conduct to be criminalised and the requirement of an element of profit or financial gain for facilitation of irregular stay to be punished³⁷. This results in legal uncertainty and inconsistency. As one civil society organisation put it, «we work in a grey area»³⁸. Previous studies have demonstrated that fear of sanction in itself can have a deterrent effect, contributing to «collective indifference»³⁹. The large scale and importance of civil society work in protecting the rights of migrants and asylum seekers – which led in recent years, among others accolades, to civil society groups in Greek islands to be nominated for the Nobel Peace Prize – demonstrates the potentially devastating consequences of any perceived or real ‘chilling effect’ on this work in terms of impacting on migrants’ access to their fundamental rights.

35. See Section 2 *EU and International Legal Frameworks* in S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015, pp. 21-37. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>.

36. United Nations General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15th November 2000. Available at: <http://www.refworld.org/docid/479dee062.html>.

37. See Section 2 *EU and International Legal Frameworks* in S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015, pp. 21-37. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>.

38. Focus group discussion with civil society actors, CEPS, Brussels, 11 May 2017.

39. T. Basaran, *The saved and the drowned: Governing indifference in the name of security*, in *Security Dialogue*, 2015, 46(3), pp. 205-220; see Section 4 *Effects of the Facilitation Directive as Implemented in Member States* in S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015, pp. 45-61. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>.

The limited transposition of the voluntary humanitarian exemption requirement and for profit motive has been the subject of ongoing criticism from scholars, international organisations and NGOs⁴⁰, European officials⁴¹, and EU institutions such as the Fundamental Rights Agency⁴². Informal civil society groups and individuals have also mobilized around the issue at the national and EU level: a recent petition launched by WeMove.eu calling for the decriminalisation of assistance was signed by 164,166 individuals⁴³.

3. The Impacts of EU Anti-smuggling Policies on Civil Society

Civil society groups were often the first and sometimes the sole actors responding to the scenes of humanitarian need at Europe's external and international borders during the crisis of 2015-17. This work was, and is, conducted by an expanding group of volunteers and professional service providers, many of whom came to work together for the first time – from reputed international NGOs such as Oxfam or Médecins Sans Frontières, to grass-roots informal collectives and activist groups (both more political groups such as No Borders groups and less explicitly political Refugees Welcome groups) which sprung up in towns across the continent. As one Hungarian civil society actor put it in 2017:

«We are the only ones still doing any kind of work for these people. So there is practically nothing or bare minimum provided by the state and its institutions and authorities...[If] these organisations would shut down now these people would be left with nothing [...]»⁴⁴.

Civil society groups expressed concerns that heightened efforts to combat the smuggling of migrants and refugees during this period were affecting irregular migrants' access to fundamental rights, including healthcare, education and housing. Recent research has corroborated this claim, demonstrating that the anti-smuggling apparatus at

40. E.g. L. Fekete, *Europe: Crimes of Solidarity*, in *Race & Class*, 2009, 50(4), pp. 83-97; F. Webber, *Border wars and asylum crimes*, London, Institute of Race Relations, 2008.

41. In his 2010 report *The Criminalisation of Migration in Europe: Human Rights Implications*, the Council of Europe Commissioner for Human Rights raises the criminalisation of persons engaging with foreign nationals with irregular immigration status as a key concern. See: <https://wcd.coe.int/ViewDoc.jsp?id=1579605>.

42. European Union Agency for Fundamental Rights (FRA), *Criminalisation of Migrants in an Irregular Situation and of persons engaging with them*, March, FRA, Vienna, 2014.

Available at: <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>.

43. WeMove, *Criminalising Humanity: Petition to the European Commission*, 2016. Available at: <https://act.wemove.eu/campaigns/criminalising-humanity>.

44. Interview with civil society organisation providing legal assistance in Hungary over Skype, 16 August 2017.

the EU and national level – and most importantly a widespread confusion among actors regarding what is legal and what is not – has led to some NGO workers being legally criminalised for smuggling or related offences when acting to save migrants’ lives. Another pervasive and well documented effect of anti-smuggling laws concerns the ‘chilling effect’ on humanitarian interventions on land and at sea⁴⁵.

3.1. Phase 1 – Unintended Consequences of Ambiguous Legislation?

As the European refugee crisis unfolded, the position of NGOs and civil society groups providing assistance to irregular migrants and asylum seekers became more controversial. Early on, civil society groups highlighted a series of so-called ‘unintended consequences’ of the anti-smuggling apparatus on their work. The results of a questionnaire of 69 civil society organisations and 13 cities across approximately 20 Member States for a 2016 study for the European Parliament⁴⁶ give an indication of the range of material, direct and perceived effects of the Facilitators’ Package on irregular migrants and on individuals and organisations providing humanitarian assistance to them. Almost all of those surveyed considered their work to be humanitarian in nature; claiming to provide services that help migrants to access their fundamental rights (including to health care, shelter, hygiene and legal assistance) and to live with dignity.

Just a handful of survey respondents reported direct experience of proceedings, prosecution or sanction for their work supporting asylum seekers and irregular migrants. Criminal acts included fundraising for the medical bill of a migrant domestic worker without licence, protesting, and misusing public funds. Yet one fifth of respondents from a range of Member States reported that their organisation or a member of their organisation had *feared sanction* for their work assisting an irregular migrant – both for work related to the transit of migrants, and supporting them during their stay in a Member State. The chilling effect of anti-human smuggling laws was confirmed by a recent European Commission evaluation⁴⁷ which corroborated the effects on civil society and private actors

45. J. Allsopp and M-G. Manieri, *The EU Anti-Smuggling Framework: Direct and Indirect Effects on the Provision of Humanitarian Assistance to Irregular Migrants*, in E. Guild, S. Carrera, (Eds.) *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*. CEPS Paperback, 2016, pp. 81-93; T. Basaran, *The saved and the drowned: Governing indifference in the name of security*, *Security Dialogue*, 46(3), 2015, pp. 205-220.

