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# Saving Lives at Sea: Security, Law and Adverse Effects

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## Abstract

In the wake of recent shipwrecks at the Strait of Sicily, the European Union and its Member States have come under renewed pressure to address rescue at sea. Saving lives at sea is not simply a question of enhancing EU rescue efforts, however, but requires eliminating third party sanctions that significantly impede the proper functioning of the international rescue regime. This article focuses on anti-smuggling laws and related instruments and their thorny relation to humanitarian acts. To improve rescue efforts at sea, as a first step all humanitarian acts need to be exempted from criminal sanctions (including the EU Directive 2002/90/EC). This needs to be accompanied by efforts to desecuritize rescue, separating rescue from border security concerns.

## Keywords

Rescue – anti-smuggling laws – EU – borders – security – migration

## 1 Introduction

In the wake of recent shipwrecks at the Strait of Sicily, the European Union and its Member States have come under renewed pressure to address rescue at sea. 3 October 2013 a boat capsized on its way from Libya to Italy, less than half a mile from the Italian island Lampedusa. From approximately 500 people only 155 were rescued, more than 350 people were presumed to have drowned in the Mediterranean.<sup>1</sup> Only a few days later 11 October 2013 another

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<sup>1</sup> T. Kington, 'Lampedusa shipwreck: Italy to hold state funeral for drowned migrants', *The Guardian* (9 October 2013).

boat capsized, from about 200 people more than 30 drowned, bringing the official count of people who have died over the last two decades trying to reach the southern borders of Europe to more than 20 000.<sup>2</sup> These figures are based on bodies counted, cases known, unofficial numbers are much higher, as many drowned remain missing and unknown. Of the 20 000 deaths over the last two decades close to 7000 occurred in the Strait of Sicily, a small, usually easily navigable area of the Mediterranean, between Tunis and Lampedusa about 80 nautical miles wide, extending at its east between Libya and Lampedusa to 180 nautical miles, covered through the Search and Rescue Zones of Malta, Italy, Tunisia and Libya.<sup>3</sup> This is a stretch of the Mediterranean that is anything but a deserted area with a significant number of commercial fishing fleets supplemented by military and maritime surveillance, under normal circumstances crossable within 24–48 hours. For many migrant boats, however, it has become a death trap. The paradox of the situation is apparent to most observers.

The Italian president Giorgio Napolitano speaks of a 'slaughter of innocents',<sup>4</sup> Pope Francis of 'vergogna', shame triggered by complicity,<sup>5</sup> and Jack Shenker from the *Guardian* calls it 'a litany of largely avoidable loss'.<sup>6</sup> There is widespread consensus that these are preventable deaths, but how can they be prevented? Saving lives at sea is not simply a question of enhancing rescue efforts, but requires the elimination of sanctions for rescue at sea that significantly impede and counter the proper functioning of the international rescue regime.<sup>7</sup> The problem is not geography or a lack of capacities, as often

2 J. Kanter, 'Drownings put migration at fore of European Meeting', *New York Times* (23 October 2013); IOM (2013) 'IOM mourns Lampedusa shipwreck victims: DG statement', Press Release 4 October 2013.

3 Fortress Europe (2013), available online at <http://fortresseurope.blogspot.com/2006/01/fortress-europe.html> (accessed 31 October 2013).

4 L. Davies, 'Lampedusa boat tragedy is "slaughter of innocents" says Italian president', *The Guardian* (3 October 2013).

5 A. Geddes, 'Letters: Shaming lesson behind the boat tragedy in Lampedusa', *The Guardian* (8 October 2013).

6 J. Shenker, 'Mediterranean migrant deaths: a litany of largely avoidable loss', *The Guardian* (3 October 2013).

7 For the international rescue regime, see United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS 397, 10 December 1982 (entry into force 16 November 1994); International Convention on Salvage (Salvage Convention), 1953 UNTS 165, 28 April 1989 (entry into force 14 July 1996); International Convention on Maritime Search and Rescue (SAR), 1405 UNTS 118, 27 April 1979 (entry into force 22 June 1985); International Convention for the Safety of Life at Sea (SOLAS), 1184 UNTS 3, 1 November 1974 (entry into force 25 May 1980).

portrayed in EU debates, but the sanctioning of rescue. The investigations into the left-to-die boat (2011), which returned after fourteen days adrift in the Strait of Sicily with only eleven of seventy-two passengers alive illustrates merely the tip of the iceberg: Survivors recount encounters with military helicopters, ships and a number of fishing vessels – nobody comes to rescue, however; on the contrary many leave swiftly and even fail to inform the maritime authorities.<sup>8</sup> This is not a unique case. Testimonies of passengers and seafarers at the Strait of Sicily confirm a tendency to turn away from boats with irregular migrants, even if in distress, as to avoid costly investigations, detention or possible prosecution, leading to a rising number of people left to their fate at the seas. Many could have been rescued and alive, were it not for lack of fellow human beings ignoring their requests.

While there is a general legal duty to render assistance at sea, over the last decades an increasing number of laws, regulations and practices on national, regional and international levels have effectively discouraged rescue at sea and encouraged seafarers to look away, leading to the incremental institutionalization of a norm of indifference to the lives of migrants. Many of the laws that discourage rescue at sea are embedded in efforts to prevent, criminalize and punish facilitation of crossing borders by third parties – widely known as smuggling, assistance and facilitation – with the declared objectives of protecting victims of smuggling and targeting organised crime. This legislation has provided a fertile ground for the securitization of rescue, and as a result hereof the weakening of the international rescue regime.

Contributing to contemporary EU debates on saving lives at sea, this article analyzes an occasionally present, but largely marginalized aspect of the present debate: legal instruments and practices that discourage rescue. Thereby, it focuses on anti-smuggling laws and related instruments and analyzes their thorny relation to humanitarian acts. Starting with a study of EU proposals to save lives at sea, part two addresses the fault lines between security and rescue. Through the cases of *Cap Anamur* (2009) and *Morthada/El-Hedi* (2009), part three demonstrates the adverse effects of anti-smuggling laws on third party rescue at sea. Part four addresses the inherent challenges of anti-smuggling laws in protecting humanitarian acts. The conclusion contains some thoughts and recommendations on safeguarding humanitarian acts in

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8 J. Shenker, 'Aircraft carrier left us to die, say migrants', *The Guardian* (8 May 2011); T. Strik, *Lives lost in the Mediterranean Sea: Who is responsible?*, Report for the Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 29 March 2012; C. Heller, L. Pezzani and Situ Studio (2012) *Forensic Oceanography – Report on the 'Left-To-Die Boat'*, Centre for Research Architecture, Goldsmiths, University of London.

