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**CIVIL SOCIETY SUPPORT TO REFUGEES AND OTHER MIGRANTS IN EUROPE:
THE NEED TO END THE BACKLASH ON CIVIL SOCIETY SPACE**

Thematic Study prepared by the Expert Council on NGO Law of the Conference
of INGOs of the Council of Europe*

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**The opinions expressed in this work are the responsibility of the authors and do not necessarily reflect the official policy of the Council of Europe.*

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I. INTRODUCTION

1. This thematic study explains how civil society space in Europe is adversely impacted by policies to deter refugees and other migrants from accessing Europe. It assesses the impediments imposed on non-governmental organisations (NGOs) and solidarity networks who provide humanitarian and related support to those arriving either by sea or by land, as well as to those who have already arrived. Such humanitarian and related support reflects the vital role civil society organisations play in fostering the fundamental values of human rights, democracy and the rule of law and it is protected by freedom of association among other rights.
2. These impediments facing civil society include the criminalisation of their activities, subjecting them to harsh regulations and fines, publicly stigmatising them and their work, impeding their access to locations where refugees and other migrants are located, imposing barriers on their ability to register as NGOs or to maintain their registration, as well as obstructing their access to funding. The study assesses how such measures impact on Council of Europe (CoE) member States' obligations to foster civil society space and makes recommendations as to how such space can be better fostered. It takes into account Article 11 of the European Convention on Human Rights (ECHR) (freedom of association) and associated standards relating to the treatment of NGOs applicable to CoE member States, including *Recommendation CM/Rec(2007)14 on the legal status of nongovernmental organisations in Europe* ([Recommendation CM/Rec\(2007\)14](#)), and *Recommendation CM/Rec(2018)11 on the need to strengthen the protection and promotion of civil society space in Europe* ([Recommendation CM/Rec\(2018\)11](#)). It also reflects the Expert Council on NGO Law's [Guidelines on protecting NGO work in support of refugees and other migrants](#) (Expert Council Guidelines).¹
3. This study updates an earlier study prepared by the Expert Council on NGO Law (the Expert Council) in 2019 covering similar themes.² The Expert Council decided to update its 2019 study because of the continued and serious challenges faced by NGOs and solidarity networks supporting refugees and other migrants in a growing number of countries in Europe, the evolving regional dynamics associated with those challenges and the need for concerted efforts to be undertaken by States and other actors to ensure that this backlash against civil society ends.
4. Many CoE member States have adopted strategies to deter refugees and migrants which they have sought to keep away from the gaze of the public. In some cases, member States have reduced or eliminated rescue or humanitarian services as a part of their strategies of deterrence. This has contributed substantially to migrant precarity and deaths. Efforts undertaken by NGOs and civil solidarity networks that seek to fill the gaps left by inadequate State services have led these actors to be criminalised or rebuked in other ways. The Parliamentary Assembly of the Council of Europe (PACE) has noted these trends and expressed its deep concern about 'reports about politically motivated and undue restrictions on the work of NGOs which are assisting refugees and migrants.'³

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¹ Expert Council on NGO Law, CONF/EXP(2020)3 (May 2020), <https://rm.coe.int/expert-council-conf-exp-2020-3-guidelines-on-protecting-ngo-work-in-su/16809e4a81>.

² Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and other Migrants In Council of Europe member States (Expert Council on NGO Law, December 2019) CONF/EXP(2019)1 <https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969>.

³ PACE, 'Rights and obligations of NGOs assisting refugees and migrants in Europe', Resolution 2356 (2020).

5. The study adopts the approach taken by [Recommendation CM/Rec\(2007\)14](#), which provides at I(1)-(4):

For the purpose of this recommendation, NGOs are voluntary self-governing bodies or organisations established to pursue the essentially non-profit-making objectives of their founders or members. They do not include political parties. NGOs encompass bodies or organisations established both by individual persons (natural or legal) and by groups of such persons. They can be either membership or non-membership based. NGOs can be either informal bodies or organisations or ones which have legal personality. NGOs can be national or international in their composition and sphere of operation.

6. However, given their importance in providing support to people on the move throughout Europe, the study regularly refers as well to solidarity networks, which in practice can be ad hoc citizen or community groups, networks sometimes including amongst them registered organisations which come together to address a particular issue or problem. Because of their loose structure, these groups are often at the forefront of criminalisation and related strategies of deterrence.
7. This study pursued a mixed methodological approach involving:
- i) the analysis of international law, standards and jurisprudence governing freedom of association, and wider applicable legal frameworks where relevant to the context, including human rights law, refugee law, as well as laws which prohibit trafficking in human beings and smuggling of migrants;
 - ii) a review of the domestic legal frameworks operating in CoE member States, and how those legal frameworks were applied in practice.
8. The analysis of international law, standards and jurisprudence was undertaken by reviewing applicable treaties and other texts binding on CoE member States as well as declarative and other soft law instruments, jurisprudence, statements by relevant expert bodies, academic treatises and commentaries.
9. A questionnaire was developed to facilitate the collation of primary and secondary materials on the laws and practice of CoE member States. Data was collected and analysed by the author and by a team of students working with her at the University of Essex Human Rights Centre Clinic.⁴
10. The questionnaire was also circulated for input through the CoE Conference on INGOs to its membership, and was also circulated to national NGOs, to relevant CoE bodies, other international and regional organisations, as well as to policy institutes, academics, legal practitioners and others with relevant expertise or experience related to the subject matter of the study. Twenty-five submissions were received in direct response to the questionnaire, including several submissions from national ombudsman and human rights institutions, NGOs and NGO networks coming from or reporting on developments in fourteen CoE member States. Further targeted input was gathered from CoE and European Union (EU) bodies, United Nations treaty bodies and special procedures, policy institutes, and academic studies relevant to the subject.

⁴ The author acknowledges and is very grateful for the research assistance and related support provided by Güley Bor, Itzia Miravete Veraza, Leonie Ngom and Vanessa Topp.

11. The study also takes account of information gathered while preparing previous studies of the Expert Council, particularly the 2024 [Study on the Stigmatisation of Non-Governmental Organisations in Europe](#).⁵
12. The Expert Council is grateful for all inputs received which have aided significantly in the preparation of this thematic study.

II. CONTEXT

13. People are on the move for numerous reasons. Many are seeking to escape war, persecution, protracted conflicts, or political instability. Others seek to escape extreme poverty, lack of economic prospects, inequalities, and discrimination. They are seeking to relocate to countries where they believe they will find safety, opportunity, or stability, or where they already have family or other ties. Refugees and other migrants are a heterogeneous group.
14. Due to the lack of safe routes for individuals in need of protection, many have been compelled to travel in an “irregular” situation,⁶ sometimes characterised by destination States as “illegal.” As noted by the UN Special Rapporteur on the human rights of migrants,

[a]lthough the act of seeking asylum is lawful and crossing borders without authorisation should be considered an administrative infraction at the most, the word “illegal” is commonly used to label asylum seekers, undocumented migrants or others in irregular situations. Once the act of migration is tarred as a crime, it is easy to label any group assisting these “criminals” as acting illegally itself.⁷

15. There are multiple routes used by refugees and other migrants compelled to travel in an irregular situation in search of safety or opportunity. These routes continue to evolve in response to the barriers, pushbacks and other countermeasures imposed by many States of transit and destination.
16. Common routes by sea include: i) the Central Mediterranean route (persons coming from many African and some Asian countries through Libya or Tunisia and hoping to reach Italy or Malta); ii) the Eastern Mediterranean route (persons coming from Syria and elsewhere to Türkiye and hoping to reach Greece); and iii) the Western Mediterranean or Atlantic routes (persons coming from mainly sub-Saharan African countries through eastern Morocco to Spain or from western Morocco/Western Sahara to the Canary Islands in the Atlantic Ocean or the enclaves of Ceuta and Melilla).
17. Common land routes include: i) the Balkan route (persons coming through Türkiye, then onward to Bulgaria or Greece then further north, through countries in the Western Balkans and onward via countries like Croatia or Hungary with the goal of reaching countries in northern and western

⁵ Study on the Stigmatisation of Non-Governmental Organisations in Europe (Expert Council on NGO Law, 20 March 2024) CONF/EXP(2024)1 <https://rm.coe.int/study-on-stigmatisation-of-ngos-in-europe-en/1680af95df>.

⁶ IOM, *Glossary on Migration* (18 June 2019) “migrant in an irregular situation”, 133. Even when in an irregular situation, migrants are still entitled to the respect, protection and fulfilment of their human rights. It is recognised in Art 31(1) of the 1951 Refugee Convention that people fleeing persecution may have to use irregular means to claim asylum in another country.

⁷ UN Human Rights Council, ‘Right to freedom of association of migrants and their defenders’, Report of the Special Rapporteur on the human rights of migrants, UN Doc A/HRC/44/42 (13 May 2020) para 67.

Europe); ii) the Eastern Europe route through Belarus, and Moldova towards the eastern EU Member States of Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Slovakia and Romania.

18. The overriding response by European States to the patterns of refugee and other migrant arrivals and the prospect of further arrivals is to erect both physical and legal barriers to prevent individuals from crossing borders and/or to quickly push back those that arrive, and in some cases to reduce or eliminate support services (both search and rescue capacities at sea and humanitarian support at borders and in-country). New walls and fences have been constructed⁸ such as the razor-wired wall in Poland with the Belarusian border completed in 2022⁹ and the fence built by Greece at the Evros river along the shared border with Türkiye (which Greece is hoping to extend¹⁰), and an increasing number of countries are resorting to violent pushbacks and mass expulsions to prevent persons who are approaching a border from seeking protection,¹¹ or ignoring or delaying responses to distress calls from persons aboard boats at risk of capsizing, sometimes with devastating results.¹²
19. Bilateral¹³ and multilateral¹⁴ agreements are brokered to deem certain transit or third countries as “safe” and thereby to pave the way for persons’ asylum claims in destination countries to be declared inadmissible and for them to be deported to those transit or third countries. Some such agreements have sought to extend border control cooperation with neighbouring countries¹⁵ leading to pull-backs,¹⁶ or to declare certain methods of travel or arrival as automatically inadmissible without consideration of the substance of the claims.¹⁷
20. Bureaucratic hurdles and attempts to deflect rescue responsibilities often result in significant

⁸ Costica Dumbrava, ‘Walls and fences at EU borders’, Briefing, European Parliamentary Research Service, PE 733.692 (October 2022). See also, Jennifer Rigby and Jeff Crisp, ‘Fortress Europe’, The Telegraph, <https://www.telegraph.co.uk/global-health/fortress-europe-borders-wall-fence-controls-eu-countries-migrants-crisis/>.

⁹ AP with Euronews, ‘Poland completes 186-kilometre border wall with Belarus after migration dispute’ (7 July 2022).

¹⁰ Antonia Zimmermann, ‘Greek prime minister renews call for EU cash for border fence’, *Politico* (1 April 2023).

¹¹ CoE Commissioner for Human Rights, ‘Pushed beyond the limits Four areas for urgent action to end human rights violations at Europe’s borders’ Recommendation (April 2022).

¹² *AS & others v. Italy*, UN Doc CCPR/C/130/D/3042/2017 (HRC, 28 April 2021); *AS & others v. Malta*, UN Doc CCPR/C/128/D/3043/2017 (HRC, 28 April 2021).

¹³ Safety of Rwanda (Asylum and Immigration) Act 2024, Ch. 8; Greek Joint Ministerial Decision 42799/2021 designating Türkiye as a ‘safe third country’ for asylum seekers originating from Syria, Afghanistan, Pakistan, Bangladesh and Somalia, with additional countries subsequently also designated. See also, the Memorandum of Understanding signed between Italy and Libya on 2 February 2017 (renewed for a second time in February 2023).

¹⁴ For example, EU-Türkiye Statement of 18 March 2016. See also, Memorandum of Understanding (MoU) on a strategic and comprehensive partnership between the EU and Tunisia (Tunis, 16 July 2023); Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger); Working Arrangement between Frontex and the European Union Capacity Building Mission in Niger (15 July 2022) (currently suspended).

¹⁵ MOU between Italy and Libya (2 February 2017, last renewed February 2023).

¹⁶ Pull-backs are ‘designed to physically prevent migrants from leaving the territory of their State of origin or a transit State (retaining State), or to forcibly return them to that territory before they can reach the jurisdiction of their destination State.’ They can be undertaken in the interest of retaining states trying to prevent citizens from escaping or ‘at the instigation and on the behalf of destination States desiring to prevent migrant arrivals without having to engage their own border authorities in unlawful pushback operations (indirect arrival prevention).’ [UN Human Rights Council, ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer’, UN Doc A/HRC/37/50 (23 November 2018) para. 54].

¹⁷ Safety of Rwanda (Asylum and Immigration) Act 2024, Ch. 8 The Migration and Economic Development Partnership (MEDP) with Rwanda which underpins the application of the Safety of Rwanda (Asylum and Immigration) Act 2024 provides for the transfer to Rwanda of all migrants entering the UK after 1 January 2022 who arrive “through an illegal and dangerous route” and without a right to remain.

delays to disembark those rescued at sea to a place of safety, leaving vulnerable people onboard in a state of *de facto* detention, also suffering from overcrowding, inadequate food, shelter and medical care and anxiety about their fate.¹⁸ Once disembarked, they and the many others who have traversed land borders face further and often prolonged detention often in closed reception centres and other controlled facilities,¹⁹ such as the Closed Control Access Centres in Greece,²⁰ or the automatic detention in Foreigner Registration Centres of people crossing into Lithuania from Belarus.²¹

21. Civil society organisations should ideally be collaborating with governments to address these, and the range of other challenges faced by refugees and other migrants.²² However, as is set out in detail in this thematic study, efforts by civil society to assist such persons and groups in the face of States' policies of deterrence, have been routinely thwarted and often criminalised. The more that NGOs are perceived to disrupt policies, funding arrangements and securitised border practices to limit the influx of refugees and other migrants (particularly those coming from sub-Saharan Africa, the Middle East or Asia), the more they are criminalised. This contributes, and has already contributed, to a shrinking civil society space in Europe. It also heightens the vulnerability of refugees and other migrants, persons who already face extreme risks.
22. There is a significant distinction between how States have responded to refugees and others fleeing conflicts in Europe (e.g., persons fleeing the Russian invasion of Ukraine,²³ or ethnic Armenians fleeing the conflict in Nagorno-Karabakh) and the support provided by NGOs and solidarity networks in those contexts, as opposed to their response to persons, often from communities discriminated against on the basis of their race or country of origin, coming from further afield.
23. Following the Russian invasion of Ukraine on 24 February 2022, the EU Temporary Protection Directive,²⁴ a specialist agreement which needs to be specifically activated, was activated.²⁵ Once triggered, beneficiaries of temporary protection are entitled to a residence permit for the entire duration of the protection (which can last from one year to three years), access

¹⁸ OHCHR, "Lethal Disregard" Search and rescue and the protection of migrants in the central Mediterranean Sea (May 2021) 29-31.

¹⁹ European Council on Refugees and Exiles, *Reception, detention and restriction of movement at EU external borders* (Heinrich-Böll-Stiftung European Union, July 2021).

²⁰ NGO Joint Statement: 'Not again in 2024: Call for upholding human rights in the Samos Closed Controlled Access Centre', <https://rsaagean.org/en/joint-statement-samos-ccac/>.

²¹ MSF, *Death, Despair and Destitution: The Human Costs of the EU's Migration Policies* (February 2024) 40.

²² This is recognised in the New York Declaration for Refugees and Migrants [UN General Assembly, UN Doc. A/RES/71/1 (3 October 2016) para 61: 'While recognizing the contribution of civil society, including non-governmental organizations, to promoting the well-being of migrants and their integration into societies, especially at times of extremely vulnerable conditions, and the support of the international community to the efforts of such organizations, we encourage deeper interaction between Governments and civil society to find responses to the challenges and the opportunities posed by international migration.'

²³ Global Detention Project, 'The Ukraine Crisis: Double Standards: Has Europe's Response to Refugees Changed?' (2 March 2022).

²⁴ Council of the European Union, 'Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof', OJ L 212 (7 August 2001) 12–23.

²⁵ Council of the European Union, 'Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection', ST/6846/2022/INIT, OJ L 71 (4 March 2022) 1–6.

to employment, access to suitable housing, medical care, education for children; the possibility of family reunification in certain circumstances subject to rules applicable to the profession and to national labour market policies and general conditions of employment etc. Many governments have praised the capacity of civil society and volunteers to self-organise in response to the influx of asylum seekers from Ukraine.²⁶

24. Following the escalation of the conflict in Nagorno-Karabakh, the Armenian Government reported an influx in refugee arrivals (ethnic Armenians) in September and October 2023, with approximately 15,000 persons arriving each day during the peak of the crisis between 24 September and 4 October 2023. Local and international civil society organisations were considered “partners” by the Government and collaborate closely on meeting basic humanitarian needs.²⁷
25. The Secretariat of the European Commission against Racism and Intolerance (ECRI) has noted in its factsheet on the integration and inclusion of migrants that ‘solidarity with people in need’ must remain ‘the norm in the management of humanitarian crises. All people fleeing war and other emergencies, irrespective of their national or ethnic origin, citizenship, skin colour, religion, language, sexual orientation or gender identity, should be promptly offered adequate protection.’²⁸
26. Civil society have a crucial role to play in reminding States and entities in Europe of the importance of solidarity and respect for the fundamental rights of all persons, without discrimination on any ground.

III. CIVIL SOCIETY SPACE – THE STANDARDS

27. Solidarity is an elemental expression of shared humanity. As the UN Special Rapporteur on the situation of human rights defenders has explained in her 2022 report on human rights defenders working on the rights of refugees, migrants and asylum-seekers, many defenders came to this work:

not because they intended to establish a career in human rights, but decided to act when confronted with families, including children, dying in their localities. They are rescuing people from drowning in seas, saving those making desperate attempts to cross mountains, those freezing in forests or trekking across deserts. Some defenders are bringing food and clothes to those in need, or providing shelter, sometimes in their own homes, to those making dangerous journeys.²⁹

28. The right to act in solidarity and support of others is reflected in numerous international declarations such as the [Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and](#)

²⁶ Aarti Narsee and Giada Negri, *Civic Space Report 2023: Bulgaria* (CIVIC-FORUM.EU; CIVICSPACEWATCH.EU, 2023) 16.

²⁷ UN Inter-Agency Appeal, Armenia Refugee Response Plan: Emergency and Resilience Appeal (October 2023 – March 2024); UN Women, ‘Voices of Women Activists and Civil Society Organizations: First respondents to the Armenia refugee crisis’ (12 October 2023); Will Neal, ‘Winter looms for Nagorno-Karabakh’s (already forgotten) refugees’, *The New Humanitarian* (25 October 2023).

²⁸ ECRI, ‘Integration and inclusion of migrants’ Factsheet (13 March 2024) para. 10.

²⁹ UN General Assembly, Report of the Special Rapporteur on the situation of human rights defenders ‘Refusing to turn away: human rights defenders working on the rights of refugees, migrants and asylum-seekers’, UN Doc A/77/178 (18 July 2022) para 8.

Fundamental Freedoms, which recognises that

everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels.³⁰

29. The Declaration explains further that,

everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights.³¹

30. In accordance with this Declaration, States are obligated not only to refrain from inhibiting acts of solidarity but are also called upon to adopt such legislative, administrative and other steps as may be necessary to give effect to, and support those who seek to act in solidarity.³² Indeed, States are obligated to create the legal and factual conditions for defenders to be able to freely perform their mandates.³³ This includes protecting associations from threats and actions emanating from private persons and entities that would impair their rights.³⁴

31. Given the important role of human rights defenders in democratic societies, the free and full exercise of this right [to freedom of association] imposes upon the State the duty not only to refrain from unnecessary, unlawful or arbitrary interferences with rights, but also

to actively protect and promote a safe and enabling environment in which human rights defenders can operate safely without stigmatisation and fear of reprisals.³⁵

32. A safe and enabling environment is one in which civil society can operate free from hindrance and insecurity. It is also an environment meant to capacitate and to empower, to support and to encourage. This is underscored in the [OSCE/ODIHR and the Venice Commission Joint Guidelines on Freedom of Association](#) which recognise that States Parties to the ECHR are obligated by virtue of Article 11 to facilitate the exercise of the right to freedom of association by 'creating an enabling environment in which formal and informal associations can be established and operate.'³⁶

33. Fostering such an enabling environment

assists States in fulfilling their existing international human rights obligations and

³⁰ UN General Assembly Resolution 53/144 (9 December 1998) Art. 1.

