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MIGRANT SEARCH AND RESCUE OPERATIONS IN THE MEDITERRANEAN BY HUMANITARIAN ORGANIZATIONS: MIGRANT SMUGGLING OR HUMANITARIAN ASSISTANCE?

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ABSTRACT: In contrast with the world's other migratory routes, the Mediterranean is the one where more migrants die or disappear in their attempt to reach Europe's coasts. Although different international instruments refer to the obligation of States and the captains of vessels to provide assistance to anyone who is in distress at sea, the truth is that there has been a progressive reduction in search and rescue operations by the European Union and its Member States. Faced with this inaction, various NGOs dedicated to humanitarian aid have deployed vessels in the Mediterranean in order to search for and rescue migrants in distress at sea. NGOs have come to play an important role in assisting migrants, although they have encountered substantial hostility on the part of certain States, which regard these NGOs as acting as accomplices in illegal migrant smuggling. Through an analysis of different measures by certain States to deter NGOs engaged in rescue operations in the Mediterranean and the current regulatory framework for combatting illegal immigration, this article aims to assess whether these humanitarian organizations can be considered to have been wrongly criminalized and what the consequences are from the perspective of the observance of human rights.

KEY WORDS: Illegal immigration. Migrant smuggling. Human rights. NGOs. Search and rescue operations at sea. Humanitarian clause.

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OPERACIONES DE BÚSQUEDA Y RESCATE DE MIGRANTES EN EL MEDITERRÁNEO POR ORGANIZACIONES HUMANITARIAS: ¿TRÁFICO ILÍCITO DE MIGRANTES O ASISTENCIA HUMANITARIA?

RESUMEN: La ruta mediterránea es, con diferencia respecto del resto de rutas migratorias del mundo, donde más migrantes mueren o desaparecen en el intento de llegar a las costas europeas. Si bien distintos instrumentos internacionales aluden a la obligación de los Estados y de los capitanes de los buques de prestar auxilio a toda persona que se encuentre en peligro en el mar, lo cierto es que ha habido una reducción progresiva de las operaciones de búsqueda y salvamento operadas por la Unión Europea y sus Estados miembros. Ante esta inacción, distintas ONG dedicadas a la asistencia humanitaria han desplegado buques en el Mediterráneo con el objetivo de buscar y rescatar en el mar a los migrantes que se encuentren en dificultades. Las ONG han adquirido una papel muy relevante en labores de asistencia a migrantes, si bien han tenido que hacer frente a una hostilidad muy importante por parte de determinados Estados al considerarlas cómplices del tráfico ilegal de migrantes. El objetivo de este estudio es, a partir del análisis de las distintas medidas adoptadas por determinados Estados contra ONG dedicadas a operaciones de rescate en el Mediterráneo y teniendo en cuenta el actual marco normativo en materia de lucha contra la inmigración ilegal, valorar si se puede considerar que se criminaliza de forma incorrecta la labor realizada por dichas organizaciones y las consecuencias que ello tiene desde la perspectiva de la observancia de los derechos humanos.

PALABRAS CLAVE: Inmigración ilegal. Tráfico de migrantes. Derechos Humanos. Organizaciones no Gubernamentales (ONG). Operaciones de búsqueda y salvamento en el mar. Cláusula humanitaria.

OPÉRATIONS DE RECHERCHE ET DE SAUVETAGE DE MIGRANTS EN MÉDITERRANÉE PAR LES ORGANISATIONS HUMANITAIRES: TRAFIC ILLÉGAL DE MIGRANTS OU ASSISTANCE HUMANITAIRE?

RÉSUMÉ: La route méditerranéenne est, à la différence du reste des routes migratoires dans le monde, où davantage de migrants meurent ou disparaissent dans la tentative d'atteindre les côtes européennes. Bien que différents instruments internationaux se réfèrent à l'obligation des États et des capitaines de navires de prêter assistance à toute personne en danger en mer, la vérité est qu'il y a eu une réduction progressive des opérations de recherche et de sauvetage géré par l'Union européenne et ses États membres. Face à cette inaction, différentes ONG dédiées à l'aide humanitaire ont déployé des navires en Méditerranée dans le but de rechercher et de secourir des migrants en difficulté en mer. Les ONG ont acquis un rôle très pertinent dans l'assistance aux migrants, même si elles ont dû faire face à une hostilité très importante de la part de certains États lorsqu'elles les considèrent comme complices du trafic illégal de migrants. L'objectif de cette étude est, à partir de l'analyse des différentes mesures adoptées par certains Etats contre les ONG dédiées aux opérations de sauvetage en Méditerranée et compte tenu du cadre réglementaire actuel de la lutte contre l'immigration clandestine, d'évaluer s'il est possible d'envisager que le travail effectué par ces organisations est à tort criminalisé et les conséquences que cela a du point de vue du respect des droits de l'homme.

MOTS CLÉS: Immigration illégale. Trafic de migrants. Droits humains. ONG. Opérations de recherche et de sauvetage en mer. Clause humanitaire.

