

Summary of the request of admission to the Italian Constitutional Court in relation to the case against the crew of the *luventa*.

Legal request written by Francesca Cancellaro, summary prepared by the From Sea to Prison project, 8 May 2023.

Contents

- I. Premise
- II. The facts of the case
- III. Legal framework
- IV. Reasons for constitutional illegitimacy
 - 1.1. The constitutional illegitimacy of Article 12, paragraph 1, of the Immigration Act, due to violation of the principle of equality and reasonableness.
 - 1.2. Constitutional illegitimacy of increasing the penalty through the aggravating factors relating to the number of people committing the crime and to the number of migrants transported for violation of the principle of equality and reasonableness.
 - 2.1. The constitutional illegitimacy of Article 12, paragraph 1, for violating the principle of proportionality.
 - 2.2. Constitutional illegitimacy of increasing the penalty through the aggravating factors relating to the number of people committing the crime and to the number of migrants transported for violation of the principle of proportionality.
 3. Constitutional illegitimacy of the humanitarian exemption pursuant to Article 12, paragraph 2, of the Immigration Act.
 4. Incompatibility of European criminalization obligations as envisioned in the Facilitators' Package with the EU Charter of Fundamental Rights.

I. Premise

In the context of the criminal proceedings against the crew members of the *Iuventa* ship, the defense has filed a request to the Italian Constitutional Court¹ that brings to light the constitutional illegitimacy of some of the provisions contained in Article 12 of the Italian Immigration Act.² It constructs its argument on different grounds and also requests for a preliminary ruling by the Court of Justice of the European Union (in accordance with Article 267 of the Treaty of the Functioning of the EU).

The request to the Court takes into account the basic provision establishing facilitation of irregular migration – the “simple” facilitation – established in paragraph 1 of Article 12 of the Immigration Act, as well as the aggravating circumstances set forth in paragraph 3 letters (a) and (d) relating to the number of people who have committed the crime and the number of people who were transported, respectively. Finally, it examines the ‘humanitarian exemption’, provided for in paragraph 2 of Article 12.

The request argues that the simple form of the crime of facilitation, as well as the aggravating circumstances, violate two legal principles protected by the Italian Constitution and by the EU Charter of Fundamental Rights: the principle of equality and reasonableness, and the principle of proportionality of the punishment.

The request argues for the illegitimacy of the humanitarian exemption, on the other hand, in terms of its unreasonable scope, limited as it is solely to acts that are carried out for the benefit of foreign citizens who are already on national territory. The exemption’s territorial limitation violates the right to human dignity, the right to private and family life, the right to asylum, and the best interests of the child, all of which are enshrined both in the Italian Constitution and in the EU Charter of Fundamental Rights.

Finally, the request raises the incompatibility of EU Member states’ obligations to incriminate facilitation set forth in the ‘Facilitators Package’ (of which Article 12 of the Immigration Act constitutes the Italian implementation) with the EU Charter of Fundamental Rights.

1 From herein, “the request”.

2 *“Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero”*, law n. 286 of 1998.

II. The facts of the case

The defendants are charged with violation of the following articles of law:

- Article 81 of the Criminal Code (continuity of the crime)
- Article 110 of the Criminal Code (joint enterprise)
- Article 12 of the Immigration Act:
 - paragraph 3, letter (a) (the aggravating factor of facilitating the entry of five or more persons)
 - paragraph 3, letter (d) (the aggravating factor of having committed the act in three or more persons)
 - paragraph 3, section 2 (the aggravating factor for committing more than one aggravating factor as detailed in in paragraph 3)

When examining the charges, three elements become clear: first, the defendants are not charged with having acted for profit; second, they are not charged with having maltreated or endangered the lives of any of the migrants; finally, the migrants transported were not on national territory at the time of the facts, consequently the humanitarian exemption is currently not applicable.