46. S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, European Parliament, 2016, pp. 45-61. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>.

47. European Commission (2017) REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: The Facilitators Package (Directive 2002/90/EC and Framework

(such as ship-owners and fishermen). Those assisting irregular migrants also reported a significant margin of manoeuvre and degree of arbitrariness in the way the Facilitation Directive is implemented in their Member State, and there is also widespread confusion among civil society actors around how the Facilitation Directive *should* be implemented in their Member State, leading to misinformation and ‘erring on the side of caution’, thereby compromising migrants’ access to vital services. This is especially true in the context of the significant increase in the number of people migrating to Europe and seeking asylum, where everyday citizens are obliged to volunteer vital services without full training in the absence of sufficient state provision.

Data from the surveys suggests that while in some Member States, such as France, Spain and Belgium, the fear of sanction for assisting the irregular entry, transit or stay of an irregular migrant under the grounds of the Facilitation Directive has decreased, in part due to reformed national legislation informed by civil society activism⁴⁸; in other Member States, civil society organisations increasingly fear sanction for their work supporting irregular migrants. This appears to be especially true in EU external border states which have seen large and unprecedented influxes of migrants, such as Hungary, Italy and Greece. This finding is confirmed by ongoing research. Reported incidents of criminalisation in Italy and France include administrative fines for distributing food and erecting shelter. Meanwhile, policing measures include intimidating acts such as the parking of police vans outside service provision spots and disciplining measures such as repeated ID checks of volunteers⁴⁹.

3.2. Phase 2 – *The Debate Intensifies: NGOs as ‘Collaborators’*

Previous analysis has framed both the real and normative tensions between anti-smuggling laws in Europe on the one hand, and the safeguarding of the independence of humanitarian actors on the other, in terms of ‘unintended’ or ‘indirect’ policy consequences. Another body of work has seen this tension as reflective of a more

Decision 2002/946/JHA). Available at: <https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-120-F1-EN-MAIN-PART-1.PDF>.

48. See Section 4 *Effects of the Facilitation Directive as Implemented in Member States* in S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015, pp. 45-61. Available at: <https://www.ceps.eu/publications/fit-purposethe-facilitation-directive-and-criminalisation-humanitarian-assistance>; for analysis of the civil society movement and legal changes in France, see J. Allsopp, *Contesting fraternité: Vulnerable migrants and the politics of protection in contemporary France*, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012.

49. See S. Carrera, J. Allsopp and L. Vosyliūtė, (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

fundamental tension in liberal democracy between communitarianism and universalism; and as evidence of the important role of civil society in protecting society's 'core principles'⁵⁰. These effects can be mitigated but never fully resolved. Indeed, an element of social mistrust or respectful conflict between civil society and statutory actors is fundamental feature of a healthy democracy.

During 2016 and 2017, in some parts of the EU, attacks on civil society organisations under the guise of anti-smuggling measures nevertheless became more confrontational, leading some actors to consider that the counter effects of anti-smuggling measures on their work were intentional after all: intended to reduce the monitoring role of civil society and reduce scrutiny of statutory actors as well as creating a hostile environment for migrants by reducing access to services. Attacks on civil society actors came from national, local and EU actors.

Frontex provoked the ire of civil society groups from across the EU by alleging a link between humanitarian assistance and people smuggling, claiming that NGOs' proximity to Libyan waters and the increasing number of people rescued monthly suggested a 'pull factor' for irregular migration⁵¹. The labelling of Search and Rescue NGOs as a 'pull factor' for irregular immigration and smuggling networks was unsubstantiated (more migrants were rescued by Italian authorities than NGOs), but it nevertheless had the effect of increasing the policing of the activities of civil society organisations at sea and of creating a more controlled and 'hostile' environment for their operations. The accusation of collusion has also been leveled at civil society groups by a number of prominent figures including a public prosecutor in Catania⁵². In an increasingly toxic debate between Hungarian civil society and the Orbán government, NGOs (especially foreign funded NGOs) have also been accused of being a 'pull factor'⁵³ for irregular migration and human smuggling. As a consequence, they have been subjected to controversial new monitoring laws that have been challenged at the EU level⁵⁴.

50. J. Allsopp, *Contesting Fraternité: Vulnerable migrants and the politics of protection in contemporary France*, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012.

51. Financial Times, *EU border force flags concerns over charities' interaction with migrant smugglers*, (2016) article by Duncan Robinson, December 15. Available at: <https://www.ft.com/content/3e6b6450-c1f7-11e6-9bca-2b93a6856354>; Frontex (2017) Annual Risk Analysis of 2017. Available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf.

52. K. Loftin, *Collusion or compassion? Accusations levied against Mediterranean rescue NGOs*, The World Weekly, 27 April 2017. Available at: <https://www.theworldweekly.com/reader/view/storyline/2017-04-27/collusion-or-compassion-accusations-levied-against-mediterranean-rescue-ngos/9972>.

53. Interview with UN agency, Budapest, 31 August, 2017; Interview with government affiliated research centre on migration, Budapest, 30 August 2017.

54. A. Byrne, *EU escalates legal action against Hungary over NGO law*, (2017). Financial Times, 4 October 2017. Available at: <https://www.ft.com/content/c148694d-685f-3405-ba9d-7c4fda603054?mhq5j=e7>.

