

PICUM Submission to the United Nations Special Rapporteur on the situation of human rights defenders

Thematic report to the issue of human rights defenders working on issues related to migration, refugees and asylum

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The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of 164 organisations working with undocumented migrants in 31 countries, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With twenty years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

This submission is broadly based on the upcoming report “Resilience and Resistance in defiance of the criminalization of solidarity across Europe”, co-written by Marta Gionco and Jyothi Kanics and commissioned by the Greens/EFA.

Cases of human rights defenders criminalised in the EU

Criminalisation of solidarity with migrants remains a widespread phenomenon in the EU. Between January 2021 and March 2022, at least 89 people were criminalised in the EU, according to media monitoring of different national news.¹ Out of them, 18 people faced new charges, while the other 71 were ongoing cases from previous years. Four of them are migrants themselves. For 71 people, the trial is still ongoing, 3 people were convicted and 15 acquitted. People have been criminalised for actions including: providing food, shelter, medical assistance, transportation and other humanitarian aid for people who crossed the border and were in dire conditions; assisting with asylum applications; rescuing migrants at sea.

In the vast majority of the cases (88%), human rights defenders were charged with facilitation of entry, transit or stay or migrant smuggling (depending on how the crime is defined in the national legislation).² In 28% of these cases, in addition to the offense of smuggling, people were also accused of money laundering, espionage and membership of a criminal organisation.³ Other charges used to criminalise human right defenders include: disturbing the peace;⁴ conspiracy, abuse of office, fraud, extortion, embezzlement and abetting irregular immigration;⁵ being in emergency zone (i.e., at the Lithuanian and Polish borders with Belarus);⁶ illegally obtaining state secrets;⁷ hijacking a vessel and engaging in an act of terrorism;⁸ resistance and violence against a warship;⁹ complicity in trafficking in human beings.¹⁰

It is also notable that the criminalisation of solidarity has continued, and in certain cases even soared, during periods in which many countries adopted restrictions due to the COVID-19 pandemic, and during which volunteers were risking their personal safety and health to go in the street and help others.

However, these numbers are likely to only represent a very minimal percentage of the people who are criminalised in the EU for solidarity towards migrants. As already noted in the 2018 update of the report *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants*,¹¹ there is a widespread absence of statistical and official data concerning those who are being accused, charged or convicted for smuggling and related offences. Many cases of criminalisation are likely to go unreported because of fears that media attention could further endanger the relations with the authorities and limit access to border areas or reception centres; to preserve volunteers' right to private life and not to put them and their families at risk; or because some human right defenders might prefer not to speak out while trials are ongoing. In addition, our media monitoring has no claim of comprehensiveness, as some news may not be detected by our alert system. Many cases of harassment which do not amount to criminal prosecution might also not be picked up by the media.¹²

1 See M. Gionco; J. Kanics, (2022 – upcoming) Greens/EFA report: *Resilience and Resistance in defiance of the criminalization of solidarity across Europe*, Annex 3.

2 Weronika Strzyżyńska, '[Poland detains activists accused of smuggling migrants over Belarus border](#)' *The Guardian* (25 March 2022); Luventa, '[Italian prosecutor presses charges against the Juventa crew](#)' (4 March 2021); '[Un juez italiano archiva la investigación contra ONG por tráfico de migrantes](#)' *swissinfo.ch* (28 January 2022); Bartosz Rumieńczyk, '[Aktivistka przesłuchana w kajdankach. KIK: „Dlaczego są dwie kategorie uchodźców i pomagających?”](#)' [Activist interviewed in handcuffs. KIK: "Why are there two categories of refugees and helpers?"] *Oko.press* (29 March 2022); Memesita, '[Criticism of church asylum verdict against religious sister](#)' (6 June 2021); Emma Wallis, '[Greece: Migrant accused of smuggling sentenced to 146 years in prison](#)' *InfoMigrants* (14 May 2021); Paul Myers, '[French judges clear farmer who offered humanitarian solidarity to migrants](#)' *RFI* (31 March 2021).

