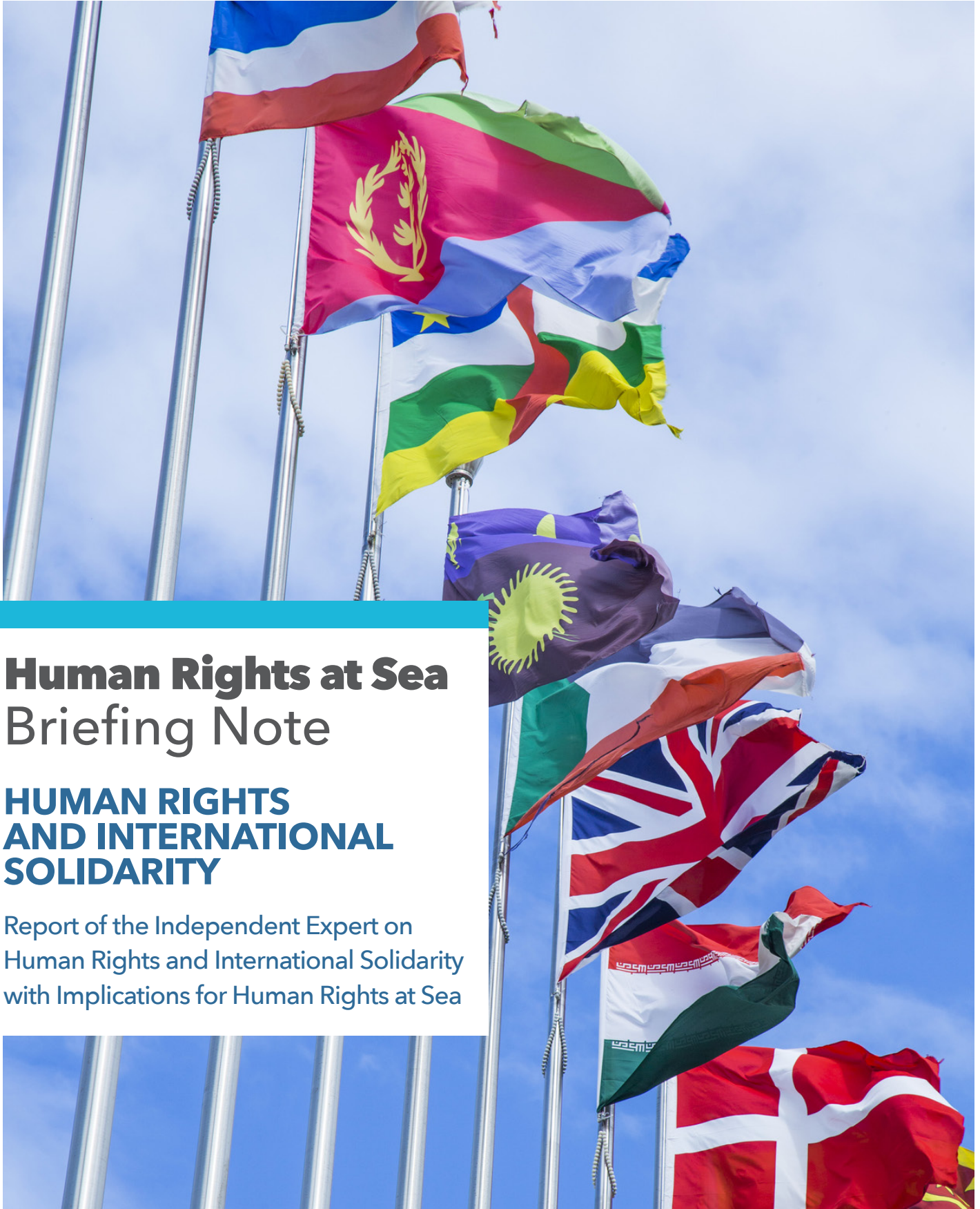




HUMAN RIGHTS AT SEA



Human Rights at Sea Briefing Note

HUMAN RIGHTS AND INTERNATIONAL SOLIDARITY

Report of the Independent Expert on
Human Rights and International Solidarity
with Implications for Human Rights at Sea

Human Rights at Sea

BRIEFING NOTE - REPORT OF THE INDEPENDENT EXPERT ON HUMAN RIGHTS AND INTERNATIONAL SOLIDARITY WITH IMPLICATIONS FOR HUMAN RIGHTS AT SEA



Foreword

For six years the UK-based charitable NGO, Human Rights at Sea, has been researching, educating, advocating and constructively lobbying for change of institutional and generational attitudes in the maritime sector for better awareness, protections and effective remedies stemming from human rights abuses at sea, reflecting the fundamental rights established the 1948 Universal Declaration on Human Rights. Today, the discussion and emerging international narrative concerning human rights at sea as a concept and its practical application continues to rapidly develop from academic, commercial, State and civil society perspectives; something which factually was not occurring in 2013 when the platform was conceived. The present report of the UN Independent Expert on human rights and international solidarity reflects much of the work being carried out and often triggered, if not led by Human Rights at Sea, but this maritime focus area for human rights development remains little known about, or if known about, shunned and ignored in favour of commercial and competitive advantage. This briefing note is part of the continuous awareness raising campaign led by Human Rights at Sea.

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¹ <https://www.doughtystreet.co.uk/barristers/susie-alegre>

² See Annexe 1: Report of the Independent Expert on human rights and international solidarity, 6 April 2019, A/HCR/41/44

³ https://www.humanrightsatsea.org/wp-content/uploads/2019/02/2019_HRAS_Briefing_Note_Criminalisation_SAR_SECURED.pdf

⁴ A/HCR/41/44 at para 26

⁵ https://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁶ Article V

⁷ Article 10

⁸ Article 2

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Introduction

Human rights are universal, they apply at sea as they do on land. But effective protection of human rights at sea outside the territorial waters of States is impossible without international solidarity and recognition of the extra-territorial responsibility of States for human rights on the world's oceans.

The recent 2019 report² of the UN Independent Expert on human rights and international solidarity presented to the Human Rights Council Forty-First Session earlier this summer highlighted some of the challenges faced by those providing humanitarian assistance at sea in the current global climate of hostility towards migrants.

The report flags important points on human rights at sea and the wider problem of criminalisation and attacks on those providing humanitarian assistance to migrants wherever and wherever they may be.

As an independent charitable NGO, Human Rights at Sea has worked on many of the issues raised in the report including the human rights implications of the criminalisation of search and rescue (SAR) missions conducted by civil society organisations³.

We welcome the report and look forward to working closely with the Independent Expert and other UN Bodies on developing further work to address the legal and practical complexity of ensuring human rights at sea in the context of international solidarity.

This briefing note provides an overview of some of the specific implications of human rights and international solidarity for human rights at sea. The Charity aims to use it as a basis for developing further detailed analysis and engagement at UN level to ensure that human rights standards and protections at sea are real and effective in the same way as they are on land.

Human Rights at Sea and International Solidarity

1. Duty to Rescue any Person at Sea

As the Independent Expert notes in their report, the duty to rescue any person in distress at sea is well established in international law⁴. Article 98 of the United Nations Convention on the Law of the Sea⁵ provides a duty to render assistance. This *obliges* every State to require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him. It also *obliges* every coastal state to establish and maintain an adequate search and rescue service for safety on and over the sea, including through regional cooperation where circumstances require it.

Other international Conventions such as the International Convention for the Safety of Life at Sea 1974,⁶ the International Convention on Salvage 1989,⁷ and the International Convention on Maritime Search and Rescue 1979⁸ extend similar duties to all ship's masters regardless of the flag State and the duty to rescue any person in distress at sea, like the Universal Declaration of Human Rights may be considered as customary international law.

These obligations reflect the serious consequences for people finding themselves in distress at sea and the imminent risk to life of such situations. **The duty to rescue any person at sea applies to the master of any ship, whether a humanitarian vessel, a fishing boat, commercial ship or State search and rescue vessel.** And that duty must be respected without discrimination, regardless of the characteristics of the people in distress, their race, nationality, age, gender, immigration status or any other characteristic.

With irregular migration routes increasingly crossing the oceans, seafarers find themselves called upon to rescue large numbers of people in distress at sea including children and babies. The duty to rescue any person at sea is key to ensuring the protection of human rights at sea, including the right to life and the rights of the child are real and effective. The international community must ensure that ship's masters are able to fulfil their duty under international law.

