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CRIMINALIZING SOLIDARITY: A CASE FOR REVIEW OF THE FACILITATORS PACKAGE

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1. INTRODUCTION AND BACKGROUND

With Russia threatening the ramparts of the old continent once more, the ever-high walls of this fortress have been scaled up even further for the refugees that flock its borders for their aspirations of a better life. Recently, the extreme right government of Poland announced that it won't be taking in any more refugees from the war battered Ukraine in contravention to the EU's plan to spread out more asylum projects, with the PM saying that Poland doesn't want foreigners so that 'Poles could walk the streets safely'.¹

But those same Poles differ from their government in opinion, 52% say they support admitting refugees, while 39% oppose.² Similar is the mood in Hungary, where another right-wing government has banned refugees.³ They are going against their governments to support their fellow Europeans.

There have been numerous incidents in recent years, where civil society have been penalized for acting in solidarity with refugees by EU states to prevent the flow of refugees.⁴

¹ The Guardian: <https://www.theguardian.com/world/2023/jun/08/poland-eu-migration-summit-asylum-luxembourg-talks> (accessed 20.01.2024)

² Pew Research Centre: <https://www.pewresearch.org/global/2023/10/02/support-for-taking-refugees-in-poland-and-hungary/> (accessed 20.01.2024)

³ *Ibid*

⁴ A. Nabert, C. Torrisi et al. *Hundreds of Europeans 'Criminalised' for Helping Migrants – As Far Right Aims to Win Big in European Elections*, OPEN DEMOCRACY (Accessed 19.01.2024), [Hundreds of Europeans 'criminalised' for helping migrants – as far right aims to win big in European elections | openDemocracy](https://www.opendemocracy.com/en/feature/hundreds-of-europeans-criminalised-for-helping-migrants-as-far-right-aims-to-win-big-in-european-elections/)

Humanitarian assistance, has for political reasons become insurgent and criminal.⁵ Different forms of policing have been instituted apart from direct criminalization against NGOs.⁶ This trend has been called the ‘Criminalisation of Solidarity’ which was possible because ‘Criminalisation of Migration’. The rationale being to discourage migrants from arriving and moving within EU.⁷ This has transformed the old continent into a fortress, with its walls getting higher and higher for those in need.⁸

In 2002, EU adopted rules to curb the smuggling of people, to make a common legislation for the same, defining facilitation of unauthorized entry, transit and stay (council directive from hence)⁹ a complimenting framework to strengthen penalties was also adopted (henceforth, framework convention/decision)¹⁰ collectively making the infamous ‘Facilitators’ Package’ which directs members to criminalize facilitation of irregular entry, transit and stay. The adoption of the Directive rests on Articles 79(2)(c) of the TFEU¹¹ while the Framework Decision rests on 83(2) TFEU¹². The Package also supplements the UN Protocol against smuggling of migrants by land, sea and air and the UN Convention against Transnational Organized Crime.¹³

This package runs contrary to EU’s spirit of safeguarding human rights and promoting asylum in face of the war and instead of uniformity it has caused ‘legislative ambiguity

⁵ S. Carrera, J. Allsopp and L. Vosyliūtė, *Policing the Mobility Society: The Effects of EU Anti-Migrant Smuggling Policies on Humanitarianism*, 4(3) IJMBS 236, 244 (2018).

⁶ PP Wilkins, *Criminalising Assistance and Solidarity: The ERCI Case and Beyond*, OBSERVATORY OF THE REFUGEE AND MIGRATION CRISIS IN THE AEGEAN (Accessed 28.09.2023), <https://refugeeobservatory.aegean.gr/en/criminalising-%CE%B1ssistance-and-solidarity-erci-case-and-beyond>

⁷ J. Allsopp, *Contesting Fraternity: Vulnerable Migrants and the Politics of Protection in Contemporary France* 16 (Working Paper No. 82, Refugee Studies Centre, Oxford Department of International Development, University of Oxford, 2012).

⁸ Amnesty International, *Europe: Punishing compassion: Solidarity on trial in Fortress Europe*, AMNESTY.ORG (Accessed 20.01.2024), <https://www.amnesty.org/en/documents/eur01/1828/2020/en/>

⁹ Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, OJ L 328,17 12 2002/946/JHA.

¹⁰ Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328,1.

¹¹ Article 79(2)(c), Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012. (EU can develop common immigration policy covering illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation.)

¹² Article 83(2), Treaty on the Functioning of the European Union, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012 (If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.)

¹³ *United Nations Convention against Transnational Organized Crime (UNTOC)*, 8 January 2001, A/RES/55/25.

and legal uncertainty’ as members sanction ‘a broad range of behaviors that cover a continuum from smuggling at one extreme to assistance at the other’ under it.¹⁴

2. THE PACKAGE AND ITS CRITIQUE

According to article 1(1) of package directive,¹⁵ any person intentionally assisting a third country citizen to enter or transit across a member’s territory or assisting them, for financial/material gain, to reside in such nation, must be penalized.

