

Migrants, borders and the criminalisation of solidarity in the EU

LIZ FEKETE

Abstract: Europe's response in 2015 to the arrival of the largest forced displacement of peoples since the second world war, was not to attend to their needs but to securitise its borders and use laws aimed at people traffickers and smugglers, against those giving aid to the destitute new arrivals. This article focuses on a discussion at the launch of *Humanitarianism: the unacceptable face of solidarity*, between the Institute of Race Relations, NGOs, solidarity campaigns, academics and students concerned about the EU's attitude and policies to search and rescue in the Mediterranean Sea, the harassment and criminalising of those trying to give support to refugees and the ways to organise to preserve humanitarian principles in Europe. Discussion covers the secret deals being made by the EU with countries around the Mediterranean, in Libya and in central Africa to act as gatekeepers to prevent migration to Europe, the difficulty of challenging the Facilitation Directive which allows humanitarians to be prosecuted as people smugglers, within a European Parliament which has increasing numbers of members from the extreme Right, and the importance of independent research to counter the myths and misinformation from the EU and member states on migration and asylum.

Liz Fekete, director of the Institute of Race Relations, carried out much of the IRR's research into the criminalising of solidarity, co-wrote *Humanitarianism: the unacceptable face of solidarity* and organised and chaired the discussion meeting. Her book, *Europe's Fault Lines: racism and the rise of the Right* is published by Verso (2018).

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Introduction

In 2015, when over 1 million people arrived in Europe from countries such as Syria, Iraq, Afghanistan and Eritrea, and EU member states bickered over who should take responsibility for newcomers, a pan-European community of volunteers took on much of their care. The emergence of autonomous migrant and refugee solidarity movements and the lengths individuals were prepared to go to help were perceived by states as a threat to their control of borders. EU member states resorted to military solutions, while exporting migration controls to countries such as Turkey, Libya, Afghanistan, Chad and Nigeria via special agreements, some secret. And in order to undermine the autonomous solidarity movements, laws, originally aimed at traffickers and smugglers, began to be used against a completely different set of actors – those simply offering humanitarian support.

*The Institute of Race Relations (IRR) held a meeting on 4 December 2017 to mark the publication of *Humanitarianism: the unacceptable face of solidarity*,¹ its report based on forty-five such prosecutions (see Figure 1). We publish below an updated and edited version of the discussion moderated by Liz Fekete with a panel composed of Frances Webber (from the IRR), Konstantinos Antonopoulos (Médecins Sans Frontières), Lorenzo Pezzani (Watch the Med and Forensic Oceanography), Jean Lambert (Member of European Parliament); and others speaking from the audience.*

Liz Fekete: State harassment of humanitarian assistance to refugees and migrants across Europe is now obvious and politically pointed, with anti-trafficking and immigration laws being used against those in solidarity. Why do you think the law is being weaponised now?

Frances Webber: First, let me say that the criminalisation of solidarity by EU member states is not new. It began several decades ago, with heavy-handed police tactics and, on occasion, prosecution of those individuals (including priests) involved in the sanctuary movement, providing a place of safety for those facing deportation. But this particular and more extreme incarnation of it, started around 2015 after the EU decided on a military rather than a humanitarian response to the greatest forced displacement of people since the second world war. The forced movement of over 1 million people from countries such as Syria, Afghanistan, Iraq and Eritrea could not be ignored because of the visibility of the tragedy as it unfolded in the Mediterranean Sea with so many drownings and deaths. So, in the UK, in October 2014, the Foreign Office Minister Lady Anelay, announcing the British government's decision to withdraw support for search and rescue missions to prevent further drowning in the Mediterranean, set the



Figure 1. From left to right: Liz Fekete, Lorenzo Pezzani, Konstantinos Antonopoulos, Frances Webber, Jean Lambert.

tone for the duplicity that was to follow when she described such missions as a ‘pull-factor’ making it more attractive for migrants to take their chances.²

That was the first use of the words ‘pull-factor’ to describe rescue. Now, the same words are used over and over again in relation to any humanitarian act, whether it is giving people lifts, whether it is feeding them, giving water, basically any act of simple human solidarity is now perceived by the EU as a pull-factor.

As the desperate plight of refugees became visible, particularly on the Greek islands, what was shocking was the absence of any EU emergency response or system of reception. Everybody on Lesbos, was asking, ‘Where’s the EU?’ All these people coming, needing not just to be rescued, but needing warmth, needing food, needing medical care, needing shelter. Where were the big humanitarian players like UNHCR? Nowhere to be seen. And when the European Commission finally set up a refugee camp at Moria, a so-called reception ‘hotspot’ (where refugees are fingerprinted, screened and registered) the conditions at this severely overcrowded closed camp, guarded by military and police personnel and surrounded by barbed wire, were absolutely disgusting. It was the army of crowd-funded and self-funded volunteers which provided genuine care rooted in humanitarian principles rather than security concerns. It’s precisely because the EU is so determined not to allow what it calls ‘spontaneous migration’ – what anyone else would recognise as ‘refugees needing help’ – that they are prepared to do what is morally unjustifiable, i.e. abandoning search and rescue missions in favour of missions to destroy smugglers’ boats, where rescue is, at best, a by-product but not the central aim of the mission.³

