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## Rights and obligations of NGOs assisting refugees and migrants in Europe

### Report<sup>1</sup>

Committee on Migration, Refugees and Displaced Persons

Rapporteur: Mr Domagoj Hajduković, Croatia, Socialists, Democrats and Greens Group (SOC)

### Summary

*Many non-governmental organisations (NGOs) are assisting refugees and migrants in Europe and globally, in particular through humanitarian assistance in refugee camps or other accommodation for migrants, medical and psychological support, educational services, or legal assistance and translation services before administrations and courts. They are also increasingly assisting in rescues at sea in the Mediterranean. Without the efforts of thousands of volunteers working in NGOs, member States would not be able to meet their commitments regarding refugees and migrants or their daily humanitarian need.*

*Nevertheless, attacks on NGOs and their donors have taken the form of physical violence, legal obstacles, prosecutions – including of NGOs assisting boat migrants at sea, political accusations or even racist attacks. The legislation and practice of member States must comply with Council of Europe standards. Member States should neither discriminate against foreign NGOs providing humanitarian assistance to refugees and migrants on their territory, nor should they restrict foreign funding of humanitarian work by domestic NGOs. NGOs on their side must comply with requirements such as respect for national laws and transparency.*

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<sup>1</sup> Reference to Committee: Doc. 14380, reference 4331 of 13.10.2017.

## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly pays tribute to the enormous and tireless efforts of so many non-governmental organisations (NGOs) which are assisting refugees and migrants in Europe and globally. Depending on voluntary donations or working as contractual partners of the United Nations, the European Union (EU) or member states, those NGOs accomplish extremely valuable humanitarian work. Without the efforts of thousands of volunteers working in NGOs, member States would not be able to meet either their legal commitments regarding refugees and migrants or their daily humanitarian needs.
2. Many NGOs provide specialised forms of assistance to migrants and refugees, in particular humanitarian assistance in refugee camps or other accommodation for migrants, medical and psychological support, educational services, or legal assistance and translation services before administrations and courts. Some assist in finding and reuniting family members of refugees. Others help migrants who are victims of violence, human trafficking and crime. Their neutrality and humanitarian competence enable them in some cases to work in conflict situations, following the historical example of the International Red Cross and Red Crescent Movement. In addition, NGOs have an important role in raising awareness about the situation of refugees and migrants, including human rights violations.
3. Many NGOs assist refugees and migrants, but there are also good examples of how refugees participate actively in their work and even create NGOs themselves. This allows to better take account of the specific needs of persons concerned and can ensure that humanitarian assistance effectively reaches beneficiaries. Within NGOs, refugees can also overcome language barriers and cultural differences. The Assembly encourages NGOs and donors to include refugees and migrants in the implementation of their humanitarian work and its monitoring.
4. The Assembly strongly condemns attacks on NGOs and their donors, which have taken the form of physical violence, legal obstacles, political accusations or even racist attacks. Respecting the rights and freedoms of NGOs is imperative to upholding fully functioning democratic societies. At the same time, governments or political organisations should not use NGOs as vehicles for extending their sphere of influence through political agitation.
5. Recalling Article 11 of the European Convention on Human Rights, the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS N° 124) and Recommendation CM/Rec(2007)14 of the Committee of Ministers on the legal status of non-governmental organisations in Europe, the Assembly is deeply concerned by reports about politically motivated and undue restrictions on the work of NGOs assisting refugees and migrants.
6. The legislation and practice of member States must comply with Council of Europe standards and member States concerned should also implement the respective opinions by the Venice Commission in this field.
7. Member States should neither discriminate against foreign NGOs providing humanitarian assistance to refugees and migrants on their territory, nor should they restrict foreign funding of humanitarian work by domestic NGOs. In this regard, humanitarian donations and action should not be taxed by national fiscal authorities.
8. Being such pivotal civil society actors, NGOs on their side must comply with requirements such as respect for national laws and transparency. They should be incorporated and ensure clarity about their objectives, staff, funding, use of financial resources and action. Lack of transparency, political agitation, religious or philosophical proselytising or commercial lobbying by NGOs assisting refugees and migrants would undermine public trust in them.
9. The Assembly welcomes the substantial financing of NGOs assisting migrants and refugees by the European Union. In the current context it invites member States which are EU members to continue their budgetary contributions during and after the Covid-19 pandemic. Oversight of the appropriate use of such funds should be pursued by the EU Court of Auditors and the EU Anti-Fraud Office (OLAF).
10. Because NGOs can be vehicles for illegal activities, such as the smuggling or human trafficking of migrants, money-laundering or aiding terrorism, they must take all precautions to ensure that they do not

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<sup>2</sup> Draft resolution adopted by the Committee on 7 September 2020.

become parties unintentionally to such criminal activities. In line with the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime (Palermo, 2000), member States should not criminalise the transport of migrants across borders on purely humanitarian grounds. European history has a multitude of heroic examples of humanitarian smuggling of refugees fleeing various dictatorships or ethnic cleansing.

11. Recalling Resolution 2229 (2018) “International obligations of Council of Europe member States to protect life at sea”, the Assembly emphasises that NGOs should be allowed to carry out search and rescue activities in international waters and disembark rescued persons at the nearest safe port, in accordance with international maritime law. National border guards can set up rules or codes of conduct for the cooperation of NGOs in official search and rescue operations within national territorial waters. In the current context of the Covid 19 pandemic and its aftermath the Assembly recalls that the “safety” of a port is also determined by local health risks. Nevertheless, the specific health problems of people rescued at sea require more expedient disembarkation and medical treatment.

