

AMNESTY INTERNATIONAL PUBLIC STATEMENT

26 February 2025

Index Number: TIGO IOR 10/2025.6505

CONSIDERATIONS ON THE EUROPEAN COMMISSION'S PROPOSAL TO REFORM THE FACILITATORS PACKAGE

INTRODUCTION

In November 2023, the European Commission published a proposal to review the EU anti-smuggling legal framework.¹ The proposal involves issuing a new directive of the European Parliament and Council, to replace Council Directive 2002/90/EC (the Facilitation Directive) and Council Framework Decision 2002/946 JHA, jointly known as the Facilitators Package. The Facilitators Package currently establishes a common definition of the offence of facilitation of unauthorised entry, transit, and residence and provides guidance on the applicable penalties. On 13 December 2024, the Council of the European Union agreed its position on the new proposal.²

EU member states and institutions have often used the fight against human trafficking and smuggling to justify policies which expose refugees and migrants to grave risks to their lives and safety. Examples include reducing the number of naval assets available for search and rescue at sea along the routes where most shipwrecks happen; and increasing security measures at land borders and unlawful summary returns at borders (“pushbacks”), which has resulted in individuals and families in need of protection having to travel through more impervious and perilous routes. In recent years, individuals and groups who have dared to mitigate or question the human impact of migration and border control measures and policies exposing people to risks, for example by rescuing those at sea, alerting the authorities to boats at risk of sinking or at risk of “pushbacks”, or by offering humanitarian aid at borders, have found themselves under investigation or on trial in numerous European countries.

Amnesty International has documented the criminalization of human rights defenders, including their organizations, that have helped refugees and migrants, and has identified one important element contributing to it in the poorly drafted offence of “facilitation of unauthorized entry, transit and residence” in the Facilitators Package.³ Across Europe, member states have in fact targeted individuals and NGOs providing non-profit humanitarian assistance - such as food, shelter, medical care, or legal advice - with criminal investigations and prosecutions, harassment, and undue restrictions, using domestic laws on facilitation of irregular entry, transit and stay which are based on the Facilitators Package. These harmful policies contradict the EU’s human rights standards, anti-discrimination and social cohesion policies, and violate the right to defend human rights, freedom of association, liberty and a fair trial for those who defend human rights as enshrined in the UN Declaration on Human Rights Defenders.⁴

¹ European Commission, 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, 28 November 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0755>.

² Council of the European Union, 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 - General approach, ST-15916-2024-REV-1, 29 November 2024, <https://data.consilium.europa.eu/doc/document/ST-15916-2024-REV-1/en/pdf>.

³ Amnesty International, *Europe: Punishing compassion: Solidarity on trial in Fortress Europe* (Index: EUR 01/1828/2020), <https://www.amnesty.org/en/documents/eur01/1828/2020/en/>.

⁴ United Nations, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (UN Doc A/RES/53/144).

To counter such “criminalization of solidarity”, Amnesty International, among other recommendations, has urged EU member states and institutions to review the Facilitators Package, to bring it in line with the UN Smuggling Protocol,⁵ as well as with international human rights and refugee law, namely by introducing the element of unjust financial or other material benefit in the crime of facilitation of entry, transit and stay of a foreign national in an irregular status.⁶

Amnesty International therefore welcomes the European Commission’s initiative to introduce a reform of the anti-smuggling legal framework, which should go in the direction of narrowing the offence of facilitation and of harmonizing it with EU states’ obligations under the UN Smuggling Protocol. The UN Smuggling Protocol’s provisions better reflect the reality of the experience of people who may need to use smugglers’ services to reach their destination. Scholars have recognized that “most asylum-seekers require smugglers at some, if not all, stages of their journey.”⁷ It should also be noted that, while the two phenomena can overlap, smuggling is distinct from trafficking in that it involves consent, and is not per se exploitative or involving human rights abuses; indeed, in some cases, it is a lifesaving operation that makes it possible to escape persecution or access international protection. Furthermore, the UN Smuggling Protocol aims not only to prevent and address people smuggling, but also to guarantee international cooperation for the protection of the rights of people who have been smuggled (Article 2).

However, while addressing some important gaps in the EU’s approach to smuggling, several provisions in the proposed directive risk being insufficient, or indeed counterproductive, in protecting migrants and refugees, their family members, as well as human rights defenders, organizations that assist them, and those providing *bona fide* services, from criminalization.