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2. Duty to Allow Disembarkation

The Independent Expert notes that there is some argument about the legal gap between the duty to rescue at sea and the obligation on coastal states to allow for disembarkation of those rescued.

Human Rights at Sea absolutely supports the Independent Expert's analysis that "the international treaties could not have established the obligation to rescue persons in distress at sea without contemplating an implied requirement that such persons be allowed to disembark in as nearby a port as is practicable."⁹ Without such a requirement, the duty to rescue could not be fulfilled in practice and the protection of the right to life at sea could not be real and effective.

As well as undermining the practical effectiveness of the duty to rescue, failure to allow disembarkation has further implications for the rights of those provided with humanitarian assistance and the crews on the ships concerned.

Resources are limited on a ship and rescuing large numbers of people in distress at sea could have implications for the rights of access to healthcare, food and water of those rescued and of the crew on board. Where disembarkation is refused in several ports, both crew and people rescued at sea are effectively deprived of their liberty as they are unable to leave the ship.

Refusal of disembarkation also has consequences for the rights of those onboard to seek asylum or international protection.

3. Criminalisation of Humanitarian Assistance

Criminalisation of humanitarian assistance is a worrying trend on land and at sea as the Independent Expert highlights in the report and which was first addressed by the charity in 2016 in the publication 'Volunteer Maritime Rescuers: Awareness of Criminalisation'¹⁰ and again this year in the publication 'Legal and Policy Matters Arising from the Increased Criminalisation of Civil Society Search and Rescue Activities in the Mediterranean'.¹¹

When laws criminalise humanitarian assistance at sea, they put seafarers in direct conflict with their international duty to rescue people in distress at sea and undermine one of the key legal principles to protect the right to life at sea. **Criminalising people for saving lives is not compatible with international human rights law or the international law of the sea.**

Despite the clear incompatibility of such laws on a national or regional level with the practical application of customary international law, Human Rights at sea¹² has documented many cases where such laws have been used to prosecute ship's masters for fulfilling their duty to rescue at sea. Even though, as the report highlights, many of the prosecutions have failed, many seafarers and civil society members, including those in charge of humanitarian vessels, fishermen and other members of the public have had to face lengthy detentions, pre-trial processes and trials, often lasting several years, some of them in countries far from home. **These proceedings raise questions about the right to a fair trial and the right to liberty pending the outcome of proceedings as well as having an impact on the rights to family life, freedom of association and other economic and social rights of those affected and their families.**

⁹ A/HRC/41/44 at para 29

¹⁰ https://www.humanrightsatsea.org/wp-content/uploads/2015/05/HRAS-Voluntary-Maritime-Rescuers-Awareness-of-Criminalisation_2016-SP-LRSecured.pdf

¹¹ https://www.humanrightsatsea.org/wp-content/uploads/2019/02/2019_HRAS_Briefing_Note_Criminalisation_SAR_SECURED.pdf

¹² Include examples

¹³ See for example European Court of Human Rights Judgment of 23 February 2012 in the case of Hirsi Jamaa and Others v Italy



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4. Extra-Territoriality, Jurisdiction and Regional Cooperation

Rescue at sea often occurs outside the territorial waters of a State, but this does not mean that there are no State obligations to guarantee the rights of the ship's crew and those rescued. Human rights are universal, and States and the international community have obligations to ensure that they are made real and effective for all people, on land and at sea. A State's jurisdiction in terms of human rights obligations extends to its territorial waters and ships which bear its flag on the high seas¹³ as well as to situations where a State intercepts a vessel on the high seas taking effective control of those on board.¹⁴

The Independent Expert highlights the problem that, rather than supporting international cooperation to protect human rights at sea, certain regional approaches to migration have an adverse effect on State's willingness to support humanitarian assistance. The report does note some positive examples in the European context of EU Member States applying humanitarian exceptions in order to decriminalise acts of rescue at sea in accordance with international law. But it is unfortunate that the humanitarian exceptions contained in EU migration law are voluntary rather than obligatory. **It is important to note that regional law frameworks on migration do not override the human rights obligations of the States that subscribe to them.**¹⁵

International solidarity and cooperation are crucial to the effective protection of human rights at sea. Coastal States and islands are on the front lines of humanitarian support at sea, but they often lack the resources to manage humanitarian assistance efforts adequately. International cooperation and regional responses to humanitarian crises are needed to ensure appropriate protection for the human rights of those who rescue and are rescued at sea.

As the Independent Expert's report underlines, the focus of much international cooperation is on stemming flows of migrants, whatever the consequences for human rights. Human Rights at Sea hopes that the report will spur change so that States and regional and international organisations can instead concentrate on cooperation to protect human rights at sea in line with their international commitments to ensuring that human rights are universal.

Conclusions and Recommendations

The Independent Expert's Report on Human Rights and International Solidarity raises key issues around the effective protection and promotion of human rights at sea in the context of humanitarian rescue efforts.

It makes clear the need for international cooperation to support and reinforce the duty to rescue people in distress at sea without discrimination. It also highlights the urgent need to clarify that the duty to rescue implies an obligation on States to allow for disembarkation in as near a port as is possible taking account of the potential requirements of international protection.

In the context of rescue at sea, criminalisation of humanitarian assistance is directly at odds with customary international law. This should be clarified by making humanitarian assistance exceptions to migration law obligatory rather than optional. The complexity of extra-territorial jurisdiction and responsibility for human rights at sea requires clarification at the international level to reinforce the principle that human rights are universal and must be protected at sea as they are on land.

Human Rights at Sea hopes that the Independent Expert's Report will serve as a first step towards developing strong international frameworks to ensure that human rights at sea are protected effectively through effective international cooperation. The Charity looks forward to working with UN human rights bodies to develop sound principles for the protection of human rights at sea based on international law and make the following recommendations for developments at the UN level to build on this:

- **Special Procedures Thematic Reports on human rights at sea and international solidarity and on the rights of migrants**
- **General Comment on the human rights obligations of States at sea including the duty to allow for disembarkation following rescue at sea**
- **Establishment of a Special Rapporteur on human rights at sea**

¹⁴ See for example European Court of Human Rights Judgment of 23 March 2010 in the case of *Medvedev and Others v France*

¹⁵ See judgment of *Hirsi Jamaa and Others v Italy* above for analysis of the application of the European Convention on Human Rights in the context of implementation of EU law on migration

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Reference Annex

The following report is the third prepared by the Independent Expert on human rights and international solidarity, **Obiora Chinedu Okafor**, and the second that he has addressed to the Human Rights Council. In the report, submitted pursuant to Human Rights Council resolution 35/3, the Independent Expert engages with the issue of the criminalisation or suppression of the rendering of humanitarian assistance to migrants and refugees who enter a State in an irregular manner.

Reference Annex

By Obiora Chinedu Okafor, Special Rapporteur

United Nations

A/HRC/41/44



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**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Human rights and international solidarity

Report of the Independent Expert on human rights and international solidarity

Summary

The present report is the third prepared by the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, and the second that he has addressed to the Human Rights Council. In the report, submitted pursuant to Human Rights Council resolution 35/3, the Independent Expert engages with the issue of the criminalization or suppression of the rendering of humanitarian assistance to migrants and refugees who enter a State in an irregular manner.

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I. Introduction and activities of the Independent Expert

1. Since reporting to the Human Rights Council in June 2018, the Independent Expert on Human Rights and International Solidarity presented his second thematic report to the General Assembly, in which he discussed the enjoyment or lack thereof of human rights-based international solidarity in the global migration context. The Independent Expert conducted two country visits in 2018, to Sweden from 23 to 27 April and to the Netherlands from 5 to 13 November (A/HRC/41/44/Add.1 and A/HRC/41/44/Add.2). In March 2019, the Independent Expert also participated in the second High-level United Nations Conference on South-South Cooperation in Buenos Aires. The Independent Expert reminds States from which he was awaiting invitations at the time of writing about the need for positive replies to his requests to visit.

2. In the present report, the Independent Expert engages with the question of compliance under both general international law and international human rights law of the criminalization and suppression of human rights activists and other humanitarian actors who show solidarity to migrants and refugees by assisting them to access the enjoyment of their basic human rights. The domestic and regional laws and practices that criminalize or suppress the expressions of this kind of solidarity and the behaviour by a section of civil society that suppresses it, are discussed and analysed against the background of the relevant general international law and international and human rights law norms and rules.