## **B. Draft recommendation<sup>3</sup>**

1. Recalling its Resolution .... (2020) on rights and obligations of NGOs assisting refugees and migrants in Europe, the Parliamentary Assembly emphasises the importance of NGOs for member States in assisting refugees and migrants.
2. Referring to the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS N° 124) and Recommendation CM/Rec(2007)14 of the Committee of Ministers on the legal status of non-governmental organisations in Europe, the Assembly recommends that the Committee of Ministers prepare common standards for facilitating the international work of NGOs providing humanitarian assistance for migrants, refugees and displaced persons. Particular attention should be given to facilitating:
  - 2.1. the establishment of local field offices,
  - 2.2. entry visas and residence permits for staff members,
  - 2.3. the transport and distribution of humanitarian goods,
  - 2.4. the provision of humanitarian services by staff members,
  - 2.5. the recognition of professional qualifications of staff members, such as medical qualifications,
  - 2.6. international bank transfers of funds for humanitarian action,
  - 2.7. tax privileges for international and national donations and their humanitarian use.
3. Referring to the Charter on the Rights and Responsibilities of Volunteers of the European Youth Forum, the Assembly recommends that the Committee of Ministers develop legally binding standards for volunteers, with due regard to the European Social Charter.

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<sup>3</sup> Draft recommendation adopted unanimously by the Committee on 7 September 2020.

## C. Explanatory memorandum by the rapporteur, Mr Domagoj Hajduković

### 1. Introduction

1. This report was initiated by a motion for a resolution (Doc. 14380) on “Defining guidelines for international NGOs”, tabled by Ms Deborah Bergamini and others following the prosecution of foreign non-governmental organisations (NGOs) in Italy for allegedly aiding illegal immigration by rescuing migrants in the Mediterranean Sea and bringing them to Italian ports. Prosecutors in Greece, Malta, Spain and other countries also started investigations against NGOs in their respective jurisdictions. These prosecutions caused wide criticism<sup>4</sup> and a public debate about what NGOs are permitted to do and how boat migrants should be rescued in the Mediterranean Sea.

2. The Committee on Migration, Refugees and Displaced Persons decided to change the title of the report to “Rights and obligations of NGOs assisting refugees and migrants in Europe”, in order to clarify that this work would not attempt to regulate all NGOs, but rather focus on those which assist refugees and migrants in Europe. The rights and obligations of NGOs assisting boat refugees and migrants are addressed in a separate chapter of this report.

3. The Parliamentary Assembly specifically addressed the need to rescue boat migrants in distress at sea in Resolution 1872 (2012) “Lives lost in the Mediterranean Sea: Who is responsible?”, Resolution 1999 (2014) “The ‘left-to-die boat’: actions and reactions”, and Resolution 2229 (2018) “International obligations of Council of Europe member States to protect life at sea”. This report will not duplicate that work. Instead, it shall provide further guidance for member States as well as NGOs, who run the risk of criminal liability because of their activities for the benefit of migrants and refugees. It is important to recognise the huge value of the humanitarian assistance provided by NGOs to refugees and migrants every day.

4. The political controversies over rescuing refugees and migrants in the Mediterranean Sea have not lost their topicality. While prosecutions of NGOs operating rescue ships often ended before domestic courts, the European Court of Human Rights could clarify the obligations of member States regarding migrants on board of rescue ships in the case of *Rackete and Others v. Italy* (application no. 32969/19), which did not include an obligation to open ports for disembarkation.<sup>5</sup> With the outbreak of the coronavirus and the Covid 19 pandemic in Cyprus, France, Greece, Italy, Malta and Spain in spring 2020, those countries declared health emergencies and closed their ports for foreign vessels including migrant boats, making the work of private migrant rescue ships very difficult.<sup>6</sup>

5. The committee held hearings with Mr Ruben Neugebauer, co-founder of the German NGO Sea Watch, Mr András Léderer from the Hungarian Helsinki Committee and with the President of Doctors of the World, Dr Philippe de Botton. I very much regret that an exchange of views was finally not possible with Ms Magdalena Majkowska-Tomkin, Division Director for the Migration and Inclusion Unit and Mr Yervand Shirinyan, Deputy Director of the Open Society Human Rights Initiative, who had offered to address the committee. Therefore, I am grateful for the written contribution by Mr Manos Moschopoulos, Senior Programme Officer for the Protection and Rights of Migrants with the Open Society Foundations (OSF) in Berlin. OSF is the most prominent NGO donating globally huge amounts to other NGOs active on migration and asylum issues.<sup>7</sup>

### 2. How to define NGOs

#### 2.1. NGOs are not a homogeneous category

6. As my predecessor as rapporteur, Ms Daphné Dumery, stated in her introductory memorandum, NGOs or civil society organisations are important in serving public interests, but they are not a standardised category. Culturally and historically there have been different approaches, ranging from the individualistic Anglo-American “do-it-yourself” approach vis-à-vis public authorities, to the absolutist control over the population through “mass organisations” in communist and fascist regimes. Those historical differences seem to influence some thinking still today.

7. This report focuses on NGOs which assist refugees and migrants in a broad sense. However, many NGOs have several objectives or purposes. Some are also active in politics and sometimes cooperate with

<sup>4</sup> <https://www.migpolgroup.com/wp-content/uploads/2019/07/Signatories-Joint-Statement-2.pdf>.

<sup>5</sup> <http://hudoc.echr.coe.int/eng-press?i=003-6443361-8477507>.

<sup>6</sup> <https://www.dw.com/en/coronavirus-crisis-hampering-mediterranean-migrant-rescues/a-53168399>.

<sup>7</sup> <https://www.opensocietyfoundations.org/voices/topics/migration-and-asylum>.

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political parties or private lobbying. Besides purely humanitarian objectives, NGOs can also have political, religious, scientific, professional or any other objectives.

