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HUMANITARIAN SMUGGLING: SETTING BORDERS BETWEEN ACTS OF CRIMINALITY AND ACTS OF SOLIDARITY WITH PEOPLE ON THE MOVE

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1. Introduction

Since the 1990s, the smuggling of migrants has increasingly been associated with great harm to the States concerned, as well as with serious threats to the lives and security of the migrants themselves. Its increasing importance to the international community led the UN General Assembly to establish an open-ended intergovernmental Ad Hoc Committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and discussing the elaboration of, *inter alia*, an international instrument that specifically addresses the illegal transporting of migrants. Negotiations led to the adoption on 15 November 2000 of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air (the “Smuggling Protocol”),¹ supplementing the UN Convention against

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¹ *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, signed in New York, 15 November 2000, entered into force in 28 January 2004, United Nations, Treaty Series, vol. 2241, p. 507. The certified true copy of the Smuggling Protocol is available at: https://treaties.un.org/doc/Treaties/2000/11/20001115%2011-21%20AM/Ch_XVIII_12_bp.pdf. On the Smuggling Protocol, see A. T. GALLAGHER, F. DAVID, *The International Law of Migrant Smuggling*, Cambridge, 2014. In addition to the Smuggling Protocol, the Organised Crime Convention is further supplemented by two additional Protocols, which target other specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

Transnational Organized Crime (the “Organized Crime Convention”). In its preamble, the Protocol sheds light on «[t]he need to provide migrants with humane treatment and full protection of their rights».² Its main purpose «is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants».³

State cooperation in the criminalization of the smuggling of migrants, meanwhile, has been accompanied by the criminalization of humanitarian assistance to migrants and refugees crossing international borders in an irregular manner. As far as humanitarian rescue at sea is concerned, since 2018 the European Agency for Fundamental Rights has addressed reports on the trend of criminalising search and rescue (“SAR”) initiatives carried out by non-governmental organisations (“NGOs”) or other private entities in the Mediterranean Sea.⁴ The suppression and criminalization of those who perform humanitarian rescues at sea is also a matter of concern for the UN Independent Expert on Human Rights and International Solidarity (the “Independent Expert”); in his reports addressed to the UN Human Rights Council and the UN General Assembly, however, he proves that the issue is wider and widespread, since it concerns – more generally – the suppression and criminalization of the rendering of humanitarian assistance to migrants and refugees who enter a State in an irregular manner.⁵ In the same vein, the European Commission has taken note of the increasing number of prosecutions and investigations against individuals – mainly volunteers, human rights defenders, and crews of boats involved in SAR operations at sea, but also ordinary members of the public, family members and journalists – on grounds related to the offence of facilitation.⁶

² *Smuggling Protocol*, Preamble.

³ *Smuggling Protocol*, Art. 2. In many parts of the instrument reference is made to the importance of cooperation among State Parties to prevent and combat migrant smuggling and protect migrants’ rights. In addition to Art. 2, see for instance Preamble, Art. 7 and Art. 15.2.

⁴ Agency For Fundamental Rights, *Fundamental Rights Considerations: NGO Ships Involved in Search and Rescue in the Mediterranean and Criminal Investigations*, 2018, available at: fra.europa.eu/en/theme/asylum-migration-borders/ngos-sar-activities.

⁵ Among the reports of the UN Independent Expert on Human Rights and International Solidarity (the “Independent Expert”) addressed to the UN General Assembly, see Independent Expert, *Report on International Solidarity and Refugees*, UN Doc. A/74/185, 17 July 2019, pp. 9-10, and *Report on International Solidarity and Global Migration*, UN Doc. A/73/206, 20 July 2018, pp. 5-7, while among the reports addressed to the UN Human Rights Council, see Independent Expert, *Report on International Solidarity in the Context of Migration*, UN Doc. A/HRC/41/44, 16 April 2019, pp. 2-9, where special attention is given to the criminalization and suppression of humanitarian initiatives in various countries. In addition, the Independent Expert recalls the need for international solidarity with migrants and refugees at sea in the Statement of 2 February 2021, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TransnationalOrganizedCrime.aspx>. In regards to the United Nations, on the targeting of humanitarian aid to migrants see also *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions*, UN Doc. A/73/314, 6 August 2018, p. 13 ff. In 2020, Amnesty International also issued a report documenting cases of restriction and criminalization of assistance and solidarity directed at people on the move in eight countries, namely: Croatia, France, Greece, Italy, Malta, Spain, Switzerland, and the United Kingdom; see Amnesty International, *Punishing Compassion: Solidarity on Trial in Fortress Europe*, 2020. For doctrine on the issues related to the criminalization of humanitarian smuggling, see V. MITSILEGAS, *The Normative Foundations of the Criminalization of Human Smuggling: Exploring the Fault Lines between European and International Law*, in *New Journal of European Criminal Law*, 2019, pp. 68-85; O. OKAFOR, *On the Legality under International Law of the Criminalization or Suppression of the Expression of Solidarity to Refugees*, in *Proceedings of the ASIL Annual Meeting*, 2020, pp. 104-113.

⁶ European Commission, *Guidance on the Implementation of EU Rules on Definition and Prevention of the Facilitation of Unauthorised Entry, Transit and Residence*, C (2020) 6470 final, Brussels, 23.9.2020. In the same vein, but in the context of the Council of Europe, see the Thematic Study prepared for the Expert Council on NGO Law, C.

In light of this troubling scenario, we believe it is crucial to investigate whether – according to the Smuggling Protocol – this humanitarian assistance directed at people on the move should be criminalised or, on the contrary, be sharply distinguished from the transnational crime of migrant smuggling. With this goal in mind, we will look first at the principal elements that characterise this humanitarian practice, focusing our attention on a few current and significant examples of types of assistance along international borders (*Section 2*). Once we know who the subjects of this practice are, what they do, and, above all, why they operate, we can proceed to an in-depth analysis of the Smuggling Protocol, examining in particular the provisions that include the definition of the offence and the requirements for its criminalisation, together with a number of related official documents which explain how the Protocol's provisions are to be interpreted and implemented by States Parties (*Section 3*). Since the European Union (“EU”) also acceded to the Protocol and has also developed a comprehensive legal framework to address the phenomenon,⁷ we will then examine Directive 2002/90/EC on the facilitation of unauthorised entry, transit and residence (the “Facilitation Directive”), with the specific aim of assessing its compatibility with the Smuggling Protocol and its implications for EU Member States’ legislations (*Section 4*). Against a highly fragmented and ambiguous legal picture, to draw the line between humanitarian and criminal smuggling as sharply as possible, we will further extend the analysis to include recent jurisprudential developments in domestic supreme courts, which tend to prioritize the interests of both providers and beneficiaries of solidarity (*Section 5*). Jurisprudence, however, cannot be the only way forward. We conclude by affirming that significant additional efforts are now needed to reform regional and national provisions on migrant smuggling (*Section 6*).

2. Exploring the Content of Humanitarian Actions along Land and Sea Borders

Throughout history humanitarian smuggling has saved countless lives. Such was the case of Armenians exiting the Ottoman Empire, of European Jews fleeing the Nazi regime, and of Indochinese fleeing communism.⁸ Today, in response to the epidemic of crime and abuse linked to international migrations, demonstrations of solidarity with migrants and refugees continue to have a special prominence. All over the world volunteers assist people on the move, facilitating their entry, transit and/or stay in a given safe State, and providing them with the basic necessities of life, such as water, food, housing, medical and/or legal assistance. Since these humanitarian initiatives may take different forms, we will focus our analysis on these initiatives *vis-à-vis* migrants and refugees crossing borders in an irregular way both at sea and on land, within and outside the European continent.

