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MIGRANT SMUGGLING: WHY WE NEED A PARADIGM SHIFT

Briefing paper

In international law, migrant smuggling is defined as the act of procuring someone's irregular entry into a country "in order to obtain, directly or indirectly, a financial or other material benefit".¹ However, not all parts of this definition were included in the EU legal framework, which requires Member States to impose "effective, proportionate and dissuasive" sanctions on any person who facilitates someone's irregular entry or transit across a Member State, even if they did not obtain any financial gain.²

Common narratives describe migrant smugglers as ruthless "criminals who take advantage of people's vulnerability and naïveté"³. Indeed, migrants do face violence and harm during their journeys. However, counter-smuggling policies are often based on limited empirical data and several misconceptions.⁴ While they often refer to the violence that migrants suffer from the hands of smugglers, very little attention has been paid to the major harm done by counter-smuggling policies themselves, nor the reasons why people make informed decisions to turn to smugglers – notably, the lack of any opportunities for many people to move and cross borders in a regular manner. As a consequence, several of these policies risk having counterproductive effects on the rights of migrant communities and those supporting them.

In her policy brief "Five Misconceptions About Migrant Smuggling", researcher Gabriella Sanchez dismantles several myths about migrant smuggling.⁵

In particular, she shows that most people convicted for smuggling are actually working independently, often on behalf of family members or friends, and that many others are themselves migrants on the route. Debunking the idea that smuggling is always a highly profitable business, also reiterated in the renewed EU action plan against migrant smuggling (2021-2025)⁶, she explains that rates can vary very much (also depending on how much migrants can afford, and the quality of the services) and are negotiated on basis of reciprocity or as a "good business practice".⁷

Previous research from academic Ilse Van Liempt demonstrates that policy-makers' views do not always coincide with how smuggled migrants themselves perceive the work of smugglers.⁸ She highlights that "smugglers can be familiar people, usually friends of friends, but sometimes also family members" and that "migrants who have used the services of smugglers often describe them as 'helpers', as people who 'save lives', or as a 'necessary alternative'⁹. In an article from Al Jazeera, some refugees in Sudan consider them "freedom facilitators".¹⁰

Sociologist Milena Belloni reports of interviews both with migrants who claimed to be "morally indebted to those middlemen who enabled their safe passage to Europe", and with people who had been deceived by violent and dishonest smugglers. Summarising the results of her field research, she concludes that "smuggling was not a despicable activity in itself according to my informants, but could become extremely condemnable in some circumstance".¹¹

1 United Nations, 2000, *Protocol against smuggling of migrants by land, sea and air, supplementing United Nations Convention against transnational organized crime* art. 3(a)

2 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence art. 1(1)(a)

3 Sanchez, G., 2018, *Five Misconceptions About Migrant Smuggling*, RSCAS Policy Brief 2018/07

4 Sanchez, G., 2021, *A lack of evidence-based approaches will weaken the implementation of the EU Action Plan against migrant smuggling 2021-2025* DIIS Policy Brief, [Checked on 16 May 2022]

5 Sanchez, G., 2021, *A lack of evidence-based approaches will weaken the implementation of the EU Action Plan against migrant smuggling 2021-2025* DIIS Policy Brief, [Checked on 16 May 2022]

6 European Commission, 29 September 2021, *A renewed EU action plan against migrant smuggling* (2021-2025)

7 Sanchez, G., 2018, *Five Misconceptions About Migrant Smuggling*, p. 2

8 Ilse Van Liempt, April 2016, *Humanitarian Smuggling in a time of crises: Examples from Europe*.

9 Ilse Van Liempt, April 2016, *Humanitarian Smuggling in a time of crises: Examples from Europe*.

10 Al Jazeera America, 30 November 2014, *Human smugglers: Exploiters or pioneers of new underground railroad?*, [Checked on 17 May 2022]

11 Allegra Lab, April 2016, *Crossing the border, blurring the boundaries: alternative views on human smuggling from the Horn of Africa to Europe*

There are three main reasons for which counter-smuggling policies can harm, rather than protect, migrants' safety and their rights.