8. Just as political views diverge on migration issues, NGOs set up by political parties and movements try to promote their opposing views and action. In this context, for example, the Heinrich Böll Foundation of the Green Party of Germany works to help migrants and refugees and published in 2018 the report *Germany – Land of Immigration*.<sup>8</sup> On the other side of the political spectrum, right-wing political activists created an NGO which bought in 2017 a rescue vessel to stop boat migrants leaving Libya.<sup>9</sup>

9. The International Catholic Migration Commission is a registered non-profit organisation founded in 1951 and seated in Geneva.<sup>10</sup> International Orthodox Christian Charities is an NGO seated in the USA and assists refugees since 1992 in Belgrade, 1994 in the Caucasus, 2003 in Syria and 2015 in Greece.<sup>11</sup> Turkey's Religious Affairs Directorate (Diyanet) Foundation provides aid to displaced persons in Syria<sup>12</sup> and to Rohingya in Bangladesh.<sup>13</sup> The NGO Islamic Relief USA provided financial assistance to Palestinians in the Gaza Strip and, together with the USA-based NGO Hebrew Immigrant Aid Society, humanitarian aid to migrants in Greece.<sup>14</sup>

10. The President of the Protestant Church Council in Germany decided in 2019 to finance an NGO ship for rescuing boat migrants in the Mediterranean Sea.<sup>15</sup> Approximately 20 000 Armenian Orthodox Christian refugees from Syria were assisted by the Austrian Red Cross in 2018 to receive Armenian citizenship and settle in Armenia through a project funded with € 300 000 from an Armenian Diaspora NGO and € 3 million under the European Union Trust Fund.<sup>16</sup>

11. NGOs may be created and funded by wealthy individuals, on whom they depend financially and who can determine their action.<sup>17</sup> In addition, we find mixed forms such as “quasi-autonomous non-governmental organisations” or quangos which are private but have been initiated by state officials, receive public funds or fulfil public tasks. Under Greek law, for example, unaccompanied child refugees have the right to have a legal guardian. NGOs with their staff are thus hired by Greek authorities as legal guardians of unaccompanied child refugees, such as the Greek NGO METAdrasi which created a guardianship network in 2014.<sup>18</sup>

## **2.2. NGOs as institutional partners**

12. Independent civil society organisations have become important stakeholders in international cooperation. For international organisations, civil society organisations are strategic partners in the implementation of policies and practical action, especially in countries where government and the public sector fail to respect standards of human rights due to lack of democratic control, corruption or inefficiency.

13. Our committee had the opportunity to hear several NGOs during exchanges of views, for the preparation of this report, but also for other reports as well as in the context of campaigns, seminars and conferences. The Conference of INGOs of the Council of Europe is the Council of Europe body which institutionalises regular cooperation with the NGOs which are its members and engages in regular dialogue with the Parliamentary Assembly. During the preparation of this report, an exchange of views was held notably with Ms Anna Rurka, president of the Conference.

14. The EU depends very much on private institutions and NGOs for the operation of EU-funded projects. From 2014-2017, the European Commission committed an estimated € 11.3 billion for projects implemented

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<sup>8</sup> <https://www.boell.de/en/2018/12/18/germany-land-immigration>.

<sup>9</sup> <https://time.com/4896962/anti-immigration-ship-rescue-ngo-boat/>.

<sup>10</sup> <https://www.icmc.net/>.

<sup>11</sup> <https://ioccc.org/how-we-serve/assistance-refugees>.

<sup>12</sup> <http://dinhizmetleri.diyamet.gov.tr/Documents/FKB-ZDB%20Faaliyet%20Raporu.pdf>.

<sup>13</sup> <https://www.aa.com.tr/en/asia-pacific/covid-19-turkish-diyamet-foundation-helps-rohingya-1790647>.

<sup>14</sup> <https://www.hias.org/blog/hias-islamic-relief-usa-partner-protect-refugees-greece>.

<sup>15</sup> <https://www.dw.com/en/germanys-protestant-church-to-send-rescue-ship-to-mediterranean/a-50407182>.

<sup>16</sup> [https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eutf\\_madad\\_action\\_document\\_armenia-v2.pdf](https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eutf_madad_action_document_armenia-v2.pdf).

<sup>17</sup> For example, George Soros has donated US-\$ 32 billion to his foundations since 1984,

<https://www.opensocietyfoundations.org/george-soros>;

Chatham House published research in 2016 on NGOs funded by wealthy Russian citizens,

<https://www.chathamhouse.org/sites/default/files/publications/research/2016-04-14-agents-russian-world-lutsevych.pdf>.

<sup>18</sup> <https://metadrasi.org/en/campaigns/guardianship-of-unaccompanied-minors/>. The committee heard Ms Lora Pappa, Founder, President and CEO, METAdrasi on 30 January 2020 in Strasbourg on guardianship law and practice in Greece.

by NGOs.<sup>19</sup> The Asylum, Migration and Integration Fund of the European Commission will provide € 21.5 million for projects to support the integration of third-country nationals from 2020.<sup>20</sup> Other sectors of the European Commission address the situation and legitimacy of NGOs working with migrants, for instance in a recent study entitled “Crackdown on NGOs and volunteers helping refugees and other migrants”,<sup>21</sup> which is relevant for this report and was funded under the EU Horizon 2020 Research and Innovation Programme’s budget of € 30 billion for the years 2018-2020.<sup>22</sup>

15. EU funding to NGOs assisting migrants has faced questions about the appropriate use of such funds, for instance in a parliamentary question of 24 January 2020 by Ms Elissavet Vozemberg-Vrionidi (MEP from Greece, EPP) to the EU Commission.<sup>23</sup> The European Anti-Fraud Office (OLAF) of the EU Commission concluded in February 2020 an investigation into the use of EU funds by an NGO for Syrian refugees and found that nearly € 1.5 million of a project of € 19 million were misappropriated.<sup>24</sup> The EU Court of Auditors called for more transparency and scrutiny of NGO funding in 2018.<sup>25</sup>