In regard to sea border crossings, an extraordinary demonstration of humanity towards people on the move is provided by the civil society groups operating in the Mediterranean

FERSTMAN, *Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and other Migrants in Council of Europe Member States*, December 2019.

⁷ Council Directive 2002/90/EC of 28 November 2002 *Defining the Facilitation of Unauthorised Entry, Transit and Residence*, in OJ L 328/17; 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*, in OJ L 328/1. These instruments were adopted together and are commonly referred to as the “Facilitators Package”.

⁸ In this regard, see *Statement by the Special Rapporteur on the human rights of migrants*, 3 June 2016, available at: <http://icj-ch.org/wp-content/uploads/2012/06/Cr%C3%A9peau-ICJ-CH-Migrant>.

region. In the aftermath of the Arab Spring, and more precisely between 2014 and 2017, non-governmental rescues became a regular practice.⁹ An increasing number of NGOs became key actors in SAR initiatives. As the number of rescue ships increased, different vessels could cover different situations.¹⁰ Some of them focused on first response to emergencies, while others conducted fully-fledged SAR operations, patrolling areas which were likely to be the origin of distress calls, and making sure vessels in distress were spotted early on.¹¹ Rescues in the Mediterranean Sea also took place through the cooperation of private merchant ships with those operated by NGOs. In 2020, for instance, in what became known as the *Maersk Etienne* saga, a group of 27 people was rescued by a shipping tanker and then transferred to a humanitarian vessel, which brought the rescued persons ashore in Sicily.¹²

Both the number of rescues in the Mediterranean and the manner in which they take place are unprecedented, but expressions of human solidarity with people migrating by sea are not limited to the practice we have just illustrated. In 2009, for instance, Canadian authorities intercepted a freighter ship named *Ocean Lady* off Vancouver Island with 76 passengers aboard. All of them were Tamil asylum-seekers from Sri Lanka who had boarded the freighter in Southeast Asia.¹³

However, the migratory route, or part of it, may also go over land. In regard to land border crossings in Europe, for instance, it is reported that over the last few years several thousand people have arrived in France across the French-Italian border.¹⁴ As crossing the Alps can be rather dangerous, especially for those who are not trained or equipped to walk in the mountains, ordinary individuals, associations and networks of solidarity have begun to assist migrants and refugees determined to reach France. A noteworthy case for the purposes of this analysis is that of the French farmer Cédric Herrou. Since 2015, when he first encountered a group of exhausted people along a disused railway track near the French-Italian border, Mr Herrou has sheltered irregular migrants and refugees in his farmhouse in

⁹ For an overview of the practice of non-governmental rescues along the central Mediterranean migratory route, see Italian Coast Guard, *Attività nel Mediterraneo Centrale*, 2017, available at: www.guardiacostiera.gov.it/attivita/Documents/attivita-sar-immigrazione-2017/Rapporto_annuale_2017_ITA.pdf.

¹⁰ For an interesting legal analysis of non-governmental rescues, see M. FINK, *Non-Governmental Organisations and Search and Rescue at Sea*, in *Mar. Saf. Sec. Law Jour.*, 2018, available at: http://www.marsafelawjournal.org/wp-content/uploads/2018/06/MarSafeLaw-Journal_Issue-4_Gombeer-and-Fink.pdf; G. CATALDI, *Disobbedienza e diritto nell'ottica dell'interazionista*, in *Dir. um. dir. int.*, 2020, pp. 159-174, p. 170. In general, on the evolving role of NGOs in the context of international law, see E. TRAMONTANA, *Organizzazioni non governative e ordinamento internazionale*, Milano, 2013.

¹¹ A safe place is: «[...] a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Furthermore, it is a place from which transportation arrangements can be made for the survivors' next or final destination». See IMO-Maritime Safety Committee, *Guidelines on the treatment of persons rescued at sea* (MSC Guidelines) art 6.12 Resolution MSC.167(78), 20 May 2004, available at www.unhcr.org/refworld/docid/432acb464.html. For doctrine on the definition of a safe place, see P. TURRINI, *Between a 'Go Back!' and a Hard (to Find) Place (of Safety): On the Rules and Standards of Disembarkation of People Rescued at Sea*, in *It. YB. Int. Law*, 2018, p. 29 ff.

¹² On the issue K. NERI, *The Challenges Faced by Private Ships in Large-Scale Rescue Operations at Sea*, in G. BEVILACQUA (ed.), *Human Security in Navigable Spaces: Common Challenges and New Trends/Sicurezza umana negli spazi navigabili: sfide comuni e nuove tendenze*, Napoli, 2021, p. 95 ff., available at: <https://www.editorialescientifica.com/shop/e-book/sicurezza-umana-negli-spazi-navigabili-sfide-comuni-e-nuove-tendenze-detail.html>.

¹³ On the case of the *Ocean Lady*, see Section 5.2.

¹⁴ See Amnesty International, *Punishing Compassion*, cit., p. 34 ff.

southern France. Indeed, since the re-establishment at this frontier of border controls on anti-terrorism grounds,¹⁵ the valleys of the Maritime Alps have become a central node on the route to France. On this basis, the French farmer, together with other volunteers living in the area, created a humanitarian organization called *Roya Citoyenne* with the aim of helping families, women, (accompanied and unaccompanied) minors, and any other person attempting to cross the French-Italian border, as well as ensuring the people it helps receive housing services and assistance when claiming asylum in France.¹⁶

Whereas similar stories of solidarity have recently become a common practice in other European States too,¹⁷ a significant example of a different form of help we believe it is important to mention, if we are to understand how and why volunteers operate in the context of irregular migration, concerns a humanitarian initiative undertaken in Kenya. Here civil society organizations provided assistance to people filing a constitutional petition to prevent the closure of two refugee camps. Their closure would have caused the forcible return of a number of refugees to their countries of origin, where the conditions that forced them to flee and seek international protection were still present.¹⁸

This preliminary overview of humanitarian initiatives aimed at people crossing land and sea borders could easily continue for several pages more. However, it should already be clear that, when patrolling large bodies of water to catch people at risk of drowning and transferring the survivors to a place of safety on land, or when providing refugees with hospitality and legal assistance to claim international protection in a safe State, civil society representatives carry out activities for an altruistic purpose; indeed, such activities are aimed at giving people access to the enjoyment of their primary human rights and fundamental freedoms,¹⁹ as well as alleviating their condition of vulnerability, given that these people,

¹⁵ In 14 December 2015, following the violent terrorist attacks in Paris on 14 November 2015, French authorities renewed the reinstatement of all internal borders on counter-terrorism grounds.

¹⁶ As recalled in the text, the story of the French farmer, Cedric Herrou, is a famous one, and he has become the target of anti-refugee politics across Europe. For press sources, see among others: BBC NEWS EUROPE, *French Farmer Cedric Herrou Fined for Helping Migrants*, 10 February 2017, available at: <https://www.bbc.com/news/world-europe-38930619>. Furthermore, his humanitarian initiatives drew the attention of international and European institutions. In this respect, see for instance Independent Expert, *Report on International Solidarity and Global Migration*, cit., p. 6. For literature analysing the case of Cedric Herrou, see J. P. ARIS ESCARCENA, *Punishing Solidarity. The Crime of Solidarity at the Land and Sea Borders of the European Union*, in *DPCE online*, 2020, p. 2540 ff.

¹⁷ In this regard, see among others Amnesty International, *Punishing Compassion*, cit.