III. Legal framework

The obligation to criminalize “smugglers”. Article 12 represents the Italian fulfillment of international obligations of incrimination of so-called smugglers of migrants. The Palermo Protocol of 2000 is the foremost relevant element in this framework;³ while not giving guidelines on the extent of penalties, it establishes that people who facilitate irregular migration for the purpose of profit should be incriminated. The Protocol, however, does not prohibit the incrimination of those who act with different purposes.

At the European level, the other relevant provisions are Directive 2002/90/EC and Framework Decision 2002/946/JHA, which comprise the 'Facilitators Package'. Unlike the Palermo Protocol, these directives

3 Specifically, the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention against Transnational Organised Crime (2000).

do state that facilitation carried out without the purpose of profit should also be incriminated. At the same time, they give member states discretionary power in applying the humanitarian exemption.

Article 12 of the Immigration Act consists of a composite series of regulations, which are the result of a variety of legislative interventions made over the last 25 years. The result has been a provision that generates so many interpretative difficulties that in 2014 even the Italian Court of Cassation defined it as being "light years away from the precepts of the science of legislation."⁴

1. Offenses under Article 12 (Article 12 paragraphs 1 and 5).

Article 12 establishes two incriminating provisions: in paragraph 1, the crime of facilitating irregular migration, and in paragraph 5, the crime of facilitating irregular stay. The two offenses are distinguished from each other because, while for paragraph 5 facilitating stay constitutes a crime only if the person charged acted for unjust profit, facilitating irregular migration (paragraph 1) is considered an offense even if there is no purpose of profit. The penalty for the crime of facilitating entry under paragraph 1 is imprisonment of between 1 and 5 years, and a fine of 15,000 euros for each transported foreign citizen.⁵

2. The aggravating circumstances.

- **Article 12, paragraph 3**, provides for a considerable increase in the penalty: imprisonment ranging from 5 to 15 years, and a fine of 15,000 euros for each transported foreign citizen, in a variety of different circumstances, as will be examined in the next paragraphs;⁶
- **Article 12, paragraph 3, section 2** states that if more than one aggravating circumstance outlined in paragraph 3 is present, the penalty is increased further;
- **Article 12, paragraph 3, section 6**: this provision provides for the application of the penitentiary regime referred to in Article 4, section 2 of the Prison Regulation, i.e. hard prison for cases of facilitation with aggravating circumstances under paragraph 3.

4 Court of Cassation, penal section 1, 25 March 2014 (deposited 1 October 2014), n. 40624, Scarano, Rv. 259923.

5 The decree-law n. 20 of 2023 increased the penalty, established as between 2 to 6 years.

6 (a) The fact relates to the illegal entrance or stay in the territory of the Italian state of five or more persons;
(b) The person transported has been exposed to danger to their life or to their safety, through procuring their illegal entrance or stay;
(c) The person transported has been subjected to inhuman or degrading treatment through procuring their illegal entrance or stay;
(d) The fact has been committed by three or more people as a joint enterprise;
(e) The authors of the fact have available to them either weapons or explosive material.

◦ **Article 12, paragraph 3, section 3: increases punishment when facilitation under paragraph 1 is committed for profit.** (The defendants in the case at hand are not charged with this aggravating circumstance).

3. The new criminal provision expanding Article 12 (Decree-Law No. 20/2023, the so-called Cutro Decree), which does not apply to the defendants because it was introduced after the occurrence of the facts of the case, provides for two relevant changes to the legal framework: a tightening of the penalties provided for in paragraphs 1 and 3 of Article 12,⁷ and the introduction of a new crime of "death and injury as a consequence of crimes in the field of illegal immigration", which are punished in the new Article 12, section 2. The Constitutional request notes that this amendment to Article 12 is essentially symbolic; even before the reform, the maximum prison sentence applicable if all aggravating circumstances were applied was 30 years imprisonment. This limit cannot be exceeded even after the latest criminal law reform, in accordance with Article 66 of the Penal Code, which provides for a maximum of 30 years' imprisonment when aggravating circumstances apply to any crime. At the same time, the new decree poses even greater problems with respect to the principle of proportionality of punishment, because of the increase in the penalties it establishes (both minimum and maximum sentencing). It is worth noting that the increase in the minimum sentencing possible represents the more serious problem, as this forces a judge to apply increased penalties even in minor cases.