liberal democracies under conditions of security.<sup>9</sup> In the course of this article the formulation ‘anti-smuggling’ will be used in a wider sense, as to include criminal laws targeting third party assistance and facilitation.<sup>10</sup>

## 2 The EU’s Agenda for Saving Lives at Sea

The sequence of catastrophic events at the Strait of Sicily early October 2013 has led to the reinvigoration of debates across European Union institutions on saving lives at sea. Within a few weeks the European Commission, the European Parliament and the European Council, all released statements on the need to prevent these tragedies from happening again. Shortly after the 3 October incident, the Justice and Home Affairs Council discussed during their meeting 7–8 October 2013 ‘actions that are needed to avoid such tragedies’<sup>11</sup> and proposed setting-up the *Task Force Mediterranean* (TFM) to identify solutions; the Commissioner for Home Affairs Cecilia Malmstrom proposed 8 October 2013 to ‘deploy an extensive Frontex search and rescue operation that will cover the Mediterranean from Cyprus to Spain’;<sup>12</sup> the European Parliament adopted a resolution to save lives at sea on 23 October 2013;<sup>13</sup> and the European Council put rescue on its agenda for its summit on the 24 and 25 October 2013 ‘express[ing] its deep sadness at the recent and dramatic death of hundreds of people in the Mediterranean which shocked all Europeans’ and demanded that ‘determined action should be taken in order to prevent the loss of lives at sea and to avoid that such human tragedies happen again’.<sup>14</sup> After this first round of commitments in October, the core agenda of the European Union in response to the 3-October disaster has started to be shaped by the Task Force Mediterranean. This section explores current EU proposals with a focus on Task Force Mediterranean’s Communication released early December 2013, as to understand the EU’s agenda for preventing further deaths at sea.

9 See also T. Basaran, ‘The curious state of the Good Samaritan: Humanitarianism under conditions of security’, in C. Kinnvall and T. Svensson (eds), *Governing Bodies and Security: The Politics of Connectivity and Dispersal* (London: Routledge, 2014). Chapter 4.

10 See part 4 for the UNTOC definition.

11 Council of the European Union, Press Release, 3260th Council Meeting, Justice and Home Affairs, 14149/13, 8 October 2013.

12 European Commission, Commissioner Malmstrom’s Intervention on Lampedusa during the Justice and Home Affairs Council Press Conference, Memo/13/864, 8 October 2013.

13 European Parliament, Resolution 2013/2827, 23 October 2013.

14 European Council, European Council 24/25 October 2013 – Conclusions, EUCO 169/13, 25 October 2013, para. 46.

### 2.1 *A Common Platform*

In search for a common platform for action, the European institutions established the Task Force Mediterranean and entrusted it with identifying solutions to save lives at sea, as proposed by the Justice and Home Affairs Council, and in principle endorsed by the European Parliament. The European Council invited the Task Force Mediterranean to ‘identify – based on principles of prevention, protection and solidarity – priority actions for a more efficient short term use of European policies and tools’.<sup>15</sup> The European Commission, as chair of the Task Force Mediterranean, organised two meetings, on 24 October 2013 and 20 November 2013, with all Member States, the European External Action Service and various EU Agencies, including the European Asylum Support Office (EASO), European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), Europol, European Maritime Safety Agency (EMSA) and the Fundamental Rights Agency (FRA).<sup>16</sup> The meetings resulted in a Communication, endorsed by the Justice and Home Affairs Council at its meeting on 5–6 December 2013 and by the European Council on 19–20 December 2013. In its Communication, the Task Force Mediterranean identifies five areas of action with 38 action points in total:<sup>17</sup> 1. Cooperation with third countries (15 action points); 2. Regional protection programmes, resettlement and reinforced legal ways to access Europe (5 action points); 3. Fight against trafficking, smuggling and organised crime (8 action points); 4. Reinforced border surveillance contributing to enhancing maritime situational picture and to the protection and saving of lives of migrants in the Mediterranean (6 action points) and 5. Assistance and solidarity with Member States dealing with high migration pressures (4 action points).

The Communication underlines three co-supportive agendas for reducing deaths at sea: a prevention agenda, a security agenda and a rescue agenda. The prevention agenda seeks to prevent migrants from reaching the coastal shore as to be able to commence their maritime journey; it seeks both to incentivize migrants to use legal routes and equally deter them through security measures from boarding. This agenda is targeted primarily through cooperation

15 European Council, European Council 24/25 October 2013 – Conclusions, EUCO 169/13, 25 October 2013, paras 48, 49.

16 Others consulted include the Associated Countries, UNHCR, IOM, ICMPD, MPC, IMO, UNODC and Interpol.

17 European Commission, Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, COM (2013) 869 final, 4 December 2013.

with third countries (area 1), alternative legal avenues (area 2) and by deterrence through reinforced border surveillance. The security agenda is reflected in efforts to counter smuggling, trafficking and organised crime (area 3) and to increase border surveillance (area 4), both together underlying the importance of strengthening policing efforts. In contrast to the prevention and security agenda, the rescue agenda of the European Union, focusing on saving lives at sea is narrowly conceived. No specific area is dedicated to rescue at sea; the very word rescue appears only in 2 of the 38 action points (points 1.9 and 3.8) and actions that seek to improve safety of migrants on the seas, target questions of safe passage or saving lives at sea are limited in the Communication to less than a handful of points.

## 2.2 *The Rescue Agenda*

The EU's rescue agenda, focusing on saving lives on the seas, is not only marginal to the Communication, but to a large extent merged with and even subsumed under the security agenda. Under area 4, 'Reinforced border surveillance contributing to enhancing maritime situational picture and to the protection and saving of lives of migrants in the Mediterranean', rescue is largely equated with enhanced border surveillance. The Communication promotes a joint security/rescue agenda of border security *and* protection of lives under the aegis of Frontex, built upon the supposition that it is possible and efficient to address security concerns and rescue efforts together. The 'objective is to have a comprehensive and coordinated approach to border surveillance operations led by Frontex in the Mediterranean (from Cyprus to Spain)' (point 4.1).<sup>18</sup> To increase operational and coordination capacities for rescue missions, the Communication proposes the reinforcement of Frontex, complemented by technological fortification through Eurosur and legal buttressing through The Frontex Sea Borders Regulation.