¹⁸ The Constitutional Court held, *inter alia*, that the contested government decision to close the two refugee camps breached several provisions of the Kenyan Constitution and its international obligations under both the 1951 Convention, its related 1967 Protocol, and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, and restrained the government from implementing the decision at issue. See Kenya, National Commission on Human Rights and Legal Advice Centre, *Kituo Cha Sheria v. Attorney General and 3 Others*, Constitutional Petition No. 226 of 2016, Judgment of 9 February 2017.

¹⁹ Interestingly, in this specific respect, according to the Independent Expert, «[...] to address the challenge posed by migration, [...] States must remain cognizant of the human rights of migrants. These rights are grounded in international human rights treaties, and, in particular, most of the rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights are applicable to all individuals, regardless of their migration status. In addition, there are certain rights guaranteed specifically to migrants [...] ». See Independent Expert, *Report on International Solidarity and Global Migration*, addressed to the UN General Assembly, cit., p. 5. The importance of migrants' rights is recalled also in the *Smuggling Protocol*, cit., Preamble, Artt 2, 4, 14, 16, 18 and 19. On this issue, see A. GALLAGHER, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, in *Hum. Rights Quart.*, 2001, pp. 975-1004.

among other things, are migrating around the planet, and doing so in the absence of safe official channels.²⁰

In other words, it seems that humanitarian practice directed at people on the move fulfils the need, clearly affirmed in the preamble and in several provisions of the Protocol, to guarantee smuggled migrants «humane treatment and full protection of their rights».²¹ In this perspective, humanitarian smuggling could be interpreted as an expression of two complementary human rights that are currently emerging in the context of two distinct soft-law instruments. Specifically, what we see is the coexistence of, on the one hand, the «right [of ordinary people and volunteers] to promote and to strive for the protection and realization of [migrants and refugees'] human rights and fundamental freedoms at the national and international levels», which is stipulated in the UN Declaration on Human Rights Defenders,²² and, on the other, the right to international solidarity, which according to a Draft Declaration presented at both the Human Rights Council and the General Assembly in 2017, is «a human right by which individuals and peoples are entitled, on the basis of equality and non-discrimination, to participate meaningfully in, contribute to and enjoy a social and international order in which all human rights and fundamental freedoms can be fully realized».²³ These two complementary rights implicate, in practice, the right to assist and the right to be assisted, which converge on the fundamental value of solidarity. The latter, in turn, finds confirmation in a number of binding legal instruments at both supranational level, such as the Treaties of the European Union, which often mention solidarity, describing it as essential between European peoples²⁴ and between generations,²⁵ and the Charter of Fundamental Rights of the EU,²⁶ which goes beyond this idea by elevating solidarity to the status of a founding value of the Union, alongside human dignity, freedom, and equality.²⁷ Prior even to that, solidarity is enshrined in constitutional charters at national level.²⁸

Seen from a different perspective, however, it is an undeniable fact that human rights defenders, volunteers and/or family members are facilitating the irregular entry, transit and stay of migrants and refugees in a given foreign State. Accordingly, the next key question to

²⁰ On the concept of vulnerability, in its ordinary meaning and through the lens of international human rights law, see I. NIFOSI-SUTTON, *The Protection of Vulnerable Groups under International Human Rights Law*, London and New York, 2017, p. 4 ff. The specific case studies of vulnerable categories analysed by the author involve irregular migrants from North and Sub-Saharan Africa to Italy.

²¹ *Smuggling Protocol*, Preamble.

²² *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN Doc. A/RES/53/144, 8 March 1999.

²³ *Draft Declaration on the Right to International Solidarity*, presented at both the UN Human Rights Council and the General Assembly, on 25 April and 19 July 2017 respectively. See in particular, Art. 1.

²⁴ Regarding solidarity between the peoples of Europe, see the Preamble and Art. 3(3) of the Treaty on European Union.

²⁵ Regarding solidarity between generations, see Art. 3(3) of the Treaty on European Union.

²⁶ The EU Charter enshrines in EU law a range of personal, civil, political, economic and social rights of EU citizens and residents and, with due regard for the EU's powers and tasks and for the principle of subsidiarity, reaffirms the rights since they derive, in particular, from the constitutional traditions and international obligations common to EU Member States. In the same vein on solidarity, even if it is not expressly recalled, as in the EU Charter, see Art. 1 of the Charter of the United Nations and Art. 28 of the Universal Declaration of Human Rights.

²⁷ Art. 2 of the Treaty on European Union, which is the main normative provision setting out the Union's founding values, does not name solidarity as such a value.

²⁸ See, for instance, Art. 2 of the *Italian Constitution* and the Preamble, Artt. 2, 72, and 73 of the *French Constitution*.

resolve is whether acts of solidarity may fall within the definition of the offence of migrant smuggling and should, therefore, be criminalised under the Smuggling Protocol.

3. *The Smuggling Protocol: The Evolving Drafting Context, the Definition of Illegal Conduct and the Role of Financial or other Material Benefit*

The Smuggling Protocol, adopted in 2000 and brought into force in 2004, is the first international instrument to provide a common definition of migrant smuggling. Prior to this Protocol's inclusion of an agreed legal definition of "smuggling of migrants", the term was often used as an umbrella concept referring to a range of conducts related to the facilitation of unauthorized entry into a State's territory and sometimes also unlawful stay. The first negotiating text submitted by Austria and Italy in early 1999 also makes reference to multiple concepts, including "illegal trafficking" and "transport of migrants, especially by sea".²⁹ Parallel discussions by the drafting committee around the development of a protocol on trafficking in people helped to affirm a distinction between the two concepts.³⁰ This distinction was already reflected in the second draft of the Smuggling Protocol, which omits any reference to "illegal trafficking" in favour of the concept of "smuggling of migrants", and this alone. In its final version, Article 3(a) defines the "smuggling of migrants" as «the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, from the illegal entry of a person into a State Party of which the person is not a national or a permanent resident».³¹

Moving from theoretical on to practical aspects, according to the Smuggling Protocol, States Parties are concretely required to criminalize conduct consisting of the procurement of illegal entry, illegal stay, as well as the production and possession of fraudulent travel or identity documents, when this is committed for the purpose of enabling the smuggling of migrants. Smuggling of migrants, therefore, may take various forms, such as transporting or managing the transportation of anyone who does not have a right to enter or transit through a State of which they are not a national, fabricating or providing fake documents, or arranging marriages of convenience. On this basis, the distinguishing line between humanitarian assistance and migrant smuggling may appear blurred. By way of example, moving back to the aforementioned story of the French farmer who assisted migrants and refugees at the French-Italian border, when he was arrested, during a police raid in Cannes, he was found on a train with two hundred irregular persons, while he was facilitating their entry into France.

However, if we read the legal definition of migrant smuggling carefully, we note that this is a crime of specific or special intent, and thereby the purpose of the procurement of assistance is decisive. Indeed, according to the Smuggling Protocol definition, migrant

²⁹ Any person who intentionally procures, for his or her profit, repeatedly and in an organized manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident commits the offence of "illegal trafficking and transport of migrants" within the meaning of this Protocol. *Draft elements for an International Legal Instrument against Illegal Trafficking and Transport of Migrants (Proposal submitted by Austria and Italy)*, UN Doc. A/AC.254/4/Add.1, 15 December 1998, at Art. A.

³⁰ See, for example, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc. A/AC.254/4/Add.1/Rev.1, 13 May 1999, at note 1.

³¹ *Smuggling Protocol*, cit., Art. 3.

smuggling occurs when the offender is intentionally procuring the illegal entry of a foreigner for the purpose of obtaining a financial or other material benefit. The French farmer was arrested while he was intentionally facilitating the entry of a large group of non-nationals and non-permanent residents to help them to request asylum in France and not in the pursuit of personal profit.

