

When witnesses won't be silenced:

citizens' solidarity
and criminalisation

Briefing paper No 13



Liz Fekete, Frances Webber
and Anya Edmond-Pettitt

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The Institute of Race Relations
2-6 Leeke Street, London WC1X 9HS
Web: www.irr.org.uk
Email: info@irr.org.uk
Tel: 44 (0) 207 837 0041

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Kristian Buus

Design

Sujata Aurora/Gratuitous Graphics

Preface

In 2017, the IRR published *Humanitarianism: the unacceptable face of solidarity*, which examined twenty-six cases, involving forty-five individuals who were arrested, investigated or prosecuted under anti-smuggling and/or immigration laws from 2015 to 2017. In this update on prosecutions for what are commonly referred to as 'crimes of solidarity', we look at seventeen cases involving ninety-nine people who have been investigated and/or prosecuted in 2018 and the first three months of 2019. Not only has the number of people placed under investigation increased, but new offences have been added to the charge sheet, including endangering maritime and airport security, espionage, criminal association and membership of a criminal network or gang. We have even seen laws designed to prosecute terrorists and the mafia applied to organisations and individuals who assist refugees and migrants, who in some cases have also had phones tapped and bank accounts frozen.

But why are so many citizens' solidarity initiatives and anti-deportation networks springing up across Europe, and why are individuals willing to take action that puts them at risk of prosecution? We attempt here to provide some much-needed context to the case studies, examining the EU laws and practices that have galvanised dissent. What is immediately obvious is that their actions are a response to the huge number of needless deaths and dangers posed by EU policies, particularly (but not exclusively) in the Mediterranean region.

The citizens' solidarity networks are challenging laws that create boundaries between 'us' and 'them' and, in setting such limits, determine whose lives are worth saving and whose are not. They create what the French call *lieux de vie* (spaces of life) at the same time as defending the 'spaces of sociability' fostered by migrants and refugees themselves.¹ Far from being deterred by prosecution, the witnesses whose cases we document here are refusing to be silenced. And their resistance has been reflected in some cases by judges, determined to uphold principles of international law and human rights under attack by populist politicians and zealous police and prosecutors.

Background: Securitisation versus humanitarian principles

They say a picture is worth a thousand words. The iconic 1972 image 'The terror of war', by Nick Ut, came to epitomise the horrors of Vietnam, while in 2001, 'Falling Man' by Richard Drew symbolised the start of the War on Terror. Pictures have a way of galvanising people in ways that recitation of facts can't always do. And so, in September 2015, the image of the body of 3-year-old Syrian-Kurdish toddler Alan Kurdi lying lifeless on a beach near Bodrum in Turkey, in capturing the ongoing tragedy of migrants' deaths provoked a moment of global shock and sympathy.

Alan's death caused many ordinary Europeans to travel to the various locations where refugees were arriving in distress, such as Ventimiglia in Italy, Calais in France, Lesvos in Greece and Bihać in Bosnia, with some offering their services to the larger NGO search and rescue missions. Their intention was to save lives and provide humanitarian relief. For a moment, when Germany opened its borders to refugees from Syria, there were hopes of a more coordinated EU-wide state response. But other countries did not follow suit, and soon all the talk was about securitising the borders against what Hungarian prime minister Viktor Orbán described as a 'civilisational threat'.

The hardline approach by European governments, and by the EU, which by now had set up hotspots for the screening and processing of refugees in Greece and Italy, did not stop the volunteers. They continued to respond to the needs of the new arrivals in places like Lesvos and Ventimiglia, and in Dunkirk, Calais and Brussels, where the majority of those congregating in makeshift camps were attempting to head for the UK. The volunteers soon began to find that they were not just responding to a 'refugee crisis' but a crisis in EU values. The conflict between ordinary European citizens and European states with increasingly hard-right governments, between humanitarian values and securitisation principles, was deepening. In November 2017, the IRR wrote about that conflict in its report *Humanitarianism: the unacceptable face of solidarity*. We showed how European states, in their attempts to end voluntarism outside their control, were resorting to prosecuting people for assisting refugees and migrants. The issue was taken up by others, including the Transnational Institute in its 2018 report *The shrinking space for solidarity with migrants and refugees*.

Since then, European states have decided to dig in further, both with securitisation and with prosecutions. EU policies are driving people into seeking ever more dangerous routes to and through Europe, and this, when combined with the way member states are abandoning their responsibilities towards refugees, has opened up a market for profiteering, allowing private security companies to diversify their portfolios, and creating additional opportunities for smugglers. But the volunteers targeted as criminals in 2018-19 have all responded to the deadly impact of EU policies by attempting to get people to a place of safety. They see their actions as necessary to prevent death.

Italy, Libya and the prosecution of search and rescue NGOs

In *Humanitarianism: the unacceptable face of solidarity*, we recorded the ways in which the EU set about downgrading search and rescue (SAR) in favour of the militarisation of the Mediterranean and the capture and destruction of smugglers' boats. While in 2015 and 2016 a certain space was still available to SAR NGOs to fill the gaps created by the absence of states, by 2017, with the introduction of the Italian government's code of conduct, such space was rapidly shrinking. One of the first indications that the crew of SAR NGOs would be harassed out of the Mediterranean came in August 2017, with the seizure in western Sicily of the *Iuventa*, the rescue ship of the German NGO Jugend Rettet (Youth Rescue) and the launching of a preliminary investigation against its crew members for facilitating illegal entry. The background to the six new prosecutions in 2018 against SAR NGOs operating in the central Mediterranean is the election of a new far-right government in Italy and the externalisation of migration controls to Libya – a country with no refugee law and no asylum system, and to which UNHCR says no one should be returned – in which Italy, supported by the EU, has played a central part.²

The central role played by the Italian far-right government

In June 2018, a new Italian coalition government was formed, an alliance of the League and the populist Five Star Movement. The new interior minister and deputy prime minister, the League's Matteo Salvini, has played a central role both in the outsourcing of migration controls to Libya and in the political attack on the activities of SAR NGOs. He has described Libya as a 'safe port' and has told 'voracious' NGOs, who he alleges are funded by the financier and philanthropist George Soros and the Open Society Foundations, to 'stop disturbing' the Libyan authorities and 'causing them trouble'. Salvini does not shrink from describing refugees and migrants in dehumanising terms – he refers to Africans, for instance, as the 'new slaves' – and has made it his personal mission to hound SAR NGOs, constantly tweeting against them. He abuses his position to call for prosecutions, such as against four British crew members of the *Sea Watch 3* (operated by the German charity Sea Watch), which rescued 47 people in January 2019, only to be left stranded for eleven days before being allowed to land in Sicily, and most recently, against the crew of the *Mare Jonio* after they brought 49 rescued people to Lampedusa in March 2019. In response to the *Mare Jonio's* request for landing the day before, Salvini had issued a directive to senior police, customs, port, defence and immigration officials, claiming that the duty of sea rescue is subject to considerations of public order and security, including combating illegal immigration. He described NGO search and rescue missions as 'wilful *modus operandi* that – in concrete terms – facilitates the illegal entry of rescued migrants into European territory'.³

Salvini has taken it upon himself to legalise the harassment of crews of rescue ships in the central Mediterranean as they attempt to take people to safety. As we shall see, some prosecutors in Sicily have enthusiastically adopted the Salvini approach,

launching investigations into Médecins Sans Frontières (MSF) and Proactiva Open Arms, among others. And it is not only SAR NGOs that have been refused permission to disembark: commercial vessels too have been harassed. But Salvini has not gone unchallenged. At least for a time, he faced a real prospect of standing trial on charges of kidnapping migrants, including unaccompanied children, arising out of the so-called Diciotti incident in August 2018, when the interior minister refused to allow about 150 migrants to disembark the *Diciotti*, a ship run by the Italian coastguard which had docked at Catania, Sicily, until Albania, Ireland and the Catholic church agreed to accept them. In January 2019, a special tribunal in Catania overturned an earlier ruling and gave Sicilian prosecutors the go-ahead to pursue their investigation into Salvini on allegations of illegal confinement, illegal arrest and abuse of power. But in March 2019, the Senate voted to block the prosecution. For now at least, Salvini cannot be touched.