And it is not just the obscene response to desperate people in the Mediterranean that should concern us. The attempt to criminalise humanitarian assistance now extends to any area where, thanks to the lack of proper state planning or assistance, bottlenecks of refugees, makeshift camps and squats emerge, such as Ventimiglia in Italy, Calais in France (where the makeshift camp, known as 'The Jungle' was demolished in 2016–2017) and Lesbos, in Greece. On land, then, what we see are first policies of institutional neglect, the rationale being if you just don't do anything for people, they will move on. And, if they don't, then what lies in store is intensive territorial policing aimed at creating a hostile environment both for would-be refugees and anyone supporting them.⁴ What has unfolded in areas where land borders are closed and displaced people stuck with absolutely nothing, is that volunteers spontaneously come, and, by providing food, shelter, water and basics like that, they make the situation visible, they make the migrants visible. And it is this that cannot be countenanced. The mayor of Calais for example said words to the effect, 'I don't want another Jungle, we spent all this money destroying the Jungle with the bulldozers and the riot police and everything'. She responded to the show of humanitarian solidarity by passing a law that made unauthorised distribution of food unlawful. And it is this kind of mentality, viewing displaced people and refugees as an itinerant underclass and a public order nuisance, that means laws to criminalise solidarity.

LF: But to what lengths are the EU and its member states prepared to go to render the refugee crisis invisible to Europe? Are the deals that the EU and the Italian government striking with Libya also linked to this question of invisibility? After all we know that in Libya mass and indefinite detention is the norm, and forced labour, sexual abuse and torture are widespread in its so-called detention centres.

FW: Yes of course, the EU has done a number of deals with all the transit states aimed at preventing 'irregular migration'. We already know about the EU-Turkey agreement,⁵ we know about the EU-Libya agreement⁶ which, given the lawlessness and fracturing of state institutions that followed the ousting of Gaddafi in 2011, involves turning a blind eye to the collusion of the Libyan coastguard with smugglers and the activities of locally-based armed groups and militia, who are responsible for these concentration camps, these centres of torture and slavery.⁷ So, yes, this is all part of the kind of military solution, where the EU has said 'we will make deals with anybody', basically, to stop migrants coming to Europe. And then when they do come, like at Calais, in northern France, where children are sprayed with tear gas, and, when they try to sleep, their sleeping bags are confiscated, routinely, this obscene approach continues. It makes you speechless when you think about it, the lengths to which the EU and the member states will go in order to deter migrants.

LF: Can we turn now to the role of Médecins Sans Frontières. Kosta, wasn't it the EU's refusal to maintain proper funding and resources for search and rescue which forced the NGOs to step in, to do the job of co-ordinating emergency rescue and saving lives that you would normally expect states to do? And how does harassment and the new restrictive legal framework affect your mission? I remember that, in May 2017, one MSF boat carrying 14,000 passengers was denied permission to dock in Sicily for forty-eight hours while another vessel jointly operated by MSF and SOS Méditerranée was threatened at gunpoint by the Libyan coastguard.

Konstantinos Antonopoulos: Doctors Without Borders is an international medical humanitarian organisation and since its inception we have worked with refugees and migrants. But it has really only been in the last two years that our work has become so extensive in the European context, it was new for us. In 2015 we started to operate three sets of rescue boats in the Mediterranean Sea, though now we have only one (I will explain why later). And the boat that was attacked by the Libyan coastguard, had not just got our staff on board, but sick patients, pregnant women, children, men who had suffered torture in Libya. We take the security of our staff and patients extremely seriously.

Overall, we have assisted in the rescue of around 73,000 people in 600 operations. But we have never considered this number as important as the twelve people who die each day trying to cross the Mediterranean Sea from Libya to Italy. Important too are the thousands of people that are currently detained in the centres in Libya, around fourteen official centres organised by the DCIM (General Directorate for Combating Illegal Migration) and a number of other centres that nobody knows about, organised by militias.⁸ Since the beginning of our mission, MSF was accused of being a pull-factor, and of undermining maritime safety and security. We were very concerned about the impact of this dominant narrative of NGO search and rescue (SAR NGOs) being a pull-factor (parents would send more unaccompanied children to Europe, etc.) which began in 2016. We then carried out our own research, and we found out that none of this was true. There was no correlation between the work of the NGOs and the number of refugees trying to reach Europe. And so, the idea of the pull-factor was never valid. And the accusation that we were undermining security and safety at sea, had no correlation in our research either.

We also saw for ourselves how this criminalisation was manifesting itself through a kind of legal persecution.⁹ There is a European law about facilitating irregular entry and irregular stay in the European Union.¹⁰ But it's very strange to see how EU states respect that law but disregard all other international and European laws. They disregard the Geneva Convention for refugees, they disregard European laws about family reunion, and so on. The same disregard for international law applies in other contexts – beyond Europe. It is something that is becoming global. And it is obvious in a securitised approach to borders in all

high income states, the global North, whatever we like to call it. They see a clear distinction between the self and the other. And that is what we face right now and what we try to challenge in our work. We see the same response by the Australian state at Manus Island.

