

Response to the proposal by the European Commission for a Directive to update the Facilitators Package

UN Special Rapporteur on the situation of human rights defenders

February 2024

Support for people defending the human rights of migrants, refugees and asylum seekers has been a priority for me since I took up my mandate as Special Rapporteur. During my first term, from May 2020 to June 2023, together with colleagues I addressed 43 formal communications on the subject to States, and the topic was the focus of my [2022 report](#) to the UN General Assembly.

This work covered cases and trends from all regions, yet repression of migrants' rights defenders in Europe and EU Member States in particular has been a constant area of concern, with defenders facing retaliation and restrictions in a number of Member States, including [Italy](#), [Greece](#), [Poland](#), [Cyprus](#) and [Latvia](#).

This push-back against defenders is extremely worrying. EU Member States are among the strongest supporters of human rights defenders (HRDs) and the UN Declaration on Human Rights Defenders, and the EU is founded on principles of equality, justice, solidarity and respect for human rights. Attacks against defenders within the EU severely undermine this.

The large majority of cases of retaliation against these HRDs in the EU involve the criminalisation of solidarity. These are situations in which people, including migrants themselves, are prosecuted for action they have taken either as part of a group or simply upon witnessing injustice to support migrants in need or whose rights are at risk of being violated.

The retaliation defenders face in these instances involves both the initiation of criminal investigations and proceedings against them, and the deliberate, systematic conflation of their work with criminal activity through public discourse and leaks in the media.

The laws most frequently used to criminalise defenders in these cases stem from the EU's 'Facilitators Package', the legal framework adopted by the EU in 2002 to define the criminal offence of facilitating unauthorised entry, transit or residence in the EU.¹ While seeking to address people smuggling, the legislation has been the subject of consistent and fierce criticism for its impact on fundamental rights and human rights defenders, notably stemming from its failure to align with international standards on the definition of people smuggling.²

A reform of the EU legal framework governing the area has been long overdue, given the clear and persistent misuse of anti-smuggling legislation by Member States to criminalise solidarity with migrants, as well as migration itself. As such, the European Commission's move to reform the EU's legal framework in the area, made concrete through its publication of a proposal for a Directive on 28 November 2023, is very welcome.³

1 Research by the organisation PICUM indicates that 171 people acting in solidarity with migrants were charged with facilitation of illegal entry, transit or stay in the EU between 2015-2019, with cases coming from 13 Member States. See: <https://picum.org/blog/over-100-people-criminalised-for-helping-migrants-in-the-eu-in-2022/>

2 See, for example, 'The EU Approach on Migration in the Mediterranean' (2021), commissioned at the request of the LIBE Committee, pp. 96 – 98; and European Parliament, motion for Resolution on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018)

3 Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA, available at: <https://eur-lex.europa.eu/legal->

If agreed by the co-legislators, the Directive will replace the 'Facilitators Package' and provide a new legal touchstone for EU Member States, ushering in new legislation on people smuggling across the bloc.

Yet while the proposal by the Commission represents advances in some respects, when the potential impact on human rights defenders is considered it provides significant grounds for concern.

What follows are my main concerns as regard the Commission's proposal, as well as specific recommendations for improvements to the text. I am calling on the EU Parliament and Member States to take them on board to ensure that the opportunity to address the primary legislation leading to the criminalisation of human rights defenders in the EU is not missed.

It should be noted that all of these concerns are amplified by the failure of the Commission to publish an impact assessment to accompany its proposal - a shocking omission given the potential impact of the proposed legislation on fundamental rights protected under EU and international law.