More specifically, the rescue agenda of the EU consists of the following three parts: First and primarily, it seeks to enhance the role of Frontex. Frontex

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18 This is in line with the initial proposal of Cecilia Malmstrom, European Commissioner for Home Affairs, dating from 8 October 2013 for an 'extensive Frontex search and rescue operation that will cover the Mediterranean from Cyprus to Spain' to 'help lead to quicker tracking, identifying and the rescuing of more vessels and boats and, therefore, prevent the loss of lives at sea'. European Commission, Commissioner Malmstrom's Intervention on Lampedusa during the Justice and Home Affairs Council Press Conference, Memo/13/864, 8 October 2013. European Commission, Press Release, Tragic accident outside Lampedusa: Statement by European Commissioner for Home Affairs, Cecilia Malmstrom, Memo/13/849, 3 October 2013. See also I. Traynor and T. Kingston, 'EU pressed to rethink immigration policy after Lampedusa tragedy', *The Guardian* (8 October 2013).

is explicitly mentioned in fifteen of the thirty-eight action points,<sup>19</sup> more than any other EU agency or institution, and the only one to be mentioned across all five action areas. It is regarded as the frontline of European efforts for rescue, subsumed under matters of border surveillance, and expected to become the node of cooperation for intelligence and operations both with Member States and Third Countries. This reinforces the current trajectory of Frontex, which has already established itself since its founding in 2004 as the key coordination body in the Mediterranean and has coordinated close to fifty sea operations, many of which have targeted the Mediterranean.<sup>20</sup> During this period its budget has increased exponentially from €6 million in 2004 to €94 million in 2013.<sup>21</sup> Border surveillance through Frontex is reinforced and complemented though, second, the technological component EUROSUR, a European border surveillance technology to track and identify small vessels, operational since December 2013.<sup>22</sup> Along with an emphasis on operational capacities through Frontex and Eurosur, third, we find the intention to enhance the legal basis for Frontex-coordinated approaches through the Frontex Sea Borders Regulation (action point 4.2) and an invitation to accelerate negotiations hereto.<sup>23</sup> This EU regulation, first proposed in 2010 provides the definition of distress that triggers a search and rescue operation (Article 9) and recommends rules of disembarkation (Article 10) as to avoid contradictory approaches amongst Member States. It is limited in its scope to operations coordinated by Frontex in the framework of EU border controls.<sup>24</sup> To summarise, the rescue agenda is

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- 19 Frontex, see action points 1.1, 1.3, 1.7, 1.8, 1.10, 1.11, 2.4, 3.5, 4.1, 4.2, 4.3, 4.4, 4.5, 5.1, 5.3.
- 20 See Archive of Operations at Frontex, available online at <http://frontex.europa.eu/operations/archive-of-operations/> (accessed 30 October 2013).
- 21 Frontex, *Budget 2013*, 4 November 2013, available online at [http://frontex.europa.eu/assets/About\\_Frontex/Governance\\_documents/Budget/Budget\\_2013.pdf](http://frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2013.pdf) (accessed 18 December 2013).
- 22 For Eurosur, see action points 1.8, 4.1, 4.4, 4.5.
- 23 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing rules for surveillance of the external sea 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, COM(2013) 197 final, 12 April 2013. All six Mediterranean Member States (Cyprus, France, Greece, Italy, Malta, Spain) oppose the Frontex Sea Borders Regulation; see S. Peers, 'EU rules on maritime rescue: Member States quibble while migrants drown', *Statewatch Analysis* (22 October 2013).
- 24 Peers (2013). Council Decision, 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, 2010/252/EU, 26 April 2010



built upon institutional, technological and legal reinforcement of the current EU approach to the Mediterranean, seeking to integrate rescue within border control measures.

The rescue agenda is built upon the assumption that a proper functioning of the rescue regime is hampered due to a lack of operational capacities and coordination to detect vessels and provide timely help. It proposes to overcome this deficiency through enhanced border surveillance. Greater levels of harmonization in information-sharing, decision-making and common operations, combined with an increase of surveillance capacities, it is argued, will lead to less loss of lives at sea. These solutions stem from a specific form of constituting the problem.<sup>25</sup> The problem of migrant death at sea is hereby reduced to a natural problem of crossing the seas in unseaworthy vessels, a problem of geography and insufficient/uncoordinated rescue coverage, which can be countered by technical solutions stressing sufficient surveillance and operational coverage for better implementing the international rescue regime. This ignores the wider problematic of political and security issues at interplay causing and contributing to death at sea. Saving lives at sea is not simply a question of enhancing rescue efforts, but also a question of eliminating sanctions as to permit widespread rescue efforts and allow the proper functioning of the international rescue regime.

### 2.3 *Some Points Towards A Sanctions Agenda*

In relation to the 3 October incident, Tom Kington from *The Guardian* is one of the very few to stress an important, but often neglected point: 'After reports that some fishing boats had ignored the sinking vessel, local fisherman said they were often hesitant to pick up migrants at sea since they risked their boats being seized under Italy's tough laws on illegal migrants.'<sup>26</sup> Similarly, in the 2011 investigation of the left-to-die boat, which returned after 14 days adrift in the Strait of Sicily with only eleven of seventy-two passengers alive, the Rapporteur to the Parliamentary Assembly of the Council of Europe, Tineke Strik, stresses that certain measures 'negatively affect the willingness of fishing vessels and other commercial shipping to fulfil their obligation of rescue at

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[OJ L111/20]. European Commission, Proposal for a regulation of the external sea 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, COM(2013) 197 final, 12 April 2013.

25 M. Foucault, *Polemics, Politics and Politicization*, in M. Foucault and P. Rabinow, *Ethics: Essential Works of Foucault 1954–1984* (London: Penguin), pp. 111–119.

26 T. Kington, *The Guardian* (4 October 2013).

sea' including amongst these 'the threat of criminal sanctions for aiding and abetting irregular migrants'.<sup>27</sup> These statements only illustrate the tip of the iceberg. Testimonies of migrants and seafarers at the Strait of Sicily confirm a tendency to turn away from boats with irregular migrants, even if in distress, as to avoid costly investigations, detention or possible prosecution, leading to a rising number of people left to drown at seas. An important factor hereby are criminal sanctions imposed by anti-smuggling legislation and their adverse effects on rescue. This issue has also not remained unnoticed on the EU level.