The context in which this reform is taking place is that of a dangerous erosion by European states and institutions of their obligations in relation to the right to life, to seek asylum, and to live in dignity without discrimination for refugees, asylum seekers and migrants. EU member states and institutions continue to implement ever stricter border and migration control measures, focused on reducing departures of people from northern Africa, Turkey and the Middle East and on making Europe’s external borders ever harder to access. Numerous measures in the recently adopted Pact on Migration and Asylum raise concerns for their foreseeable negative impact on human rights. European leaders should address the challenges presented by irregular migratory movements by agreeing to truly sustainable and humane migration policies that do not compromise on human rights protection and expand the options for safe mobility.

At the same time, it is urgent to end the criminalization of human rights defenders who assist refugees and migrants. EU member states and institutions must act immediately to prevent any further instances of criminalization of solidarity, including by reforming the Facilitators Package and relevant legislation at national level; ending the misuse of criminal law and of other legislation against human rights defenders; and ensuring that legislation, policies and practices are compatible with states’ international human rights obligations in relation to human rights defenders.

SUGGESTED AMENDMENTS TO THE PROPOSED DIRECTIVE

The following considerations and recommendations to co-legislators concentrate on the key points that should be amended or strengthened to ensure that the proposed directive constitutes an improvement for the protection of human rights of refugees and migrants and of human rights defenders acting in solidarity with them. These are not intended as a

⁵ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf.

⁶ See p. 85 in Amnesty International, *Europe: Punishing compassion: Solidarity on trial in Fortress Europe*, where Amnesty International recommended that EU member states and institutions: “Review the Facilitators’ Package, to bring it in line with the UN Smuggling Protocol, international human rights law as well as international refugee law, and in particular: 1) introduce the element of unjust financial or other material benefit in the crime of facilitation of entry, transit and stay of a foreign national in an irregular status; and 2) decriminalize the irregular entry of a foreign national and ensure that any administrative penalty is proportioned and consistent with international human rights laws and standards. States should also consider, should the introduction of material benefit as a constitutive element of the offence of facilitation not be possible, the introduction instead of a mandatory and broadly defined humanitarian exemption clause, to bar prosecutions against individuals and groups who act peacefully to protect the human rights and dignity of refugees and migrants.”

⁷ Sharon Pickering, 'Transnational Crime and Refugee Protection' (2007) 34(2) *Social Justice* 53 http://www.socialjusticejournal.org/archive/108_34_2/108_05Pickering.pdf.

comprehensive of the views of the organization on the new proposed EU Facilitation Directive. Amnesty International will continue to contribute to the review of the Facilitators Package in coordination with other civil society stakeholders.

Other standard-settings initiatives relevant to this reform should also be relied on, to ensure the highest level of protection, such as Parliamentary Assembly of the Council of Europe (PACE)'s Resolution 2568 (2024) on a shared European approach to address migrant smuggling. In the context of the proposed revisions to the Facilitation Directive, for instance, the Resolution "*warns against the excessively large scope of the crimes falling under the definition of migrant smuggling entailed in the proposed Directive aiming to replace Directive 2002/90/EC. This exacerbates the risk of lack of consistency across European States as regards their understanding and interpretation on what the crime of migrant smuggling should and should not entail.*"⁸

PREAMBLE

Failure to mention international law and standards on the protection of human rights defenders

The preamble of the proposed directive, at recitals 4 and 10, refers to key international law instruments, to ensure that the directive is interpreted and implemented consistently with the obligations they set out for EU member states. These include the 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention) as amended by the Protocol of New York of 1967, the Convention on the Rights of the Child, and treaties on saving lives at sea. The preamble, however, makes no reference to international law and standards on the protection of human rights defenders, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights, as well as the UN Declaration on Human Rights Defenders. This is striking, given that many of those who have been unjustly investigated and prosecuted through the misuse of laws on facilitation of irregular entry, transit and stay for assisting refugees and migrants fall within this category.

Amnesty International has identified disregard by numerous EU member states of their international human rights obligations in relation to human rights defenders as one important element that has contributed to their criminalization.⁹ The organization continues to urge EU member states to work towards the full implementation of the UN Declaration on Human Rights Defenders in Europe, and of all relevant human rights treaties and instruments ratified by EU member states.¹⁰ Such implementation would also be in line with the 2023 Council Conclusions on the application of the EU Charter of Fundamental Rights.