I want to finish by posing an idea – we should go beyond the concept of legality, and focus on *legitimacy*. The key point for us right now is whether our actions are or are not legitimate.

LF: Lorenzo Pezzani, as co-director of both Watch the Med and Forensic Oceanography, you bring a unique approach to EU border crimes. Can you tell about how these organisations work?

Lorenzo Pezzani: Forensic Oceanography got started by myself and Charles Heller in 2011, which coincided with the Arab Spring, the rebellions on the other side of the Mediterranean. Actually, in retrospect, we can see that it was not really a coincidence but it was intimately connected with those events, as that was also the moment where the kind of border regime that the EU and its member states had been intent on creating, started to crumble, with different fractures opening up. A lot of people were able to regain, at least temporarily (and still having to face a lot of obstacles) a certain freedom of movement that had been denied to them. Our two initiatives emerged in trying to drive a wedge into the fractures that were opening up. Forensic Oceanography is the more academic and research side of our project, while Watch the Med, which we co-founded in 2012 together with others, operates in more of an activist context. We are trying to document the militarised border regime in the Mediterranean, while, at the same time, creating tools that can be used to challenge the death of migrants at sea. We've produced a series of maps, videos and human right reports to document specific cases of shipwrecks. To do that, we have also used tools that are routinely employed by EU border controllers themselves (satellite imageries or oceanographic science) but applied what we have called a 'disobedient gaze', which means trying to show the violence that the border produces, but not to show what the migrants themselves want to keep secret, i.e. their patterns of crossing. In producing maps and videos, we try to intervene at the level of image production, reflecting very critically about the ways in which a certain aesthetic regime operates on the border. This might sound a bit abstract, but it is very simple and it refers to the way in which specific conditions of visibility operate at the border. Border enforcement is often spectacularised as a way to reinforce the idea of Fortress Europe. At the the same time, the violence it produces is constantly hidden. We try to fight that. We also work a lot with what we call 'policy forensics', making freedom of information requests from institutions like Frontex¹¹ to try to find out what they actually knew about a specific incident, and to try to show that some of their policies were quite deliberate in trying to create more difficult and more deadly conditions of crossing. Within this, forensics does not just refer to

science in a legal context, but also more etymologically to the idea of creating a forum where the violence that the borders produce can also be discussed and challenged. That's vital, because so far it has been really difficult to address it in a court of law or in existing political arenas.

The ultimate goal is to show that border violence and death at the border is not a kind of tragic side-effect of border policing, but it is really a structural outcome, even at times a deliberate goal, of it. In one of our first investigations, we worked to document the case of the so-called 'Left to die boat', the story of seventy-two people that, after they left Libya in 2011, were left drifting for fourteen days without food and water in the central Mediterranean, despite repeatedly calling for help and despite being approached by several military vessels and helicopters. The scandal is that sixty-three of those migrants lost their lives while drifting in a maritime zone tightly monitored by the NATO-led coalition intervening in Libya. The legal cases that emerged out of this investigation are still ongoing. More recently, we produced the report *Blaming the Rescuers: criminalising solidarity, re-enforcing deterrence* which tackled the accusations that SAR NGOs are a pull-factor made not just by the media, but by Frontex, and prosecutors in Italy – all of which are powerful actors undermining the amazing efforts that NGOs have made in saving lives. We highlighted the vital lifesaving role played by NGOs demonstrating the strong inverse correlation between the number of NGO ships present at sea and the mortality rate, the number of people dying, meaning that the more NGO ships are out there, a lot less people die. Through empirical research we demonstrated that the intervention of NGOs did not create more dangerous conditions of crossings – one of the specific accusations against them.

Right now we are working on the continuing attacks against SAR NGOs, via the case of the *Iuventa*, the ship of the German NGO Jugend Rettet that was seized on the orders of the prosecutor in Trapani in August 2017. This was the only NGO ship that has actually been stopped directly by a court order. Other ships have been stopped, or dissuaded from continuing their operations, but this was the only ship that was actually impounded by the judiciary. And it was done through legal means, on the basis of accusations of collusion with smugglers, an accusation which we can now say is baseless. Jugend Rettet granted us unprecedented access to their archives so that we can analyse all their photographs and footage in order to fit that into a sort of spatial and temporal reconstruction which shows that they did not collude with smugglers.

The second thing that we are working on are the new EU arrangements with countries like Libya, and the whole question of the pull-backs that exist now instead of push-backs. This is in itself a reaction to important legal victories in the European Court of Human Rights.¹² So now we see the Europeans, in return for providing material support, tasking the government of Libya (and earlier Turkey) to pull-back refugees before they reach European waters, which in effect means forcing people back into Libyan territory, where they face misery and violence, as already mentioned. It has now become standard practice for European military

ships not to launch search and rescues but to call the Libyan coast guard and wait until people are picked up and brought back to Libya.

LF: Jean [Lambert MEP] can you suggest what more we could do at the level of the European Parliament, particularly around the NGOs' demand that the European Commission provide mandatory exemption from criminalisation for humanitarian aid to bring the legal framework in line with international instruments.