3 Tala Michel Issa, '[Greece to put Syrian swimmer, aid workers who helped migrants on trial for espionage](#)' *Alarabia News* (18 November 2021).

4 Joanna Plucinska, '[Locals helping migrants on Poland-Belarus border fear backlash](#)' *swissinfo.ch* (15 November 2021).

5 Deutsche Welle, '[Migrant-friendly Italian ex-mayor sentenced to 13 years in prison](#)' *InfoMigrants* (1 October 2021).

6 European Council on Refugees and Exiles (ECRE), '[EU Eastern Borders: Belarus and Poland Enact Brutal Violence and Block Aid Workers, Lithuania Lifts State of Emergency](#)' (14 January 2022).

7 Associated Press, '[Greece: Norwegian photographer held on spy charge released](#)' (21 March 2022).

8 Sertan Sanderson, '[Calls to release three young asylum seekers in Malta grow, as EU countries face criticism for jailing migrants](#)' *InfoMigrants* (26 October 2021).

9 Huffington Post, '[No trial for Carola Rackete, “her duty to bring migrants to port”](#)' (19 May 2021).

10 Solidarity is not a crime, '[Communiqué 26 Mai Verdicts Procès de la Solidarité et de la migration en appel](#)' (26 May 2021).

11 Carrera et al., '[Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update](#)' (European Parliament December 2018)

12 See, for instance, [GIJTI](#) (2019), which lists several different reasons for which people have faced charges under administrative law, such as depositing waste on the street or violations of the town planning code, and which were not reported in the media.

Migrants who act in solidarity with other migrants are disproportionately affected by criminalisation policies. Criminal proceedings, including when they end in acquittals, can have a life-long impact on migrant human rights defenders' possibility to live regularly in the EU. Because of their precarious administrative situation, they are at risk of losing their residence permit, and can face arrest, detention and deportation. A first instance conviction, or even simply proof of reasonable suspicion, can have the effect of excluding them from the right to apply for asylum¹³ and from future applications for residence status. 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.¹⁴ Institutionalised racism means that migrants, or people with a migrant background, can face harsher consequences for the same circumstances or alleged offences, and receive discriminatory and unfavourable treatment during trial.

For many reasons, it is difficult to document cases of criminalisation of solidarity concerning migrants themselves. Migrants face greater risks if they speak out to denounce human right abuses and may be afraid of losing their residence status or compromising their application for international protection. The cases of some migrants have been difficult to document because they have been deported from the EU or pushed back in violation of international law. Migrants may also be more exposed to prosecution and risk of deportation when irregular entry and stay are criminal offences.

In recent years, there has also been an increased tendency of EU Member States to use counter-smuggling legislation against migrants themselves. In Italy, more than 1,000 migrants have been criminalised in the last decade.¹⁵ As reported by ARCI Porco Rosso and Alarm Phone, boat drivers are often identified on the basis of faulty photography 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.¹⁶ 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 migrants who would know how to steer boats in distress are now actively discouraged from intervening in situations of shipwrecks as this could condemn them to years of prison. Similar trends have also been analysed in Greece, where there has been a 100% increase in convictions for smuggling reported from 2016 (951 convictions) to 2019 (1,905 convictions).¹⁷

Case study 1 : Criminalisation of undocumented activists in Brussels during demonstrations

Undocumented activists in Belgium have been organising collectively and through various groups for many years.¹⁸ In 2021, campaigns,¹⁹ calls²⁰ and occupations focusing on the need for regularisation mechanisms in Belgium to be more accessible and fair were ramped up, in the face of severe and increased precarity and exploitation of undocumented people and frontline workers due to the COVID pandemic. In particular, undocumented residents and a broad range of civil society have been calling for clear and stable regularisation criteria, as well as for the re-instatement of an independent commission to hear people as part of the application procedure.²¹

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

14 Flavia Patane, Maarten P. Bolhuis, Joris van Wijk and Helena Kreiensiek, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy' (June 2020) *Refugee Survey Quarterly*, 39(2), 123-152.