³¹ UN General Assembly Resolution 53/144 (9 December 1998) Art. 12(3).

³² UN General Assembly Resolution 53/144 (9 December 1998) Art. 2(1) and (2).

³³ See, e.g., *Kawas-Fernández v. Honduras* (Merits, Reparations and Costs) Series C No. 196 (IACtHR, 3 April 2009) para. 146 [concerning States' obligations towards environmental defenders].

³⁴ UN Human Rights Committee, 'General Comment 31' Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para. 8.

³⁵ Recommendation CM/Rec(2018)11, preamble.

³⁶ OSCE/ODIHR and the Venice Commission Joint Guidelines on Freedom of Association, Study no. 706/2012 OSCE/ODIHR Legis-Nr: GDL-FOASS/263/2014, CDL-AD(2014)046 adopted at its 101st Plenary Session, 12-13 December 2014 (2015), para. 74.

commitments, without which equality, accountability and the rule of law are severely weakened, with implications at the national, regional and international levels.³⁷

34. The manifestation of a vibrant civil society space, with NGOs and related civic networks providing humanitarian assistance or other services to vulnerable individuals and groups, and expressing a diverse range of views and interests, gives effect to the right to freedom of association under Article 11 of the ECHR. States' respect and positive support for such activities reflects their adherence to principles of democratic pluralism and their commitment to human rights and the rule of law.

III.1 Civil society and freedom of association

35. The pivotal role of NGOs in providing support to refugees was recognised already at the time of the adoption of the Refugee Convention in 1951.³⁸ Recommendation C provides:

CONSIDERING that, in the moral, legal and material spheres, refugees need the help of suitable welfare services, especially that of appropriate non-governmental organisations:
RECOMMENDS Governments and inter-governmental bodies to facilitate, encourage and sustain the efforts of properly qualified organisations.

36. This pivotal role of civil society is also recognised in the [Global Compact on Refugees](#) (the Global Compact), which understands that 'civil society organisations, including those that are led by refugees, women, youth or persons with disabilities, and those operating at the local and national level' 'undertake important work for refugees' and should be seen 'in a spirit of partnership.'³⁹

37. The Global Compact further recognises that

In fostering respect and understanding, as well as combating discrimination, the power and positive impact of civil society, faith-based organisations, and the media, including social media, will be harnessed.⁴⁰

38. This important role of civil society is also underscored in the [Global Compact for Safe, Orderly and Regular Migration](#), in which State signatories recognise the need to implement the Global Compact in cooperation and partnership with 'migrants, civil society, migrant and diaspora organisations, faith-based organisations' and many others.⁴¹

39. In accordance with the Expert Council [Guidelines](#),⁴² NGO activities in support of refugees and other migrants are a manifestation of the right to freedom of association and an essential contribution to securing the human rights of refugees and other migrants, including the rights to be treated with dignity and respect for their humanity, to be provided with adequate food, shelter and health care, to liberty and security, to seek asylum, to protection against torture

³⁷ UN General Assembly, 'Civil Society Space', UN Doc. A/HRC/RES/32/31 (20 July 2016) para. 1.

³⁸ Final act of the United Nations conference of plenipotentiaries on the status of refugees and stateless persons (Geneva, Switzerland, 2 - 25 July 1951) para. IV(c).

³⁹ UNGA, [Global Compact on Refugees](#), UN Doc A/73/12 (Part II) (2018) para. 40.

⁴⁰ *Ibid*, para. 84.

⁴¹ UNGA, [Global Compact for Safe, Orderly and Regular Migration](#), UN Doc A/RES/73/195 (11 January 2019) para. 44.

⁴² Expert Council on NGO Law, CONF/EXP(2020)3 (May 2020), <https://rm.coe.int/expert-council-conf-exp-2020-3-guidelines-on-protecting-ngo-work-in-su/16809e4a81>.

and other ill-treatment and against refoulement and collective expulsion.

40. The right to freedom of association protects individuals and associations against unjustified State interference which may include the unjustified refusal to register or the decision to dissolve an organisation, hampering an association from carrying out its activities (e.g., by imposing excessive administrative burdens or limitations on activities or restrictions on financing).
41. Although freedom of association is not an absolute right, interferences with the right will only be justified under the European Convention if they are:
 - i. Prescribed by law, meaning that they have a basis in domestic law, that such law is accessible and foreseeable in its effects in the sense that it is formulated with sufficient clarity and precision to enable the individuals or organisations concerned to understand how to regulate their conduct in line with the law. Interferences should not be overly broad, and legal frameworks must also afford protection against arbitrary interferences by public authorities, for instance by avoiding any legal discretion granted to the executive which could be expressed as an unfettered power.⁴³
 - ii. Even where the interferences are prescribed by law, they will only be justifiable if they pursue one or more of the legitimate aims set out in Article 11(2) of the ECHR: national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms of others. These aims (and the interferences or exceptions related to freedom of association they give rise to) must be narrowly interpreted.⁴⁴ The existence of a “legitimate aim” must not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work nor as a means to hinder persons from applying for asylum.⁴⁵ According to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘crossing the border of a country in an unauthorised manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalising irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.’⁴⁶
 - iii. They must also be necessary in a democratic society.⁴⁷ As an open, plural, and vibrant civic space is a pre-condition for democratic, cohesive, and resilient societies, only interferences on civil society space which correspond to a ‘pressing social need’ will be countenanced.⁴⁸ Furthermore, the interference must be proportionate to the legitimate aim pursued. A principal consideration is whether the restrictions adopted were needed at all,

⁴³ *Islam-Ittihad Association and Others v. Azerbaijan*, No. 5548/05, 10 November 2014, paras. 43, 44.

⁴⁴ *Sidiropoulos and Others v. Greece*, No. 26695/95, 10 July 1998, para. 38. See also, OSCE/ODIHR and the Venice Commission, Joint Guidelines on Freedom of Association, para. 34.

⁴⁵ Venice Commission and OSCE/ODIHR, ‘Joint Opinion on the Provisions of the So-Called “Stop Soros” Draft Legislative Package which Directly Affect NGOs’, [Hungary] CDL-AD(2018)013, Strasbourg (25 June 2018) para. 80.

⁴⁶ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, ‘General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families’, UN Doc. CMW/C/GC/2 (28 August 2013) para. 24.

⁴⁷ Art. 11(2) ECHR.

⁴⁸ *Erdođdu and İnce v. Turkey* [GC], No. 25067/94, 8 July 1999, para. 47.

and if so, whether they constituted the least intrusive of all possible means that could have been adopted.

III.2 Civil society organisations that pursue agendas that diverge from State policies

42. Civil society organisations regularly pursue agendas that differ or extend beyond State policies or priorities. They tend to do so by monitoring and advocacy with Parliaments and others, engaging the media and the public, seeking judicial review of governmental regulations and policies they disagree with or see as ineffective, or pursuing other test cases through the courts.⁴⁹ They also do so by taking direct action to contribute to the fulfilment of human rights or other social justice objectives. Some of this direct support and assistance may simply be to engage where governments are aligned but overwhelmed (e.g., community environmental clean-up operations; local civic support in response to natural disasters). Here, governments tend to see such support as complementary to their own service provision and are generally supportive. However, NGOs and solidarity networks might also engage where States' policy is not to engage.
43. Freedom of association requires States to foster civil society space regardless of whether civil society groups align with government policies; this is the basis of pluralist societies. In practice however, and as described in this study, governments often take steps to regulate lawful civil society conduct that they disagree with or seek to discourage or limit it:

Organisations and individuals offering solidarity to migrants are “inconvenient”: they monitor and report the violence and responsibilities of European authorities. That is why they are obstructed in every possible way.⁵⁰

44. In some cases, such civil society engagement will be lawful, just undesirable to the government. In other cases, States might criminalise the conduct regardless of whether there is a sound criminological basis to do so. Indeed, “[c]riminalisation of solidarity is the unhappy outcome of States trying to put off NGOs and solidary movements who are trying to fill gaps States don’t want to be filled.”⁵¹ As has been argued, it is precisely “because of their intrinsic character of opposition to both the militarisation of borders and to humanitarian technologies of government” that ‘autonomous practices of migrant’s solidarity are accused of “facilitating illegal migration” and become the target of State repression.’⁵²
45. Any interference with freedom of association must be assessed on the grounds of legality, the legitimacy of the aims, and whether the restriction can be justified as necessary in a democratic society; ‘This means that any restriction must be proportional to the intended legitimate purpose and that there must be a strong, objective justification for the law and its application.’⁵³ States cannot impede freedom of association for an illegitimate or ulterior purpose. A part of

⁴⁹ Recommendation CM/Rec(2018)11, paras. 10, 12.

⁵⁰ Border Violence Monitoring Network (BVMN), ‘The Balkan route : Migrants without rights in the heart of Europe’, (June 2020) 34.

⁵¹ Carla Ferstman, ‘Hypocrisy, Cynicism or Just Tokenism? The (In)Compatibility of Partnership and Whole-Of-Society Approaches with the Criminalisation of Civil Society Groups Who Support Refugees and Migrants’ ASILE Forum on the Partnership Principle in the UN Global Compact on Refugees (13 May 2022) <https://www.asileproject.eu/hypocrisy-cynicism-or-just-tokenism/>.

⁵² Deanna Dadusc and Pierpaolo Mudu, ‘Care without Control: The Humanitarian Industrial Complex and the Criminalisation of Solidarity,’ (2022) 27(4) *Geopolitics* 1205.

⁵³ OSCE/ODIHR and the Venice Commission, Joint Guidelines on Freedom of Association, para. 111.

these considerations will involve assessing whether there were contextual factors to consider, such as the application of other branches of law,⁵⁴ professional or ethical obligations,⁵⁵ codes of conduct, and/or the need to act urgently to assist persons in distress, prevent loss of life or ill-treatment. The more significant the interference, the less likely it is to satisfy proportionality requirements.

III.3 Migrant/Refugee-led associations and civil society space

46. The right to freedom of association applies to all persons and groups within a State without discrimination, including refugees and other migrants.⁵⁶

47. The UN Special Rapporteur on the human rights of migrants has underscored that:

Allowing migrants to organise empowers migrant communities to care for their own needs directly rather than relying on the advocacy and support of others. As migrants have better access to their peers and understanding of the challenges they face, their collective response to problems is often more effective than that of others. Encouraging migrants to exercise their freedom of association enables them to have a positive impact in the communities and countries in which they reside.⁵⁷

48. It has been recognised that empowering migrant or refugee-led organisations to advocate for changes in laws and policy ‘should be a cornerstone of any integration strategy.’⁵⁸ The important role played by refugees in civil society groups assisting refugees and migrants has been highlighted by PACE. It recognised that refugee participation in NGOs

allows NGOs to better take account of the specific needs of the persons concerned and can ensure that humanitarian assistance effectively reaches beneficiaries. Within NGOs, refugees can also overcome language barriers and cultural differences.⁵⁹

49. PACE also encouraged NGOs and donors to ‘include refugees and migrants in the implementation of their humanitarian work and its monitoring.’⁶⁰ The need to ‘encourage and empower refugees, at the outset of an emergency phase, to establish supportive systems and networks that involve refugees and host communities’ is also recognised by the New York Declaration for Refugees and Migrants.⁶¹

50. Despite this, some migrants who help others can face greater risks when providing support if

⁵⁴ International Maritime Organization, Guidelines on the Treatment of Persons Rescued at Sea, Resolution MSC.167(78) (adopted on 20 May 2004) MSC 78/26/Add.2 Annex 34, paras. 3.1, 5.1(2).

⁵⁵ The Hippocratic Oath.

⁵⁶ UN Human Rights Council, ‘Right to freedom of association of migrants and their defenders’, Report of the Special Rapporteur on the human rights of migrants, UN Doc A/HRC/44/42 (13 May 2020) para. 33. See also, OSCE/ODIHR and the Venice Commission Joint Guidelines on Freedom of Association, para. 30. See also, Art. 15, Convention on the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; *Cisse v. France*, No. 51346/99, 9 April 2002, para. 50 [regarding freedom of peaceful assembly].

⁵⁷ UN Human Rights Council, ‘Right to freedom of association of migrants and their defenders’, *ibid*, para. 34.

⁵⁸ Neil Falzon, ‘Migrant-Led Initiatives: Turning the Tables’, African Media Association Malta (2022) 11.

⁵⁹ PACE, ‘Rights and obligations of NGOs assisting refugees and migrants in Europe’ Resolution 2356 (2020) (adopted 4 December 2020) para. 3.

⁶⁰ *Ibid*.

⁶¹ New York Declaration for Refugees and Migrants [UN General Assembly, UN Doc. A/RES/71/1 (3 October 2016) para 7(c).

their residency status is precarious and they can fear a backlash. For example, the Platform for International Cooperation on Undocumented Migrants (PICUM) has reported on undocumented activists in Belgium who had advocated for the regularisation of their status in the face of increased precarity and exploitation. During demonstrations in 2021, these activists suffered police violence, and their status put them at risk of deportations; they write that ‘Sixty-six people were arrested by the police during two demonstrations in April 2021, including for “identity checks”, while trying to reach the location of the occupation.’⁶²

51. These fears produce a chilling effect and can impede refugees and other migrants from engaging.

IV. THE PRACTICE

52. This section considers the practice of shrinking civil society space in Europe for NGOs and solidarity networks who are providing humanitarian assistance and other support to refugees and other migrants. It focuses principally on the period from 2020 forward and considers the criminalisation of humanitarian assistance and support, the introduction of overly restrictive regulatory frameworks, harassment and xenophobic speech acts targeting NGOs and solidarity networks, pushbacks and externalisation policies and civil society space.

IV.1 Criminalising humanitarian assistance and support

53. Criminalisation refers to the process of determining which acts or omissions should be prohibited and sanctioned, who should be charged and ultimately convicted of having contravened those prohibitions, and what sentences are applied from a range of permissible sanctions.⁶³ It involves considerations about what harm the conduct is purported to be causing and to whom, how “serious” the harm is, whether the public needs to be protected from the conduct and if so, how best to ensure such protection, and whether there are less restrictive means to deter the conduct and ensure public protection.⁶⁴
54. Accordingly, the criminalisation of humanitarian assistance and support provided to refugees and other migrants by NGOs and members of solidarity networks denotes the decision by parliaments and others that the impugned conduct (the act of providing the assistance or support) must be considered as a criminal offense because of the serious harm it causes, and the (unsubstantiated) assertion that there is no better or more appropriate method of addressing this harm. Yet as civil society groups have reported to the Expert Council, in the field of migration, ‘charges intentionally misconstrue legal activities, such as assisting with human rights and the monitoring of human rights violations, as criminally motivated activities.’⁶⁵ As was put by the Greek Council for Refugees,

Criminalisation aims to delegitimise the actions of persons who promote, protect and defend human rights. We therefore understand criminalisation to derive from the intent to discredit, sabotage or impede the important work of HRDs through the abuse of the legal

⁶² Marta Gionco and Jyothi Kanics, *Resilience and Resistance: In Defiance of the Criminalisation of Solidarity Across Europe*, Study commissioned by the Greens/EFA (June 2022) 17.

⁶³ Andrew Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart 2011) 3.

⁶⁴ Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (OUP 2008) 122-132.

⁶⁵ BVMN, ‘Contribution to the Questionnaire on State Practice – December 2023 in the framework of the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe’ (31 January 2024).

system and a targeted manipulation of the public discourse.⁶⁶

55. The impact of criminalisation is that NGOs and their employees and volunteers, members of solidarity networks and affiliated private sector actors, regardless of whether they are prosecuted or ultimately convicted,⁶⁷ are threatened with arrest, intimidated, at constant risk of being kept under police surveillance, interrogated, detained, deported, fined, having bank accounts frozen and assets seized,⁶⁸ or otherwise sanctioned. Criminalisation deters organisations and individuals associated with them from providing humanitarian assistance and support, which has an adverse impact not only on them but on those they would normally be seeking to protect and support.
56. Criminalisation can result in negative media exposure. It also makes it more difficult for the organisations affected to remain operational,⁶⁹ to be funded, and to comply with domestic administrative regulations pertaining to NGO registration, thereby having potentially long-term effects on the viability of the organisations.
57. The criminalisation of the facilitation of illegal entry, transit or stay derives from the criminalisation of migrant smuggling, as set out in UN Protocol against the Smuggling of Migrants by Land, Sea and Air. The Protocol defines the crime of migrant smuggling as ‘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.’⁷⁰
58. Parties to the Protocol are requested to criminalise the conduct of smuggling of migrants, the procurement of irregular stay, as well as producing, obtaining or providing fraudulent travel or identity documents for the purpose of enabling migrant smuggling. By including ‘financial or other material benefit’ as a required element of the crime of migrant smuggling, the Protocol was seeking 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.’⁷¹
59. The European Union’s Facilitators Package⁷² includes a Directive and Framework Decision.

⁶⁶ Alkistis Agrafioti Chatzigianni and Kleio Nikolopoulou, ‘At Europe’s Borders: Between Impunity and Criminalization’ (Greek Council for Refugees, 2023) 41.

⁶⁷ CJEU (Grand Chamber) Judgment in Case C-821/19 *Commission v. Hungary (Criminalisation of assistance to asylum seekers)* ECLI:EU:C:2021:930 (16 November 2021) para. 108.

⁶⁸ E.g., following the allegations made against the migrant rescue ship Aquarius that it had unlawfully disposed of infectious waste, Italian authorities sought to seize the ship and freeze the bank accounts of Médecins sans frontières in Italy. See, MSF, ‘Sinister attacks by Italian authorities on lifesaving search and rescue in the Mediterranean’, (20 November 2018).

⁶⁹ According to a 2021 report, ‘Among the 28 NGO-operated SAR vessels that have been operational in the Mediterranean and Aegean since January 2015, 18 have faced administrative and criminal investigations and spent time impounded or unable to sail on instruction by Italian, Greek, Maltese, German, and Dutch authorities.’ [See, Violeta Moreno-Lax et al, ‘The EU Approach on Migration in the Mediterranean’, European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs, Directorate-General for Internal Policies PE 694.413 June 2021, 95].

⁷⁰ UN Protocol against the Smuggling of Migrants by Land, Sea and Air (adopted 12 December 2000, entered into force 28 January 2004), Art. 3(a). See also, UNODC, ‘The Concept of “Financial or Other Material Benefit” in the Smuggling of Migrants Protocol’, Issue Paper, 2017.

⁷¹ UNODC, ‘Global Study on Smuggling of Migrants’, 2018, 18.

⁷² Council of the EU, Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002; Council of the EU, Framework Decision of 28 November 2002 on the strengthening

Article 1(1)(a) of the Facilitation Directive defining the crime of facilitation of entry and transit lacks a mandatory element of financial and other material benefit (it is left to the discretion of EU Member States whether to explicitly exclude humanitarian actors from criminal sanctions),⁷³ whereas Article 1(1)(b) of the Facilitation Directive requires a profit motive ‘for financial gain’ for the facilitation of irregular residence and stay, though its vague framing means that potentially persons offering legal assistance for a fee or those who receive a salary for providing humanitarian assistance may be captured by the provision.

60. The ambiguity of the Facilitation Directive has led to divergent rules and uneven implementation, including the criminalisation of humanitarian assistance in many European States. Despite repeated recommendations over many years to reform the Directive,⁷⁴ including by the Expert Council,⁷⁵ the provisions remain in place.⁷⁶ The EU Commission’s proposed update⁷⁷ which remains under consideration does not include a mandatory humanitarian exception for acts of solidarity aimed at seeing the human rights of migrants upheld. It also introduces a new offence of public instigation, without a mandatory profit motive, which could potentially become another basis to target human rights defenders.⁷⁸
61. Guidance on the Facilitation Directive was introduced in 2020,⁷⁹ though it does not go far enough. Moreno-Lax and others have argued the guidance fails to provide examples of what should be understood as ‘humanitarian assistance’, it is limited to those rescue operations conducted ‘while complying with the relevant legal framework’, and claim that

of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA), OJ L 328, 5 December 2002.

⁷³ Article 1(2) of the Facilitation Directive provides that ‘[a]ny Member State *may* decide not to impose sanctions with regard to ... cases where the aim of the behaviour is to provide humanitarian assistance.’