16. On the other hand, NGOs also helped to shed light on irregularities in action for migrants by government officials. For instance, the Greek NGO Solidarity Now called in 2017 for investigations into the misuse of EU funds for refugees in Greece which apparently had not benefitted those refugees.<sup>26</sup> NGOs also reacted to cases of sexual exploitation of displaced persons by NGO staff, such as the European Confederation of Relief and Development NGOs (CONCORD) in its statement in February 2018.<sup>27</sup>

### **2.3. Activities related to both policies and practise**

17. Since 1994 the European NGO Platform on Asylum and Migration (EPAM) serves as a forum for NGOs seeking to contribute to the development of asylum and migration policy in the European Union. It has 29 members and four observers.<sup>28</sup> EPAM meetings are co-chaired by the Churches’ Commission for Migrants in Europe (CCME) and UNHCR, and its working groups on asylum and migration are chaired respectively by the European Council on Refugees and Exiles (ECRE) and the Migration Policy Group (MPG) in Brussels. ECRE has 104 member NGOs, and MPG describes itself as a “think-and-do-tank” which qualifies for research funds by the EU.

18. Many NGOs consider themselves “human rights defenders”, a term widely used in international law and politics, which refers to UN General Assembly Resolution 53/144 of 1999 containing the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.<sup>29</sup>

19. In the light of all these considerations, the term NGO is used in this report in order to describe non-governmental organisations as well as private organisations linked to civil society groups, religious communities, political parties or other interest groups in the field of migration. While it is virtually impossible to categorise and distinguish them, most of these NGOs are typically tax-exempted non-profit organisations or charities, whose action and budget are to some extent monitored by tax authorities of member States.

## **3. Fundamental rights of NGOs**

20. Under Article 11 of the European Convention on Human Rights and Article 22 of the International Covenant on Civil and Political Rights, everyone has the right to freedom of association which allows NGOs to

<sup>19</sup> <http://publications.europa.eu/webpub/eca/special-reports/ngo-35-2018/en>

<sup>20</sup> <https://ec.europa.eu/migrant-integration/news/european-commission-makes-215-million-available-through-asylum-migration-and-integration-fund>.

<sup>21</sup> [https://www.migpolgroup.com/wp-content/uploads/2019/06/Final-Synthetic-Report-Crackdown-on-NGOs-and-volunteers-helping-refugees-and-other-migrants\\_1.pdf](https://www.migpolgroup.com/wp-content/uploads/2019/06/Final-Synthetic-Report-Crackdown-on-NGOs-and-volunteers-helping-refugees-and-other-migrants_1.pdf).

<sup>22</sup> <https://ec.europa.eu/programmes/horizon2020/en/news/commission-invest-%E2%82%AC11-billion-new-solutions-societal-challenges-and-drive-innovation-led>.

<sup>23</sup> [https://www.europarl.europa.eu/doceo/document/P-9-2020-000402\\_EN.html](https://www.europarl.europa.eu/doceo/document/P-9-2020-000402_EN.html).

<sup>24</sup> [https://ec.europa.eu/anti-fraud/media-corner/news/07-02-2020/olaf-concludes-investigation-activities-ngo-providing-emergency\\_en](https://ec.europa.eu/anti-fraud/media-corner/news/07-02-2020/olaf-concludes-investigation-activities-ngo-providing-emergency_en).

<sup>25</sup> <https://www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=11402>.

<sup>26</sup> <https://www.solidaritynow.org/en/petition/>.

<sup>27</sup> <https://concordeurope.org/blog/2018/02/13/reaction-sexual-exploitation-abuse-ngo-staff/>.

<sup>28</sup> <http://www.ngo-platform-asylum-migration.eu/about-epam/members/>.

<sup>29</sup> <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>.

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be created. Under the case-law of the European Court of Human Rights, the margin for restriction of this right is very limited.<sup>30</sup>

21. The European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations (ETS N° 124) stipulates that the legal personality and capacity of an NGO shall be recognised in other member States, if that NGO has “a non-profit-making aim of international utility” and unless its activity “contravenes national security, public safety, or is detrimental to the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others, or jeopardises relations with another State or the maintenance of international peace and security”. The purpose of this convention is to enable NGOs to act as a legal person in another State and, for instance, sign contracts, acquire rights, hold bank accounts or appear as a party before a court. An international NGO can hence enjoy human rights and freedoms in the country of its headquarters as well as abroad.

22. NGOs have the possibility to appear as a party in legal proceedings before the European Court of Human Rights, but also to be heard as an expert witness or to make submission concerning a case or the implementation of a judgment by the Court.<sup>31</sup> NGOs may also assist refugees and migrants in bringing their cases to the European Committee of Social Rights of the Council of Europe’s European Social Charter, which also contains rights that are relevant for refugees and migrants.<sup>32</sup>

23. In its Resolution 22/6 of March 2013 entitled “Protecting human rights defenders”, the UN Human Rights Council called on UN member States to ensure that no law should criminalise or delegitimise activities in defence of human rights on account of the origin of funding thereto. The Parliamentary Assembly addressed human rights defenders in its Resolutions 1660 (2009) and 1891 (2012) on the situation of human rights defenders in Council of Europe member states, Resolution 2095 (2016) on strengthening the role and protection of human rights defenders in Council of Europe member States, and Resolution 2225 (2018) on protecting human rights defenders in Council of Europe member States.

24. The Expert Council on NGO Law of the Conference of INGOs of the Council of Europe prepared Guidelines on Protecting NGO Work in Support of Refugees and Other Migrants.<sup>33</sup> I very much welcome these Guidelines and invite member States to take them into account.