Expanded role for Libya in central Mediterranean

The background to this is the externalisation of migrant controls by the EU to Libya, in which Italy plays the key role. Involving Libya in the policing of Europe's borders is in itself nothing new, pre-dating the toppling of Gaddafi in 2011. But outsourcing of migration controls intensified in 2018, when Libya became the first non-EU country to be integrated into the EU's satellite-supported 'Seahorse Mediterranean' network, which provides a communications infrastructure for the exchange of maritime incident reports, including search and rescue missions.⁴ The agreement was followed by Italy's withdrawal from its leading role in coordinating rescues at sea and the creation of an expanded Libyan search and rescue zone in the central Mediterranean which increased the area of its coastguard's authority by about 80 nautical miles, halfway to the island of Lampedusa, thereby giving its officials the right to intercept boats in international waters and take them back to Libya.⁵

Despite warnings from Human Rights Watch that the Libyan coastguard, part of the military, are corrupt and collude with traffickers, the Italian government has been an eager cheerleader for the transfer of responsibility to the Libyan coastguard for search and rescue within the area where most shipwrecks happen. This transfer of responsibility, supported by the French government which in March 2019 gave six lifeboats to the Libyan coastguard, has allowed the institutional withdrawal of EU states from search and rescue coordination, and an even more punitive approach to European SAR NGOs which refuse to abandon their mission of saving lives. The Libyan navy has set about creating a 'hostile environment' for lifesaving rescue missions in the Mediterranean, which has included firing warning shots at refugee boats and NGO vessels, and in one incident opening fire on an MSF vessel.

The result has been, predictably, more deaths on the central Mediterranean route. According to the International Organization for Migration's (IOM) Missing Migrants Project (MMP), the Mediterranean region as a whole continues to account for most deaths recorded globally, with 2,242 migrant deaths and disappearances recorded from 1 January to 21 December 2018. And although the numbers crossing by the central Mediterranean route have declined dramatically following a crackdown on migrant embarkations by Libya under Italian and EU pressure, the Italian Institute for International Political Studies (ISPI) think-tank is clear that deaths are spiralling, with

almost one in ten people who embarked from a Libyan port and attempted to reach Italy through the central Mediterranean route either drowning or going missing in June 2018, a figure rising to nearly one in five in September, according to MSF.

As Amnesty International has documented, we have now moved to a situation where, through a combination of violent attacks by the Libyan coastguard on rescue ships and the policies of EU member states, SAR NGOs have been almost entirely pushed out of the central Mediterranean and their crews left at the mercy of arbitrary and punitive decisions by the authorities.⁶ Not only have ships been impounded and crews prosecuted, but those rescued at sea have been disregarded as the Italian government, followed by Malta, adopted a new policy of refusing to allow ships to dock and those on board disembark. Since June 2018, this policy has led to repeated morale-destroying attacks on the work of NGOs like SOS Méditerranée, MSF, Mission Lifeline, Sea Eye and Sea Watch, whose vessels have been stranded at sea for days and sometimes weeks on end as the Italian and Maltese governments refuse access to ports for disembarkation, in an approach which, according to AI, renders the search and rescue system 'unreliable, unpredictable and punitive'.⁷ In this way, rescued migrants, some in a critical condition, are treated like unwanted packages and punished for being rescued.⁸ Are EU governments deliberately attempting to demoralise SAR NGOs as a way of driving them out of the Mediterranean, incidentally ensuring that there are no independent witnesses to the crimes committed by the Libyan coastguard? The crews of SAR NGOs are between a rock and a hard place: if they continue their mission, they will be harassed and prosecuted, but at the same time they know only too well that if they don't, refugees rescued by the Libyan coastguard will be returned to the hell of Libyan detention centres, where arbitrary detention, cruel and degrading conditions, torture, sexual violence, extortion and forced labour have been documented by Human Rights Watch among others.⁹ It is this knowledge that drives these human rights defenders on.

Below we report on six ongoing cases instigated by prosecutors in Italy (five cases) and Malta (one case). Five of those cases refer to NGO search and rescue missions, while the sixth case involves the prosecution of the Tunisian crew of a trawler.

Iuventa, Jugend Rettet

Ten crew members of the Iuventa, a search and rescue ship of the small German NGO Jugend Rettet (Youth Rescue) are under investigation for aiding illegal immigration to Italy.

The allegations relate to three specific search and rescue missions in the central Mediterranean off the Libyan coast between September 2016 and June 2017. While the Italian prosecutor in Trapani, western Sicily, announced an extension of the investigation in July 2018, a smaller preliminary investigation under the aegis of the Anti-Mafia Investigation Directorate had begun in August 2017, when the *Iuventa* was impounded, just days after it refused to sign the Italian Code of Conduct.¹⁰ The seizure of the boat was justified as a pre-emptive measure based on anti-mafia law to prevent further crimes being committed. The Italian investigator claims that on the basis of several months' surveillance of the ship, including bugging and wiretapping, it has evidence to prove that ten crew members, including the *Iuventa's* captain, Pia

Klemp, acted in collusion with traffickers. But the organisation Forensic Oceanography, commissioned to carry out a counter-investigation, has created video reconstructions, based on interviews and taped conversations with the central command and on logbooks, that it says disprove the investigator's allegations. A spokesperson for Jugend Rettet describes the investigation as a 'political act', accusing the authorities of orchestrating a 'politically motivated trial' and trying to force NGOs out of the Mediterranean so that the illegal acts of the Libyan coastguard, who act as 'bouncers' for the EU, can be rendered invisible.¹¹ To date, no charges have been brought against the crew and no trial date has been set, leading Jugend Rettet's press officer Philipp Külker to describe the whole procedure as based on a 'hideous method, because we have nothing we can take legal action against... There is no basis for a trial, because there are no charges. This is a preventive measure and the Italian authorities can... keep it going for months'.¹²

Open Arms, Proactiva Open Arms

Captain Marc Reig and mission coordinator Anabel Montes are charged with aiding illegal immigration in Italy.

In March 2018 *Open Arms*, operated by the Spanish NGO Proactiva Open Arms, was returning from rescuing 218 people from a leaky raft off the coast of Libya when the boat was seized and impounded in the port of Pozzallo, Sicily, and a preliminary investigation opened into the captain and two crew members for criminal association for the purpose of aiding illegal immigration. The crew were interviewed without lawyers or interpreters. The allegation was that the ship was in Libyan waters when it carried out the rescue (which was denied by the crew), and that the crew refused to hand over those on board to the Libyan coastguard. The judge in the preliminary investigation, Giovanni Giampiccolo, ordered that the boat be released in April 2018, concluding that the crew had acted out of a 'state of necessity' and that the decision to bring those rescued to Italy was justified by the 'serious violations of human rights in Libya'. But the prosecutor persisted with the investigation into aiding illegal entry, though the criminal association aspect of the charges was dropped. No further decision has been made.

Lifeline, Mission Lifeline

Claus-Peter Reisch, the captain of Lifeline, is currently on trial in Malta on charges relating to incorrect documentation of the vessel and entering Maltese waters illegally in breach of international law.

One vessel that was refused permission to disembark, first in Malta and then in Italy, and was subsequently impounded in Malta was *Lifeline*, operated by the German charity Mission Lifeline. In June 2018, its captain, Claus-Peter Reisch, ran into difficulties when he attempted to take to shore the 234 people the vessel had rescued close to the Libyan coast, with both Italy and Malta refusing docking. Eventually those rescued were allowed to disembark in the Maltese capital of Valletta, but Reisch found himself arrested by the police and subsequently charged with possessing incorrect registration documents for the ship as well as allowing the *Lifeline* to be used as a

rescue vessel when it was registered in the Netherlands as a pleasure craft. In addition, Reisch was charged with ignoring official orders and entering Maltese waters illegally thereby breaking international law. He was given bail and allowed to return to his home in Bavaria pending trial. His trial resumed in November 2018 and judgment is expected in May 2019.