Jean Lambert: These growing calls for a mandatory exemption from prosecution has in its sights the 2002 Facilitators Package which regulated member states' national penal laws against human smugglers, with no obligation placed on member states to exempt humanitarian smuggling from criminalisation. At the time the Facilitators Package and the Directive were introduced, the European Parliament was not part of the legislative process, i.e., we were allowed to comment but we weren't part of the co-decision process. One of the things that we have seen at the EU level and we hear in the Parliament and in governments, is this mixing up of trafficking, which involves the exploitation of human beings, with smuggling, which are quite different things, with different legal definitions. Furthermore, smuggling for financial or material benefit and smuggling for humanitarian purposes, are also quite different. If you are not profiting from what you're doing, it is effectively not smuggling, it is humanitarianism. And the Facilitation Directive, in relation to the prosecution of humanitarian assistance, gives the member states a choice, they do not have to adopt the clause. So some member states don't criminalise humanitarian assistance and some do. There is no clear legal EU-wide instruction that says to member states 'you can't criminalise in cases of humanitarian protection'. The European Commission has been looking at whether or not to open the Facilitation Directive to change this. It did this through what they called the 'refit package' which is supposed to look at whether legislation is fit for purpose. But when the Commission looked at the Facilitators Package as well as a related study published in 2015, it concluded that there was insufficient evidence that member states were using the Facilitators Package to criminalise. The European Parliament then commissioned its own study (because we can do that as we have money available through our different committees) carried out by the Centre for European Policy Studies, which came to a rather different conclusion than that of the European Commission.¹³

So what I would conclude is that the European Commission is not yet minded to open it up, even though there are a growing number of voices arguing for it to be brought into line with the UN Convention on Transnational Organised Crime, to make it clear, as related UN protocols do, that humanitarian assistance *should not* be criminalised. But what we need to bear in mind now is that there are always dangers in opening a directive, you need to be very careful what you ask for, so that you don't find people increasing penalties unnecessarily on a lot of other

stuff. You need to deal with this specific clause alone. There seems to be some appetite in the European parliament for such a move but, even so, it is by no means clear you would have the necessary majority. If you look at governments across Europe you see what you're up against. You've got a new rightwing coalition government in Austria, which includes the extreme Right Freedom Party. Last time round, back in 2001 when there was at least more accord amongst governments on strengthening anti-discrimination legislation, Austria did not want to make common cause on the humanitarian issue, in fact they didn't want to mention it at all. And now we have a number of new governments with an extreme anti-immigration agenda, such as in Hungary and Poland. There is more work to be done – at both the European level and the national level – to make sure that if it is opened up you get the result that you want. What's important are the studies – like the IRR's and the others mentioned today – pushing at the issue, making politicians more aware that loopholes, with the lack of any clear instruction, allow for misuse.

Turning to the absolute scandal of what is happening in Libya at the moment, the very fact that the EU agreements with both Turkey and Libya are informal agreements, over which the European Parliament has no jurisdiction, provides opportunities for dissent. If it were an ordinary re-admission agreement, like, for instance, the one we have with Pakistan, Parliament would at least have a chance to say, 'yes' or 'no'. But the EU-Turkey deal, the EU-Libya deal, and the agreement with Afghanistan, were all informal agreements, done at the level of the European Commission, with the backing of member states, but bypassing Parliament. We parliamentarians can't even get the text of the Turkey deal, in order to be able to actually see what is written there.

LP: I think it's important to mention recent developments in Libya. The CNN footage of migrants being auctioned as slaves in Tripoli opened up a completely different space for intervention, and mobilisations on this issue have been tremendous. Official Europe may use the anti-smuggling discourse as a way to enforce a border containment strategy but here we have a completely different anti-slavery/anti-trafficking discourse emerging from sub-Saharan Africa, as well as within Black communities across Europe from people with a historical relation to slavery. This really opens up a different kind of space for action, challenging the neo-colonial underpinnings of that discourse. These mobilisations have also reinvigorated an important debate which has been happening within North Africa on 'Arab' racism against 'black Africans'. Against the simplistic, and I should say racist, mainstream European interpretations of what has been happening in Libya, which basically simply reproduces the idea of a country of chaos to justify anti-migration deals, they ultimately create a new geographical and political context in which another conversation can take place, and offer the opportunity to now enter into the whole anti-trafficking and anti-smuggling debate on a different footing.

LF: Is there anybody who would like to respond to Lorenzo's point about opening up new spaces for resistance and challenging neo-colonial frameworks?

Syd Bolton, Last Rights: I am a lawyer working on a project that principally fights for the rights of the bereaved, for decent and proper treatment of those who have died on their migrant journey, as well as their families (see Figure 2). We've talked a lot about state and supra-state structures and we've talked about the hostile environment, but I would add that the hostile environment permeates deeper and it's very easy once a destabilising environment has been established for it to permeate through the layers to a very low level indeed. In addition to the criminalisation of humanitarian action, we also see the co-opting of international NGOs to do some of this destabilisation work. Then there is the bureaucracy at very local levels. We've seen human rights defenders in Lesbos facing huge fines of tens of thousands of Euros, simply for providing refuge for people rescued on the coast. That is then bureaucratised into an absurd system where it is costing around a thousand Euros a time at each stage of the legal process to challenge what started off as a hotel of residents' association attack on the locals. It penetrates right down to the bottom of what would normally be a benign institution, a hoteliers' institution. Another example is the issue of catering in Lesbos, where food supplies are taken and turned into a monopoly for local catering companies which are then filtered through the funding of some big NGO. There have been some notorious examples of NGOs being co-opted into this hostile environment and while it is unfair to single any one out, I just wanted to point out that the



Figure 2. Refugee graves in a Calais cemetery.
Photo © Aidan Pettitt.

hostile environment does not simply exist in the actions of the state or in the militarisation of the police, but it is starting to infect and infest at all levels, getting a life of its own.

