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CRIMINALISATION OF MIGRATION:
FIELDWORK PRACTICES AND CONSEQUENCES

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POVZETEK

V zadnjih nekaj letih je kriminalizacija migracij glavni način spopadanja s povečanim številom migrantov v Evropi. Trend, ki preko spoja upravnega in kazenskega prava onemogoča bivanje, vstopanje ali celo dostopanje do ozemlja EU, je glavna tema raziskav o migracijah. Pričujoče delo analizira prakso kriminalizacije migracij v Sloveniji in njenih štirih sosednjih državah, pri čemer odgovarja na sledeči vprašanji: kako se prakse kriminalizacije migracij udejanjajo in kakšne so pri tem razlike med državami. Temelječ na pregledu teorij in raziskav na temo kriminalizacije migracij smo intervjuvali člane NVO in analizirali njihova pričevanja o praksah kriminalizacije migracij, ki so jih opazili pri svojem delu. Pričevanja poročajo o najbolj pogostih praksah in kršitvah pravic pri postopkih obravnave migrantov. Kažejo tudi, da je, kljub različnim statusom članstva v EU ali javnim stališčem o migracijah, med obravnavanimi državami zelo malo ali nobenih razlik pri praksah kriminalizacije migracij. Na podlagi rezultatov smo naslovili najbolj pereče problematike in podali priporočila za nadaljnje delo, raziskave in spremembe na področju migracijskih politik, ki bi odpravile kršitve človekovih pravic.

Ključne besede: kriminalizacija migracij, kriminalizacija solidarnosti, migracije, neregularne migracije, sekuritizacija.

SUMMARY

Criminalisation of migration is a main way in which migration is addressed in Europe today. As a merge of administrative and criminal law it tackles migration with an objective to prevent migrants from residing, entering or even reaching the territory of the EU. This study analyses the practices of criminalisation of migration in Slovenia and its four neighbouring countries to answer the following questions: how do they materialise and to what extent they differ from country to country. Based on a review of theories and research on criminalisation of migration, interviews were conducted with members of NGOs. The results revealed the most common actions and violations in the process. The results also showed that little or no difference was detected among the included states, even when accounting for the differences in their EU membership statuses or public stances on migration. On this basis, the issues that were sensed as most problematic were addressed through recommendations, suggesting an update of the research due to the topic's fast-changing nature, and some policy changes that would put human rights violations to stop.

Keywords: criminalisation of migration, criminalisation of solidarity, migration, irregular migrants, securitisation.

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1 INTRODUCTION

On 14 November 2018, The Guardian, British daily newspaper, published an article on reports from Bosnian-Croatian border (Tondo 2018). These reports are coming from migrants who try to cross the border between Bosnia and Herzegovina and Croatia, and from volunteers and workers of non-governmental organisations (NGOs) that provide aid for the migrants in that area. They all report about the forceful and illegal treatment of Croatian police: pushing migrants who try to cross the border back to Bosnia and Herzegovina by beating them, destroying their phones, taking their money, and ignoring their claims for asylum and protection. Croatian police denied all allegations (Are You Syrious 2018b). The same actions were reported in Slovenia. The platform Border Violence Monitoring, which documents illegal push-backs and police violence, reported on the attack that was carried out by the Slovenian police (Border Violence Monitoring 2018a). Slovenian police denied all allegations (Border Violence Monitoring 2018b). In March 2018, a volunteer from Croatian NGO *Are You Syrious* was accused of helping migrants illegally cross the Bosnian-Croatian border (Are You Syrious 2018a). Evidence showed that he did everything legally, only wanting to make sure that migrants (among whom there were several minors and children) crossing the border will be given a chance to apply for asylum. He was charged with 60,000 HRK (cca. 8,100 EUR). Police suggested a fine of 320,000 HRK (cca. 43,200 EUR) and imprisonment.

Police violence, illegal and forceful push-backs at the border, denying information, aid, ignoring the asylum claims, obstruction of work of NGOs that provide different forms of aid for migrants are all standard practice of criminalisation of migration.

1.1 Definition of the research problem and contextual background

Stumpf (2006) defines the criminalisation of migration as a merger of criminal and administrative law, a process in which the line between the two areas of law becomes blurred. This creates “parallel systems in which immigration law and the criminal justice system are merely nominally separate” (Stumpf 2006, 376), making the sanctions that applied to criminal offences applicable to migrant violations. However, the practice of criminalising migration goes well beyond this legal aspect of the definition. Palidda (2008b, 19) thus describes it as “all the discourses, facts and practices made by the police, judicial authorities, but also local governments, media and a part of the population that hold migrants/aliens responsible for a large share of criminal offences”. This definition can be furthered with the one Provera (2015) provided, highlighting the adoption of criminal law characteristics in immigration procedures as well as the adoption of immigration consequences for violations of criminal law. All of these definitions indicate the complexity of this phenomenon, which merges criminal and immigration law, having effects on the broader society.

This trend of merging the criminal law and migration management is not new and has been present throughout history but in Europe it has intensified in the last 30 years. Provera (2015) understands the criminalisation of migration in the European context as a much broader phenomenon compared to the context of the United States of America (USA). He recognises four elements of it:

- repressive action of police forces and later judicial proceedings;
- use of immigration detention;
- criminalisation of those in solidarity with migrants;
- discourse.

Discourse provides the climate in which the concrete practices can later be imposed. The discourse in media with the help of authorities and state bodies constructs the group of migrants as a risk category. They are presented as inherently linked to deviance and crime, hence a security threat. As Spena (2014) states, criminalisation of migrants is now based on *wrongbeing* instead of *wrongdoing* – the criminal act becomes intrinsic to the sole *being* of a certain social group, with certain characteristics, and not their actions. This construction of a type of criminal comes in two stages, which are reinforcing each other. First, the stereotype of certain categories of migrants is constructed. This justifies the criminalisation of migration. Only certain categories of migrants can commit the crime of “illegal” immigration. Second, the fact that this crime of illegal immigration exists and can be committed only by certain groups confirms the stereotype. It reinforces its normative side: “The impression of a criminal stigma on illegal immigrants works, then, both as a presupposition (a ground reason) and as an effect of the criminalisation of illegal immigration” (Spena 2014, 24).