Amnesty International recommends that the preamble of the proposed directive makes explicit reference to the UN Declaration on Human Rights Defenders and to international and EU law and standards on the protection of human rights defenders.

Lack of clarity on the non-criminalization of refugees and migrants and human rights defenders

Recital 7 of the preamble sets out to clarify that refugees and migrants and those assisting them should not be criminalized. Given that the criminalization of smuggled people and human rights defenders has been one key motive for the proposed reform of the Facilitators Package, it is essential that the new directive articulates this aim in the clearest terms. Alas, this is not the case with the proposed wording of Recital 7, which states that the elements of criminal liability "*will usually not be fulfilled when it comes to assistance among family members or the provision of humanitarian assistance or the support of basic human needs. Third-country nationals should not become criminally liable for having been the subject of such criminal offences. Moreover, it is not the purpose of this Directive to criminalize, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations.*"

The wording of this provision leaves open the possibility of criminalization by saying that the elements of criminal liability will "usually" not be fulfilled. Moreover, it is not sufficiently broad to protect these categories from criminalization. The reference to the fact that it is not the proposed directive's purpose to criminalize "the support of basic human needs provided to third-country nationals in compliance with legal obligations" is on one hand redundant, as it seems

⁸ The Parliamentary Assembly of the Council of Europe, *A Shared European Approach to Address Migrant Smuggling*, 1 October 2024, <https://pace.coe.int/en/files/33812>.

⁹ International Service for Human Rights, *Declaration Plus 25*, 19 June 2024, <https://ishr.ch/wp-content/uploads/2024/06/20240619-DeclarationPlus25-ISHR.pdf>.

¹⁰ See for Example: European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum, COM(2023) 755 final, 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023PC0755>.

unnecessary to state that the proposed directive does not aim to criminalize compliance with the law; and on the other, it is insufficient, because it does not help to clarify that permissible acts of assistance that are not required by law are to be spared from prosecution. Furthermore, because the provision is in the preamble, it is not binding. Instead, the directive should clearly state that peaceful acts of assistance, solidarity and defense of human rights should be protected and not criminalized.

Article 5 of the UN Smuggling Protocol states that: “Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol”.¹¹ Nevertheless, many smuggled migrants have been and continue to be criminalized as facilitators, due to the broad interpretation of what “facilitation” entails, for example for having been placed at the helm of rubber boats abandoned by smugglers at sea, or for having been handed a satellite phone by smugglers.¹²

Amnesty International recommends reformulating and strengthening the text currently in recital 7 of the preamble to adhere more closely to the purpose and provisions of the UN Smuggling Protocol, particularly article 5, by stating that one of the purposes of the directive is to protect smuggled migrants from criminalization. The organization recommends the inclusion in the text of a prohibition to criminalize smuggled migrants, as well as individuals providing assistance to family members.

Amnesty International further recommends that such prohibition is moved from recital 7 of the preamble to article 3, as a binding provision.

Amnesty International considers that an unjust financial or material benefit should be a constitutive element of the offence of facilitation to prevent criminalizing activities where such an unjust benefit is not present. Furthermore, the organization is concerned that the variety of legitimate activities that human rights defenders carry out in solidarity with refugees and migrants are not adequately covered by the term “humanitarian assistance or the support of basic human needs”, which in the second part of the provision is even further restricted to “humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations”. The organization considers it essential to ensure that the proposed directive does not replicate the risk of “criminalization of solidarity” experienced by human rights defenders under the Facilitators Package. Any list or description of activities that should be exempt from criminalization should be exemplary and not exhaustive. It should not be limited to acts that are required by law but encompass other manifestations of solidarity and human rights defense, including for instance, documenting and reporting on human rights violations and abuses or acting to prevent a real risk of refoulement or other serious human rights violations or harms. In cases where activists may breach national laws that are not in conformity with international law and standards to protect refugees and migrants from harm, including to protect them from being summarily returned across a border in violation of the principle of non-refoulement, or to protest against the national law, these acts should be protected from criminalization, too.

