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Criminalising Search and Rescue Operations in the Mediterranean

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MATILDE VENTRELLA, JUN 10 2017

The Frontex Risk Analysis 2017 Report

Frontex has recently reported that Non-Governmental Organisations' (NGOs) involvement in search and rescue operations (SAR) in the Central Mediterranean has increased since 2016.^[1] Frontex has emphasised that their involvement in 2015 amounted to less than 5%, whilst in 2016, their participation to SAR increased up to 40%. According to Frontex, NGOs have intercepted or rescued vessels 'without any prior distress call and without official information as to the rescue location'. Furthermore, it has been reported that NGOs have doubled compared to 2015 their activities undertaken occasionally close to the 12 miles Libyan territorial waters and as a result the number of incidents in that area has increased significantly. The Frontex's report highlighted as SAR missions close to 12 mile Libyan territorial waters have the unintended consequences to 'act as a pull factor that compounds the difficulties inherent in border control and saving lives at sea'. According to Frontex, NGOs' activities in the Central Mediterranean unintentionally help smuggling networks to achieve their aims at a minimum cost and encourage migrants and refugees to travel by the support of criminal organisations as they are aware that they will be provided with humanitarian assistance. Frontex's report highlights that the more active NGOs are, the more significant the implications on border surveillance and SAR activities.

The Report emphasised that the Western Mediterranean route was closed because of strict border surveillance, return operations and cooperation between law enforcement authorities of countries of origin and departure.^[2] It concluded that the same result can only be achieved by addressing the root causes of migration and refugee movement and targeted policies in African countries of origin and transit particularly Libya to provide safer and lawful routes to refugees and reduce migration towards the EU.

Frontex's report highlighted two important facts. Firstly, NGOs' search and rescue operations do not cause a surge in the activities of smugglers networks intentionally. Secondly, long term policies on root causes of migration and refugee movement can only reduce irregular migration and facilitate the arrival of refugees through safer and legal routes. The Report did not state that NGOs are connected with criminal organisations.

Investigations and Campaigns against NGOs to Increase Security on Borders

Following the publication of the Frontex Annual Report, the Public Prosecution Office of Catania (Italy) opened an investigation on NGOs as there was an indication that some of them handle a very large amount of money of unknown origin. Therefore, in cooperation with the Italian Navy and Frontex, the Public Prosecution Office of Catania started to monitor the NGOs which benefited from large amounts of money. The Public Prosecutor of Catania affirmed that it is necessary to wiretap conversations between boat drivers as it seems that when they are intercepted by military boats, they throw their satellite phones in the sea. Instead, when they are intercepted by civilian boats, the satellites phones are given to third parties and used to make other telephone calls. However, at the moment of writing this article, investigations have not revealed connections between NGOs and smuggling networks. The public prosecutor of Catania has clearly stated that he has no evidence that NGOs are connected to people smuggling. The Public Prosecutor of Siracusa has confirmed that they do not have any information or evidence of

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connections between criminal networks and NGOs. The Public Prosecutor of Siracusa only noted that some NGOs cooperate more in investigations compared to others. The Public Prosecutor believes that lack of cooperation can be attributed more to their ideological beliefs rather than to involvement in criminal activities in cooperation with smuggling networks. Unfortunately, investigations opened by the Public Prosecutor in Catania have fed the populist propaganda against migration. One of the leaders of the populist political party 5 Stars Movement, has accused NGOs of being involved with the criminal activities committed by smugglers and of having transported criminals. Other populist political parties have attacked NGOs in Italy without any evidence as at the moment investigations have not found out that NGOs cooperate with criminal networks in smuggling migrants and refugees to Europe.

On the basis of lack of evidence, it can be affirmed that these attacks are unjustified. The EU should adopt legislation on the NGOs' position in relation to humanitarian assistance to migrants and refugees in distress at sea and on the kind of their contribution in rescuing people in the sea and in the fight against human trafficking. If the position is not clarified by law, NGOs will be vulnerable to unjustified attacks which have already targeted them in the past.

At the moment, there is only the EU Facilitation Directive adopted in 2002^[3] which includes only one provision concerning humanitarian organisations such as NGOs. Article 1(2) states that Member States may decide not to punish those who provide humanitarian assistance to the migrant trying to enter the territory of EU Member States irregularly. This provision has been applied restrictively by Member States and the result is that some humanitarian organisations have been prosecuted unfairly because they provided humanitarian assistance to smuggled migrants.^[4] It has also been reported that in some Member States, civil society organisations fear they may be sanctioned because of the support they provide to irregular migrants.^[5] On the same report, members of humanitarian organisations have also denounced that in some Member States, police do not allow them to give assistance to irregular migrants. The Commission is planning to amend the Facilitation Directive 'to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress'. Nevertheless at the moment, not only are humanitarian organisations not facilitated in their search and rescue operations by adequate EU policy and law, but they are also at risk of being criminalised. There is too much emphasis on the securitisation of borders. As a result, there are campaigns against NGOs, human trafficking is neglected and victims are not protected as the law requires.