The need to exempt humanitarian acts from criminal sanctions and security concerns is placed – even if marginally – on the EU agenda. In its resolution from October 2013, in response to the 3 October incident, the European Parliament acknowledges and calls upon 'EU and Member States to amend or review any legislation sanctioning people assisting migrants in distress at sea' and requests 'the Commission to review Council Directive 2002/90/EC'.<sup>28</sup> This is taken up by the Task Force Mediterranean, acknowledging the effect of sanctions and more specifically the negative effect of criminal sanctions on humanitarian acts in its Communication in two action points: Point 3.8 under the area 'Fight against trafficking, smuggling and organised crime' highlights that the Commission will evaluate, and if needed modify, Directive 2002/90 'by reconciling effective fight against smuggling with the need to avoid criminalising humanitarian assistance.' Point 4.6 under the area 'Reinforced border surveillance contributing to enhancing maritime situational picture and to the protection and saving of lives of migrants in the Mediterranean' emphasizes the need to provide mariners 'public reassurance' that 'provided they are acting in good faith, [they] would not face any negative legal consequences for providing . . . assistance'. These action points stress for the first time the criminalization of third party rescue as a possible result of anti-smuggling and related legislation. Their focus is on the 2002 EU Council Directive 2002/90 defining the Facilitation of Unauthorized Entry, Transit and Residence,<sup>29</sup> which partly

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27 T. Strik, *Lives lost in the Mediterranean Sea: Who is responsible?*, Report for the Parliamentary Assembly, Committee on Migration, Refugees and Displaced Persons, Council of Europe, 29 March 2012, p. 18; see also J. Shenker, 'Aircraft carrier left us to die, say migrants', *The Guardian* (8 May 2011); Heller et al. (2012).

28 European Parliament, Resolution, Migratory flows in the Mediterranean with particular attention to the tragic events of Lampedusa, 2013/2827(RSP), 23 October 2013.

29 Council Directive 2002/90 of 28 November 2002 defining the Facilitation of Unauthorised Entry, Transit and Residence [OJ L328/17] in combination with the Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence 2002/946 [OJ L328/1]; to be implemented by Member States by December 2004. The Framework Decision complements the Directive by providing

supersedes the Schengen Convention of 1990<sup>30</sup> and requires Member States to create criminal offences for aiding unauthorized entry, transit and residence.

Whilst these are laudable efforts, the question of sanctions remains insufficiently addressed in terms of its significance and in terms of its complexity. In the following we shall seek to address these issues more in-depth by focusing on anti-smuggling laws and their relation to humanitarian acts. The challenges of protecting humanitarian acts shall be explored through the cases of *Cap Anamur* (2009) and *Morthada/El Hedi* (2009) in part three, followed by an analysis of anti-smuggling laws and their inherent difficulty in protecting humanitarian acts in part four.

### 3 On Anti-Smuggling Laws and Adverse Effects

Two prosecutions had an important impact on the transnational community of fishermen at the Strait of Sicily<sup>31</sup> and compellingly illustrate the role of anti-smuggling laws in sanctioning rescue. Even though all defendants are eventually acquitted the cases of *Cap Anamur* (2009) and *Morthada/El-Hedi* (2009) demonstrate that rescue at sea is a sanctioned enterprise and greatly influence the conduct of seafarers, willing to increasingly turn away from boats with irregular migrants, even if in distress, as to avoid crime by association, costly investigations and possible prosecutions, leading to a number of people left to their fate at seas. In both cases defendants claim rescue; the prosecution claims aiding and abetting crime by assisting/ smuggling irregular migrants.

#### 3.1 *The Trials of Agrigento*

The first trial is against three members of the organisation *Cap Anamur*.<sup>32</sup> *Cap Anamur* is a humanitarian organisation founded in 1979, at the height of the

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minimum rules for penalties, applicable both to natural persons and legal persons, stressing that Member States shall ensure that infringements shall be punishable by criminal penalties (Framework Decision, Article 1.1).

30 The Convention foresees penalties, not necessarily criminal sanctions. Convention Implementing the Schengen Agreement 1990 of 14 June 1985 (The Schengen Acquis OJ L176).

31 Strik (2012).

32 *Cap Anamur*, Tribunale di Agrigento, I Sezione Penale, I Collegio, 954/2009. See also: F. Vassallo Paleologo (2010) 'Il caso Cap Anamur. Assolto l'intervento umanitario', *Diritto, Immigrazione e Cittadinanza* (no. 2); A. Huemer (2011), 'Safety and Rescue at Sea: Contentious Legal Issues and Their Potential Detrimental Effect on Boat People', in: V. Dzihic and T. Schmidinger (eds), *Looming Shadows; Migration and Integration*

refugee crisis at the South China Sea, to provide support to boat people. On 20 June 2004 *Cap Anamur*, the vessel of the same name organisation sailing under the German flag, takes 37 people in distress between Libya and Italy on board. It accompanies a second boat encountered towards Malta and requests June 30 permission to dock at the port of Empedolce in Sicily, Italy. It is denied permission. After waiting for twelve days, *Cap Anamur* cites distress on the vessel, enforcing debarkation, and proceeds to the port. Upon arrival the director, captain and first officer of *Cap Anamur* are detained and their vessel is seized under charges of aiding irregular immigration. The *Cap Anamur* trial begins two years later, November 2006 and lasts for three years. Prosecution demands a fine of €400 000 per person and imprisonment of four years for assisting irregular entry under the aggravated circumstances clause. The director of *Cap Anamur*, Elias Bierdel, captain Stefan Schmidt and first officer Vladimir Dachkevitch are tried on charges of assisting irregular entry under the Italian legislation 286/1998, Article 12(1) punishing facilitation of unauthorized entry and Article 12(3) providing for aggravating circumstances for organised crime.<sup>33</sup> Charges of assisting irregular entry are based on two claims: the meaning of procuring a profit and a false declaration to gain access to debarkation. The prosecutor claims that defendants had sought to procure a profit through their action, specifying that ‘to procure a profit whether direct or indirect – also consisted in the advertising and international publicity obtained in the sale of third-party images and information relative to the facts of the process’.<sup>34</sup> Further, the defendants are accused of false declaration of a medical emergency as to be allowed to disembark and facilitate illegal entry.<sup>35</sup> The *Cap Anamur* case not only demonstrates the uses of anti-smuggling law, but also that the distinction between for-profit and non-profit assistance provides an uneasy separation between criminal and non-criminal acts – a point to which

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*at a Time of Upheaval; European and American Perspectives*, Washington, DC: Center for Transatlantic Relations, pp. 49–70; D. Arntz (ed.) (2009) *Ein Fluechtlingspolitik der Europaeischen Union: Ein Reader*, Berlin: Bildungswerk Berlin der Heinrich-Boell Stiftung.

33 CP, Article 110; DL 286/98, Article 12 i, iii e, iii bis.

34 Original text ‘al fine di procurarsi un profitto sia diretto che indiretto – anche consistito nella pubblicita e risonanza internazionale ottenuta ed inoltre un profitto relativo alla vendita a terzi della immagini e delle informazioni relative ai fatti per cui e processo – utilizzando la motonave ‘CAP ANAMUR’ battente bandiera tedesca’.