Aquarius, (Médecins sans Frontières and SOS Méditerranée)

A criminal investigation by the Italian authorities continues into 12 crew members – 7 of whom are MSF staff – including the ship's captain and the MSF mission coordinator, for 'trafficking and illegal management of waste'

In August 2018, the MSF/SOS Méditerranée rescue vessel, the Aquarius, was refused permission to dock by Italy and Malta after rescuing 141 people from the Mediterranean. After a five-day wait, the Maltese authorities agreed to act as a 'logistical base' for those rescued to be processed prior to being distributed among five European states, and the passengers were landed. Soon after this, as the Aquarius docked in Marseilles, Gibraltar revoked its flag (vital as without a flag ships are unable to dock). The boat set sail again under a flag from Panama but under pressure from Italy, Panama revoked the flag, forcing Aquarius to return to Marseilles. While it was there, on 20 November, the Italian prosecutor in Catania ordered the boat's seizure and froze some of MSF's Italian bank accounts instigating a preliminary investigation into 12 crew members. The decision also made reference to a year-long investigation by the Catania prosecutor's office into the disposal of on-board waste, with particular reference to food leftovers, clothes of rescued people, and waste from on-board medical activities. According to the prosecutor, clothing worn by those rescued by Aquarius between Libya and Italy, disposed of between January and May 2017, could have been contaminated by HIV, meningitis and tuberculosis, and was therefore illegally labelled 'special waste' by the ship's crew when it should have been categorised as 'toxic waste'.

In December 2018, MSF announced that Aquarius had been forced to stop its search and rescue operations, as a result of 'a sustained campaign, spearheaded by the Italian government and backed by other European states, to delegitimise, slander and obstruct aid organisations providing assistance to vulnerable people'. 'Not only has Europe failed to provide search and rescue capacity', the charity said, but 'it has also actively sabotaged others' attempts to save lives. The end of Aquarius means more deaths at sea, and more needless deaths that will go unwitnessed'.¹³

Tunisian trawler

Six Tunisian fishermen were arrested in September 2018 and charged with people smuggling and illegally escorting a boat into Italian waters.

In September 2018, the fishermen's trawler released the small vessel it had been towing with 14 migrants on board, 24 miles from the Italian island of Lampedusa. The trawler had been under aerial observation by FRONTEX, which then moved to arrest the crew at sea before taking them to the Sicilian town of Agrigento for questioning. Although they were released seventeen days later and allowed to return to Tunisia, the

charges against the six fishermen have not been dropped and they still face trial for migrant smuggling. The men, who are known locally for their rescue of hundreds of migrants over the years, say they came across the migrants' boat in distress and towed it into Italian waters, notifying the Italian coastguard before releasing it.¹⁴

Mare Jonio, Mediterranea collective

The Mare Jonio became the first Italian-flagged rescue ship to be denied landing in Italy, in March 2019. It was seized and its captain and the NGO's mission chief placed under investigation for assisting illegal entry and disobeying military orders.

Mediterranea – Saving Humans, a collective of aid groups, launched the ship in October 2018, not just to provide humanitarian aid but also to protest the 'toxic politics of Italy, Europe and the US'.¹⁵ Its mainly Italian crew believed it could not legally be refused landing in Italy, as an Italian-flagged ship. After rescuing 49 people, including 12 children, in international waters, it was initially denied landing in Italian ports in a stand-off lasting several hours, before being escorted to Lampedusa, where its passengers were disembarked. The ship was seized and the captain, Pietro Marrone, with the NGO's head of mission Luca Casarini, were placed under investigation for assisting illegal entry – for bringing the passengers to Italy after rescuing them in international waters, which the interior minister claims is illegal. The captain is also charged with disobeying the orders of a warship (which ordered him to turn off the ship's engines in three-metre waves off the coast, which he refused to do as it would have put lives at risk).¹⁶

Other prosecutions – Western and Eastern Mediterranean route

Other Mediterranean sea routes include from Turkey to Greece, via the Aegean Sea (eastern route), and between Morocco and Spain, via the Strait of Gibraltar (western route). The EU-Turkey deal signed in March 2016, which declared Turkey a safe country for refugees, was meant to close down the eastern Mediterranean route, with Turkey given responsibility for intercepting migrants in its waters. But by the summer of 2018, not only were the shipwrecks and the drownings resuming but the ‘hotspots’ set up by the European Commission in Greece to screen new arrivals and decide whether they were entitled to resettlement had become dangerous, overcrowded and deadly.¹⁷ The IRR database on asylum and migrant deaths recorded that six people had died in these ‘hotspots’ in the winter months of 2016–17 from hypothermia, or from carbon monoxide poisoning or explosions caused by faulty gas cylinders brought in to heat flimsy tents in sub-zero conditions. Once again, volunteers, horrified by gaps in EU and Greek provision, were to step in to provide emergency assistance.

In the western Mediterranean, neither a 1992 returns agreement between Spain and Morocco nor various partnership agreements with the EU have stopped refugees, many from sub-Saharan Africa, from attempting the sea crossing to Spain. When in 2018 the Moroccan government complained that Italy’s actions in Libya were displacing migrant smugglers to Morocco, the EU approved an extra €140m for border control there, at Spain’s urging.¹⁸ A new agreement reached in February 2019 allows the Spanish Maritime Rescue to take migrants to Moroccan ports if they are rescued closer to Morocco than Spain. But desperate people still attempt the dangerous passage, and with Spain now overtaking Greece and Italy as the primary destination for refugees, shipwrecks and deaths are spiralling. According to IOM statistics, the figure for those dying along the sea route from Morocco to Spain is now the highest it has been for a decade. One organisation that helps those at risk of drowning is Caminando Fronteras (Walking Borders), a collective of volunteers which operates a telephone helpline, alerting the Spanish Maritime Rescue when migrants’ boats run into difficulties during the Mediterranean crossing.

Once again, we can see how it is those NGOs and volunteers whose activities are a direct response to deaths who are facing prosecution. Two prosecutions initiated in Spain/ Morocco and Greece have set very dangerous precedents, as they seem to be aimed at closing down the life-saving activities of an entire network of volunteers. And by charging volunteers connected to the European Response Centre International (ERCI) and Caminando Fronteras, not just with aiding illegal immigration but also with supporting criminal activity, the countries’ prosecuting authorities have raised the stakes still further.

Seán Binder and Sara Mardini

Two humanitarian volunteers, with the Emergency Response Centre International (ERCI), and its former field director, Nassos Karakitsosi, face prosecution in Lesvos for people

smuggling, espionage, forgery and membership of a criminal organisation. Another 27 have been named as parties to criminal activity, and summoned for questioning in the investigation.

ERCI is (or was) registered as a non-profit organisation that provided emergency response including search and rescue in cooperation with the Greek coastguard, and primary medical care, as well as informal educational projects for refugees and migrant children on the island of Lesbos.

In February 2018, ERCI volunteers Seán Binder, a German national and son of a Vietnamese refugee, and Sara Mardini, a Syrian with refugee status in Germany, were arrested and their mobile phones and computers seized under a special warrant.¹⁹ They were released but a preliminary investigation was launched into the activities of ERCI. On 21 August, Sara Mardini was arrested, and Seán Binder and ERCI staff member Nassos Karakitsos were arrested later. Thirty people in total, from a number of NGOs including ERCI, were taken in for questioning, and remain under investigation for organised human smuggling. ERCI was accused of using its charitable status as a cover for the criminal purpose of bringing people to Greece for profit, and suspended all operations. Binder, Mardini and Karakitsos were accused of involvement in human smuggling, money laundering, espionage, forgery and membership of a criminal organisation, and were held in pre-trial detention for 107 days before finally being granted bail in December 2018. The justification for such lengthy detention, according to the judge, was the gravity of the accusations and the danger that they might 're-offend'. Human Rights Watch, which has examined court records and other documents in the cases of Binder and Mardini, has called for all the charges to be dropped, pointing out that the two were not even in Greece on many of the dates on which they are alleged to have facilitated people smuggling. It also points out that the people-smuggling law allegedly violated by Binder and Mardini (Law 4251 of 2014) states that helping asylum seekers does not constitute smuggling, and that the charges, including those of violating government secrets and espionage (which relate to the monitoring of open maritime radio channels) and money laundering (fundraising activities for ERCI) misrepresent their volunteer work with a registered non-profit group. HRW concludes that 'accusations of money laundering, people smuggling and espionage' levelled at Binder and Mardini 'appear no more than an effort to criminalise humanitarian activism on behalf of refugees and migrants in Greece'.²⁰

Helena Maleno Garzón

The founder of Caminando Fronteras (Walking Borders) was under criminal investigation for six years, in Spain and then Morocco, until March 2019, for allegedly aiding and abetting illegal immigration.