1. Counter-smuggling legislation is often used against migrants themselves

More and more people trying to cross to Europe are unfairly accused of being “smugglers”, and risk long periods of arbitrary detention as well as exclusion from accessing asylum and other regularisation procedures. This is in violation of articles 5 and 16 of the UN Protocol on Migrant Smuggling, which forbid the use of counter-smuggling legislation against migrant themselves, and article 31 of the Convention relating to the Status of Refugees, according to which asylum seekers should not be penalised for crossing borders without authorisation.¹²

Often, the mere fact of having touched the wheel of the boat,¹³ or having turned on one's GPS,¹⁴ is enough to be considered a smuggler. Testimonies from other people on the boat asserting that the person was only trying to save everyone's lives, or the fact of having one own's children or other family members on the boat, are not considered as sufficient to counter-evidence to smuggling accusations. As a consequence, migrants often face decades of imprisonment. In many cases, asylum seekers have been charged of smuggling just after being rescued from a shipwreck.

N., a 25-year-old asylum seeker from Afghanistan, is facing up to ten years of imprisonment on charges of “endangering the life of his child” for having boarded a boat to Greece together with his son, who died in a shipwreck.¹⁵ Hasan, who was on the same boat, has been accused of smuggling and is facing a life sentence and 230 years imprisonment for having steered the boat at some point during the journey. Other passengers claim that Hasan took the wheel because nobody else was doing it, and that he had carried his paralyzed mother on his back when getting into the boat. None of them blame Hasan for the shipwreck.

In another case, Mohamad H, an asylum seeker from Somalia, has been accused of smuggling for having taken the helm of the boat before it capsized. Other survivors reported that he was trying to save everyone's lives.¹⁶

Far from being isolated incidents, the criminalisation of boat drivers is a widespread phenomenon in several EU countries. The report “Incarcerating the Marginalised - The Fight Against Alleged ‘Smugglers’ on the Greek Hotspot Islands” analyses 48 cases of criminalisation of asylum seekers on the Aegean Islands in **Greece**, all of which led to convictions after procedures characterised by lack of fair trial guarantees, such as lacking or inadequate access to legal aid and translation. Some of them suffered from ill-treatment in prisons or police stations.¹⁷ They have been convicted to an average sentence of 48 years of prison.¹⁸

In **Italy**, the report “From Sea to Prison” identifies more than 1,000 cases of criminalisation of boat drivers in the last decade.¹⁹ As reported by ARCI Porco Rosso and Alarm Phone, boat drivers are often identified on the basis of faulty photography

12 United Nations, 2000, [Protocol against smuggling of migrants by land, sea and air, supplementing United Nations Convention against transnational organized crime](#), art. (5,16,31)

13 ECRE, 14 May 2021, [Greece: Survivor Sentenced to 146 Years Imprisonment Amid Deaths in Camps and at Borders](#)

14 Border-line Europe, [Twitter thread](#)

15 Free the Samos Two, n.d. [The real crime is the border regime – Freedom for N.* & Hasan](#), [Checked on 17 May 2022]

16 ECRE, 14 May 2021, [Greece: Survivor Sentenced to 146 Years Imprisonment Amid Deaths in Camps and at Borders](#)

17 Hänsel, V., Moloney, R., Firla, D. & Serkepkanı R., 2020, [Incarcerating the Marginalized The Fight Against Alleged ‘Smugglers’ on the Greek Hotspot Islands](#),

18 Ibid., p. 88

19 ARCI Porco Rosso and Alarm Phone, 15 October 2021 [From Sea to Prison: The Criminalization of Boat Drivers in Italy](#)

and unreliable witnesses, and the trials against them characterised by several violations of procedural rights, such as lack of adequate defence and the impossibility to contact their families.²⁰ Even when boat drivers are acquitted, they face harsh social and economic consequences and do not receive any compensation for the time they spent in prison. This trend makes sea journeys even more dangerous, as people who would know how to steer boats in distress are discouraged from intervening in situations of shipwrecks as this could condemn them to years of prison.