4. The humanitarian exemption (Article 12, paragraph 2) is applicable only when "humanitarian rescue and assistance is offered in favor of foreign citizens in need *granted that the action is carried out in Italian territory*". This wording implies that the exemption is not applicable to the facilitation of irregular entry into Italy from abroad. At the same time it is essentially useless in the context of charging for the facilitation of irregular stay (established by paragraph 5) which, as seen above, requires that the act be carried out with the aim of gaining profit - so is in itself incompatible with humanitarian activity.

⁷ Paragraph 1 currently establishes the penalty as detention between 2 to 6 years, while paragraph 3 as detention between 6 to 16 years.

There are two crucial sentences that were recently issued on this matter:

5. Sentence n. 63 of the Italian Constitutional Court, issued 10 March 2022, which declares the constitutional illegitimacy of Article 12 paragraph 3, letter (d), in relation to the part which establishes a 5 to 15 year prison term if the facilitation of irregular migration is carried out through the use of international transportation services, or through the use of forged documents. Although this circumstance does not constitute one of the charges in the current proceedings, the Constitutional Court's conclusions in this case are crucial, as the Court declared that the punishment provided in this circumstance is not proportionate to the offense, both intrinsically and in comparison with the penalties established for other crimes. Importantly, this ruling is effective for all past, present and future cases, effectively cancelling the relevant phrase from the current wording of the law.

6. The Sentence of the Court of Justice of the European Union (Commission v. Hungary, 16 November 2021) which determined the unlawful character of the Hungarian law criminalizing anyone providing assistance to foreign citizens by preparing an asylum request destined to be rejected. The court found the law to be illegitimate, among other reasons, because of the deterrent effect it exerts over legitimate assistance given to foreign citizens requesting asylum, which in turn infringes on Article 12 of the EU Charter of Fundamental Rights, i.e. the right to asylum. This sentence is crucial in demonstrating how the 'Facilitators Package' is in fact incompatible with the rights enshrined in the Charter of Fundamental Rights of the EU, as will be examined in the following sections.

IV. Reasons for constitutional illegitimacy

1.1. The constitutional illegitimacy of Article 12, paragraph 1 of the Immigration Act, due to violation of the principle of equality and reasonableness.

The first point of the request for the Court examines the penalty established for Article 12, paragraph 1 of the Immigration Act, i.e. for the crime of so-called ‘simple’ facilitation of irregular migration, arguing that it runs contrary to the principle of equality and reasonableness, which is protected by Article 3 of the Italian Constitution.⁸ According to the Constitutional Court, this principle is violated whenever a legislator establishes significantly different penalties for homogeneous criminal facts, without any reasonable justification.⁹

Under this light, the illegitimacy of Article 12, paragraph 1 of the Immigration Act is based on a comparison with another crime established by the Italian legal system for the protection of national borders, being Article 10, section 2, of the Immigration Act. The argument demonstrates that, despite these being homogeneous crimes, and constituting similar levels of offense], they are punished to very different degrees without justification, consequently representing a violation of the principle of reasonableness.

The homogeneity of these crimes can be seen from the fact that Article 10, section 2, of the Immigration Act punishes a foreign citizen who physically crosses the national border in an irregular manner,¹⁰ while Article 12 of the Immigration Act punishes anyone who helps them in crossing it. These are very similar and connected crimes, especially if one considers that if Article 12 did not exist, the simple fact of helping a foreigner without authorization to cross a border would be punishable anyway as a joint enterprise to commit the crime of Article 10, section 2, and would be prosecuted according to the penalties established for that same crime. Indeed, the Italian legal system, when

8 Article 3 of the Italian Constitution: “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, or personal or social conditions. The Republic has the task of removing those social and economic obstacles which, by effectively limiting citizens’ freedom and equality, inhibits the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”