3. Given the continued salience and importance of migration issues in our time; the highly consequential nature of the efforts that have been made by some States, regional organizations and sections of civil society to criminalize or suppress the expression of international solidarity to irregular migrants and refugees; and the serious human rights implications of those actions, the Independent Expert considered it important to focus on this specific issue. It is hoped that the analysis, conclusions and recommendations made here will be taken into consideration by all stakeholders.

4. The report is set out in seven sections. This first section introduces the report. Section II is devoted to a discussion of the domestic laws and practices that criminalize or suppress humanitarian assistance to irregular migrants and refugees. In section III, certain regional laws and practices that criminalize or suppress humanitarian assistance to irregular migrants and refugees are considered. Section IV focuses on the suppression of pro-migrant and refugee solidarity in some countries or locations by a section of civil society. In section V, an analysis of the legality or otherwise under general international law of the laws and practices that criminalize or suppress pro-migrant and refugee solidarity is set out. Section VI is devoted to an analysis of the legality or otherwise of such laws and practices under international human rights law. Drawing from the preceding discussions in the report, section VII offers concluding remarks and some recommendations for reform that is pro-human rights.

II. Domestic laws and practices that criminalize or suppress humanitarian assistance to irregular migrants or refugees

5. The Independent Expert wishes to highlight with examples evidence of the suppression and criminalization of expressions of human rights-based international solidarity (the so-called crimes of solidarity¹) in many countries around the world. They can be organized around a number of discrete categories, as set out below.

¹ See Liz Fekete, Frances Webber and Anya Edmond-Pettitt, “Humanitarianism: the unacceptable face of solidarity” (Institute of Race Relations, 2007), p. 3.

Suppression and criminalization of those who perform humanitarian rescues of irregular migrants at risk of death at sea

6. There are a number of examples of this type of response to mass migration, especially across the Mediterranean Sea from North Africa to Europe. The practice of targeting humanitarian groups that make efforts to rescue irregular migrants in distress at sea is, unfortunately, a longstanding one.² As far back as 2004, a ship (the *Cap Anamur*) belonging to a German humanitarian non-governmental organization (NGO) encountered an unseaworthy vessel in grave danger, carrying 37 African refugees en route from Libya to Italy, and rescued the refugees, thereby saving their lives. Its subsequent request to dock at a port was denied by the Coast Guard. For 11 days, the *Cap Anamur* sailed the high seas near territorial waters, until it was forced to dock owing to distress on board. The captain and first officer of the ship and the director of the NGO were immediately detained by the authorities on charges of aiding irregular migration. They were, however, acquitted of the charges five years later.

7. In 2007, in the *Morthada/el-Hedi* case, crew members of two Tunisian fishing boats who had rescued 44 migrants in distress, were detained upon their boats arriving in port.³ The crew members were tried on charges of human smuggling, under the heads of “facilitation of unauthorized entry,” and “aggravating circumstances for organized crime”.⁴ Although all of them were eventually acquitted either at first instance or by the Court of Appeal at Palermo, this took between two and four years.⁵ Much more recently, in March 2018, a rescue ship of the Spanish humanitarian NGO Proactiva Open Arms was seized and a human smuggling investigation against its crew was opened after the vessel brought approximately 216 migrants stranded on the high seas into port and refused to hand them over to the authorities of the country of departure.⁶ On 16 April 2018, a court found that the rescue on 15 March 2018 of migrants off the coast by the humanitarian group had been justified because migrants and refugees faced “grave violations of human rights” in the country of departure.⁷ However, On 24 April 2018, the Supreme Court rejected an appeal against the seizure of an NGO rescue ship, the *Iuventa*, impounded in August 2017 following an investigation initiated by authorities into NGOs in the Mediterranean.⁸

Prosecution or suppression of humanitarians who assist the entry into a country of irregular migrants (including by transporting them to a border)

8. The Independent Expert considers that this practice is widespread. A statement by a European Immigration Minister in 2008 before the Lower House of that country’s parliament that the provision of even tacit support to irregular migrants was no longer acceptable to the Government and that the Government would investigate means of making “those who accompany and advise asylum seekers ... responsible for their acts” is a good example of that tendency.⁹ Authorities of another country have prosecuted some persons for assisting entry, even when the humanitarian motives of such alleged offenders should have been clear.¹⁰ Similar arrests and/or prosecutions have occurred in a number of European countries.

² See Liz Fekete, “Europe: crimes of solidarity”, *Race and Class*, vol. 50, No. 4 (April 2009).

³ See Tugba Basaran, “Saving lives at sea: security, law and adverse effects”, *European Journal of Migration and Law*, vol. 16, No. 3 (2014).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ See BBC News, 19 March 2018, available at www.bbc.com/news/world-europe-43455555.

⁷ See <https://af.reuters.com/article/libyaNews/idAFL8N1RT4FQ>.

⁸ See www.aljazeera.com/news/2018/04/italian-court-rules-iuventa-rescue-vessel-remain-impounded-1804241151621.html.

⁹ See Liz Fekete, “Europe: crimes of solidarity”.

¹⁰ See Liz Fekete, Francesca Webber and Anya Edmond-Petit, “Humanitarianism: the unacceptable face of solidarity”, pp. 53–54.

Prosecution or suppression of humanitarians who assist irregular migrants with transportation within a country

9. This humanitarian activity frequently attracts the ire of many States. In 2005, two young volunteers working with a North American humanitarian advocacy group, No More Deaths, were charged with transporting and conspiring to transport “in furtherance of an illegal presence.”¹¹ Those are felony charges that could potentially lead to a sentence of 15 years in prison and charges arose from the volunteers driving three migrants who were ill to a medical clinic.¹² In one European country, despite their humanitarian motives, several citizens have been charged with violating immigration laws, and convicted (at least during their trials at the courts of first instance), after driving migrants to a railway station, or helping them to get on boats.¹³

Prosecution or suppression of humanitarians who provide the necessities of life to irregular migrants

10. In one North American country, humanitarian groups, such as the one mentioned above, have for years provided the basic necessities of life, like water, food and medical assistance, to irregular migrants within the southern border.¹⁴ Such groups have often been confronted with efforts to intimidate and/or criminalize them.¹⁵ Other examples of this type of response to mass migration are provided by the professional and administrative measures taken against members of the medical profession in one European country for providing medical assistance to irregular migrants.¹⁶

Prosecution or suppression of humanitarians who rent accommodation to irregular migrants

11. Like other forms of the criminalization or suppression of the expression of solidarity to irregular migrants, humanitarian groups or individuals who rent accommodation to such migrants have suffered threatened or actual prosecutions at the hands of their Governments. For example, one study has shown that this type of action is criminally punishable and is actually punished in some form in some European countries.¹⁷ However, the criminalization of such conduct appears to be less common outside Europe. A few countries in South-East Asia and the Middle East also require anyone who provides accommodation to foreigners to keep records and notify the authorities, failing which administrative and criminal penalties can arise.¹⁸ Some entities and cities in one North American country also have legislation penalizing and even jailing individuals for renting apartments to irregular migrants.¹⁹

Prosecution of religious authorities, NGOs and others who provide housing or sanctuary to irregular migrants

12. In one North American country, the prosecution of churches, humanitarian groups or individuals who offer sanctuary or a place of safety to irregular migrants facing capture or

¹¹ See Maria Lorena Cook, “Humanitarian aid is never a crime: humanitarianism and illegality in migrant advocacy”, *Law & Society Review*, vol. 45, No. 3 (September 2011).

¹² *Ibid.*

¹³ See Liz Fekete, Francesca Webber and Anya Edmond-Pettitt, “Humanitarianism: the unacceptable face of solidarity”, p. 53.

¹⁴ See Andrew Burridge, “Differential criminalization under operation streamline: challenges to freedom of movement and humanitarian aid provision in the Mexico-US borderlands”, *Refuge*, p. 83.

¹⁵ See Kristina M. Campbell, “Humanitarian aid is never a crime: the politics of immigration enforcement and the provision of sanctuary”, *Syracuse Law Review*, vol. 63 (2012).

¹⁶ See Liz Fekete, “Europe: crimes of solidarity”.