In a landmark decision, in December 2021 the highest court in Italy found that two migrants who had been accused of facilitation of irregular migration, violence and forceful resistance to a public official for opposing being returned to Libya during a rescue operation had acted for self-defence, and acquitted them.²¹

In **Romania**, at least eight unaccompanied children have been apprehended while crossing the borders from Serbia and prosecuted for irregular border crossing and migrant smuggling. They were all held in pre-trial detention.²²

In the **Netherlands**, three Syrian brothers were convicted to 182 days imprisonment on charges of smuggling in September 2021 because they had paid smugglers to bring their parents and sister to the Netherlands, after previous applications for family reunification had been denied.²³

At the same time, counter smuggling is increasingly prominent in member states' and the EU political agenda.²⁴ Borderline-Europe reports a 100% increase in convictions for smuggling reported from 2016 (951 convictions) to 2019 (1,905 convictions).²⁵ In Italy, the number of arrests on smuggling grounds almost doubled from 2020 to 2021, raising from 121 to 225.²⁶

Criminal proceedings, including when they end in acquittals, can have a life-long impact on migrants' possibility to live regularly in the EU. A first instance conviction, or even just reliable proof for suspicion, can have the effect of excluding people from the right to apply for asylum²⁷ and other residence status procedures. Even after an acquittal, migrants who have been accused of smuggling often have difficulties accessing asylum procedures, and they are often excluded from official reception centres.²⁸

2. Counter-smuggling policies make crossings more unsafe

Counter-smuggling policies are often justified by policy-makers with the need to protect migrants' lives and safety.²⁹ However, this narrative contributes to hide the real harm that people are suffering as a direct consequence of counter-smuggling policies. Almost a decade ago, academic Hein de Haas already highlighted that "smuggling is a reaction to border controls, not the cause of migration"³⁰. As counter-smuggling policies lead to the increased militarisation of borders, crossing becomes more and more unsafe, pushing more

20 ibid.

21 MEDITERRANEA Saving Humans, 17 December 2021, [VOS Thalassa case: historic sentence by Italian high court](#) [Checked on 17 May 2022]

22 Asylum Information Database (AIDA), 2020, [Country report: Romania](#)

23 De Rechtspraak, 2021, [Uitspraak ECLI:NL:RBNNE:2021:3309](#)

24 See European Commission, 29 September 2021, [A renewed EU action plan against migrant smuggling \(2021-2025\)](#); Euractiv, 23 January 2017, [EU considers increased support to help Libya tackle people smugglers](#) InfoMigrants, 13 July 2020, [UK and France step up action to stop people smuggling in the Channel](#)

25 Data from the Hellenic Ministry of Justice cited in: Hänsel V., Moloney R., Firla D. & Serkepkanî, R. November 2020, [Incarcerating the Marginalized: The Fight Against Alleged Smugglers on the Greek Hotspot Islands](#)

26 Attualita, 12 April 2022, [Immigrazione: Polizia, boom di sbarchi, in un anno arrestati 225 scafisti](#) [Checked on 17 May 2020]

27 European Asylum Support Office (EASO), January 2016, [Exclusion: Articles 12 and 17 Qualification Directive \(2011/95/EU\), A Judicial Analysis](#), p. 42.

28 Patane, F., Bolhuis, M., van Wijk, J., & Kreiensiek, H., 2020, [Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy](#). Refugee Survey Quarterly, 39(2), 123-152.

29 European Commission, 29 September 2021, [A renewed EU action plan against migrant smuggling \(2021-2025\)](#) p. 3

30 De Haas, H., 5 October 2013, [Smuggling is a reaction to border controls, not the cause of migration](#); De Haas, H., 23 September 2015, [Don't blame the smugglers: the real migration industry](#)

people into taking dangerous and expensive routes and having to rely on smugglers, increasing risks of extortion, debt bondage and other abuses.³¹ History could not be clearer: because of the progressive increase in border surveillance in the Mediterranean since the nineties, people had no choice but to take increasingly dangerous routes.³² More recently, the militarisation process which also affected the English Channel led to the creation of “an infrastructure that completely revolves around smuggling”³³.