This discourse leads to policy measures that are arguably needed to preserve a state’s security. To achieve that goal, criminal law starts overlapping with the migration law. Criminal consequences are imposed for breaches of immigration law, the detention being the most common example. Intriguingly, in most Member States (MS), detention would fall under administrative detention, meaning it would not involve a penal measure. However, this divide between criminal and immigration law is blurred in many countries, either because the migrant is involved in both a criminal and an administrative procedure simultaneously, or because the line between detention facilities for criminal offences and those for people falling under the immigration proceedings is not clearly defined (Parkin 2013). The same actors are governing both the detention for migrants and convicted criminals (Provera 2015).

The whole process of criminalising migration aims to achieve one goal in particular – to expel and keep the unwanted migrants from a particular territory, thus preventing them from both entering and staying in the country they reached. This is successfully realised by creating what Edmond-Pettitt (2017) calls a “hostile environment” – creating disadvantaged circumstances for migrants, pushing them to the very edges of the society. In words of Provera this means isolating them both legally and socially (Provera 2015). To keep the

migrants in a marginalised position, these deterring measures also target anyone who could potentially help them overcome the obstacles posed by the state – hence the aid to migrants becomes criminalised as well. Article 27 of the Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Official Journal of the European Union, L 239) clearly stated that acts of aid to migrants are penalised only in the case of obtaining financial gain for the act. Article 1(a) of the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Directive 2002/90/EC, Official Journal of the European Union, L 328) removes this explicit defining characteristic of financial gain for the act of providing transport to irregular migrants. Instead, it keeps it only for the acts of providing assistance with the further residence of irregular migrants. Moreover, Article 2 of the Directive 2002/90/EC gives the MS an option on deciding whether they will exempt humanitarian aid from sanctioning or not. Furthermore, Article 2(2) of the Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (Framework Decision 2002/946/JHA, Official Journal L 328) states that the penal measures may be accompanied by a prohibition of the whole activity through which the offence was committed.

Left with an option of exempting humanitarian aid from sanctioning, the majority of MS chose not to pursue this option. There are numerous reports from different states in the European Union (EU) on measures taken by the official bodies (mainly police) that target the work of NGOs, who provided aid to irregular migrants (Webber 2017). Jalušič (2018) adds another critical category of criminalisation of migration; the category of these policies getting control over the entire population by criminalising acts of solidarity and assistance.

These reports have made it clear that the whole process of criminalisation of migration and of the humanitarian aid has broader consequences than targeting people directly involved. Parkin (2013) describes the consequences for individuals that range from those of migrants facing even greater social exclusion and being susceptible to exploitation, to being racially profiled and thus losing the trust in police and justice system, and the consequences for the very criminal justice system. Jalušič (2018), on the other hand, points out the broader consequences this trend has on the society as a whole, especially when it comes to criminalisation of solidarity and assistance. This extends beyond actual sanctioning and leads to narrowing of the legal framework for agency of non-governmental actors and individuals, and to shrinking of political space for debate and action. She suggests that this is an attempt to destroy people's capacities and framework for agency, spontaneity, and politics.

1.1.1 Aims of the research

The purpose of this research was to understand the extent to which the practices of criminalisation of migration are present in Slovenia and its four neighbouring countries (Austria, Croatia, Hungary and Italy). Final results and conclusions will:

- fill an academic and practical gap in the analysis of criminalisation of migration in the mentioned area;
- contribute to the broader academic research of these phenomena;
- contribute to a better understanding of the development of the criminalisation of migration and especially the effects it has on the society in general.

This geographical area is particularly relevant because of its geopolitical position. Located on the so-called Balkan migration route, the countries that form part of it offer the entering point to the Western Europe. Additionally, the states that were included in this research also have different member statuses, with Croatia being in the EU, but not yet in the Schengen zone. Croatia and Hungary both border on states that are neither in the Schengen zone nor members of the EU. These results provide critical information on the practices in border regions not only when it comes to state borders but also EU's borders.

This research also aims to connect the phenomena of criminalisation of migration and criminalisation of solidarity and show that both of them are essential in the process of achieving the ultimate goal, i.e. removal from the territory.

We would also like to propose some alternative solutions for the current situation and hopefully give ideas for new international projects or policy-making in general.

1.1.2 Research questions

In this thesis, we seek to better understand the practices of criminalisation of migration that NGOs or more loosely organised groups in Slovenia and its neighbouring countries (Austria, Croatia, Hungary, Italy) have witnessed at their work with migrants, and the consequences of these practices. To meet this goal, we address the following research questions:

- What forms of criminalisation of migration have the groups witnessed at their work?
- Do the criminalisation practices differ from country to country? If so, how?

1.2 Methods

This thesis consists of a theoretical and an empirical part. The theoretical part will draw from authors from different fields, including but not limited to legal studies, sociology, and philosophy. It will outline the theories describing the trend of criminalisation of migration and discuss the defining elements, consequences and the reasons behind the implementation

of such legal measures. It will also present the trend of criminalisation of solidarity, as it appears to be one of the essential elements of criminalisation of migration. The empirical part presents an analysis of the nine interviews that were conducted with the members of different NGOs in Slovenia, Austria, Croatia, Hungary, and Italy. A more detailed description of the methodology is presented in the Chapter 4.2.

Criminalisation of solidarity affects not only a narrow group of migrants, but also a broader group of citizens in solidarity with them. We seek to highlight ways in which the criminalisation of migration and the criminalisation of solidarity is very much present, happening on various levels and to different extent. Thus, it critically affects the structure of legal system, rule of law and shrinking the space of freedom and political activity in general.

1.3 Limitations

This work does not come without limitations. Some of the critical ones include:

- a limited space to discuss all the characteristics of the phenomenon, mainly because the topic is fast-changing and this is an ongoing issue;
- the empirical research focuses on NGOs and other loosely organised civil groups, which all do various kinds of activities, not only humanitarian ones.