¹⁷ See European Union Agency for Fundamental Rights, “Criminalization of migrants in an irregular situation and of persons engaging with them” (March 2014).

¹⁸ This information was gleaned from a survey of the domestic immigration laws of these States.

¹⁹ See National Commission on Fair Housing and Equal Opportunity, “The future of fair housing” (December 2008), p. 49.

deportation by State authorities has been happening for several decades.²⁰ In one European country, a number of citizens have been prosecuted and some have been convicted and given heavy fines for providing housing or sanctuary to migrants.²¹ For instance, some members of an NGO, Refugees Welcome to the Arctic, were arrested in 2016 and charged with “assisting illegal residence” after trying to help Syrian refugees threatened with removal to another country move into a place of safety in a church. All three of them were fined by the public prosecutor. One of them refused to accept the fine and his case went to court. He was acquitted in 2017, on the basis that although he was careless and his behaviour risky, it had not been proved that it was criminal.²²

Prosecution or suppression of humanitarian lawyers who provide legal advice to irregular migrants

13. There have been instances of harassment and threats to immigrant rights lawyers. In April 2017, Northwest Immigrant Rights Project, a respected NGO in one North American country that represents immigrants in deportation proceedings received a “cease and desist” letter²³ from that country’s Department of Justice demanding that it drop representation of its clients and close down its asylum advisory programme. The NGO was accused of breaking a rule that was put in place to protect people from lawyers or notaries who take their money and then drop their case.²⁴ They were, however able to successfully challenge the letter in court.²⁵

Punishment of cities which provide sanctuary to irregular migrants

14. In some States, some cities have adopted and executed resistance or non-cooperation policies in opposition to certain legislation or actions taken by the central Governments of their countries that these cities have interpreted as inimical to the human rights of irregular migrants and refugees.²⁶ That has often included the provision of affirmative benefits to them.²⁷ Such cities have faced a backlash from their central Governments aimed at punishing or suppressing them for their adoption of this kind of oppositional stance.

Prosecution or intimidation of humanitarians and others who participate in or support street protests in solidarity with irregular migrants

15. In one European country, lawsuits were instituted by the authorities in 2007 against some persons who had supported a national day of solidarity that was observed that year by pro-immigrant civil society groups and measures were later introduced that allowed the Government to gather and store information about supporters of asylum seekers and undocumented migrants.²⁸ In another European country, some persons who participated in community protests against a raid on a migrant family were indicted and charged with breach of the peace.²⁹

²⁰ See Liz Fekete, Francesca Webber and Anya Edmond-Pettitt, “Humanitarianism: the unacceptable face of solidarity”, p. 3.

²¹ *Ibid.*, p. 55.

²² *Ibid.*

²³ See Department of Justice, letter, 5 April 2017, available at www.nwirp.org/wp-content/uploads/2017/05/Dkt-1-1-exhibit.pdf.

²⁴ See Rachel B. Tiven. “The airport lawyers who stood up to Trump are under attack: the Department of Justice is perverting a rule to shut down immigration-rights lawyers”, *The Nation*, 19 May 2017.

²⁵ *Northwest Immigrant Rights Project v. Sessions*, order No. 2:17-cv-00716, available at www.nwirp.org/wp-content/uploads/2017/05/Dkt-33-order-granting-tro.pdf.

²⁶ See Kristina M. Campbell, “Humanitarian aid is never a crime: the politics of immigration enforcement and the provision of sanctuary”.

²⁷ *Ibid.*

²⁸ See Liz Fekete, “Europe: crimes of solidarity”.

²⁹ *Ibid.*

Threats to prosecute, deport or suppress those who campaign on behalf of or speak in support of irregular migrants (or actually taking such measures)

16. In February 2018, a group of United Nations human rights experts criticized one North American country for issuing a notice to appear at deportation proceedings to a Mexican woman who was at the forefront of a campaign against the alleged ill-treatment of migrant detainees in that country; a step that appeared to have been related to her advocacy work. The experts also expressed concern that her treatment appeared to be part of “an increasing pattern of intimidation and retaliation against people defending migrants’ rights.”³⁰ In one European country, the authorities once issued a threat to prosecute, under their Foreigners Law, politicians who had spoken in support of a 15-year-old migrant girl who had been provided with sanctuary by a Catholic priest.³¹

Prosecution or suppression of persons who participate in or support protests on board aircraft in solidarity with irregular migrants about to be deported

17. On March 2017, a group of 15 activists prevented a secretive chartered deportation flight by chaining themselves to the plane and lying on the tarmac for over 10 hours. The activists were charged with various crimes, including aggravated trespass and the terrorism-related offence of endangering airport security, which carry a maximum of life imprisonment. Their trial started on 14 March 2018 at a criminal court and is expected to take a long time.³² Prosecutions for such protests have also been undertaken in other European countries. It is noteworthy that although many of the persons prosecuted in the instances recounted in the paragraphs above were eventually acquitted by higher courts in the countries at issue, they were still subjected to the considerable rigours and anxieties of being temporarily criminalized and forced to defend themselves in the law courts, sometimes at great personal expense.

18. It should also be observed that the practice of criminalizing or suppressing those who offer humanitarian assistance to irregular migrants and refugees is usually authorized under the domestic laws and practices of the countries at issue. As regards the “offence” of assisting entry into a country, in a recent study, it was reported that in four of the six countries assessed, assisting the entry of irregular migrants into any of their territories could attract criminal sanctions, even if it was not done for gain.³³ With regard to assisting the stay of irregular migrants in a given country, the study also found that this activity was punishable or otherwise sanctioned under the laws of all the six countries assessed, except that in four of them, to be punishable, such assistance must have been for financial gain. That is an element of the offence that could perhaps shield those who render humanitarian assistance to irregular migrants from being convicted, although it would not necessarily prevent their arrest and prosecution.³⁴ The Independent Expert’s review of domestic legislation around the world indicates that the position of the law with regard to criminal or regulatory liability for assisting the entry or stay of irregular migrants appears to be similar in many other European countries, as well as in most of Africa, Asia and Latin America.³⁵ With regard to renting housing to irregular migrants, the Independent Expert’s global review of national laws suggests that this activity is also criminalized or otherwise suppressed by law in a large number of countries around the world.

19. Importantly, some European countries have introduced humanitarian exceptions to their anti-smuggling and other immigration laws and have thus decriminalized most forms of the expressions of solidarity with irregular migrants. For example, in 2012 France passed legislation that exempts specific family members of irregular migrants from prosecution

³⁰ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22657&LangID=E.

³¹ See Liz Fekete, “Europe: crimes of solidarity”.

³² Frances Webber. “Institute of Race Relations.” Interview, 8 March 2018.

³³ See M. Provera, “The criminalization of irregular migration in the European Union”, Centre for European Policy Studies paper in Liberty and Security in Europe, No. 80 (February 2015).

³⁴ Ibid.

³⁵ See also Andreas Schloenhardt, “Trafficking in migrants in the Asia-Pacific: national, regional and international responses”, *Singapore Journal of International and Comparative Law*, vol. 5 (2001).

and other persons providing legal advice, food, accommodation, medical care, or “any other assistance to preserve the dignity or physical integrity of the person” to such migrants.³⁶ Suggested by European Union law,³⁷ such “optional humanitarian clauses”, however limited in scope, have also been introduced into the laws of a number of other European countries, including Belgium, Germany and Italy (explicit exemptions for humanitarians who come to the aid of any type of migrant); Finland and Denmark (only in an implicit way); Ireland, the United Kingdom of Great Britain and Northern Ireland and Spain (only for those who help asylum seekers); and Greece (only for those who rescue migrants at sea or who help those in need of international protection).

20. What is more, in a handful of other States, courts have held that the rendering of humanitarian assistance to irregular migrants cannot in and of itself be considered as criminal conduct. For example, in Austria the Constitutional Court decided in 2006 that the provision of humanitarian aid without the intention to prevent official measures over a longer time did not meet the elements of the offence. In France, the recent decision of the Constitutional Court, holding that Cedric Herrou was not guilty of smuggling migrants (including asylum seekers) into France because he acted under the principles of fraternity (i.e. solidarity), is highly instructive and progressive.³⁸ In Canada in 2015, the Supreme Court held in *R v. Appulonappa* that the Immigration and Refugee Protection Act was unconstitutional to the extent that it failed to make a distinction between humanitarian smuggling and for-profit smuggling.³⁹ The court found that the material or financial gain threshold contained in the definition of human smuggling in the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organized Crime was an indication that it was not intended to criminalize humanitarian smuggling.