While, on the one hand, the relevance of the “financial or other material benefit”³² for the configuration of the crime is clear, since it is indicated not only as an element of the definition of the offence,³³ but also as a requirement for its criminalization,³⁴ on the other hand, an explicit indication of what this expression should entail is not present in the Smuggling Protocol.

Understanding the meaning and scope of the “financial or other material benefit” thus implies the analysis of additional documents, and *in primis*, of its parent instrument, the Organized Crime Convention, whose provisions should be applied *mutatis mutandis* to the Smuggling Protocol.³⁵ In effect, the expression “financial or other material benefit” can be found in this Convention too, where it provides a definition of an organized criminal group. This, under Article 2(a), should consist of:

«a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences [...] in order to obtain, directly or indirectly, a financial or other material benefit».³⁶

This provision of the Organized Crime Convention is useful in delimiting the scope of application of the entire Smuggling Protocol since, as expressly stipulated in Article 4, it includes smuggling offences which are transnational in nature and involve an organized criminal group. The relation between the two international legal instruments therefore leads us to exclude from the scope of application of the Protocol groups of people who assist other people crossing international borders so long as they do not belong to any criminal transnational groups.

Furthermore, looking at the drafting history of the instrument under review, we note that in the interpretative notes that were discussed by the Ad Hoc Committee on the

³² It is noteworthy that early drafts of the definition referred to “profit” as an element of the definition of migrant smuggling. This was subsequently changed to “financial or other material benefit,” reflecting the agreed language of the *Organized Crime Convention*.

³³ *Smuggling Protocol*, cit., Art. 3.

³⁴ *Ibid.*, Art. 6.

³⁵ The relation between the two instruments is expressly recalled in Art. 1 of the Smuggling Protocol, which essentially stipulates that it supplements the Organized Crime Convention and shall be interpreted together with this Convention.

³⁶ *Organized Crime Convention*, Art. 2 (a). It is worth mentioning that smuggled migrants do not fall within the scope of application of the Smuggling Protocol. This may be derived from the above definition of organised criminal groups, but also from Art. 5 of the Smuggling Protocol, which includes a saving clause that expressly stipulates that migrants who are objects of smuggling offences are not liable to criminal prosecution under the Protocol for being the object of such conduct. In the same vein, Art. 16 of the Smuggling Protocol provides that States Parties «...shall take, consistent with [their] obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of [smuggling]». In addition, the interpretative note of the Smuggling Protocol, at Art. 6(1) (ii), stipulates that migrants possessing fraudulent documents should not be criminalised.

Elaboration of an Organized Crime Convention and its Protocols throughout the process of their negotiations,³⁷ with respect to Article 3(a) it is indicated that:

«the reference to ‘a financial or other material benefit’ [...] was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, *but to exclude the activities of those who provided support to migrants for humanitarian reasons* or on the basis of close family ties. *It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations*».³⁸

The same interpretation of “financial or other material benefit” is provided in the Legislative Guide, which is aimed at organizing the priorities and obligations that drafters of national legislation should take into consideration when implementing the Smuggling Protocol. More generally, it clarifies that the element of benefit was indeed intended to exclude groups with purely political or social motives and to prevent States Parties from criminalizing or taking other actions against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers.³⁹

More recently, in its 2017 paper on the “Concept of ‘Financial or Other Material Benefit’” in the Smuggling Protocol, the UN Office on Drugs and Crime (“UNODC”) describes this element of migrant smuggling as the principal purpose of the offence⁴⁰ and clarifies expressly that the «phenomenon of facilitated illegal entry with no benefit motive» is «an act that falls beyond the scope of the Protocol».⁴¹ In particular, according to UNODC, “[t]he financial or other material benefits associated with migrant smuggling are fuelling a trade that turns human suffering and resilience against unfair odds into enormous and unscrupulously procured profits”.⁴²

The above cross-analysis of the Smuggling Protocol with the related parental Organized Crime Convention and other interpretative official sources demonstrates significant consistency; beyond confirming that the intention of the drafters of the Protocol was to craft an international instrument that would address organized criminal involvement in facilitation of irregular migration, all these documents clearly affirm that the application of such a binding legal instrument does not extend to the initiatives of human rights defenders or ordinary individuals providing support to migrants and refugees on the basis of humanitarian motives.

This consistency is, in our opinion, an important step forward. The States Parties of a multilateral binding treaty – today 150 – have found an agreement on the definition of the

³⁷ *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, including the Addendum on Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc. A/55/383/Add. 1, 3 November 2000.

³⁸ *Ibid.*, par. 88, and in the same vein, but with respect to the interpretation of Art. 6 of the Smuggling Protocol, which refers to what should be criminalised by States Parties, par. 91. Emphasis added.

³⁹ Office on Drugs and Crime (“UNODC”), *Legislative guide for the Protocol against the Smuggling of Migrants by Land, Air and Sea (Smuggling of Migrants Protocol)*.

⁴⁰ UNODC, Issue Paper: *The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol*, Vienna, 2017.

⁴¹ *Ibid.*

⁴² *Ibid.*, Preface, at (iii). In this respect see also *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions*, cit., p. 16 ff.

transnational offence they intend to cooperate on in order to address the threat of migrant smuggling. This, however, is only a first step. As is frequent in international law treaties, the content of conventional provisions must be further implemented at regional and national level. It is indispensable for the effectiveness of this form of cooperation, therefore, that the same consistency is respected at these subsequent implementing steps too.

4. *The EU Regional Legal Framework and the Broader Scope of the Facilitation Directive*

At the regional level, the EU has also developed a comprehensive legal framework to address migrant smuggling.⁴³ This framework comprises two legal instruments: the abovementioned Facilitation Directive, which includes «defining the facilitation of unauthorized entry, transit and residence»; and Framework Decision 2002/946/JHA, which includes «the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence».

In particular, under Article 1(1) of this Directive, anyone who intentionally helps a non-EU national to enter, transit, or (when conducted for financial gain) reside in the EU in breach of immigration law, must be penalised. In other words, the Facilitation Directive obliges Member States either to appropriately penalise anyone who, in breach of laws, intentionally assists a non-EU country national to enter or transit through an EU country, or, for the purposes of financial gain, assists a non-EU country national to find residence in an EU country.

Even though the EU acceded to the Protocol in 2006,⁴⁴ and all EU Member States, except Ireland,⁴⁵ have ratified it, the facilitation offence, as set out in Article 1(1) of the

⁴³ *Facilitators Package*, cit. In addition, in May 2015, in the aftermath of several maritime tragedies in the Mediterranean, the EU launched Operation EUNAVFOR MED, a military mission specifically designated to tackle the business model of migrant smuggling (and human trafficking) networks in the Southern Central Mediterranean Sea. In October, to support this operation, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 2240, condemning «all acts of migrant smuggling and human trafficking into, through and from the Libyan territory and off the coast of Libya», and authorising the use of «all measures commensurate to the specific circumstances» to inspect, seize and dispose of vessels used by suspected smugglers and traffickers. See Resolution 2240(2015), adopted by the Security Council at its 7531st meeting, on 9 October 2015, UN Doc. S/RES/2240, 9 October 2015, para. 1 and para 10. For doctrine on the issues related to both Operation EUNAVFOR MED and Resolution 2240, see G. BEVILACQUA, *Exploring the Ambiguity of Operation Sophia Between Military and Search and Rescue Activities*, in G. ANDREONE (ed.), *The Future of the Law of the Sea*, Chan (Switzerland), 2017, p. 165 ff., and M. GESTRI, *EUNAVFOR MED: Fighting Migrant Smuggling Under UN Security Council Resolution 2240 (2015)*, in IYIL, 2015, p. 21 ff. In this context, and on the specific need to strike a balance between the need to fight migrant smuggling and the need to protect the rights of smuggled migrants (especially children), see R. VIRZO, *Coastal States and the Protection of Migrant Children at Sea*, in F. IPPOLITO, G. BIAGIONI (eds.), *Migrant Children: Challenges for Public and Private International Law*, Napoli, 2016, p. 3 ff.