⁷⁴ Sergio Carrera, Lina Vosyliūtė, Stephanie Smialowski, Jennifer Allsopp and Gabriella Sanchez, ‘Update Study “Fit for purpose?” The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants’, Study for the EP Petitions Committee (PETI), European Parliament (December 2018) 29; Lina Vosyliūtė and Carmine Conte, ‘Crackdown on NGOs and volunteers helping refugees and other migrants’, Research Social Platform on Migration and Asylum (ReSOMA), Final Synthetic Report, June 2019; Violeta Moreno-Lax, Jennifer Allsopp, Evangelia Tsourdi, and Philippe De Bruycker, ‘The EU Approach on Migration in the Mediterranean’, PE 694.413, European Parliament (June 2021) 92-117. See also, OHCHR, ‘*Lethal Disregard: Search and rescue and the protection of migrants in the central Mediterranean Sea*’ (May 2021) 28 [calling for EU legislation to be revised and modified to be brought in line with UN standards under the Protocol against the Smuggling of Migrants, in particular by introducing a ‘financial or other material benefit’ requirement for classifying ‘migrant smuggling’ as a crime and an obligatory provision that expressly exempts humanitarian assistance by civil society organisations or individuals from criminalisation].

⁷⁵ Using Criminal Law to Restrict the Work of NGOs Supporting Refugees and other Migrants in Council of Europe Member States (Expert Council on NGO Law, December 2019) CONF/EXP(2019)1, paras. 127, 128.

⁷⁶ Mitsilegas has referred to the Facilitators Package as ‘a paradigm of preventive criminalisation of such a breadth that it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law. Practice on the ground has resulted in the use of criminal law on facilitation of unauthorised entry by Member States to target civil society for humanitarian assistance, and even to target migrants themselves for their journeys. [...] The Commission’s inaction appeared to perpetuate the criminalisation of humanitarianism in EU law, by sustaining a paradigm of overcriminalisation and legal uncertainty, and sent a very strong preventative signal to anyone inclined to assist migrants’ [See, Valsamis Mitsilegas, ‘Reforming EU Criminal Law on the Facilitation of Unauthorised Entry: The new Commission proposal in the light of the Kinshasa litigation’, (2024) 15(1) *New Journal of European Criminal Law* 3, 4; 5].

⁷⁷ EU Commission, ‘Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA,’ COM/2023/755 final (28 November 2023).

⁷⁸ UN Special Rapporteur on the Situation of Human Rights Defenders, ‘Response to the proposal by the European Commission for a Directive to update the Facilitators Package’ (February 2024).

⁷⁹ Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (‘Criminalisation Guidance’), C(2020) 6470 final (23 September 2020).

[e]veryone involved in search and rescue activities must observe the instructions received from the coordinating authority when intervening in search and rescue events and thereby disregarding incidents involving controversial orders to stand by or to collaborate with the [Libyan Coastguard] that could lead to refoulement.⁸⁰

62. Furthermore, activities may potentially be excluded if they are undertaken by organisations who have not been formally mandated to carry out such assistance.⁸¹
63. Some of these difficulties may ultimately be resolved when the Court of Justice of the EU (CJEU) has occasion to decide on the reference for a preliminary ruling to the CJEU by the *Tribunale di Bologna* in Italy as to whether the criminalisation of the facilitation of unauthorised entry without a mandatory exemption for humanitarian assistance is compatible with the EU Charter.⁸²
64. Laws related to migrant smuggling and trafficking in persons can be used to criminalise the actions of the providers of humanitarian services to refugees and other migrants. The *Repatriation Improvement Act*, adopted by the German Parliament on 18 January 2024, extends the scope of criminal liability for the smuggling of migrants and results in a *de facto* criminalisation of humanitarian support. Assistance with irregular entry into the EU could be punishable with up to 10 years imprisonment if it is carried out ‘repeatedly or for the benefit of several foreigners.’ This comes after prior attempts in Germany in 2019 to classify information related to the practical steps leading up to a removal as State secrets, and to potentially prosecute civil society for “aiding and abetting” in the disclosure of confidential information should they happen to share any information about removals in the course of their work.⁸³ Whilst the draft law never progressed, it contributes to a chilling effect on civil society space.
65. Individuals associated with humanitarian organisations or solidarity networks have been investigated and/or prosecuted for the facilitation of illegal entry, transit or stay despite it being clear they had no financial incentive, in an array of European countries, including Greece,⁸⁴

⁸⁰ Moreno-Lax et al, 99. See also, Gionco and Kanics (n 62) 21.

⁸¹ Gionco and Kanics, *ibid*.

⁸² ‘Request for a preliminary ruling from the Tribunale di Bologna (Italy) lodged on 21 July 2023 — Criminal proceedings against OB’ (Case C-460/23, Kinshasa) 2023/C 338/17 (25 September 2023) [involving a Congolese woman arrested at Bologna airport while attempting to enter with false documents for her, her daughter and another child travelling with them].

⁸³ CoE Commissioner for Human Rights, Letter to Ms Andrea Lindholz, Chairwoman, Committee on Internal Affairs and Community, Parliament of the Federal Republic of Germany (16 May 2019) <https://rm.coe.int/letter-to-andrealindholz-%20%20chairwoman-of-the-committee-on-internal-affa/168094799d>.

⁸⁴ For example, the cases brought against Seán Binder and Sara Mardini and other aid workers. They were variously charged with forgery, infringement of State secrets and possession of a radio without a licence (ultimately dismissed) and the more serious felony charges related to the formation and membership of a criminal organisation; the facilitation of illegal entry and money laundering (also ultimately dismissed).

Italy,⁸⁵ Switzerland,⁸⁶ Poland,⁸⁷ Latvia,⁸⁸ Lithuania.⁸⁹

IV.1.1 Criminalising the facilitation of entry

66. There is a wide range of acts that have resulted in allegations of facilitation of entry, including rescuing or helping refugees or other migrants in distress at sea, helping migrants to disembark safely, helping migrants who have experienced “pushbacks” to cross the border again, photographing coast guard vessels, providing advice to migrants and basic advocacy work like participating in peaceful demonstrations. According to the EU Fundamental Rights Agency, ‘since 2017, Germany, Italy, Malta, the Netherlands, and Spain initiated 63 administrative or criminal proceedings affecting search and rescue operations by civil society actors. The majority concern measures against SAR [search and rescue] vessels; one third of the 63 measures concern criminal proceedings against the staff working for the NGOs deploying the vessels or against the crew.’⁹⁰
67. In Greece, humanitarian workers have been targeted and some criminalised for raising the alarm about pushbacks. These include activists like Panayote Dimitras of the Greek Helsinki Monitor who were subjected to criminal investigations following their supply to authorities of information about the presence of persons within Greek territory seeking to claim asylum (and thereby, allegedly assisting persons to enter into Greece and facilitating illegal residence of a citizen of a third country for profit).⁹¹ Dimitras was required to pay a 10,000 euro bail, and has been banned from international travel. He has also reportedly been barred from conducting work related to the Helsinki Monitor.⁹² According to the Greek Council for Refugees, they and

⁸⁵ For example, the criminal investigation for aiding and abetting illegal migration, opened by the Ragusa public prosecutor against the crew and staff of the ship *Mare Jonio*, operated by *Mediterranea Saving Humans*, in March 2021. This case remains pending.

⁸⁶ BGE 146 IV 297, [involving the prosecution of a refugee aid worker charged with enabling illegal entry for having driven an Afghan asylum seeker from Italy to Switzerland]; GB190015-L/U [involving a catholic parish leader who was charged with enabling illegal stay for having accommodated a rejected Armenian asylum seeker for approximately five years, offered her a room free of charge in the parish facilities].

⁸⁷ According to *Grupa Granica*, at least 9 humanitarian aid workers working on the Polish-Belarusian border were charged in 2022 with organising illegal border crossings or aiding and abetting in the organisation of an illegal border crossing, though some of these charges were ultimately discontinued. At least one pre-trial proceeding was initiated for facilitating unlawful stay in Poland. See, “We are afraid they will shoot at some point. And it's not a joke, it can happen even by accident”, Report on the *Grupa Granica*'s anti-repression work carried out by the *Szpila Collective* and the *Helsinki Foundation for Human Rights* from the beginning of the humanitarian crisis (autumn of 2021) until the end of December 2022, <https://hfhr.pl/upload/2023/02/report-eng.pdf>. See also, *Gionco and Kanics* (n 62), 33, who put the figure of arrests much higher.

⁸⁸ Cases include members of the Latvian NGO “I want to help”, who allegedly had criminal proceedings initiated against them for their potential engagement in organising the ‘illegal movement of a group of persons across the State border’, contrary to Art 285(2) of the Latvian Criminal Code [UN Special Rapporteur on Human Rights Defenders, ‘Latvia: alleged undue use of criminal proceedings against human rights defenders Ieva Raubiško and Egils Grasmanis (joint communication)’ Official Letters and Statements (8 May 2023)].

⁸⁹ Representatives of Lithuanian organisation *Sienos Grupė* was interviewed by the head of the pre-trial division in the town of *Varėna* about allegations of migrant smuggling and hiding of migrants, though the investigation was ultimately terminated without charge. See, *Gionco and Kanics* (n 62), 32.

⁹⁰ EU Fundamental Rights Agency (FRA), ‘Search and Rescue Operations in the Mediterranean and Fundamental Rights’, (June 2023 Update) 7 (figures as of 30 June 2023).

⁹¹ UN Special Rapporteur on Human Rights Defenders, ‘Greece: criminal investigations opened against human rights defenders Panayote Dimitras, Tommy Olsen, Madi Williamson and Ruhi Akhtar (joint communication)’ Official Letters and Statements (9 March 2023).

⁹² Patrick Strickland, ‘Why Greece is clamping down on these refugee rights activists’, *Middle East Eye* (22 April 2023).

Human Rights 360 (HR360), who took the case related to the pushback of the 38 Syrians to the Evros islet at the Greek-Turkish border to the European Court of Human Rights (ECtHR), have been intimidated and targeted by the Greek authorities. According to media reports (which HR360 has denied) the organisation is being investigated for the misappropriation of funds and the establishment of a criminal organisation.⁹³

68. Law 4908/2022 amending Article 187 of the Greek Criminal Code (related to the formation and participation in criminal organisations), was enacted in March 2022. The requirements to qualify as a criminal organisation are extremely vague and broad: there must be two or more persons who gather with the intention of committing a crime. Thus, when considered alongside Greek anti-smuggling provisions of law 4251/2014 (which criminalises the facilitation of entry or stay), Law 4908/2022 will result in much heavier sentences for the facilitation of entry, a crime often applied to representatives of NGOs and solidarity groups. The amendment introduced by Law 4908/2022, allows for the mandatory imprisonment of anyone joining other people in committing a felony offence, for at least six months and up to three years, without allowing for the suspension of the sentence.⁹⁴
69. In Italy, Article 12 of the Consolidated Immigration Act regulates the offence of facilitating illegal immigration. The case law confirms that rescues at sea and the subsequent transfer of migrants to Italy can violate this provision, but these actions can be justified by the defence of fulfilling a duty (Article 51 of the Penal Code) or a state of necessity (Article 54 of the Penal Code). According to the Coalizione Italiana per le Libertà e i Diritti civili (CILD), sea rescue is usually considered a duty, but its legality may depend on the existence of imminent and serious danger to the people involved:

The issue becomes more complex when rescue occurs under conditions that do not constitute an immediate danger of shipwreck. In such situations, necessity may be invoked as a justification if there is danger to the life or safety of those rescued. However, legal opinions differ on how to interpret the requirement of serious danger to a person necessary to invoke necessity. Some judges believe this danger should be limited to risks related to navigation and shipwreck, while others include risks to the life and fundamental rights of migrants after rescue, including risks they would face if returned to Libya, such as torture and violence. This broader interpretation of danger could exclude the criminal relevance of actions by humanitarian organisations like Open Arms, even if they technically constitute a crime under the TUI. Moreover, this interpretation is supported by international norms requiring the transfer of rescues to a safe port, excluding those where people are exposed to serious risks.⁹⁵

70. After the *Cutro* shipwreck, Law no. 50/2023⁹⁶ was enacted and among other features, it creates

⁹³ Alkistis Agrafioti Chatzigiani and Kleio Nikolopoulou, 'At Europe's Borders: Between Impunity and Criminalization' (Greek Council for Refugees, 2023) 43, 45.

⁹⁴ Ombudsman Office of the Republic of Croatia, 'Contribution to the Questionnaire on State Practice' P.P.R.-2- 1 - II80I23 - s2 (1 March 2024).

⁹⁵ CILD, 'Questionnaire on State practice – Expert Council on NGO law' (On file, 2024) 4.

⁹⁶ Conversion into law, with amendments, of Decree-Law No. 20 of 10 March 2023, on urgent provisions on the flow of legal entry of foreign workers and the prevention of and fight against irregular immigration. (23G00058) (OJ General Series No. 104, 5 May 2023) <https://www.gazzettaufficiale.it/eli/id/2023/05/05/23G00058/SG>.

a new offence for 'death or injury as a consequence of illegal immigration offences.'⁹⁷ This new offence operates as a form of aggravated crime related to the facilitation of illegal entry. The targets are said to be the criminal smuggling networks however often the persons criminalised are the boat drivers, who are often migrants themselves.

71. Criminal allegations of facilitation of entry have also been made against persons assisting refugees and other migrants at land borders. For example, in Croatia, a human rights defender was prosecuted and sentenced in 2021 by the High Misdemeanour Court for having assisted an Afghan family in an irregular crossing of the State border (the family at the heart of the *M.H. and Others v. Croatia* case⁹⁸).⁹⁹ Ieva Raubiško, a project manager with the civil society group "I Want to Help Refugees", from Latvia, was charged with organising intentional illegal crossing of the State border for a group of people under the Article 20 and Article 284/2 of the Latvian Criminal Code. She is being prosecuted for assisting a group of asylum seekers at the Latvia-Belarus border in January 2023.¹⁰⁰
72. In Poland, where the work of members of NGOs and solidarity networks supporting vulnerable migrants in the border areas with Belarus have also been criminalised, one resident from Podlasie explained:

It was hard for me to believe what I was being accused of, I didn't think there was a law that said giving food, drink, clothes and medicine to another person was punishable. If someone told me about this, I wouldn't believe it. And yet now I am facing a court case and maybe even a sentence because I helped people and wanted to take a family with children out of the forest.¹⁰¹
73. In France, the focus has been on the criminalisation of members of solidarity networks. Cédric Herrou was accused by French authorities of having facilitated the entry, transit and irregular stay of non-EU citizens coming across the Italian border at Ventimiglia. The case was ultimately overturned by the French Constitutional Court in 2018, on the basis of the application of the core principle of fraternity to others.¹⁰² Despite the 2018 ruling, there have been later cases of persons' convictions being upheld (facilitation of entry into France as opposed to exit to other countries), such as the January 2023 Court of Cassation ruling upholding the 3 November 2021 decision of the Court of Appeal of Aix against the president of *Emmaüs La Roya* and member of the board of *Anafé*, Loïc le Dall, who was said to have helped an undocumented Ethiopian migrant to cross the border from Italy to France. His conviction was upheld for aiding the entry of an illegal alien into France.¹⁰³
74. In Hungary, the 'Stop Soros' legislation was adopted by the Parliament on 20 June 2018, and

⁹⁷ Art 12bis. ASGI, 'input for the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe (On file, 2024). See also, CILD, 'Questionnaire on State practice – Expert Council on NGO law' (On file, 2024) 4.

⁹⁸ *M.H. and Others v. Croatia*, Nos. 15670/18, 43115/18, 18 November 2021.

⁹⁹ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 17.

¹⁰⁰ Ieva Puķe, 'Latvian activist could face charges for helping migrants', Public broadcasting of Latvia (28 February 2024) <https://eng.lsm.lv/article/society/crime/28.02.2024-latvian-activist-could-face-charges-for-helping-migrants.a544670/>.

¹⁰¹ Polish Helsinki Foundation for Human Rights, 'Indictment against people providing humanitarian aid' (14 May 2024) <https://hfhf.pl/aktualnosci/akt-oskarzenia-przeciwko-osobom-niosacym-pomoc-humanitarna>.

¹⁰² *Conseil Constitutionnel*, Décision n° 2018-717/718 QPC (6 July 2018), France. 'Stop Soros' package,

¹⁰³ Emmaüs International, 'La CEDH saisie pour mettre fin aux « délits de solidarité »', (22 June 2023).

the package entered into force on 1 July 2018.¹⁰⁴ The legislation introduced a new Section 353/A to the Criminal Code that prescribed one year imprisonment for those helping asylum-seekers to submit an asylum claim who are later found ineligible for international protection. It also prescribed the same punishment for those carrying out other kinds of activities such as border monitoring, or commissioning information leaflets.¹⁰⁵ The package also connected criminal investigations with administrative sanctions. In particular, persons who were under criminal investigation (before having been charged) were banned from an 8 kilometre area from the external Schengen borders.¹⁰⁶ The two transit zones at Röszke and Tompa, the only facilities at the time where asylum applications could be submitted and where all applicants (except for unaccompanied minors under the age of 14) were kept until a final decision was issued in their case were located in that area, and therefore if any attorney or advocate representing refugees or migrants was under investigation, that person would have no longer been able to meet with their clients or to assist new clients.¹⁰⁷ No criminal procedures were started on the basis of this law.

75. The European Commission decided to refer Hungary to the CJEU, which determined that the above-cited provisions breached EU law.¹⁰⁸ The European Commission has also launched an infringement procedure against Hungary in respect to the law. On 7 December 2022, several provisions of the law were amended by the Hungarian Parliament though according to the Hungarian Helsinki Committee, the amendments fail to implement the CJEU's judgment.¹⁰⁹ The European Commission has not closed the infringement procedure and the provisions remain in place.

IV.1.2 Criminalising the facilitation of residence or stay

76. Many benign acts of solidarity have resulted in allegations of facilitation of residence or stay such as helping with an asylum application,¹¹⁰ buying or providing funds to migrants to purchase transport tickets,¹¹¹ giving them a ride, or providing food, water and/or shelter. In The Netherlands, according to the NGO MiGreat, in August 2022, hundreds of asylum seekers were forced to sleep outside at the first reception centre for asylum seekers (Ter Apel) due to lack of capacity. The municipality and the 'safety region' both implemented emergency laws which marked the area as a 'safety risk zone', which criminalised the presence of asylum seekers outside the reception centres and criminalised foreigners for having a tent. Eventually, also handing out a tent (also by non-foreigners) to foreigners was criminalised with a maximum of 3

¹⁰⁴ Unofficial translation of the 'Stop Soros' package, here: <https://helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

¹⁰⁵ Introducing s. 353/A (5)(a) to the Penal Code; unofficial translation of the 'Stop Soros' package: <https://helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

¹⁰⁶ Chapter V of the Police Law, border security restraining measure; unofficial translation of the 'Stop Soros' package, here: <https://helsinki.hu/wp-content/uploads/T333-ENG.pdf>.

¹⁰⁷ Hungarian Helsinki Committee, Responses to Questionnaire (On file, March 2024).

¹⁰⁸ CJEU (Grand Chamber) Judgment in Case C-821/19 *Commission v. Hungary (Criminalisation of assistance to asylum seekers)* ECLI:EU:C:2021:930 (16 November 2021).

¹⁰⁹ Hungarian Helsinki Committee, Responses to Questionnaire (On file, March 2024). See Hungarian Helsinki Committee's analysis of the amendment of the amendments: <https://helsinki.hu/en/wp-content/uploads/sites/2/2022/12/Criminalisation-continues.pdf>.

¹¹⁰ See, CJEU (Grand Chamber) Judgment in Case C-821/19 *Commission v. Hungary (Criminalisation of assistance to asylum seekers)* ECLI:EU:C:2021:930 (16 November 2021).