35 Original text ‘prospettando falsamente alle Autorita dello Stato competenti una situazione di emergenza anche sanitaria a bordo della nave, compivano attivita diretta a favorire l’ingresso clandestine nel territorio nazionale di 37 cittadini extracomunitario’.

this article will return later in the discussion of anti-smuggling legislation. In the verdict, announced in October 2009, all three defendants are acquitted.<sup>36</sup>

Whilst the Cap Anamur trial is the more widely publicized case, a second trial takes place roughly in the same time period and is directed against all seven crewmembers of two Tunisian fishing boats, Fakhreddine Morthada and Mohamed el-Hedi.<sup>37</sup> On 8 August 2007 the fishermen of both boats take 44 people in distress close to Lampedusa on-board. All the crew is detained upon arrival. The trial begins only two weeks later, 22 August 2007, and lasts for two years. Similar to the Cap Anamur trial, the crewmembers are tried on charges of smuggling, under the 1998 Italian legislation 286/1998, Article 12(1) punishing facilitation of unauthorized entry and Article 12(3) providing for aggravating circumstances for organised crime.<sup>38</sup> The verdict is read out November 2009, a few weeks after the Cap Anamur trial. Whilst the tribunal of Agrigento acquits all seven fishermen of aiding illegal immigration, captains Abdelkarim Bayouhd and Abdelbasset Zenzeri are convicted of 'charges of resisting a public officer and committing violence against a warship'<sup>39</sup> as they proceeded with their boats to Lampedusa, disrespecting non-disembarkation orders. Both captains are condemned to imprisonment of 2.5 years and a penalty of €440 000 each, but are acquitted by the Court of Appeal of Palermo on 22 September 2011.

Even though both cases eventually end in acquittal for the defendants, they prove that rescue at sea is a sanctioned enterprise and shape future human conduct at seas. The trials increase and expose costs associated with rescue and substantially elevate barriers for rescue at sea. Rescue at sea becomes an operation that small fishing boats and even larger commercial vessels cannot afford. The trials last for many years absorbing the energies and economic resources of the accused; the suspects are detained, some placed under house arrest; the vessels are confiscated over prolonged periods of time; the boats of the Tunisian fishermen become unusable due to damages and after the trial their licences for fishing on the high seas are denied, effectively amounting to loss of their economic livelihoods.<sup>40</sup> As Captain Schmidt expresses in a sombre assessment of the verdict '[i]f seafarers at sea notice a refugee boat, they know, that we stood trial for three years. The acquittal does then perhaps

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36 Verdict was read on 7 October 2009, published 15 February 2010.

37 *Bayouhd and Zenzeri*, Tribunale di Agrigento, Sezione Penale Feriele, 1107/2009 and Court of Appeal of Palermo, III Sezione Penale, 2932/2011.

38 CP, Article 110; DL 286/98 iiiie, iii bis; CPP 530, sec. Comma.

39 Original text: 'resistenza a pubblico ufficiale' and 'violenza contro nave da guerra'.

40 Arntz (2009).

not play an important role anymore.<sup>41</sup> The process amounts to punishment.<sup>42</sup> Hence, even in the absence of civil or criminal penalties, the costs of the criminal procedure effectively provide for a sanction and deterrence function. This is intentional. As the prosecutor of Agrigento, Ignacio de Francisci, highlights it is important ‘to avoid the repetition of these kinds of actions, even if they happen due to a noble purpose’.<sup>43</sup>

These cases demonstrate how even a duty, anchored in national and international law, can be selectively undermined (targeting irregular migrants only) through a system of legal sanctions. Anti-smuggling legislation can be used to sanction rescue, even though rescue is firmly anchored in national and international legislation. The duty to render assistance is codified in various international conventions, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS), the 1979 International Convention on Maritime Search and Rescue (SAR) and the 1989 International Convention on Salvage (SALVAGE). More specifically, Italian legislation provides for the duty to render assistance at sea in the Navigation Code,<sup>44</sup> but also provides for a more general assistance in the Italian Civil and the state of necessity clause in the Penal Code<sup>45</sup> and even explicitly exempts relief efforts and humanitarian

41 Die Zeit, ‘Der Staatsanwalt hat uns zum Freispruch gratuliert’, *Die Zeit Online* (8 October 2009), available online at <http://www.zeit.de/politik/ausland/2009-10/cap-anamur-kapitaen> (accessed 10 March 2013). Original text: ‘Das Kind ist ja teilweise schon in den Brunnen gefallen: Wenn Seeleute auf See ein Flüchtlingsboot sehen, dann wissen sie, dass wir drei Jahre vor Gericht standen. Der Freispruch spielt dann vielleicht gar keine große Rolle mehr.’

42 M.M. Feeley (1979), *The Process is Punishment: Handling Cases in a Lower Criminal Court*, London: Russell Sage Foundation.

43 B. Hans, ‘Urteil im Cap-Anamur-Prozess: Freispruch fuer den Einzelkaempfer’, *Spiegel* (7 October 2009), available online at <http://www.spiegel.de/panorama/gesellschaft/urteil-im-cap-anamur-prozess-freispruch-fuer-den-einzelkaempfer-a-653762.html> (accessed 10 March 2013). Original text: ‘Oberstaatsanwalt von Agrigent, Ignacio de Francisci, sagte vor dem Prozess, man habe gegen Bierdel und die zwei Mitarbeiter einfach vorgehen müssen: Man sei “in rechtlicher und auch in politischer Hinsicht gezwungen, die Wiederholung solcher Aktionen zu verhindern, auch wenn sie aus edler Absicht geschehen”. Ansonsten würde riskiert, “trojanische Pferde hereinzulassen, mit denen Tausende von Leuten zu uns kommen würden”.’

44 Codice della Navigazione, Article 1158.

45 Italian civil code, Article 245; Penal Code, Article 54: ‘Anyone who has committed an act having been compelled to do so by the necessity of saving himself or others from the risk of an imminent personal injury, that was not voluntarily caused, nor otherwise

assistance in the consolidated immigration legislation.<sup>46</sup> Even though there is a general legal duty to render assistance at sea, supported by various humanitarian clauses, ultimately these clauses fail to exempt seafarers from criminal prosecution. As demonstrated through the Agrigento trials, prosecution is sufficient to subvert a positive duty, a demand to act rather than to restrain from an action.

### 3.2 *Legal Framework*

At stake are in both cases aiding and abetting crime under the Italian penal code in the matter of clandestine immigration and for disregarding orders of disembarkation.<sup>47</sup> The legal basis of both cases is the 1998 Legislative Decree 286/1998 (Turco-Napolitano Act), which consolidated immigration legislation and contains clauses that criminalize the facilitation and smuggling of migrants.<sup>48</sup> The relevant articles hereto are: Article 12(1) specifies that facilitation of unauthorized entry can be punished by fines of up to €15,000 and imprisonment of up to three years, even if conducted without purpose of financial gain. Article 12(3) declares aggravating circumstances for organised crime, that is if three or more persons committed the crime for profit and facilitated the entry of five or more persons. Under aggravating circumstances 4–12 years of imprisonment and fines of €15,000 for each person entered are foreseen.