⁴⁴ Council Decision 2006/616/EC of 24 July 2006 on the Conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention Against Transnational Organised Crime concerning the provisions of the Protocol, insofar as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community, in OJ L 262/24; and Council Decision 2006/617/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, insofar as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community, in OJ L 262/34.

⁴⁵ Ireland has signed the Smuggling Protocol on 13 December 2000, but has not yet ratified it.

Facilitation Directive, is clearly broader than in the Protocol insofar as financial gain is not a constituent component of the offence of facilitation of irregular entry or transit.⁴⁶ Financial gain – together with participation in a criminal organisation or endangering the lives of the people who are the subjects of the offence – is listed under the aggravating circumstances set out in Article 1(3) of the aforementioned Framework Decision 2002/946/JHA.

In addition to the humanitarian initiatives undertaken by the French farmer and his organisation, the abovementioned SAR operations put in place by NGOs and private entities in the Mediterranean Sea could all potentially fall within the scope of the Facilitation Directive, insofar as they simply facilitate the entry of unauthorised non-EU country nationals into the southern countries of the EU.

At the same time, Article 1(2) of the Directive makes it possible to exempt the facilitation of unauthorised entry and transit from criminalization, provided it is carried out for humanitarian assistance purposes. According to this provision,

«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».

At first glance the presence of this exemption may change the scenario. It may appear that Article 3 of the Smuggling Protocol and Article 1 of the Facilitation Directive present a different structure, while pursuing the same goal. In practice, the fact that the Facilitation Directive allows but does not require Member States to exclude activities that aim to provide humanitarian assistance signifies a crucial legal gap; indeed, this normative scheme, granting wide discretion to EU Member States, leaves open the possibility that they may investigate and prosecute volunteers and other individuals involved in facilitating unauthorized entry and transit for humanitarian purposes. Such criminalization can be extended to persons who render assistance to migrants in danger in a way that results in their unauthorized entry or transit in an EU Member State.⁴⁷ And, as seen above, this was neither the aim of the drafters of the Smuggling Protocol nor the definition agreed by its States Parties. On the contrary, we have seen that the express requirement in the Smuggling Protocol that there must be a financial or other material benefit for the individual to be held criminally liable for smuggling was specifically meant to shield humanitarian actors and family members from punishment.⁴⁸

⁴⁶ On the broader definition included in the Facilitation Directive, see V. MITSILEGAS, *The Normative Foundations*, cit., pp. 77- 78.

⁴⁷ On the implications deriving from the different terminology used in the Smuggling Protocol and in the Facilitation Directive, see A. SPENA, *Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?*, in S. CARRERA and E. GUILD (eds.), *Irregular Migration, Trafficking and Smuggling of Human Beings*, Brussels, 2016, pp. 33-40, available at: https://aei.pitt.edu/72834/1/Irregular_Migration,_Trafficking_and_SmugglingwithCovers.pdf.

⁴⁸ For more details, see S. CARRERA, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 update*, 21 December 2018, p. 80, a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee. On the issue, see F. RONDINE, *La criminalizzazione delle attività di sostegno ai richiedenti asilo in ungheria nella procedura di inadempimento avviata dalla Commissione: le attività umanitarie come complemento al diritto di asilo nella UE*, in *Ordine internazionale e diritti umani*, 2021, p. 1138 ff.; available at: https://iris.uniroma1.it/retrieve/handle/11573/1580174/1926283/Rondine_criminalizzazione_2021.pdf; M. STARITA, *Il Patto sulle migrazioni e l'asilo della Commissione europea del 23 settembre 2020 e il dovere di soccorso in mare*, in *Sovranazionalità e sovranismo in tempo di Covid-19*, *St. integr. eur.*, 2021, p. 281 ff.

Furthermore, the coexistence of different definitions of the offence at the international and regional level has produced significant implications at the national level. As is well known, the main purpose of the legal instrument of the Directive is to harmonise the Member States' legislations. Rather than a harmonised legal picture, a variety of different national interpretations of the Facilitation Directive are currently in force. According to the 2020 Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence, only eight Member States include in their national law an explicit exemption from punishment for facilitating unauthorised entry or transit in order to provide some form of humanitarian assistance.⁴⁹ This is the case of the Italian legal system, for instance, which criminalises the offence of clandestine immigration with a provision presenting a very wide formulation that, however, exempts whoever acts to assist and rescue migrants on the Italian territory, even if those migrants have entered the territory illegally.⁵⁰ According to the Guidance, in most EU Member States, the base migrant smuggling offence requires only proof of facilitation of illegal entry, but not of additional physical or mental elements relating to profit or benefit obtained or intended to be obtained by the perpetrator. In most EU States, the presence of a financial or other material benefit serves to aggravate the penalty imposed.⁵¹

On top of these theoretical and practical issues is the fact that the absence of consistency generates ambiguity and legal uncertainty that in turn determines a false perception among legal operators – and also among the general public – of what is criminal, and hence an act to be persecuted, and what is simply a form of solidarity, and hence an act to be protected as a value stemming from international obligations and, prior even to that, from constitutional charters.

5. *Jurisprudential Developments of Domestic Supreme Courts Shaping the Real Content of the Smuggling Protocol and the Pure and Genuine Spirit of Solidarity*

Against this fragmented and uncertain normative backdrop at the regional and national level, in order to establish whether humanitarian assistance towards migrants and refugees crossing international borders in an irregular manner should be effectively criminalised, we believe it important to look at a few jurisprudential developments following the adoption of the Smuggling Protocol and the Facilitation Directive.

5.1. *The Supreme Court of Canada in the Case of the Ocean Lady*

Emblematic for our purposes is a judgment of the Supreme Court of Canada, which in 2015 held that Section 117 of the Immigration and Refugee Protection Act ("IRPA"), addressing the offence of «organizing entry into Canada», is unconstitutionally overbroad

⁴⁹ European Commission, *Guidance*, cit.

⁵⁰ See Art. 12 of the Legislative Decree of 25 July 1998, No. 286, *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero*, in *Official Journal* of 18 August 1998, No. 191.