The research could be further upgraded by:

- analysing the experience of solely humanitarian organisations;
- analysing the experience of those organisations who still have access to now closed ‘hot spots’, refugee camps and detention centres for migrants;
- expanding the research in states that are not a part of the EU but are bordering to it, since they play an important role in border control (e.g. Bosnia and Herzegovina, Serbia, North Macedonia, Turkey, Morocco, also other states in Northern Africa).

1.4 Overview

This thesis consists of two parts, a theoretical part and an empirical part. In Chapter 2, the theoretical part contains a review of the relevant literature and extensively defines the phenomenon of criminalisation of migration through all its constituent elements. To better understand the process of criminalisation of migration in the EU in the analysed time frame, there is a timeline presented in Chapter 3, which serves as an introduction to the empirical part. Chapter 4 presents the empirical part of the thesis, first describing the purpose of the research, methodology used, and limitations of the research. After that, the results are presented and discussed. Finally, Chapter 5 outlines the main conclusions and provides recommendations for both further research and policy changes.

2 THEORETICAL PART

We have analysed the work of authors that have been dealing with criminalisation of migration from perspectives including—but not limited to, legal, sociological, and political ones, since this topic is intersecting various fields. The aim is to define the trend of criminalisation of migration and the consequential criminalisation of solidarity.

We will first define the sole term criminalisation of migration, drawing from several authors dealing with this topic. We will define its key elements and the practices through which it is realised. Furthermore, different reasons behind the evolution of this trend will be analysed, and the consequences it has both on migrants and citizens.

In the second part, we will present the trend and practice of criminalisation of solidarity, how it constitutes and upgrades the effectiveness of criminalisation of migration. Here, we will also present the findings of the interviews' analysis by Vlasta Jalušič (2018), who focused on the criminalisation of solidarity among the participants of our research.

2.1 Definition of terms

There are a lot of terms used in public discourse, political discourse, legislation and literature that all bear rather different meaning but are often used interchangeably. We would like to first define the most used terms and make clear which one will be used for the purpose of this thesis and why.

In Recommended Principles and Guidelines on Human Rights at International Borders, the United Nations Human Rights Office of the High Commissioner (n. d., 4) defines the term “international migrant” as a person who is outside their state of residency or, in the case of a stateless person, outside of their state of birth or habitual residence. This term includes both people who move permanently or temporarily, and people who migrate in a regular or documented way, or are in irregular situations.

Koser (2007, 16-18) describes three main categories of migrants. The first distinction that can be made is between those who migrated voluntarily and those who are so-called forced migrants. The latter include those who left their country because of conflict, persecution, or environmental reasons. Forced migrants are often called refugees, although the term “refugee” is a very narrow and specific category that does not include all forced migrants (see below). The second distinction is made between those who migrate for political reasons and those who move for economic reasons. The first category usually overlaps with the category of refugees, while the second is usually marked as “labour migrants” that are further categorised as either low skilled or highly skilled. There is also an in-between category of those who move for social reasons, such as those who migrate because of a family reunion. The third distinction is made between legal and “illegal” migrants, although the term “illegal”

is wrongly used here since it makes their very being illegal. It also makes the direct connection between migration and criminality. Instead, a term “irregular” should be used.

Irregular migrants are defined in two different contexts, in the global and EU context. In the EU context, the irregularity is defined in the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive, Official Journal of the European Union, L 348/98). In Article 2(1) of the Return Directive, it is stated that the Return Directive applies to “third country nationals staying illegally on the territory of a Member State”. The term “third country nationals” is defined in Article 3(1) of the Return Directive as “[...] any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty establishing the European Community (Official Journal, C 325) and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code, Official Journal of the European Union, L 77/1)”. The term “illegal stay” is defined in Article 3(2) of the Return Directive as “[...] the presence on the territory of a Member State, of a third-country national who does fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State”.

Two other terms are often used in public discourse when addressing irregular migrants: “undocumented” and “unauthorised”. As Koser (2007, 55) points out, the term “undocumented” is ambiguous since it is used both for those who have not been officially documented or recorded, and for those who have no documents (i.e. passports or work permits). Neither situation applies to all irregular migrants. The term “unauthorised” does not apply to all irregular migrants either. Koser (2007, 55) highlights that irregular migration is a highly complex and diverse concept. There are numerous ways of becoming an irregular migrant: i.e. entering and/or passing a country with fraudulent documents, staying in a country after the expiration of a visa or work permit, moving with migrant smugglers or human traffickers, or abusing the asylum system.

Koser (2007, 70) mentions two other terms that are legally defined and broadly used in public discourse: “asylum-seeker” and “refugee”. An asylum-seeker is someone who applied for international protection, either by reaching the country of application or applying outside of the country at an embassy or a consulate. Applications have to fulfil the criteria of the Convention and Protocol Relating to the Status of Refugees (United Nations High Commissioner for Refugees 2010). If the application is successful, an asylum-seeker is granted a refugee status and therefore becomes a refugee. In Europe, there is also a special group of people that fall under the description of Exceptional Leave to Remain, consisting of those who are not refugees but cannot return to their homes.

The term “refugee” is defined in Article 1 of the and Protocol Relating to the Status of the Refugees (United Nations High Commissioner for Refugees 2010, 14) and applies to every person who based on a:

[...] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This complexity of definitions and statuses is highly volatile, and one person’s status can easily change in time and also space, since they are moving through more than one country on their journey. The majority of articles and theories refer to irregular migrants. Media uses a combination of the above-mentioned terms, often wrongly as synonyms. These categories are all highly complex and there are a lot of different statuses present in all groups of migrants and sometimes even with one individual. Since we are usually referring to different statuses, we will use the broadest term “migrants” for the purpose of this thesis to avoid naming all the categories each time.

2.2 Criminalisation of migration

As Parkin (2013, 1) points out, criminalisation of migration is a trend that has become a subject of research for numerous authors in the last couple of years, due to the proliferation of criminalising practices, especially in the EU. Nevertheless, this trend has been developing for the past few decades and it started in the context of the USA.