III. Regional laws, policies and practices that criminalize or suppress humanitarian assistance to irregular migrants or refugees

21. There are at least two regional-level pieces of legislation in Europe that have contributed the most directly and significantly to the maintenance of the legal regimes in most European States that suppress and criminalize humanitarian assistance to irregular migrants. Both legal instruments were aimed specifically at curbing irregular migration to Europe by strengthening the criminalization of acts undertaken in aid of such migrants. The main one is European Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, which had been adopted by all member States of the European Union by 2007.⁴⁰ The Directive requires member States acting before 5 December 2004 to implement effective, proportionate and dissuasive sanctions against persons who instigate, participate or attempt to assist a person who is not a national of a member State to enter or transit across the territory of a member State in breach of the laws of the State concerned on the entry or transit of non-citizens. However, the Directive, through its so-called “optional humanitarian clause,” leaves it to the discretion of member States to introduce (or not introduce) a limited exception to those rules to cover cases in which humanitarian assistance is rendered to irregular migrants (except in those cases in which the assistance is aimed at helping the irregular migrant

³⁶ See Mark Provera, “The criminalization of irregular migration in the European Union”.

³⁷ See Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence (28 November 2002).

³⁸ Case of Cedric Herrou and others, Constitutional Court décision No. 2018-717/718 QPC of 6 July 2018, available at www.conseil-constitutionnel.fr/decision/2018/2018717_718QPC.htm.

³⁹ See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15648/index.do>.

⁴⁰ See Kay Hailbronner and Georg Jochum, “Synthesis report on the implementation of the directive on facilitation of unauthorised entry and stay of 28 November 2002” (Academic Network for Legal Studies on Immigration and Asylum in Europe, 2007).

reside in a country of the European Union).⁴¹ The Directive does not define “humanitarian assistance.” Unfortunately, as has already been noted, to date only a few member States of the European Union have enacted such a humanitarian exemption in their domestic laws.⁴²

22. The second relevant regional-level piece of legislation in Europe is European Council Framework Decision No. 2002/946/JHA of 28 November 2002, on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence. The Decision supplements Directive 2002/90/EC and requires member States to provide effective, proportionate and dissuasive criminal penalties for violations of the Directive. Such measures are to include the confiscation of the means of transport used to commit the offence and the prohibition of the direct or indirect practice of the occupational activity in the exercise of which the offence was committed, or deportation. Those laws are supplemented by a host of similarly oriented but non-binding policy documents, including the European Council conclusions on migrant smuggling of March 2016 and the European Union action plan on migrant smuggling (2015–2020), in both of which measures were proposed that have had the effect of suppressing humanitarian assistance to irregular migrants. The practices of certain European Union agencies, such as the European Border and Coastguard Agency (also known as Frontex), have sometimes had a similar effect. One such practice is the making of unsubstantiated but damaging accusations of collusion with or providing aid and comfort to traffickers and smugglers against many of the humanitarian NGOs and agents who work to assist irregular migrants.⁴³

23. In the Asia-Pacific region, at least two regional-level policy documents appear to have contributed significantly to the suppression and criminalization of those who come to the aid of irregular migrants, including those who do so for humanitarian reasons. Those instruments have been implemented in many States in the region.⁴⁴ Bangkok Declaration on Irregular Migration of 1999 encourages participating States in the Asia-Pacific region to criminalize both irregular migration and human smuggling, and to sanction the latter, whether it was undertaken for financial gain, or not.⁴⁵ In 2015, the Association of Southeast Asian Nations adopted the Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia, which also supports the trend towards the criminalization of human smuggling, but does not make any clear distinction between smuggling for financial gain and the rendering of humanitarian assistance to irregular migrants to enter or remain in a given country.

24. In Africa, there are no regional-level laws, policies and practices that explicitly focus on suppressing or criminalizing those who render humanitarian aid to irregular migrants or refugees. The challenges of human trafficking and smuggling in the Horn of Africa have been part of the African Union agenda and led to the 2014 Khartoum Declaration on AU-Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants. The initiative seeks to understand the issue of human smuggling in detail and to make a concerted effort to combat it. No regional practice on human trafficking and smuggling has developed from that initiative.

⁴¹ See Sergio Carrera and others, *Fit for Purpose? The Facilitation Directive and the Criminalization of Humanitarian Assistance to Irregular Migrants* (European Parliament Directorate-General for Internal Policies, Citizens’ Rights and Constitutional Affairs, 2016), pp. 26–27.

⁴² See Rachel Landry, “The ‘humanitarian smuggling’ of refugees: criminal offence or moral obligation?” (Refugee Studies Centre, University of Oxford, working paper No. 119, October 2016), p. 10.

⁴³ See Stephanie Kirchgaessner, “EU migration crisis: border agency accused of stirring controversy” (The Guardian, April 2017); Italian Insider newsdesk, “Frontex accuses NGOs of providing smuggler ‘taxi’ service” (April 2017); and Nando Sigona, “NGOs under attack for saving too many lives in the Mediterranean” (The Conversation, March 2017)..

⁴⁴ See A. Schloenhardt, “Trafficking in migrants in the Asia-Pacific: national, regional and international responses”.

⁴⁵ See in particular operative paras. 8 and 14.

IV. The suppression of solidarity for migrants and refugees by a section of civil society

25. In many areas of the world, far right or other extremist elements of civil society have engaged in mass mobilization, group confrontation and other practices that have been aimed at, or had the effect of, intimidating or harming those who render humanitarian assistance to irregular migrants. A troubling “solidarity of sorts” has also been expressed against humanitarianism within the global migration context.⁴⁶ Most such expressions of this sort of “solidarity against humanitarianism” have come from far right, alternative right, white nationalist and other extremist groups. For example, Defend Europe and other such far-right groups have seized upon the generally false narrative about humanitarian actors being involved in human trafficking around the Mediterranean Sea and launched a boat patrol in July 2017 aimed at actively disrupting the work of humanitarians.⁴⁷ While Defend Europe had to abandon its mission because of its disruption by “anti-fascists” they were to claim success by arguing that certain Governments had by then already done their work for them.

V. An analysis of general international law

26. The duty to rescue any person in distress at sea is well established under general international law.⁴⁸ In the *Cap Anamur* case, the tribunal based its decision to acquit the person charged with migration offences by the authorities of a Southern European State on article 98 of the United Nations Convention on the Law of the Sea. Article 98 obligates masters of ships or “the responsible authorities” who come across or are notified of others in distress at sea to provide them with the necessary life-saving and other assistance. Indeed, the States parties to the Convention are under a legal obligation to require that ships under their flag comply with this provision. The same kind of duty is also enshrined in article V of the International Convention for the Safety of Life at Sea of 1974; article 10 of the International Convention on Salvage of 1989; and article 2 of the International Convention on Maritime Search and Rescue of 1979. The latter treaties tend to impose this duty on all ship masters, not just those under the command of a particular State party. It is thus also clear that masters of ships owned or operated by humanitarian groups (and thus the seafarers under their command) are not exempted from this duty.

27. It is logical to conclude that the domestic and regional laws and practices already discussed in this section which criminalize or suppress those who render assistance to those at risk of losing their lives at sea clearly contravene the international legal regime which recognizes a general duty to render assistance at sea.⁴⁹ The eventual acquittals enjoyed by the seafarers charged with migration offences in the *Cap Anamur* and *Morthada/el-Hedi* cases were firmly rooted in recognition of the position under general international law and in the laws that implement the stated international legal obligation on this issue. Nevertheless, it should be noted that despite the eventual acquittals, those cases (and others) clearly show that the rescue of persons at sea is still in reality a “sanctioned enterprise” which has shaped and may continue to shape “future human conduct at sea.”⁵⁰ The detention for a period and long trials endured by the accused may dissuade many would-be rescuers from attempting to assist migrants or refugees in distress at sea, leading to even more avoidable deaths at sea.

⁴⁶ See Liz Fekete, Francesca Webber and Anya. Edmond-Pettitt, “Humanitarianism: the unacceptable face of solidarity”, p. 31.

⁴⁷ See Maya Oppenheim, “Defend Europe: far-right ship stopping refugees ends its mission after a series of setbacks” (The Independent, August 2017)..