¹¹¹ For example, the president of the Baobab Experience, was prosecuted for aiding and abetting illegal immigration, because he and several volunteers offered support to migrants to buy train and bus tickets. The Criminal Court of Rome ultimately determined that the charges were unfounded. See, La Repubblica, 'Baobab, assolto il presidente Andrea Costa' (3 May 2022).

months imprisonment.¹¹² In Belgium, twelve persons, including journalists and migrants were prosecuted for helping migrants with shelter, food, clothing and lending phones.¹¹³ In Cyprus, Doros Polykarpou, co-founder and former Executive Director of KISA was arrested on charges of obstructing police work and resisting arrest, for providing support to a young person harassed by the police outside of KISA's offices. In France, an investigation was opened against members of the *Association Refuges Solidaires du Briançonnais* who chartered a bus to bring some of the people they had been hosting in an overcrowded shelter in Briançon (close to the border with Italy) to Paris (after having alerted the local authorities to the problem of overcrowding).¹¹⁴

IV.1.3 Enforcing the criminal law as a form of harassment

77. Many of the criminal cases which have been lodged against the employees or volunteers of NGOs and solidarity networks have been overturned on appeal,¹¹⁵ or have resulted in acquittals, often after protracted procedures which themselves can constitute a form of harassment.¹¹⁶
78. For instance, some of the cases brought for criminal libel or related speech crimes have not ultimately been pursued. Austrian authorities for example, sought to bring charges for criminal libel against the head of the asylum dept of civil society organisation Diakonie for discussing the percentage of negative decisions on asylum that were quashed by the Federal Administrative Court.¹¹⁷ In France, already in 2018, the Constitutional Court declared that the failure of French law to provide an exemption for humanitarian acts was unconstitutional because the principle

¹¹² Stichting MiGreat, 'Questionnaire on State practice – Expert Council on NGO law' (On file, 2024): 'MiGreat provided drinks, food, blankets and rain ponchos on a daily basis. Occasionally (if it was cold or wet), tents were distributed. On multiple occasions, 'handhavers' (order keepers, they are on a different ranking than police officers and are for example allowed to give parking tickets) told the staff and volunteers that handing out tents was a criminal activity. Even people handing out tents, and on one occasion, people handing out tea, were told that their activity was criminal. I also got an official warning from the municipality, stating that it is forbidden to hand out tents and that I risked imprisonment of up to 3 months if MiGreat would continue tent distributions. Eventually, the police never arrested us for handing out tents. Therefore it was not possible to challenge the legality of the directives in Court. We did start a procedure at the Ombudsman, that procedure is still ongoing.'

¹¹³ La Libre. *Rebondissement dans le procès des hébergeurs de migrants: le parquet général de Bruxelles fait appel contre les acquittements* (12 January 2019).

¹¹⁴ Maïa Courtois, '21 solidaires de Briançon auditionnés par la police aux frontières', *Rapports de force* (25 January 2022).

¹¹⁵ Judgment No. 33 (19-81.561) [Case brought against a French national, member of the *Association Roya Citoyenne* for assisted two Malian and two Libyan nationals by transporting them in his mother's car to the train station in Fontan/Saorge, France, the conviction ultimately overturned by the Court of Cassation]. In 2020, the Italian Court of Cassation recognised that Carola Rackete, the shipmaster of a Seawatch rescue ship, who had been arrested by the Italian border authorities for having docked in the port of Lampedusa with about 50 rescued migrants without authorisation (the Seawatch vessel had been waiting for authorisation for 17 days), was acting in fulfilment of the duty to rescue at sea under the International Law of the Sea. See also, *Avvenire*, *Archiviata l'inchiesta su Carola. "Aveva il dovere di sbarcare"*, 23 December 2021; judgment: <https://www.giurisprudenzapenale.com/wp-content/uploads/2020/02/Cass-6626-2020.pdf>.

¹¹⁶ The acquittal on 19 April 2024 of the Iuventa crew, operated by German NGO Jugend Rettet after seven years of proceedings related to the charges of aiding and abetting unauthorised immigration under article 12.3(a) and (d) and 12.3bis of Legislative Decree 286/1998; Panagiotis Balaskas and Costas Kantouris, 'Greek court rejects charges against aid workers' Associated Press (13 January 2023) [regarding the acquittal by a Lesbos court of Seán Binder and Sarah Mardini and others, who had been charged over their work with migrants newly arriving on Lesbos. Binder and Mardini were arrested in August 2018 and spent more than 100 days in prison before being released on bail]. Belgians who were charged with human trafficking for hosting migrants in their homes (*le procès des hébergeurs*) were ultimately acquitted [FIDH/OMCT, 'Europe: Open Season on Solidarity: A study on the patterns of criminalisation of solidarity through the voices of migrants' rights defenders (November 2021) 85-6]. See also, See, *La Repubblica*, 'Baobab, assolto il presidente Andrea Costa' (3 May 2022); Tim Baster and Isabelle Merminod, 'Humanitarian Workers Acquitted of 'Crime' of Helping Refugees', *New Internationalist* (10 May 2018) <https://newint.org/features/web-exclusive/2018/05/10/humanitarian-workers-acquitted-helping-refugees>.

¹¹⁷ OHCHR, 'Report of mission to Austria focusing on the human rights of migrants, particularly in the context of return' (15-18 October 2018), para. 62.

of fraternity protects humanitarian assistance to others regardless of their immigration status.¹¹⁸

79. Despite the acquittals and the dropping of charges, the negative impact on civil society space has still been felt. Some individuals who have been charged have been detained, often for lengthy periods,¹¹⁹ some have been subjected to campaigns of intimidation or have suffered administrative repercussions impeding their work, such as seizure of property, and freezing of assets. For example, following the criminal investigation opened against the crew of *Mare Jonio* in March 2021, the Tribunal ordered in December 2022 the seizure of €125,000 in equivalent assets belonging to the company that owned the ship. In some cases, foreigners working for humanitarian organisations have also been deported or prevented from returning to resume their work.¹²⁰ In other cases such as the case of Helena Maleno in Spain, even though the formal Spanish investigation against her for her alleged role in colluding with traffickers was dropped, investigative information was passed on to Moroccan investigators which resulted in her phones being tapped.¹²¹
80. In Greece, the organisation Josoor was subject to a criminal investigation for the alleged involvement of volunteers in forming a criminal organisation, espionage, facilitation of illegal entry, and violation of State secrets. Following a six-month investigation, local police issued a press statement in which they revealed the details of the case to the national media, even though the criminal investigation never led to an indictment or trial. Unsurprisingly, this then resulted in a large-scale smear campaign targeting the organisation. As a result of the investigation and the smear campaign, Josoor lost some of its funding and staff members and volunteers were faced with travel restrictions, which ultimately negatively impacted on the organisation's effectiveness, resulting in the cessation of their activities in October 2022.¹²²
81. In northern France, volunteers of organisations such as Utopia 56 have faced identity checks as well as vehicle searches. One Utopia 56 volunteer, who was arrested in April 2020 after filming police gassing a migrant during a camp eviction, spent nine hours in police custody, and eventually was charged for singing in the jail cell. After a lengthy legal process that lasted almost two years, the court ruled in favour of the volunteer and found that this constituted abusive treatment by the police.¹²³

IV.2 The criminalisation of migrants who provide support to other migrants

82. Using “irregular” or “clandestine” means to enter a country to seek safety may be the only way individuals can seek asylum and access the international protection that they are entitled to.¹²⁴ In recognition of this, the 1951 Refugee Convention contains a provision which protects

¹¹⁸ UN Human Rights Council, ‘Right to freedom of association of migrants and their defenders’, Report of the Special Rapporteur on the human rights of migrants, UN Doc A/HRC/44/42 (13 May 2020) para 72.

¹¹⁹ E.g., the Belgian *Proces des hébergeurs*.

¹²⁰ Amnesty International, ‘Punishing compassion – solidarity on trial in fortress Europe’, EUR 01/1828/2020 (March 2020), 52 [explaining the case of the CEO of Danish NGO Team Humanity, Salam Aldeen, who was listed by Greece as an “undesirable foreigner” and subjected to a re-entry ban]. See also, Baptiste Mezerette and Lila Haffaf, *Calais: un militant britannique de la cause des migrants expulsé de France* (16 May 2022) *franceinfo*.

¹²¹ Sam Jones, ‘Morocco drops case against Spanish activist who helped save lives at sea,’ *The Guardian* (11 March 2019).

¹²² BVMN, ‘Contribution to the Questionnaire on State Practice’ (31 January 2024) 20.

¹²³ Gionco and Kanics (n 62) 28.

¹²⁴ UNHCR, ‘UNHCR Comments on the Commission Proposal for a Facilitation Directive (Anti-Smuggling Directive), COM (2023) 755 (14 March 2024) para. 10.

refugees from penalisation for their irregular entry and stay provided they present themselves without delay to the authorities and show good reason for their irregular entry or presence.¹²⁵

83. Despite this, refugees and other migrants are themselves being prosecuted for performing navigational tasks or steering inflatable boats into European ports.¹²⁶ According to the organisation PICUM, between January 2023 and December 2023, at least 76 migrants in Italy, Greece and Spain were criminalised for the sole act of supposedly navigating boats across a border irregularly.¹²⁷ For instance, Italy has used organised crime provisions to criminalise migrants steering boats in distress at sea. The organisations ARCI Porco Rosso and Borderline-Europe counted at least 264 migrants who were arrested following their arrival by boat in Italy in 2022, and estimate that the number is closer to 350.¹²⁸ Following the *Cutro* shipwreck, on 7 February 2024, the Court of Crotona sentenced a 29-year-old Turkish citizen to 20 years imprisonment and a fine of 3 million euro for the crimes of aiding and abetting illegal immigration, responsibility for the shipwreck, and death as a consequence of another crime.¹²⁹ According to ASGI, foreigners who are accused of these crimes ‘suffer from different forms of discrimination in the access to the right of defence, from the lack of an adequate translation during trials to the impossibility to access to alternative measures to detention, especially in the pre-trial phase.’¹³⁰

84. According to the Captain Support Greece Network,

For every migrant boat that arrives in Greece from Türkiye, a minimum of 1 or 2 people could face smuggling charges under these provisions, and border guards and police regularly interrogate people on the move to identify who drove the boat. Since 2015, with the increased arrivals of boats coming from Türkiye to Greece carrying roughly between 20-50 people each, thousands of people have faced these charges. The prosecution - based on the same charges - of people driving cars carrying migrants over borders, has also increased. Indeed, the second largest prison population in Greece is currently composed of over 2000

¹²⁵ Art. 31, Convention on the Status of Refugees.

¹²⁶ See, e.g., ARCI Porco Rosso and Alarm Phone with the collaboration of Borderline Sicilia and borderline-europe, From Sea to Prison: The Criminalization of Boat Drivers in Italy (15 October 2021) https://www.borderline-europe.de/sites/default/files/background/from-sea-to-prison_arci-porco-rosso-and-alarm-phone_october-2021.pdf; FIDH/OMCT, ‘Europe: Open Season on Solidarity’ 67 [discussing the case of ‘Mohammed H.’, a Somali who fled the civil war who tried to take control of a sinking vessel and navigate it to port, and was ultimately prosecuted in Greece for trafficking, endangerment and causing the death of two passengers and sentenced to 146 years in prison]. See however, the jurisprudence in the United Kingdom: *Bani v. The Crown* [2021] EWCA Crim 1958; *Kakaei v. The Crown* [2021] EWCA Crim 503 where the respective convictions were quashed because of a finding that there was a distinction between ‘arriving’ with the intention of registering at a port at a designated immigration area and ‘entering’ for immigration purposes. However, the subsequent amendments to the Nationality and Borders Act [Nationality and Borders Act 2022, 2022 c. 36, s. 40(2)(D1)(b)], which include the offence of ‘knowingly arrives in the United Kingdom without a valid entry clearance’ are likely to criminalise migrant boat-drivers.

¹²⁷ Silvia Carta and Marta Gionco, ‘Cases of criminalisation of migration and solidarity in the EU in 2023’ (PICUM, 2023) 11.

¹²⁸ ‘As Long As You Can Still Listen: The Criminalization of Migrant Boat Drivers in 2022’ (10 January 2023) <https://www.borderline-europe.de/unsere-arbeit/long-you-can-still-listen-criminalization-migrant-boat-drivers-2022>.

¹²⁹ Giuseppe Pipita, ‘Condannato a 20 anni lo scafista del naufragio di Cutro’, (7 February 2024) https://www.ansa.it/calabria/notizie/2024/02/07/condannato-a-20-anni-lo-scafista-del-naufragio-di-cutro_f0c1cd10-3bfd-46f6-a1dd-73b0730f8b3f.html. See also, Sea-watch, Submission to the Expert Council on NGO Law, ‘Challenges facing NGOs supporting refugees and other migrants’ (On file, 26 February 2024) 3.

¹³⁰ ASGI, ‘input for the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe’ (On file, 2024).

racialised people who are charged with or convicted of so-called smuggling related offences.¹³¹

85. In Malta, three African teenagers who were among a group of migrants that had fled Libya on a rubber boat in 2019, were rescued by a cargo ship *El Hiblu 1* that was in the process of returning them to Libya where they faced a real risk of severe human rights abuses. The migrants protested (peacefully) and according to witnesses were trying to mediate with the crew; ultimately, they convinced the crew of *El Hiblu 1* to take them to Malta. The teenagers were arrested on arrival in Malta on the basis that they had attempted to hijack the vessel. They were detained for seven months and face terrorism charges.¹³² On 30 May 2024, a pre-trial motion to drop the case for want of jurisdiction was dismissed.¹³³

IV.3 Overly restrictive regulatory frameworks

86. In addition to the use of the criminal law to reduce civil society space, and sometimes as a consequence of having faced criminal investigations or prosecutions, NGOs and solidarity networks face myriad administrative and related obstructions to their work. As some NGOs have explained, this kind of ‘informal criminalisation’ which ‘manifests through acts of repression, surveillance, intimidation, interrogation, and even disruption or destruction of services dedicated to assisting those in need, scrutiny by governmental actors, and increasing use of inflammatory language’¹³⁴ can be even more pervasive and equally if not more damaging than traditional criminal law actions pursued by governments against civil society groups, their staff and volunteers.
87. Furthermore, staff and volunteers face difficulties to obtain permits to enter the jurisdiction and/or to work and are often limited in the places they can access and the kinds of work they can undertake. They also face direct or indirect impediments to speaking out about problems or challenges they see or experience. For example, in Spain, activists have been sanctioned for protesting aspects of migration policy.¹³⁵

IV.3.1 Search and rescue NGOs operating in the Mediterranean

88. Civil society organisations began to organise search and rescue operations at sea in the face of rising numbers of deaths and the absence of State-led search and rescue operations following the end of Italy’s *Mare Nostrum* operation. Initially, such NGO activities were supported.¹³⁶ This quickly changed.
89. In Greece, NGO search and rescue activities have been virtually blocked since September 2021

¹³¹ Captain Support Greece, ‘Imprisonment of Boat Drivers in Greece – examples from Lesbos’ (16 June 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/06/imprisonment-boat-drivers-greece-examples-lesvos>.

¹³² <https://elhiblu3.info/index>.

¹³³ Jessica Arena, ‘Case against El Hiblu 3 to continue as jurisdiction issue thrown out by court’ *Times of Malta* (30 May 2024).

¹³⁴ BVMN, ‘Contribution to the Questionnaire on State Practice’ (31 January 2024) 19-20.

¹³⁵ In accordance with Art. 36, Organic Law 4/2015 of 30 March 2015 on the protection of citizen security. Social activist Miren Koldobike Velasco Velázquez was fined 6100 euros (as communicated to interviewer).

¹³⁶ Matilde Rocca, ‘Rights at Sea: State Interference with Activists’ Search and Rescue Operations’, (2024) 26 *Eur J Migration & Law* 81, 83.

when law no 4825/2021¹³⁷ was introduced. Article 40 provides that NGOs and their members who wish to engage in such activities must:

- (a) Be registered in the special registry for local and foreign NGOs and the separate registry for members of such NGOs kept by the Ministry of Migration and Asylum;
- (b) Act under the orders and guidance of the Coastguard (and with prior authorisation to conduct search and rescue missions), and that they have not performed any such missions in the past without prior authorisation;
- (c) Engage in the management of cases of irregular entry to the country by sea only if the Hellenic Coastguard is unable to act in a specific instance and provided that they have previously informed the Coastguard authorities and have acquired their written approval.

90. A failure to comply results in significant fines for both the NGOs and their members, and a minimum term of imprisonment of 3 years if their actions cause an accident.
91. Over time, most of the restrictive measures taken against NGOs carrying out sea rescues have become administrative (as opposed to criminal) in nature based on the failure to comply with the laws of navigation and safety at sea.¹³⁸ This evolution relates, according to the NGO ASGI, to the fact that ‘the criminal judiciary has now repeatedly affirmed the legitimacy of the actions of humanitarian ships.’ ASGI has further noted, ‘exactly the opposite of what should have been expected has happened, with the criminalisation of conduct, previously punished administratively adopted because it is considered more favourable to NGOs, while the decriminalisation of conduct previously incriminated is hailed as a tightening of the punitive response.’¹³⁹
92. The focus on administrative regulations has resulted in boats being seized or otherwise blocked at ports. For example, in Spain, authorities banned the Spanish registered NGO rescue ships Open Arms and Aita Mari from operating outside of the Spanish search and rescue region, effectively blocking them from carrying out search and rescue work in the central Mediterranean.¹⁴⁰ The basis of the ban was that there was no agreement with the search and rescue authorities in the central Mediterranean about the disembarkation of people to be rescued, and therefore the prolongation on board the ship could negatively impact the health and wellbeing of the persons to be rescued. Ultimately after some delay, Open Arms was granted permission to sail to the Aegean Sea, only to bring humanitarian aid to the Greek islands. Only search and rescue operations arising during the journey to Greece were permitted, failing which this would breach maritime safety and incur a hefty fine.¹⁴¹ Similar restrictions were imposed on the Aita Mari ship.¹⁴²
93. Another example, from Italy, is the impounding of the *Iuventa* - the search and rescue boat

¹³⁷ Law no 4825/2021 (Government Gazette A 157 / 4 September 2021) ‘Reform of deportation and return procedures of third-country nationals, attraction of investors and digital nomads, issues of residence permits and procedures for granting international protection, provisions falling under the competence of Ministry of Migration and Asylum and Ministry for Citizen Protection and other urgent provisions.’

¹³⁸ EU Fundamental Rights Agency (FRA), ‘Search and Rescue Operations in the Mediterranean and Fundamental Rights’, (June 2023 Update) 6.

¹³⁹ ASGI, ‘input for the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe’ (On file, 2024).

¹⁴⁰ Amnesty International, ‘Punishing compassion: solidarity on trial in fortress Europe’, EUR 01/1828/2020 (March 2020) 73.

¹⁴¹ *Ibid.*

¹⁴² *Ibid*, 75.

operated by the German NGO Jugend Rettet in August 2017, on the basis that it was being used to facilitate illegal migration.¹⁴³ A technical report carried out in 2022 indicated that the ship had been left in a state of total abandonment from the date of seizure with no ordinary or extraordinary maintenance having been carried out. Consequently, the Iuventa crew filed a criminal complaint to the Trapani Prosecutor's Office requesting an investigation into the abandonment and destruction of the ship.¹⁴⁴ All criminal charges related to the crew and three organisations - Jugend Rettet, Save the Children and Médecins Sans Frontières (MSF) were dismissed in April 2024, along with the lifting of the seizure order related to the largely 'abandoned, plundered and largely demolished' ship.¹⁴⁵

94. In addition to the grounding of boats, NGO monitoring aircraft such as Sea-Watch's Seabird 1 and Seabird 2, and formerly Moonbird, have also faced administrative restrictions. On 4 September 2020, Sea-Watch and their partner Humanitarian Pilots Initiative were notified the Italian Civil Aviation Authority had grounded Moonbird until further notice. The basis had to do with the organisations allegedly exceeding their earlier authorisation request, and that search and rescue activities required a formal authorisation by State authorities. This matter is pending before the courts. On 27 October 2023, the organisations were cautioned about the operations of Seabird 2 which purportedly exceeded national and supranational regulations and put the safety of migrants in jeopardy. The Civil Aviation Authority advised that should such operations continue, there was a possibility the aircraft would be detained. The matter is also pending.¹⁴⁶

The particular situation in Italy

95. In 2017, the Italian Government established a Code of Conduct (*Codice Minniti*) which required NGOs carrying out search and rescue missions to agree to restrictive rules when carrying out search and rescue missions. In order to be able to disembark migrants in Italian ports, NGOs carrying out search and rescue operations were required to respect and not hamper the role of the Libyan Coast Guard further to the Memorandum of Understanding Italy had agreed with the government of Libya which privileges the role of the Libyan Coast Guard in search and rescue operations in the High Seas, with "rescued" refugees and other migrants being returned to Libya. The agreement is premised on Libya being a safe country, which does not accord with the facts on the ground; the Independent Fact-Finding Mission on Libya determined that there were 'reasonable grounds to believe that acts of murder, enslavement, torture, imprisonment, rape, persecution and other inhumane acts'¹⁴⁷ were being committed against migrants, which might amount to crimes against humanity. Consequently, involuntary returns to Libya would certainly breach the principle of non-refoulement.¹⁴⁸
96. Signatories of the Code of Conduct were also required to allow police to come on board to conduct investigations related to migrant smuggling and/or trafficking, and to commit to

¹⁴³ iuventa-crew.org, 'Iuventa ship destroyed in Italian custody, the crew filed a criminal complaint' (19 February 2023).