9 Constitutional Court, Sentence n. 68 of 2012.

10 Article 10, section 2 of the Immigration Act: “Except in cases where the facts constitute a more serious crime, the foreign citizen who enters or remains in state territory in violation of the dispositions of the current Act (as well as those referred to in Article 1 of law n. 68 of 29 May 2007) is to be punished with a fine of between 5,000 and 10,000 Euros. The crimes to which the current paragraph does not apply are given in Article 162 of the Criminal Code.”

someone assists someone else to commit a crime – in this case, the irregular crossing of a border – they too are liable for the crime (in this case Article 10, section 2) according to joint enterprise.

Nevertheless, the lawmaker intended to punish someone who assists a foreign citizen to cross a border irregularly *not* by appealing to the general idea of joint criminal enterprise, but by establishing a specific crime, i.e. Article 12, which includes a much harsher penalty: while Article 10 only provides for a monetary penalty (a fine of between 5,000 to 10,000 Euros), Article 12 provides for a penalty of imprisonment of between 1 to 5 years, as well as a fine of 15,000 Euros for each foreign citizen assisted.

Is there a reasonable justification for this legislative choice, which leads to such different penalties?

The request to the Court presents how the considerably harsher penalty established for Article 12 is justified by the criminal policy behind the particular law, i.e. in order to combat the “smuggling of migrants”. This is what is expected according to the international duty to prosecute crimes which led to the birth of Article 12 of the Immigration Act: indeed, both the Schengen Convention of 1985 and the Palermo Convention of 2000 take aim at people who profit from the illegal management of migration, on account of the social panic generated by their actions.

Despite that this was the initial spirit of the law, the way the crime of Article 12, paragraph 1 is formulated means that – as we have already seen – it can be committed even by someone who is not acting in order to make an unjust profit, with the result that it is not only “smugglers” (i.e., people who profit from the selling of services for irregular migration) but anyone who helps the irregular migrant for ends other than that of profit (for example, motivated by family ties, or solidarity) is subject to the same penalty of imprisonment of between 1 to 5 years.

It is precisely in relation to such cases – i.e. the prosecution of someone who, without aiming at profit, assists a migrant crossing a border irregularly – that the request to the Court highlights the total irrationality of such extremely different sanctions from those provided for by Article 10, section 2, in relation to someone who actually crosses the border irregularly.

In order for the penalty established by Article 12, paragraph 1, of the Immigration Act to revert to a reasonable level, the Court is requested to replace the sanctions of Article 12, paragraph 1, with those of Article 10, section 2, thereby establishing the same penalty as would be applied more generally as joint criminal enterprise to the crime of irregular immigration, according to Article 10, section 2.

This solution would conform with European law,¹¹ which – unlike other international instruments cited above – does not establish that only people acting for profit can commit the crime of facilitating irregular immigration. At the same time, however, European law imposes a penalty of imprisonment only for the most serious behavior identifiable as smuggling; consequently, punishing those who facilitate irregular immigration but who do not aim to profit from it only with a monetary fine represents a solution that conforms to European law. Furthermore, a similar solution has already been adopted by Germany, where the general idea of joint criminal enterprise to the crime of irregular immigration is applied to cases of facilitation without profit, as well as being adopted by other EU member states with juridical traditions similar to the Italian one.¹²

1.2. Constitutional illegitimacy of increasing the penalty through the aggravating factors relating to the number of people committing the crime and to the number of migrants transported – Article 12, paragraph 3, letters (a) and (d) – for violation of the principle of equality and reasonableness.

Through similar arguments as above, the request to the Court also demonstrates how the sanctions established (detention of 5 or 15 years and a fine of 15,000 for every person transported) for the aggravating circumstances laid out at Article 12, paragraph 3, letters A and D (relating to the number of people committing the crime, and the number of migrants transported) also run contrary to the principle of equality and reasonableness.