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avoidable... (shall not be punished for that conduct)... as long as the action is proportional to the danger'

- 46 Consolidated Immigration Act no. 286/98, Article 12, comma 2: 'Without prejudice to the provisions of Article 54 of the Penal Code, rescue and humanitarian relief provided in Italy to foreigners in need still present in the State's territory, do not constitute a criminal offense'; 'Fermo restando quanto previsto dall'articolo 54 del codice penale, non costituiscono reato le attività di soccorso e assistenza umanitaria prestate in Italia nei confronti degli stranieri in condizioni di bisogno comunque presenti nel territorio dello Stato.'
- 47 C.P., Article 110, DL 286/1998, Article 12. The latter specifies that procuring illegal entry shall be punished with imprisonment of one to five years and a fine of up to €15,000 for each person (*idem*, Article 12.1), to profit, even indirectly, from illegal migration shall be punished with imprisonment of four to fifteen years and a fine of €15,000 for each person (*idem*, Article 12.3). These penalties increase under aggravating circumstance, if the illegal entry or stay concerns five or more persons (*idem*, Article 12.3, 3-bis.a) or if the offense is committed by three or more people (*idem*, Article 12.3, 3-bis.c-bis). ((Further, in the case of Tunisian fishermen, 530, secondo comma, c.p.p. relevant).
- 48 Decreto Legislativo, no. 286/1998, 'Testo Unico delle Disposizioni concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero', 25 July 1998 9GU 191, 18 August 1998).

It is important to understand that the subversion of duties through anti-smuggling laws is not an Italian problem, a question of inconsistent legal practice or otherwise due to unique circumstances. This legislation and its history reflect a widespread mounting normative consensus on the need to criminalize smugglers, held culpable for the suffering and death of migrants, leading to an incessant call for more severe forms of criminalization of smuggling, trafficking and organised crime, and, thus, creating the foundation for a multiplication of laws and an increase penalties. Hereby, often assistance, smuggling and trafficking is discursively combined to one homogenous group of exploiters of human misery, prying on the vulnerability of their victims, held responsible for putting 'people's lives at risk in small, overcrowded and unseaworthy vessels'.<sup>49</sup> They are found guilty of providing unseaworthy vessels, without proper guidance and support, insufficiently informing their clients about the risk, and imprudently limiting availability of water and food.<sup>50</sup> Any assistance to cross borders irregularly is presented in this framework as ruthless organised crime with disregard for human life and human safety. This response is shared – in a rare instance of unity – by security agencies, humanitarian organisations and civil society critiques alike.<sup>51</sup>

It is within this rising normative consensus that there is an increasing resort to legal instruments on national, European and international levels to punish and criminalize smuggling. In Italy facilitating unauthorized entry becomes a criminal offence in 1986, limited then in its scope to unauthorized entry for labour exploitation only (Law 943/1986)<sup>52</sup> and is extended in its scope in 1990, applicable now more regardless of purpose of entry (Law 39/1990).<sup>53</sup> This

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49 European Commission, Press Release, Tragic accident outside Lampedusa: Statement by European Commissioner for Home Affairs, Cecilia Malmstrom, Memo/13/849 (3 October 2013).

50 Reports of NATO, Frontex, EU.

51 Shenker (2013); Strik (2012).

52 Act 943/1986, Norme in Materia di Collocamento e di Trattamento dei Lavaratori Extracomunitari Immigrati e Contro le Immigrazioni Clandestine, *Gazzetta Ufficiale* no. 8, dated 12 January 1987. See also M.V. McCreight (2006), 'Crimes of Assisting Illegal Immigration and Trafficking in Human Beings in Italian Law: Illegal Immigration Between Administrative Infringement and Criminal Offence', in: E. Guild and P. Minderhoud (eds) (2006) *Immigration and Criminal Law: the legal measures and social consequences of criminal law in Member States on trafficking and smuggling in human beings*, Leiden: Martinus Nijhoff, pp. 141–168; M. Ventralla (2010) *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy*, Burlington, VT: Ashgate.

53 Act 39/1990, *Gazzetta Ufficiale* no. 49, dated 28 February 1990.



provides the basis for 1998 Decree. The Consolidated Immigration Legislation (DL 286/1998) is modified in the following years by Law 189/2002 (Bossi-Fini Act) taking into account questions European borders and transit through Italian territory<sup>54</sup> and by Act 94/2009 increasing penalties for facilitating irregular migration and abolishing the previous distinction between assisting irregular migration and smuggling of migrants, the distinction between non-profit and for-profit, between individual and organised crime.<sup>55</sup> Article 12 now more targets anyone who 'promotes, manages, organizes, finances or carries out the transport of foreigners', allowing the criminalization of a wide range of third parties, much in line with the prosecution's interpretation in the *Cap Anamur* case.

The stages of the Italian legislation largely correlate with penalization and criminalization efforts on the European and international levels: the introduction of the Schengen Convention in 1990 and its entry into force in 1995<sup>56</sup> – with its penalty clause – and the Directive 2002/90/EC in 2002, partly superseding the Schengen Convention. The timing of the Italian and European legislation also correlates with the General Assembly resolution in 1998, leading to the *travaux préparatoire* for UNTOC and the negotiation of its Palermo Protocols from 1999 until 2002, setting the global standards in anti-smuggling legislation. Rather than a mono-directional legislative dissemination, these diverse initiatives and efforts at criminalizing smuggling need to be understood as concurring trends on national, European and international levels, with reinforcing effects upon each other, equally providing an increasing justificatory arsenal for criminalizing assistance. The situation in Italy reflects European and international developments. Hence, to a certain extent, it is these legal instruments that are equally tested in the 2009 trials against *Cap Anamur* and *Morthada/El-Hedi*. The trials illustrate the fundamentally complicated relationship between anti-smuggling legislations and humanitarian acts: the adverse effect of anti-smuggling laws and the difficulty of protecting humanitarian acts from criminal sanctions. The next section will focus on the legal instruments and explore the difficulties of setting clear boundaries between smuggling and humanitarian acts as a problem inherent to anti-smuggling legislation and related instruments.

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54 Act 189/2002, 30 July 2002.