#### 4. General obligations of NGOs

25. Recommendation CM/Rec(2007)14 of the Committee of Ministers on the legal status of non-governmental organisations in Europe<sup>34</sup> prescribes in great detail the requirements for NGOs to have a legal status or legal personality, which aims for transparency of NGOs and clarity of their rights and obligations. Paragraph 45 of this recommendation stipulates that foreign NGOs can be required to obtain approval to operate in the host country, unless the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations applies.

26. The European Commission for Democracy through Law of the Council of Europe (Venice Commission) adopted a number of opinions on national legislation targeting foreign NGOs or NGOs which receive funds from abroad.<sup>35</sup>

27. The Conference of INGOs of the Council of Europe set up an Expert Council on NGO Law, which published in November 2018 a report by Mr Dragan Golubović examining international standards relating to

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<sup>30</sup> [https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf).

<sup>31</sup> <https://www.coe.int/en/web/execution/submissions>.

<sup>32</sup> <https://journals.openedition.org/remi/pdf/7894>.

<sup>33</sup> <https://rm.coe.int/expert-council-conf-exp-2020-3-guidelines-on-protecting-ngo-work-in-su/16809e4a81>.

<sup>34</sup> <https://rm.coe.int/16807096b7>.

<sup>35</sup> See for example, Opinion 814/2015 on federal law no. 129-fz on amending certain legislative acts (Federal law on undesirable activities of foreign and international non-governmental organisations) of the Russian Federation, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)020-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)020-e);

Opinion 889/2017 on the Hungarian Draft Law on the Transparency of Organisations Receiving Support from Abroad, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e);

Opinion 919/2018 on the Provisions of the so-called “Stop Soros” draft Legislative Package which directly affect NGOs in Hungary, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)013-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e);

Opinion 941/2018 on Section 253 on the special immigration tax of Act XLI of 20 July 2018 amending certain tax laws and other related laws and on the immigration tax of Hungary, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)035-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)035-e).

the permissible scope of reporting and disclosure requirements for NGOs.<sup>36</sup> The Expert Council published its Review of developments in standards, mechanisms and case law related to NGOs – 2017-2019,<sup>37</sup> which was presented to the committee by its author Mr Jeremy McBride on 29 January 2020.

28. The Parliamentary Assembly adopted [Resolution 2096 \(2016\)](#) “How can inappropriate restrictions on NGO activities in Europe be prevented?” and [Resolution 2226 \(2018\)](#) on new restrictions on NGO activities in Council of Europe member States. A new report is currently being prepared by the Committee on Legal Affairs and Human Rights on restrictions on NGO activities in Council of Europe member States.

29. NGOs typically have a tax-exempted non-profit status as a charity.<sup>38</sup> This normally includes the obligation to abstain from commercial activities. Nevertheless, Recommendation CM/Rec(2007)14 of the Committee of Ministers on the legal status of non-governmental organisations in Europe stipulates that “NGOs should be free to engage in any lawful economic, business or commercial activities in order to support their not-for-profit activities”. Such profit-oriented activities fall under tax obligations.

30. In February 2019 the Federal Fiscal Court of Germany decided that the NGO “ATTAC” did not qualify for tax exemption under German law, because it pursued political campaigning instead of public interest work such as public education.<sup>39</sup> As taxation is a national competence of member States, including within the EU, this decision of the highest fiscal court in Germany may have implications for similar decisions by national tax authorities in other member States. NGOs assisting migrants and refugees might, for instance, be obliged to distinguish in their tax declarations between their expenses for political advocacy and those for humanitarian assistance.

31. NGOs must comply with tax obligations like anybody else. By granting tax privileges to NGOs, their work is de facto supported by member States, corresponding to applicable income tax rates of up to nearly 60% in a few countries in Europe.<sup>40</sup> It is important to recall that tax law must not be used as a tool to restrict unduly the activities of NGOs, in particular if such restrictions are politically motivated and discriminatory.

32. Many international organisations and NGOs work extensively with volunteers.<sup>41</sup> The EU Commission looked at policy frameworks for volunteer work in 2011.<sup>42</sup> However, most volunteers do not have an employment contract and generally receive no remuneration. These volunteers are often exposed to high risks for their health and their safety, be it in refugee camps or rescue vessels.

33. In 2012, the European Youth Forum produced a Charter on the Rights and Responsibilities of Volunteers, which stipulates that every volunteer has the right to social protection during their volunteering activity, in the form of health care and liability insurance. In addition, all volunteers have the right to reconcile their volunteering activity with their private and working life and are entitled to refuse tasks that would go against their beliefs and/or convictions.<sup>43</sup> In addition, health and social protection should also continue after volunteering, when burn-out and depression can happen.<sup>44</sup>

## 5. Criminal liability of NGOs

34. As NGOs have legal personality, they and their members can in principle be held liable for any violation of the law, including criminal law. In addition, individuals working for an NGO can be held liable for any violation of the law committed by them in the framework of that NGO.

35. In 2000 the United Nations General Assembly adopted the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organised Crime. Article 3 of this protocol defines smuggling of migrants as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national

<sup>36</sup> <https://rm.coe.int/expert-council-conf-exp-2018-3-review-ngo-reporting-requirements/16808f2237>.

<sup>37</sup> <https://rm.coe.int/expert-council-conf-exp-2020-1-ngos-developments-in-standards-mechanis/16809ccd3a>.

<sup>38</sup> <https://www.wsj.com/articles/george-soross-18-billion-tax-shelter-1511465095>.

<sup>39</sup> [http://www.xinhuanet.com/english/2019-02/27/c\\_137852764.htm](http://www.xinhuanet.com/english/2019-02/27/c_137852764.htm).

<sup>40</sup> <https://taxfoundation.org/top-individual-income-tax-rates-europe-2019/>.

<sup>41</sup> <https://unv-swvr2018.org/>.

<sup>42</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/citizenship-programme/docs/eyv\\_2011\\_alliance\\_pave.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/citizenship-programme/docs/eyv_2011_alliance_pave.pdf).