Summary of Recommendations		
Recommendation	Relevant Articles	Impact
Inclusion of a mandatory humanitarian exception excluding acts of solidarity aimed at seeing the human rights of migrants upheld from the scope of the crime of people smuggling	Article 3.1	Preventing the criminalisation of human rights defenders Creating an enabling environment for HRDs in the EU Coherence with EU policy on human rights defenders
Removal of the new offence of 'public instigation' or at a minimum a greatly improved definition of its constitutive elements, including the inclusion of a profit motive	Article 3.2	Reducing the risk that the legislation will be misused against human rights defenders Reducing risk of deterring people from sharing information on fundamental rights with migrants, including refugees and asylum seekers
Removal of the mandate for “special investigative tools” and the introduction of clear safeguards against abuse of investigative tools in the legal text, in line with article 17 and 19 of the ICCPR	Article 16	Reduce the risk of the repeating previous misuse of covert surveillance against human rights defenders in the EU Ensure conformity of investigations with international and EU protections on the rights to privacy and freedom of expression

Issue 1: The failure to clearly legislate to prevent the criminalisation of solidarity with migrants, refugees and asylum seekers

While the Commission states in the recitals to its proposal that the objective of the Directive is not to criminalise migrants for being smuggled, nor humanitarian assistance or support for the fulfillment of basic human needs⁴, they fail to include a clear legal obligation to ensure that such criminalisation will not occur.

This appears to be a regression even on the flawed approach to the same issue in the original legislation, with the 2002 Directive which this proposal seeks to update including in Article 1.2 an optional clause mandating Member States not to impose sanctions where the aim of the action in question was to provide humanitarian assistance.⁵

As was raised with the Commission in their consultations in advance of the proposal⁶, the optional character of the humanitarian clause in the original legislation opened the door for the criminalisation of support to migrants aimed at seeing their fundamental rights upheld. Indeed, the Commission issued guidance in an attempt to address this problem in 2020, at which time only 8 Member States had included humanitarian clauses in their legislation transposing the 2002 Directive.⁷

This risk of criminalisation was compounded by the EU's failure to align the 2002 Directive with international standards on the definition of people smuggling, notably the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, by failing to include a profit motive as one of the constitutive elements of the criminal offence.

In the explanatory note and recitals to its current proposal, the Commission states that the legislation will bring EU law in line with international standards.⁸ And while it does this in part, by introducing a material or profit motive as an element of the offence of smuggling in article 3, the same article simultaneously omits a profit motive from the requirements for an action to be deemed criminal where there is a high likelihood of causing serious harm to a person.⁹

This does not align with the UN Protocol against the Smuggling of Migrants, which only includes such a risk of serious harm as an aggravating circumstance of the offence of people smuggling¹⁰, which it defines as: “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.¹¹

This divergence from international standards risks the misapplication of the legislation against human rights defenders working in high risk situations, such as when they are involved in search and rescue missions at sea - situations in which human rights defenders are already frequently being criminalised in the EU, as documented by the EU's own Fundamental Rights Agency.¹²

4 Ibid., p. 3 and Recital 7 (p. 16)

5 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, Article 1.2 (p. 23)

6 Proposal for a Directive, p. 9

7 Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence (2020/C 323/01), p.

8 Proposal for a Directive, p. 2, 3, 5 and Recital 4 (p. 16)

9 Ibid., Article 3.1(b) (p. 23)

10 UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, Article 6.3 (p. 4)

11 Ibid. Article 3(a)

12 See <https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities?page=4#read-online>

Given this, while the inclusion of financial or material benefit as a vital element of the crime of smuggling in the Commission's proposal is positive, there remains a serious risk that the criminalisation of people for solidarity with migrants will continue unless a clear, mandatory humanitarian clause is included.

When questioned on the absence of such a clause during a session of the European Parliament's LIBE Committee, the EU Commissioner for Home Affairs stated that its inclusion was unnecessary given that EU Member States are already under an international obligation not to criminalise such assistance.¹³ This, however, overlooks the fact that Member States have consistently flouted these obligations in practice, and have done so with impunity.

As such, I am calling for the amendment of article 3 of the proposed Directive to oblige Member States to explicitly exclude acts of solidarity aimed at upholding the human rights of migrants from the scope of the behaviour criminalised under the proposal, in line with the UN Declaration on Human Rights Defenders.