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

16 *ibid.*

17 Data from the Hellenic Ministry of Justice cited in: Valeria Hänsel, Rob Moloney, Dariusz Firla and Rûnbîr Serkepkani, *Incarcerating the Marginalized: The Fight Against Alleged Smugglers on the Greek Hotspot Islands* (November 2020).

18 [La Coordination des Sans-Papiers de Belgique](#).

19 La Coordination des Sans-Papiers de Belgique et Sans-Papiers TV, '[We are Belgium too](#)'.

20 Par Mieke Van Laer and Marie-Pierre De Buisseret, '[Lettre ouverte à Madame Wilmès: La régularisation du séjour des sans-papiers n'apporte que des avantages](#)' *Le Soir* (1 May 2020).

21 FRA, '[Right to Good Administration](#)'.

During demonstrations in 2021, undocumented activists suffered police abuses, including the excessive use of violence and tear gas, and arbitrary arrests. Because of their undocumented status, they were particularly at risk of arrest, detention and deportation. Sixty-six people were arrested by the police during two demonstrations in April 2021, including for “identity checks”, while trying to reach the location of the occupation.²²

Case study 2: Racist demonstrations and attacks against migrant and refugee community in Chloraka, Cyprus

Serious incidents of violent attacks, hate speech and harassment of Syrian refugees and asylum seekers took place in Chloraka, Cyprus during a protest organised by the extreme right on 7th January 2022.²³ In response, KISA filed a report to the Attorney General and the Chief of the Police against the leader of the local council for hate speech and inciting attacks and violence, as well as against members of the police who were present for complicity and neglect of duty.

Mr Doros Polykarpou, who was Executive Director of KISA, was present at the protest because he knew that protestors came to intimidate and harrass the migrants and refugees. Protestors even used explosions at end of demonstration and threatened to return with guns. The police were present but did nothing to intervene or to deescalate the situation. Mr Polykarpou took photos and videos of the event and then went to the police station to report hate speech and other violations of the law. Afterwards, he himself was accused of violating the personal data law because he took photos and videos of the protestors.²⁴

Case study 3: The El Hiblu 3 case

In January 2022, Amnesty International reported that more than 82,000 people were intercepted at sea and returned to Libya in the last five years.²⁵ As widely documented, migrants returned to Libya face arbitrary detention, deplorable conditions and extreme abuse.²⁶ It was in this context, in March 2019, when the migrants on board the El Hiblu realised that the ship’s captain was attempting to illegally push them back to Libya, that they began to panic, refusing to be returned. Three African teenagers (now known as “El Hiblu 3”), who acted to deescalate the situation and interpreted between the crew and other migrants on the ship, were later accused by the Maltese authorities of high-jacking the ship. They were arrested upon arrival in Malta and detained for seven months. Now before a Maltese court, the “El Hiblu 3” face serious charges of terrorism and could, if convicted, spend many years - up to lifetime - in prison. Amnesty International, the Free El Hiblu 3 Campaign²⁷ and newly founded Freedom Commission²⁸ are among the many human rights defenders that continue to call for the charges against the three youths to be dropped.

22 [‘62 arrestations en marge d’une manifestation pour la régularisation des sans-papiers à Arts-Loi’, bx1.be](#) (27 April 2021); [‘Manifestation pour les sans-papiers à Bruxelles: 62 arrestations administratives’](#) RTBF (27 April 2021); [‘Manifestation de sans-papiers à Bruxelles: 4 arrestations administratives’](#) (16 April 2021); Civic Space Watch, [Activizenship #6: Civic Space Watch Report 2021: Stories of Hope in Dark Times](#) (2021) p. 14.

23 KISA, [‘Solidarity and respect of human rights: the solution to the situation in Chloraka’](#) (8 January 2022); KISA, [‘KISA condemns the racist, violent and hate speech attacks against the Syrian refugees in Chloraka’](#) (12 January 2022); KISA, [‘Backing racists and persecution of activists by the Cyprus Police’](#) (16 January 2022); KISA, [‘Refugees in Paphos faced with racism and pogroms’](#) (21 January 2022).