2.2.1 Definition

Stumpf (2006) defines the criminalisation of migration as the intersection of the criminal and immigration law. These two legal fields are essentially dealing with two different natures of issues and therefore differ in practice. Criminal law deals with the crimes that have been committed in which the state stands against an individual. The state seeks to protect the society from violence, fraud or evil motive, and it does so by sanctioning the criminals. There are two different categories of crimes – those against individuals, namely victims, and those against the society at large, or the greater good (Guild 2010, 8).

Immigration law, meanwhile, essentially falls under the administrative law, which regulates the relations between the individuals and the state, but contrary to the criminal law, does not use sanctions. However, Stumpf (2006) points out that these are both systems of inclusion and exclusion. Immigration law determines who may or may not cross the border and stay in certain territory, while criminal law excludes those who commit crimes through sanctions. Both fields also regulate the relationship between individuals and the state. Stumpf (2006)

links this to the membership theory, saying that both fields determine whether certain individuals are being included in the social contract, or excluded from it. Those who are excluded are deemed “unwanted”. As an example, within the USA context, Stumpf (2006) mentions the migrants and ex-offenders being stripped of their voting rights or the right to remain the USA territory, hence being denied two badges of membership, separating the individuals from the society by granting them lesser levels of citizenship or by literal physical exclusion.

Stumpf (2006) notes that the merge of the criminal and administrative law thus produces a new legal field in which only the harshest elements of both fields are kept. Both consequences of immigration law and criminal law sanctions are imposed for the same offences, both detention and deportation may result from the offences, and the violations of immigration law that were previously regarded as civil have become criminal. The consequences of immigration law are now imposed for the violations, since it is much easier to use detention and deportation as sanctions due to its “lesser substantive and procedural barriers to deportation compared to a criminal conviction” (Stumpf 2006, 385).

While there is a wide consensus among scholars that the trend of criminalisation of migration is becoming more visible in Western Europe since the 1980s and that it is just an echo from the USA (Parkin 2013), Provera (2015) argues that the criminalisation of migration embraces a much broader understanding in the EU context than in the USA. He defines the criminalisation of migration similarly as Stumpf (2006); the integration of criminal law techniques and adoption of criminal law enforcement strategies, such as preventative detention, into immigration law. At the same time, immigration law consequences are introduced in criminal law – i.e. expulsion from the territory as a sanction for criminal law violation. All these measures are aimed at removal from the territory. In the USA, this difference between criminal and administrative law affects also the constitutional protections offered to the person in process.

Palidda (2008b) defines the criminalisation of migration much broader and includes all of the discourses, facts and practices that refer to migrants or aliens as the one committing numerous criminal offences. These practices are carried out by police, judicial authorities, governments, media and also part of the population. Provera (2015) also defines it as repressive actions by law enforcement, triggered by the breaches of administrative, civil or criminal code, as well as discourse, immigration detention and criminalisation of solidarity.

Mitsilegas (2015) points out that in the EU context, the criminalisation of migration is a process in which the migration management assumes three features. First, it adopts the substantive criminal law; second, it resorts to traditional criminal law enforcement mechanisms which include surveillance and detention; and third, it develops mechanisms of prevention and pre-emption.

To summarise all these definitions, criminalisation of migration is a process in which criminal law and immigration law (i.e. administrative law) merge, producing a new legal field in which the harshest elements of both laws remain. Violations of immigration law have become criminal violations, and administrative consequences, such as detention and deportation, have become sanctions for criminal offences. It has developed in the USA, but has proliferated in the EU in the past few decades as well, with a much broader understanding. For the purpose of this thesis, we will use Provera's (2015) division of key features of the criminalisation of migration:

- repressive actions by law enforcements;
- discourse;
- immigration detention;
- criminalisation of solidarity.

These elements will be further explained in the following chapters.

2.2.2 Why criminalisation of migration

Numerous authors agree that the final purpose of criminalisation of migration is the expulsion of migrants from the territory through these practices.

Provera (2015, 1) argues that the measures following the trend of criminalisation of migration stem from a belief that irregular migration can be perfectly controlled – “that is, that the law can be used in an instrumental fashion, removed from normative considerations that generally underpin criminal law provisions (that is, that the law embodies the ‘right thing’ to do).”

Parkin (2013) notes that academics including Melossi (2003; Parkin 2013), Bigo (2004), and De Giorgi (2010; Parkin 2013) depicted intensification in criminalising discourse already in the 1970s, when politicians were facing a crisis. Palidda (2011; Parkin 2013) also proved that the high crime rates are not correlated to high immigration rates, but that periods of economic difficulty are connected to higher rate of xenophobic surges and criminalisation discourses. As Parkin (2013) concludes, the trend of criminalisation of migration thus rises when some sort of crisis appears, be it economic, social or political.

As Stumpf (2006) notes, the immigration law is now focusing on detaining and deporting those who *seem* most likely to commit crimes which present a threat to national security. The sanctions are based on the citizenship and ethnicity, which is not possible to do through criminal law. Parkin (2013) also stresses that irregular migrants are targets of highly restrictive immigration policies, which contributes to and actually constructs their status of irregularity. The main policy tools of European governments are systematic use of criminal sanctions, administrative detention and deportation, which all only strengthen the irregular status of this category of migrants.

In addition to the elements that constitute criminalisation of migration, Provera (2015) highlights that the essential counterpart of criminalisation of migration is criminalisation of solidarity. He notes that the combination of these practices places irregular migrants in isolated, marginalised legal and social space, so they can be easily removed from the EU territory. Irregular migrants are legally isolated in a way they cannot act or assert their rights. Since they rely on their social networks, measures are also taken against those in solidarity with them, which makes it difficult or even impossible for migrants to access health care, accommodation, employment, food or education. These measures and isolation put those who reach and stay in European territory in such an uncomfortable place that they are basically forced into leaving the territory, which then appears as a voluntary decision on return.