The organization recommends that the reference to “humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations” is deleted and substituted with “acts aimed at upholding the rights of refugees and migrants” or, as suggested by the UN Special Rapporteur on Human Rights Defenders, “acts of solidarity aimed at seeing the human rights of migrants upheld”, or expressions to this effect.¹³

Amnesty International further recommends that consideration be given to introducing a mandatory and broadly defined humanitarian exemption from criminalization to bar prosecutions against individuals and groups who act peacefully to protect the human rights and dignity of refugees and migrants, and for which the element of criminal liability of unjust benefit is not fulfilled, in article 3 of the proposed directive.

¹¹ United Nations, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000.

¹² See, for instance, Amnesty International, *Greece: Trial of Pylos shipwreck survivors must not be a shield in the investigation of the alleged responsibilities of the Greek authorities*, 17 May 2024, <https://www.amnesty.org/en/latest/news/2024/05/greece-trial-of-pylos-shipwreck-survivors-must-not-be-a-shield-in-the-investigation-of-the-alleged-responsibilities-of-the-greek-authorities/>.

¹³ UN Special Rapporteur on Human Rights Defenders, *Position Paper: On the EU Commission's Proposed Directive to Update the EU Legal Framework on People Smuggling*, February 2024, <https://srdefenders.org/resource/position-paper-on-the-eu-commissions-proposed-directive-to-update-the-eu-legal-framework-on-people-smuggling/>.

Failure to include training on the operationalization of the obligations descending from the UN Declaration on Human Rights Defenders

At recital 23 of the preamble, where the need for a multidisciplinary approach, a high level of legal knowledge, and technical expertise is mentioned for those who are tasked with preventing and combatting people smuggling, Amnesty International recommends reference to the need to train law enforcement officials, judges and prosecutors so they may recognize the role played by human rights defenders, understand the rights and protections accorded to them, and to be able to identify situations in which administrative and criminal procedures could unduly restrict, sanction or undermine their legitimate activities.

ARTICLE 3

Failure to include the decriminalization of irregular entry

Amnesty International notes that in some EU countries, irregular entry by foreign nationals continues to be punished as a criminal offence. The organization has long been calling for a decriminalization of such conduct¹⁴ and considers that the proposed directive offers an opportunity to harmonize laws in EU member states in this regard. Decriminalization of irregular entry would reflect the experience of many refugees and migrants who simply cannot access the EU through regular channels to seek protection or a better life.

Amnesty International recommends the inclusion a provision requiring EU member states to decriminalize the irregular entry of a foreign national, to ensure in all cases the non-penalisation of refugees and asylum-seekers in line with the 1951 Refugee Convention, and that any administrative penalty is proportionate and consistent with international human rights laws and standards.

Continuing risk of criminalization of human rights defenders and *bona fide* service providers

Article 3.1.a of the proposed directive calls on EU member states to ensure that “intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned” constitutes a criminal offence where: “a) the person who carries out the conduct requests, receives or accepts, directly or indirectly, a financial or material benefit, or a promise thereof, or carries out the conduct in order to obtain such a benefit”.

Amnesty International is concerned that the term “directly or indirectly” could allow prosecutors to continue criminalizing human rights defenders for their legitimate activities. Having monitored criminal proceedings against sea rescue NGOs in Italy, for example against the crew of the *Luventa* ship, Amnesty International has noted how prosecutors have tried to construe life-saving activities as motivated by the fund-raising potential that the publicity of rescues could bring to the NGOs involved.¹⁵ In many cases, these far-fetched attempts to discredit NGOs have not survived the scrutiny of the courts, but the reputation of NGOs and the lives of their staff have nevertheless been affected by such arguments of prosecutors.

Amnesty International therefore recommends that the term “directly or indirectly” is removed from Article 3.1.a.

Furthermore, the organization notes that an unqualified “financial or material benefit” risks allowing for the prosecution of *bona fide* service providers, such as shopkeepers, taxi drivers, landlords and businesses, who might through their services contribute to minimizing the suffering of refugees and migrants without exploiting their situation. A 2016 European Parliament study on the implementation of the Facilitators Package¹⁶ highlighted this risk and suggested the introduction of the financial gain element to all forms of facilitation, and for this element to be qualified to encompass only “unjust enrichment” or “unjust profit”.¹⁷ It should also be noted that there is a risk that situations of racial profiling and discrimination could arise, should service providers feel compelled to demand people’s proof of status or residence permits before offering their services.

¹⁴ Amnesty International, *Europe: Punishing Compassion: Solidarity on Trial in Fortress Europe*, p. 86.