<sup>43</sup> <https://www.youthforum.org/charter-rights-and-responsibilities-volunteers>.

<sup>44</sup> <https://www.theguardian.com/global-development-professionals-network/2017/jul/11/volunteer-burnout-i-was-overwhelmed-by-the-images-in-my-mind>.

or a permanent resident.” Its Article 6 requires States to punish by law the smuggling of migrants, the producing and providing fraudulent travel or identity documents for the purpose of smuggling of migrants, and the enabling of illegal residence. Smuggling of migrants without financial or other material benefit would not therefore qualify as a criminal offence under the protocol, but the definition of “other material benefit” may leave States a margin of discretion.

36. Whereas national criminal laws may vary considerably,<sup>45</sup> common standards were set for EU member States under EU Directive 2002/90/EC on defining the facilitation of unauthorised entry, transit and residence as well as under Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. EU law makes a criminal offence of “assisting a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of laws of the State concerned on the entry or transit of aliens”, but “allows Member States to exempt from liability those cases of facilitating illegal entry that were committed for humanitarian purposes.”

37. The UN Office on Drugs and Crime estimated that approximately 370 000 migrants were smuggled into the EU in 2016, paying smugglers between US-\$ 320 million and 550 million.<sup>46</sup> When hundreds of thousands of migrants arrived in the EU in 2016, legal scholars argued that smuggling prohibition must be more narrowly drafted in order to avoid the criminalisation of “humanitarian smugglers”.<sup>47</sup> The Platform for International Cooperation on Undocumented Migrants (PICUM) has published a research study on the subject, describing “The Effects of EU’s Anti-Smuggling Policies on Civil Society Actors” from 2016 – 2017.<sup>48</sup>

38. The European Parliament also commissioned a study on whether EU law would unduly criminalise humanitarian assistance to irregular migrants<sup>49</sup> and adopted its Resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised.<sup>50</sup> In 2018 the Fundamental Rights Agency of the EU published a note on “Fundamental rights considerations: NGO ships involved in search and rescue in the Mediterranean and criminal investigations”.<sup>51</sup> The Expert Council on NGO Law of the Council of Europe INGO Conference published in December its report by Ms Carla Ferstman entitled “Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe member States”.<sup>52</sup>

39. Human rights defenders have criticised prosecution and criminal penalties against NGOs which assist refugees and migrants.<sup>53</sup> Mr Salam Kamal-Aldeen, an Iraqi-Moldavian citizen living in Denmark, who founded, and worked in Greece with, the NGO Team Humanity Denmark helping boat migrants, filed in April 2019 an application against Greece before the European Court of Human Rights.<sup>54</sup>

40. At the same time, NGOs can be used as a front for money laundering and even for terrorist financing, as described in a report prepared for the Council of Europe in 2013.<sup>55</sup> The OECD prepared in 2008 a study on Abuse of Charities for Money-Laundering and Tax Evasion.<sup>56</sup>

41. While an NGO could be used as an umbrella for collecting and transferring money from migrants, its creation and registration necessarily exposes such NGO to scrutiny by public authorities and therefore poses additional risks for criminals. As statistics are not available, it is difficult to measure the size of such abuses, but it seems reasonable to assume that they are limited to very few cases in relation to migrants and refugees.

42. However, numerous NGOs have been created to provide migrants and refugees with humanitarian aid, medical support, legal assistance and other help. Without them, national authorities would be overwhelmed and incapable of taking the necessary care of migrants and refugees in their country. It is therefore important not to discredit this work of NGOs by putting them under a general suspicion of doing illegal activities.

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<sup>45</sup> See the overview produced in the Toolkit to Combat Smuggling of Migrants, UNODC, Vienna, 2010, [https://www.un.org/ruleoflaw/files/SOM\\_Toolkit\\_E-book\\_english\\_Combined.pdf](https://www.un.org/ruleoflaw/files/SOM_Toolkit_E-book_english_Combined.pdf).

<sup>46</sup> [https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM\\_2018\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_web_small.pdf).

<sup>47</sup> <https://www.rsc.ox.ac.uk/publications/the-humanitarian-smuggling-of-refugees-criminal-offence-or-moral-obligation>.

<sup>48</sup> [http://picum.org/Documents/Others/ESCR\\_Project\\_Main\\_Findings\\_Report.pdf](http://picum.org/Documents/Others/ESCR_Project_Main_Findings_Report.pdf).

<sup>49</sup> [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL\\_STU\(2018\)608838\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf).

<sup>50</sup> [http://www.europarl.europa.eu/doceo/document/TA-8-2018-0314\\_EN.html](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0314_EN.html).

<sup>51</sup> <https://fra.europa.eu/en/node/27683>.

<sup>52</sup> <https://rm.coe.int/expert-council-conf-exp-2019-1-criminal-law-ngo-restrictions-migration/1680996969>.

<sup>53</sup> <https://www.fidh.org/en/issues/human-rights-defenders/greece-ongoing-crackdown-on-civil-society-providing-humanitarian>.

<sup>54</sup> <https://www.glanlaw.org/single-post/2019/04/18/Case-filed-against-Greece-in-Strasbourg-Court-over-Crackdown-on-Humanitarian-Organisations>.

<sup>55</sup> <https://rm.coe.int/the-risks-to-non-profit-organisations-of-abuse-of-migrant-terrorist-financin/16807828e5>.

<sup>56</sup> <https://www.oecd.org/tax/exchange-of-tax-information/42232037.pdf>.

## 6. NGOs rescuing migrants at sea

43. The number of boat migrants in the Mediterranean Sea continuously decreased since 2015 and as did the number of dead or missing migrants crossing the Mediterranean Sea.<sup>57</sup> Nevertheless, NGOs remain essential for rescuing boats in distress, although they often face a number of difficulties.