Spanish national Helena Maleno Garzón, who lives in Tangier, Morocco, was initially investigated in 2012 by the Spanish authorities for her work with Caminando Fronteras, alerting the Spanish Maritime Rescue or the Moroccan coastguard about boats in difficulty crossing from Morocco to Spain. In April 2017, the investigation was shelved on the ground that her activities did not constitute a criminal offence. Then in late 2017, allegations of aiding illegal immigration were made against her in Morocco,

citing the Spanish police file, which described her as ‘an important international migrant smuggler’.²¹ Alerting Maritime Rescue to ships in distress constituted material assistance to ‘human trafficking networks’, according to the Moroccan indictment. After her first court appearance in January 2018, Maleno said that there was no logic to the proceedings, as both the Spanish and Moroccan police had acknowledged that she had never profited at any time. In Spain, at least 30,000 people, including prominent personalities, signed a petition in her support. In December 2018, the Tangier investigating magistrate said there was no evidence of criminal conduct and closed the investigation. The prosecutor appealed to the Tangier appeal court, which in March 2019 upheld the magistrate’s decision and closed the case.²²

From sea to land: the criminalising logic continues

In her poem *Home*, Somali-British poet Warsan Shire writes that 'no one puts their children in a boat unless the water is safer than the land'. But having traversed the waters, many refugees reaching Europe are exposed to new dangers as they travel on foot, without equipment or experience, across mountains such as those that mark the Franco-Italian frontier. It is here that mountain guides, skiers and other volunteers from a host of networks such as Tous Migrants, the Rainbow4Africa project and Refuges Solidaires, have been attempting to help them.

Deaths and prosecutions at the Franco-Italian frontier

The IRR has been keeping a database on asylum and migration-related deaths since 2010, and in 2015 we published *Unwanted, unnoticed: an audit of 160 asylum- and immigration-related deaths in Europe*. In our 2017 report *Humanitarianism*, we noted an official tally of 14 deaths at and around the Franco-Italian border in the 12 months to September 2017. In 2018, we noted five deaths. In the spring of that year, when the snow began to melt, the bodies of two African men were discovered.²³ Another man who attempted to bypass the dangerous mountain route was electrocuted trying to climb on top of a train in order to make the 15-minute journey across the border. The five deaths also include those of two Nigerian women. Destiny or Beauty, as she is variously called, died in hospital after giving birth. She was seven months pregnant and barely able to breathe when she was intercepted by French police alongside her husband. The subsequent actions of the French police, lacking in any humanity, shocked the Rainbow4Africa collective, who say the police just dropped the Nigerian family in front of a medical centre on the Italian side, as though they were 'parcels', not even bothering to inform the doctors on duty. The body of 31-year-old Blessing Matthews, the second Nigerian woman to die, was dredged from the river days after she was reported missing after trying to evade an ambush by police officers. The All Migrants Association accuses the police officers of chasing her to her death.

According to the French solidarity group Association Nationale d'Assistance aux Frontières pour les Étrangers (ANAFE), which has monitored the Franco-Italian border for years, nearly thirty bodies have been recovered in the border area in the years 2016 to 2018.²⁴ One of those whose death it records, a young Guinean with polio, had been refused entry at the French border in January 2018; he died of hypothermia on the Italian side of the border, and his badly decomposed body was only found in May.

Yet once again, it is those who come to the aid of refugees who find themselves summonsed and threatened with prosecution. This is what happened to Benoît Ducos, a volunteer medic and trained member of a ski patrol, who encountered another Nigerian family with two young children in the mountains. Realising that the heavily pregnant mother was in serious distress, he was driving the family to the nearest hospital, in Briançon, when the car was stopped at a border checkpoint. Ducos was taken to the police station for interrogation and then presented with a summons to

appear before the judicial authorities for transporting migrants in an irregular situation and helping maintain them on French territory. The case was not pursued further, but as Ducos explained to *Al Jazeera*, his was just one among dozens of cases of activists being summoned by the French authorities. While no one was brought to trial, the procedures served 'to intimidate people'.²⁵

The deaths at the border, and the sympathy they engendered amongst ordinary citizens, brought the region to the attention of the far-right group *Génération Identitaire*, which in April 2018, organised a roadblock at the Col de l'Échelle pass border point, aimed at trapping the refugees in the mountains and preventing them from travelling on to France. And it was after a mobilisation the following day against the far Right and in support of migrants, at the Montgenèvre pass near Briançon, that the French state brought its most serious prosecution yet, this time against seven men and women including Benoît Ducos, collectively known as the Briançon Seven.

Briançon Seven – Jean-Luc Jalmain, Benoît Ducos, Lisa Malapert, Mathieu Burellier, Theo Buckmaster, Bastien Stauffer, Eleonora Laterza

Five men and two women of French, Swiss and Italian nationality, including two members of the human rights organisation La Cimade, were convicted of assisting the entry of irregular foreigners to the national territory.

On 22 April 2018, the day after the *Génération Identitaire* roadblock at the Col de l'Échelle frontier, around 200 people marched from Claviere in Italy to Briançon in a peaceful counter-protest. During the mobilisation, they assisted some twenty migrants travelling from Claviere to Briançon, across the Col de Montgenèvre pass. The whole time, they were followed by police taking photos. At the end of the march, several people were accused of breaching a police border line. Initially, three people were arrested, but on 17 July, four more people who participated in the march, including two members of *La Cimade*, were taken into custody on allegations of organised assistance of illegal entry to France.

The trial was postponed to await the result of a constitutional court case on the 'principle of fraternity', brought by Cédric Herrou, who had been repeatedly convicted for bringing migrants crossing the maritime Alps from Ventimiglia to safety and providing them with food and shelter.²⁶ In July 2018, the constitutional court ruled that the principle should protect those helping migrants for humanitarian purposes. The ruling resulted in the quashing of his convictions.²⁷

In November 2018 the case against the 'Briançon Seven' was finally heard in Gap, amidst a heavy police presence, with CRS vans stationed outside the court to deal with protesters. The seven defendants argued that their actions were not part of an organised, premeditated attempt to smuggle people into the country, but were part a spontaneous demonstration against the far Right. Their only intention in assisting the migrants was to save lives. In December 2018, the seven were convicted of assisting migrants in illicitly entering France, an action that the judge said was not covered by the principle of fraternity ruling, although the prosecutor dropped the allegation of membership of an organised gang. Five were given six-month suspended sentences, while Mathieu

Burellier and Jean-Luc Jalmain, who had previous convictions and were also convicted of rebellion for the action, were sentenced to twelve months, of which four months was immediate. All have appealed.²⁸

Switzerland: compassion for Afghan refugee punished

The Swiss authorities' response to a bereaved and ill Afghan refugee included prosecuting the activist who brought him back to the country after they had taken him from his sister and deported him to Italy under the Dublin regulation.

Anni Lanz

The former director of Solidarité sans Frontières (Solidarity Across Borders) and Nobel prize nominee was convicted of smuggling and fined.