¹⁵ Similarly, in the criminal case against Sarah Mardini and Seán Binder, the charge of facilitation of illegal entry was accompanied – among others – by a separate charge of money laundering, linked to fundraising activities that the two carried out for the NGO for which they volunteered. <https://www.amnesty.org/en/documents/eur01/1828/2020/en/>, p. 51

¹⁶ European Parliament (EP), *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants* (European Parliament, 2016) (hereinafter: EP, “Fit for Purpose?” 2016).

¹⁷ Amnesty International, *Europe: Punishing Compassion: Solidarity on Trial in Fortress Europe*.

Amnesty International recommends that the term “unjust” or similar be added to qualify the financial or material benefit in article 3.1.a, to avoid the criminalization of bona fide service providers. Amnesty International also recommends removing references to the facilitation of stay from article 3.1.a. This would align the directive with the UN Protocol, which only covers irregular entry (rather than entry, transit and stay), and which relates to smuggling offences that are transnational in nature.

The risk of criminalization of refugees and migrants in the distinct offence of facilitation where there is a high likelihood of causing serious harm

Article 3.1.b of the proposed directive calls on EU member states to ensure that “intentionally assisting a third-country national to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned” constitutes a criminal offence where: “b) there is a high likelihood of causing serious harm to a person”, even in the absence of a financial or material benefit.

As stated before, the unjust financial or material benefit is a constitutive element of the offence of smuggling. The UN Smuggling Protocol does not contemplate an independent offence of endangerment of smuggled migrants. Article 6.3 considers circumstances endangering or likely to endanger the life and safety of smuggled migrants as aggravating circumstances of the offence.

Moreover, crossing borders irregularly is inherently risky and recent EU policies aimed at making the Union’s borders impermeable are contributing to increasing such risks in a context where for many there is no other option to seek protection or a better life.¹⁸ Against this background, there is a significant risk that a distinct offence of facilitation where there is a high likelihood of causing serious harm to a person could be used to incriminate refugees and migrants, not only smugglers.¹⁹

To avoid such risk, Amnesty International recommends that the high likelihood of causing serious harm to a person is made into an aggravating circumstance of the core offence at article 3.1.a, modified as suggested above by adding “unjust” to the element of “benefit”. Amnesty International also recommends that clear guidelines and stringent criteria are elaborated at EU level to assist Member States’ implementation of the norm and the assessment of whether there is a “high likelihood” that the conduct would cause serious harm to a person, to prevent abusive and over-expansive interpretations and ensure harmonization across Member States’ practices.

The risk of infringing the rights to freedom of expression and peaceful assembly and of criminalizing legitimate human rights activities in the proposed offence of public instigation to enter, transit and stay

Article 3.2 introduces a new offence of public instigation, calling on EU member states to ensure that “publicly instigating third-country nationals to enter, or transit across, or stay within the territory of any Member State in breach of relevant Union law or the laws of the Member State concerned on the entry, transit and stay of third-country nationals constitutes a criminal offence.” The wording of this provision is vague and could be interpreted by the authorities in a way that infringes on the rights to freedom of expression and peaceful assembly of refugees and migrants, as well as advocates and activists, including potentially when demonstrating against restrictive migration laws. This provision could lead to undue restrictions on and/or criminalization of the legitimate activities of human rights defenders, including the provision of information on one’s rights, and legal advice. In this regard, Amnesty International supports the UN Special Rapporteur

¹⁸ See for example: Amnesty International, *Poland: New Firearms Regulations Risk Undermining the Rule of Law*, 10 July 2024, <https://www.amnesty.eu/news/poland-new-firearms-regulations-risk-undermining-the-rule-of-law/>; Amnesty International, *Latvia: Legal Amendments Would Empower Border Guards to Torture and Push Back Migrants and Refugees*, 21 June 2023, <https://www.amnesty.org/en/latest/news/2023/06/latvia-legal-amendments-would-empower-border-guards-to-torture-and-push-back-migrants-and-refugees/>; Amnesty International, *Lithuania: Legalizing Illegal Pushbacks Gives Green Light to Torture*, 20 April 2023, <https://www.amnesty.org/en/latest/news/2023/04/lithuania-legalizing-illegal-pushbacks-gives-green-light-to-torture/>; Amnesty International, *Finland: Emergency Law on Migration Inconsistent with EU Law and Must Be Rigorously Scrutinized*, 12 July 2024, <https://www.amnesty.org/en/latest/press-release/2024/07/finland-emergency-law-on-migration-inconsistent-with-eu-law-and-must-be-rigorously-scrutinized/>; European Parliament, *Briefing: Walls and fences at EU borders*, 2022, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI\(2022\)733692_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/733692/EPRS_BRI(2022)733692_EN.pdf).