⁵¹ Working Document: *National Laws Relating to Smuggling of Migrants in Council of Europe Member States*, 70th Plenary Session, Strasbourg, 27 - 30 June 2016 (European Committee on Crime Problems, 2016), p. 6.

insofar as it may also apply to humanitarians, close family members, and refugee claimants providing mutual assistance to each other.⁵²

In effect, in 2001 the IRPA was amended in response to significant changes in international law. As illustrated above, the Smuggling Protocol was adopted in 2000, and Canada was among the first States to sign and ratify the Protocol,⁵³ thereby formalizing its commitment to counter organized crime and cooperate with other States in combating migrant smuggling.⁵⁴ Further to this revision aimed at implementing the Protocol, Section 117 IRPA stipulated that «[n]o person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act».⁵⁵

Like Article 1 of the Facilitation Directive, this formulation of Section 117 IRPA is clearly wider than the definition of migrant smuggling set out in the Protocol, insofar as it does not include financial gain as a constituent element of the offence. In this respect and consistently with the previously analysed documents providing guidance on the international relevant framework, the Supreme Court, recalling Canada's international obligations, explains that:

«[t]he Smuggling Protocol is concerned with stopping the organized crime of people smuggling. It seeks to prevent and combat the smuggling of migrants and to promote cooperation among states to this end, while protecting the rights of smuggled migrants: art. 2. Article 6(1)(a) requires signatory states to adopt measures to establish migrant smuggling as a criminal offence. The Smuggling Protocol includes as a minimum definition for this offence, procuring illegal entry of a person into a state of which the person is not a national or a permanent resident, "in order to obtain, directly or indirectly, a financial or other material benefit": art. 3 (a). [Therefore] the Smuggling Protocol was not directed at family members or humanitarians [...]».⁵⁶

In the opinion of the Court, therefore, the formulation of Section 117 IRPA goes beyond the material scope of the Smuggling Protocol, and Canada is presumed to comply with the international obligations deriving from it. This is because Section 117 IRPA was drafted so broadly that members of humanitarian organizations, family members, and refugees providing mutual support to one another could face the risk of prosecution, as was the case in 2009 in the aforementioned episode regarding the crew of the ship *Ocean Lady*, which was intercepted off Vancouver Island with 76 asylum-seekers aboard.

Interestingly, for the Supreme Court of Canada, in order to determine whether the provision was excessively broad, it was crucial to strike a balance between the main objectives of the IRPA. On the one hand, the Court found that the IRPA aims to protect and maintain

⁵² Supreme Court of Canada, *R. v. Appulonappa*, judgment No. 35958 of 27 November 2015.

⁵³ Canada signed the Smuggling Protocol on 14 December 2000 and ratified it on 13 May 2002.

⁵⁴ Canada was heavily involved in the negotiations leading to the adoption of the Smuggling Protocols, with the participation of representatives from the Department of Foreign Affairs and International Trade, and Status of Women Canada. For more details, see J. OXMAN-MARTINE, J. HANLEY, *A Follow-up Study of Canadian Policy on Human Trafficking: Impacts of the Immigration and Refugee Protection Act*, Centre de recherche interuniversitaire de Montréal sur l'immigration, l'intégration et la dynamique urbaine, No. 25, September 2004, available at: http://cedoc.inmujeres.gob.mx/documentos_download/trata_de_personas_24.pdf.

⁵⁵ *Immigration and Refugee Protection Act*, published by the Minister of Justice at: <http://laws-lois.justice.gc.ca>.

⁵⁶ Supreme Court of Canada, *cit.*, p. 44. On the relevance of this judgment that, in particular, emphasizes the dual primary purposes of the Smuggling Protocol, see V. MITSILEGAS, *The Normative Foundations*, *cit.*, p. 71.

the health and safety of Canadians by denying access to Canadian territory to people who pose security risks or are serious criminals. On the other hand, the Canadian Immigration Act also speaks of «Canada's humanitarian ideals», which include «saving lives and offering protection to the displaced and persecuted» and «safe haven to persons with a well-founded fear of persecution». On this basis, the Court held that a fair balance is ensured by targeting organized smuggling operations that have a criminal dimension, thereby excluding humanitarian, mutual and family aid. A formulation of Section 117 IRPA that may cause the prosecution of a father offering a blanket to a shivering child, or friends sharing food aboard a migrant vessel, is incompatible with Canada's international obligations, which arise from the Smuggling Protocol (and other international instruments),⁵⁷ and with the constitutional value of social justice.

Also important is that the decision rendered by the Supreme Court of Canada does not represent an isolated interpretation. In a separate but related judgment issued in the same day, the Court, demonstrating again that it was aware of Canada's international obligations, held that only those people smugglers who act to facilitate the illegal entry of asylum seekers in order to gain a financial or other material benefit, in the context of transnational organised crime, are inadmissible to Canada under Section 37(1)(b) IRPA.⁵⁸ Therefore, even though the Canadian Court is not expressly recalling the abovementioned Declarations based on solidarity, in our opinion, both these judgments go towards an assessment that the absence of the financial/material gain element in the formulation of the national provisions prescribing the relevant criminal conducts may determine the denial for smuggled persons of their right to be helped, and at the same time, determines that ordinary individuals and humanitarians are denied the right to help.

5.2. *The French Constitutional Council in the Case of the French Farmer Cedric Herrou*

In a similar vein, in France the Constitutional Council issued a judgment on 6 July 2018 regarding the humanitarian activities carried out by the abovementioned farmer and an academic to facilitate the legal entry of several irregular migrants and refugees *en route* to France from Sudan and Eritrea via Italy.⁵⁹ In essence, by means of this decision the French Court recognised the constitutional relevance of the third precept of the French Republican motto, i.e. fraternity, but it also shed light on its meaning, making it similar to solidarity by narrowing the scope of the offence of facilitating the illegal entry, circulation and residence of immigrants on the French territory.⁶⁰

⁵⁷ In particular, the Supreme Court of Canada makes reference to the related obligations deriving from the 1951 Convention relating to the Status of Refugees.

⁵⁸ Supreme Court of Canada, *B010 v. Canada (Citizenship and Immigration)*, judgment of 27 November 2015, No. 35388, 35677, 35685, 35688.

⁵⁹ After further verification in two different sets of proceedings, it was established that the French farmer had facilitated the entry into France of more than 200 irregular immigrants, in other words on a rather large scale and in a systematic manner, whereas the academic had provided assistance by giving a ride to a handful of migrants in need of medical care.

⁶⁰ French Constitutional Council, decision No. 2018-717/718, of 6 July 2018. For an interesting analysis of this decision, see *Eur. Const. Law Rev.*, 2019, pp. 183-193.

In particular, with this ruling the French Constitutional Council led the legislature to partially amend the French Code of Entry and Residence of Foreigners,⁶¹ which defined the *délit de solidarité*, addressing any person who, directly or indirectly, facilitates the illegal entry, circulation or residence of a foreign national in France with a penal and administrative sanction.⁶² However, it is worth noting that, like the normative scheme of Article 1 of the Facilitation Directive, this French Code provided two exemptions. Whereas the first exemption concerns the closest relatives of the foreign national from criminal prosecution,⁶³ the second, at the time of the decision, concerned the facilitation of the illegal residence (but not the illegal entry and transit) of a foreigner, when the alleged act does not give rise to any direct or indirect compensation and only entails providing legal advice, food, accommodation or health care in order to ensure decent living conditions for foreigners, or any other assistance aimed at preserving their dignity or physical integrity.⁶⁴

More precisely, in its judgment the French Constitutional Council ruled that the possibility of assisting people on the move for humanitarian purposes stems from the constitutional principle of *fraternité*. Therefore, like the Supreme Court of Canada, the Council recalls the relevance of French ideals, and specifically the «*idéal commun de liberté, d'égalité et de fraternité*», which is explicitly set out in the preamble, as well as in Articles 2, 72, and 73 of the French Constitution. Crucially, these values apply regardless of a person's legal status in the country.⁶⁵

In parallel, arguing that the objective of fighting irregular migration is also part of the safeguards of public order, to take its decision the French Council retained it necessary to strike a balance between the two constitutional values: fraternity on the one hand and public order on the other. Specifically, the French judges explained that:

«Dès lors, en réprimant toute aide apportée à la circulation de l'étranger en situation irrégulière, y compris si elle constitue l'accessoire de l'aide au séjour de l'étranger et si elle est motivée par un but humanitaire, le législateur n'a pas assuré une conciliation équilibrée entre le principe de fraternité et l'objectif de valeur constitutionnelle de sauvegarde de l'ordre public. Par conséquent, et sans qu'il soit besoin d'examiner les autres griefs à l'encontre de ces dispositions, les mots « au séjour irrégulier » figurant au premier alinéa de l'article L. 622-4 du code de l'entrée et du séjour des étrangers et du droit d'asile, doivent être déclarés contraires à la Constitution».⁶⁶

⁶¹ See L. 622-1 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA). On the legal history of the French Code, see BENJAMIN BOUDOU, *The Solidarity Offense in France: Egalité, Fraternité, Solidarité*, in *Verfassungsblog*, 6 July 2018, available at: <https://verfassungsblog.de/the-solidarity-offense-in-france-egalite-fraternite-solidarite/>; J. P. ARIS ESCARCENA, *Punishing Solidarity*, cit.