Anni Lanz, 72, has worked in solidarity with refugees and migrants for many years. She met 'Tom', an Afghan refugee, in February 2018, on one of her regular visits to the Swiss detention centre of Bässlergut, near Basel. He was awaiting removal to Italy under the Dublin regulation. An army veteran, he had fled Afghanistan on hearing that the Taliban had come looking for him and had killed his father. He went to Switzerland, where his sister lived. While there, he heard that his wife and child had also been killed. Lanz's intervention was unable to stop his deportation to Italy, with no notice, although he was suffering from severe post-traumatic stress disorder and no proper assessments had been performed. He found himself on the street in Milan with no warm clothes, no documents and no medication. Passers-by gave him clothes and food, and lent him a phone to call his sister.

Lanz went to Italy with 'Tom's brother-in-law to bring him back to Switzerland, but they were stopped at the border. 'Tom' was sent back to Italy, while she and his brother-in-law were charged with assisting illegal entry and given a penalty order requiring them to pay a conditional fine of 50 francs a day for 30 days (suspended for two years) and an immediate 300 franc fine. On appeal, in December 2018, the Brig court acknowledged the purely humanitarian nature of the offence, which was 'not serious', and removed the conditional fine, but increased the immediate fine to 800 francs and made a costs order of 1400 francs. Lanz's supporters, massed outside the court, were demanding an acquittal, while the prosecutor sought to have the original order upheld. Her lawyer said that a further appeal was under consideration. Her comment: 'It's utter hypocrisy to complain about the lack of accommodation for asylum seekers in Switzerland, without protesting at their removal to Italy, where they have no roof, nothing to eat, nothing at all.'²⁹

Croatia: no asylum at the brutal border

The Croatian border police are notorious for violent push-backs of asylum seekers trying to enter the country (and the EU) at the Bosnian and Serbian borders. They hold the EU record for violence and theft, with 700 reported cases in 2018, and many border-crossers suffer beatings, some having bones broken and many having phones, passports and money stolen. Few get the chance to claim asylum.

The prosecution on charges of assisting illegal entry of Dragan Umičević – a volunteer at the border who had responded to a request for help from a group who had crossed the border and needed to claim asylum – was clearly aimed at deterring witnesses monitoring police violence at the border.

Dragan Umičević

A Croatian volunteer was fined €8,000 after alerting police to the presence of refugees.

Retired army veteran Dragan Umičević is a volunteer for Are You Syrious (AYS), which has a network of monitors at European borders. He monitors the Croatia-Serbia border to try to ensure that migrants and refugees are able to claim asylum and are not beaten, and to act as a witness to police misconduct. On a stormy night in March 2018, he was contacted by AYS, who had obtained the co-ordinates of a Croatian field where a group of fourteen Afghan refugees, including eleven children and juveniles, were huddled, wet and freezing, after crossing the border. Umičević found a police patrol and took them to the field, using a flashlight to locate the group. The police told him he could leave, but he stayed to accompany the group to the police station, to make sure that they were able to claim asylum.

The group included the family of 6-year-old Madina Hussiny, who had been killed by a train in November 2017 after the border police caught the family and made them walk along the railway track back to Serbia late at night, giving them no warning that trains were still running. The child had died in front of the police, who had shown no sympathy but forced the family to continue to Serbia. The family had contacted AYS via Facebook when they crossed the border again, not wanting another tragedy.

Days later, Umičević was charged with assisting the illegal entry of the group into Croatia. The prosecution claimed that he had used a flashlight to guide the group into Croatia. In September 2018, he was found guilty of 'unwitting negligence'. The court rejected the prosecutor's demand for a two-month prison sentence and a 320,000 kuna fine, as well as a ban on AYS activity at the border, but still imposed a hefty fine of 60,000 kunas (around €8,000). He has appealed the decision, saying 'The purpose of the sentence is to discourage volunteers, who will think twice before engaging, especially if the sentence is confirmed, and then the police will have their hands free.'³⁰

Brussels solidarity network equated with criminal smuggling gang

Other locations where volunteering is important to refugee and migrant survival are Calais and more recently Brussels, where networks of volunteers have grown up to provide food, clothes and shelter to people known as 'transit migrants', those migrants passing through Brussels seeking to travel to the UK. Ever since October 2016, when the French government tore down the 'Jungle' camp in Calais, the number of migrants gathering around train stations, public squares and parks, and sleeping in the streets of Brussels, has grown. In parallel, the police presence has grown, moving in to prevent camps from developing, particularly at the Maximilien Park which is located in front of the federal immigration office, near Brussels' Gare du Nord station. Here the Platform for Refugee Support has also been active, trying to find shelter for refugees camped

out there. While many people have supported immigration raids, others have not, with anger at round-ups and deportations boiling over at the beginning of 2018 after it emerged that nine deportees to Sudan had been detained and interrogated, and some said they had been tortured. Prior to authorising their deportation, the secretary of state for asylum and immigration, careless of the risks involved, had invited officials from Sudan to Belgium to screen suspected undocumented migrants believed to be Sudanese. Deportations to Sudan were temporarily suspended while an investigation was launched. But a month later, deportations to Sudan resumed.

Volunteers providing shelter for 'transit migrants' in Brussels found themselves accused of serious criminality in summer 2018, when the Belgian authorities brought a case against twelve individuals. Four Belgian citizens, all associated with the Platform for Refugee Support, and eight others including migrants, were accused of being part of an organised criminal network of human smugglers. The case saw volunteers motivated by solidarity, along with young penniless refugees who charge others for the assistance they give in order to fund their own onward journey, treated as if they were a professional crime syndicate of human smugglers.

The Trial of Solidarity (Procès de la Solidarité)

Twelve people, eight migrants and four Belgian citizens active in the Platform for Refugee Support were prosecuted for being part of a criminal organisation dealing with the smuggling of human beings.

In the summer of 2017, East Flanders police launched an investigation into a 'smuggling ring' operating in motorway car parks throughout Belgium, leading to the arrest of several suspects at a motorway car park in Flanders. Concluding that the 'smuggling ring' operated out of Brussels, they investigated further, arresting in the process a total of twelve people, including Anouk Van Gestel, editor-in-chief of the Belgian edition of *Marie-Claire*, her friend and colleague Myrian Berghe, and Zakia, a Belgian-Moroccan social worker, all of whom had been active in solidarity networks in Belgium, with Berghe providing 55 refugees and migrants with showers, food and a place to sleep over the previous three years. With Walid, a Tunisian long resident in Belgium, and eight migrants, including Hussein, Hassan, Mustapha, Alaa, Mahmoud, Mohammad and Youssef,³¹ they were charged with the smuggling of 95 people including twelve children, as part of a criminal organisation. The evidence against Van Gestel and Berghe was a (tapped) phone conversation about how a Sudanese teenager Van Gestel was hosting could travel to the UK. The four Belgian (citizen or resident) defendants argued in court that they were only sheltering the refugees in a spirit of human compassion, and one of those helped by Van Gestel spoke outside the court that 'If everyone helped one person like Anouk did, you wouldn't see any more refugees on the streets... She gave me my start in life. I can never thank her enough.' In December 2018 the court acquitted Van Gestel and Berghe, Walid and Zakia, stressing the 'strong social commitment' and 'extreme generosity' behind their humanitarian aid (shelter, donations of food, clothing, cigarettes, hospitality), and noting that there was no evidence of economic advantage, which, the judges said, was central to the smuggling offence. The Brussels attorney general has appealed the acquittal. Seven of the eight migrants were convicted (the eighth had absconded) – the evidence indicated that

they had charged others for arranging their travel to pay for their own – and received suspended sentences of between 12 and 42 months.