55 Act 94/2009, Disposizioni in Material di Sicurezza Pubblica, GU 170, 25.07.2009.

56 Entry into force in Italy in 1997; see on this point also McCreight 2006, p. 146.

## 4 The Challenge of Protecting Humanitarian Acts

Whereas at first sight the distinction between acts of smuggling and rescue appear to be obvious, anti-smuggling laws demonstrate the difficulties of setting an impermeable boundary between humanitarian acts and criminal acts, and a resulting ambivalence between protection and criminalization of humanitarian acts. The following will provide an analysis of the multiple relations of anti-smuggling legislation to humanitarian acts, to illustrate the fluid boundaries between criminal acts and humanitarian acts – as to understand the difficulty of protecting humanitarian acts. More specifically, we will focus on the for-profit/non-profit distinction (Section 4.1), the scope of criminalization (Section 4.2), and their effects upon social relations (Section 4.3) to understand the challenges of protecting rescue within anti-smuggling legislation.

### 4.1 *The Protection of Humanitarian Acts: For Profit/Non-Profit Distinctions*

At the outset anti-smuggling legislation appears to safeguard humanitarian acts from criminalization by excluding them from their subject matter. The international anti-smuggling convention, United Nations Convention against Transnational Organized Crime (UNTOC) and its Protocols, recommend the deployment of criminal sanctions for smuggling migrants (SM, Article 6), but exclude humanitarian acts from its subject matter through the very definition of smuggling. According to the Protocol against Smuggling of Migrants by Land, Sea and Air (SM) ‘smuggling of migrants’ refers to the ‘procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident’ (Article 3(a)). The element of financial or material gain is crucial to the definition of smuggling; humanitarian and other non-profit acts, even if they contribute to the irregular entry of a person, are not to be considered as smuggling and, hence, do not fall under the Convention. This approach is also underlined through secondary sources, such as the Model Law Interpretation, which states:

The reference in this definition to ‘a financial or other material benefit’ was included in order to emphasize that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. As noted in the interpretative notes, it was not the intention of the Protocol to criminalize the

activities of family members or support groups such as religious or non-governmental organisations.<sup>57</sup>

Through a distinction between for-profit and non-profit acts as part of the smuggling definition, UNTOC and its Protocols provide an, albeit implicit, protection of humanitarian acts.<sup>58</sup> This distinction between commercial and humanitarian approaches was also crucial for the Schengen Convention of 1990, limiting penalties for assistance to irregular migration, including assistance to enter or reside, to purposes of gain (Article 27.1).<sup>59</sup>

The 2002 EU Directive defining the Facilitation of Unauthorized Entry, Transit and Residence,<sup>60</sup> that partly superseded the Schengen Convention, has been criticised for lifting this distinction and rendering humanitarian protection optional – hence opening up the possibility for prosecutions. This Directive requires Member States to create criminal offences for aiding unauthorized entry, transit and residence, and ignores humanitarian protection by simply omitting the distinction between profit and non-profit acts. Assisting to enter and transit requires in the Directive only the element of intentional

57 United Nations, General Assembly, Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1), para. 88.

58 United Nations Convention against Transnational Organized Crime (UNTOC), UNTS I39574, 15 November 2000, including the Protocol Against the Smuggling of Migrants by Land, Sea and Air (SM), UNTS A29574, 15 November 2000 and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (TIP), 15 November 2000. The Convention and its three Protocols, targeting particular areas of organized crime, were adopted by the General Assembly resolution 55/25 of 15 November 2000. The Convention entered into force on 29 September 2003, the TP Protocol on 25 December 2003 and the SM Protocol on 28 January 2004.

59 The Convention foresees penalties, not necessarily criminal sanctions. Convention Implementing the Schengen Agreement 1990 of 14 June 1985 (The Schengen Acquis OJ L176).

60 Council Directive 2002/90 of 28 November 2002 defining the Facilitation of Unauthorised Entry, Transit and Residence (OJ L328/17) in combination with the Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence 2002/946 (OJ L328/1) to be implemented by Member States by December 2004. The Framework Decision complements the Directive by providing minimum rules for penalties, applicable both to natural persons and legal persons, stressing that Member States shall ensure that infringements shall be punishable by criminal penalties (Framework Decision, Article 1.1).

assistance (Article 1.1.a) but not of financial gain.<sup>61</sup> Herewith EU legislation effectively annuls the distinction between commercial and humanitarian motives for assisting to enter and transit, integral to the definition of smuggling in UNTOC and its Protocols. The 2002 Directive provides only an optional humanitarian exception clause, stating that Member States ‘may decide not to impose sanctions... where the aim of the behavior is to provide humanitarian assistance to the person concerned’ (Article 1.2). Not requiring Member States to refrain from prosecuting humanitarian actors and providing this as an option only, the EU legislation is accused of opening up possibilities for targeting humanitarian actors with criminal sanctions.<sup>62</sup> This is also at the heart of the EU proposals to lift sanctions against rescue. Undoubtedly, the 2002 EU Directive needs to be brought in line with UNTOC and its Protocols and re-establish the distinction between for-profit and non-profit motives; this would be necessary to confirm the legal norm, but still not be sufficient to safeguard humanitarian acts from anti-smuggling and related legislation. It is often assumed that the non-distinctive nature of EU legislation poses the root of the problem, to be remedied by applying international standards. The challenges of protecting humanitarian acts is, however, more complex.

Even the boundaries set by UNTOC between for-profit and non-profit acts are blurred, leading to vague and imprecise distinctions between smuggling and humanitarian acts. Anti-smuggling laws that seek to safeguard humanitarian acts try to differentiate between acts according to the motives of the actors: criminal sanctions need to be motivated by commercial objectives, distinct from non-commercial, altruistic and humanitarian objectives. These legal distinctions are closely intertwined with moral distinction drawing a boundary between self-motivated and other-motivated intent of associations, between material gain and altruistic support. Whilst this distinction is supposed to guarantee the protection of humanitarian acts, it also leaves room for contestation, blurring the boundaries between humanitarian and criminal conduct. According to the SM Protocol, for example, each state party is required to ‘adopt such legislative and other measure as may be necessary to establish

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61 Assisting to reside within the territory on the other hand requires the elements of intentional assistance and financial gain (Article 1.1.b).

62 This exemption has been transposed into national law so far only for a handful of states, including France, Hungary, Sweden and the UK, some others have similar exemptions predating the directive including Italy, but a number of states still lack any exemption for humanitarian reasons. European Migration Network (2012), *Ad-hoc Query on Exemption from Sanctions within the Context of Offence of Solidarity*, compilation of 20 December 2012.

as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit' (Article 6). Whilst the concept of intentional direct financial benefit may appear to be clear, indirect and other material benefits open significant possibilities for contestation. As demonstrated in the Cap Anamur case, the definition of what counts as material benefit is contested even for humanitarian organisations – demonstrating that even the for-profit/non-profit distinction can be easily used to prosecute humanitarian actors.