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I. INTRODUCTION

Since the International Organization for Migration (IOM) set up the Missing Migrants projects in 2013, aimed at compiling information on migrants who die or disappear on migratory routes around the world, the Mediterranean Sea has been identified as being by far the most dangerous route, with the greatest number of dead or missing migrants. Despite the difficulties involved in collecting this data, since most of the migrants who lose their lives are smuggled across by land or sea to avoid detection, according to the IOM, 30,900 migrants worldwide lost their lives between 2014 and 2018, 17,919 of whom perished in the Mediterranean in their attempt to reach Europe's coasts along western, central and eastern routes.[2] While there has been a significant reduction in the number of migrants who have died or disappeared in 2019 and 2020, falling from 2,964 in 2016 to 758 in 2019 and 377 in 2020, the figures are still considerable and they give a clear idea of the magnitude of the tragedy that immigration represents.[3]

Migrant search and rescue operations are covered by different international legal instruments binding upon all EU Member States. Rule 33 of chapter V of the 1974 Convention for the Safety of Life at Sea (SOLAS Convention), article 98 of the 1982 Convention on the Law of the Sea, and article 10 of the 1979 Convention on Maritime Search and Rescue (SAR Convention) all refer to the obligation of States and the captains of vessels to render assistance to any person in distress at sea.[4]

Despite the existence of this obligation, the truth is that there has been a progressive reduction in search and rescue operations in the Mediterranean by the EU and by its Member States.[5] Faced with this inaction, different

[2] World Migration Report 2020, IOM, Pub. 2019/033 / L, p. 35 (available at: https://www.iom.int/).

[3] These data appear in the *Flow Monitoring Europe* Report (https://missingmigrants.iom.int/region/mediterranean) on migratory flows in the Mediterranean, which also provides updated information on the number of migrants who have died throughout the world.

[4] These obligations are complemented by the 2004 Guidelines of the International Maritime Organization regarding action relating to persons rescued at sea (MSC 78/26 / Add.2) and by the same organization's 2009 principles concerning administrative procedures for the disembarkation of persons rescued at sea (FAL.3 / Circ. 194).

[5] On 27 March 2019, EU Member States decided to suspend maritime military operations in the southern central Mediterranean carried out within the framework of EUNAVFOR Med

NGOs dedicated to providing humanitarian aid[6] have deployed vessels in the Mediterranean in order to search for and rescue migrants in distress at sea.[7] Thus NGOs have come to play an important role in assisting migrants, although they have come up against substantial hostility on the part of certain States, which regard these NGOs as acting as accomplices in the illegal trafficking of migrants.

Along with the criminal proceedings filed by the authorities of certain States against rescue ship crewmembers, NGOs have also been subject to restrictions on the use of ports in certain Mediterranean countries and permission to leave ports once docked has been denied on the basis of judicial, administrative

Operation Sophia (approved under Council Decision CFSP 2015/1778 of 18 May 2015 in order to combat human trafficking networks, to prevent irregular migration flows and to avoid deaths at sea). The temporary suspension of maritime operations was determined by Italy's refusal to let the vessels participating in the operation put rescued migrants ashore in Italian ports. On 26 September 2019, the Council extended the mandate of this naval operation through to 31 March 2020, albeit limiting its scope to air activities. The new EUNAVFOR Med Operation Irini, dedicated to controlling the arms embargo on Libya, has been in force since 1 April 2020. Thus, only humanitarian and commercial vessels are currently assisting migrants at sea. It is true that the European Border and Coast Guard Agency (FRONTEX) is currently carrying out various operations (Themis, Poseidon and Indalo) in the Mediterranean to support maritime surveillance and security work by Italy, Greece and Spain, and, according to the European Parliament, this has involved the rescue of 1,582 migrants in the central Mediterranean. However, the aim of this work is not humanitarian but security oriented. On the subject of the nature of the rescue work carried out within the framework of these operations, Sánchez Legido has observed that "(…) se trata de lo que podríamos denominar una contingencia humanitaria de atención obligada, sí, pero en operaciones cuya finalidad no es el salvamento de personas, sino el control de fronteras" (Sánchez Legido, A., *Controles migratorios y derechos humanos*, Tirant lo Blanch, 2020, p. 68). Furthermore, the European Parliament has highlighted that "since the end of the *Mare Nostrum* operation on 31 October 2014, no State has proactively carried out search and rescue operations in the central Mediterranean" (Motion for a European Parliament resolution on search and rescue in the Mediterranean, 2019/2755 (RSP), B9-0154/ 2019 of 21 October 2019).

[6] Such as Sea Watch, Proemaid, Proactiva Open Arms, SOS Mediterranée, Jugend Rettet, Médecins Sans Frontières, Migrant Offshore Aid Station, Mission Lifeline, Refugee Rescue, Save the Children, Sea-Eye, United Rescue Aid, Human Rights at Sea or International Maritime Rescue Federation.

[7] Thus, since 2014, NGO vessels have rescued around 100,000 migrants at sea, highlighting the important humanitarian work that they carry out (Cusumano, E., "Straightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs.", *Mediterranean Politics*, Vol. 24, 2019, pp. 106-114, p. 106).

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or technical impediments.[8] Also, as a result of measures to protect public health due to the COVID-19 pandemic, countries like Italy or Malta have closed their ports as they have not been considered safe. All this has led to a progressive decrease in the NGOs operating in the Mediterranean for fear of the sanctions that may be imposed on them, inferring the criminalization of the humanitarian aid provided by these organizations.[9]

Measures by States against NGOs, accusing them of carrying out criminal activities by fostering illegal immigration and encouraging the business mafias that smuggle migrants from Africa by sea, have had serious humanitarian consequences as their ability to rescue immigrants at sea has been limited. In turn, humanitarian efforts by NGOs have impacted on migration policies by forcing States to decide what to do and what the rescued migrants' final destination should be. The activism of these NGOs and contrasting inaction on the part of States, combined with the harassment that these organizations have experienced, highlight the complexity of relations between States and NGOs, calling into question States' real commitment to human rights.

Based on an analysis of different measures taken by certain States against NGOs involved in rescue operations in the Mediterranean and the current regulatory framework governing the fight to combat illegal immigration, this

[8] In a report issued on 19 June 2020, the EU Agency for Fundamental Rights stated that, during the period from 1 January 2016 to 15 June 2020, 35 legal actions of different types were brought by different countries against NGOs dedicated to search and rescue operations in the Mediterranean (European Union Agency for Fundamental Rights, 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them, Table 2).