Meanwhile, local and national actors in countries including Italy justified more stringent checks on the activities of civil society groups with direct reference to terrorist incidences in Europe. Following the Bataclan terror attack in Paris on 13 November 2015, for example, Baobab Experience, a service provider in Rome which provided shelter and food to some 55,000 irregular migrants and asylum seekers between Summer 2015 and Spring 2016, was raided by police and migrants without identification were rounded up in riot vans to be fingerprinted⁵⁵. This demonstrates that the work of CSOs assisting migrants and refugees is impacted not just by the anti-smuggling agenda, but by a broader set of securitisation and anti-terrorism priorities which justify the involvement of a wide range of EU Home Affairs Agencies.

In another development with parallels across the Union in countries including the Netherlands and Belgium⁵⁶, CSOs in the UK have complained that the work of border control is increasingly becoming co-opted into their activities, threatening, on a practical level, the bonds of trust between service providers and the migrants, but also the independence of civil society⁵⁷. The effect of dissuading migrants from accessing services also has broader consequences for society as a whole. As a representative from an international medical NGO based in the UK put it:

«[W]hat we're seeing is a normalisation of civil society being expected to play a role in immigration. Even if it's not explicit that it's a policing event, it's your responsibility to be concerned as well about someone's immigration status. Whereas the doctors we speak to would say actually it's not, I'm not interested in the person's immigration status, I want to treat the patient. And [...] that's been replicated [...] with landlords, in schools to a certain extent as well [...] [A]lthough what you might hear from a politician is that the intended impact is to dissuade, about making it a hostile environment, from our perspective the hostile environment isn't persuading people from staying in

55. Interview with representative of civil society organisation, Rome, Italy, 31 January 2017. See also Repubblica, *Blitz nel centro di accoglienza "Baobab" a Roma: migranti perquisiti e identificati*, article by Viola Giannoli and Salvatore Lucente, 24 November 2015. Available at:

http://roma.repubblica.it/cronaca/2015/11/24/news/blitz_nel_centro_di_accoglienza_baobab_a_roma_controlli_e_perquisizioni-128026444/.

56. See Section 4 *Effects of the Facilitation Directive as Implemented in Member States*, in S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015.

57. Interview with representative of civil society organisation providing medical assistance, London, 6 July 2017; Interview with representative of civil society organisation providing social, medical and legal assistance, London, 10 July 2017; Interview with representative of civil society organisation providing educational assistance, London, 7 July 2017; Interview with government organisation providing legal and social assistance, 12 July 2017.

the UK or from not coming to the UK, what it's doing is making sure you have greater health inequalities because people are getting more sick and not accessing any care [...] it increases the risk of exploitation [...] criminals taking advantage of marginalised people and thriving off this niche area which has been created»⁵⁸.

Previous studies have shown that a degree of trust is important for compliance with enforcement on the part of irregular migrants and those who assist them⁵⁹. In the Netherlands, it is reported that Local Authorities' obligation to report irregular migrants who make use of the new special night shelters has dissuaded them from accessing the service and left them sleeping rough⁶⁰. A representative of an NGO that provides health and social care in London reported that concerns about potential obligations to share data with government officials regarding clients meant they were less likely to collect the data in the first place which has consequences for funding and for monitoring their work⁶¹.

4. EU Civil Society Response

Civil society actors have responded in numerous ways to the increased monitoring and attacks on their operations and reputations. Some – in particular pursuant to the introduction of the EU-Turkey deal – chose to leave the arena of humanitarian assistance in the EU, not wishing to be complicit or 'instrumentalised' in the anti-smuggling agenda. Others continue to operate but «with our heads down»⁶², avoiding unnecessary scrutiny and attention so as to continue to receive statutory funding to provide their crucial services and/or – in the context of the UK, Hungary, Greece and Italy – to maintain government-controlled access to hotspots, transit zones and detention centres where migrants are held⁶³. New scrutiny of their work is thus reportedly having a disconcerting 'silencing effect' on some NGOs⁶⁴. Other civil society groups are taking a more vocal stance and framing their work as an immanent critique of national or European values or,

58. Interview with civil society organisation providing medical assistance, London, 6 July 2017.

59. See e.g. A. Ellermann, *Street-level democracy: how immigration bureaucrats manage public opinion*, in *West European Politics*, 2006, 29(2), pp. 293-309.

60. S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015, p. 57.

61. Interview with civil society organisation providing social, medical and legal assistance, London, 10 July 2017.

62. Interview with civil society organisation providing medical assistance, London, via Skype, 7 July 2017.

63. See S. Carrera, J. Allsopp and L. Vosyliūtė, (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

64. *Ibid.*

in extreme cases, as civil disobedience against unjust laws. Some NGO Search and Rescue boats in the Mediterranean have responded to recent accusations of colluding with smugglers and new obligations to cooperate with state authorities by leaving the arena, for example, whereas others have refused to sign the new mandatory Italian Mediterranean Code of Conduct and defiantly continue operations⁶⁵.

4.1. *Narrative Frames*

CSOs have defended themselves from accusations of creating a ‘pull factor’ or colluding with smugglers over the past two years in numerous ways. Four main strategies are common: i) they rebut the accusation, stressing that their efforts actually displace and replace those of smugglers; ii) they question the intent of the allegation – pointing to a real lack of effort from States to evidence their allegation as indicative of a different motive; iii) they reframe the discussion from one of migrants’ rights to that of the citizen’s right to assist, thus wielding their national and European citizenship privilege to assist migrants in need; they iv) argue from a universalist, humanitarian or political perspective. Some actors use a combination of the four framings.