¹⁴⁴ iuventa-crew.org, 'Iuventa ship destroyed in Italian custody, the crew filed a criminal complaint' (19 February 2023).

¹⁴⁵ France24, 'Italian court drops trafficking charges against crew members of migrant rescue ships' (19 April 2024).

¹⁴⁶ Sea-watch, Submission to the Expert Council on NGO Law, 'Challenges facing NGOs supporting refugees and other migrants' (On file, 26 February 2024) 10.

¹⁴⁷ UN Human Rights Council, 'Report of the Independent Fact-Finding Mission on Libya' UN Doc A/HRC/52/83 (3 March 2023) para 41.

¹⁴⁸ The UN Special Rapporteur on the Human Rights of Migrants has underscored that 'any agreement with Libyan authorities that involves the take-back of migrants rescued or intercepted at sea should be revoked.' [UN Human Rights Council, 'Human rights violations at international borders: trends, prevention and accountability' UN Doc. A/HRC/50/31 (26 April 2022) para. 53].

cooperate with the Public Service Authority in respect to the intended place of disembarkation. Those groups which refused to sign had their vessels seized, banned from Italian waters and crew members were arrested or at risk of arrest.¹⁴⁹

97. Despite the Code of Conduct, often boats have faced significant delays to have a port assigned to disembark rescued passengers. Frequently, boats have been left to wait for weeks before permission is granted to disembark. In October and November 2022, SOS Humanity's *Humanity 1* and MSF's *Geo Barents* were left at sea for almost two weeks before being allowed to dock in Catania, Sicily, on 5 and 6 November. They were respectively carrying 179 and 568 people.¹⁵⁰ According to MSF, in several cases in 2022 and 2023, the Italian Maritime Rescue Coordination Centre 'instructed the organisation not to render assistance to boats in distress, while lives were at immediate risk, thereby causing dangerous and unnecessary delays. In parallel, Italian maritime authorities often do not share essential information with NGO ships regarding the status of distress alerts, i.e., whether a specific distress case is still open or if it has been closed and whether the people at risk of drowning have been rescued.'¹⁵¹
98. Italian Decree Law No. 1/2023 (the Piantedosi Decree) which was subsequently converted into Law 15/2023 made it possible to restrict or deny the entry into or transit through territorial waters to vessels operated by civil society undertaking search and rescue operations, unless those vessels communicated this operation to the competent national authorities or their flag State. Noncompliance could result in a fine from 10,000 to 50,000 euros (which was lower than the fines that had previously been in place). This law required for example, that the vessel personnel collect relevant data to be made available to the authorities¹⁵² and to immediately after a rescue event request the assignment of a port of disembarkation and proceed directly to that port without delay (and without stopping to assist other boats in distress). It also specified a range of penalties and fines for any failure to comply. According to ASGI, captains and heads of mission of NGO ships are also being sanctioned under the Piantedosi Decree for failing to contact the Libyan or Tunisian authorities, as appropriate, or for non-compliance with the instructions of an alleged Libyan coast guard.¹⁵³
99. The Expert Council previously assessed this law as raising both procedural and substantive difficulties with respect to freedom of association and the protection of civil society space, noting that:

¹⁴⁹ Dadusc and Mudu, 1222-3.

¹⁵⁰ Sergio Carrera, Davide Colombi and Roberto Cortinovis, 'Policing Search and Rescue NGOs in the Mediterranean: Does justice end at sea?' CEPS (February 2023)

¹⁵¹ MSF, *Death, Despair and Destitution: The Human Costs of the EU's Migration Policies* (February 2024) 34.

¹⁵² According to MSF, 'this provision essentially allows the national authorities to request for any kind information and NGOs are obliged to provide them together with any required documentation, in practice resulting in excessive, unrelated, and unpredictable information requests and making the work of SAR NGOs more burdensome. This also translates in practice into a lack of consistency in the demands of the local authorities: each port where MSF vessel has disembarked has its own procedure and the information required and the documents to be handed over, although similar, vary from one port to another.' ['MSF input to the Council of Europe Conference of INGOs - Expert Council on NGO Law Questionnaire on State Practice' (On file, March 2024)].

¹⁵³ ASGI, 'input for the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe' (On file, 2024). See also, 'MSF input to the Council of Europe Conference of INGOs - Expert Council on NGO Law Questionnaire on State Practice' (On file, March 2024). Note however the landmark decision of the Italian *Corte di Cassazione*, No. 4557 del 1 febbraio 2024, V Sezione Penale (referred to by MSF, *ibid*) in which it was held that handing over refugees and migrants to the Libyan Coast Guard violates the crime of 'Abandonment of minors or incapacitated persons' (Art. 591 Criminal Code) and the crime of arbitrary landing and abandonment of persons (Art. 1155 Naval Code) and amounts to collective refoulement to a country that is not considered safe.

The onerous, arbitrary and at times unlawful (in the sense that they may breach law of the sea requirements, place vulnerable people at heightened risk and result in violations of individuals' privacy) requirements for NGOs carrying out search and rescue work give rise to problems of compliance with the rights in Articles 8 and 11 of the ECHR because of a lack of legality, legitimacy and proportionality.¹⁵⁴

100. In accordance with this legislation, civil society operated rescue ships are frequently assigned faraway ports of disembarkation, which 'drastically limits the numbers of days spent in active search for distress cases and substantially increases the number of days spent in transit, during which rescue vessels are effectively not able to respond to distress cases.'¹⁵⁵ It also has the result of exposing the already extremely vulnerable 'people on board SAR NGO vessels to weather conditions, the risk of re-traumatisation as well as the possible deterioration of their already vulnerable physical and mental conditions, while also postponing their access to basic rights such as medical care.'¹⁵⁶ According to the NGO EMERGENCY,

in 2023 NGOs were responsible for rescuing 8% of the total arrivals. The Italian Coast Guard and/or Guardia di Finanza vessels carry out most rescues and continue to be assigned ports in southern Italy. For these reasons, the allocation of distant ports can only be read as arbitrary and unduly penalising NGOs. A reduced presence of SAR NGOs in the Mediterranean is one of the most impactful consequences of this practice.¹⁵⁷

101. EMERGENCY officially requested access to the official documents on which decisions to assign distant ports were based. The Ministry of Interior, Ministry of Infrastructure and Transport and Coast Guard authorities responded that these documents could not be disclosed due to considerations related to national security and public order, while port authorities stated that they had no documents and were not involved in the decision-making process. EMERGENCY appealed to the Regional Administrative Court (TAR), which confirmed the legitimacy of non-disclosure in July and November 2023. EMERGENCY's appeal is pending.¹⁵⁸
102. NGOs have been sanctioned for refusing to proceed to designated ports or for rescuing additional boats in distress prior to proceeding to the stipulated port of disembarkation. According to the search and rescue NGO SOS MEDITERRANEE, throughout 2023, 'after each rescue or series of rescue operations, the *Ocean Viking* has methodically been assigned ports at a long distance from the area of the Central Mediterranean where civil rescue ships patrol to fill the void left by European States. Concretely, in 2023, instead of being assigned a place of safety that would allow for the rescue operation to be completed as soon as reasonably practicable such as Pozzallo (Sicily) as a reference port, the *Ocean Viking* has been forced to travel almost two extra months back and forth to disembark survivors rescued from distress at sea in distant ports.'¹⁵⁹ Similarly, MSF has reported that 'the *Geo Barents* was forced to travel

¹⁵⁴ See, Expert Council, Opinion on the Compatibility with European Standards of Italian Decree Law No. 1 Of 2 January 2023 on the Management of Migratory Flows, CONF/EXP(2023)1 (30 January 2023) para. 28.

¹⁵⁵ MSF, 'MSF input to the Council of Europe Conference of INGOs - Expert Council on NGO Law Questionnaire on State Practice' (On file, March 2024).

¹⁵⁶ Sea-watch, Submission to the Expert Council on NGO Law, 'Challenges facing NGOs supporting refugees and other migrants' (On file, 26 February 2024) 2.

¹⁵⁷ EMERGENCY ONG Onlus, 'Questionnaire on State practice – Expert Council on NGO law' (On file, 2024) 4.

¹⁵⁸ *Ibid.* See also, 'MSF input to the Council of Europe Conference of INGOs - Expert Council on NGO Law Questionnaire on State Practice' (On file, March 2024).

¹⁵⁹ SOS MEDITERRANEE, 'Piantadosi Decree: the price of disregard for maritime law', News (25 November 2023).

an extra 28,000km in 2023, around 70 days of navigation’, which ‘deliberately keeps them away from people in distress at sea.’¹⁶⁰ As already indicated, civil society-operated boats that have been found in breach of the law preventing vessels from carrying out multiple rescue operations without disembarking passengers have been seized,¹⁶¹ and typically fined.¹⁶²

103. In addition, governments have been sanctioning NGOs carrying out search and rescue operations for alleged negligent pollution of the environment, for safety deficiencies and accusations that NGO vessels have been carrying more passengers than they were authorised for (counting rescued persons as ‘passengers’). As a result of such issues, the NGO Sea-Watch filed a complaint with Italian courts in 2020, which was later transmitted to the CJEU. The CJEU ultimately determined that administrative port controls were permissible however they could not be used arbitrarily against NGOs. Any additional inspections or a decision to detain a ship must be based on a reasonable and justified decision by the port State. The port State must base its decision on serious indications of dangerous operations. However, a port State cannot justify additional inspections solely based on an excess of passengers beyond a ship’s classification or certifications when the reason for the excess of persons is a ship rendering assistance to rescued individuals.¹⁶³ According to Sea-Watch, some of these obstructions have continued.¹⁶⁴ Legislative reforms in Germany appear to be going in the same direction. The planned Ship Safety Ordinance¹⁶⁵ expands the possibility for small search and rescue NGO vessels to be inspected under the directive 2009/16/EC (so-called “port State control” inspections).¹⁶⁶

104. Following the 26 February 2023 shipwreck off *Cutro*, Calabria, in which over 90 people lost their lives,¹⁶⁷ the Italian government enacted a further decree: ‘Urgent provisions on legal entry flows of foreign workers and on preventing and combating irregular immigration,’ which was ultimately converted into Law no. 50/2023.¹⁶⁸ This Law affects the integration processes of

¹⁶⁰ MSF, *Death, Despair and Destitution: The Human Costs of the EU’s Migration Policies* (February 2024) 39.

¹⁶¹ ‘Italy detains two NGO vessels for defying new migrant rescue law’, *Al Jazeera*, 3 June 2023; Louise Michel, ‘Rescue ship Louise Michel detained on the Island of Lampedusa after the rescue of 180 people. MRCC pressured the crew not to rescue people in danger’ *News* (25 March 2023).

¹⁶² Sea-eye, ‘Sea-eye sues Italy for unlawful detention of Sea-eye 4’ (3 July 2023); Sea-watch, ‘Sea-Watch ship Aurora detained after rescue’ (16 June 2023); Open Arms, ‘20-day blockade and sanction on open arms after disembarking 195 rescued people at Italian port’, <https://www.openarms.es/en/news/20-day-blockade-and-sanction-on-open-arms-after-disembarking-195-rescued-people-at-italian-port>. See generally, EU Fundamental Rights Agency (FRA), ‘Search and Rescue Operations in the Mediterranean and Fundamental Rights’, (June 2023 Update) which provides a list of seizures and fines imposed on civil society-run sea vessels in the Mediterranean.

¹⁶³ Judgment of the Court in Joined Cases C-14/21 and C-15/21 | Sea Watch (1 August 2022).

¹⁶⁴ Sea-Watch, ‘Sea-Watch 3 blocked – Italy ignores ECJ ruling’ (23 September 2022) <https://sea-watch.org/en/sea-watch-3-blockade/>.

¹⁶⁵ The draft law is available here: https://bmdv.bund.de/SharedDocs/DE/Anlage/Gesetze/Gesetze-20/erste-verordnung-zur-aenderung-schiffssicherheitsrechtlicher-vorschriften.pdf?__blob=publicationFile.

¹⁶⁶ Julia Dahm, ‘Changes to Germany’s ship security rules foresee restricting the work of migrant rescue boats in the Mediterranean, many of which operate under the German flag, leaked plans from the Transport Ministry reveal’, *Euractiv* (1 March 2023). See also, Sea-watch, ‘Bundesregierung plant Behinderung ziviler Seenotrettung: Mehrheit der deutschen Seenotrettungsschiffe werden blockiert’ (28 February 2023).

¹⁶⁷ María Martín, Daniel Verdú and Lola Hierro, ‘Reconstruction of a shipwreck: How Italy and Frontex could have prevented over 90 deaths in Cutro’, *El País* with ‘Lighthouse Reports’ (2 June 2023) <https://english.elpais.com/international/2023-06-02/reconstruction-of-a-shipwreck-how-italy-and-frontex-could-have-prevented-over-90-deaths-in-cutro.html#>.

¹⁶⁸ Conversion into law, with amendments, of Decree-Law No. 20 of 10 March 2023, on urgent provisions on the flow of legal entry of foreign workers and the prevention of and fight against irregular immigration. (23G00058) (OJ General Series No. 104, 5 May 2023) <https://www.gazzettaufficiale.it/eli/id/2023/05/05/23G00058/SG>.

third-country nationals who are newly arrived or living ‘irregularly’ in the country. It has the effect of further narrowing access to special protections in-country - it reduces the cases in which expulsion to the country of origin is not allowed and, consequently, the possibilities of obtaining a residence permit under special protection in Italy, and it accelerates removal procedures.¹⁶⁹ According to Sea-Watch, this decree following the *Cutro* shipwreck ‘will lead to a decrease in the number of special protection permits issued and an increase in the number of persons irregularly present on the national territory with no rights and no prospects.’¹⁷⁰

105. Furthermore, the declaration of a state of emergency in Italy on 11 April 2023 to ‘deal with situations that required the use of extraordinary means and powers due to their intensity and dimension’ (which has subsequently been extended and at the time of writing remained in place),¹⁷¹ risks further limitations on migrant rights and those that assist them.

IV.3.2 Land rescues in border zones and related in-country support

106. During the summer of 2021, Belarus began to allow migrants to enter and to cross its territory, pushing them towards the borders of Latvia, Lithuania and Poland. This weaponisation of extremely vulnerable people was apparently in retaliation for the targeted economic sanctions introduced by the EU in June 2021.¹⁷² In response, Poland, Lithuania and also Latvia adopted emergency laws that allowed for pushbacks. They restricted civil society space in the border zones and began to push back thousands of people to Belarus.
107. In Latvia, the emergency law introduced in 2021 restricted access to the border areas close to Belarus for members of civil society, journalists and international organisations, including UNHCR, as well as the Latvian Ombudsperson.¹⁷³ As all passes to the border areas had been suspended, this severely impeded NGOs and others from exercising independent oversight.¹⁷⁴ In Poland, a state of emergency was declared in September 2021 in the area along the Poland-Belarus border and legislation was introduced that effectively legalised pushbacks and barred access of activists and journalists to the established “exclusion zone”.¹⁷⁵ This prevented human rights defenders from monitoring actions of the authorities in the zone and from providing humanitarian relief to asylum-seekers.¹⁷⁶

¹⁶⁹ EMERGENCY ONG Onlus, ‘Questionnaire on State practice – Expert Council on NGO law’ (On file, 2024).

¹⁷⁰ Sea-watch, Submission to the Expert Council on NGO Law, ‘Challenges facing NGOs supporting refugees and other migrants’ (On file, 26 February 2024) 2.

¹⁷¹ ANSA, ‘Italy extends state of emergency over migrant arrivals’ (30 May 2024).

¹⁷² <https://www.consilium.europa.eu/en/policies/sanctions-against-belarus/>. See also, Andrew Roth, ‘Polish PM urges ‘concrete steps’ by Nato to address border crisis’, The Guardian (14 November 2021).

¹⁷³ UN Special Rapporteur on Human Rights Defenders and other UN experts, Communication to the Government of Latvia on 2 March 2023, made public on 8 May 2023 <https://srdefenders.org/latvia-alleged-undue-use-of-criminal-proceedings-against-human-rights-defenders-ieva-raubisko-and-egils-grasmanis-joint-communication/>.

¹⁷⁴ Amnesty International, Latvia: Return Home or Never Leave the Woods: Refugees and Migrants Arbitrarily Detained, Beaten and Coerced into “Voluntary” Returns,’ EUR 52/5913/2022 (2022) 15.

¹⁷⁵ ECRE, ‘Poland: Parliament Approves “Legalisation” of Pushbacks, Council of Ministers Adopt Bill to Construct Border Wall, Another Life Lost at Border With Belarus,’ (15 October 2021); ‘UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)’ (13 September 2021); Human Rights Watch, “Die Here or Go to Poland” Belarus’ and Poland’s Shared Responsibility for Border Abuses (2021).

¹⁷⁶ Katarzyna Czarnota and Marta Górczyńska, ‘The Lawless Zone: Polish-Belarusian Border Monitoring’, Polish Helsinki Foundation for Human Rights (June 2022).

108. Similar measures have been put in place in Lithuania.¹⁷⁷ On 24 December 2021, three volunteers from the Lithuanian border solidary group (*Sienos grupė*) were fined for having committed an administrative offense pursuant to Article 506 of the Code of Administrative Offenses. They had entered the border area without permission to help a Syrian citizen who was stuck in the forest. The cases were ultimately re-examined, and the qualification was reduced to a breach of Article 536, the fines were cancelled, and a warning was issued in their place. The association had argued that they acted under the conditions of necessity, and the courts accepted that there was a danger to the lives of the persons concerned.¹⁷⁸
109. Estonia has followed suit with the introduction of similar revisions to its legislation: the Act on Amendments to the State Borders Act and Amendments to Other Associated Acts, (630 SE), which allows the Police and Border Guard Board (PPA) to immediately remove an alien during a threat to public order or national security.¹⁷⁹ Similarly, Slovenia amended its Foreigners Act so that in a situation deemed a “complex crisis in the field of migration,” the Ministry of Interior can propose that the to the National Assembly to close the border for 6 months and restrict access to the asylum procedure.¹⁸⁰
110. The Russian Federation appears to have deployed similar tactics to Belarus, along the Finnish border. In response, the Finnish Government closed its Eastern land border, justified based on national security considerations. It also has proposed a law restricting asylum seekers from applying for refuge on the Finnish borders, because of the ‘instrumentalisation’ of migrants at its border.¹⁸¹
111. The UN Committee Against Torture has expressed its concern *inter alia* about:
- (a) The full closure of the border of the State party’s Eastern land border since 30 November 2023 in response to the alleged instrumentalisation by a third country of the movement of asylum seekers and migrants, which raises concerns as regards effective access to means of legal entry to seek asylum in the State party and may lead to breaches of the principle of non-refoulement and of the prohibition of collective expulsion;
 - (b) The fact that asylum seekers who are victims of torture may not be effectively identified upon arrival in reception centres and provided with adequate support services.¹⁸²
112. In many countries, there have been local bans on civil society engagement in humanitarian assistance, despite the clear needs of refugees and other migrants in country. For example, in France, in 2022, actions were taken by the authorities around Calais to limit the distribution of water or food, such as blocking vehicle access to water and food distribution sites and limiting those who were authorised to carry out distributions to organisations funded by the State.

¹⁷⁷ CIVICUS, Lithuania: ‘Civil society must humanise the public narrative around irregular migration’, Interview with Mėta Aduvavičiūtė, head of Advocacy at the Human Rights Monitoring Institute (HRMI) (20 June 2023).

¹⁷⁸ Confidential submission to the Expert Council.

¹⁷⁹ ‘Estonia legalizes migrant pushbacks at borders in emergencies’, *err.ee* (2 August 2022).

¹⁸⁰ Urša Regvar and Lana Krznarič, ‘Asylum Information Database: Country Report – Slovenia’ (2022) 22.

¹⁸¹ Combating the instrumentalization of immigration and strengthening border security, Legislative Preparation, SM004:00/2024 (19 February 2024) <https://intermin.fi/hankkeet/hankesivu?tunnus=SM004:00/2024>. See, UNHCR, Observations on the proposal to enact a law on temporary measures (25 March 2024) https://www.refworld.org/legal/natlegcomments/unhcr/2024/en/147739?_gl=1%2A1ttx5s0%2A_rup_ga%2AMjE0MDMxMjE3MC4xNzA4NjAzODY1%2A_rup_ga_EVDQTJ4LMY%2AMTcxMjE1ODc0Ni4yMy4wLjE3MTIxNTg3NDYyNjAuMC4w.

¹⁸² UN Committee Against Torture, ‘Concluding observations on the eighth periodic report of Finland’, UN Doc. CAT.C.FIN.CO.8, Advance Unedited Version (10 May 2024) paras. 18(a), 18(b).