[9] Vosyliūte, L. & Conte, C., *Crackdown on NGOs and volunteers helping refugees and other migrants*, Final Synthetic Report, June 2019, Research Social Platform on Migration and Asylum (RESOMA), p. 5. *See*, also, *Fit for purpose? The Facilitation Directive and the Criminalization of Humanitarian Assistance to Irregular Migrants,* 2018 update, Policy Department for Citizens' Rights and Constitutional Affairs, PE 608.838, December 2018; Smith, A., "Uncertainty, alert and distress: the precarious position of NGO search and rescue operations in the Central Mediterranean", *Paix et Securité Internationales*, no. 5, 2017, pp. 29-70. In a letter of 31 January 2019 sent to the Italian Prime Minister, the Commissioner for Human Rights of the Council of Europe denounced "(...) 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 " (CommHR / DM / sf 004-2019, p. 2).

article aims to assess whether the work of humanitarian organizations can be deemed to have been wrongly criminalized and what the consequences are from the perspective of the observance of human rights.

II. PROCEEDINGS AGAINST HUMANITARIAN SEA RESCUE ORGANIZATIONS

The only existing statistics on how many humanitarian rescue organizations operate in the Mediterranean and how many legal proceedings have been filed against them by the authorities of different States are those drawn up by the EU Agency for Fundamental Rights.[10] If we focus on the last two years, it can be seen that, in 2019 and 2020, there has been a significant increase in legal action. This hostility toward humanitarian rescue organizations, the fear of having to face criminal proceedings, and the blocking or seizure of vessels have had repercussions on the number of them engaged in rescue work in the Mediterranean. Thus, there were 14 ships in May 2017, 5 in August 2018, 7 in June 2019 and 4 in June 2020.[11] This drop in the activity of rescue organizations has gone hand in hand with the temporary suspension, in March 2019, of maritime military operations carried out in the southern central Mediterranean within the framework of EUNAVFOR Med Operation Sophia. This means that currently, apart from EUNAVFOR Med Operation Irini, launched on 1 April 2020 to control the arms embargo on Libya,[12] there are very few vessels in the Mediterranean that can assist people in distress at sea, with the ensuing humanitarian consequences.[13] In a joint statement issued on 29 August 2020, the IOM, the UN Refugee Agency and the UN High Commissioner for Refugees pointed out that the gap left by NGOs has been partly filled by assistance from commercial vessels and, as there are no clear

[10] These statistics are available on the website https://fra.europa.eu/en.

[11] European Union Agency for Fundamental Rights, 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them, Table 1 (NGO ships involved in SAR operations).

[12] This military operation replaces EU Military Operation Sophia in the Eastern Central Mediterranean. It was approved by virtue of Council Decision (CFSP) 2020/472 of 31 March 2020 on a European Union military operation in the Mediterranean (*OJ* L 101, 1 April 2020).

[13] In a resolution of 3 October 2019, the Parliamentary Assembly of the Council of Europe recognized the role played by NGOs in migrant rescue operations and it recalled that "(…) it is the duty of States not to let people drown in the Mediterranean" (*Saving lives in the Mediterranean Sea: the need for an urgent response*, Parliamentary Assembly, Resolution 2305 (2019), p. 1).

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rules concerning disembarkation, "shipmasters of commercial vessels may be deterred from attending to distress calls for fear of being stranded at sea for weeks on end."[14]

In 2007 and 2018, the police and courts of Italy, Malta and Greece took different legal measures against 13 humanitarian sea rescue organizations. In Italy, different vessels belonging to the NGOs Open Arms, Save the Children and Jugend Rettet and personnel working for Médecins Sans Frontières and Sea Watch were involved in criminal proceedings brought by the public prosecutors and law courts of Trapani, Ragusa, Catania Palermo and Lampedusa.[15] The Maltese police and prosecutors launched investigations and carried out various seizures of vessels owned and operated by the NGOs Mission Lifeline, Sea-Eye and Sea Watch. Also, the courts and the public prosecutor's office on the Greek island of Lesbos launched human trafficking investigations into different volunteers acting individually or linked to the NGOs Proemaid, Emergency Response Center International and Team Humanity.

Statistics for 2019 reveal that a total of 19 legal proceedings were brought against humanitarian organizations, reflecting a worrying increase in harassment by States. Along with Italy, Malta and Greece, the Fundamental Rights Agency has included similar legal action by the Netherlands, Spain and Germany. During the first six months of 2019, the prosecutors of Agrigento, Catania, Trapani and Palermo opened criminal investigations into crewmembers of vessels belonging to different organizations, such as Mediterranean Saving Humans, Sea Watch, SOS Méditerranée, Médecins Sans Frontières, Open Arms, Jugend Rettet and Save the Children, as well as blocking or seizing different vessels. The Dutch authorities also adopted measures affecting organizations like Sea-Eye or Sea Watch, which operated with vessels under the Dutch flag. Malta filed proceedings against five vessels from three humanitarian organizations, while the Lesbos police and prosecutor conducted proceedings against volunteers providing humanitarian aid to migrants and they confiscated a

[14] "UNHCR and IOM call for urgent disembarkation of rescued migrants and refugees in Central Mediterranean Sea", 29 August 2020: https://www.unhcr.org/news/press/2020/8/5f491cb64/unhcr-iom-call-urgent-disembarkation-rescued-migrants-refugees-central.html?s=03.