Prosecution of Italian mayor sparks solidarity movement

Another individual who has been prosecuted for assisting migrants and refugees, this time in his role as an elected public official, is Domenico Lucano, the mayor of Riace in Calabria, southern Italy. This small town of around 2,300 people developed a reputation as a model for integration policy after Lucano used his mayoralty to develop an innovative programme that welcomed migrants, putting them in abandoned homes in the town rather than an isolated 'reception centre', and developing employment opportunities for them which also created jobs for local people, thereby revitalising the town's previously struggling economy. Lucano and his partner Tesfahun Lemlem, who has also been arrested and has had her residency rights suspended, have received huge support across Italy. The solidarity campaign for the anti-mafia mayor of Riace is linked to the mounting opposition to a security and migration package (dubbed the Salvini decree) passed in November 2018 which, amongst other things, removes the two-year humanitarian protection status previously granted to asylum seekers, and allows for the eviction of those rendered rightless from the refugee reception system, SPRAR,³² as well as denying them access to health care and other social services. Mayors like Lucano and Leoluca Orlando in Palermo, Sicily are defying the decree by granting residency rights and refusing to carry out evictions from SPRAR reception centres. They have also issued a legal challenge to the decree, arguing that it is unconstitutional, creates criminality and decreases the possibility of economic integration.³³ These mayors seem to have heeded a plea for civil disobedience made by award-winning anti-mafia writer Roberto Saviano shortly after Lucano's arrest. Saviano described the prosecution of the mayor of Riace as 'the first step towards Italy's definitive transformation from democracy to an authoritarian state.'³⁴ In response, Salvini has threatened to remove police protection from Saviano and from others threatened by the mafia.

Domenico Lucano and Tesfahun Lemlem

The mayor of Riace was temporarily banished from the town pending trial on charges of aiding illegal immigration, with which his partner Tesfahun Lemlem is also charged, and unlawful conduct in the assigning of contracts.

Ever since he came to office, interior minister Salvini has made no secret of his dislike of the 60-year-old mayor of Riace, a small town in the Calabria region, tweeting that Domenico Lucano was a man worth 'zero'. In October 2018, just a week after the publication of the Salvini decree, Lucano and his partner were arrested on suspicion of aiding illegal immigration through organising 'marriages of convenience'. Lucano was also accused of unlawful conduct in assigning public contracts, for allegedly giving a waste collection contract to a cooperative assisting migrants without going through a public tendering process. More serious charges of fraud, embezzlement and abuse of public funds, relating to allocation of government funding for SPRAR reception centres, for which Lucano had been under investigation for a year, were not proceeded with, although 'irregularities' were cited as a reason for Salvini to order hundreds of migrants and refugees to leave the town within a fortnight of the mayor's arrest.

The aiding illegal immigration charge seems to relate to a telephone conversation, caught on a wiretap, between Lucano and his partner in which they allegedly discussed arranging a marriage with an Italian man for a Nigerian victim of forced prostitution, with a view to helping her live and work legally in Italy. The couple were placed under house arrest, which was lifted after a fortnight, but a court ordered Lucano to stay away from the town. During the investigation, Lucano has had repeated death threats from a mafia group, who also poisoned his dogs. The Calabria region is home to the feared 'Ndrangheta' syndicate which is thought to control much of Europe's cocaine trade.

Salvini has not been prepared to sit on the sidelines as the investigation and prosecution proceed. On Lucano's arrest, he tweeted 'Let's see what all the other do-gooders who want to fill Italy with immigrants will say now'. And as he ordered the evictions of migrants from the accommodation the mayor had found for them, he tweeted, 'Who makes mistakes, pays. We cannot tolerate irregularities in the use of public funds, even if there's an excuse to spend them on immigrants'.³⁵

Despite a ruling in March 2019 by Italy's highest appeal court, the Court of Cassation, that there was no evidence of wrongdoing in the awarding of the waste collection contract to a migrant cooperative, Lucano has been ordered to stand trial for unlawful assignment of public contracts, as well as assisting illegal stay. The trial has been fixed for 11 June, at Locri.

'Deterrent' prosecutions of anti-deportation activists

Just like those attempting to assist migrants and refugees reach a place of safety at the border, those who try to prevent deportations do so on the grounds of the threat posed to life and in the fear that a deportation could literally send someone to their death. Swedish anti-deportation activist Elin Ersson was explicit about this when she told the press that forced repatriation of refugees to Afghanistan is 'in practice sending someone to their death ... As someone who is against the death penalty it is only right to stand up for those who are faced with being deported to a land in war'.³⁶

Unlike in our previous report, we include here three case studies involving criminal prosecutions (including the use of anti-terrorism provisions) against eighteen individuals arising from attempts to prevent deportation flights. The prosecutions come at a time of heightened anger over the hostile environment policies pursued by various European governments that are aimed at forcing refused asylum seekers and others without papers out of the country. At one end of this lie policies that make access to most of the necessities of life dependent on immigration status, while at the other end lie aggressive immigration policing and the chartering of deportation flights. It is no accident that in the three case studies we present below, anti-deportation activists were attempting to prevent the removal of Afghani and African asylum seekers. Despite the serious and deteriorating security situation in Afghanistan, one of the most conflict-driven countries in the world, the EU has declared parts of Afghanistan safe for removal of refused asylum seekers, with the Joint Way Forward Agreement of 2016 providing the framework, and several member states including the UK, Germany and Sweden carrying out deportations to Kabul.³⁷ A similar willingness by European governments to overlook conflict, repression and danger applies vis-à-vis African countries, including Somalia, Democratic Republic of Congo, Eritrea and Sudan. As suicide attempts in EU detention centres increase, many of those who seek to take their lives, rather than be returned to their home countries, are from Afghanistan and African countries like Eritrea and Sudan. The sheer inhumanity of politicians responsible for overseeing deportation policy has shocked many. As we have already seen, Theo Francken, then secretary of state for asylum and immigration in Belgium (a member of the New Flemish Alliance, dubbed the 'Flemish Trump') came under pressure to resign after nine men deported to Sudan were detained and interrogated and three, from the Darfur and South Kordofan regions, claimed to have been tortured. In Germany, too, where the government resumed charter deportation flights to Afghanistan in 2017, there was shock when, at a press conference to announce his 'migration masterplan' in July 2018, interior minister Horst Seehofer joked that sixty-nine Afghan migrants had been deported on his 69th birthday. Six days later, there were calls for Seehofer to resign after it emerged that one of those deported, a 23-year-old man who arrived in Germany as a minor and had lived in the country for eight years, committed suicide in a hotel room soon after arriving in Kabul.³⁸

For those who attempt to stop deportations, as with the SAR volunteers and solidarity activists in Belgium and Italy, the manner and timing of the prosecutions and the

disproportionality of charges suggest a coordinated political response, in which the law is used as a deterrent against non-violent protest. Five United Nations Special Rapporteurs acknowledged this when they criticised the British authorities for using terrorism-related legislation to prosecute fifteen anti-deportation protesters who attempted to stop an immigration deportation flight at Stansted airport in March 2017. The application of such disproportionate charges against those exercising the right to peaceful and non-violent protest, they concluded, suggested that the charges were brought to 'deter others from taking similar peaceful direct action to defend human rights and in particular the protection of asylum seekers'.³⁹

Stansted 15: Benjamin Smoke, Emma Hughes, Melanie Evans, May McKeith, Melanie Strickland, Lyndsay Burtonshaw, Laura Clayson, Helen Brewer, Ruth Potts, Jyotsna Ram, Edward Thacker, Nicholas Sigsworth, Alistair Tamlit, Nathan Clack and Joseph McGahan

Fifteen activists from a number of anti-deportation groups were charged with aggravated trespass, and then with endangering airport security under the 1990 Aviation and Maritime Security Act, after they chained themselves to an immigration removal plane.