Many of these measures were held to be illegal by the administrative court in a ruling from October 2022.¹⁸³ Fences, barbed wire, concrete walls which have altered the permanent landscape, have been installed to deter encampments and to prevent access to the port. For example, between Calais and Marck, a trench has been dug and an embankment created to prevent NGO vehicles from accessing the area to distribute food and water and provide a phone charging service.¹⁸⁴

113. Similarly, in Serbia, incidents have been reported in which distributions of food and non-food essentials were blocked by authorities and volunteers were restricted from carrying out humanitarian aid services.¹⁸⁵ In Bosnia and Herzegovina, following the closure of camp Bira in Bihać at the end of September 2020, according to the Border Violence Monitoring Network (BVMN) there were many people who were forced to sleep on the streets, in informal camps and abandoned buildings. Instead of considering how best to help vulnerable people as winter approached, the local authorities issued a general ban on assistance outside the camps; 'This ban was aimed not only at organisations involved in food distribution, but also at organisations responsible for the protection of unaccompanied minors and the provision of medical assistance.'¹⁸⁶ The ban on assistance was ultimately extended to transport. In The Netherlands, civil society groups MiGreat and Doorbraak filed a complaint with the ombudsman because local authorities were taking away the tents that they were supplying to vulnerable migrants exposed to the elements.¹⁸⁷
114. Civil society organisations have also been targeted with Strategic Lawsuits against Public Participation (SLAPP) cases for criticising the degrading conditions in which refugees and other migrants are forced to exist in certain countries. For example, Petar Rosandić, the chairman of SOS Balkanroute was sued before the Vienna Commercial Court in 2023 for allegedly damaging the reputation of the International Centre for Migration Policy Development (ICMPD); ICMPD requested an injunction and retraction, arguing that SOS Balkanroute accused the Centre of building a prison in Bosnia and Herzegovina which is similar to USA's detention camp at Guantanamo Bay, Cuba (this request was ultimately denied and the case dismissed).¹⁸⁸

IV.3.3 Exclusive zones to which civil society organisations have no access

115. Like the restrictions on civil society access to the zones in Latvia, Lithuania and Poland bordering Belarus, many countries in Europe have restricted civil society and media access to border zones where migrants have been held. For example, in November 2020, Spanish photojournalist Javier Bauluz was covering the disembarkation of several people rescued at sea in the Canary Islands when police officers tried to remove him from the scene. Ultimately, he was fined 960 euros for 'disrespecting an officer' and 'refusing to be identified'.¹⁸⁹

¹⁸³ Asylum Information Database, Country Report: France (2022) 106.

¹⁸⁴ Julia Pascual, Mathilde Costil and Sylvie Gittus, 'A Calais, la frontière bunker avec l'Angleterre repousse les migrants vers la mer', *Le monde* (3 February 2023).

¹⁸⁵ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 32.

¹⁸⁶ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 15.

¹⁸⁷ www.pilp.nu, 'MiGreat and Breakthrough file complaint with Ombudsman: "Taking tents away from people in need outrageous"', (2 February 2023).

¹⁸⁸ See, Frontline Defenders, 'Austria: SOS Balkanroute and its chairman Petar Rosandić are facing a SLAPP case' (18 July 2023); Azem Kurtic, 'Critics of Bosnian Migrant Centre Win 'Austrian Guantanamo' Case', *BalkanInsight* (8 November 2023).

¹⁸⁹ Gabriela Sánchez, 'El Premio Pulitzer Javier Bauluz, multado por la ley mordaza mientras fotografiaba la llegada de migrantes a Canarias', *elDiario.es* (13 June 2022).

116. Access of civil society to closed or semi-closed migrant detention or reception centres has also proved difficult in most parts of Europe. In some cases, this is because the centres are in remote areas. For example, Austrian NGOs have expressed concern about the practice 'to move reception and pre-removal detention centres to hard-to-reach places outside cities, which would reduce their ability to continue to regularly monitor and provide assistance and counselling.'¹⁹⁰ In other countries, it is because the zones are securitised and/or limited to privileged government partners. In France, in some of the areas bordering Italy, civil society representatives have been prohibited through administrative decisions from accessing locations where migrants are detained, though these restrictions have been regularly overturned by administrative courts.¹⁹¹ Elsewhere, there is no access simply because it is not the practice to provide access. For example, in Ireland, according to the Irish Refugee Council, it is 'unclear whether or not a person refused leave to land had protection grounds or had intended to apply for asylum' (and in this sense pushed-back). This is because 'there is currently no access for independent authorities or NGOs at air or land borders in order to monitor the situation, nor do there appear to be any plans to allow such access in the future.'¹⁹²
117. In Hungary, NGO access to enter migrant reception centres is strictly controlled. State authorities have terminated pre-existing cooperation agreements with civil society groups who were previously monitoring closed facilities or offering humanitarian or related services within them.¹⁹³ Furthermore, NGO affiliated lawyers do not have access to open reception centres or detention facilities. Consequently, lawyers can only represent asylum seeking clients if the clients communicate explicitly their wish to be represented by the specific lawyer to the National Directorate-General for Aliens Policing and sign a specific form to that effect. In such a case, the attorney would be able to meet the individual in the presence of police. This severely restricts access to legal aid.¹⁹⁴
118. In the case of *Szurovecz v. Hungary*,¹⁹⁵ the ECtHR held that a refusal to grant a journalist access to a reception centre for refugees and asylum-seekers for reporting purposes amounted to a violation of his right to freedom of expression. Hungarian authorities had denied his requests to access one of the reception centres concerned based on the need to protect the personality rights, privacy and security of inhabitants of the centres. This was despite the journalist's confirmation that interviews and photos would only be taken with the permission of the persons concerned.
119. The situation for NGOs is similar in Croatia, where the applicable legislation allows for NGO visits on the condition of a signed cooperation agreement and the announcement of arrival according to the criteria prescribed for all visitors. In practice, only the Croatian Red Cross has the signed cooperation agreement with the Ministry of the Interior allowing them to visit immigration

¹⁹⁰ OHCHR, 'Report of mission to Austria focusing on the human rights of migrants, particularly in the context of return' (15-18 October 2018).

¹⁹¹ Asylum Information Database, Country Report: France (2022) 29.

¹⁹² Irish Refugee Council. Asylum Information Database, Country Report: Ireland (2022) 30.

¹⁹³ Hungarian Helsinki Committee, Responses to Questionnaire (On file, March 2024). See also, Katalin Juhász, Gruša Matevžič and Zolt Szekeres, Asylum Information Database (AIDA), *Country Report: Hungary* (2022) 71.

¹⁹⁴ Juhász, Matevžič and Szekeres, *ibid*, 42.

¹⁹⁵ *Szurovecz v. Hungary*, No. 15428/16, 8 October 2019.

detention centres. No other civil society organisation has access on a regular basis.¹⁹⁶ As regards Reception Centres, in practice only the Croatian Red Cross and *Médecins du Monde* have access on a regular basis, while some of the other civil society groups can be present in individual situations (i.e., to attend the hearings for asylum seekers).

120. BVMN has reported in relation to its partner organisations in Greece that some human rights groups, like PRAKSIS, a civil society organisation helping children in the Closed Controlled Access Centre on Samos to access legal aid have been completely blocked from entering camps where people on the move are held.¹⁹⁷ MSF has further explained in relation to Greece that:

With maritime zones strictly off-limits to non-military and non-coastguard oversight, and restrictions on civilian SAR imposed in 2021, a vacuum of scrutiny has been created, which has enabled non-assistance, pushbacks and violence to proliferate, despite the presence of Frontex land, sea and aerial assets in the Aegean. The most immediate consequence has been the loss of life and injuries linked to shipwrecks, as well as the proliferation of violence at sea.¹⁹⁸

121. Because of the challenges Greek NGOs have faced to be registered in the NGO register relevant to work with migrants and refugees (see further, section IV.3.4 below), and as was recounted by one of the respondents to the Expert Council's study on stigmatisation,

organisations that are not registered in the NGO register, i.e., the vast majority of organisations operating in Greece, are not allowed to operate in refugee camps and detention centres. It should be noted that since the closure of the ESTIA II programme at the end of 2022, all asylum-seekers who were considered vulnerable and who had previously been living in urban accommodations have been transferred to refugee camps. The result of these two measures is that the majority of asylum seekers are now *de facto* detained in infrastructures to which NGOs have no access to. Asylum procedures are conducted behind closed doors, and to date there are dozens of refugee camps in mainland Greece that are complete black holes with no human rights supervision or monitoring.¹⁹⁹

122. In Italy, the administrative detention of asylum seekers is dealt with by Article 7 of Legislative Decree 142 /2015 regulating the conditions of the administrative detention of asylum seekers and an administrative regulation of 19 May 2022 (the Lamorgese Directive²⁰⁰). The Legislative Decree makes clear that access to representatives of human rights organisations with established experience, and others should be provided though access may be restricted for reasons of security, public order, or otherwise for reasons related to the proper administration of the centres, provided it is not prevented completely. However, in practice, according to the NGO ASGI, any kind of entrance or engagement from civil society is refused.²⁰¹ Many NGOs have

¹⁹⁶ Ombudsman Office of the Republic of Croatia, 'Contribution to the Questionnaire on State Practice' P.P.R.-2- 1 - II80I23 - s2 (1 March 2024).

¹⁹⁷ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 25.

¹⁹⁸ MSF, *Death, Despair and Destitution: The Human Costs of the EU's Migration Policies* (February 2024) 37.

¹⁹⁹ Expert Council, 'Stigmatisation of Non-Governmental Organisations in Europe,' CONF/EXP(2024)1 (20 March 2024) para. 52.

²⁰⁰ https://www.interno.gov.it/sites/default/files/2022-06/direttiva_ministro_lamorgese_19.5.2022_accessibile.pdf.

²⁰¹ ASGI, 'input for the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe' (On file, 2024).

used strategic litigation to guarantee the right to access the centres. On 2 January 2023, the Lombardy Milan Regional Administrative Court determined affirms that there must be a procedure to fairly determine on a case-by-case basis applications for access, based on the relevant experience of the applicants.²⁰²

IV.3.4 Overly onerous NGO registration procedures

123. NGOs in Europe working with refugees and other migrants also face difficulties to meet the administrative hurdles related to their registration as formal NGOs. In Bosnia and Herzegovina, NGOs have indicated that they struggle to operate lawfully because of the increasing bureaucratic pressures and requirements/hurdles. New legislation on registration and taxation were mentioned as key challenges, and this has forced some NGOs to shut down or leave the country.²⁰³
124. In 2018, Hungary imposed a special tax (25%) on financial support to an immigration-supporting activity carried out in Hungary or on the financial support to the operations of an organisation with a seat in Hungary that carries out immigration-supporting activity.²⁰⁴ The tax is payable in respect to activities 'that directly or indirectly promote migration.' The Venice Commission and the OSCE Office for Democratic Institutions and Human Rights (ODIHR) determined that the tax constituted 'an unnecessary and disproportionate restriction of the associations' freedom to determine their objectives and activities and therefore a disproportionate interference with their right to freedom of association. The special tax represents moreover an unjustified interference with the right to freedom of expression of NGOs, since the special tax limits their ability to undertake research, education and advocacy on issues of public debate.'²⁰⁵ This tax remains in force.
125. The Expert Council has commented on Greek legislation affecting NGOs supporting refugees and other migrants.²⁰⁶ The reforms to the legislation which were introduced in 2020, set out additional, overly onerous conditions for the registration (and often reregistration for those who had already been registered under prior schemes) and certification of NGOs and their members, staff, and volunteers, active in the field of international protection, immigration and social integration in Greece. Those who did not register would be barred from certain activities. At the time, the Expert Council stated that:

The provisions will have a significant chilling effect on the work of civil society on account of the significant number of NGOs who are likely not to complete the registration process either because they are ineligible for registration or certification on formal grounds, are rejected by decision-makers for having failed any number of the overly broad criteria for registration or certification, or because they exempt themselves from the registration process because it is judged to be too onerous, they do not wish to share personal data or they are

²⁰² *Ibid.*

²⁰³ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 13.

²⁰⁴ Section 253 of Act XLI on amending certain tax laws and other related laws and on the immigration tax (entered into force 25 August 2018)

²⁰⁵ Venice Commission / ODIHR, 'Hungary: Joint opinion on section 253 on the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax', Venice Commission Opinion No. 941 / 2018 OSCE/ODIHR Opinion No. NGOHUN/336/2018, para 78.

²⁰⁶ Expert Council, 'Opinion on the Compatibility with European Standards of Recent and Planned Amendments to the Greek Legislation on NGO Registration', CONF/EXP(2020)4 (2 July 2020) and 'Addendum', CONF/EXP(2020)5 (23 November 2020).

unconvinced that there is a reasonable likelihood of registration or certification.²⁰⁷

126. The UN Special Rapporteur on Human Rights Defenders, Mary Lawlor has commented on these NGO registration requirements, following her visit to Greece in 2022. She indicated that the competent authorities have the ‘power to deny registration to NGOs on vague, arbitrary and ambiguous grounds, which, potentially, leave the registration process subject to abuse. The Special Rapporteur has received information about the review of the certification of at least one NGO previously admitted to the register that left the organisation in a situation of extreme uncertainty as to how it might continue its operations. Many human rights defenders who are members of NGOs working on migration and asylum have expressed concerns about extensive delays in the processing of their applications for registration.’²⁰⁸
127. This situation has also been underscored by MSF, who has noted that ‘in Greece, organisations, including MSF, have to complete lengthy and confusing registration procedures, and the delivery of urgent medical assistance has previously been obstructed by lengthy checks and roadblocks.’²⁰⁹
128. In 2023, the Berlin-based NGO Mare Liberum, which had been monitoring the human rights situation in the Aegean announced its dissolution and its withdrawal from Greece, citing among other reasons the ‘sabotage, obstruction, and, repression’ they experienced, the ‘repeated controls and questioning’ of their NGO registration documents and the arbitrary refusal of the Greek authorities to include it in the NGO Register.²¹⁰
129. In its report on the [stigmatisation of NGOs](#), the Expert Council recounted from NGO respondents in Greece that
- within the first year of the Registry’s operationalisation (by May 2021) the number of NGOs denied registration was more than double than those approved, with some even being denied registration on account of providing legal support to persons facing deportation, in compliance with the EU acquis, which was nevertheless initially deemed as incompatible with Greek legislation by the Ministry of Migration and Asylum. Others – which have been characterised as ‘ghost organisations’ by investigative media outlets – were expeditiously approved and called to manage significant operations and EU funds, despite not meeting the criteria of registration set by the Greek government at the time their registration was approved.²¹¹
130. The Expert Council has learned from other Greek NGOs supporting refugees and other migrants that registration has been near impossible. Boat Refugee Foundation, a Netherlands-based organisation, has unsuccessfully attempted to register its foreign branch in Greece three times. It also recounted that on Lesbos, a considerable number of (medical) organisations had to cease operations or were forced to leave the Closed Controlled Access Centre due to mandatory

²⁰⁷ Expert Council, ‘Opinion on the Compatibility with European Standards of Recent and Planned Amendments to the Greek Legislation on NGO Registration’, CONF/EXP(2020)4 (2 July 2020) para. 107.

²⁰⁸ UN Human Rights Council, ‘Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor: Visit to Greece’, UN Doc A/HRC/52/29/Add.1 (2 March 2023) para/ 52.

²⁰⁹ MSF, *Death, Despair and Destitution: The Human Costs of the EU’s Migration Policies* (February 2024) 39

²¹⁰ <https://twitter.com/rspaegean/status/1655891228762726400>; See also ECRE, News (5 May 2023).

²¹¹ Expert Council, ‘Stigmatisation of Non-Governmental Organisations in Europe,’ CONF/EXP(2024)1 (20 March 2024) para. 52.

registration requirements.²¹² Another NGO recounted how the failure of the Greek authorities to include them in the NGO Register (their last application was rejected for inconsistencies in their financial reports and audits, which were however never specified and they were not granted a 10-day extension to submit explanations as foreseen in Art. 3(2) of Joint Ministerial Decision 10616/2020) has led to banking difficulties; the NGO's bank has decided not to renew the NGO's legalisation because they are not on the Registry, and proceeded to deactivate their bank account. Furthermore, certain Greek NGOs have been penalised for not having their websites translated into the Greek language, whereas this requirement has not been applied to foreign NGOs operating in Greece. The application to annul the Joint Ministerial Decision establishing the NGO Register remains pending before the Greek Council of State, the Supreme Administrative Court of Greece.²¹³

131. The ECtHR has recognised that any interference with the right to freedom of association, if it has a basis in domestic law, must pursue a legitimate aim and be necessary in a democratic society to be admissible. Because of the importance of freedom of association, only convincing and compelling reasons can justify restrictions to it; such restrictions should be guided by a "pressing social need".²¹⁴ Any such restrictions must also be proportionate to the aim. For example, the failure to register an association or the involuntary dissolution of an association are considered by the ECtHR to be overly harsh measures with significant consequences. In such cases, the ECtHR has held that it is incumbent on governments to consider whether less stringent measures may achieve the aims invoked.²¹⁵
132. In Cyprus, the establishment and formation of associations, organisations and foundations are governed by the Law of Associations and Foundations and other Relevant Matters of 2017. In 2020, the Parliament amended the law, setting a two-month deadline for registered NGOs to submit administrative data and giving the Minister of the Interior executive powers to remove NGOs from the Register of Associations and thereby end their work. The failure to comply with the requirement would result in the commencement of a dissolution process for the NGOs concerned. Accordingly, the NGO Action for Support, Equality and Antiracism (KISA), a leading NGO in Cyprus providing among other things, support and assistance to migrants, who had missed the deadline, and had been accused publicly of cooperating with terrorist organisations, of corruption and money-laundering, was included on a list of associations published by the Ministry of the Interior that were to be dissolved. On 10 June 2021, the Cyprus Administrative Court rejected KISA's appeal against the decision of the General Registrar to deregister KISA from the Register of Associations. Although KISA has since then a new formal legal status as a non-profit company and the deregistration is under further appeal, the government – particularly the Ministry of the Interior – the climate of threats and intimidation impedes KISA's work in support of migrants and refugees.²¹⁶

IV.3.5 Targeting foreign workers and volunteers with onerous work authorisation or residence permit procedures

²¹² Boat Refugee Foundation (correspondence on file).

²¹³ Communication by the Expert Council on NGO Law with representative of a Greek NGO, May 2024.

²¹⁴ *Costel Popa v. Romania*, No. 47558/10, 26 April 2016.

²¹⁵ See, *ibid.* See also, *Adana Tayad v. Turkey*, No. 59835/10, 21 July 2020; *Association Rhino and Others v. Switzerland*, No. 48848/07, 11 October 2011.

²¹⁶ International Service for Human Rights, 'Cyprus must halt escalating harassment against KISA and safeguard civic space' (14 February 2024).

133. Foreigners volunteering with or working for NGOs and other solidarity networks have had their work or residency permits pulled as a method to impede the work of those organisations.²¹⁷ For example, in Croatia, the BVMN has reported that Omer Essa Mahdi, the partner of an employee of the NGO Are you Syrious? had his international protection revoked after he refused to become an informant for the Security and Intelligence Agency.²¹⁸ In Bosnia and Herzegovina, police increasingly scrutinised the identification of volunteers, with the result that three volunteers from Collective Aid were ordered to leave the country within 14 days and threatened to be deported and issued with a ban for the country for at least one year in case of non-compliance. Similarly, police checks at distribution sites in Bihać, Bosnia and Herzegovina resulted in the confiscation of volunteers' passports, and the requirement to report to the local police station.²¹⁹
134. This has also been a problem facing Britons volunteering in France. For example, PICUM has reported that a 22-year-old UK citizen providing support to migrants in Calais had his residence permit revoked and was ordered to leave the area and banned from entering France for a year. He was arrested and detained briefly before leaving France voluntarily.²²⁰

IV.3.6 Access to funding for activities in support of refugees and other migrants

135. The CoE Committee of Ministers has underscored that 'NGOs should be free to solicit and receive funding – cash or in-kind donations – not only from public bodies in their own State but also from institutional or individual donors, another State or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.'²²¹ As the former UN Special Rapporteur on the rights to freedom of assembly and association has underscored, 'The ability to seek, secure and use resources is essential to the existence and effective operations of any association, no matter how small. The right to freedom of association not only includes the ability of individuals or legal entities to form and join an association but also to seek, receive and use resources – human, material and financial – from domestic, foreign, and international sources.'²²²
136. The right of associations to seek resources, as an inherent part of the right to freedom of association, may only be restricted under three cumulative conditions:

- 1) the restriction must be prescribed by law (condition of legality, including the requirements of foreseeability and accessibility);

²¹⁷ BVMN, *The Black Book of Pushbacks* (Expanded & Updated edition, Vol IV, 2022) 31; BVMN, 'Contribution to the Questionnaire on State Practice – December 2023 in the framework of the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe' (31 January 2024) 12. In January 2021, local police said that volunteers of the Bosnian NGO Collective Aid were no longer allowed to carry out their work as they were considered a "disturbance of public peace". As they only had temporary registrations for Bosnia and Herzegovina, Collective Aid was asked to obtain a work permit for the volunteers, even though the permit for short-term residents did not legally exist at the time. Also in January 2021, three volunteers were taken to the immigration authorities while carrying out their daily activities, interrogated for several hours and had their passports withheld for a weekend.