4.1.1. *Opposition to Smuggling*

Some civil society groups have been careful to specifically frame their work as existing *in opposition* to smuggling. A respondent from Italy interviewed for ongoing research, for example, stressed that the intimidation they undergo from police to stop their provision of food and services to migrants serves to encourage, not discourage smuggling networks:

«[W]here the collective is prevented from providing these services, the migrants either end up in the street or are forced to turn back to smugglers for assistance. [...] bringing it into the public sphere is a form of protection».

A respondent from the Netherlands similarly commented in the 2015 survey that the difficulties in accessing assistance caused by criminalisation caused vulnerable migrants to «stay in isolation, vulnerable to exploitation». Among these migrants are the ‘most

65. News Deeply, *Expert Opinion: Should Search and Rescue NGOs Sign Mediterranean Code of Conduct?*, article by Daniel Howden and Kim Bode, 16 August 2017. <https://www.newsdeeply.com/refugees/community/2017/08/16/expert-views-should-rescue-ngos-sign-mediterranean-code-of-conduct>.

vulnerable' a Belgium respondent stressed, including pregnant women, trafficking victims and sex workers in need of psychological and health support⁶⁶.

The grounds that providing safe and legal resettlement routes for asylum seeking children in the EU is also a 'pull factor' has also come under fire from politicians. After accepting a small number of unaccompanied minors from France following the demolishing of the 'Jungle camp' in Calais⁶⁷, the UK government shut down the so-called 'Dubs scheme' and refused to work with NGOs to provide 'safe and legal routes' for unaccompanied minors from Calais to come to the UK on the grounds that it constituted a 'pull factor'. Opposition MP Yvette Cooper, Chair of the UK's Home Affairs Select Committee, explicitly stressed that far from stopping a 'pull factor' for irregular migration, in abandoning the scheme the government was reopening a market for traffickers and smugglers to transport children illegally from Calais to the UK. Referring to the then ongoing parliamentary inquiry into the issue, she insisted on the need to listen to and work with NGOs on the ground:

«There is a big gap between what the government has said, and the evidence we heard from local councils and from organisations like Unicef who are working with child refugees. This is too important to get wrong when children's lives and futures are at risk. [...] Ministers have said that they need to end the Dubs scheme in order to prevent trafficking, but Save the Children and others have said this will make child trafficking, abuse and exploitation worse»⁶⁸.

4.1.2. *Question the 'Effectiveness' of Laws*

Some civil society groups have suggested that in increasing their scrutiny of NGOs, certain government and EU actors are trying to distract attention away from policy failures and find a common 'scapegoat'. Common critiques levelled in this regard include: i) EU and statutory actors lack standards for effective policy delivery; ii) statutory actors have no standardized frameworks for measuring the effectiveness of their policies; iii) there is therefore a lack of evidence regarding the impacts of policies and standards being met.

66. S. Carrera, E. Guild, A. Aliverti, J. Allsopp, M-G. Manieri, M. Levoy, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*, Brussels, European Parliament, 2015.

67. Guardian, *Home Office decision to end Dubs scheme 'not backed by evidence'*, (2016), article by J. Jackson, 6 March 2017. Available at: <https://www.theguardian.com/world/2017/mar/06/home-office-decision-to-end-dubs-scheme-not-backed-by-evidence>.

68. *Ibid.*

CSOs, like governments, have different ideas about what makes ‘effective’ policy and what these minimum standards *should* be. In a radio debate on the BBC’s “Moral Maze” a representative of an NGO working to operationalize Dublin III’s family reunion provisions in Calais challenged that with four children having died between 2015 and 2017 trying to cross to the UK illegally (all of whom had a full right to lawful family reunion), and thousands more perishing in the Mediterranean, the obligation to evidence the claimed humanitarian justification for deterrence (‘pull factor’) is both extremely heavy and unmet⁶⁹. In his words, «in our logic, no child should die to deter others from coming». This position was echoed by submissions from UNICEF UK, Save the Children, and the International Rescue Committee to the aforementioned UK Home Affairs Select Committee Inquiry into the situation of Unaccompanied Minors in Europe⁷⁰. Meanwhile, the UK House of Lords recently concluded the Frontex-led joint Operation Sophia to be a failure, it having not «in any meaningful way deterred the flow of migrants, disrupted the smugglers’ networks or impeded the business of people smuggling on the central Mediterranean route.»⁷¹.

As Sergio Carrera and I have previously argued, the lack of knowledge and consensus regarding the impacts and minimum standards for such policies on the ground stems in part from a lack of agreement about what constitutes an ‘effective’ anti-smuggling policy and of the relative importance of different outcomes (security or humanitarian based) in this regard. What is more effective: a fall in the numbers of arrivals, or a fall in the number of migrant deaths at sea? Ambiguity over such questions leads to an ‘ineffectiveness conundrum’: a rhetorical stalemate and opaque EU policy framework in terms of formation, monitoring and evaluation⁷².

Increasingly civic actors contend that the failure to evidence the claimed efficacy of deterrent based interventions reveals the anti-smuggling agenda as principally politically and rhetorically motivated.

69. BBC, *The Morality of Empathy*, The Moral Maze, 18 February 2017. Available at: <http://www.bbc.co.uk/programmes/b08dnwrw>; Interview with a representative of a civil society organisation providing legal assistance in Calais, France, 4 July 2017.

70. UK House of Lords European Union Committee (2016) *Children in crisis: unaccompanied migrant children in the EU*, 26 July 2016. Available at: <https://publications.parliament.uk/pa/ld201617/ldselect/lducom/34/34.pdf>.

71. UK House of Lords (2017) European Union Committee, *Operation Sophia: a failed mission*, 2nd Report of Session 2017-19 HL Paper 5, London, 12 July, p. 14.