Issue 2: The potential for the newly created offence of 'public instigation' to be used against human rights defenders

Through its proposal, the Commission seeks to codify a new criminal offence of 'public instigation' of illegal entry, transit or stay in the EU.¹⁴ In its explanatory note, it implies that the creation of such a criminal offence is necessary to discourage the working methods of people smugglers.¹⁵ It further states that providing “objective information or advice to third-country nationals on the conditions for the legal entry and stay in the Union, and on international protection, should not be understood as public instigation.”¹⁶

Given the absence of a clear and mandatory clause to prevent the criminalisation of solidarity with migrants, as well as existing patterns of criminalisation of human rights defenders in EU Member States, there is a serious risk that the proposed novel offence of 'public instigation' will be used to criminalise human rights defenders and deter people and groups from sharing information concerning migration to the EU.

Unfortunately, the weakness of the language included in the recitals on this subject, including through the use of the undefined term “objective information or advice”, does little to dissuade my concerns in this regard. This is particularly so when cases in which defenders in the EU have already been criminalised for sharing information with migrants are borne in mind.¹⁷ Of further concern is the failure of the legislation to include any profit motive as a constituent element of the proposed crime.

Given that very little information is provided by the Commission to justify the inclusion of this new criminal offence, I am calling for its removal, or at a minimum a greatly improved definition of its constitutive elements, including a profit motive, combined with the mandatory humanitarian clause called for above.

Issue 3: The mandating of special investigative tools

13 See https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-civil-liberties-justice-and-home-affairs_20240123-0900-COMMITTEE-LIBE from 12.38.06

14 Proposal for a Directive, Article 3.2

15 Ibid., Recital 6 (p. 16)

16 Ibid

17 See, for example, the details of the case brought against HRDs Tommy Olsen and Panayote Dimitras in Greece: <https://srdefenders.org/greece-criminal-investigations-opened-against-human-rights-defenders-panayote-dimitras-tommy-olsen-madi-williamson-and-ruhi-akhtar-joint-communication/>

In Article 16 of its proposal, the Commission mandates Member States to use all “effective and proportionate” investigative tools to ensure instances of people smuggling can be investigated and prosecuted.

The Commission makes clear that these tools “shall include special investigative tools, such as those which are used in countering organised crime or other serious crime cases”, where appropriate.¹⁸

This follows Recital 24, which includes “the interception of communications” and “covert surveillance including electronic surveillance” as examples of such investigative tools.¹⁹

While the Recitals to the proposal also state that these tools should be applied in line with the Charter of Fundamental Rights of the European Union, and that the right to personal data should be respected²⁰, no such checks are included in the legal text. This is a major omission which creates serious concerns about the potential unintended consequences of article 16.

Covert surveillance has already been misused to target migrants' rights defenders in the EU – a severe violation of their rights to privacy and freedom of expression - with these measures being deployed as part of mass surveillance techniques adopted from the fight against organised crime in some Member States. Examples include the cases of surveillance of human rights defenders from the Iuventa crew in Italy²¹, or of Italian journalists covering migration and humanitarian actors²².

These examples also highlight that special investigative tools are already being used in EU Member States with the stated objective of countering people smuggling, raising questions about the necessity of Article 16 given the existing investigative powers of Member States.

As such, I am calling for the removal of the mandate for “special investigative tools” included in article 16, along with the introduction of clear, mandatory safeguards in the article to ensure investigative tools will only be used in complete conformity with international law.

In particular, I call for these safeguards to protect the rights to privacy and freedom of expression guaranteed in articles 17 and 19 of the International Covenant on Civil and Political Rights (ICCPR), incorporating the three essential tests of legality, necessity and proportionality, and legitimacy, necessary for any restriction of these rights.²³

18 Ibid., Article 16 (p. 29)

19 Ibid., Recital 24 (p. 19)

20 Ibid

21 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25526>

22 See <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26512>

23 See Human Rights Committee, General Comment No. 34 (2011) (CCPR/C/GC/34), paras 22-36