⁴⁸ See Tugba Basaran, “Saving lives at sea: security, law and adverse effects”.

⁴⁹ See Tugba Basaran, “Saving lives at sea: security, law and adverse effects” and Richard Barnes, “The international law of the sea and migration control” in *Extraterritorial Immigration Control: Legal Challenges*, Bernard Ryan and Valsamis Mitsilegas, eds. (Leiden, Netherlands, Martinus Nijhoff, 2010).

⁵⁰ See Tugba Basaran, “Saving lives at sea: security, law and adverse effects”.

28. It should be remembered, however, that most of the countries that have acted the most frequently to criminalize or suppress humanitarian rescues of migrants in distress at sea by NGOs or other private actors have argued that this approach will eventually lead to the minimization of migrant and refugee deaths at sea. Their contention is that such deaths will stop if their navies and criminal justice systems succeed in discouraging humanitarians from assisting irregular migrants who find themselves in distress at sea, leading in turn to these persons being discouraged from attempting to cross the Mediterranean and other bodies of water. For example, some European Union countries have argued that they have set up the Task Force Mediterranean to save lives at sea and that private individuals or groups who rescue migrants and refugees in distress at sea encourage others to attempt the crossing, making the task of the Task Force Mediterranean more difficult and leading to more deaths.⁵¹ There is, however, little evidence that this approach has been or can be effective in deterring the usually desperate attempts by irregular migrants and refugees to cross the Mediterranean Sea and enter Europe.

29. It should also be emphasized that some have argued that there may be a gap between the obligation to rescue migrants and refugees in distress at sea and the explicitly and clearly stated requirements of coastal States to allow disembarkation at their ports.⁵² However, although some have argued that “it is doubtful that the right to assistance extends as far as the right to enter a particular port or sheltered waters,”⁵³ and have also contended that “even though the relevant rules of international law clearly apply to cases of physical distress, it cannot by extension be said to apply necessarily to vessels seeking entry to disembark persons who were rescued at sea,”⁵⁴ basing this claim on the *Tampa* case of August 2001 where one country refused to allow the disembarkation of persons rescued at sea by a vessel.⁵⁵ The Independent Expert firmly takes the contrary position. He is of the view that the relevant treaties could not have established the obligation to rescue persons in distress at sea without contemplating an implied requirement that such persons be allowed to disembark in as nearby a port as is practicable.⁵⁶ In any case, the logic and outcomes of the *Cap Anamur* and *Morthada/el-Hedi* cases provide strong support for his view on this question.

30. It should also be remembered that the general international legal duty to rescue persons in distress at sea (including migrants and refugees) is limited to ocean spaces.⁵⁷ There is no similar affirmative duty under international law to rescue persons who are in distress on land within the relevant countries of transit or destination. This point has been previously recognized by scholars.⁵⁸

⁵¹ Ibid.

⁵² See Richard Barnes, “The international law of the sea and migration control” and Natalie Klein, “International migration by sea and air,” in *Foundations of International Migration Law* Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, (Cambridge, Cambridge University Press, 2012).

⁵³ See Richard Barnes, “The international law of the sea and migration control”.

⁵⁴ Ibid.

⁵⁵ See *Ruddock v. Vadarlis*, FCA 1329 (September 2001). See also W. Kirtley, “The Tampa incident: the legality of *Ruddock v. Vadarlis* under international law and the implications of Australia’s new asylum policy”, *Columbia Journal of Transnational Law*, vol. 41, No. 1 (January 2002); Richard Barnes, “Refugee law at sea”, *International and Comparative Law Quarterly*, vol. 53, No. 1 (January 2004); and Cecilia Baillet, “The Tampa case and its impact on burden sharing at sea”, *Human Rights Quarterly*, vol. 25, No. 3 (August 2003).

⁵⁶ See paragraphs 5 and 12 of resolution 1821 (2011) of the Parliamentary Assembly of the Council of Europe. See also the rules for sea border operations annexed to Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

⁵⁷ See Shalini Bhargava Ray, “Saving lives”, *Boston College Law Review*, vol. 58, No. 4 (September 2017).

⁵⁸ Ibid.

31. The overall point being made in this section is that if general international law requires every person who is in command of a ship to rescue anyone they encounter at sea (including migrants and refugees) in distress or at risk of drowning and every State to require and facilitate such rescues, then the criminalization or suppression of those who respect this rescue obligation is clearly in violation of general international law.

VI. An international human rights analysis

32. The Independent Expert would like to stress that several established international human rights law norms also prohibit or at least severely constrain both the criminalization of humanitarian assistance to irregular migrants and refugees and other similarly repressive ways in which States have attempted to stamp out private humanitarian aid to irregular migrants and refugees. Those norms are contained in key international human rights treaties, such as the Protocol against the Smuggling of Migrants by Land, Sea and Air, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

33. Although the Protocol against the Smuggling of Migrants by Land, Sea and Air supplements and forms an integral part of the system created by the United Nations Convention against Transnational Organized Crime, it was also intended to be implemented in a manner that respects international human rights law. The Protocol requires States to criminalize human smuggling but sets certain parameters within which they are to do so (art. 6). One such parameter is that the scope of the Protocol is limited “to the prevention, investigation and prosecution of the offences established in accordance with its article 6, where the offences are transnational in nature and involve an organized criminal group” (art. 4).⁵⁹ This provision makes it very clear that the kind of offence of human smuggling that the Protocol requires its parties to create within their national laws is not one that criminalizes the rendering of humanitarian assistance to irregular migrants. That much is also clear from a reading of the preparatory work on the Protocol.⁶⁰

34. In the case of *R v. Appulonappa*, the Supreme Court of Canada held that the Protocol was not intended to criminalize humanitarian smuggling and struck down a provision of the Canadian federal immigration legislation to the extent that this section of the relevant law contravened the limited intent of the Protocol. Whatever the merits of this judicially rejected argument, it must be remembered, however, that the Protocol also explicitly and completely “saves” the other international human rights guaranteed to all human beings, including migrants and their humanitarian allies. It provides that “nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law (art. 19). The implication of this is that even if the criminalization of humanitarian aid to irregular migrants and refugees were to be permissible under the Protocol, it could still be illegal under the norms of other international (human rights) law. This reading of the Protocol is also supported by the decision in *R v. Appulonappa*.

35. There is little doubt that the criminalization by States (and even regional organizations⁶¹) of the rendering to irregular migrants and refugees the forms of humanitarian assistance already discussed here will normally violate international human rights law. That much has been recognized in the literature.⁶² One expert has for example, noted correctly that such acts of criminalization have invariably inhibited the ability of

⁵⁹ See also Liz Fekete, “Europe: crimes of solidarity”.

⁶⁰ See Rachel Landry, “The ‘humanitarian smuggling’ of refugees: criminal offence or moral obligation?”

⁶¹ See Sergio.. Carrera and Joanna Parkin, “Protecting and delivering fundamental rights of irregular migrants at local and regional levels in the European Union” (Centre for European Policy Studies, 2011), p. 3.

⁶² See Mark Provera, “The criminalization of irregular migration in the European Union”, pp. 27–28; and European Agency for Fundamental Rights, “Criminalization of migrants in an irregular situation and of persons engaging with them”.

irregular migrants and refugees to access many of their human rights, especially in the context of critical and emergency services.⁶³ Violations of several international human rights norms are implicated here and as such the ways in which some of these norms are violated by one or other type of the criminalization or suppression of such humanitarian assistance to irregular migrants will be discussed here.