In addition, as mentioned above, the frequent criminalisation of migrants who steer the boat before or during shipwrecks make crossings more unsafe because migrants fear taking the helm of the boat or, in certain cases, move away from the motor when the boat is intercepted by the authorities in order not to be identified, thus creating more imbalance on board. In other cases, migrants have thrown their satellite phone overboard when the authorities were approaching, in order not to be convicted as “smugglers”, thus interrupting the contact with the rescue mission.³⁴

Over 30,000 people died trying to reach Europe in the 15-year period between 2000 and 2015.³⁵ Far from leading to a decline, increased counter-smuggling efforts seem to have had the opposite effect: in half of the time period, between 2014 and 2022, nearly 24,000 migrants have died in the Mediterranean.³⁶

Follow the money: the border industrial complex

Increasing political efforts to counter migrant smuggling have been accompanied by an expansion of the border industrial complex.³⁷ Between the 2014-2020 Multiannual Financial Framework and the 2021-2027 Multiannual Financial Framework, the EU tripled its budget dedicated to the management of external borders, migration and asylum, from 13 billion euro to 34.9 billion euro³⁸, while funding for border controls and visa processing under the Integrated Border Management Fund increased by 131%, from 2.7 billion euro to 6.2 billion euro³⁹.

Private corporations have vested economic interests in border surveillance, and play a major role in driving the expansion of this sector in order to maximise their profit.⁴⁰ The global border security market is estimated to grow between 7,2% and 8,6% every year, and will reach a total of 65-68 billion dollars by 2025.⁴¹ As highlighted by a study from The Left, major defence companies, such as Airbus, Thales, Leonardo and Indra, have lobbied for the expansion of the defence industry; and consulting firms, such as Deloitte and Atos, are also benefitting from this trend.⁴² US, Australian, European and Israeli firms leading the border security and control field are also among the world's major arms sellers.⁴³

The testing of technologies to track, identify and control people crossing borders, including those

31 While noting that people who enter into smuggling arrangements can find themselves in situations of violence, extortion, and human trafficking; PICUM insists on the continued differentiation between smuggling and human trafficking, and the importance not to conflate them in policy responses.

32 De Haas, H., 23 September 2015, [Don't blame the smugglers: the real migration industry](#).

33 The Guardian, 10 May 2021, [‘We thank your government for our full pockets’ – Calais smugglers speak](#) [Checked on 17 May 2022]

34 ARCI Porco Rosso and Alarm Phone, 2021, [From Sea to Prison: The criminalization of boat diversity in Italy: Conclusions](#)

35 OHCHR, 15 September 2015, [People on the move have human rights which require protection](#)

36 Missing Migrants Project: [24,023 missing migrants](#) recorded in Mediterranean since 2014, [Checked on 17 May 2022]

37 De Haas, H., 23 September 2015, [Don't blame the smugglers: the real migration industry](#); see also Statewatch, 06 May 2021, [Border surveillance, drones and militarisation of the Mediterranean](#)

38 UNGA, 10 November 2020, [Contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#) p. 9

39 Statewatch and the Transnational Institute, April 2022, [At what cost? Funding the EU's security, defence, and border policies, 2021-2027](#), p. 27.

40 *ibid*

41 Transnational Institute and Stop Wapenhandel, March 2021, [Financing Border Wars. The border industry, its financiers and human rights](#), p. 1.