¹⁹ See for example this case: Al Jazeera, *‘Asylum-Seeker Father Faces 10 Years in Greek Jail for Son’s Death’*, 16 May 2022, <https://www.aljazeera.com/features/2022/5/16/asylum-seeker-father-faces-10-years-in-greek-jail-for-sons-death>.

on Human Rights Defenders' call for this new offence to be removed.²⁰ Recital 25, which refers to the suspension or termination of accounts of individuals or entities posting this content, should likewise be deleted.

ARTICLE 15

The need to include training on the operationalization of the obligations descending from the UN Declaration on Human Rights Defenders for authorities tasked with investigating and prosecuting smuggling

Article 15 of the proposed directive requires that EU member states ensure “specialized regular training” for members of the judiciary, of law enforcement and other authorities tasked with the investigations and criminal proceedings for the offences established in the proposed directive. In Amnesty International’s experience, in many EU countries investigators and prosecutors lack knowledge of states’ international human rights obligations in relation to human rights defenders and the right to defend human rights, as enshrined in the UN Declaration on Human Rights Defenders and of how these should inform their investigating and prosecutorial activities. The organization recommends that the specialized training in Article 15 includes how to operationalize states’ obligations under international human rights law and standards on the right to defend human rights, as well as on the rights to freedom of expression, peaceful assembly and association, and refugee law.

ARTICLE 16

A redundant reference to “special investigative tools”

The first part of Article 16 of the proposed directive requires Member States to ensure that “effective and proportionate” investigative tools are available for investigating or prosecuting the criminal offences described at Articles 3, 4 and 5. The second part of Article 16 adds: “Where appropriate, these tools shall include special investigative tools, such as those which are used in countering organised crime or other serious crime cases.”

Amnesty International has documented the impact of the use by Italian police and prosecutors of “special investigative tools” devised to combat organized crime in the investigations against the crews of *Luventa* and other NGO rescue ships.²¹ The investigation into the *Luventa* case was exceptionally resourced and led by the experts of the police investigative branch, which is part of the Central anti-crime directorate, with considerable powers, including to intercept communications and plant undercover agents, to combat organized crime. The extent of the investigation’s reach emerged only when prosecutors shared their conclusions and evidence with defence lawyers. The file included thousands of pages of transcripts of intercepted communications regarding several journalists and lawyers who were not part of the investigation. The broad wiretapping of journalists and lawyers’ communications as well as the failure to remove irrelevant transcripts before sharing the file with the defence lawyers constituted a breach of the right to privacy and to a fair trial. The *Luventa* case can be seen as emblematic of how the criminalization of the legitimate activities of human rights defenders can be the gateway towards further infringements of the rights of many others. The court nevertheless acquitted all the accused at the end of the preliminary hearing, finding that there was no evidence to send them to trial.

Member States can and do already use special investigative tools to combat organized crime. The reference to them in Article 16 is therefore redundant. Amnesty International recommends that the reference to “special investigative tools” is removed from the proposed directive.

ARTICLE 9

An expansion of the concept of ‘instrumentalisation’

Amnesty International has long opposed the codification of the ‘instrumentalisation of migration’ concept into EU law, which has been cited repeatedly by Member States since 2021 to justify derogations from the right to asylum and reception. Amnesty International therefore recommends the deletion of Article 9(d), which sets out as an aggravating circumstance the fact that “the criminal offence entailed or resulted in the [...] instrumentalisation of a third-country national who was subject to the criminal offence.”

²⁰ UN Special Rapporteur on Human Rights Defenders, *Position Paper: On the EU Commission's Proposed Directive to Update the EU Legal Framework on People Smuggling*, February 2024, <https://srdefenders.org/resource/position-paper-on-the-eu-commissions-proposed-directive-to-update-the-eu-legal-framework-on-people-smuggling/>.

²¹ Amnesty International, *Italy: A Slippery Slope for Human Rights: The Luventa Case*, 4 August 2021, pp. 13-14, <https://www.amnesty.org/en/documents/eur30/4475/2021/en/>.