24 See M. Gionco; J. Kanics, (2022 – upcoming) Greens/EFA report: *Resilience and Resistance in defiance of the criminalization of solidarity across Europe*, p. 18.

25 Amnesty International, [‘Libya/EU: Conditions remain ‘hellish’ as EU marks 5 years of cooperation agreements’](#) (31 January 2022).

26 Human Rights Watch, [No Escape from Hell EU Policies Contribute to Abuse of Migrants in Libya](#) (21 January 2019); Human Rights Watch, [‘Libya: Nightmarish Detention for Migrants, Asylum Seekers’](#) (21 January 2019); UN News, [‘UN report documents horrors faced by thousands held in arbitrary detention in Libya’](#) (10 April 2018); OHCHR, [‘UN report details scale and horror of detention in Libya’](#) (10 April 2018); OHCHR, [Abuse Behind Bars: Arbitrary and unlawful detention in Libya](#) (April 2018); Ian Urbina, [‘The Secretive Prisons That Keep Migrants Out of Europe’](#) The New Yorker (28 November 2021); UN Refugee Agency (UNHCR), [‘Thousands of refugees and migrants suffer extreme rights abuses on journeys to Africa’s Mediterranean coast, new UNHCR/MMC report shows’](#) (29 July 2020).

27 <https://elhiblu3.info/>

28 [The ElHiblu3 Freedom Commission](#); Amnesty International, [‘Malta: Amnesty delegation to attend El Hiblu 3 hearing as third anniversary of arrest approaches’](#) (1 February 2022).

Case study 4: Judicial harassment of pro-transparency activists and migrants' rights defenders

In autumn 2020, the European Border and Coast Guard Agency (Frontex) launched legal proceedings to recover €23,700 in legal fees after winning an EU general court case against pro-transparency activists Luisa Izuzquiza and Arne Semsrott.²⁹ The campaigners had sought access to the name, flag and type of each vessel deployed by Frontex in the central Mediterranean. Frontex had refused their request citing security issues, and was supported by a ruling from the Court of Justice of the European Union (CJEU) in November 2019. In November 2020, other freedom of information requests filed by Izuzquiza and Semsrott revealed the role of Frontex and the Greek government in the illegal pushback of migrants in Greece.³⁰

In the context of the 2019 budget discharge, the European Parliament called on Frontex to withdraw its demand for the legal fees from transparency activists Luisa Izuzquiza and Arne Semsrott, underlying its potential chilling effect on civil society.³¹ In April 2021, the European Court of Justice stated that Frontex's legal bill of €23,700 had been excessive, and reduced it to €10,520.³²

Despite these calls, Frontex continued to seek payment from the transparency activists. In addition, Frontex has also asked the legal costs of a case brought by the organisation Front-LEX before the CJEU to be covered by the applicants, who are an unaccompanied child and a former asylum seeker who now has refugee status.³³

Laws and practices used by the authorities to target or obstruct the work of human rights defenders working on issues related to migration, refugees and asylum

A diverse range of legal provisions is being used to criminalise humanitarian assistance to migrants and acts of solidarity across Europe. The most widely applied are the anti-smuggling provisions transposed into national laws³⁴ in line with the provisions of the EU Facilitation Directive. The Facilitation Directive³⁵ leaves it up to the EU Member States whether to exempt or to criminalise civil society organisations (CSOs) and individuals who provide assistance to migrants who entered or transited a country irregularly. The European Commission has reported that only eight Member States (Belgium, Croatia, Finland, France, Greece, Italy, Malta and Spain) have introduced a "humanitarian exemption" clause into legislation.³⁶ However, even in these countries, this clause is not always applied in practice.

In 2020, the European Commission issued *Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence*.³⁷ Some important shortcomings limit the impact of the guidance in preventing criminalisation of solidarity. In particular, the text of the guidance invites Member States not to criminalise acts that are "mandated by law". However, as also flagged by civil

29 Nikolaj Nielsen, '[Frontex hits activist pair with €24,000 legal bill](#)' *EUobserver* (27 February 2020).

30 Nikolaj Nielsen, '[Revealed: Official Greek order to illegally pushback migrants](#)' *EUobserver* (18 November 2020)

31 *ibid.*

32 '[EU General Court reduces the legal costs claimed by Frontex against transparency activists](#)' *Access Info* (19 April 2021)

33 Statewatch, '[EU: Frontex asks court to reject human rights case, seeks legal costs from asylum seekers](#)' (5 January 2022).