On 28 March 2017, the 'Stansted 15', activists from a number of anti-deportation groups, attempted to stop a charter deportation flight from Stansted airport, outside London, to Ghana and Nigeria, by chaining themselves to each other and the plane, and lying on the tarmac for over ten hours. The fifteen men and women were arrested and charged with aggravated trespass, a minor offence triable in the magistrates' court. Later, however, after the Crown Prosecution Service applied to the attorney general, the more serious charge of 'endangering airport safety' was added (an offence under the 1990 Aviation and Maritime Security Act, brought in after the Lockerbie bomb). It took eighteen months for the case to be heard: in March 2018, when the trial was scheduled to start, the judge discharged the jury and adjourned the case, imposing reporting restrictions that prevented any discussion of the reasons for the adjournment. The case came back to court in October 2018, and in December, after the judge instructed the jury to disregard the defence case that they acted to stop human rights abuses, the defendants were found guilty of 'endangering the safety of Stansted airport'. Following a public outcry, and with the defence saying they would appeal on the ground that the judge's instruction was unlawful, the defendants were all given non-custodial sentences when they returned to court in February 2019.⁴⁰

In the two other cases, a prosecution against two Icelandic activists was brought two and a half years after their action and only after a similar prosecution was brought in Sweden, leading to accusations that the prosecutions were coordinated and the law was once again being used in a political manner against non-violent protest. In addition, in the case of Swedish student Elin Ersson, police say they only began the preliminary investigation after people filed complaints when they saw her video. This brings to mind previous cases, reported in *Humanitarianism: the unacceptable face of solidarity*, where it was the complaints of far-right activists that initiated prosecutions.

Elin Ersson

Student Elin Ersson was convicted of violating the Swedish aviation act for attempting to stop a deportation.

In July 2018, 21-year-old student Elin Ersson boarded a Turkish Airlines flight to Istanbul at Landvetter airport in Gothenburg with the specific intention of preventing the deportation of a man to Afghanistan. Ersson refused to sit down and live-streamed her fifteen-minute act of defiance on her mobile phone. Eventually, after other passengers including members of a football team joined her protest, both she and the Afghan man were taken off the flight. A preliminary investigation was started and Ersson was eventually charged with violation of the Swedish aviation act. In February 2019, she was convicted and fined 3,000 Swedish krona (€250) – which an Afghan asylum seeker in Germany offered to pay. She appealed her conviction, after it emerged that one of the lay judges, a member of the anti-immigrant Swedish Democrats, called her a ‘criminal’ on social media months before her trial. He wanted her to go to prison. In March, the conviction was quashed and she was granted a retrial in the light of the lay judge’s comments.⁴¹

Ragnheiður Freyja Kristínardóttir and Jórunn Edda Helgadóttir

Two young anti-deportation activists, who in May 2016 attempted to prevent a deportation from Iceland, were charged in October 2018 with jeopardising the safety of a flight.

In May 2016, the two young anti-deportation activists attempted to prevent the deportation to Sweden of Nigerian asylum seeker Eze Okafor by standing up and attempting to alert other passengers to what was going on, while their Icelandair plane stood by the terminal with the doors open. They were particularly incensed by Okafor’s deportation, as the Immigration Appeals Board had ruled that he should not be deported to Sweden (from where he would be sent back to Nigeria), but the immigration authorities were pressing ahead anyway. As they mounted their protest, police officers entered the plane and arrested them, handcuffing Jorunn and, she claims assaulting her during the arrest. Nearly two and a half years later, on the same day in October 2018 that Swedish prosecutors announced charges against Elin Ersson in Sweden, they were charged with jeopardising the safety of a flight. The wording of the charge suggests that the flight was on the runway preparing for take-off, which the women strongly contest. A legal challenge on the ground of the long delay in bringing the charges was rejected in December 2018. The trial began on 6 March 2019, and on 3 April they were sentenced to three months suspended for two years.⁴²

The courts and criminalisation

In *Humanitarianism*, we wrote about the confusion, inconsistency and legal uncertainty caused by the EU's 2002 Facilitators Package, which requires member states to criminalise assistance for illegal entry and transit, while allowing but not requiring them to exempt humanitarian action. The investigations, prosecutions, convictions and sentences described here bear out that criticism. Where cases have come to court, the conflict faced by judges, between upholding national law and recognising its injustice in penalising decency, is palpable. Some judges have resolved the conflict by ruling defendants guilty but passing a non-custodial sentence. It was the preferred resolution in the cases of Swiss activist Anni Lanz, Swedish protester Elin Ersson and Croatian volunteer Dragan Umičević (who was convicted of a lesser offence than that charged – although he should not have been convicted at all). And in Greece, unionist and activist Lola Gutierrez was given a 17-month suspended sentence for aiding illegal travel and using false documentation so that a 17-year-old Kurdish refugee could join his family in northern Europe. Gutierrez had been arrested at the airport when she tried to take the youth through as her son in May 2016, was held in detention and then deported to Spain as a danger to Greek national security, her re-entry barred until 2023. At the trial, held in her absence in December 2018, the prosecutor sought a sentence of five to ten years. The sentence, suspended in recognition of her humanitarian motive, was hailed as a victory by her supporters.⁴³

In other cases, judges were prepared to go further in upholding the human rights of migrants and refugees and those helping them. In May 2018, the Lesvos court acquitted Salam Aldeen and four other volunteers from search and rescue NGOs Team Humanity and PROEM-AID, arrested at sea in January 2016 in the course of a rescue mission and charged with aiding illegal entry.⁴⁴ The acquittal was based on the failure of the prosecutor to prove criminal intent or that the defendants had initiated the action.⁴⁵ The charging of the ERCI volunteers on similar and more serious charges only months later reveals the gulf between the prosecuting and judicial authorities in Greece.

A similar gap between prosecutors and judges is evidenced by the acquittal of the four Belgian solidarity activists in December 2018, and that of Helena Maleno Garzón in Morocco in March 2019.⁴⁶ In both cases, the prosecutor appealed or has indicated an intention to do so.

It was the French constitutional court's decision in July 2018 which seemed to offer the most hope, enshrining the constitutional value of the principle of fraternity, 'the freedom to help others for a humanitarian purpose, regardless of the legality of their stay in the national territory', and calling on parliament to amend the law. At the time the ruling was hailed as a step change in French policy on migration and assistance, and a number of politicians, including Paris mayor Anne Hidalgo, came out in support of it. It was even believed that the ruling could have an impact across Europe. As a result the convictions of Cédric Herrou for helping refugees enter and stay in France were quashed by the Court of Cassation in December 2018.

But the Briançon Seven's conviction on charges of assisting illegal entry in December dashed the hopes of solidarity campaigners. The Gap court decided that the constitutional court's ruling only applied to providing aid to those already on the territory, and not to bringing people across the border, reinforcing the already existing exemption from prosecution for those who provide 'food, accommodation, medical care or other assistance necessary to ensure dignified and decent living conditions for no reward'. The narrow interpretation of the 'principle of fraternity' by the Gap court indicates a clear 'red line' that humanitarians cross at their peril: feed people or shelter them if you must, but assisting entry remains criminal. To that extent the constitutional court's decision represents more of a symbolic declaration than an indication of any real change in policy.

Solidarity movements grow

If the aim of the investigations, prosecutions and court hearings is to deter solidarity action, they seem to have had the opposite effect. In the face of the deaths in the sea and at the land borders, every seizure of a rescue ship, every criminal investigation and every court case leads to more widespread anger at the injustice of penalising humanity and decency. Whether it is armed police bursting in to the homes of Belgian journalists, border guards impeding the transfer to hospital of sick or heavily pregnant women, the arrest of a trade unionist for trying to effect family reunion for a lone young refugee, or the laying of terrorism-related charges against those stopping deportations which may result in death, the effect of criminalisation is to strengthen the movement of solidarity for Europe's new human rights defenders, and to draw the attention of more and more ordinary citizens to the underlying cruelty and inhumanity of European migration and asylum policies. A recent European citizens' initiative, supported by over 170 organisations across Europe, called on the European Commission to provide safety, solidarity and justice to refugees and those seeking to support them.⁴⁷ Another initiative, by a group of lawyers, activists, academics and journalists in Italy who came together in an alliance as the Osservatorio Solidarietà of the Milan Charter, is seeking commitments from candidates in the 2019 European elections for a charter of migrants' rights.⁴⁸ And in March 2019, AI and HRW presented the EU with a 20-point action plan for a fair and predictable rescue system, calling for (among other things) no penalties for search and rescue.⁴⁹

Institutional response

In June 2018, the European Parliament passed a resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised.⁵⁰ In August, UN Special Rapporteur Agnes Callamard presented a report to the UN General Assembly calling for an end to prosecutions of crimes of solidarity.⁵¹ The following month, a joint communication from the UN High Commissioner for Human Rights and five UN Special Rapporteurs called on the EU and member states to 'ensure that acts of solidarity with migrants by civil society organisations and human rights defenders, including during search and rescue operations and border crossing, are not criminalised.'⁵² The Council of Europe Human Rights Commissioner has also expressed concern at the 'worrying retrogression' in the protection of human rights defenders and their ability to work in a number of EU countries,⁵³ and in January 2019 the UN High Commissioner for Refugees called on European governments to stop actions to deter SAR operations.⁵⁴ So far, however, the European Commission has not responded to the pressure to make humanitarian action exempt from prosecution under smuggling and assisting illegal entry laws in the member states.