44. The Fundamental Rights Agency of the EU published an overview of NGO ships involved in search and rescue in the Mediterranean and criminal investigations from 2015 to 2018<sup>58</sup> and up-dated these figures until June 2019.<sup>59</sup> Twelve NGOs have been operating vessels and one airplane in the Mediterranean Sea, all of which have been subject to legal actions or stopped their activity due to legal pressure. The reason for their prosecutions is generally the fact that they brought migrants to EU member States, instead of bringing them back to Libya or another country along the southern Mediterranean shore.

45. Mr Ruben Neugebauer, Spokesperson and co-founder of the NGO Sea Watch in Berlin, informed the Committee on Migration, Refugees and Displaced Persons in Strasbourg in June 2018, that Sea Watch had originally been created as a political NGO for observing the EU's external action regarding migrants, not for rescuing migrants from the Mediterranean. Otherwise, it would have been called "sea rescue". However, the current situation had compelled them to rescue migrants and transport them to safe ports in Italy, Malta or Spain. Sea Watch operated the Sea Watch 3 vessel and an airplane which flew along the Libyan coast to detect migrant boats not equipped for the high seas or already in distress. The airplane, which had been funded by a donation of € 200 000 from the Protestant Church in Germany, was finally prohibited by the Maltese authorities from flying into the airspace over the Libyan coast.

46. The chief prosecutor for the Italian port city of Catania stated in April 2017 that he had evidence that NGOs were directly working with human smugglers to bring migrants into Italy.<sup>60</sup> This statement was finally withdrawn before the defence committee of the Italian Senate in May 2017.<sup>61</sup>

47. In 2017, Italy drew up a code of conduct for NGOs undertaking activities in migrants' rescue operations at sea.<sup>62</sup> NGOs not signing, or complying with, this code would be excluded from rescue operations by Italy. Some NGOs refused signing the code and criticised it, because it recognised the search and rescue activities of the Libyan coast guard.<sup>63</sup> Instead, a voluntary code of conduct for search and rescue operations was drawn up by NGOs<sup>64</sup> and legal arguments were voiced against the Italian code.<sup>65</sup>

48. NGOs can carry out search and rescue activities in international waters and disembark rescued persons at the nearest safe port, in accordance with international maritime law. Nevertheless, NGOs should coordinate their work with search and rescue operations being carried out by the authorities.

49. The European Commission and Frontex approved the Italian code.<sup>66</sup> In his reply to a question from the European Parliament, Commissioner Avramopoulos replied on behalf of the European Commission on 16 January 2018, that the European Commission supported strengthening coordination of all actors involved in SAR activities, within the respect of applicable international law, and believed that more effective coordination in this field was instrumental to prevent loss of life at sea, but the European Commission did not plan to adopt any 'European code of conduct' under 'a Community procedure'.<sup>67</sup>

50. This action by Italy and the European Commission was criticised in 2017 by Mr Felipe González Morales, Special Rapporteur of the UN Human Rights Council on the human rights of migrants and Mr Nils

<sup>57</sup> <https://data2.unhcr.org/en/situations/mediterranean>.

<sup>58</sup> [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-ngos-sar-mediterranean\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-ngos-sar-mediterranean_en.pdf).

<sup>59</sup> <https://fra.europa.eu/en/publication/2019/2019-update-ngos-sar-activities>.

<sup>60</sup> <https://www.dw.com/en/italy-prosecutor-claims-ngos-working-with-human-smugglers/a-38554753>.

<sup>61</sup> <https://www.reuters.com/article/us-europe-migrants-italy-ngo/italy-prosecutor-investigating-ngo-rescuers-says-has-no-proof-of-wrongdoing-idUSKBN17Z260>.

<sup>62</sup> <https://www.avvenire.it/c/attualita/Documents/Codice%20ONG%20migranti%2028%20luglio%202017%20EN.pdf>.

<sup>63</sup> <https://www.theguardian.com/world/2017/jul/31/aid-groups-snub-italian-code-conduct-mediterranean-rescues>.

<sup>64</sup> <https://www.humanrightsatsea.org/wp-content/uploads/2017/03/20170302-NGO-Code-of-Conduct-FINAL-SECURED.pdf>.

<sup>65</sup> [https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper\\_Final\\_EN.pdf](https://www.asgi.it/wp-content/uploads/2017/07/Draft-ASGI-Position-Paper_Final_EN.pdf).

<sup>66</sup> [http://www.ansa.it/english/news/politics/2017/07/17/italys-migrant-ngo-code-of-conduct-ok\\_6255c72b-281e-4f18-9acd-fc1c9a95a575.html](http://www.ansa.it/english/news/politics/2017/07/17/italys-migrant-ngo-code-of-conduct-ok_6255c72b-281e-4f18-9acd-fc1c9a95a575.html).

<sup>67</sup> [http://www.europarl.europa.eu/doceo/document/E-8-2017-005646-ASW\\_EN.html](http://www.europarl.europa.eu/doceo/document/E-8-2017-005646-ASW_EN.html).