Palidda (2008a) also points out that migrants are being pushed into irregularity because the possibilities to migrate regularly are basically non-existent. This lack of regular immigration possibilities and the repression imposed on migrants has two outcomes. First, it reproduces irregular migrants who are stripped of their rights and denied the access to them, which makes them a highly vulnerable and exploitable work force. Second, it makes them a useful enemy who can be at any moment blamed for all the economic, social and political issues, fears and insecurities. Palidda (2008a) suggests the criminalisation of migration makes it possible to manage the society in such a way that social recovery, reintegration or rehabilitation is excluded. This can be clearly seen in the purpose of immigration detention which is not rehabilitation and resocialisation, but merely an exclusion from society, a waiting step to deportation.

Mitsilegas (2015) highlights that one of the key elements of the immigration enforcement strategy in the EU is the prevention of migrants from reaching the sole territory of the EU. That way the MS and the whole EU are not obliged to assume legal obligations towards migrants. Under Article 4 of the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (Protocol no. 4 to ECHR, European Treaty Series, No. 46), the collective expulsion of aliens is prohibited. Article 4 of the Protocol no. 4 to ECHR is further upgraded with national laws, which mostly mention the rights of their citizens to not be subject to expulsion from any territory. When mentioning foreigners, it is explicitly stated that those who are lawfully on the territory are protected from the expulsion, thus excluding those put in irregular situation. Furthermore, Fekete (2001) also warns that:

To break domestic immigration laws (through, for instance, entering a country as a stowaway) is now redefined as a criminal act, even though the [Convention and Protocol Relating to the Status of Refugees] (United Nations High Commissioner for Refugees 2010) upholds the right of refugees to break domestic immigration laws in order to seek asylum. In such ways has the EU succeeded in shifting terms of the asylum debate so as to treat asylum seekers not as people from

many different countries, with many different experiences and each with an individual story to tell, but as a homogenous and undifferentiated mass.

That said, Spena (2014) argues that the criminalisation of migration aims to exclude from society and that this exclusion is aimed at particular groups of people. He analyses Italian legislation that defines who can enter the state and reside on its territory; the same criteria are applied also in Slovenia, Austria, Croatia and Hungary. All of the mentioned states require visas for third-country nationals (TCN), reasoning for their stay and a proof of sufficient means of subsistence. Spena (2014) stresses that this kind of legislation automatically closes the possibility of legal entry for certain groups of migrants based on their economic status and their nationality. The majority of migrants that use irregular ways to enter the MS are coming from countries that require visas and have lower GDPs. Slovenian police reports on irregular migration show that the majority of migrants that are caught crossing the border illegally are from Pakistan, Afghanistan, Algeria, Iran and Syria (Ministrstvo za notranje zadeve RS, Policija 2018). All of these nationals need visa to enter Slovenia.¹

Several possible explanations on why the criminalisation of migration is happening can be drawn from the theories. Parkin (2013) provides a few: first, it can be used by states to gain new means of exerting control over migration flows, both at the border and at states' territories. That way, they act as gatekeepers of human mobility and criminal law offers them "new possibilities to enforce migration control when immigration law and policy reaches its limits" (Parkin 2013, 9). However, Parkin (2013) argues that practice of imposing criminal sanctions in immigration offences shows that this is usually discretionary and often used as a last resort, which shows that there are more complex factors at play here. She suggests that the answer might be laying in the securitisation of migration. Presenting questions of mobility and migration as security and crime issues often has a symbolic rationale. Parkin (2013, 15) builds her argument on David Garland's (2001) theory, which suggests that states resort to expansion of criminal law because of their limited options to deal with contemporary social challenges, presenting it as a symbolic, communicative act. This sends a message both to citizens, who are reassured in the power of the state and its ability to protect the citizens from crime and deviance, and to potential criminals.

As the theory suggests, criminalisation of migration can stem from various reasons. Border control is, undoubtedly, one of the state's priorities and through it the state maintains its sovereignty. Since the MS in the EU agreed to open borders, it is in all MS' interest that especially external borders are protected.² Merging criminal and immigration law makes it

¹ Just to get a better idea: Slovenian citizens can visit 180 states without needing a visa. Pakistani citizens can visit 33; Afghanis can visit 30; Algerians can visit 50 states; Iranians 43; Syrians 32 (Henley&Partners n. d.)

² 6th Whereas of Schengen Borders Code: "Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in

easier for the states to, at least seemingly, perfectly control the mobility of people. Through legislation and practice they have created a space in which legally arriving to the state territory is possible only for certain groups of people, while some other groups are only left with an option of entering irregularly and using illegal means. Their desperate actions can then be used as an argument for their expulsion, since they breached the laws and entered illegally, thus fulfilling the ultimate goal of removing them from the territory.

Numerous scholars mention that these practices are aimed at particular groups of people. In order to make them legitimate, construction of those subjected to the criminalisation of migration has to be carried out. Since the discourse plays an essential role in constructing here, we will start with the discourse as one of the key elements of the criminalisation of migration.

2.2.3 Discourse

A clear link between the criminalising discourse and policy-making has been pointed out by various authors. As Parkin (2013, 2) notes, the discourse on immigration constructs the notion of inevitable connection between the criminal threat and the very character of migrants. This connection has to be analysed in order to understand the social and political conditions, and public perceptions that “allow the construction of migrants as a risk category” and therefore a security threat.

Even though it seems as if the subject of the legislation and the following sanctions is illegal entry and residence, Spena (2014) suggests that what is criminalised here are not offences that people make but rather the certain type of people per se. Being a certain type of person, hence not your wrong-doing but wrong-being, inflicts a punishment. Spena (2014) stresses that this trend has, paradoxically, nothing to do with actors as individuals, human beings with their personal traits, but is concerned with stereotypes – simply possessing certain traits can link a person to an image that is criminalised. He describes the steps in this mechanism: “First, a stereotype [...] is constructed at a social and political level, by singling out certain (allegedly) descriptive traits (country of origin, racial characteristics, the bare fact of being regularly unoccupied and lacking means of support, and so on)” (Spena 2014, 16). Based on some existing social and political prejudices, a “corresponding expectation, and thus normative judgement, or qualification, is tied (dangerousness, deviancy, disloyalty, enmity, etc.)” (Spena 2014, 16). These stereotypes thus serve as an instrument to identify certain types of persons which are assumed to have negative traits. The suspicion is linked to criminal law (Guild 2010, 10). They are then transformed in formal definitions of a crime, either directly or indirectly. The measures are then applied to persons who simply happen to

human beings and to prevent any threat to the Member States’ internal security, public policy, public health and international relations” (Schengen Borders Code).

fall under the stereotype – just by possessing certain traits that match the descriptive part of the stereotype they are connected to the normative judgement, and finally penalised. As Guild (2010) points out, the use of a certain discourse is a political choice and it is a very important one when it comes to choosing the focus of attention in this situation.