42 The Left, 7 December 2021, [Profiteering and new border technology](#)

43 Transnational Institute and Stop Wapenhandel, March 2021, [Financing Border Wars. The border industry, its financiers and human rights](#), p. 2.

who make use of automated decision-making, have raised several concerns among civil society. As pointed out by EDRi, migration management technologies “perpetuate harms, exacerbate systemic discrimination and render certain communities as technological testing grounds”.⁴⁴

3. Counter-smuggling policies are used to create a hostile environment and deter solidarity with migrants

As mentioned above, the EU Facilitation Directive requires Member States to impose “effective, proportionate and dissuasive” sanctions on any person who facilitates someone’s irregular entry or transit across a Member State, even if they did not obtain any financial gain.⁴⁵ Article 1(2) of the Directive permits Member States to decide not to criminalise actions “where the aim of the behaviour is to provide humanitarian assistance to the person concerned”.⁴⁶ However, only eight member States (Belgium, Greece, Spain, Finland, Italy, Malta, Croatia and France) have introduced this exemption clause.⁴⁷

As a consequence, people acting in solidarity with migrants risk being accused of “facilitating their irregular entry, transit or stay” even if they did not receive any financial or material benefit. Moreover, even in the countries in which this exemption was introduced, people acting in solidarity with migrants have still been criminalised.⁴⁸ Between 2015 and 2019, at least 171 human rights defenders were investigated or convicted on grounds related to the

EU Facilitation Directive in 13 EU Member States, including volunteers, SAR NGOs, individuals.⁴⁹

After the publication of the Commission Guidance on the implementation of EU rules on the definition and prevention of the facilitation of unauthorised entry, transit and residence⁵⁰, this trend continues unabated: between January 2021 and March 2022, at least 89 human rights defenders were criminalised in the EU.⁵¹ In 88% the cases, they were charged with facilitation of entry, transit or stay or migrant smuggling.

Migrants who act in solidarity with other migrants are disproportionately hit by criminalisation policies. As mentioned above, any involvement in criminal proceedings, including when it does not lead to a conviction, can have very harmful consequences on migrants’ life, including their possibility to receive asylum or another residence permit in the EU.⁵² In addition, migrants often face harsher treatment during investigations, including lengthy pre-trial detention.⁵³

44 Molnar, P.; EDRi; and the Refugee Law Lab, 2020, [Technological Testing Grounds: Migration Management Experiments and Reflections from the Ground Up](#)

45 Council Directive [2002/90/EC](#) of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. 1(1)(a)

46 Ibid.

47 Ibid.: “Belgium, Greece, Spain, Finland, France, Croatia, Italy and Malta in the REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence cit., p. 15, as well as Article L622-4 of the French Code on Foreigners, as amended by law n°2018-778 of 10 September 2018, and Article 43, Para 2, Item 2 of Croatia’s Law on Foreigners, as adopted in 2017”

48 M. Gionco; J. Kanics, (2022) Greens/EFA report: [Resilience and Resistance in defiance of the criminalization of solidarity across Europe](#)

49 ReSOMA, 2020, [The criminalisation of solidarity in Europe](#).

50 European Commission, 23 September 2020, [Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence](#)

51 M. Gionco; J. Kanics, (2022) Greens/EFA report: [Resilience and Resistance in defiance of the criminalization of solidarity across Europe](#)

52 European Asylum Support Office (EASO), January 2016, [Exclusion: Articles 12 and 17 Qualification Directive \(2011/95/EU\). A Judicial Analysis](#), p. 42.

53 M. Gionco; J. Kanics, (2022) Greens/EFA report: [Resilience and Resistance in defiance of the criminalization of solidarity across Europe](#)

In April 2021, a Syrian man was sentenced in Greek court to 53 years in prison, accused of “facilitating illegal entry” and causing a shipwreck after Greek authorities accused him of having been at the helm of a boat that brought his family and as many as 40 people to safety.⁵⁴

In May 2020, the Croatian Ministry of Interior revoked the refugee status of an Iraqi citizen volunteering for a Croatian organisation supporting migrants on allegations that he represents a “threat to national security”.⁵⁵ The move comes after several episodes where he and his partner, who also works for the same organisation, were intimidated by the police and questioned about their work.