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Melzer, Special Rapporteur of the UN Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, who jointly stated that this action threatened life and breached international standards by condemning people to face further human rights violations in Libya.<sup>68</sup> Ms Agnès Callamard, Special Rapporteur of the UN Human Rights Council on extrajudicial, summary or arbitrary executions also criticised: “Through this new code of conduct, Italy and the European Commission are imposing procedures that could reduce the ability of NGOs to carry out life-saving activities. This could lead to more deaths at sea, and the resulting loss of lives, being foreseeable and preventable, would constitute a violation of Italy’s human rights obligations.”<sup>69</sup>

51. In August 2017, the vessel *Iuventa* operated by the German NGO *Jugend Rettet* (youth rescues)<sup>70</sup> was impounded in the Italian port of Trapani for assisting illegal immigration and collusion with human smugglers, a decision upheld by the supreme court of Italy in April 2018.<sup>71</sup> At the same time, the crew of *Iuventa* received a human rights award of € 50 000 from the Paul Grüninger Foundation in Switzerland in recognition of their life-saving work.<sup>72</sup>

52. In 2019, civil society activists tried to initiate action by the Prosecutor of the International Criminal Court implicating the European Union and member States’ officials and agents in crimes against humanity due to their migration policies in the Central Mediterranean and Libya since 2014.<sup>73</sup>

53. In the case of *Hirsi Jamaa and Others v. Italy*,<sup>74</sup> the European Court of Human Rights found a violation of Article 3 of the European Convention on Human Rights, noting that migrants in Libya in 2009 could not apply for asylum and were systematically arrested and detained under inhuman conditions. On 29 January 2019, the Court granted an interim measure concerning the vessel *Sea Watch 3* with 47 migrants on board anchored outside of Syracuse, Sicily in Italian waters, but did not grant the applicants’ requests to be disembarked. It requested the Italian Government “to take all necessary measures, as soon as possible, to provide all the applicants with adequate medical care, food, water and basic supplies as necessary. As far as 15 unaccompanied minors were concerned, the Government was requested to provide adequate legal assistance (e.g. legal guardianship).”<sup>75</sup>

54. However, the miserable situation of migrants on board of an NGO vessel for a longer period of time and uncertainty must be avoided. The code of conduct by Italy and the one drafted by some NGOs referred to above do not seem fundamentally contradictory, given that the UN Protocol against the Smuggling of Migrants by Land, Sea and Air as well as EU Directive 2002/90/EC allow exemption from liability those cases of facilitating illegal entry that were committed for humanitarian purposes. Only illegal smugglers would not qualify for such a humanitarian exception.

55. Due to the Covid 19 pandemic, Mediterranean ports have been closed for foreign vessels, as have been land borders for foreign persons. The rescue ship *Alan Kurdi* of the German NGO *Sea Eye* was unable to enter Italian ports after having rescued boat migrants leaving from Libya. Those migrants have subsequently been transferred onto a larger Italian vessel and remain under quarantine, waiting for a decision on their destination.<sup>76</sup> Another NGO stopped its rescue ship due to the pandemic.<sup>77</sup> I welcome the statement by the Commissioner for Human Rights of the Council of Europe, Ms Dunja Mijatovic, who said that even during the coronavirus crisis, member States should ensure rescue at sea and allow safe disembarkation.<sup>78</sup>

## 7. Conclusions

<sup>68</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21978&LangID=E>.

<sup>69</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21971&LangID=E>.

<sup>70</sup> <https://jugendrettet.org/en/>.

<sup>71</sup> <https://www.aljazeera.com/news/2018/04/italian-court-rules-iuventa-rescue-vessel-remain-impounded-180424115151621.html>.

<sup>72</sup> <https://solidarity-at-sea.org/2019/05/24/iuventa-crew-receives-human-rights-award/>.

<sup>73</sup> <https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>.

<sup>74</sup> <http://hudoc.echr.coe.int/eng/?i=001-109231>.

<sup>75</sup> [https://www.echr.coe.int/Documents/CP\\_Italy\\_ENG.pdf](https://www.echr.coe.int/Documents/CP_Italy_ENG.pdf).

<sup>76</sup> <https://www.bbc.com/news/world-europe-52263969>.

<sup>77</sup> [https://www.francetvinfo.fr/sante/maladie/coronavirus/coronavirus-medecins-sans-frontieres-arrete-ses-operations-de-sauvetage-en-mer-avec-sos-mediterranee\\_3920993.html](https://www.francetvinfo.fr/sante/maladie/coronavirus/coronavirus-medecins-sans-frontieres-arrete-ses-operations-de-sauvetage-en-mer-avec-sos-mediterranee_3920993.html).

<sup>78</sup> <https://www.coe.int/en/web/portal/-/during-virus-crisis-states-should-ensure-rescue-at-sea-and-allow-safe-disembarkation>.

56. NGOs are vital partners for member States in coping with the arrival of migrants and refugees as well as their integration. Without such voluntary action, virtually all States would be overwhelmed. It is therefore important to recognise the valuable contribution of NGOs assisting refugees and migrants.

57. Member States should respect the rights of foreign NGOs. NGOs are free to receive funds, also from abroad, but should be transparent about their funding and work. Council of Europe standards should be respected by member States.

58. Humanitarian aid should be tax exempted as well as the humanitarian work by NGOs. This is particularly evident where humanitarian aid is financed by donations from abroad and serve a country which should not impose tax on such funds. Humanitarian assistance can be distinguished from commercial activities or political advocacy of NGOs.

59. While NGOs may be held liable, for instance when migrants suffer through their actions, it is inadmissible to promote general suspicion against NGOs of colluding with human traffickers and smugglers. At the same time, NGOs must not overstep legal boundaries due to their desire to help migrants arrive in safety in Europe. They should be aware of often cruel and illegal actions by smugglers and cooperate in bringing them to justice.

60. Political parties and politicians should avoid exacerbating national controversies and divisions in society about migrants and the role of NGOs. Migrants and NGOs cannot be used as scapegoats for societal problems and as a diversion from other political shortcomings. Europe must recognise the humanitarian needs of migrants and the humanitarian work of NGOs in this field.

61. NGOs are particularly essential in assisting migrants and refugees arriving in front-line states, and thus in assisting also front-line states. The Covid 19 pandemic is an obstacle to the disembarkment of boat refugees, in addition to the lack of any progress regarding European policies on how to share the burden of front-line states. Given the possibly long duration of the Covid 19 pandemic, NGOs must be able to rescue boat migrants in distress at sea, who are only a small number compared to the number of irregular migrants entering European states and who can be registered and identified as well as medically tested upon disembarkment.