Right to life

36. This right is guaranteed in article 6 of the International Covenant on Civil and Political Rights which provides that: “Every human being has the inherent right to life. This right shall be protected by law.” The suppression and criminalization of those who perform humanitarian rescues of irregular migrants or refugees at risk of death at sea contravenes this provision, as the Special Rapporteur on extrajudicial, summary or arbitrary executions has rightly pointed out in a recent report (A/73/314). If, as a human being, an irregular migrant or refugee is inherently entitled to a right to life that is protected by law, then criminalizing or suppressing any act designed to prevent the loss of life would amount to a violation of this entitlement. Few could therefore reasonably disagree that from an international human rights perspective, it is imperative to rescue those imperilled at sea.⁶⁴ However, the “shadow and reality” of the criminal sanctions imposed on those who attempt to rescue irregular migrants in distress at sea has led such persons to second-guess themselves before rendering such assistance and this hesitation has often had grave consequences for the migrants and refugees whose lives are in danger. The dramatic rise in the deaths of irregular migrants and refugees along one border in North America since 1994 is illustrative.⁶⁵

Right to liberty and the security of the person

37. The twin rights to liberty and the security of the person are guaranteed in article 9 of the International Covenant on Civil and Political Rights. It is well recognized in the jurisprudence of the courts of some countries,⁶⁶ as well as of the Human Rights Committee,⁶⁷ that the ability of a migrant or refugee who faces threats in another country to the enjoyment of his or her fundamental human rights (free from for example freedom from discrimination, torture or death) to secure protection in his or her host country engages the right to liberty and the security of the person. As such, the prosecution or suppression of humanitarians who, without any material gain to themselves, assist the entry into a country of such irregular migrants, assist irregular migrants with transportation within a country, or assist them with sanctuary in the host country, will violate those twin rights.

Right to freedom of expression

38. The right to freedom of expression is guaranteed in article 19 (2) of the International Covenant on Civil and Political Rights. Thus, the prosecution or intimidation of humanitarians who participate in or support street protests in solidarity with irregular

⁶³ Mark Provera, “The criminalization of irregular migration in the European Union”, pp. 27–28. See also Jennifer Allsopp, “Contesting fraternité: vulnerable migrants and the politics of protection in contemporary France” (Refugee Studies Centre, University of Oxford, working paper No. 82, July 2012), pp. 5–6.

⁶⁴ See Brunilda Pali, “Europe as Terraferma: against the criminalization of solidarity” Security Praxis (May 2017).

⁶⁵ See Jill M. Williams, “The safety/security nexus and the humanitarisation of border enforcement” *The Geographical Journal*, vol. 182, No. 1 (March 2016).

⁶⁶ See *Singh v. Minister of Employment and Immigration*, Supreme Court of Canada, judgments (SCR 177, 4 April 1985), paras. 44–48, 52–53 and 59–60; *Suresh v. Canada (Minister of Citizenship and Immigration)*, Supreme Court of Canada judgments (1 SCR. 3, 11 January 2002), paras. 75–78, 113–114 and 118–119; *Medovarski v. Minister of Citizenship and Immigration* and *Esteban v. Minister of Citizenship and Immigration*, Supreme Court of Canada, judgments (2 SCR. 539, 2005 SCC 51, 30 September 2005), paras. 17 and 19–22.

⁶⁷ See *Said Hashi v. Denmark* (CCPR/C/120/D/2470/2014), paras. 9.1–9.10; *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), paras. 10.5–13; and *X v. Denmark* (CCPR/C/110/D/2007/2010), paras. 8.5 and 9.3.

migrants or refugees; threats to prosecute, deport or suppress those who campaign on behalf or speak in support of them (or the actual taking of such measures); and the prosecution or suppression of persons who participate in a reasonable way in protests on board aircraft in solidarity with irregular migrants about to be deported, are prima facie violations of this right. The enjoyment of this right is explicitly limited by the permission granted to States in article 19 (3) to enact “necessary” restrictions “for respect of the rights or reputations of others” and “for the protection of national security or of public order, or of public health or morals.” Except in the case of protests on board aircraft, the criminalization or suppression of protests in solidarity with irregular migrants and refugees is manifestly unjustifiable, even under any of these permissible limitations. Even so, not every act of protest on board an aircraft can be justifiably suppressed or criminalized in the interests of national security. Such restrictions must be strictly necessary and justifiable in the circumstances.⁶⁸

Right to a fair hearing

39. The right to a fair hearing is guaranteed in article 14 of the International Covenant on Civil and Political Rights. A key component of that right is the right to legal counsel for those charged with or likely to be charged with breaking the law. The enjoyment of that right is violated by any law or practice that functions to restrict or negate access to a lawyer of one’s choice. Thus, the right would be violated by the prosecution or suppression of humanitarian-minded lawyers who provide legal advice to irregular migrants. That is so because such prosecutions and acts of suppression will have the effect of discouraging many lawyers from providing advice to irregular migrants or refugees, thereby restricting significantly their rights to access to legal counsel.

Right to adequate housing

40. The right to adequate housing is guaranteed in article 11 of the International Covenant on Economic, Social and Cultural Rights as a component of “the right of everyone to an adequate standard of living.” States parties to the Covenant are required by this provision to take appropriate steps to ensure the realization of this right. The criminalization or suppression of humanitarians who rent accommodation to irregular migrants or refugees and the prosecution or suppression of religious authorities, NGOs and others who provide housing or sanctuary to them are prima facie serious violations of this right. The Committee on Economic, Social and Cultural Rights has authoritatively interpreted the Covenant as requiring States to guarantee to “everyone” within their territory a “minimum core entitlement” to each right contained in that treaty, such as the right to adequate housing.⁶⁹ Instructively, only developing countries are given some wiggle room in article 2 (3) to determine to what extent they may refrain from guaranteeing this kind of right to non-citizens, such as irregular migrants. The case of *European Council of Churches v. The Netherlands* before the European Committee on Social Rights is also illustrative of the validity of the positions taken here by the Independent Expert.⁷⁰

Right to food and to an adequate standard of living

41. The right to food is guaranteed in article 11 of the International Covenant on Economic, Social and Cultural Rights as a component of “the right of everyone to an adequate standard of living.” In line with the arguments in the previous paragraph, it becomes clear that the prosecution or suppression of humanitarians who provide the necessities of life, such as food, water, medical help, clothing and showers, to irregular migrants and refugees is also a serious violation of this right and that the “progressive realization” clause discussed above does not save such acts of criminalization and suppression from being illegal under international human rights law.

⁶⁸ See *Bakur v. Belarus* (CCPR/C/114/D/1902/2009), paras. 7.4, 7.7, and 7.9–7.10.

⁶⁹ See Committee on Economic, Social and Cultural Rights, general comment No. 4 (1991) on the right to adequate housing; and *I.D.G v. Spain*. (E/C.12/55/D/2/2014), para. 11.1.

⁷⁰ See *Conference of European Churches v. the Netherlands* (decision on the merits, 1 July 2014), complaint No. 90/2013, paras. 31–32, 34–35, 37, 41, 45, 48 and 113.

42. Furthermore, the Independent Expert would like to stress that in the Global Compact for Safe, Orderly and Regular Migration adopted by the United Nations General Assembly in December 2018 and approved by 152 Member States, parties commit to ensuring a set of cross-cutting and interdependent guiding principles, including the human rights and well-being of migrants (whatever their migratory situation); adherence to the rule of law; and international cooperation.⁷¹ In paragraph 24 of the Global Compact, signatories “commit to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants, in accordance with international law”. This provision highlights the legal position explained above by the Independent Expert. Similarly, in the Global Compact on Refugees (A/73/12, part II, paras. 5 and 16) the principle of international solidarity is stressed as a fundamental guiding principle for the protection and well-being of refugees and asylum seekers.

43. In addition, the Independent Expert recalls that in his report to the Human Rights Council in 2017 the Special Rapporteur on the situation of human rights defenders reviewed the situation of persons acting to defend the rights of migrants and refugees and drew attention to the difficult situation of those who act in solidarity with these persons and who seek to promote and strive for the protection of their rights. He also called upon all States and other actors to protect and promote the rights of defenders of people on the move and to address the challenges that they face (A/HRC/37/51).

44. Following the analysis in the preceding paragraphs, it must be considered whether these acts are justifiable under a general limitation clause (in the interests of national security or public order), or under any general derogation clauses in the treaties concerned that allow States some leeway during crises or public emergencies. Many States have referred to the recent global mass migration or refugee events either as a national security or public order crisis in and of themselves, or as precipitating such a crisis.⁷² Given that there is no public emergency clause in either the Protocol against the Smuggling of Migrants by Land, Sea and Air or the International Covenant on Economic, Social and Cultural Rights, the analysis here will be limited to the International Covenant on Civil and Political Rights and only in relation to the civil and political rights guarantees discussed in the previous paragraph.