²¹⁸ BVMN, *The Black Book of Pushbacks* (Expanded & Updated edition, Vol IV, 2022) 30.

²¹⁹ BVMN, 'Contribution to the Questionnaire on State Practice – December 2023 in the framework of the study on restrictions to civil society space relating to the support of refugees and other migrants in the Council of Europe' (31 January 2024) 13.

²²⁰ PICUM, 'More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022' (2023) 7.

²²¹ Recommendation CM/Rec(2007)14), para. 50.

²²² UN Human Rights Council, 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association' (24 April 2013) UN Doc A/HRC/23/39, para. 8.

- 2) the restriction must pursue a legitimate aim (as set out in Article 11(2) ECHR: in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others); and
- 3) the restriction must be necessary in a democratic society to achieve that legitimate aim (the condition of necessity requiring also proportionality).

137. As the Venice Commission has indicated,

The ECtHR has held that public authorities must be able to demonstrate that the disputed measure can truly be effective in pursuing the legitimate aim, that the disputed measure is necessary in addition to already existing means of pursuing the legitimate aim, the cumulative effect of all legal rules combined on the freedom concerned, and whether there is a proportionate relationship between the effects of the measure concerned and the freedom affected.²²³

138. In addition to the criteria of legality, legitimacy and necessity (including proportionality), any restriction on the right to freedom of association, including access to funding, must not be discriminatory and no law should criminalise or delegitimise activities in defence of human rights on account of the geographic origin of funding.²²⁴ Restrictions on the ability to seek resources should 'not be used as a pretext to control NGOs or to restrict their ability to carry out their legitimate work, notably in defense of human rights.'²²⁵

139. NGOs supporting refugees and other migrants who are unable to satisfy onerous registration or reporting requirements, may in consequence be restricted from accessing certain types of funding. To the extent that their inability to satisfy onerous registration or reporting requirements is itself an unjustifiable limitation on their ability to exercise freedom of association, any consequential impediment to access funding sources would equally be an unjustifiable restriction.

140. As the Expert Council's study on the stigmatisation of NGOs recounts,

NGOs providing assistance to asylum seekers and refugees faced challenges not only with the access to State funds, but also to the EU funds, which due to the government pressure on the European Commission, were alleged to have been diverted to the government instead. Those challenges were compounded by the fact that the negative publicity to which those NGOs have been exposed having then impacted adversely their ability to attract private funding.²²⁶

141. Another respondent to the study on stigmatisation has noted similarly in respect to Poland that 'In the past, many NGOs supporting asylum seekers, refugees, migrants and stateless persons in Poland were funded by the EU's funds (...). However, in practice, these NGOs' access to funding has been increasingly and purposefully limited since 2016. The funds have been

²²³ Venice Commission, 'Report on funding of associations', CDL-AD(2019)002 (18 March 2019) para. 9.

²²⁴ *Ibid*, para. 122.

²²⁵ Venice Commission, 'Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary' CDL-AD(2017)015,(20 June 2017) paras. 39 and 66.

²²⁶ Expert Council, 'Stigmatisation of Non-Governmental Organisations in Europe,' CONF/EXP(2024)1 (20 March 2024) para. 147.

distributed to national authorities only, or via those national authorities that the NGOs monitored (and criticised, inter alia, for human rights violations) for many years.²²⁷

142. In 2017, Hungary imposed legislation on the financing of civil society organisation which stipulates new reporting obligations for those organisations who receive foreign funds beyond a certain threshold.²²⁸ The CoE's Venice Commission determined that the provisions caused a disproportionate and unnecessary interference with freedoms of association and expression, the right to privacy, and the prohibition of discrimination.²²⁹ In *European Commission v. Hungary*, the CJEU held that the provisions were discriminatory and unjustified restrictions on civil society and on those providing them with support. The Court determined that the measures in question did not comply with requirements related to the free movement of capital. All State authorities terminated all of the existing cooperation agreements with civil society organisations that pertained to monitoring closed facilities or offering services therein (e.g., social services in prisons, assistance with reintegration).²³⁰ One year later, after the 'Stop Soros' package entered into force, carrying out human rights monitoring at the Hungarian-Serbian border where push-backs occur (and were legalised in 2016) became a criminal offence punishable with up to 1 year imprisonment.

IV.4 Harassment and xenophobic speech acts targeting NGOs and solidarity networks

143. Several governments have initiated smear campaigns, harassment and stigmatising rhetoric against NGOs and solidary groups supporting refugees and other migrants. These campaigns of harassment are often accompanied by invasive forms of surveillance, audits, stop-and-searches and monitoring of online activities.²³¹ Among these is Italy, which initiated a media campaign aimed at discrediting those NGOs that undertook rescue operations for migrants at sea,²³² and Lithuania, where a lawyer who requested and was granted interim measures by the ECtHR on behalf of five Afghan nationals stuck at the Lithuanian – Belarusian border (the measures were not respected by the State) was accused of lying to the Court and labelled a provocateur.²³³
144. In the United Kingdom, former Home Secretary Suella Braverman commented on the back of a Charity Commission ruling that

it's clear that some charities and civil society groups are actively undermining efforts to curb illegal migration. ... They form part of an establishment committed to ever increasing migration, with no regard for the will of the British people. These groups are comprised of politically motivated activists masquerading as humanitarians. It is a con. But the British public won't be fooled.²³⁴

²²⁷ *Ibid*, para. 148.

²²⁸ Law No LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad.

²²⁹ Venice Commission, 'Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad of Hungary' CDL-AD(2017)015,(20 June 2017) para. 68.

²³⁰ Hungarian Helsinki Committee, 'National authorities terminated cooperation agreements with the Hungarian Helsinki Committee', at: <https://helsinki.hu/wp-content/uploads/termination-of-agreements-summary.pdf>.

²³¹ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 23.

²³² Eugenio Cusumano and Flora Bell, 'Guilt by association? The criminalisation of sea rescue NGOs in Italian media' (2021) 37(19) *J Ethnic & Migration Studies* 4285.

²³³ 'Despite European court ruling, five Afghans remain stuck on border with Lithuania' (14 September 2021) LRT.lt.

²³⁴ Rory Poulter, 'Aevo head criticises Home Secretary's 'irrelevant and politically motivated' comments' *Third Sector* (24 August 2023).

145. Greece has also deployed this tactic against NGOs. According to BVMN, direct interference in NGOs' work is often accompanied by 'smear campaigns and defamation in the media, often following statements made by high-ranking government officials. These feed into the narrative of migration as a security threat, incite hatred, further stigmatise and dehumanise people on the move, while delegitimising supporters and discrediting [human rights defenders] while legitimising threats and violent attacks.'²³⁵ When Türkiye began to document illegal pushbacks by Greece and their sometimes-deadly consequences, the

Greek government began to accuse NGOs, activists and journalists reporting on migration policy-driven State crimes of being Turkish fifth columnists aiming to discredit Greece.²³⁶

146. Thus, the Greek authorities wrongly implied that the NGOs that were filing submissions to the CoE Committee of Ministers as part of the execution of ECtHR judgments on behalf of the survivors of pushbacks had been involved in smuggling activities.²³⁷

147. As was reported in the Expert Council's study on the stigmatisation of NGOs, following its advocacy in favour of such migrants,

In November 2022 the authorities stepped up its attack against HR360 by demonising its acceptance of foreign funding for regranting and HR360 founders' personal financial situation. The public prosecutor launched a preliminary investigation which to this moment, hasn't produced any outcomes. No information has been disclosed about the findings, neither has any criminal process been initiated. The situation in which HR360 finds itself can be described as a "limbo", with huge administrative and financial consequences and a severe impact on staff's morale.²³⁸

148. Some governments also failed to protect civil society groups, employees and volunteers from xenophobic attacks and threats from far-right groups and other anti-immigrant elements within society. In Greece, private actors have made racist, xenophobic comments and threats or physical violence meant to stop civil society actors from engaging in humanitarian efforts. In March 2020, a warehouse used by an NGO to store supplies was set on fire. In the same month, journalists covering migrants' rights were attacked by masked individuals who threw rocks at their car. These acts, given the failure of the State to exercise any form of due diligence to protect the organisations and their personnel from harm and the absence of any investigation into the incidents or the persons responsible, contributes to the unsafe environment for civil society in the country and a reduction in civil society space.²³⁹

149. This has also been the case in Türkiye. As racism against migrants increased, it spread to the organisations supporting them. According to human rights defenders who provided information for this study, in the last two to three years, migrant and refugee rights defenders have been

²³⁵ BVMN, *The Black Book of Pushbacks* (Expanded & Updated edition, Vol IV, 2022) 31.

²³⁶ Yasha Maccanico, 'Pushbacks, migration policy and returns at the core of EU support for authoritarian regimes', *The Arrested Lawyer Initiative* (8 November 2022).

²³⁷ BVMN, *The Black Book of Pushbacks*, *Ibid.* See also, Alkistis Agrafioti Chatziagianni and Kleio Nikolopoulou, 'At Europe's Borders: Between Impunity and Criminalization' (Greek Council for Refugees, 2023) 42.

²³⁸ Expert Council, 'Stigmatisation of Non-Governmental Organisations in Europe,' CONF/EXP(2024)1 (20 March 2024) para. 38.

²³⁹ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 24.

attacked more by nationalist groups than by the State, and the State has turned a blind eye and taken advantage of the chaos.²⁴⁰

150. Similarly, in July 2022 in Serbia, someone broke into the warehouse of the NGO Collective Aid, spat on the food, and alleged that the organisation was operating illegally. After the organisation's project coordinator reported the incident to the police, several more incidents took place. The coordinator was arrested after recording his testimony and his driving licence was deliberately destroyed in front of him. No investigation was ever initiated.²⁴¹
151. In Hungary, the harassment of NGOs by both State and non-State actors is common and frequent.²⁴² Pro-government pundits and individuals affiliated with government-organised non-governmental organisations regularly use unacceptable language, including for example the statement that those working for the NGO the Hungarian Helsinki Committee 'are war criminals that can be liquidated without a court procedure.'²⁴³

IV.5 Pushbacks and civil society space

Every day we return them to Bosnia, without papers and without procedure, regardless of who they are, women, children, everybody is treated the same way.

... The chief of the station ... [redacted] ... and the officials in the Administration Unit give us orders to return everybody, without paperwork, without track, to take their money, to smash their cellphones and throw them into the ... [redacted] ... or take them, and return the refugees to Bosnia by force.

... We return 20-50 people on a daily basis. When transferred from other police districts, the people are exhausted, sometimes beaten up, and then, on top of that, we transport them during the night and move them over to Bosnia by force.²⁴⁴

152. Refugees and other migrants who approach many European borders regularly experience the practice of pushbacks, which has been described as entailing the 'various measures taken by States which result in migrants, including asylum-seekers, being summarily forced back to the country from where they attempted to cross or have crossed an international border without access to international protection or asylum procedures or denied of any individual assessment on their protection needs which may lead to a violation of the principle of non-refoulement'.²⁴⁵ These acts are often accompanied by physical violence and the denial of assistance.
153. Pushbacks have been reported in an ever-growing number of countries throughout the CoE²⁴⁶

²⁴⁰ Interview, 21 February 2024.

²⁴¹ BVMN, 'Contribution to the Questionnaire on State Practice' (31 January 2024) 33.

²⁴² See, Hungarian Helsinki Committee, 'Five Years and Counting: Government Attacks against Civil Society 2018-2023' (20 June 2023) <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/06/Attack-against-NGOs.pdf>.

²⁴³ See, "'War criminals to be liquidated freely without trial" - László Földi on the Helsinki Committee,' (5 October 2017, updated 9 February 2021) <https://vastagbor.atlatszo.hu/2017/10/05/birosagi-eljaras-nelkul/>.

²⁴⁴ Ombudsman Office of the Republic of Croatia, Anonymous letter sent to the Ombudswoman 'No institutional reaction to alleged illegal police treatment of migrants' (25 July 2019)

²⁴⁵ Katrien Luyten, 'Addressing pushbacks at the EU's external borders', EU Parliament Briefing, PE 738.191 (October 2022) 2.

²⁴⁶ See generally, e.g., MSF, *Death, Despair and Destitution: The Human Costs of the EU's Migration Policies* (February 2024); UN Human Rights Council, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea', Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, UN Doc A/HRC/47/30 (12 May 2021).

to the point that it can almost be said that the phenomenon has been normalised. There are reports of pushbacks and/or legislation which allows for pushbacks in CoE member States including Albania,²⁴⁷ Austria,²⁴⁸ Bulgaria,²⁴⁹ Croatia,²⁵⁰ Cyprus,²⁵¹ France,²⁵² Germany,²⁵³ Greece,²⁵⁴ Hungary,²⁵⁵ Italy,²⁵⁶ Latvia and Lithuania,²⁵⁷ Malta,²⁵⁸ North Macedonia,²⁵⁹ Poland,²⁶⁰

²⁴⁷ Euractiv, 'UN warns pushbacks of migrants in Europe becoming normalised' (21 February 2022).

²⁴⁸ Judgment of the Regional Administrative Court of Styria, LVwG 20.3-2725/2020-86 (1 July 2021).

²⁴⁹ HRW, 'Bulgaria: Migrants Brutally Pushed Back at Turkish Border: The EU Should Act to Stop Illegal and Dehumanizing Pushbacks', (26 May 2022). The estimated number of pushback incidents in Bulgaria for 2022 was 9,897 involving 174,588 individuals [See, Bulgarian Helsinki Committee, Annual Report on Border Monitoring: Bulgaria (2023) 8]. According to an interview by Collective Aid about a pushback from Bulgaria to Türkiye, reported to BVMN, 'they pushed everybody back into the river, forcing them to wade through the chest high water in underwear. Once on the other side, the group hid in bushes, afraid to be caught by the Turkish border police and be taken to a detention camp' [Interview, 21 January 2024]. See also, *D v. Bulgaria*, No. 29447/17, 20 July 2021.

²⁵⁰ Steffen Lüdke and Nicole Vögele, "'They Were Beating Me Like Crazy": Video Documents Illegal Refugee Pushbacks in Croatia' *Spiegel International* (18 November 2020).

²⁵¹ CoE, Commissioner for Human Rights, Letter to the Minister of Interior of Cyprus, CommHR/DM/sf 014-2021 (10 March 2021).

²⁵² MSF, 'People on the move face violence and pushbacks at Italian-French border' (4 August 2023).

²⁵³ Pushback Alarm Austria, BVMN, Bayerischer Flüchtlingsrat, 'NGOs Sound the Alarm: Evidence of Systematic Pushbacks Now Also at the German-Austrian Border' (30 May 2023).

²⁵⁴ *Safi and Others v. Greece*, No. 5418/15, 7 July 2022. See also, Alkistis Agrafioti Chatzigianni and Kleio Nikolopoulou, 'At Europe's Borders: Between Impunity and Criminalization' (Greek Council for Refugees, 2023); Lena Karamanidou and Bernd Kasperek, 'From Exception to Extra-Legal Normality: Pushbacks and Racist State Violence Against People Crossing the Greek-Turkish Land Border.' (2022) 11(1) *State Crime Journal* 12.

²⁵⁵ *S.S. and Others v. Hungary*, No. 56417/19, 12 October 2023.

²⁵⁶ ASGI, Asylum Information Database (AIDA), *Country Report: Italy*, 'Access to the territory and push backs' (31 May 2023) (<https://asylumineurope.org/reports/country/italy/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/>).

²⁵⁷ Human Rights Monitoring Institute (HRMI), 'Litigation concerning the pushback policy of migrants and the restrictions of their liberty implemented in the Republic of Lithuania; (12 March 2024) <https://hrmi.lt/en/litigation-concerning-the-pushback-policy-of-migrants-and-the-restrictions-of-their-liberty-implemented-in-the-republic-of-lithuania/#:~:text=According%20to%20the%20applicant%2C%20these,procedures%20and%20the%20legal%20norms.>

²⁵⁸ Aditus Foundation, Asylum Information Database, 'Country Report: Malta' (2022), 22-29.

²⁵⁹ Katy Fallon and Lorenzo Tondo, 'Videos show migrants stripped of clothing in freezing temperatures at Serbian border', *The Guardian* (22 February 2024); Statewatch, 'Foreign agents and violence against migrants at the Greek-Macedonian border' (8 June 2021). See also, the facts of *A.A. and Others v. North Macedonia*, Nos, 55798/16, 55808/16, 55817/16, 55820/16, and 55823/16, 5 April 2022, which describe a situation in which more than 1500 refugees and other migrants were summarily returned from North Macedonia to Greece. Note however that the ECtHR judgment blames the applicants for their treatment, noting *that* 'it was in fact the applicants who placed themselves in jeopardy by participating in the illegal entry onto Macedonian territory on 14 March 2016, taking advantage of the group's large numbers. [...] [T]he lack of individual removal decisions can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention.' [at para. 123].

²⁶⁰ *M.K. and Others v. Poland*, No. 40503/17 23 July 2020.

Romania,²⁶¹ Serbia,²⁶² Spain,²⁶³ Switzerland,²⁶⁴ Türkiye,²⁶⁵ and the United Kingdom.²⁶⁶ Some pushbacks have been facilitated through informal readmission agreements,²⁶⁷ whereas others are the product of controversial emergency legislation or in response to the phenomenon of ‘instrumentalisation’ (though a state of emergency or a State practice involving the ‘instrumentalisation’ of borders would not provide a lawful rationale to violate the principle of non-refoulement).²⁶⁸ This matter will be considered by the ECtHR Grand Chamber in the matter of *C.O.C.G. and Others v. Lithuania*.²⁶⁹ Allegations of pushbacks have also engaged authorities of European Border and Coast Guard Agency (Frontex) who has been involved in joint return operations, though efforts to pursue the accountability of Frontex have controversially failed, given the absence of its formal role in decisions about whether individuals should be returned. In the CJEU case brought against Frontex, the General Court determined that Greece had exclusive responsibility for assessing asylum claims, and Frontex’s role was limited to technical support, and thus any harm caused by the expulsion was attributable entirely to Greece.²⁷⁰

154. Pushbacks have long been recognised to violate the prohibition on non-refoulement under refugee law as well as international human rights law.²⁷¹ In 2022, the ECtHR decided *Safi and Others v. Greece*, which concerned the sinking of a fishing vessel in the Aegean Sea which had 27 Afghan, Syrian and Palestinian nationals on board who were seeking to enter Greece from Türkiye; 11 people died in the sinking.²⁷² The survivors argued that the boat sank when the

²⁶¹ UN Committee Against Torture, ‘Concluding observations on the third periodic report of Romania’, UN Doc. CAT/C/ROU/CO/3 (23 August 2023) para. 23.

²⁶² Protecting Rights at Borders, ‘Pushbacks at Europe’s Borders: A Continuously Ignored Crisis’, (January 2024) 10-11.

²⁶³ See, the comments on the real risk of refoulement, in the CoE Commissioner for Human Rights Dunja Mijatović, Report following her visit to Spain from 21 to 25 November 2022, CommHR(2023)9 (13 April 2023) paras. 116-129.

²⁶⁴ Asylex, Responses to Questionnaire (On file, December 2023).

²⁶⁵ Karolína Augustová, ‘The Border Landscape in Eastern Turkey after the Taliban’s Takeover of Afghanistan’, Istanbul Policy Center (September 2021); Human Rights Watch, ‘No One Aaked Me Why I Left Afghanistan’: Pushbacks and Deportations of Afghans from Turkey (2022).

²⁶⁶ Illegal Migration Act, 2023 c. 37, which provides a legal duty on the Home Secretary to remove anyone (other than unaccompanied children) arriving irregularly to the UK, which includes those arriving by small boat and other means of transport, either to their home country or to a safe, third country such as Rwanda. Such persons’ asylum claims will be declared inadmissible. While there have been no cases yet, this legislation is likely to result in pushbacks and other forms of refoulement.