LF: We also have here two other contributors to the report: Anya Edmond-Pettitt, who wrote about the issue of the hostile environment in relation to Calais, and researcher Simon McMahon who looked at the implications of the criminalisation of solidarity for academic research. Simon, is there a danger that academics are also being co-opted into this porous hostile environment that Syd has described?

Simon McMahon, Centre for Trust, Peace and Social Relations, Coventry University: Lots of people in the room are nodding their heads! There is a certain type of research around the production of maps, for instance, which is very much about doing what states need, which is charting where people go, where you can intercept them and so on. I was in Italy in 2015 and 2016, when we interviewed around 200 people who had crossed the sea by boat to Italy from North Africa, most of them from Libya. Many of the people who were doing similar research whom I met during this period, were also approaching their work from an activist perspective, saying that they were not so much interested in engaging with state institutions, as talking directly to people about their journey. But in trying to open up space for new voices to come through, they were very much aware that they were opening themselves up to accusations of facilitating illegal migration. I knew people who were providing migrants with support over things like how to find a lawyer, how to move across the town, how to go into squats or informal settlements, volunteering as well on an informal basis. And by so doing they were coming under threat, facing accusations of facilitating illegal migration. So they had to constantly be aware of where the boundaries were between who they were talking to and what they were doing, while also being able to carry out their research at the same time.

LF: Lorenzo made the point about looking at the criminalisation of solidarity through a different lens, and also in relation to protest and resistance. One of the reasons we at IRR decided to bring out this report was precisely because of the challenge posed by the humanitarian activism that emerged during summer 2015. We began to build up case files about the people prosecuted and saw that many of them had not acted out of any complicated ideology, or because they were politically active, they were simply motivated by a sense of decency. And we thought we weren't going to sit back and allow the criminalisation of decency to become the new norm. That is what motivated us to write this report.

FW: I think that this polarisation between the people of Europe, who still relate to the humanitarian tradition, and the politicians, with their securitised agenda, is still very much ongoing. It is ironic that one of the reasons given by the European Commission for refusing to amend the Facilitation Directive was that there were

still so many volunteers providing humanitarian assistance, proving that they had not been deterred by the risk of criminalisation. This is the logic of the European Commission.

Martina Tazzioli, Swansea University: I was wondering whether the EU is attempting to create a division between the 'good humanitarians' – larger institutions that are integrated into the system – and other smaller organisations, that are local and independent. This is certainly the case in Lesbos and also at other borders, such as Ventimiglia, in the Alps between France and Italy. I don't think that humanitarian institutions are outside of migration governmentality, they can be part of the system, but there is this split.

LP: Can I just add that we saw the same kind of pattern in terms of the search and rescue NGOs in the Mediterranean, because the only boat that was actually seized was the *Iuventa*, which belonged to the smallest organisation that was set up initially by a group of university students in Berlin, emerging from an extremely beautiful and moving kind of impetus amongst people who were very young, and full of enthusiasm. The judiciary hit here because it didn't dare to go against a bigger organisation. So that is also a way of creating a rift between humanitarian organisations. And in that sense it is very important to understand this campaign of criminalisation as problematic because it also shuts down any possibility of legitimate criticism towards different forms of humanitarianism. Lastly, I think that it was quite shocking for those of us who followed the evolution of the institutional attacks on the NGOs doing search and rescue at sea to see how, in a matter of weeks, the smear campaign against them went from a minoritarian discourse emerging from far-right movements to become the main official position of the EU, of the Italian interior ministry, the Italian prosecutor, etc.¹⁴ In terms of how to create change, I was struck how quickly that could happen, and there is something to learn perhaps there – in reverse.

KA: I think that governments in Europe and beyond have been very resourceful in creating a narrative that trapped us. They managed to attract the conservative media and populist movements, so criminalisation was underpinned by smear campaigns, the raising of administrative barriers, putting in place of legal procedures that are costly and lengthy, using the police, the military and local conservative forces to harass people. Even the word 'criminalisation' puts us on the defensive. It is very necessary to move now on to the offensive. We have to move beyond navigating and manoeuvring within the framework that they have constructed, set our focus beyond just responding to criminalisation and legal prosecution.

Vicky Canning, Open University: I want to make a point about co-option of international and national organisations and the localised implications of that in

relation to trafficking. I work with different women's organisations in the North-West of England and have seen how 'best intention issues' arise when concerns about sexual trafficking get filtered through a neo-colonialist, racist framework about how cultures work in relation to trafficking or other issues like female genital mutilation. Women's groups are specifically targeted and I have seen just how problematic it is for those who experience the kinds of support, where people's details are taken and shared with the Home Office, which is sold to them as in their 'best interest'. I have also interviewed border control officers in Sweden and Denmark, and I know that their priority is simply to find traffickers. So they use these women to find the trafficking rings, but the women are not supported while they are in the country, and eventually returned. What I am concerned about is how to get local groups, which are the ones giving immediate assistance, to understand the issue of co-option.