[15] The immobilization of the vessel "Iuventa", owned by German NGO Jugend Rettet, in the port of Lampedusa in August 2017 made a great media impact as its captain Pia Klemp was accused of colluding and assisting in illegal immigration, with calls by the prosecutor for a ruling of 20 years' imprisonment.

boat from a retired German couple, with calls by the prosecution for a prison sentence for human trafficking totalling 1655 years. In April 2019, the Spanish Ministry for Transport denied vessels owned by NGOs Proactiva Open Arms and the Humanitarian Maritime Rescue Association permission to leave Spain's ports, considering that they could not carry out sea rescue operations. Likewise, in April 2019, the German authorities blocked a vessel belonging to the organization Mare Liberum for alleged security reasons. On 3 September 2019, the Italian authorities confiscated a vessel owned by the Italian NGO Mediterranean Saving Humans and the organization was fined €300,000 for entering the port of Lampedusa to put ashore 31 rescued migrants, despite the fact that, according to the NGO, they had the necessary permission to do so.[16] In May 2020, vessels "Aita Mari" and "Alan Kurdi " operated by the NGOs Salvamento Marítimo Humanitario and Mediterranean Saving Humans were seized in the port of Palermo due to technical and operational irregularities.

The statistics on proceedings filed in the EU against private bodies involved in Mediterranean rescue operations during the period 2017 and 2020, compiled by the EU Agency for Fundamental Rights, are truly worrying and they show a clear trend by certain States to prosecute humanitarian organizations, even in cases in which their national legislation exempts persons and bodies providing humanitarian aid to migrants entering a Member State's territory from any criminal liability. Most proceedings concerning the blocking or seizure of vessels have ended in their release. However, some criminal proceedings have been brought against the captains and crew of certain NGOs or against individuals who have voluntarily rescued people at sea[17] and some of them are

[16] Agencia EFE: https://www.efe.com/efe/espana/society/incautan-el-barco-mare-jonio-y-multa-de-300-000-euros-por-entrar-en-aguas-italia/10004-4055720.

[17] In certain specific cases, there have been preventive arrests, although these have lasted for a short time. The most recent, well-publicized case was the house arrest for 72 hours in Agrigento in July 2019 of Carola Rackete, captain of the rescue ship Sea Watch 3. She decided to take 40 migrants, rescued in the Mediterranean, to the port of Lampedusa. At the prosecutor's request, she was arrested for disobeying the orders of Italian warships, as well as entering Italian waters without authorization. Ms. Rackete took this decision after spending more than 15 days at sea with the rescued immigrants, without obtaining permission to dock in a port. Given the Italian authorities' refusal to allow them to disembark, the NGO asked the European Court of Human Rights to allow them to put the immigrants ashore as a precautionary measure, since it understood that Italy was violating the right to life and the prohibition of inhuman or degrading treatment provided for in articles 2 and 3 of the Convention. By virtue of an

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still in progress.[18]

III. MIGRANT SMUGGLING OR HUMANITARIAN ASSISTANCE? THE NEED TO ESTABLISH COMMON GUIDELINES

Because the number of rescued migrants has increased in recent years, different countries have taken steps to criminalize or deter humanitarian sea rescue operations by NGOs and other private bodies or individuals on the grounds that they foster and cover up criminal activities, such as migrant smuggling, which is closely related to human trafficking.[19] A report presented on 16 April 2019 to the Council of Human Rights by the United Nations Independent Expert on Human Rights and International Solidarity states that the argument put forward by a State to criminalize humanitarian aid is the fact that migrant deaths will cease "(…) if its navy and its criminal justice system succeed in dissuading humanitarian workers from helping irregular migrants who are in danger at sea, which in turn will deter these people from trying to cross the Mediterranean or other seas."[20]

In 2002, in order to clamp down on migrant smuggling, including both assistance in irregular border crossings and for the purpose of sustaining networks that exploit humans, the EU adopted what is known as the "Facilitators Package". This legal package, aimed at the approximation of Member States' criminal legislation in order to combat such practices, is made

order of 25 June 2019, the ECHR rejected such precautionary measures but asked the Italian authorities "(...) 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" (Rackete and Others v. Italy, application no. 32969/19, press release, p. 1).

[18] European Union Agency for Fundamental Rights, 2020 update - NGO ships involved in search and rescue in the Mediterranean and legal proceedings against them, Table 2. (Legal proceedings by EU Member States against private entities involved in SAR operations in the Mediterranean Sea (15 June 2020).

[19] The EU Action Plan against the smuggling of migrants (2015-2020) refers to both crimes and States: "(…) the difference between the two is that in the former, migrants willingly engage in the irregular migration process by paying for the services of a smuggler in order to cross an international border, while in the latter they are the victims, coerced into severe exploitation which may or may not be linked to the crossing of a border. The two phenomena are not easy to disentangle as persons who start their journeys in a voluntary manner are also vulnerable to networks of labour or sexual exploitation" (COM (2015) 285, 27 May 2015, p. 2).

[20] A/HRC /41/44 of April 16, 2019, p. 10.

up of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence and 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.[21]

The so-called "Facilitation Directive" requires that Member States impose effective, proportionate, dissuasive sanctions on those who instigate, participate in or attempt to assist a person who is not an EU citizen to enter or cross the territory of a Member State in breach of the laws of that State on the entry or transit of non-citizens. While article 1 (a) states that each Member State shall impose appropriate sanctions on "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", article 1.1 of the Framework Decision 2002/946 states that each Member State shall take the necessary measures to ensure that the violations defined in the aforementioned article of the Directive are punishable "by effective, proportionate and dissuasive criminal penalties, which may entail extradition". Given that the application of these articles could lead to the penalization of assistance by humanitarian organizations or by individuals, article 1.2 of Directive 2002/90 includes a "humanitarian exemption clause" which 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."[22]

[21] Both regulations were published in OJ L 328, 5 December 2002. Although this study focuses on EU legislation, it should be noted that, within the framework of the United Nations, different conventions have been adopted aimed at achieving the universal criminalization of migrant smuggling. In this sense, reference should be made to article 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in New York on 15 November 2000, which indicates that the State Parties will adopt legislative and other measures to criminalize the smuggling of migrants (Instrument of ratification by Spain published in *BOE* no. 295, 10 December 2003).