34 FRA, *EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay* (2014). This chart contains both administrative and criminal law provisions.

35 [Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence](#), Article 1 para. 2.

36 European Commission, [Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01](#). 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.

37 European Commission, [Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01](#)

society organisations,³⁸ referring to “acts mandated by law” has very different meaning from acts “permitted by law.” Activities such as providing food, shelter and information risk being excluded, in particular if they are not carried out by an organisation that is “mandated” to carry out such activities. The almost exclusive focus on search and rescue in the guidance also risks leaving out activities on the territory and activities that are not directly life-saving.

This approach was further reiterated by the European Commission’s Renewed Action Plan Against Migrant Smuggling (2021-2025)³⁹, which clarifies that acts which are “mandated by law” should never be criminalised. However, the Action Plan further states that a different set of rules applies to what the Plan calls “humanitarian acts not mandated by law”. With regard to these acts, Member States are merely “invited” to make use of the possibility to amend their national legislations to exempt them from criminalisation.⁴⁰

In addition to anti-smuggling provisions, governments are also using other administrative and criminal law provisions to hinder humanitarian assistance and solidarity. For example, national security arguments and anti-terrorism legislation have also been used to criminalise those involved in humanitarian assistance. When national security clauses are applied, it is frequent that lawyers, as well as the accused themselves, are denied access to important documents, which seriously hinders their right to defence. In addition, the penalties for such offences may also result in the migrant concerned having their residence or international protection status revoked.

Recommendations to help protect and promote the work of human rights defenders working on issues related to migration, refugees and asylum

The criminalisation of migration and people acting in solidarity with migrants is a complex, deep-rooted phenomenon. At the source is the criminalisation of migration itself, and for this reason, the first step to work towards its end would be embracing a different narrative and approach to migration through legal changes which do not criminalise undocumented people and people crossing borders irregularly. This also includes refraining from xenophobic discourse, which foments a climate of suspicion against migrants and NGOs and volunteers helping them.

Secondly, national legal frameworks should be amended in line with the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) Guidelines on Freedom of Association⁴¹ and the Opinions of the expert council on NGO law of the Council of Europe⁴².

Thirdly, as several migrants’ and human rights’ defenders are unfairly accused of migrant smuggling, it is pivotal to narrow the interpretation of the crime of migrant smuggling in line with the UN Migrant Smuggling protocol and fundamental rights, by limiting it to acts carried out to obtain unjust profit and in connection with transnational organised crime. The interpretation of the crime of migrant smuggling should not prevent the realization of the fundamental rights of undocumented migrants, including access to housing, services and collective organising.

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38 Red Cross EU Office, *Position Paper: Protecting the humanitarian space to access and support migrants* (3 March 2021); PICUM, *‘More detention, fewer safeguards: How the new EU Pact on Migration and Asylum creates new loopholes to ignore human rights obligations’* (14 October 2020).

39 European Commission, *A renewed EU action plan against migrant smuggling (2021-2025)* - COM(2021) 591(29 September 2021); European Commission, *EU Action Plan against migrant smuggling (2015 – 2020)* COM(2015) 285 final (27 May 2015).

40 PICUM, *‘The New EU Action Plan against Migrant Smuggling is Failing Migrants’* (7 October 2021).

41 OSCE/ODIHR and Venice Commission, 2015, *Guidelines on Freedom of Association*.

42 See, for instance, ODIHR, Council of Europe – Expert Council on NGO law (2 July 2020) *“Opinion on the compatibility with European standards of recent and planned amendments to the Greek legislation on NGO registration”*, and Council of Europe – Expert Council on NGO law (23 November 2020) *“Addendum to the opinion on the compatibility with European standards of recent and planned amendments to the Greek legislation on NGO registration”*.