FW: This issue of co-option by the state has been with us for a long time. We had it in relation to the UK's biggest children's charity, Barnardo's, which ended up running, alongside G4S a 'prettier prison', again with the best of intentions, colluding in the detention of children at Cedars immigration detention centre in West Sussex. Yes, this is very problematic. But I would like to draw out further the discussion around co-option and divide and rule and ask Kosta and Lorenzo to comment on the Italian Code of Conduct which sought to bring NGOs under the control of the Italian and Libyan coastguards. How was that used, or was it used, and was it successful in dividing the 'respectable' organisations from the 'non-respectable' ones? And, also could they comment on the significance of the alternative voluntary code of conduct drawn up by NGOs and launched in the European parliament in March?

KA: First, all MSF actions were in co-operation with the Italian maritime research centre, which co-ordinates all search and rescue activities in the Mediterranean Sea. However, the Italian authorities then wanted to make all NGOs sign an agreement stipulating how they should organise operations in the Mediterranean. At the start it was not clear whether this was a legal document. But what was clear was that this Code of Conduct was introduced as a deliberate attempt to challenge our principles by inserting certain clauses that crossed the lines of the NGOs that run the search and rescue operations. We have some values that define our identity: we have to be independent, we have to be neutral, we have to be impartial and our actions have to be based on humanitarianism and solidarity. So in the proposed Code they dictated, for instance, that we should have military and police escorts on board. This obviously directly undermined our independence and neutrality. We would be responsible for all the (criminal) activities on board, and we would be responsible for handing over all these people directly to the police. This was something that we could not agree to.

Let me give you another example. It is fundamental to sea rescue operations and the law of the sea that you can move passengers in international waters from one vessel to another. But the Code of Conduct said you could not do that. What that would mean is that if you, say, save 600 people, you would put them on board, but then instead of transferring them to another vessel that could return them to the port and allow you to continue your search and rescue operations, you would have to continue to the port, put all these people ashore, and then come back and continue the operation. That would mean you would have to travel three weeks to go back to the port, and three weeks to go back to the sea. That would give you one and a half months with no people [rescued] in the water. So this is another thing that we could not agree to.

While we and other NGOs were debating and meeting amongst ourselves and with the authorities, momentous things were happening in the background. There were the migration agreements with countries like Libya, Chad, Gambia and Niger.¹⁵ They were militarising the borders, the EU was establishing border controls in zones further and further, beyond Libya. And all the time, the number of migrants and refugees getting to Europe was dropping. Only around 10 per cent of all search and rescue missions in the Mediterranean were carried out by NGOs, with 90 per cent affected by the Italian authorities and the state. And in the end, because of the Code of Conduct, some NGOs decided to stop their activities altogether, while others, like MSF, decided to reduce activities in response to the significant drop in the number of arrivals. But the stance taken by the authorities was instrumental in forcing out some of the small NGOs, as it was very difficult for those operating with a small number of people and small boats to continue their humanitarian activities.

LP: I was in Italy while the Code of Conduct was being discussed and what was quite extraordinary was how, every time it was mentioned in any newspaper or TV report, or by the Italian interior ministry, it was as though the lack of such an agreement was the single most important security threat. For several weeks it was the main focus of political discussion and yet, all of a sudden, after August it disappeared completely off the radar. In fact, whether the NGOs signed or did not sign, no longer mattered because, through the Code and other means, they had effectively been kicked out. And now the EU has provided the Libyan coastguard – whose activities in any other context would be called piracy – with the means and the legitimacy to operate as they please in international waters. NGOs doing search and rescue at sea have been held under threat and told to leave international waters, they have been shot at. In an extraordinary rapid evolution, freedom of navigation, one of the basic tenets of our capitalist world, has been undermined. In this, the Code of Conduct was simply one instrument within a larger campaign to kick out NGOs and strengthen the Libyan coastguard so as to stop the arrival of migrants.

Sam Berkson, Plan C: Just listening to everything that has been said, I was thinking about criminalising solidarity, and within that, what is solidarity and who is it with. It seems to be that when people are setting up soup kitchens, or providing shelters, or giving people lifts, it's about communalising resources, and building those autonomous structures where we can run our own things. When the state steps back, people have to create their own situations and in the process, because of what it is that we are expressing solidarity with, we break down racialised hierarchies. Now all of those things seem to be incredibly powerful and it seems to me that the reason that these acts of solidarity are being criminalised, is precisely because they are powerful. Liz reminded us that when the migration was made visible in 2015, there was an incredible outpouring of solidarity that put the rightwing media and the Right in general on the back foot. I remember *The Sun*, of all newspapers, briefly, had a 'help the refugees' campaign on its front page, turning it into a story of how one photograph of Alan Kurdi, the 3-year-old Syrian-Kurdish boy whose body was washed ashore on the Turkish beach changed everything, by so doing aggrandising the role of the media – which syndicated the photograph around the world.