EU Priority Policies

The EU policy is concentrated on reinforcing border security but despite their focus on this priority, the arrival of irregular migrants is increasing rather than diminishing. The International Organisation of Migration (IOM) has reported in their last update that by May 2017, 61,512 migrants would have arrived in Europe and 1,530 are dead or missing. Despite this situation, the EU is continuing to prioritise the security of Member States rather than the protection of migrants. The consequence of this approach is that migrants are continuing to travel by the support of criminal organisations as 'current restrictive immigration and asylum policy measures have had scant deterrent effect'. In 2014, it was estimated that 80% of migrants were supported in their journeys by criminal organisations. In 2016, a report published by Europol showed that more than 90% of migrants who leave their countries of origin irregularly are facilitated by smuggler networks. Hence, smuggling networks are becoming stronger and are able to control the irregular routes and security measures are not deterring migrants to rely on smugglers. Once migrants embark in their dangerous journey by sea, NGOs simply respect the law of the sea by searching and rescuing distressed migrants. A solution in order to prevent the criminalisation of NGOs rescuing migrants, could be to introduce a narrower definition of smuggling of migrants stating that although humanitarian organisations cannot be exempted from criminal prosecution if they are not fulfilling the legal obligation to rescue migrants in the sea, they cannot be 'construed as blameworthy smugglers warranting criminalisation'. If there are NGOs supporting criminal organisations, they should be investigated, otherwise NGOs' activities should be supported not only because they can contribute to the reduction of the migrant death toll, but also because they can contribute to identify and protect victims of human trafficking who, at the moment, are being neglected by EU Member States.

There are humanitarian organisations such as the IOM which can provide groups of experts who can interview smuggled people and find out whether smuggled people have been trafficked and need legal protection. This is

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because the IOM has worked against human trafficking since 1994 and has programmes specifically established to prevent trafficking and to protect victims. They have already assisted 70,000 victims of trafficking and thus, they are in the best position to contribute to the identification of victims of trafficking among migrants rescued at sea. NGOs should work in cooperation with domestic police specifically trained to cooperate in the identification of victims of human trafficking. The Group of Experts on Action against Trafficking in Human Beings (GRETA) established by the Council of Europe to monitor how State Parties of the European Convention on human trafficking apply it, emphasised that a priority, in order to identify victims in between irregular migrants, should be to train adequately border police officers, asylum officials, members of staff in reception centres for asylum seekers and irregular migrants and judicial bodies in charge for issuing expulsion. GRETA reported that in some Member States training as such does not take place. The Commission highlighted that this is the reason why prosecution and conviction of human trafficking 'remains worryingly low'. The Commission also emphasised that whilst for Member States it is important to investigate and prosecute traffickers, they need to develop regular training for investigators, prosecutors and judges. There is too much burden on victims and on their testimonies during criminal investigations and the Commission has reported that often victims are refused assistance by domestic police and are often misidentified as criminals and prosecuted rather than protected. Unfortunately, this is the policy the EU is following and negative reports on NGOs without evidence of their involvement in criminal activities, render them vulnerable and not able to support the identification of victims of human trafficking when smuggled people are rescued in the sea.^[6]

Conclusions

In conclusion, it can be affirmed that accusing NGOs of supporting smugglers of migrants has not been proved as no evidence shows that this is the case. Conversely, evidence shows that NGOs can give a significant contribution in searching and rescuing people at sea. Also, NGOs have experience in supporting the identification and protection of victims of human trafficking which are neglected by EU Member States and often criminalised for having been smuggled. Public Prosecutors in Palermo have emphasised that it is commonly thought that victims of human trafficking should be accountable for having become victims, because initially they decided to leave their countries of origin with the support of criminal organisations. In other terms, the consent initially given should be the reason why the victim is not innocent but culpable and the public opinion and some stakeholders do not consider the fact that exploiters may have misled migrants with the aim to obtain the consent to be smuggled and eventually, the smugglers have become traffickers by exploiting, torturing, raping and using other forms of coercion against migrants who are in a vulnerable position.^[7] As it can be noted, the situation of victims of human trafficking is very serious and if the priority of the EU and its Member States will continue to be closing frontiers, crime will increase and many people will end up being smuggled and eventually trafficked. It is important to involve NGOs in the fight against trafficking by adopting policies allowing them to work in cooperation with domestic police and the European Asylum Support Office (EASO) to identify victims and give them a shelter. Unfortunately, this approach will not be possible if NGOs are targeted rather than supported in their important mission consisting of saving lives at sea and from human trafficking.

Notes

^[1] See Frontex Risk Analysis for 2017, February 2017, p. 32.

^[2] Supra, note 1, p. 33.

^[3] See Council Directive 2002/90/EC of 28 November 2002, L 328/17, 5/12/2002.

^[4] P. Umbriano 'Is it a crime to help people to survive (Cap Anamur and other cases)', accessed on 10/2/2016.

^[5] See Directorate General for Internal Policies. Policy Department C: Citizens' Rights and Constitutional Affairs'. Civil Liberties, Justice and Home Affairs 'Fit for Purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants', p. 46. 2015.

^[6] For an in depth analysis of this problem see M. Ventrella 'Identifying Victims of Human Trafficking at Hotspots by

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Focusing on People Smuggled to Europe', Social Inclusion, forthcoming July 2017.

[7] See See Decreto di Fermo disposto dal P.M.-art 384 c.p.p. *Procura della Repubblica presso il Tribunale di Palermo, Direzione Distrettuale Antimafia*, 30/5/2014, (Arrest warrant issued by the Prosecutor's Office at the Court of Palermo, District Antimafia Directorate), pp. 12 at 13. Document received by Public Prosecutor Dr Gery Ferrara by e mail on 23/3/2016, in M. Ventrella *supra* note 26.

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