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Europe is becoming more polarised – with more populist, anti-migrant governments and their supporters confronting more citizens moved to protect principles of fraternity, solidarity and hospitality. As Helena Maleno among others has made clear, the role of solidarity activists is not only to provide help, sometimes in the process saving life, but

also to bear witness to violations of the human rights of migrants. Maleno has patiently collected testimony which reveals the pattern of illegal deportations from Spain's enclaves of Ceuta and Melilla back to Morocco, border guards injuring migrants who try to scale the border fences, and details of those who have died trying to cross the Gibraltar strait to mainland Spain. In seeking to hold the authorities to account, she has attracted the enmity of officials which resulted in the criminal investigations – but throughout the six years of her ordeal, she has continued with her work, both of alerting the coastguard to vessels in distress and of bearing witness. Many of the activists whose cases we have described have performed similar work. As the NGOs operating rescue ships like *Aquarius*, blocked from performing search and rescue, the volunteer border monitors like Dragan Umičević and anti-deportation activists are only too aware, their absence not only leads to more deaths and brutality at sea and land borders, but also makes these invisible, giving impunity to those for whom migrants and refugees are to be kept out of Europe by any means necessary. As the UN High Commissioner for refugees, Filippo Grandi said, launching the report *Desperate Journeys*, 'We do not really know how many people are dying in the Mediterranean – there are no witnesses any more.'

That is why the fight against the criminalisation of solidarity is so important.

We renew our call for the European Commission to redraft the Facilitators Package so as to align it with the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, which defines as criminal smuggling only those acts done for material benefit.

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- 21 In April 2018, the new Spanish government confirmed what the previous government had denied, i.e., that the Spanish police had passed the file to the Moroccan authorities.
- 22 'Criminal investigation against Spanish human rights activist Helena Maleno closed', *Statewatch*, 12 March 2019, <http://www.statewatch.org/news/2019/mar/es-mo-helena-maleno-case.htm>.
- 23 There was another death in February 2019, that of 29-year-old Derman Tamimou from Togo, who also died of hypothermia.
- 24 ANAFE: *Persona non Grata: Conséquences des politiques sécuritaires et migratoires à la frontière Franco-Italienne*, January 2019.
- 25 'Refugees hoping to reach France find solidarity in the Alps', Al Jazeera, 8 April 2018.

- 26 For the cases of Cédric Herrou and the Roya citizens, see *Humanitarianism: the unacceptable face of solidarity*.
- 27 See 'Helping Migrants: Top French court says no punishment for "crimes of solidarity"', *The Local*, 6 July 2018.
- 28 'Aide aux migrants: les "sept de Briançon" condamnés', *Le Monde*, 14 December 2018.
- 29 'Soutien pour Anni Lanz', 'Peine allégée pour Anni Lanz', *Le Matin (Suisse)*, 6, 10 December 2018.
- 30 See 'Statement on an unjust verdict against AYS volunteer', *AYS*, 25 September 2018; 'Activist fined for helping refugees illegally enter Croatia', *New Internationalist*, 25 September 2018; 'Croatia, criminalisation of solidarity', *Osservatorio Balcani e Caucaso Transeuropa*, 8 November 2018.
- 31 With the exception of Van Gestel and Berghe, only the first names of the defendants have been made available.
- 32 Sistema di Protezione per Richiedente Asilo e Rifugiati, Protection system for asylum seekers and refugees.
- 33 Jason Horowitz, 'Italy's crackdown on migrants meets a grass-roots resistance', *New York Times*, 1 February 2019.
- 34 Cited by Yleni Gostoli, 'Italy's pro-refugee mayor Domenico Lucano arrested', *Al Jazeera*, 2 October 2018.
- 35 'Matteo Salvini orders removal of refugees from Riace', *Guardian*, 14 October 2018.
- 36 'Sweden indicts woman who tried to block Afghan man's deportation on flight', *New York Times*, 20 October 2018.
- 37 'EU Migration Policy and Returns: Case Study on Afghanistan', ECRE, November 2017. For UNHCR's current eligibility guidelines for assessing the international protection needs of asylum seekers from Afghanistan, issued in August 2018, see <https://www.refworld.org/docid/5b8900109.html>.
- 38 'Germany's interior minister urged to resign after death of asylum seeker', *Guardian*, 11 July 2018.
- 39 'UN Special Rapporteurs criticise use of terrorism-related legislation to prosecute "Stansted 15" anti-deportation activists', *Electronic Immigration Network*, 7 February 2019.
- 40 All were ordered to do community work, and three were given suspended sentences. For details see 'Stansted 15: no jail for activists convicted of terror-related offences', *Guardian*, 6 February 2019.
- 41 In Sweden, a panel of three lay judges appointed by political parties sit in district courts with the professional judge. See 'Swedish student fined for anti-deportation protest that went viral', *Guardian*, 18 February 2019; 'Swedish anti-deportation activist granted retrial', 29 March 2019.
- 42 Reykjavík District Court, April 3: Anti-Deportation Protesters got 2 Years on Probation for 'Nuisance', 3 April 2019, <https://adstandaupp.com/2019/04/reykjavik-district-court-april-3-anti-deportation-protesters-got-2-years-on-probation-for-nuisance/>.
- 43 See 'Suspended sentence for Spanish activist is "decisive" in decriminalising solidarity with migrants and refugees', *Statewatch*, 19 December 2018, <http://www.statewatch.org/news/2018/dec/gr-lola-gutierrez-case.htm>.
- 44 See *Humanitarianism* for details of the prosecution.
- 45 See 'Humanitarian workers acquitted of "crime" of helping refugees', *New Internationalist*, 10 May 2018, <https://newint.org/features/web-exclusive/2018/05/10/humanitarian-workers-acquited-helping-refugees>.
- 46 Although, in the Belgian case, the seven migrants were convicted, it was not disputed that they had acted for money (to fund their own travel).
- 47 See the 'We are a welcoming Europe' initiative, <https://www.weareawelcomingeurope.eu/en/>.
- 48 En carta Impegno migrazione, Charter of Commitments, March 2019.
- 49 *Action Plan for a fair and predictable rescue system in the Mediterranean Sea*, AI and HRW, 6 March 2019.
- 50 See European Parliament, http://www.europarl.europa.eu/doceo/document/B-8-2018-0314_EN.html?redirect.
- 51 'Saving lives is not a crime', Report by the UN Special Rapporteur on extrajudicial, summary or arbitrary Executions, A/73/314, 7 August 2018.
- 52 OL OTH 64/2018, 18 September 2018, https://www.ohchr.org/Documents/Issues/SRMigrants/Comments/OL_OTH_64_2018.pdf
- 53 Commissioner for Human Rights, 'States' Duty to Protect Human Rights Defenders', Council of Europe, Strasbourg, December 2018, (https://www.coe.int/en/web/commissioner/view/-/asset_publisher/ugj3i6qSEkhZ/content/states-duty-to-protect-human-rights-defenders)

54 'UNHCR appalled at news of refugee and migrant deaths on Mediterranean Sea', UNHCR UK, 19 January 2019.