⁶² The sanction was five years' imprisonment and a fine of €30,000.

⁶³ L. 622-4, 1o and 2o CESEDA.

⁶⁴ L. 622-4, 3o CESEDA.

⁶⁵ The irrelevance of the legal status of irregular migrants also emerged in the decision of the Italian Constitutional Court, which in 2011 held that everyone is entitled to the right to housing in light of Art. 2 of the Italian Constitution, which, as seen above, includes the duty of solidarity. See Italian Constitutional Court, judgment of 21 February 2011, No 61, available at: www.cortecostituzionale.it. On this specific aspect, G. BEVILACQUA, *Corte costituzionale italiana ed inviolabilità del diritto all'alloggio dello straniero irregolare*, in *Dir. um. dir. int.*, 2011, p. 629 ff.

⁶⁶ French Constitutional Council, decision No. 2018-717/718, of 6 July 2018. For an interesting analysis of this decision, see *Eur. Const. Law Rev.*, 2019, pp. 183-193.

From this interpretation of both constitutional principles, the offence of solidarity is narrowed from two perspectives. First, the legislature had failed to strike an appropriate balance between the conflicting values of fraternity and public order we have just recalled by limiting the material scope of the exemption to providing assistance for illegal residence without, however, including the facilitation of illegal circulation when the latter is merely ancillary to the assistance to the residence of the foreign national and pursues humanitarian purposes. Second, exemption must be further extended to include any other act of assistance provided for humanitarian purposes, beyond the acts explicitly enumerated in the legislation.

Even though these first conclusions are in line with the definition provided by the Smuggling Protocol, the Council goes further by distancing itself from its international obligations and the ruling of the Supreme Court of Canada, stating that the facilitation of illegal entry does not fall within the extended scope of the new exemption. On the latter the French Council, which may rely for this approach on the previously recalled normative scheme of the Facilitation Directive, is unmovable, and this is not without consequences for many volunteers, as well as for the French farmer, who, in fact, was also facilitating illegal entry.

5.3. *The Supreme Court of Cassation in the Case of the Sea Watch 3*

Somewhat different is the route taken by judges in Italy, where, after 2017, the political campaign aimed at hindering non-governmental rescues in the central Mediterranean soon took the form of suspicions of links between NGOs and migrant smugglers. And, even though that year the Italian Senate Defence Committee concluded a general enquiry on their actions by dismissing any suspicions and finding that humanitarian organisations were not involved – directly or indirectly – in migrant smuggling,⁶⁷ this enquiry opened the door to a number of administrative and criminal measures targeting the majority of the NGOs operating in the area, resulting in the seizure of the NGOs' rescuing units as well as criminal investigations of their mission coordinators, shipmasters and/or crew members.

Against this scenario, in Italy, in order to distinguish between the offence of abetting illegal migration and humanitarian initiatives at sea, rather than looking at the scope of application of the relevant national provisions, domestic judges have taken a different approach. Namely, several Tribunals have excluded the criminal responsibility of the author of the offence by means of a number of exemption clauses stipulated in the Italian criminal code.⁶⁸ In this trend of justification, particularly worthy of note for the purposes of this

⁶⁷ Commissione Permanente Difesa, *Sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative*, Doc. XVII No. 9, 24 May 2017.

⁶⁸ Such as Art. 54 Italian Penal Code, which concerns the state of necessity. This was, for instance, the case of the Decree released by the pre-trial judge at the Tribunale di Ragusa, which ordered the release of the non-governmental ship *Open Arms*, seized by the Italian authorities for having ignored the request of the Italian Maritime Coordination Centre to relinquish the responsibility of the rescue event to the Libyan Coast Guard and to deliver the rescued people to the Libyan authorities. In this case, according to the Decree the state of necessity applies immediately with respect to the people to rescue, and also afterwards with respect to risks associated with the handover of the rescued people to the Libyan authorities. See Tribunale di Ragusa, Ufficio del Giudice per le indagini preliminari, *Decreto di rigetto di richiesta di sequestro preventivo* of 16 April 2018 and Tribunale di Ragusa, Giudice del riesame, *Ordinanza di conferma del decreto del g.i.p.* of 11 May 2018. On the aforementioned justification trend, see C. RUGGIERO, *Dalla criminalizzazione alla giustificazione delle attività di ricerca*

analysis is the judgment of the Italian Supreme Court of Cassation in relation to the *Sea Watch 3* case, released on 16 January 2020.⁶⁹ With this ruling, the Italian Supreme Court confirmed the decision of the pre-trial judge, who did not validate the arrest of the German shipmaster of the Dutch non-governmental vessel,⁷⁰ detained for having facilitated the entry into the Italian territorial waters of rescued migrants and refugees, notwithstanding the explicit interdiction orders of the Italian enforcement authorities.⁷¹

In particular, the Italian Supreme Court confirmed that the arrest was not legitimate given that the responsibility of the shipmaster could be exempted by Article 51 of the Italian criminal code, including the justification clause of the fulfilment of a legal obligation, which, in this specific case, consisted of the duty to rescue people in distress at sea.⁷² As said, the shipmaster of the *Sea Watch 3* entered Italian waters illegally in order to allow a group of migrants saved at sea to disembark on Lampedusa. The duty to rescue is a legal obligation set out in a number of international treaties,⁷³ all of them ratified by Italy, which codify a customary principle of solidarity at sea. Its relevance is due also to the fact that this principle can make its entry into the Italian legal order through Article 10(1) of the Italian Constitution, and, on this basis, may prevail over other laws and regulations.

Although it took a different route from the decisions we have analysed previously, the Italian Court of Cassation, with its ruling in the *Sea Watch 3* case, played a crucial role, as it supports the current Italian tendency of justification and even goes a step further by making reference to the exemption concerning the fulfilment of a legal duty – the duty of solidarity at sea – which, according to the Court, must be known and respected by both those who operate SAR activities at sea, such as crew members and shipmasters, and those operating as maritime enforcement authorities, such as the Guardia di Finanza. In addition, it is significant

e soccorso in mare. Le tendenze interpretative più recenti alla luce dei casi Vos Thalassa e Rackete, in *Dir. imm. citt.*, 2020, p. 185 ff.

⁶⁹ Supreme Court of Cassation (Sec. III, pen.), judgment of 16 January 2020, No. 6626. For a thorough analysis, see C. PITEA, S. ZIRULIA, *L'obbligo di sbarcare i naufraghi in un luogo sicuro: prove di dialogo tra diritto penale e diritto internazionale a margine del caso Sea Watch*, in *Dir. um. dir. int.*, 2020, p. 659 ff.