However, the Package doesn’t define ‘financial gain’. With the lack of a ‘financial or other material benefit’ clause for migrant smuggling, it defaults on UN standards on the definition, giving members a free pass to decide what they consider to be the base of the crime. Elements of gain are needed as an ancillary only to criminalize facilitation of irregular stay, in that kind of gain too fair and exploitative gain haven’t been distinguished. The UN Protocol defines ‘smuggling of migrants’ as the procurement, 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.¹⁶ A financial benefit clause is necessary to absolve family members or NGOs from penalty and that was the objective of it being included in the UN definition. However, the package doesn’t have such provisions, grossly sidelining the UN directives although the package is supplementary to the UNCTOC.

Under the option set out in Article 1(2) of the directive, Members can decide not to criminalise facilitation of unauthorised entry and transit, where the aim is to provide humanitarian assistance to refugees. This has been the most panned provision of the directive, neither does it provide any inclusive definition of humanitarian aid or the actors providing it, nor does it make it mandatory for members to decriminalize such activity in contravention of numerous

¹⁴ S. Carrera, L. Vosyliūtė, J. Allsopp et al., Study for the EP Petitions Committee (PETI), "*Update Study "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants"*", European Parliament (2018)

¹⁵ Article 1(1), Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, OJ L 328,17.

¹⁶ Article 3(a), *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, UNTS. 2241, 507. (Smuggling of migrants shall mean 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.)

international conventions like article 31 of the refugee convention,¹⁷ and article 14 of universal declaration of human rights,¹⁸ As EU members, even those who recognise the exception criminalize solidarity under their national laws indirectly,¹⁹ UNCTOC reflects the realities of the problem much better, with emphasis on humanity more than penalization, scholars note that smuggling isn't the same as trafficking where the people are transported by coercion, rather smuggling is consensual and most asylum seekers need smugglers at some point in their journey,²⁰ and smuggling is therefore an essential lifesaving operation that has saved countless lives throughout history even though the route and the manner of it may cause human right violations. In critiquing of the package, the UN notes that the international community stands united by convention to curb smuggling by criminal syndicates and not humanitarian ones and only with humanitarian exception can the true principles of international custom be satisfied.²¹

The Framework decision also says that the package applies without compromising the protection of refugee and asylum seekers' rights in accordance with international law.²² That means in relation to Articles 31 (on the non-penalisation of unlawful entry or presence) and 33 (on non-refoulement) of the Geneva Convention on refugees.²³ However it fails to prohibit criminalization of smuggled migrants in EU nations themselves with no specific provisions for enforcement of the same, thus the provisions of article 6 are rendered useless. The UN convention under smuggling protocol by land sea and air, provides for the same.²⁴

The EU, waking up to all this critique in wake of the migrant crisis of 2015 decided to review the package. the 2020 commission guidance recommended that 'humanitarian assistance' in package, that cannot be construed in a way by national laws that would allow an act mandated by international law to be criminalised.

The guidelines don't bind EU like a directive and place emphasis on national laws once more thus, they haven't been followed cohesively by EU states. They not only fail to provide a

¹⁷ Article 31, *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS. 189, 137.

¹⁸ Article 14, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III).

¹⁹ *Supra note 9*.

²⁰ Sharon Pickering, *Transnational Crime and Refugee Protection*, 34 J. Soc. Justice. 47, 53 (2007).

²¹ Report of the Special Rapporteur of the Human rights Council on extrajudicial, summary or arbitrary executions, Saving lives is not a crime, A/73/314, 6 August 2018, para 74

https://www.ohchr.org/Documents/Issues/Executions/A_73_42960.pdf (Assessed 20.01..2024)

²² Article 6, 2002/946/JHA Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328,1.

²³ *Supra note 17*; Article 33, *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS. 189, 137.

²⁴ Articles 6 and 19, *Protocol against the Smuggling of Migrants by Land, Sea and Air*, Supplementing the *United Nations Convention against Transnational Organized Crime*, 15 November 2000, UNTS. 2241, 507.

definition of 'Humanitarian Aid' but also only urge the states to allow such exception without any binding value, with each state free to be liberal or conservative with the concept. The guidelines don't address the above highlighted concept of 'Financial Gain' as well. Lastly, the package still remains contrary to international law.

3. RECOMMENDATIONS AND CONCLUSION

The above analysis makes it clear that the package is a flawed legislation and demands restructuring, the following recommendations are made in the regard:

- Introduction of a mandatory 'financial or other material benefit' requirement for facilitation of entry and transit and 'unjust enrichment' for the facilitation of stay to restrict the crime of smuggling and an explicit provision must be made to exclude family, friends, citizens and NGOs (with codification of their various areas of work, including sea rescue operations) acting without any gain or unjust enrichment to facilitate migrants' entry and stay.
- A common definition of humanitarian aid should be worded broadly and must include provision of providing human rights like food, clothing, shelter and legal aid and rescue etc. it must also cover individuals and legal persons.
- Lastly, there should be a mandatory provision for all states to decriminalize humanitarian aid to refugees as mandated by international law and specific provisions and rules must be laid to protect rights of refugees under article 6 of the directive to end ambiguity on the same.

This would make it more akin to EU's foundations of respect for human rights and would lead to betterment of many displaced lives and those helping them.