In Malta, in 2019, three teenagers, known as *El Hibliu 3*, have been accused of terrorism for resisting pushbacks to Libya, which would have involved them and more than other 100 people. The three teenagers, who at that time were 15, 16 and 19 years old, acted as translators during a collective protest against an attempted pushback of 108 people from Malta to Libya, where they would be facing torture and ill-treatment. Upon arrival in Malta, they were immediately detained for seven months and are currently on parole. The case against them is still ongoing, with the first witness summoned only in March 2021.⁵⁶

Besides having a chilling effect on solidarity with migrants, the excessively broad definition of smuggling also hinders the provision of normal services to undocumented people, such as transport and housing.⁵⁷ In fact, these provisions place on service providers such as taxi drivers, landlords, and Airbnb owners the burden of verifying their clients’ documents, at the risk of being considered “smugglers” if they provide services to undocumented people.

For instance, in nearly two thirds of EU member states, landlords who rent to undocumented migrants risk a fine or imprisonment⁵⁸. Provisions criminalising renting to undocumented migrants exclude people, including families with children, from the regular housing market. This pushes them into precarious, over-crowded and unsuitable housing, often at exploitative rent prices, where they face eviction, abuse and theft of rent and deposits.

54 ECRE, 30 April 2021, [Greece: Scandalous Sentence for Young Refugee, Request to Commission, Legal Action Before ECtHR and Ombudsman Report on Pushbacks](#) [checked on 27 August 2021].

55 Frontline Defenders, 21 July 2021, [Pressure on family member of migrant rights defender Tajana Tadić](#) [checked on 16 May 2022].

56 BBC, 9 August 2021, [Malta: The teenagers pulled from the sea and accused of terrorism](#) [checked on 27 August 2021].

57 ICJ, 22 April 2022, [Criminalization of humanitarian and other support and assistance to migrants and the defence of their human rights in the EU](#)

58 FRA, 2014, [Criminalisation of migrants in an irregular situation and of persons engaging with them](#)

Recommendations

As highlighted in this briefing, counter-smuggling policies can endanger the rights of migrants and people acting in solidarity with them – often causing more harm than what they seek to prevent.

In order to protect the rights of migrants and foster an enabling civic space, we recommend:

- Ensuring that legislation and measures adopted to fight migrant smuggling are not used against migrants themselves nor people defending their rights. This requires amending the definition of “facilitation of irregular entry, transit or stay” by introducing the element of “undue financial profit”, in order to exclude humanitarian actions as well as normal interactions and transactions with undocumented migrants; and introducing an obligatory exemption of humanitarian acts.⁵⁹
- Monitoring the implementation of all immigration and organized crime legislation and policy in light of their impacts on the rights of migrants and trafficked persons. In particular, this should be done through the collection of evidence base from an intersectional approach⁶⁰ by a broad range of stakeholders, including migrant communities.
- Shifting from measures which are primarily focused on border control and criminalisation towards promoting regular pathways and regularisation⁶¹ and measures to protect migrants' rights.
- Ensuring transparency in the use of technology in the context of immigration enforcement, and creating accessible means to challenge its misuse.⁶² This includes empowering equality bodies, data protection authorities, and other relevant public bodies to enhance their capacities to ensure accountability for the implications of digital technology and data processing for human rights and discrimination.

59 Joint Statement, 2019: [The EU must stop the Criminalisation of solidarity with migrants and refugees](#); see also M. Gionco; J. Kanics, (2022) Greens/EFA report: [Resilience and Resistance in defiance of the criminalization of solidarity across Europe](#)

60 Sanchez, G., 2017. [Beyond the matrix of oppression: Reframing human smuggling through intersectionality-informed approaches](#). *Theoretical Criminology*, 21(1), 46–56.

61 PICUM, 2021, [Designing labour migration policies to promote decent work](#).

62 See PICUM, 2022, [Digital technology, policing and migration – what does it mean for undocumented migrants?](#) and FRA, 11 April 2018, [Interoperability and fundamental rights implications](#)



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