[22] This issue is also referred to in recital 19 of Regulation 2016/1624 of 14 September 2016 on the European Border and Coast Guard (*OJ* L251, 16 of September 2016), which states that "Directive 2002/90 allows Member States not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants."

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Unfortunately, the inclusion of this clause does not exempt NGOs dedicated to sea search and rescue operations or the captains of these vessels from the possibility of having to face accusations of migrant smuggling and human trafficking, with the foreseeable criminal sanctions, since the inclusion of this clause in national criminal legislation is not mandatory, but optional ("Member States may decide not to impose sanctions" says Directive 2002/90).

In fact, only six out of the 27 EU Member States provide for an exception under their domestic legislation that exempts organizations and individuals who assist migrants on humanitarian grounds from punishment.[23] Thus, in a response by the European Commission of 31 July 2017 to a request by the Petitions Committee of the European Parliament, following an earlier request by a Spanish MEP on behalf of an NGO dedicated to humanitarian sea rescue operations, it stated that Belgium, Greece, Spain, Finland, Italy and Malta included some type of exception. The European Commission also highlighted the relevant fact that four of them were Mediterranean countries directly affected by the arrival of migrants to their coasts.[24] However, in their transposition of the directive, most EU Member States have chosen not to insert the humanitarian exemption clause in the provisions that criminalize migrant smuggling. This clearly jeopardizes people and humanitarian organizations that assist migrants insofar as they may have to face sanctions.[25]

[23] The United Nations Independent Expert on Human Rights and International Solidarity has been highly critical of these norms as they "(…) have contributed the most directly and significantly to the maintenance of the legal regimes in most European States that suppress and criminalize humanitarian assistance to irregular migrants" (Report *cit.* note 19, p. 7).

[24] Petition no. 1247/2016 by Paula Schmid Porras on behalf of the NGO Professional Emergency Aid (PROEM-AID) concerning the criminalization of persons engaging with migrants in an irregular situation and the criminalization of humanitarian assistance at sea, 31 July, 2017, PE 609, 434v01-00, p. 2.

[25] On its website (fra.europa.eu/en/ publication/ 2018/ngos-sar-activities), the European Union Agency for Fundamental Rights has an annex (EU Member States' legislation on irregular entry and stay, as well as the facilitation of irregular entry and stay), which analyses the relevant legislation of each Member State and identifies the terms under which six Member States have incorporated the humanitarian clause. In Spain, article 318 *bis* of the Penal Code (inserted in title XV *bis* concerning crimes against the rights of foreign citizens) establishes in its first section that "those who intentionally help a person who is not a national of an EU Member State to enter Spanish territory or to transit through it in a way that violates legislation on the entry or transit of foreigners will be punished with a fine of three to twelve months or with imprisonment of three months to one year. The acts will not be punishable

When an evaluation is made of whether the exemption is included or not in the national provisions that typify and punish the illegal smuggling of migrants, it should be borne in mind, as the EU Agency for Fundamental Rights has pointed out, that the legal concept of 'a state of necessity' in force in countries like Hungary, Portugal, Lithuania or Spain would protect NGOs working in the field of the humanitarian aid from punishment.

Moreover, in the absence of a humanitarian exemption clause, decisions not to impose criminal sanctions on humanitarian organizations have been tied in with principles of a constitutional nature. Thus, in a judgment of 6 July 2018, France's Constitutional Council declared that the provisions of article L 622 of the Code of Entry and Stay regulating foreigners and the right of asylum were contrary to the "principle of fraternity" established in articles 2 and 72.3 of the French Constitution.[26] The applicants (organizations providing aid to migrants) appealed against the provisions of the said article of the Code of Entry and Stay in the consideration that the envisaged exemption from criminal liability only applied when a person was charged for having helped to facilitate an illegal stay and not for facilitating the entry and movement of a foreign national in an irregular situation within French territory. Similarly,

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when the pursued objective was solely to provide humanitarian aid to the person in question (…)." Likewise, section 3 of article 54 (dedicated to very serious violations) of Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their social integration (*BOE* no. 10 of 12 January 2000) establishes that no sanctions will be imposed on carriers if the foreigner "(…) having promptly submitted their application for international protection, has it admitted for processing". The 'state of necessity' provided for in article 20 of the Penal Code, would also exempt NGOs from any responsibility in transporting rescued migrants to Spain.

[26] Decision no. 2018-717 / 718 QPC of 6 July 2018 (M.Cédric H. et autre) available on the website of the French Constitutional Council (https://www.conseil-constitutionnel.fr/). *See*, Saas, Cl., "The debt of solidarity is mort, live the debt of solidarity", *Recueil Dalloz ,* October 2018, no. 34, pp. 1894-1898; Tech, V., "La fraternité en droit des estrangers : un principe qui manquait ?", *Actualité Juridique , Droit Administratif*, September 24 , 2018, no. 31, pp. 1786-1790. In relation to this judgment, CARITAS EUROPEA has pointed out that "(…) although this ruling gives an important positive message about solidarity, it does not prevent the prosecution of cases related to aid at the entrance to the border, as it does not provide for a humanitarian exemption. Furthermore, the 2018 revision of the French law on migration and asylum has not defined what it means to facilitate entry for profit, which leaves a wide margin of interpretation to the French courts" ("The 'criminalization' of solidarity towards migrants", Position document, 20 June 2019, p. 3).