72. See S. Carrera and J. Allsopp, *The Irregular Immigration Policy Conundrum: The Ineffectiveness of Expulsion and Criminalisation Policies*, in F. Trauner and A. Ripoll Servent, (Eds.) *The Routledge Handbook of Justice and Home Affairs Research*, London, Routledge, 2018, p. 79.

4.1.3. *Immanent Critique and Civil Disobedience*

A third argument used by civil society organisations in rebutting accusations of smuggling is immanent critique. This is an important function of liberal democracy – holding a government or institution accountable to its own professed principles. Immanent critique starts with narrative at one end and ends with civil disobedience at the other end of the continuum. Civil disobedience can be defined as an illegal action committed by a citizen or a group of citizens in order to change a law and remedy a common injustice which they feel to be contrary to what the liberal legal theorist Steven Macedo has called a society’s fundamental «principles of justice»⁷³. It also raises the issue of democratic legitimacy or «the ideal of public justification»⁷⁴.

Immanent critique arguments are not new as justification for circumventing or disobeying real or perceived anti-smuggling laws and their impacts. Prior to the 2015-2017 European refugee crisis, following the introduction of the UN Smuggling Protocol and the EU Facilitators Package in 2002, debates had already arisen in several Member States over the impact of anti-smuggling and migration control policies on the provision of social services to migrants in countries, including in France, Spain, Greece. In these debates, proponents of a more communitarian migration control logic on the one hand, and those advocating more universal hospitality on the other, often drew on national tropes to frame their non-compliance or resistance as a form of civil disobedience. During the public debate about the so-called ‘crime of solidarity’ in France in 2011 for example, both sides claimed their actions sought to defend the Republican principle of *Fraternité*⁷⁵. Meanwhile, in Greece, while the government named an operation to control irregular migration beginning in 2012 after the Ancient Greek god of hospitality, ‘Xenios Zeus’ opponents of the measures and critics of the Greek state’s immigration detention apparatus used the same trope to argue against such deterrence⁷⁶.

In the context of the recent ‘European’ refugee crisis, we are starting to see the emergence of immanent critiques of policy at the EU level. Several civil society groups have appropriated the frame of European values to justify their actions in solidarity with migrants and refugees, appealing - as with the aforementioned WeMove.eu petition – to a common sense a European citizenship. Many civil society Remain groups in the UK also

73. S. Macedo, *Liberal virtues: Citizenship, virtue, and community in liberal constitutionalism*, Oxford, Clarendon Press, 1991, p. 79.

74. *Ibid.*, p. 85.

75. J. Allsopp, *Contesting fraternite: Vulnerable migrants and the politics of protection in contemporary France*, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012.

76. E. Cossé, *Xenios Zeus: hard times in Greece, openDemocracy*, 9 July 2013. Available at: <https://www.opendemocracy.net/eva-cosse/xenios-zeus-hard-times-in-greece>.

made the case for staying in the EU on the basis of common enlightenment values of human rights, for example. Indeed, it was a common sight at UK Remain rallies to see ‘Refugees Welcome’ placards alongside EU flags as part of a progressive narrative about staying in Europe. Other civil society actors have argued that the EU community’s «basic principles» include assisting vulnerable migrants on the basis of its common history of receiving refugees (and a common shame regarding the episodes in European history where States have not ‘done their bit’). UK efforts to resettle children from Calais to the UK were framed, for example, as a modern-day following of the Kindertransport which sought to honour Europe’s past tradition and learn from mistakes. Lord Alf Dubs, a former Kindertransport refugee himself and former British Member of Parliament lent his own name to the Bill seeking to facilitate the safe passage to more unaccompanied minors from Europe to Britain. As Heidi Allen, the Conservative MP that tabled the amendment stressed in Parliament, the amendment was not just about helping child refugees, but also about the principle of «European solidarity»⁷⁷.

Significantly, thousands and thousands of EU citizens voted with their feet, travelling freely across EU Member States to volunteer at the height of the crisis. Some European citizen activists and volunteers have stated that being European citizen helped them in their work, meaning that they could mobilize their own «citizen privilege» to assist less fortunate migrants⁷⁸. Other civil society volunteers (such as one of a group of Spanish fireman currently on trial for migrant smuggling in the Mediterranean Sea for their work with the Search and Rescue charity PROEM-AID⁷⁹, and some European activists in Ventimiglia who were issued cautions banning them from the border territory) claim that they were targeted regardless of, or specifically because of their European citizenship by way of ‘being made an example’ to dissuade others⁸⁰.

This rooting of universal values and obligations towards outsiders within the European tradition expands the breadth of the movement to a broader spectrum of citizens. The frame adopted exemplifies a combination of ideology and strategy theorized

77. J. Allsopp, *A Very British Tug of War Over Europe’s Child Refugees*, openDemocracy, article published 9 March 2017. Available at: <https://www.opendemocracy.net/5050/jennifer-allsopp/very-british-tug-of-war-over-europe-s-child-refugees>.

78. Interview with civil society activist providing social assistance in Ventimiglia, Italy, via Skype, 20 February 2017.

79. Discussion with Spanish firefighter currently on trial for migrant smuggling, 21 November 2016, European Parliament. For more information on the event see: <http://www.socialplatform.org/blog/round-table-meeting-in-the-european-parliament-on-the-eu-facilitation-directive/>.