While act-centred approach to criminal law assumes everyone has a rationality and morale, hence trying to prevent crimes from happening by eliciting practical and moral reasons for them, Spina (2014) argues that the actor-centred approach has different assumptions. In this approach, actors are dehumanised and stripped of their rationality and morality. They are inherently criminal and they cannot help it, thus it makes no sense to expect them to not committing the crimes. Since they are not free to choose how they will act, they should also not be free to act how they chose for society's sake: "the whole comes first, the single later" (Spina 2014, 20). Preventing social harms and disorder is more important than protecting and respecting individual liberties and privacy.

This process of criminalising persons for what they are based on stereotypes always presents itself as inevitable for protecting social order and society, warns Spina (2014). But as Ana Kralj (2008) points out, the sole creation of the so-called "other" is also needed for the very creation of "us" as a national community realised in a national state. In order to create a category of the nation or community, a category of aliens has to be created simultaneously. This category of aliens embodies all of the threats that threaten the nation and protecting ourselves against them strengthens our community. Even though this category of foreigners is homogenised at first, the second step is much more important – the hierarchical classification of foreigners. The latter are categorised by their biological, cultural and/or historical features, thus getting a hierarchy ranging from those who are the least different and unwanted, to those who possess all of the categories of otherness: "To illustrate with an example: at the top of the hierarchy there are the 'good foreigners', for example white, rich members of Western culture, who are not natives but are interesting, useful and so on. At the bottom of this chain we can find a poor, dark-skinned immigrant woman" (Kralj 2008, 141).

This category of the foreigner or alien, the 'other', has an important role in the society – it is the so-called scapegoat in the times of uncertainty, to be blamed for all the troubles (Kralj 2008, 142). As Kralj (2008) mentions, throughout the history of Christian Europe, the Jews were the prototype of dubious strangers who are not to be trusted; the same still holds for Roma who have the status of permanent aliens, being continuously subjected to segregation, rejection, culpabilisation and criminalisation, regardless of their rights as citizens. Some authors have found additional parallels in the past; Weber and Bowling (2008, 356) have pointed out that Tudor laws were aimed at the unwanted in such a way that those who did not belong were either expelled or, where that was not possible, they were immobilised. Paupers and beggars were incarcerated or expelled from the parishes, thus made outsiders both in socio-economic and geographical sense.

Belonging and being unwelcome has always been associated with class and poverty, as well as race, since it is the most visible otherness and can be the first target of exclusion. As Weber and Bowling (2008, 363) explain, the Tudor laws were first targeting vagrants, who were at the beginning defined quite narrowly as a group of people who wandered from place to place. The definition, however, expanded through time and included also scholars, sailors, fortune tellers, and prostitutes, among others. Vagrancy became connected to one's class, gender and ethnicity. The same was happening in the Habsburg Monarchy – they expelled the unwanted, those of other religions, criminals, beggars, vagrants and “loose women”, literally removing them from the society: “Lacking overseas territories, the Habsburg monarchy dumped them in Transylvania. Between 1752 and 1768 vagrants and prostitutes were put on boats to Temesvar two times a year” (Becker 2010, 36–37). Parkin (2013) mentions Sigona and Trehan's (2011; Parkin 2013) research on how the perception of Roma as a group with racial predispositions to crime, vagrancy and idleness has been constructed. They highlight “the deep-rooted nature of assumptions and framings that link migrants with crime, but also the racialisation of the migrant/crime association, especially for visible minorities” (Parkin 2013, 3).

Weber and Bowling (2008, 364) mention Kleg's (1993) division of “raciological thinking”. Racial categorisation constitutes the practices of creating a division between the superior and the inferior. This categorisation is not limited only to national levels, but starts happening of the supra-national levels as well, for example European. The European identity and the sole European constitutionality are based on the distinction between Europeans and the others, Easterners, Southerners, Balkans, etc. These then present themselves as factual actions against migrants at local levels, where citizens demand the restriction of migration (Pajnik and Zavratnik Zimic 2003, 6).

Fekete (2001) argues that we are no longer dealing with the state racism but a globalised racism designed by supranational bodies. This new form of racism is now based on cultural superiority and Sivanandan (2002) calls it xeno-racism: it is aimed at refugees and asylum seekers regardless of their colour. It is rather based on the fear of strangers (xeno), but it also operates against them (racism). It rejects based on both race and class, but now with neo-liberal features – those who are rejected are marked as those with low economic or production value. Bigo (2004, 3) adds that the discourse around migrants also touches upon the core values of different societies that are suddenly separated and contrasted (e.g. in France, the Republican values were contrasted with Islamic values). The migrant is now seen as someone with different customs that poses a threat from within.

The need to control the immigration and to make the selection at the borders started after the end of the golden years after the Second World War, and particularly after the so-called oil crisis in 1973 and 1974, argues Palidda (2008a). Countries that were historically the

destination countries started adopting policies in order to prevent or control the immigration (Palidda 2008a, 7– 8):

It was from the start of the 1990s that European police forces ended up adopting racial profiling as an instrument of customary repression and control and the selection of immigrants, informal but nonetheless effective, was primed to favour people from coming from eastern countries, from Latin America, from the Philippines and some other Asian countries, to the detriment of “Arabs” (already before 9/11/01).

Bigo (2004) furthermore elaborates that the politicians of the richer countries of destination see migration and mobility of people not as an opportunity, but a danger. These rich countries “accept the mobility of capital and mobility of rich people, of consumers in transit, of rich tourists, but the refuse the same “freedom” of movement to the poor people, to the vagabonds, to the people fleeing ecological, economic or political disasters” (Bigo 2004, 2).