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the exemption from criminal liability did not include assistance in facilitating an irregular stay for purely humanitarian reasons, without receiving any direct or indirect compensation in exchange. In the opinion of the Constitutional Council, "by sanctioning any assistance in facilitating the movement of a foreign national in an irregular situation, even if it is secondary to assistance in facilitating the foreigner's stay and it is given for humanitarian reasons, the legislator did not ensure a fair balance between the principle of fraternity and the constitutional objective of protecting public order" and it therefore declared the words "assistance in facilitating irregular stays" contemplated in the first paragraph of article L 622-4 as being unconstitutional.

MEPs have condemned the criminalization of humanitarian aid and the optional, non-mandatory nature of the humanitarian exemption clause before the European Commission. The Commission was asked what measures it intended to take to promote the application of this clause and to clarify what types of aid should not be penalized by Member States.[27] In his reply of 3 July 2018, although he considered that it was not necessary to modify the wording of the directive,[28] Commissioner Avramopoulos (responsible at that time for Migration, Home Affairs and Citizenship policy) acknowledged "(…) a perceived risk of criminalization of humanitarian assistance as one of the areas in need of improvement."[29]

In a report published in 2014, the EU Agency for Fundamental Rights raised the need to modify the wording of Directive 2002/90 to avoid any

[27] Question O-000065/2018 presented to the Commission on 12 June 2018, with a request for a verbal response, made by MEP Claude Moraes (PE 541.101).

[28] In 2017, the Commission carried out an evaluation of Directive 2002/90, and while it noted that there was a concern about the perceived risk of the criminalization of humanitarian aid, it considered that there was insufficient evidence to justify the need for reforms to the humanitarian clause, among other issues (Commission Staff Working Document, REFIT EVALUATION, SWD (2017) 117 final, of 22 March 2017).

[29] At this same session, in the light of the Commissioner's response, debate was sparked off on this issue and different MEPs (it is worth mentioning E. Urtasun, J.F. López Aguilar and E. Schlein) asked the Commission for the directive to be amended to avoid any penalization of humanitarian aid. *See* also the written question of 16 April 2019 (E-001857/2019) presented by different MEPs to the Commission on the criminalization of humanitarian aid in relation to the blockade of the Proactiva Open Arms ship (PE 638.117) and Commissioner Avramopoulos' response on 10 July on behalf of the Commission, in which he affirms that assistance to people and vessels in difficulty should not be criminalized.

criminalization of humanitarian aid to migrants. Also, while this amendment was still pending, it proposed the drafting of a practical guide "(…) to support EU Member States to implement the directive in a fundamental rights compliant manner."[30] The agency deemed that the guide should explicitly exclude any criminal sanction in the case of humanitarian aid for the entry of migrants (including sea rescues) and any form of humanitarian aid granted to immigrants in irregular situation.[31]

Along these lines, on 5 July 2018, the European Parliament (an institution that has shown a special sensitivity to human rights issues) adopted a resolution where it asked EU Member States to incorporate the humanitarian exemption clause into their domestic legal systems and urged the European Commission "(…) to adopt guidelines for the Member States that specify which forms of aid will not be penalized in order to ensure clarity and uniformity in the application of the current *acquis*."[32]

Finally, and after noting the significant increase in the actions taken against rescue NGOs, on October 1, 2020 the European Commission presented a communication with some guidelines on the application of EU rules aimed at defining and preventing aid to irregular entry, circulation and stay.[33] It should be noted that the Commission takes a position clearly in favor of the humanitarian work carried out by rescue organizations at sea. After pointing out that "the duty of countries to set out the obligation to shipmasters to assist any individual, vessel or aircraft in distress at sea is recognized as a principle of customary international law" which is binding to all countries, the Commission makes it clear that "criminalization of non-governmental organizations or any other non-state actors that carry out search and rescue

[30] EU Agency for Fundamental Rights "Criminalization of migrants in an irregular situation and persons engaging with them", March 2014, p. 16.

[31] *Idem.*

[32] Resolution on guidelines for Member States to prevent the criminalization of humanitarian aid (2018/2769 (RSP)). Back in 2016, in a resolution of 12 April 2016 on the situation in the Mediterranean and the need for a comprehensive approach by the Union on migration (*OJ* C 58 of 15 February 2018), the European Parliament stated that " (...) the captains of private ships or non-governmental organizations (NGOs) that really help people who are in distress at sea should not be exposed to penalties for providing such assistance" (point 6).

[33] Communication from the Commission. Commision guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, (*OJ* C 323 of 1 october 2020).

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operations while complying with the relevant legal framework amounts to a breach of international law, and therefore is not permitted by EU law ".[34]

Being aware of this reality, it might have been appropriate to propose a modification of article 1 of directive 2002/90/EC. However, the Commission just decides to include in this communication some guidance addressed to the States in order to interpret Article 1 of the Facilitation Directive. The Commission considers that article 1 must be interpreted in the sense that: a) humanitarian assistance that is mandated by law cannot be criminalized; b) the criminalization of NGOs or any other non-state actors that carry out search and rescue operations at sea, while complying with the relevant legal framework, amounts to a breach of international law, and therefore is not permitted by EU law; and c) where applicable, assessment of whether an act falls within the concept of "humanitarian assistance" in article 1 (2) of the Directive - a concept that cannot be construed in a manner that would allow an act mandated by law to be criminalized - should be carried out on a case-by-case basis, taking into account all the relevant circumstances.[35]

The Commission's guidance is a very important step, as it clearly states that it is not feasible to criminalize the work of rescue organizations at sea[36]. It is even more necessary if we take into account the significant increase in criminal proceedings (the seizure of vessels and arrest of crewmembers) taken by some Mediterranean countries against organizations dedicated to sea rescue operations. Disappointingly, these legal proceedings have been taken by States such as Greece, Italy, Malta or Spain, whose legislation on migrant smuggling incorporates the humanitarian clause.