Nevertheless, solidarity is a very powerful thing. And what, or who, is the solidarity with? It's with migration. The most powerful movement against borders is people who cross them illegally. The best expression of 'no borders' politics, is people who just cross them, the migrants themselves.

Ida Sprengers, student: The discussion has mainly focused on the NGOs and the criminalisation of their work, so my first question is, when individuals are criminalised, is there any difference in the approach? I also wanted to ask Kosta if he could expand on the point he made about MSF's efforts to change the narrative from legality to legitimacy.

LF: In terms of the first question, if you look at the forty-five cases of individual prosecution, it seems that the law is mis-used to set an example, but the example differs in terms of the individual prosecuted. You have people like Lizbeth Zornig Andersen in Denmark, who was a former children's ombudsman. She was a very well-known public figure and she had access to the media and she was proving very influential in the public debate about refugees. What was interesting was that in terms of punishment, hers was one of the most severe cases we documented as, on conviction, she received a very hefty fine which was actually increased on appeal. But in other cases, like that of Felix Croft and Cedric Herrou, for instance, the law was used against people connected to autonomous solidarity movements – and the example being set was aimed against them. As our report shows, the range of people prosecuted under the law is diverse, but for the most part it has been against 'ordinary people'. But the more severe punishments were ranged against those who were politically articulate about the refugee crisis.

FW: In the case of Cedric Herrou, and the solidarity group *Roya Citoyenne*, I think there was a relationship between the way they were treated and how they have been politicised precisely because of the authorities' reaction. I mean Cedric Herrou was an olive farmer. Without doubt he is now the most surveyed olive farmer in the whole of France! The more he was arrested for giving lifts to people across this incredibly dangerous border, from the Italian side to the French side, where fourteen people have died just trying to walk that road over the past year, the more he reacted by digging in his heels and saying 'well, I'm going to carry on doing this'. And then the next time he gets a more severe punishment, to make an example of him.

I would add to that that during the consultation process that the EU held with NGOs and civil society about whether or not to amend the Facilitators Package, over 90 per cent of those consulted wanted the Facilitation Package to be amended to exempt humanitarian assistance. But the Commission decided to just ignore that. That also is an indication of the strength of feeling across Europe, and we must channel that anger. In terms of the discussion about legality versus legitimacy, if you turn it round, what the EU is attempting to do, in terms of these directives, may be legal, as they define the law, but it is certainly not legitimate.

KA: In terms of the difference between legality and legitimacy, at MSF we embarked on a process to consider lessons learnt. And we asked ourselves to what extent, when we provide humanitarian assistance, can we defend our actions? We can defend our actions in terms of legality – if our actions are legal – and we can defend our actions if they are legitimate. I'm not talking about going beyond the law, we can respect the law, but what is also important is to ask who puts the law in place and for what purpose? For example, what we see now is that the state is going against laws already in place. The 1951 Refugee Convention is there, but they don't respect it, despite it being a law. Instead, they put in place *ad hoc* policies, administrative barriers and measures that are not in fact legal. We should defend our actions against legitimate authority, but also ask, is there a legitimate actor in place to hold accountable those who do not respond to the needs of those who migrate and refugees? If states don't do that, then it falls on us, never going against the law, but using the law to do something that the states are failing to do.

Tony Bunyan, Statewatch: What is very noticeable is the way the EU bypasses democracy. When you look at the key events, such as the dodgy deal with Turkey, there is a challenge in the court of justice, and there's a very real chance that it will be embarrassed by the accusations made against it. Then there is the EU/Afghanistan deal, and also what they are now calling 'standard operating procedures' in agreements with Bangladesh and Gambia. It is not clear whether members of the European Parliament are aware of what is going on with these agreements, as they are 'restricted documents'. It's the same issue with Libya. Power resides with the EU External Action Service (i.e., EU diplomats) and the

Security Committee (security services), which examine all matters regarding the protection of classified information. It is they who are determining policy in Libya. None of those issues have gone through the European Parliament, not a single one of them. So there's a real danger if we inadvertently legitimise a kind of pretence of democratic accountability.

SMcM: One thing I have noticed from the report, from my research and this really interesting discussion, is that criminalisation of solidarity happens in certain times and places, while not in others, and it's important to consider why. So in 2015, the public was in support of search and rescues missions, what changed in 2017? This was also the year, in Italy, when long-established squats for migrants and refugees were destroyed and people were put out on the street. This year I have spent several months in Southern Mexico, a place where there hasn't been a criminalisation of solidarity, looking at the migrant shelters which exist to support people entering Mexico on the way to the United States. I asked workers and volunteers at the migrant shelters, given the massive investment here of border security, do you have a problem with the police or border guards and they all said no, the police would never come in this shelter, partly because they are legally protected, but also because it is a very strongly organised network, with some powerful national figures who are very vocal in the public debate. Perhaps there is something here we could learn from.

LP: The second half of 2015, what has been referred to as the 'long summer of migration', was just two years ago. And I think it is very important to keep this alive in our memory and our practice, to try to think about what we can do to bring back that beautiful moment of solidarity. We need to understand the wave of criminalisation we have seen also as a reaction to the position of power that refugee solidarity movements managed to take when they somehow became mass movements, with a lot of people who were less politicised and not part of already existing movements for migrants' rights deciding to intervene and do something. This offers a very different narrative to that of the state, and it poses the question, what needs to be done to regain the upper-hand in the struggle with power?