First, the request shows that if the solution proposed above relating to Article 12, paragraph 1 is accepted, substituting the existing penalty with the monetary penalty provided for in Article 10, section 2, then the current sanctions for the aggravating circumstances become enormously disproportionate in relation to those foreseen for the basic crime – and for this reason would be illegitimate.

Second, the request shows the complete inappropriateness of the aggravating factors in the context of the basic acts of facilitation described in Article 12, paragraph 1, in terms of identifying behavior amounting to actual ‘smuggling of migrants’, given that these factors can also be present in the absence

11 Directive 2002/90/CE and framework decision 2002/946/GAI.

12 Germany, Spain, Holland, Sweden, Finland, Estonia and Lithuania all establish the application of punishment either through a fine or imprisonment. Belgium, Ireland, Luxemburg, Malta, Cyprus and the United Kingdom establish the possibility of applying fines or imprisonment together, or as alternatives.

of any profit, and without putting migrants' lives in danger or subjecting them to inhumane and degrading treatment. We can thus apply the same considerations made in relation to Article 12, paragraph 1, to the aggravating factors described in paragraph 3, letters (a) and (d), recalling that in these circumstances the penalty is currently up to 15 years of imprisonment.

Furthermore, it is unreasonable that the legislator punishes someone who puts migrants' lives at risk, or subjects them to inhumane and degrading treatment, in the same way as they punish someone who acts with 2 or more people or transports more than 5 migrants. The absurdity of this equivalency becomes clear when one considers that the aggravating factors described at letters (a) and (d) automatically apply to many situations that do not include any negative impact beyond the basic facts of facilitation in the manner of paragraph 1 – as is the case, for example, with NGO rescue operations at sea, which bring dozens of rescued migrants into Italy simultaneously. An equally unjustified situation of these aggravating factors being applied would be in the case of a nuclear family comprising of three or more persons (letter a) who attempt to facilitate the entrance of their relative, or alternatively of a single subject who attempts to assist a family comprising of five or more persons (letter d).

For the reasons described above, the request for admission to the Court asks for the aggravating factors of Article 12, paragraph 3, letters (a) and (d) to be declared constitutionally illegitimate, and for the facts to which they currently apply to be punished instead through the basic penalty of Article 12, paragraph 1.

2.1. The constitutional illegitimacy of Article 12, paragraph 1, for violating the principle of proportionality.

The second point of the request to the Court demonstrates how the penalty established for Article 12, paragraph 1, also runs contrary to the principle of the proportionality of the punishment, analyzing the importance and meaning of this principle both in terms of the Italian Constitution and European law. The request then indicates the unconstitutionality of the law under examination in relation to this principle.

The Constitutional Court considers any law which, in pursuing a particular penal aim, generates a penalty that constitutes a disproportionate damage to the individual's fundamental rights as running

contrary to the principle of proportionality.¹³ While it may be true that it is down to the legislator's discretion to define the penalty to be applied to the facts described by a crime, this discretion comes up against an insuperable limit if the penalty is clearly unreasonable in relation to the facts being punished.¹⁴ The principle of proportionality thus allows the Constitutional Court to check the correct exercise of the legislator's discretionary powers in terms of a given penalty – independent from any comparison that might be made with the penalty established for another crime that presents similar features.¹⁵

Failing to respect the principle of proportionality represents a violation of Article 3 of the Italian Constitution, but also of Article 27, paragraph 3, of the Constitution, which establishes that a penalty must aim at the reeducation of the guilty party: a disproportionate penalty, on the other hand, creates a sense of injustice in someone subjected to it, thus fundamentally inhibiting the possibility for reeducation.¹⁶ On a European level, the request also notes Article 49, paragraph 3 of the European Charter of Fundamental Rights (which Italy is obliged to respect), which expressly states that “*the punishment inflicted cannot be disproportionate to the crime.*” It is also worth recalling the sentence issued by the Court of Justice of the EU (*Grand Chamber*, 8 March 2022), which establishes that the principle of proportionality given by Article 49, paragraph 3 absolutely prohibits the adoption of disproportionate penalties. This article serves as a general principle of the European legal order, and thus has a direct effect on the legal orders of the member states, with the effect that any individual judge on a national level can treat any law that runs contrary to the principle as inapplicable.¹⁷ This is a sentence of fundamental importance, as it definitively clarifies that the deterrent effect of a sanction cannot override considerations over its proportionality.