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[34] Point 3 of the Communication, p. 5.

[35] Point 4 of the Communication, p. 6.

[36] Along with the aforementioned guidelines set on the matter of immigrant assistance at sea, the Commission has also made a series of recommendations to States to cooperate with each other in relation to operations carried out by privately owned or operated vessels for the purpose of search and rescue operations with a view to reduce fatalities at sea (Commission recommendation 2020/1365 of 23 september 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, *OJ* L 317 of 1 october 2020).

IV. THE CRIMINALIZATION OF HUMANITARIAN ASSISTANCE, COMBATTING MIGRANT SMUGGLING AND HUMAN RIGHTS

As the Commission has clearly pointed out recently, the criminalization of humanitarian aid by States does not comply with the provisions of international treaties aimed at combatting the illegal trafficking of immigrants and it is contrary to the most essential human rights, such as the right to life.

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in New York on 15 November 2000 (and ratified by all EU Member States except Ireland),[37] excludes humanitarian aid from its scope insofar as it cannot be considered that this activity responds directly or indirectly to the procurement of economic benefit.[38] In NGOs' capacity as civil society organizations dedicated to the promotion and protection of human rights, these bodies (particularly those dedicated to sea rescue operations) can be considered to be the defenders of human rights. According to a resolution adopted in March 1999 by the UN General Assembly, States have a prime responsibility and duty to protect, ensure and give effect to the fundamental rights of those who devote their activities to the promotion of human rights.[39]

The differing aforementioned proceedings that have been taken against humanitarian sea rescue organizations do not comply with international treaties or resolutions adopted by the United Nations. These documents clearly imply a commitment to protect NGOs as human rights defenders. As pointed out by the Commissioner for Human Rights of the Council of Europe, it is not reasonable to believe that these NGOs are engaged in the trafficking of illegal migrants.[40] In response to evidence that humanitarian aid to migrants was being criminalized, in 2014, the UN adopted principles and guidelines calling

[37] Available at https://www.treaties.un.org.

[38] Articles 3 (a) and 6 (1) of said protocol. *See,* also, *Travaux Préparatoires of the Negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, United Nations, New York, 2006.

[39] Declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms (A/RES/53/144 of 8 March 1999). On 18 December 2009, another declaration with very similar contents was approved, in which certain actions by States contrary to human rights defenders were denounced and revealed (A/RES/64/163 of 17 March 2010).

[40] Council of Europe Commissioner for Human Rights, "Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean", June 2019, p. 37.

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on States to adopt or amend any domestic legislation that could penalize individuals and organizations who rescue migrants at sea.[41] In 2018, the UN reiterated these principles and guidelines.[42] Furthermore, following Italy's harassment of humanitarian organizations, independent UN rapporteurs and experts in the field of human rights have pointed out that "(…) search and rescue operations aiming at saving lives at sea cannot represent a violation of national legislation on border control or irregular migration, as the right to life should prevail over national and European legislation, bilateral agreements and memoranda of understanding and any other political or administrative decision aimed at 'fighting irregular migration"'.[43] Given the Italian authorities' refusal to establish mechanisms to protect the life and dignity of migrants at sea, the experts referred to the existence of positive and negative obligations on the part of Italy which should clearly constitute a limit on the penalization of rescue organizations' humanitarian activities.[44]

[41] Recommended principles and guidelines on human rights at international borders, United Nations Human Rights, 2014, guide 2.6, p. 15.

[42] Principles and guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations, United Nations Human Rights, 2018, principles 4.7, p. 28.

[43] Joint communication from the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination and xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Special Rapporteur on trafficking in persons, especially women and children, AL ITA 4/2019, May 15 2019, p. 4.

[44] It was pointed out that "(…) the State has a positive obligation to seek and facilitate humanitarian action (through an act of delegation) and a negative obligation not to engage in acts that would jeopardize the enjoyment of the right to life", *idem*. Despite this, Italy has ignored the existence of these obligations. The approval, in September 2018, of Decree Law 113/2018 on security and migration (and its subsequent transformation into Act 132/2018), by virtue of which the Italian Home Office could deny access by vessels carrying migrants to Italian ports for reasons of public order, impose fines of up to € 50,000, seize ships in the event of a breach of the said prohibition, and impose prison sentences of up to 15 years, was not compatible with the humanitarian clause established in its domestic legislation. In relation to this act, which the new Italian Government has now said it will review, *vid.* CARTA, S., "Beyond closed ports: the new Italian Decree-Law on Immigration and Security", October 2018 (available at: http://eumigrationlawblog.eu). However, on October 5, the Italian government approved a new Decree that partially revoked this regulation, easing fines against NGOs and extending humanitarian protection to immigrants. On October 3, Matteo Salvini,

The administrative and criminal proceedings that have been taken against crewmembers of ships and the vessels' seizure have raised the issue of the compatibility of these actions with International Law (especially in the case of Italy), particularly with provisions on the Law of the Sea and human rights. This has led NGOs to appeal before domestic courts against decisions taken by the administrative authorities and by prosecutors. Indeed, the courts have referred to reasons of humanity and the need to guarantee fundamental rights, like the right to life, as justifications for not imposing sanctions on NGOs. It is the duty of judicial authorities to assess in the light of a case's circumstances whether an act falls under an exemption as set out in national law and to strike the right balance between different interests and values at play.