²⁶⁷ See, e.g., Asylum Information Database, ‘Country Report: Austria’ (2022), 22 (regarding the informal readmission agreement between Austria and Slovenia).

²⁶⁸ Latvia introduced a state of emergency in four administrative territories near its border with Belarus, on 10 August 2021, via the Law on Emergency Situation and State of Exception (*Par ārkārtējo situāciju un izņēmuma stāvokli*). This state of emergency empowered Latvian border guards to return to Belarus third country nationals who crossed the border irregularly, without a need for an assessment of their individual protection needs. The law was amended in April 2022, to enable the making of asylum claims at the immigration detention centre in the city of Daugavpils and at border crossing points, though not at any other places along the land border with Belarus. See, UN Special Rapporteur on Human Rights Defenders and other UN experts, Communication to the Government of Latvia on 2 March 2023, made public on 8 May 2023 <https://srdefenders.org/latvia-alleged-undue-use-of-criminal-proceedings-against-human-rights-defenders-ieva-raubisko-and-egils-grasmanis-joint-communication/>. See, CoE Commissioner on Human Rights, Letter to Mr Māris Kučinskis, Minister for the Interior of Latvia, CommHR/DM/sf 004-2023 (27 January 2023); UNHCR, ‘UNHCR observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518),’ (13 October 2021).

²⁶⁹ *C.O.C.G. and Others v. Lithuania*, No. 17764/22, Press Release ECHR 094 (2024) 17 April 2024 ‘Grand Chamber to examine case concerning Cuban nationals’ allegations of “pushbacks” from Lithuania to Belarus’.

²⁷⁰ See, *WS and Others v. Frontex*, Case T-600/21 (CJEU, 6 September 2023), para 64. At the time of writing, an appeal against the General Court’s judgment was pending.

²⁷¹ *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

²⁷² *Safi and Others v. Greece*, No. 5418/15, 7 July 2022.

coastguard was trying to push the boat back into Turkish waters. In contrast, the Greek authorities argued that the boat was being towed by the coastguard towards the island of Farmakonisi when it capsized. The ECtHR found that there had been a procedural violation of Article 2 (right to life) which related to the weaknesses of the official investigation into the circumstances of the boat sinking and a violation of the State's positive obligation to do all that could be reasonably expected to protect the passengers. The ECtHR also held that there was a violation of Article 3 (prohibition of inhuman or degrading treatment), concerning the degrading treatment the survivors had been subjected to after they had been disembarked from the boat.

155. In the communicated case of *H.M.M. and Others v. Latvia*,²⁷³ which concerns developments at the Latvian-Belorussian border from 10 August 2021 and onward, the applicants indicate they crossed the border from Belarus to Latvia on 10 August 2021 and were pushed back across the border by Latvian border guards without having their claims for asylums registered. As the Belorussian authorities did not readmit them to Belarus, they remained stranded in the forest in the border area for two weeks. Ultimately, eleven of the individuals were allowed back into Latvia where they spent time in a border tent, some were beaten by the authorities, before being pushed back to Belarus, only for the cycle to happen once again. This cycle continued until some of the applicants were forced to agree to be removed to Iraq.

156. Quasi pushbacks have also been reported in countries like Spain, where the Government has deemed certain parts of its territory (the enclaves of Ceuta and Melilla) as part of Morocco, and from this standpoint it has rejected and removed persons from these enclaves which it deems as outside of the jurisdiction of Spain. Thus, the semantics of the border operation have been used to legitimise (through the resort to a form of externalisation) what are essentially pushbacks and/or expulsions, depending on the context.²⁷⁴ The UN Special Rapporteur on the Human Rights of Migrants has expressed his

'serious concern about barriers placed by Spain to accessing asylum in practice, in light of the creation of zones of exception at the border' [...], and that the migrants in the zone 'effectively lack access to Spain.'²⁷⁵

157. Given that these strategies of deterrence do not comply with States' obligations under human rights or refugee law, States do not wish civil society to observe them. Consequently, those States employing these strategies have initiated crackdowns on NGOs and solidarity groups who have tried to monitor, report and assist, as well as independent media associations who have sought to publicise, to make it difficult for them to reach the border and operate independently in border zones. These crackdowns are most prevalent in the securitised border areas where pushbacks typically occur. The forests bordering Belarus are therefore dangerous places for Polish, Latvian and Lithuanian civil society organisations because of what happens there. This is like other land borders where pushbacks are rife, and also applies to sea rescues in applicable search and rescue zones. While there have been some pushback cases filed in the courts, it is difficult for local NGOs to assist victims of pushbacks to seek justice for the violations they suffered because often contact will be broken through the act of the pushback where phones and other property are routinely stolen or destroyed. Moreover, many of the migrants are still

²⁷³ *H.M.M. and Others v. Latvia*, No. 42165/21, Communicated Case, 3 May 2022.

²⁷⁴ Note that some of these extraterritorial arguments put forward by Spain were rejected by the Grand Chamber of the ECtHR in *N.D. and N.T. v. Spain (GC)*, Nos. 8675/15, 8697/15, 13 February 2020, paras. 104-111.

²⁷⁵ UN Human Rights Council, 'Report on means to address the human rights impact of pushbacks of migrants on land and at sea', Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, UN Doc A/HRC/47/30 (12 May 2021) para. 71.

intent on reaching their destination and would not want to 'jeopardise that with a human rights complaint.'²⁷⁶

IV.6 Externalisation policies and civil society space

158. Many States and entities within Europe including both the European Union and individual EU Member States as well as CoE member States not part of the EU have initiated border externalisation policies to prevent refugees and other migrants from travelling through irregular channels to Europe. These consist of agreements, direct financial contributions and in some cases the contribution of law enforcement personnel, infrastructure and surveillance equipment, the construction of detention facilities in other States so these States can administer migration and border management measures outside of the territory of the destination country to prevent unwanted arrivals, and depending on the country, to encourage partnering countries to 'pull back' unwanted refugees and other migrants.
159. Agreements have been implemented with States outside of the CoE such as Egypt,²⁷⁷ Lebanon,²⁷⁸ Libya,²⁷⁹ Morocco,²⁸⁰ Niger,²⁸¹ and Tunisia,²⁸² which some have argued have strengthened the legitimacy of authoritarian regimes, and made more powerful State security and policing agencies known for their repression.²⁸³ These agreements provide no in-built mechanisms to monitor the respect of human rights in the partner countries,²⁸⁴ and in many ways the agreements and their implementation undermine civil society groups in these countries who have consistently sought to advocate for greater human rights protections by their governments. At times, civil society groups in these countries outside of the CoE such as Tunisia, have worked in conjunction with NGO migrant solidarity networks like Alarm Phone, a telephone hotline for people in distress at sea, and have collected many testimonies and videos which highlight the violent behaviour of authorities during interception operations at sea.²⁸⁵ But these agreements have also streamlined the kinds of work that NGOs outside of the CoE can do. Some organisations close to governments will be accorded official roles to assist with the implementation of the goals of the agreement, whereas civil society acting more independently will not get the necessary authorisations.²⁸⁶

²⁷⁶ Interviews with Turkish defenders, February 2024.

²⁷⁷ Joint Declaration on the Strategic and Comprehensive Partnership between The Arab Republic of Egypt and the EU https://neighbourhood-enlargement.ec.europa.eu/news/joint-declaration-strategic-and-comprehensive-partnership-between-arab-republic-egypt-and-european-2024-03-17_en.

²⁷⁸ Nadine Talaat and William Christou, 'Pushing back against Cyprus pushbacks: From a dinghy in Lebanon to EU court' *The New Arab* (1 August 2022).

²⁷⁹ Unofficially at: https://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf.

²⁸⁰ Support partnerships are summarised at: https://neighbourhood-enlargement.ec.europa.eu/system/files/2023-03/EU_support_migration_morocco.pdf.

²⁸¹ The Nigerien agreement was repealed by the military junta in November 2023. See, France 24, 'Niger's repeal of migrant smuggling law prompts EU fears over curbing immigration' (4 December 2023).

²⁸² Paolo Cuttitta. 'Non-governmental/civil society organisations and the European Union – externalisation of migration management in Tunisia and Egypt', (2020) 26(7) *Population, Space and Place* 1.

²⁸³ Khaled Tabbabi, *Le mémorandum entre la Tunisie et l'Union Européenne : Vers un renforcement de la dépendance, de l'autoritarisme et de L'Europe forteresse?* (ECRE, Working Paper 20, 2023) 6.

²⁸⁴ See, e.g., European Commission, 'Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia', (16 July 2023) https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887.

²⁸⁵ Tabbabi, 8.

²⁸⁶ Tabbabi, *ibid*, 9.

160. The bilateral agreement signed between Cyprus and Lebanon in 2020 provided a framework through which migrants trying to reach Cyprus from Lebanon would be intercepted by Lebanese authorities and sent back. In 2024, it was reported that Cyprus was seeking to spearhead a similar agreement between Lebanon and the EU.²⁸⁷ The agreement between Italy and Libya recognising the Libyan Search and Rescue Region and coinciding with the disengagement of the EU and its Member States from search and rescue operations in the Mediterranean has led to vulnerable refugees and other migrants being intercepted and returned to arbitrary detention in Libyan detention centres where they have been exposed to torture and cruel, inhuman and degrading treatment, and inhumane detention conditions.²⁸⁸ As the Grand Chamber of the ECtHR recognised in the *Hirsi Jamaa* judgment, Italy must have known the situation in Libya (back in 2009) could not be considered safe, thus it violated the principle of *non-refoulement* by pushing migrants intercepted on the high seas back to a country they fled from.²⁸⁹
161. Whilst the situation in Libya has evolved significantly since 2009 when Muammar Gaddafi was in power, there is little doubt that it remains unsafe. The EU and single EU Member States continue to delegate responsibilities to render assistance to boats in distress at sea, despite being aware that those taken back to Libya will be brought to detention centres and face a likelihood of serious violations of their rights. In May 2020, Maltese authorities also concluded an agreement with Libya, the aim of which was to establish coordination centres in Tripoli and Valletta to support ‘operations against illegal migration’.²⁹⁰
162. The externalisation policies of the EU and its Member States also consist of agreements and funding to non-EU member States within the CoE such as Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia, Ukraine and Türkiye.²⁹¹ Perhaps the vanguard of these is the 2016 EU- Türkiye statement,²⁹² an agreement by which in exchange for billions of euros from the EU, Türkiye would accept the forced return of all migrants who arrived to the Greek islands from Türkiye (on the basis of the assumption that Türkiye is a safe country for refugees). The deal resulted in Greece enacting geographic restrictions on migrants who arrived at the Greek islands which trapped them in overcrowded hotspots on the Greek islands without access to necessities, so that they could be more easily returned to Türkiye. Quite different, but also falling within this category, is the agreement between France and the United Kingdom (the 2003 Treaty of Le Touquet) which provided a judicial framework to allow for ‘*juxtaposed controls*’, which enable both States to conduct border control on each other’s territory in the North Sea and Channel ports.²⁹³

²⁸⁷ Nektaria Stamouli, ‘Cyprus demands Lebanon control migrant flows’ *Politico* (4 April 2024).

²⁸⁸ UN Human Rights Council, ‘Report of the Independent Fact-Finding Mission on Libya’ UN Doc A/HRC/52/83 (3 March 2023) para 41.

²⁸⁹ *Hirsi Jamaa and Others v. Italy* [GC]No. 27765/09, 23 February 2012. See also, CoE Commissioner for Human Rights, ‘Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, Application No. 21660/18 *S.S. and others v. Italy*’, CommDH(2019)29 (15 November 2019) <https://rm.coe.int/third-party-intervention-before-the-european-court-of-human-rights-app/168098ddd4d>.

²⁹⁰ Memorandum of Understanding Between the Government of National Accord of the State of Libya and The Government of The Republic of Malta in the Field of Combating Illegal Immigration (28 May 2024) <https://www.statewatch.org/media/documents/news/2020/jun/malta-libya-mou-immigration.pdf>.

²⁹¹ See, e.g., European Commission, EU Action Plan on the Western Balkans (5 December 2022).

²⁹² EU-Türkiye Statement of 18 March 2016.

²⁹³ Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic concerning the Implementation of Frontier Controls at the Sea Ports of both Countries on the Channel

163. Some externalisation strategies can be imposed by a single country. For instance, Hungarian legislation has required certain third-country nationals or stateless persons present in its territory or at its borders, to have already submitted a declaration of intent at a Hungarian embassy situated in Serbia or Ukraine, and to be granted a travel document enabling them to enter Hungarian territory. The CJEU ruled that the Hungarian legislation is contrary to the objective of ensuring effective, easy and rapid access to the procedure for granting international protection and denies people their right to seek international protection in Hungary.²⁹⁴
164. Externalisation agreements also consist in destination States transferring arrived individuals to third countries for the purposes of processing the asylum claims on behalf of the destination State, or to take on the responsibility of destination country to address any protection or humanitarian needs. This is done in a variety of ways, for instance by way of broadening the threshold for a transit or other country to be classed as “safe”, by either or (both) significantly reducing the threshold of protection that should be available in the other country for it to be classified as safe and/or by limiting – and allowing national definition of – the connection required between the person and that country (although the connection criterion remains).²⁹⁵ It is sometimes done in conjunction with legally questionable steps to deem the individuals legally inadmissible to seek protection in the destination State without considering the individual merits of the claims, either because of the route they took to come to the destination State or because they transited through a so-called “safe” country. While outside of the EU, the United Kingdom’s agreement with Rwanda falls within this framing, as does Italy’s agreement with Albania related to the transfer of migrants rescued in Italian territorial waters to Albania, where they would be placed in Italy-funded Albanian detention centres while their asylum claims are assessed by Italian authorities,²⁹⁶ and the Danish legislation passed in 2021, that could allow refugees arriving in Denmark to be moved to asylum centres in partner countries outside of Europe.²⁹⁷

and North Sea (Le Touquet, 4 February 2003, entered into force 1 February 2004). See also, Melanie Gower, ‘Irregular migration: A timeline of UK– French cooperation’, House of Commons Research Briefing No. 9681 (22 March 2023).

²⁹⁴ *Commission v. Hungary (Declaration of intent prior to an asylum application)*, Case C-823/21 (23 June 2023). See also, *Ilias and Ahmed v. Hungary (GC)*, No. 47287/15, 21 November 2019, para. 163 (regarding the lack of full consideration as to whether Serbia should be considered a safe country).

²⁹⁵ Catherine Woollard, ‘All Pact-up and ready to go: EU asylum law reforms’, (ECRE, 16 February 2024).

²⁹⁶ A bilateral agreement between Italy and Albania agreed in 2023 and approved by the Albanian Parliament on 22 February 2024, in which Albania would host up to 36,000 migrants “caught” by Italian authorities in the Mediterranean each year, who, once disembarked, would be automatically detained in detention centres funded by Italy and unable to leave the centres for up to 18 months. See Llazar Semini, ‘Albanian Parliament approves controversial deal to hold migrants for Italy’, AP (22 February 2024). See also, Sergio Carrera, Giuseppe Campesi, and Davide Colombi, ‘The 2023 Italy-Albania Protocol on Extraterritorial Migration Management: A Worst Practice in Migration and Asylum Policies’ (CEPS, 2023). See also, CoE Commissioner for Human Rights, Statement: ‘Italy-Albania agreement adds to worrying European trend towards externalising asylum procedures’ (13 November 2023).

²⁹⁷ Amendments to the Danish Aliens Act which provide for the outsourcing of visa processing were adopted on 3 June 2021. The amendments will enter into effect if Denmark secures a formal agreement with a third country. Denmark was exploring the possibility of sending spontaneous asylum seekers arriving to Denmark to Rwanda for consideration of their asylum applications and protection, and the option of settling in Rwanda. It now appears to be calling for the establishment of a reception centre outside Europe in cooperation with the EU or several other countries. The UN Committee Against Torture in its concluding observations on Denmark’s eighth periodic report, expressed concern ‘over legislation passed by the State party that provides a basis for the externalisation of its asylum policy and related plans for the processing of asylum claims in Rwanda.’ [UN Committee Against Torture, Concluding observations on the eighth periodic report of Denmark, UN Doc. CAT/C/DNK/CO/8 (8 December 2023) para. 14]. See also, CoE Commissioner for Human Rights, *Report Following Her Visit to Denmark from 30 May to 2 June 2023*, CommHR(2023)38 (25 October 2023) paras. 14-18.

165. Human rights organisations have decried these agreements and the EU and Member States' approach to externalisation. Alenius Boserup, the Executive Director of EuroMed Rights recently spoke to CIVICUS about the EU-Egypt deal which involves €7.4 billion in loans and grants to Egypt.²⁹⁸ Not only does he worry about the likely impact on the rights of refugees and migrants, but he also expresses concern about the impact of the EU's legitimisation of the repressive regime on the delegitimisation of civic space more broadly.
166. What does the dichotomous approach of European States and institutions vis-à-vis human rights protections of persons coming from the outside say about civil society space? According to Boserup, 'By prioritising a security-first approach and reaching compromises with authoritarian rulers to reinforce its borders, [the European Union] has disappointed the hopes of activists, human rights defenders and journalists who pay a high price to keep civic space open.' Amnesty International made similar comments about the EU-Tunisia deal. 'Coming against a backdrop of escalating violence and abuses against sub-Saharan African migrants by Tunisian authorities, the decision shows no lessons have been learned from previous similar agreements. This makes the European Union complicit in the suffering that will inevitably result.'²⁹⁹

V. KEY FINDINGS

167. The backlash on civil society space has become more entrenched throughout all parts of Europe. NGOs and solidarity networks that support refugees and other migrants are shunned, criminalised, demonised and thwarted in their efforts despite the vast challenges (unmet by States) to safely and humanely meet the humanitarian and protection needs and rights of those who require and are entitled to them. This has made the journeys of all people on the move more unsafe, leading arguably to a significant increase in preventable deaths.
168. These findings are largely consistent with the Expert Council's original study from 2019 on using criminal law to restrict the work of NGOs supporting refugees and other migrants. They are also consistent with the findings of the Expert Council study on the stigmatisation of NGOs in Europe.
169. The types of civil society organisations that have faced the most significant backlashes include: the organisations carrying search and rescues at sea; the grassroots solidarity networks providing front-line support in border zones in the countries bordering Belarus and along the major land borders throughout the Western Balkans countries; the groups providing key services in high-density areas like Calais, the French-Italian border, the hotspots on the Greek islands and in Italy. Particularly stigmatised are migrant representatives of solidarity networks.
170. The forms of backlash are varied. NGOs and civil society groups have been subjected to harsh regulations and fines, publicly stigmatised, impeded from accessing locations where refugees and other migrants are located, prevented from registering as NGOs or complying with the administrative requirements of such registrations, pursued with SLAPP claims, and impeded from accessing public funds. These measures have been taken by parliaments enacting new laws or amending existing ones and by executives imposing emergency decrees or putting in place new regulatory frameworks. Legal protections have been largely ineffectual given the long delays before actionable rulings (usually siding with the NGO) are made, while boats and other equipment are seized, accused persons subjected to preventive detention, foreign volunteers

²⁹⁸ CIVICUS, 'EU-EGYPT DEAL: 'The EU is losing its credibility as a value-driven ally to civil society' (28 April 2024).

²⁹⁹ Amnesty International, 'EU/Tunisia: Agreement on migration 'makes EU complicit' in abuses against asylum seekers, refugees and migrants' (17 July 2023).

deported, or with administrative restrictions on their ability to operate pending the outcome of court cases. Furthermore, many governments have fuelled racist and xenophobic rhetoric which has contribute to violence against all persons on the move and the civil society groups supporting them.

171. What is striking is the failure of governments and European institutions to entertain any substantial dialogue with civil society on what is practically required to arrive at effective and rights-compliant solutions for all those affected. Instead of engaging with civil society groups, the externalisation deals brokered by European countries and the European Union appear to be undermining the human rights and democracy work of civil society groups in those “partner” countries. And there is little sign of the ‘multi-stakeholder and partnership approach’ and ‘whole-of-society approach’ advocated respectfully by the Global Compact on Refugees and the Global Compact for Migration.
172. What is even more striking is the commitment shown by NGOs and solidary networks in the face of the backlash. Solidarity networks continue to be active on the frontlines providing invaluable humanitarian support and essential services. Civil society in all its diversity continue to monitor, to report, to advocate and litigate. Their actions deserve all possible respect and support.