Finally, it's important to note that the Constitutional Court verifies the principle of proportionality through two logical moments: first identifying the cases of least serious breach of the norm that might be prosecuted, and then verifying if in these cases, even applying the lowest penalty, a judge would be

13 Constitutional Court, sentence n. 341 of 1994.

14 Constitutional Court, sentence n. 222 of 2018.

15 A comparison that is made, on the other hand, in cases of violation of the principle of equality and reasonableness, as described in point 1.1, above.

16 Constitutional Court, sentence n. 222 of 2018 and sentence n. 236 of 2016.

17 While the Court of Justice allows for a single judge to render the norm inapplicable, the current request to the Constitutional Court maintains that, given that the Italian legal order is characterized by a centralized check on aspects of legitimacy, it would be preferable for the complaint to be presented to the Constitutional Court, both to guarantee a decision applicable to all cases, and in terms of the power held by the Court to correct laws that run contrary to the aforesaid principle.

forced to lay down a sanction that exceeds the gravity of facts; if this is so, then the law would be constitutionally illegitimate.¹⁸

In terms of Article 12, the weakest facts to which the crime can be applied are those in which someone facilitates the irregular entrance of foreign citizens for humanitarian reasons or through solidarity, to the benefit of vulnerable persons. The very minimum penalty that a judge is forced to apply in these cases (one year imprisonment and a fine of 15,000 Euros for each person transported) is disproportionate and excessive inasmuch as it punishes with prison and an excessive and disproportionate fine someone who, even though they have violated the administrative discipline that regulates the entrance of foreign citizens, has done so not for a return, but for altruism. In such cases, the sacrifice that the law imposes upon the fundamental rights of the author of the offense, and of the migrant persons being assisted, is disproportionate in relation to the benefit gained in terms of the interest protected by the same law, i.e. the integrity of national borders – which, it should be noted, is not in this case offended in any significant way.

In this example, it is also maintained, once more, that to make Article 12, paragraph 1 of the Immigration Act respectful of the principle of proportionality, the penalty established should be substituted with that provided for in Article 10-bis of the Immigration Act, which is more proportionate to the facts at hand.

2.2. Constitutional illegitimacy of increasing the penalty through the aggravating factors relating to the number of people committing the crime and to the number of migrants transported – Article 12, paragraph 3, letters (a) and (d) – for violation of the principle of proportionality.

The Court request demonstrates, furthermore, how the aggravating circumstances relating to the number of people committing the crime, and to the number of people transported, runs contrary to the principle of proportionality of the punishment. Here again, all of the arguments already used in the preceding points are utilized, i.e. the inability of these aggravating circumstances to correspond to the acts defined as ‘smuggling of migrants’. The consequence is that the penalty established for people charged with aggravating circumstances – detention up to 15 years – results absolutely

18 Constitutional Court sentence n. 236 of 2016.

disproportionate in relation to the many situations that do not contain intrinsic negative impact beyond those described in the basic facts of facilitation according to Article 12, paragraph 1, e.g. the case of an NGO sea rescue mission, that of numerous family members assisting a relative, or of a single person assisting a numerous family. Last but not least, the extremely severe penalty is entirely incompatible in these cases with the re-educational role of the penalty necessitated by Article 27, paragraph 3 of the Italian Constitution, inasmuch as it is inevitable someone subject to such a severe penalty will experience a feeling of injustice, with the result that this type of penalty fundamentally prohibits every possibility for re-education.

3. Constitutional illegitimacy of the humanitarian exemption pursuant to Article 12 paragraph 2 of the Immigration Act.

The Italian legal system states that even if a person has committed a certain crime there is a set of circumstances by which the action is justified and the person cannot be found guilty. The norms that identify those situations in which acts are not punishable (or rather, are not unlawful) are called ‘exemptions’ or justifying causes.