These categories of unwanted foreigners are linked through the discourse to the policy-making. As Parkin (2013, 4) points out, the discourse on immigration builds on “use of collective categories that lack any descriptive coherence or precision”, but have strong connotations and imply associations, e.g. “gypsies”, “Muslims”, and also “illegal migrants”. Additional confusion is created by the use of term “economic refugee” or “economic migrant”; as Bigo (2004, 7) points out, this has an effect of decreasing the level of protection given to a person. When it comes to illegal migrants, this term clearly implies that these people have criminal status based on administrative misdemeanour of lacking proper documentation, and that their whole existence is therefore illegal, hence making a simplified construct out of highly complex questions and terms.

In the EU context, the term “illegal” is used when describing a person’s presence in certain MS territory which is against the law. Provera (2015, 4) warns that there should be a distinction between the behaviour that is “illegal”, hence denoting criminality and bearing normative connotation, and “unlawful”, thus contrary to the law and also appropriate for an administrative breach. A problem that Provera (2015) also highlights is that the definition under the Return Directive understands irregularity in binary terms, when in reality many forms of migration may overlap and are not mutually exclusive – for instance, those who are subjected to human smuggling can also be asylum seekers. Also, it should not be overlooked that the Parliamentary Assembly of Council of Europe called all MS to promote the use of neutral terminology and to replace the terms “illegal” with “irregular” in its document Resolution 2059 – Criminalisation of irregular migrants: a crime without a victim (Council of Europe Parliamentary Assembly 2015).

Numerous EU-funded studies have found that the use of criminal categories has negative impacts. The use of these terms by journalists and politicians precedes the policy changes that become necessary to fight, control, detain, limit, and restrict illegal immigration (Parkin 2013, 5). Authors who focused on discourse in more detail also found that the element of

threat is present in the discourse and consequently in policy-making throughout the whole EU, both on national and Union level. The EU-funded project “Support and Opposition to Migration (SOM) has shown that “security and crime” are the most frequent themes in journalistic and political discourses concerning migration (Berkhout 2012; Parkin 2013, 5). Several social institutions have their own reasons to exploit immigration presented as a target. Police, for example, meets their quota for arrests and actions in problem areas by dealing with irregular migrants. Media sees it as a convenient enemy figure, using the frame of emergency and emphasising threatening elements to increase saleability. While they raise the alarm, politicians use the state of moral panic to introduce policy changes. Immigration also becomes a convenient platform through which the political messages are easily transferred – “talking tough on illegal immigration is more straightforward for instance than explaining/distinguishing a party’s economic policies or stance on foreign affairs” (Parkin 2013, 5).

As pointed out, the construction of certain groups of others that should be excluded from the society begins with the discursive construction of stereotypes. This affects our perception of certain groups of people, also in a political context, which importantly affects the policy-making as well. Policy-making leads to concrete actions by politicians, officials and law enforcement – securitisation, repressive actions, detention, and expulsion.

2.2.4 Repressive actions by state officials and law enforcement

Governments thus present questions of mobility and migration as security and crime issues, which often has a symbolic rationale. As Van den Berg and Hutten (2018) explain, securitisation is a process of labelling certain issues as security issues. In this process, issues become politicised, gaining political priority, which calls for legitimate responses and measures that exceed the ordinary ones. What we label as a safety or security risk is arbitrary – it is a matter of political decision and impacts our understanding of safety and security in general. Discourse thus importantly affects the policies and measures imposed. The same goes for the so-called state of exception as a state of necessity, which states invoke in order to be able to breach their own national legislation and international law. Agamben (2005) argues that this necessity for which the state is invoked is not objective – it is subjectively judged and declared as a necessity by those who find it necessary: “The concept of necessity is an entirely subjective one, relative to the aim that one wants to achieve” (Balladore-Pallieri 1970; Agamben 2005, 30).

In the 20th century, the discourse of biopolitics became the dominant discourse when it comes to foreigners. As Palidda (2008a) and Provera (2015), Kralj (2008) also highlights that the aim of these politics is to create a unified, controllable and normal society with semi-open borders. Capital, work force, communication and certain cultural practices are allowed to enter, while the borders are reinforcing and are kept closed for everything else. Unwanted

aliens are therefore faced with numerous obstacles when trying to enter a certain territory. But these obstacles do not start only with at the border – they start with the “nationalistic construction of the alien” (Kralj 2008, 143), which perceives the migrants “as an unwanted intrusion into the national body, which brings deterioration of intrinsic values of the national society” (Kralj 2008, 144). These politics of exclusion are present at all levels, local, national and supranational, such as European.

Making migration a security issue has important consequences when it comes to policy-making and the practices that result from it. As Bigo (2004) suggests, this securitisation occurs when the politicians are faced with economic issues and urban crises. To make it look like they are in control of the issues, the general social unease is manufactured, the threats that the states and its citizens need to be secured from. Politicians do not invent the problems – they merely choose them from the pool of issues in the so-called “risk society” (Bigo 2004, 1).

Parkin (2013) also mentions Bigo’s (2002; Parkin 2013, 6) description of continuum of threats that is created by security professionals. The notions of security are now aimed at other targets, including people crossing borders or individuals born to foreign parents, instead of terrorists, criminals, spies and counterfeiters. The aim is to problematise certain social phenomena to gain power, influence and to expand their budgets and resources for their services. This is “facilitated by the transformation of technologies they use (large-scale surveillance databases, data profiling etc.)” (Parkin 2013, 6). Since these professionals are holding a certain established and legitimate positions, working with privileged knowledge, the weight of phenomena that are presented as threats becomes even more emphasized.

Securitisation is implemented both on the national and European level. As Parkin (2013) notes, open borders presented a security threat ever since Schengen was established. This led to proliferation of various security measures and transnational cooperation of police and border control; some security agencies were established also on the European level, such as Europol and FRONTEX. These additionally contributed to closely linking migration to continuum of threats (e.g. smuggling, trafficking, terrorism). To prevent this cross-border crime, series of surveillance systems were created on European level, such as Schengen Information System I and II (SIS I and SIS II), the Visa Information System (VIS), EURODAC, EUROSUR, and similar. Parkin (2013, 7) argues that what these systems have in common is monitoring and controlling the mobility of non-EU citizens, and they also present an example of selective identification of risk categories.