45. The Supreme Court of Canada has developed a systematic and rigorous general way of balancing the community’s interests in national security, public safety, and public order (on the one hand) against the individual’s human rights (on the other hand).⁷³ The so-called Oakes test is applied whenever it is necessary to limit individual rights to advance certain collective goals of fundamental importance. Thus, before a limitation on individual rights can be justified, two things must be clearly shown:

(a) That the objective of the proposed limitation is related to concerns that are pressing and substantial in a free and democratic society;

(b) That the means chosen is reasonable and demonstrably justified. To show this, the measures adopted must be carefully designed to achieve the objective (and not be a blunt instrument). The means chosen must also impair as little as possible the human right in question. There must also be proportionality between the effects of the measures limiting the right and the objective for which it has been limited (i.e. no overkill and strict adherence to the principle of limiting rights only to the extent absolutely required).

46. While the States and regional organizations that have enacted laws and engaged in practices that criminalize or suppress humanitarian aid to irregular migrants or refugees

⁷¹ See General Assembly resolution 73/195, paras. 15 and 24.

⁷² See, for example, www.kormany.hu/en/prime-minister-s-office/news/government-declares-state-of-crisis-due-to-mass-migration-in-two-counties and www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-orban-europe-response-madness.

⁷³ See *R v. Oakes*, Supreme Court of Canada, judgments (1 SCR. 103, 1986).

may or may not be correct to argue that their concern over the relatively large influx of such migrants into their territories satisfies requirement (a) above, it would be extremely difficult for them to make a convincing argument that requirement (b) is satisfied. The means they have chosen clearly does not impair as little as possible the human rights of migrants and their humanitarian allies, and there is also no proportionality between the effects of the measures limiting the right (that is the criminalization and suppression) and the objective for which it has been limited (which is to restrict immigration to their territories).⁷⁴ However, the solidarity channels are all too often the only channels through which irregular migrants and refugees can access basic rights and live a life of even minimum dignity.⁷⁵ As social networks and solidarity are almost always the main means through which irregular migrants can effectively access basic rights, the criminalization of solidarity therefore fosters social exclusion and constitutes a direct challenge to internationally-protected human rights, such as the right to dignity.⁷⁶ The fact that even the inclusion of the “optional humanitarian clause” in European Directive 2002/90/EC was contentious (a clause that was not compliant with the Protocol against the Smuggling of Migrants by Land, Sea and Air⁷⁷) is instructive here. The final wording adopted was in fact a compromise agreement suggested by Sweden, as Austria had opposed the clause in its entirety, the UK had submitted reservations, Germany had proposed a compulsory humanitarian clause, and Greece did not disagree with the substance of the provision.

47. It should also be noted that these measures and acts that criminalize or suppress the expression of human rights-based international solidarity in favour of irregular migrants and refugees contravene the letter and spirit of the right of the latter group of persons to international solidarity; a right that is contained in the draft declaration on the right to international solidarity that was submitted to the Human Rights Council in 2017 as an annex to the final report of the previous Independent Expert (A/HRC/35/35). The draft declaration provides us with a persuasive indication of what international solidarity would require in this context.

VII. Conclusions and recommendations for reform that is pro-human rights

48. **In conclusion, the Independent Expert is of the view that the criminalization or suppression of the rendering of humanitarian assistance to irregular migrants and refugees significantly and unjustifiably impairs or harms many of their human rights and is thus illegal under international human rights law. The European Agency for Fundamental Rights has recognized this.⁷⁸ It should also be noted that the recent effort in France to decriminalize the expression of solidarity to irregular migrants and refugees, including the progressive decision by the Constitutional Court in the Cedric Herrou case, is indicative of a growing realization even within Governments of the anti-human rights nature of such edicts.⁷⁹**

⁷⁴ See Liz Fekete, “Europe: crimes of solidarity”.

⁷⁵ See Sergio Carrera and Joanna Parkin, “Protecting and delivering fundamental rights of irregular migrants at local and regional levels in the European Union”, p. 3.

⁷⁶ See Sergio Carrera and Massimo Merlino, “Undocumented immigrants and rights in the EU: Addressing the gap between social science research and policy-making in the Stockholm programme?” (Centre for European Policy Studies, December 2009), p. 33.

⁷⁷ See Sergio Carrera and others, *Fit for Purpose?: The Facilitation Directive and the Criminalization of Humanitarian Assistance to Irregular Migrants*, pp. 10–11. See also Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford, Oxford University Press, 2012), p. 47.

⁷⁸ See European Agency for Fundamental Rights, “Criminalization of migrants in an irregular situation and of persons engaging with them”.

⁷⁹ See Law No. 2012-1560, available from www.legifrance.gouv.fr/affichTexte.do;jsessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v_1?cidTexte=JORFTEXT000026871211&categorieLien=id. See also Mark. Provera, “The criminalization of irregular migration in the European Union”, p. 17.

49. Given the salience and importance of migration issues in our time and especially in the context of the serious negative human rights implications of the laws and practices that criminalize or suppress the rendering of humanitarian assistance (i.e. the expression of human rights-based international solidarity) to irregular migrants and refugees, it is imperative that States and other stakeholders redouble their efforts to address much more effectively the issues and difficulties identified in the present report. The Human Rights Council is very well positioned to facilitate that process.

50. In the light of the discussion and analysis set out in the present report, the Independent Expert makes the following recommendations:

(a) All States should take all the necessary individual and joint steps to end the criminalization and suppression of those who render humanitarian assistance and who thus show solidarity, to irregular migrant and refugees. In that context, the example that France has set is worthy of emulation;

(b) To that end, all States that have enacted, or will enact, laws to combat human smuggling should ensure that such legislation contains humanitarian exemption clauses that make it as clear as possible that individuals and groups that render humanitarian assistance to migrants are not to be criminalized or suppressed by such laws;

(c) All regional organizations should ensure that their legal regimes and practices do not lead to the criminalization or suppression of the expression of solidarity to migrants by humanitarian actors. In that regard, European Union Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence (and other relevant European Union legislation) should be amended to make its currently optional humanitarian clause mandatory for all its parties;

(d) States parties to the Protocol against the Smuggling of Migrants by Land, Sea and Air should consider adopting and ratifying an amendment protocol, eliminating the discretion that the Protocol affords States to define human smuggling and create anti-human smuggling legislation within their domestic legal orders. That is to remedy the current tendency on the part of all too many States to adopt and implement overbroad provisions that criminalize both organized criminals and humanitarian actors in a similar manner. In that connection, the decision of the Supreme Court of Canada in *R v. Appulonappa* should serve as a positive example;

(e) All States should rededicate themselves to their treaty obligations to rescue and facilitate the rescue of all persons in distress at sea, including irregular migrants and refugees, as a failure to do so is a serious breach of international law;

(f) States should take steps to clarify that the international legal obligation to rescue migrants in distress at sea includes an existing and inherently corresponding obligation to allow rescued migrants and refugees to disembark on the land territories of any of the coastal States in the relevant area;

(g) States should consider instituting or at least explicating a positive obligation to rescue migrants in distress on their land territories, and not criminalize or suppress humanitarian actors who make an effort to do so. The Human Rights Council could play a facilitative role in ensuring that this change is made;

(h) States should take steps to discourage and sanction elements within their various civil society sectors that attempt to suppress those who show solidarity to migrants.

END.

Who We Are

BACK GROUND

Human Rights at Sea was established in April 2014. It was founded as an initiative to explore issues of maritime human rights development, review associated policies and legislation, and to undertake independent investigation of abuses at sea. It rapidly grew beyond all expectations and for reasons of governance it became a registered charity under the UK Charity Commission in 2015.

Today, the charity is an established, regulated and independent registered non-profit organisation based on the south coast of the United Kingdom. It undertakes **Research, Education, Advocacy and Lobbying** specifically for human rights issues in the maritime environment, including contributing to support for the human element that underpins the global maritime and fishing industries.

The charity works internationally with all individuals, commercial and maritime community organisations that have similar objectives as ourselves, including all the principal maritime welfare organisations.

OUR MISSION

To explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.



KEEP IN CONTACT



We welcome any questions, comments or suggestions. Please send your feedback to:
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HUMAN RIGHTS AT SEA





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Human Rights at Sea is a Registered Charity in England and Wales No. 1161673. The organisation has been independently developed for the benefit of the international community for matters and issues concerning human rights in the maritime environment. Its aim is to explicitly raise awareness, implementation and accountability of human rights provisions throughout the maritime environment, especially where they are currently absent, ignored or being abused.

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