Article 12 paragraph 2 applies this exemption to humanitarian rescue and assistance provided to foreign citizens in need, *granted that the action is carried out in Italian territory* (emphasis added). This paragraph exists to avoid actions such as rescue and humanitarian assistance, from being punished pursuant to Article 12, even while such actions might facilitate the movement of undocumented foreign citizens in a strict sense. This is because such activities are considered worthy of protection by the legal system. This paragraph’s function, however, is not fully achieved because of the territorial clause, which limits the applicability of the exemption only to cases in which the assisted foreign citizen is already in Italian territory. As a consequence, Article 12 paragraph 2 exempts rescue and humanitarian assistance from criminal prosecution only when it facilitates foreign citizens’ stay in Italy, or their irregular entry into another country – but it does not exempt conduct facilitating irregular entry into Italy. This third instance is thus excluded from the application of the humanitarian exemption, even though it is perfectly comparable to the first two.

Having acknowledged this, it becomes necessary to evaluate whether the logic behind this exclusion is reasonable. Indeed, the Constitutional Court has ruled that since an exemption is intended to establish

an exception to the general rule, it needs to be capable of wholly fulfilling its purpose, unless there are reasonable grounds to exclude certain cases from its application.

The French *Conseil Constitutionnel* attempted to provide a justification for the exclusion of the facilitation of irregular entry from the humanitarian exemption. The Court argued that in this case a new situation of illegality is created which, on the other hand, would not be generated in cases of irregular stay or exit of the foreigner on state territory, where the irregular situation would already be ongoing at the time of the act at issue.

The request to the Constitutional Court, however, emphasizes that this justification cannot be considered valid if the value of the interests at stake is taken into account. Those who conduct rescue activities and humanitarian assistance in favor of a foreign citizen are defending that person's fundamental rights, such as their human dignity and their right to asylum, safeguarding the best interest of the child, and their right to private and family life – regardless of whether this act facilitates this person's irregular stay or transit, be it from Italy to another state or from abroad into Italy. These rights certainly take priority over the state's interest to preserve the integrity of its borders, or to prevent the creation of a new situation of illegality, as the French *Conseil Constitutionnel* puts it. For this reason the difference in treatment for those who are facilitating entry into Italy does not have a valid justification.

The Supreme Court of Canada came to the same conclusion in 2017, when it declared the illegitimacy of the offense that corresponds to Article 12 as infringing the Canadian Charter of Fundamental Rights.¹⁹ In its decision, the Court upheld the principle by which in a free and democratic society, fundamental rights can be limited only when this can be reasonably justified. The Canadian judges affirmed that situations that are unrelated to the needs that justify the criminal policy cannot be considered a crime, such as, in the current case, of providing humanitarian assistance, mutual support between asylum seekers and any act that expresses family ties.

For this reason the request to the Court asks that the territorial limitations of the humanitarian exemption be removed, in order to bring it into conformity with the cited constitutional principles. This decision better represents a faculty that is granted by Directive 2002/90/CE to member states, and which also aligns with the most advanced European legislation. In Belgium, for example, humanitarian acts are considered legitimate without territorial limitations, as in Finland, which also includes acts of family solidarity.

19 Supreme Court of Canada, *R. v. Appulonappa*, 27 November 2017 (2015 SCC 59).

4. Incompatibility of European criminalization obligations as envisioned in the Facilitators' Package with the EU Charter of Fundamental Rights.

Finally, the request emphasizes how the regulations enshrined in the Facilitators' Package are generally incompatible with Article 52 paragraph 1 of the EU Charter of Fundamental Rights (CFR). This is argued on the basis of the principle of proportionality, read alongside other fundamental rights established by the Charter, which stands as an important parameter for the legitimacy of legislation adopted by the European Union and its member states.