80. Interview with civil society activist providing social assistance in Ventimiglia, Italy, via Skype, 20 February 2017. See also ‘G’, G., *Chronology of Incidents against migrants and activists in Ventimiglia 2015-2016*, published in *Q Code Magazine*, 2016. Available at: <http://www.qcodemag.it/2016/12/09/ventimiglia-migranti-repressione/>.

by Westby whereby framing «strategically appropriates hegemonic ideology»⁸¹. This strategy, common in democratic polities and among social movements involving civil disobedience, «displays the ideology and its lived contradictions in collective actions that affirm rather than deny the basic legitimacy of the system». Matringe has commented that the same logic was used by French protesters who used the frame of *Fraternité* to defend their right to assist irregular migrants. In doing so, they sought «the modification of the rule or institution, not the throwing into doubt of the entire system»⁸².

In some areas of civil society – and in particular among the newer more informal civil society groups –, European citizens have thus replicated and sought to transform the solidarity dynamics at the EU institutional level through activism and volunteering: just as EU institutions have positioned themselves in regional solidarity, such as posting Frontex officers pooled from EU Member States at certain EU external borders, EU civil society actors and activists are also present at these borders serving a protective, safeguarding and monitoring function.

4.1.4. *Universalism*

Meanwhile, as NGOs and activists across Europe have faced increasing policing and criminalisation of their work, some frame their solidarity as a religious, humanitarian or political universal moral obligation which is diametrically opposed to traditional ideas of citizenship, including the idea of European citizenship and its associated bias or privilege. There is evidence that this universalist framing nevertheless has its own consequences.

Some international NGOs like Médecins Sans Frontières invoke universalist values with reference to international humanitarian law while also appealing to rights guaranteed by the European project and national laws. In contrast, as explained by a No Borders activist in Calais in 2011, some CSOs (especially more informal activist groups) frame their work as in strict opposition to the international nation-state order altogether:

«My identity as an anarchist promoting no borders comes before any critique of the government qua citizen. Yes, nation states are significant, they impact hugely on people's lives, they are responsible for deaths, tens of thousands of deaths worldwide, but it is for me, in another sense they are wholly

81. D.L. Westby, *Strategic imperative, ideology, and frame*, in *Mobilization: An International Quarterly*, 2002, 7(3), pp. 287-304.

82. J. Matringe, *Le délit de solidarité et la résistance à l'oppression*, Paper delivered at the Observatoire Juridique de la vie politique on September, 24th, 2009.

insignificant [...] in the way I engage with people, borders are not there at all»⁸³.

One of the observations reported across the research is that the more political mobilization is associated with the humanitarian assistance provided to migrants, the more authorities police and seek to discipline a group's operations⁸⁴. Some CSOs interviewed in our research were, for example, keen to disassociate themselves with activist groups, and in particular with internationalist No Borders groups operational in border areas, for fear of reputational harm, even where they shared common purposes or aims in areas of humanitarian assistance⁸⁵. One interviewee who works for a well-established UK NGO which has direct dialogue channels with the government also belongs to an informal activist group. They were very cautious in the interview to separate the two roles out of concern that their association with the activist group could negatively impact on the formal NGO's ongoing dialogue with government. She went so far as to ask that the interviews be conducted as two separate interviews⁸⁶. A civil society volunteer in Rome, Italy, similarly explained how their organisation sought to position itself strategically as 'politically engaged but not too much', so as to avoid excessive scrutiny:

«We organized marches to support migrants' human rights but we know such actions come with a cost. Overall we tried to find a balance so that we could stand up against the injustice but also carry on with our work»⁸⁷.

Across Hungary, the UK, Italy and Greece, CSOs reported cases where their work had been made more difficult after they had spoken out against certain government practices in a way that was perceived to be overly political and in conflict with their service delivery role. Penalties included having statutory funding sources stopped or not renewed, or having their access barred to certain spaces such as detention centres (in the UK)⁸⁸ and transit zones for migrants (in Hungary)⁸⁹. An element of self-censoring thus

83. Interview with civil society activist providing social assistance in Calais, France, 31 March 2011.

84. See S. Carrera, J. Allsopp and L. Vosyliūtė, (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

85. Interview with CSO providing social assistance in Calais, 11 July 2017.

86. Interview with CSO providing legal assistance, 7 July 2017; Interview with non-formal group (activist), 7 July 2017.

87. Interview with CSO providing social assistance, 31 January, 2017, Rome, Italy.

88. Interview with CSO providing social and legal assistance, London, UK, 7 July 2017.

appears required in certain contexts for CSOs to maintain good working relations with national authorities and continue their service delivery. In some contexts, additional policing is explicitly targeted at CSOs with an international ethos. In Hungary, a controversial new law of June 2017 ('Law on the Transparency of Organisations Receiving Support from Abroad') which has been challenged by the UN⁹⁰ and European Parliament⁹¹, requires 'foreign funded' NGOs to declare sources of international funding and state this in all public outputs. This is experienced by some NGOs as intentional stigmatization or as a «smear campaign against NGO's and organisations working with migrants»⁹². As one interviewee commented, «foreign-funded NGOs are seen as working *against* the national interest»⁹³. Again, this debate is indicative of a wider communitarian/universalist tension which finds expression in the norms and practice of providing assistance (or not) to irregular migrants and asylum seekers in need.

4.1.5. *Combination of Reasons*

In reality, most civil society groups have sought to defend their actions from anti-smuggling accusations through appealing to a range of the aforementioned arguments. After being prosecuted for facilitating irregular entry of migrants, for example, French farmer Cedric Herrou explained that he «has no regrets» for performing his a «citizen's duty» and would not stop helping migrants (indeed, a new investigation was recently opened after he was arrested again for smuggling activities). Herrou explained that he acted to help migrants cross into France from Italy in the aftermath of migrants being run over trying to cross unsafely. «I picked up kids who tried to cross the border 12 times», he explained. «There were four deaths on the highway. My inaction and my silence would make me an accomplice. I do not want to be an accomplice.». Herrou defended his actions as a response to the inefficiency of EU policies and operations in terms of their failure to save lives (see 4.1.2), as a humanitarian obligation (see 4.1.4) and an act of civil disobedience stemming from his duty as French (and European) citizen (see 4.1.3). The word 'accomplice' is especially rhetorically charged, evoking the collective European

89. Interview with CSO providing social and medical assistance, Budapest, Hungary, 30 August 2017.

90. The Independent, *UN condemns Hungary's new law targeting foreign-funded NGOs for "chilling effect" on freedoms and scrutiny*, article by Lizzie Dearden, 16 May 2017.