#### 4.2 *The Protection of Humanitarian Actors: On the Scope of Legislation*

A further problem relating to the protection of humanitarian acts arises from the scope of the legislation. Even though UNTOC and its Protocols seek to target transnational organised crime, a cursory look reveals that many of SM Protocol's clauses help construct a broad scope of criminalization. Article 34(2) broadens the scope of the Convention beyond transnational organised crime by stating that neither the principles of 'transnationality' nor that of 'organised criminal group' are required as elements when drafting domestic legislation. Or more explicitly '[t]hus the offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group, and regardless of whether this can be proved or not'.<sup>63</sup> This implies that any relations between irregular migrants and individuals, with or without transnational connections, with or without an organized criminal component, can be targeted, thus expanding the scope of criminal conduct, and paving the way for blurring the boundaries between criminal and humanitarian conduct.

The 2002 Directive has an even broader target population of sanctions. It does not only obscure the distinction between smugglers and rescuers, by rendering the protection of humanitarian actors optional, but also increases the scope of criminal sanctions. The 2002 Directive targets not only direct but also indirect aid, and extends identical sanctions from the person committing or attempting to commit the crime to accomplices and instigators alike (Article 2). This leaves humanitarian actors in a potentially lethal legal minefield as being an instigator, however defined, will suffice to draw criminal penalties. Again, whilst the 2002 EU Directive needs to be brought in line with UNTOC and its Protocols, this would not be sufficient to safeguard humanitarian actors. This leads us to the most fundamental problem of anti-smuggling

63 See UNODC (2004), *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, New York, NY: United Nations, p. 276.

and related legislation as regards to safeguards for humanitarian acts and actors, the creation of suspicion.

#### 4.3 *The Protection of Humanitarian Acts: Suspicion and Social Relations*

Anti-smuggling and related legislations create a broad suspect category. Any third party interaction related to the entry or crossing of borders of irregular migrants, even if not criminalized, becomes open for scrutiny – as to investigate whether the acts in question fall under smuggling or related acts, whether they are pursued under the qualifying circumstances of financial or other material gain. This allows essentially placing anybody related to these acts – whether for gain, exploitation or not – in the suspect category, opening the possibility of prosecution. This is embedded within a wider mounting legal and normative consensus of criminal sanctions against third parties, not only for crossing borders, but also for providing employment, housing and other social interaction.<sup>64</sup>

By criminalizing certain acts and qualifying them as smuggling, anti-smuggling legislation creates a distinction between legally authorized and unauthorized interactions between irregular migrants and the general public. Whilst UNTOC and its Protocols still limit unauthorized interactions largely to commercial interactions, EU legislation weakens these boundaries by dissolving the distinctions between for-profit and non-profit interactions, between commercial interactions and protection for humanitarian and family motives. It re-negotiates the boundaries between authorized and unauthorized interaction and by that also between criminal acts and humanitarian acts. Thus, it has the potential to criminalize all interactions between irregular migrants and the general public, if related to crossing the international border, and to ultimately dissolve the protection of humanitarian acts, effectively criminalizing and punishing not only economic, but any kind of social interactions with irregular migrants, including family relations and humanitarian acts.

As the boundaries between criminal acts and humanitarian acts are fluid, third parties, whatever their motives may be, can be governed in similar ways, based upon suspicion – and possibly criminalization – for their interaction with irregular migrants crossing borders. This has an important impact upon societal relations, widening the gap between irregular migrants and the general population, leading eventually to lower levels of engagement with the suffering of irregular migrants. Whilst an explicit protection of humanitarian acts is urgently needed to set the proper normative standards, it is likely to be insufficient to avoid all implications of anti-smuggling laws, as these criminal

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64 See author's research.

laws invoke a general level of insecurity, anxiety and securitization targeting third parties in touch with irregular migrants.

## 5 Conclusion

Saving lives at sea is not simply a question of enhancing the EU rescue efforts, but primarily a question of eliminating sanctions and facilitating third party rescue efforts. Understanding the current problem not as a natural problem of geography and capacities, but as the result of the incremental securitization of rescue requires a different set of responses on saving lives at sea than those proposed by the EU. Hereby, it is important to point out that it is not rescue in the Mediterranean as such that poses a challenge, but the problem is limited to the rescue of irregular migrants. Enhancing rescue efforts will remain insufficient as long as rescue of irregular migrants is not decriminalized and desecuritized. All seafarers that fulfil their duty to render assistance at sea should be protected and even more supported through EU legislation. EU policies need to desecuritize the Mediterranean to avoid further lives lost at sea and to allow seafarers to follow their international duties without fear of punishment.

Concretely, the following steps are required:

First, an important means in eliminating sanctions that impede rescue at seas is the elimination of criminal sanctions imposed by anti-smuggling laws for humanitarian acts, requiring a modification of the Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence. Equally all humanitarian acts need to be legally exempted from criminal and administrative sanctions in letter and in practice. An implicit protection of humanitarian acts, based upon a distinction between for-profit and non-profit acts, or an optional protection is insufficient. EU institutions need to endorse an explicit protection of humanitarian acts and provide easy possibilities of appeal by individuals and organisations for restrictions imposed. Whilst these steps might not be sufficient, at least they will allow for a normative consensus, anchored in law, for the protection of rescue and other humanitarian acts.

Second, rescue needs to be disentangled from border security issues. Currently, steps towards decriminalizing rescue continue to be embedded in a program of border security, subordinated to wider security concerns. This renders the rescue agenda highly vulnerable as it becomes merged with and even subsumed under security concerns. A joint rescue/security agenda is untenable, due to their conflicting nature. As one may need to be prioritized over the other, saving lives can be subordinated to broader security concerns. Embedding rescue within security is likely to continue the securitization of

rescue and is unable to efficiently tackle the problem of third party sanctions. Ultimately, embedding rescue within security will privilege rescue operations by border security agencies and marginalize third party rescue efforts.

Many of the proposals by the EU's Task Force Mediterranean continue with current policies of prevention, security and rescue, increasing operational capacities of Frontex and the Member States, supplemented by border surveillance technologies. The last decade has, however, illustrated that more of the same is not better. In spite of the number of people saved, it is evident that these policies have so far not succeeded in reducing the death toll. On the contrary, the death toll at European borders seems to be incessantly increasing. Concentrating solely on the European Union's rescue capacities is under these circumstances not sufficient; it is important to consider the concerns that impede rescue by seafarers. The elimination of sanctions to rescue is a first step in the right direction, but it needs to be complemented by desecuritization efforts to be effective. Ultimately, the success of policies for saving lives can only be measured against a diminishing death toll at the borders.