The request challenges the two main pillars on which the Facilitators Package's legal framework is based: the obligation to criminalize the facilitation of irregular entry even when not enacted for financial gain, and the fact that states can apply the humanitarian exemption in a discretionary manner. The request argues that these regulations violate the rights of people who facilitate border crossings, as well as the foreign citizens who are helped by their acts.

Regarding the first group, the request identifies several violations: of personal reputation (as an expression of the right to private life, Article 7 CFR); the right to liberty (Article 6 CFR); and the right to property (Article 17 CFR).

The fundamental rights of migrant people, on the other hand, are not directly affected by the implementation of the criminal law introduced through the Facilitators Package. However, their rights are indirectly affected as a result of the so-called "chilling effect", i.e. the deterrent effect that the threat of criminal punishment has on a wide range of people, who as a result might choose to abstain from activities that otherwise safeguard the fundamental rights of others. According to the Facilitators Package, member states have an obligation to criminalize people, but only a discretionary possibility to implement the humanitarian exemption; this evidently produces a deterrent effect on efforts to assist and rescue migrant people at the border. The latter's fundamental rights are therefore inevitably limited, such as the right to life and to the integrity of the person (Articles 2 and 3 of the CFR), the right to asylum (Article 18 CFR) and the right to private and family life (Article 7 CFR).

Having unpacked to what extent the provisions introduced by the Facilitators Package infringe on fundamental rights, it is necessary to make an evaluation of whether this interference is legitimate. To this effect, it is relevant to remember that the Charter itself allows a margin to which the rights it enshrines can be somewhat limited to guarantee the safeguarding of conflicting interests (except for those rights that are considered absolute). Article 52 paragraph 1 of the CFR states that limitations to

these fundamental rights must be legally mandated, must preserve the essential meaning of the right or liberty in question, and respect the principle of proportionality. To ensure that the requirements of Article 51 paragraph 1 are respected, the Court of Justice of the European Union (CJEU) established that all legislation that limits the rights enshrined in the Charter must be: pursuant to legitimate aims; compatible with the achievement of such aims; limiting only to the necessary extent (so to have the least possible impact on the rights it limits); finally to be proportionate *in a narrow sense*, i.e. being the result of a reasonable balancing of the interests at stake.

Considering these last two elements – necessity and proportionality in a narrow sense – the obligations to criminalize established by the Facilitators Package prove illegitimate. This is because they prescribe criminal prosecution for conduct that is of a humanitarian character and not for profit, and which is unrelated to the smuggling of migrants, i.e. unrelated to the very conduct that the Facilitator’s package aims to repress. The result is that the fundamental rights of facilitators are unnecessarily limited.

The violation of the principle of proportionality in the narrow sense is even more evident. Even if the Facilitators Package had intended to repress any act aimed at facilitating the entry of foreign citizens without the necessary documents, the reasonable balancing between the interests at stake does not hold. The fundamental rights of the facilitated migrant people, i.e. the right to life and to integrity of the person, the right to asylum and the right to private and family life, are put under pressure in a manner that is entirely disproportionate to the interests of the state to protect its borders. This disproportionality is particularly evident considering migrant people’s fundamental right to life, which is an absolute right that cannot be given any kind of limitation, and which is gravely affected by the “chilling effect” caused by the obligation to criminalize. This is because the regulation deters people from engaging in the rescuing of migrant people for fear of undergoing criminal prosecution.

For this reason, the request to the Court asks that this preliminary question be referred to the CJEU, in order for the European court to have an opportunity to declare the incompatibility of the obligation to criminalize established in the Facilitators Package with the EU Charter of Fundamental Rights, in that (a) it does not require that the facilitation be conducted for profit or through the exploitation of migrant people, and (b) that Member States are allowed to apply the humanitarian exemption discretionally, rather than being required to do so.

Finally, once these points are recognized, the CJEU should also consider the implications of the incompatibility of the Facilitators Package with the CFR in relation to Article 12 of the Italian Immigration Act, which represents the implementation of the Package in Italian law.