91. European Commission, *Hungary: Commission launches infringement procedure for law on foreign-funded NGOs*, Press release, Brussels, 13th July 2017.

92. Interview with CSO providing legal assistance, 16 August 2017, via Skype.

93. Interview with non-formal group (activist) providing social assistance, 31 August 2017.

historic memory of the Vichy collaboration with Nazi occupation during the Second World War⁹⁴.

5. Discussion and Conclusion - Liberal Democracy, Refugees and the Crisis of Inclusion and Exclusion

This article has argued that the phenomenon of increased policing and criminalisation of NGOs that has accompanied the EU response to the refugee crisis can be understood as part of a fundamental tension of liberal democracy and nation states writ large at the EU level. This tension is encapsulated by the questions: (i) *who* has the power to include and to exclude; (ii) under *what* conditions; and (iii) *how* is his power policed.

It is recognized in international humanitarian law that we all have a duty to act to save fellow human beings in need, and that human rights are universal. Other protections are included for example in the 1999 UN Declaration on Human Rights Defenders. Yet the boundaries of where this duty begins and ends are often contested. Meanwhile, as Feldman and Ticktin have argued, and as this article has shown, «human rights and humanitarian perspectives on how best to protect human life can mandate conflicting courses of action.»⁹⁵. We have seen that in the fight against migrant smuggling in the EU, the rhetoric of ‘humanitarian reason’⁹⁶ has been used by states and EU agencies to justify stringent anti-smuggling laws and the increased policing of NGOs in the Mediterranean and across the EU to avoid the risk of ‘collaboration’ or ‘pull factors’. Anti-smuggling operations are justified as necessary to protect EU Member States from terrorism and organised crime, but also as a form of ‘saving migrants from themselves’ by deterring them from taking unsafe journeys and risking their lives. The ongoing deaths of migrants seeking safe passage both to and within the Union in real time is a price that many statutory actors appear willing to pay to deter future migrants. Meanwhile, NGOs assert the humanitarian nature of their acts as justification for critiquing and in some cases, for disobeying increased policing and new anti-smuggling regulations and laws. To repeat the words of the NGO worker in Calais: «no child should die to deter others from coming».

The unprecedented new concentration of powers to deter migrants and control the actions of civil society actors at the level of the EU (discussed in Section 2), coupled with

94. See J. Allsopp, *Contesting Fraternité: Vulnerable migrants and the politics of protection in contemporary France*, 2012. Refugee Studies Centre, Oxford Department of International Development, University of Oxford for a discussion of how this frame has been employed in the ‘crime of solidarity’ debate in France.

95. I. Feldman, and M. Ticktin, (eds.) *In the Name of Humanity: The Government of Threat and Care*, Duke University Press, Durham and London, 2010, pp. 12.

96. D. Fassin, *Humanitarian reason: a moral history of the present*, Berkeley and Los Angeles, University of California Press, 2010.

a lack of clear protection for citizens to provide humanitarian assistance to irregular migrants and asylum seekers at the same level (explored in Section 3), has made the Union for one of the first times an arena of democratic deliberation (see Section 4). Parts of civil society have awoken across borders to contest policies and laws that they believe to be contrary to the ‘core principles’ of both the EU and its Member States, as well as contrary to broader humanitarian or political principles. Sergio Carrera and I have argued elsewhere that «the increasing involvement of the EU and its actors in irregular immigration is likely to displace mistrust on the effectiveness of irregular immigration policies from domestic actors towards the EU»⁹⁷. As with mistrust on the effectiveness of policies to control irregular migration, mistrust for policies’ *fairness* or democratic legitimacy has also emerged from across the political spectrum over the course of the refugee crisis. It is important to stress this has led to civil society mobilization to open and close borders and both to welcome and deter migrants. It is beyond the scope of this article to explore civil society actors’ mobilizations to close borders and exclude migrants and refugees, but it must be noted that anti-migrant and xenophobic movements are also on the rise in the EU⁹⁸. Still, efforts to include migrants and asylum seekers have largely been the domain of parts of European civil society; while, with some exceptions⁹⁹, the policies and activities of the EU, its Home Affairs agencies and Member States, have largely followed the populist logic of exclusion.

In a context where the EU is increasingly joining individual nation-states’ efforts to determine the boundaries of inclusion and exclusion and where civil society – the natural counterpart in such discussions – is increasingly the subject of such boundaries and their enforcement, the development of a pan-European civil society is more important than ever for holding EU and Member State institutions to account to a liberal, democratic and humanitarian agenda. The debate poses new questions in an increasingly interconnected world to what a European civil society looks like. Some initial observations are clear.

97. S. Carrera and J. Allsopp, *The Irregular Immigration Policy Conundrum: The Ineffectiveness of Expulsion and Criminalisation Policies*, in F. Trauner and A. Ripoll Servent, (Eds.) *The Routledge Handbook of Justice and Home Affairs Research*, London, Routledge, 2018, p. 79.