Acknowledgements

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References

- 1 Institute of Race Relations, *Humanitarianism: the unacceptable face of solidarity* (London: Institute of Race Relations, 2017).
- 2 The British withdrawal coincided with the end of the Italian naval search and rescue operation, Mare Nostrum, which had involved the rescue of 100,000 shipwrecked migrants and refugees in a year, and its replacement with Operation Triton, based on border surveillance, the deployment of fewer vessels, further away from the Libyan coast and led by the EU's border agency Frontex.

- 3 In May 2015, EU defence and foreign ministers agreed the military mission, EUNAVFOR MED, to destroy boats used by 'people smugglers' in the Mediterranean.
- 4 The term 'hostile environment', which has now been absorbed into French and British policing practices, was first used by Theresa May, when she was home secretary. In the years before the 2014 Immigration Act, she promised to create a hostile environment for undocumented migrants and established a 'hostile environment working group' to devise measures to force them out of the country. See Anya Edmond-Pettitt, 'Territorial policing and the "hostile environment" in Calais: from policy to practice', Special Edition (Minorities, Crime and (In) Justice, *Justice, Power and Resistance: Journal of the European Group for the Study of Deviance and Social Control*, forthcoming, June/July 2018.
- 5 On 18 March 2016, the EU struck a deal with Turkey whereby, in exchange for 3 billion Euros and other incentives, Turkey would assist the EU by closing down the eastern Mediterranean route for migrants to Greece. The EU-Turkey deal allowed for the deportation of all migrants considered not to need international protection and brought in the 'one-in, one-out' solution for Syrian refugees (for each Syrian returned to Turkey, one would be selected for resettlement from Turkey's refugee camps).
- 6 The EU-Libya Memorandum of Understanding is aimed at 'combat[ing] illegal immigration, human trafficking and contraband and ... reinforcing the border security between the Libya State and the Italian Republic'.
- 7 See Amnesty International, 'Libya's dark web of collusion: abuses against Europe-bound refugees and migrants', Index: MDE 19/7561/500.
- 8 Both AI and Human Rights Watch have documented the abuse which exists in DCIM sites which are under the control of militias and armed groups that use them as money-making ventures with no clear distinction between DCIM detention centres and criminal enterprises.
- 9 The Sicilian public prosecutors have launched a number of investigations against SAR NGOs which they accuse of assisting smugglers, either directly or indirectly, and an Italian parliamentary inquiry was launched. In July 2017, an Italian Code of Conduct for NGO search and rescue missions, backed by the European Commission, came into force with the Italian interior ministry suggesting that all those organisations not participating in the scheme would be outside 'the organised system of sea rescue' and would face 'all the consequences'. Four NGOs – MSF, Sea Watch, Jugend Rettet and SOS Méditerranée refused to sign it. The next day, shortly after docking at Lampedusa, *Iuventa*, the ship of Jugend Rettet, was seized on the orders of the prosecutor, who accuses the NGO of co-operating with traffickers. On 15 August, Save the Children, Sea Eye and MSF suspended sea rescue missions in the southern Mediterranean following repeated clashes with Libyan coastguard vessels at the edge of Libyan waters.
- 10 The 2002 EU legislation comprising a Directive and a Framework Decision which commits member states to criminalise help for illegal entry, transit or stay in the EU, lies at the heart of what Frances Webber describes as the 'legal ambiguity' of EU law which, in failing to make clear distinctions between smuggling and humanitarian action, allows member states to criminalise humanitarians.
- 11 Frontex is the European Border and Coast Guard Agency which has played a central role in constructing the 'pull-factor' narrative, with its director, Fabrice Leggeri, claiming in an interview with *DieWelt* that NGOs were encouraging trafficking. In a 2007 Frontex report, NGOs' work was described as tantamount to 'providing a taxi-service to Europe'.
- 12 In 2012, the European Court of Human Rights ruled in a case brought by eleven Somalis and thirteen Eritreans, *Hirsi Jamaa and others v Italy* (Application 27765/09) that Italian naval 'push-back' operations, which intercepted migrant boats in the Maltese search and rescue area of responsibility and returned passengers to Libya, handing them over to the authorities without ascertaining whether any of those on board intended to claim international protection as refugees, were unlawful. The migrants were subject to collective expulsion, the court held, which is unlawful in itself, and their rights to protection from torture and inhuman and

degrading treatment were breached by returning them to Libya, where they risked inhuman treatment and arbitrary expulsion to their home countries without the right to claim asylum.

- 13 LIBE Committee, 'Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', European parliament, 2016.
- 14 The Alternative Right Génération Identitaire formed a campaign to 'defend Europe' from migrants and refugees and to disrupt the work of SAR NGOs in the Mediterranean, chartering the 422-tonne vessel the *C-Star* to shadow and harass rescue boats launched by humanitarians.
- 15 See Frances Webber, 'Europe's unknown war', *Race & Class* 59, no. 1 (July–September 2017).