⁷⁰ Carola Rackete, the German shipmaster of the *Sea Watch 3*, was arrested in the act, and additionally accused of both resistance against a public official (Art. 337 Italian criminal code) and resistance and violence against a warship (Art. 1100 Italian navigation code). The case of the *Sea Watch 3* was closed with the GIP's ruling issued on 19 May 2021, that upheld the motion for dismissal of the charges made against the shipmaster, agreeing with the initial assessment recalled in the text made by the Court of Cassation and confirming that Carola Rackete had acted on the basis of the justification referred to in Art. 51 Italian Penal Code. See Court of Agrigento, GIP Office, decree of archiving, 14 April 2021, which accepted the request of the Public Prosecutor's Office at the Court of Agrigento, 19 January 2021. On this case and its relationship with the domestic case-law concerning non-governmental savings, see A. DEL GUERCIO, *Migrazioni via mare, luogo di sbarco sicuro e principio di non-refoulement*, in G. BEVILACQUA (ed.), *Human Security in Navigable Spaces*, cit. p. 95 ff.

⁷¹ Interdiction from Italian authorities was imposed in accordance with the so-called *Decreto sicurezza bis*, which was adopted during the case of the *Sea Watch 3* illustrated above. See Decreto-legge 14 June 2019, No. 53, *Disposizioni urgenti in materia di ordine e sicurezza*, published in the *Italian Official Journal*, No. 138 of 14 June 2019. The Law-decree entered into force on 15 June 2019 and became Law No. 77 on 8 August 2019. For doctrine, see G. CATALDI, *Il "decreto sicurezza bis" alla prova degli impegni internazionali dello Stato in materia di diritto del mare. Alcune osservazioni*, in *Dir. uomo*, 2020, p. 439 ff.; M. FANTINATO, V. SCHATZ, *Post-Rescue Innocent Passage by Non-governmental Search and Rescue Vessels in the Mediterranean*, in *Int. Jour. Mar. Coast. Law*, 2020, p. 1 ff.

⁷² On the duty to rescue at sea, see F. G. ATTARD, *The Duty of the Shipmaster to Render Assistance at Sea under International Law*, Leiden, Boston, 2020; M. STARITA, *Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave privata*, in *Dir. um. dir. int.*, 2019, p. 5 ff.; I. PAPANICOLOPULU, *The Duty to Rescue at Sea, in Peacetime and in War: A General Overview*, in *Int. Rev. Red Cr.*, 2016, p. 491 ff.

⁷³ In relation to the duty to rescue at sea, reference is usually made to the UN Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994, Art. 98.

that once the Italian Supreme Court of Cassation is given the chance to pronounce on the legitimacy of the humanitarian practice of helping people crossing sea borders, it decides to remain clearly consistent with the aforementioned foreign constitutional jurisprudence, and prevents the criminalisation of humanitarian initiatives in the name of both binding international obligations and constitutional values inspired by solidarity.

6. Conclusions

Careful analysis of the relevant provisions of the Smuggling Protocol, of its parental Convention on Organised Crime, and of other official documents including guidelines on its interpretation and implementation shows unequivocally that humanitarian assistance given to people crossing land and sea borders falls outside the scope of the Protocol and should not be criminalised under the legislations of its numerous States Parties. This is, in short, because individuals providing support to migrants and refugees are trying to help them to compensate for the unequal situation, they find themselves in, and to give them access to their primary needs and human rights.

Since the adoption of the Protocol in 2000, however, many States have lost sight of the main object of the agreement, which, as seen above, consists in promoting cooperation among them in order to combat migrant smuggling, while providing smuggled migrants with humane treatment and full protection of their rights.⁷⁴ The Facilitation Directive and other national legislations that implement the Protocol, insofar as these contemplate an overly broad definition of the offence and permit the criminalisation of pure acts of solidarity, are clearly betraying this object, since they are not aimed at the real authors of criminal conduct and do not protect the rights of the smuggled persons.

Domestic supreme courts are working hard to resist the temptation to criminalise humanitarian actions *vis-à-vis* vulnerable people on the move. To resist this temptation, which is created by ambiguous and inadequate rules, national supreme courts make reference to the real obligations deriving from the Smuggling Protocol and other related conventional instruments, recognise the constitutional status of historical values, such as social justice and fraternity, and strike the balance between conflicting interests in favour of both providers and beneficiaries of solidarity. The immediate concrete effect of these jurisprudential developments is to limit the punishment of ‘people smugglers’ to those who engage in the activity in the context of organised crime, while avoiding punishing those who merely provide humanitarian aid. The national jurisprudential trend was recently confirmed at international level when the UN Human Rights Committee ruled last January that Italy had violated the right to life by not assisting people in distress at sea who were in the Maltese SAR zone, though in the vicinity of Lampedusa.⁷⁵ As declared by the Independent Expert in the aftermath of this ruling, solidarity should go beyond the delimitation of SAR zones.⁷⁶

⁷⁴ *Smuggling Protocol*, Art. 2.

⁷⁵ UN Human Rights Committee, *A.S., et al. V. Italy*, Decision adopted on 27 January 2021, UN Doc. CPR/C/130/D/3042/2017. For comment on this, see N. MADJIDIAN, *Mediterranean Responsibilities Extra-territorial Jurisdiction of Coastal States in the Context of Maritime Migration*, in *Verfassungsblog on Matters Constitutional*, 29 January 2021, available at: <https://verfassungsblog.de/mediterranean-responsibilities>>/

⁷⁶ Independent Expert, *Statement*, cit.

Nevertheless, the situation is concerning, and, as demonstrated by the only partially appreciable result reached by the French Constitutional Council, it is far from certain that we will be able to rely only on the jurisprudence of national supreme courts and international monitoring bodies to fill the vacuum of consistency between different legal regimes. The coexistence of separate and independent powers works, as is well known, as an indispensable guarantee for modern democratic societies, but, at the same time, their conflictual relationship may, in our view, generate uncertainty among legal operators and confusion in the opinion of the general public.

Against the persisting tendency to investigate and prosecute humanitarian smuggling,⁷⁷ considerable efforts are urgently required to eliminate, first and foremost, the significant discrepancies that exist between the Smuggling Protocol and the Facilitation Directive. In this respect, the analysis demonstrates that an important step ahead will be to include the requirement of the direct or indirect financial or other material benefit among the constituent elements of the criminal offence. This will work specifically to limit the discretion of legal operators and prevent the criminalisation of altruistic conduct. However, to establish consistency with the Protocol's provisions, the amendment should address all relevant conducts, and, hence, the facilitation of irregular entry, transit and stay. Eliminating this grave inconsistency will be extremely helpful, especially for States which are both Parties to the Protocol and Member States of the Union.

Ultimately, to build a uniform legal picture, and above all to draw a clear-cut distinction between humanitarian and criminal smuggling, adequate reform should take into account the overall legal context and the effective needs that lie behind the adoption of the Smuggling Protocol. It should also acknowledge and be oriented by the directions opened up by the above recalled soft-law instruments based on new emerging human rights on solidarity. Inverting the current trend of criminalising assistance of migrants and refugees should be seen as an opportunity: the opportunity to keep alive the sensitive and interrelated international commitments inspired by solidarity that are the result of incontrovertible constitutional conquests.

⁷⁷ The former mayor of an Italian town who revitalised his community by welcoming and integrating migrants has been sentenced in September 2021 to more than 13 years in jail for abetting illegal migration and for irregularities in managing the asylum seekers. For press sources, see, among others, L. TONDO, *Pro-refugee Italian Mayor Sentenced to 13 Years for Abetting Illegal Migration*, in *The Guardian*, 30 September 2021, available at: <https://www.theguardian.com/world/2021/sep/30/pro-refugee-italian-mayor-sentenced-to-13-years-for-abetting-migration>.