98. A group of activists crowdfunded more than £67,000 in 2017, for example, to hire the boat as part of a mission to ‘Defend Europe’. See The Independent, *Mayor aims to stop ‘vigilante’ anti-immigrant activists from docking in Sicily*, article by Rachel Roberts, 22 July 2017. Available at: <http://www.independent.co.uk/news/world/sicily-catania-enzo-bianco-defend-europe-libya-migrants-refugee-crisis-mediterranean-a7854301.html>.

99. For example, Germany’s 2015 commitment to assisting Syrian refugees. See e.g. The Independent, *Germany opens its gates: Berlin says all Syrian asylum-seekers are welcome to remain, as Britain is urged to make a ‘similar statement*, article by Allan Hall and John Lichfield, 24 August 2015. Available at: <http://www.independent.co.uk/news/world/europe/germany-opens-its-gates-berlin-says-all-syrian-asylum-seekers-are-welcome-to-remain-as-britain-is-10470062.html>.

Firstly, the state of ‘emergency’ introduced in parts of the EU in response to the ‘refugee crisis’ has brought in a raft of illiberal measures and allowed for unprecedented restrictions on civil society in a number of Member States including the UK, Italy and Hungary. Where civil society actors were often the first to respond to the refugee crisis they are now being forced out, often through measures of policing including intimidation, disciplining and criminalisation¹⁰⁰. In this context, it is crucial that civil society remains connected to preserve the important monitoring and service space it occupies at the national and Europe-wide level.

Secondly, the nature of civil society groups and the work of NGOs in the EU has changed during the refugee crisis. Our ongoing research suggests that the main concerns of practitioners continues to be how to deliver their assistance tasks and responsibilities without being penalised, and how to avoid social exclusion, maintain social cohesion and cater for the needs of all these populations. Meanwhile, organisations used to providing shelter and food have leant into new areas such as legal assistance in recognition of shortcomings in avenues for justice¹⁰¹. The space for civil society groups supporting migrants and refugees in Europe has also expanded to include more informal and loose networks and activist groups who are increasingly connected across borders¹⁰². Many such groups are working with migrants and refugees for the first time. It is yet to be seen how this new arrangement will develop and how these diverse threads will work together, although current research suggests there are examples of tensions as well as fruitful collaborations. More research is needed to explore how different types of civil society groups position themselves strategically according to different frames – from international humanitarian law, religious values, national ethics, political stances and personal ethics which must all be accommodated for civil society actors to operate. And also, crucially, civil society must create space for the voices of affected migrants themselves.

Thirdly, it is important to note that the stakes of maintaining an independent civil society have impacts far beyond the response to the 2015-2017 refugee crisis. Policies which criminalise migration have been shown to have broader impacts on the population as a whole, including making life more difficult for other minority groups in society and

100. See S. Carrera, J. Allsopp and L. Vosyliūtė, (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

101. Interview with international civil society organisation, London, via Skype, 13 July 2017.

102. We propose the term ‘mobility society’ to capture this demographic of those who move and those who mobilize to support migrants in the EU. See S. Carrera, J. Allsopp and L. Vosyliūtė, (forthcoming), *Policing the Mobility Society: The Effects of Anti-Human Smuggling Policies on Humanitarian Assistance in the EU*, *International Journal of Migration and Border Studies*.

negatively impacting social trust in society¹⁰³. It is hypothesized that policies that criminalise contact with irregular migrants may lead to widespread feelings of subjective insecurity as well as stigma, ill trust and prejudice towards migrants¹⁰⁴. Speaking of the recent deployment of 3,000 new ‘border hunters’ and enhanced policing and reports of violence at the external Schengen border between Hungary and Serbia, one civil society interviewee commented,

«I wonder what is going to happen in a few years time, when those officers who have taken part in these acts of violence will go back to their original postings and community [...], if it will normalize that violence? ... [I]t’s a very serious issue, not to do with migrants and asylum seekers. These police officers will be the ones who stop me on the road or anyone else so that’s very problematic»¹⁰⁵.

Fourthly, and finally, in this emerging arena of pan-European civil society activism, caution must be taken to recognize the specificity of each national context. One Hungarian civil society volunteer highlighted the problems that arose in this regard when activists came to show solidarity with migrants in Szeged at the external Schengen border in 2015:

«There’s EU and German money involved so I get they felt they had a stake in it and it was cool that they came to show solidarity and were helpful, but some had a political mission [...] the other ones would come to Eastern Europe and the Balkans with a very certain type of rhetoric going on nationality. They had their own idea of what political organisation means, not understanding what it looks like here. No Borders struggles in the West have a strong anti-capitalist focus, but you don’t say that here because of the past traumas of communism. So this new European solidarity is great, we were calling people ahead in different countries and coordinating between service

103. J. Allsopp, *The European Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: Measuring the Impact on the Whole Community*, in E. Guild, S. Carrera, (Eds.) *Irregular Migration, Trafficking and Smuggling of Human Beings: Policy Dilemmas in the EU*. CEPS Paperback, 2016, pp. 47-57.

104. See e.g. F. Webber, *Border wars and asylum crimes*, London: Institute of Race Relations, 2008; and Fundamental Rights Agency, *Criminalisation of migrants in an irregular situation and of persons engaging with them*, 2014. See also 2010 report on the Criminalisation of Migration in Europe: Human Rights Implications by the Council of Europe Commissioner for Human Rights on the risk of hate crime and xenophobia.

105. Interview with representative of a civil society organisation providing legal services, Budapest, via Skype, 16 August 2017.

providers and activist groups. [...] [B]ut there's also a problem in this idea of facilitating only the transit on migrants from East to West, not challenging ideas of East and West *within* the Union»¹⁰⁶.

106. Interview with representative of a civil society organisation providing social services, Budapest, 30 August 2017.