On July 3 2019, based on "the duty to save lives at sea", an Agrigento magistrate released Sea Watch 3 captain Carola Rackete, who was under house arrest for 72 hours after putting ashore 40 migrants rescued at sea.[45] On 29 August 2019, another magistrate from Agrigento ordered the release of the Open Arms ship seized by the Italian authorities after 160 rescued migrants were put ashore. The magistrate pointed out that the "(…) obligation to save lives at sea is a duty of the States and it prevails over the bilateral rules and agreements aimed at combating irregular immigration. The international conventions on the matter, to which Italy has adhered, do in fact constitute a limit to the State's legislative power in accordance with art. 10, 11 and 117 of the Constitution, and so an exception cannot be made to such a limit at the discretion of the political authorities, ranking themselves higher hierarchically than the prime source."[46]

Some courts, however, have not shared this view and they have imposed restrictions on the movement of humanitarian activists and seized vessels. The compatibility of these decisions with the human rights standards of

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former Italian Minister of the Interior and responsible for the approval and implementation of Decree Law 113/2018, appeared before a court in Catania (Sicily) accused of kidnapping people and of negligence when denying the disembarkation of 131 migrants rescued at sea by an NGO in August 2019, facing a sentence of 15 years in prison.

[45] Verdú, D. "The captain of Sea Watch 3 is released after appearing before the judge", https://elpais.com/internacional/2019/07/02/actualidad/1562094157_265245.html

[46] This excerpt from the case appears in the press release "The Italian prosecution orders the release of the Open Arms ship" of 30 August 2019 by the NGO Open Arms (https://www.openarms.es/es).

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the European Convention on Human Rights has been questioned recently before the European Court of Human Rights. On 24 April 2019, after filing pertinent appeals before the Greek courts, the organization Global Legal Action Network (GLAN) filed the first suit before the ECHR against Greece on behalf of Salam Kamal-Aldeen. GLAN considers that the confiscation of a vessel owned by NGO Team Humanity and its founder's imprisonment under Greek law due to the organization's humanitarian activities on the island of Lesbos since 2015 were contrary to certain rights recognized by the Convention.[47] It is thus the first appeal brought before the ECHR that seeks to determine the compatibility of the Convention with measures adopted by States that criminalize humanitarian aid.[48]

V. FINAL REMARKS

Inaction on the part of Mediterranean States has led humanitarian organizations to play a fundamental role in assistance and rescue operations

[47] Global Legal Action Network: "Case filed against Greece in Strasbourg Court over crackdown on humanitarian organisations", https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations.

[48] A different matter is referred to in a lawsuit filed on 3 May 2018 against Italy before the ECHR, also by Global Legal Action Network (GLAN), in the consideration that Italy had breached certain positive obligations derived from the Convention (Requête no. 21660 / 18, *SS et autres contre l'Italie, Communiquée le 26 juin 2019* - available at: www.echr.coe.int). Following an agreement between Italy and Libya on migration issues, reached in February 2017, Italy assumed the coordination of rescue operations by the Libyan authorities in a certain area of the Mediterranean. On 6 November 2017, partly under the instructions of the rescue coordination centre in Rome, the Libyan Coast Guard intervened in a sea rescue operation of 130 migrants by humanitarian aid vessel Sea Watch 3, leading to the drowning of 20 migrants. 47 migrants were rescued and brought ashore by the Libyan authorities, where they were interned in a detention centre and mistreated. The suit filed by GLAN (which Amnesty International and Human Rights Watch joined on 11 November 2019) is based on the violation of article 2 (the right to life), art. 3 (the prohibition of torture) and art. 4 of additional protocol no. 4 to the ECHR (the prohibition of collective expulsions of foreigners). It raises a particularly relevant issue related to the exercise of jurisdiction (art. 1 of the ECHR) and its limits in rescue operations at sea involving States that are party to the Convention. With regard to this issue, *see* PAPASTAVRIDIS, E., "The European Convention of Human Rights and Migration at Sea: reviewing the "Jurisdictional threshold" of the Convention under the Law of the Sea paradigm", *German Law Journal*, Vol. 21, 2020, pp. 417-435.

at sea. Incomprehensibly, these States have chosen to criminalize solidarity, perhaps due to their inability to manage migrant arrivals to their coasts.

Although the administrative and criminal proceedings that have been brought against the crews and vessels of humanitarian sea rescue organizations have had very little success, since no ship has been permanently immobilized and no one is currently in prison, it is worth wondering whether there is any sense to all this. Likewise, is the fact that only six of the 27 EU Member States have incorporated the humanitarian exemption clause in their domestic legislation on illegal immigration consistent with the fundamental values that inspire EU legislation? It all seems contrary to the values enshrined in article 2 TEU.

In the absence of the humanitarian clause's inclusion and bearing in mind that the UN Protocol against the illegal trafficking of migrants by land, sea and air–which all EU Member States have ratified (with the exception of Ireland)– excludes humanitarian aid from its scope, it makes no sense for States to criminalize humanitarian aid by NGOs. Even if the Commission has recently published some guidelines (which are not binding to Member States) on the application of EU rules aimed at defining and preventing aid to irregular entry, circulation and stay, it should show more determination in amending Directive 2002/90 so as to make the clause compulsory for Member States. That would provide legal certainty to organisations dealing with migrants at sea.

Unfortunately, the humanitarian clause's inclusion will not guarantee no acts of Member State harassment of humanitarian organizations. The EU and its Member States' inability to manage migrant sea rescues in a joint way should not lead to the criminalization of solidarity with the sole objective of discouraging humanitarian aid by rescue organizations. Maybe the ECHR's reply on the compatibility of repressive measures against some NGOs with the European Convention on Human Rights and the fact that some European Mediterranean countries have recently relaxed their immigration policies a little herald a change of course. Whatever the case, it is inadmissible for States to criminalize the activities of NGO rescue organizations and to view them as accomplices in the illegal smuggling of migrants when they simply provide humanitarian aid.

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