Franko Aas (2011, 333) additionally builds on this selective identification and argues that this also presents an important question of sovereignty. She argues that the transformation of the nation state into assembly of territories, authorities and rights is marked by the weakening of the Westphalian concept of sovereignty and the detachment of sovereignty from the state.

Through these control systems at the EU level, surveillance became a tool for European integration and for strengthening the supranational structures. It also became an export – the aim here is that some of the surveillance labour is transferred to third-world countries, especially in Eastern Europe and Northern Africa. Through this practice the control of migration strategy and policy is taken away from the states and is imposed on them by supranational bodies, hence taking over the one of the basic state functions. States give away this function in order to join the EU club and/or get other benefits (Fekete 2001). These states have lost a part of their sovereignty over immigration controls in order to also keep their citizens to get out – unless they are the wanted kind of citizens. Fekete defines those wanted ones as doctors, computer scientists and skilled workers that can practice their mobility through managed migration policies. They are deemed wanted because of their skills and knowledge, even though the fact is that their countries of origin would need them more – “In the era of globalisation, the skills pool, not the genes pool, is the key” (Fekete 2001).

European surveillance databases play an important role in border control and surveillance. Franko Aas (2011) describes some of the main systems also mentioned by Parkin (2013). All of them (SIS I and SIS II, VIS, EURODAC, Automatic Border Crossings – ABC, EUROSUR) are used for controlling people’s mobility. All of them now collect and use biometric information of individuals and this information is accessible to numerous institutions. EURODAC, for example, collects asylum seekers’ fingerprints; this data is managed by the European Commission and it is used to control whether a person has already applied for an asylum, or entered the European territory irregularly. If so, they can be transferred to territories where they applied or entered at according to the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin Regulation, Official Journal of the European Union, L 180/31) (Franko Aas 2011).

The majority of these systems are based on biometric information through which the individuals are then sorted and marked either as mobile or immobile. Some of the systems not only exclude, but also provide easier travelling solutions to the selected groups. ABC system introduced European biometrics passports in order to minimise border checks for EU citizens. Registered Travelers System also minimises border checks for “pre-enrolled, ‘low risk’, third world country nationals, who have been granted registered traveller status”, regardless of their potential visa requirements (Franko Aas 2011, 335). The travellers’ system FLUX, the USA-Dutch experience, gives a privilege to skip queues and border checks for US or Dutch citizens that are low-risk passengers with no criminal record, no customs and immigration convictions, and who pay an enrolment fee. As Franko Aas (2011) states, the mentioned systems prove that the object of surveillance is not only the mobility of the risk groups, but also the mobility of those who chose to be watched in order to gain some benefits. She argues

that while Foucault's concept of panoptic gaze was aimed only at lower classes of society, while the upper ones could afford relative anonymity, the hierarchy of visibility is now being levelled through surveillance systems.

What distinguishes the lower and upper parts of society now is rather the set of objectives and consequences behind the surveillance. These systems do not only create a divide between the mobile global North and the mobility poor global South. Franko Aas (2011, 337) highlights that it also gives a special functional and discursive role to crime and security:

The discursive and political coupling of migration and crime is creating a specific dynamic of social exclusion which transforms traditional social boundaries and deals not simply with 'an immobilised global underclass' [...], but an illegalized global underclass, whose control is a driving force behind the formation of many of the transnational surveillance networks.

Through these surveillance practices the institutional racism and xeno-racism is applied. People are being categorised based on their race and class, either having all the obstacles for their mobility removed, or being immobilised and excluded. The surveillance has thus moved from the panoptic rationality, hence the disciplinary one, to banoptic rationality, which is aimed at banishment and denying entry (Franko Aas 2011). The surveillance zones are expanding – border lines are now becoming border zones, which makes the control much less visible and much broader. Control has actually become delocalised, presenting a shift of focus from territorial security to security of populations (Bigo 2004, 20). The states have shifted their focus from crimes of arrival to preventative strategies of non-arrival, hence preventing people from even reaching the territories through prevention of embarking or military blockades (Weber and Bowling 2008). EU's proactive, preventative measure to prevent people from leaving their territory is now being replaced or additionally upgraded by the passive policy of border refusal (Bigo 2004, 20).

Since the focus is now on the verification, authentication of identity in order to access rights, bodies, spaces and so on, the sole body becomes a passport. This means that citizenship is transformed into a digital citizenship, which does not only serve to make our lives easier, but can also be the reason to put the physical body in danger and pain. Franko Aas (2011, 341–342) mentions the case of 280 migrants in Norway who disfigured their fingertips in order to avoid recognition and consequent deportation in 2008.

Recent EU measures are aimed at prevention activity directly in the countries of origin. As Bigo (2004, 20) states, these strategies are not new and were implemented already in the 1970s by the USA and France. Law enforcement from the MS is being sent to countries of migrant origin and to the states at the external borders of the EU. EU has made bilateral agreements with certain states, such as Libya, to help them improve their border control in order to limit and prevent the migration from Northern Africa. EU is reinforcing Libyan border control by capacity building, training, advising, mentoring and funding their border

control. Between August 2016 and August 2017, the budget for this mission was 17 million euros (European Union External Action 2016).

Externalisation of the border control and bi- and/or multilateral agreements between the EU and third countries, through which the latter are colluded or incited to prevent their own nationals to leave the country, have human rights consequences. By preventing people to leave their own country out of fear that they might become irregular migrants in the EU, the EU is violating Article 2 of the Protocol No. 4 to ECHR (the right to leave any country, including their own). In addition, placing border controls of this nature only in certain countries means discriminating against foreigners without justification, thus violating Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (European Treaty Series, No. 177) general duty. Denying entry to those who come from territories where they experienced torture, inhuman or degrading treatment or punishment, regardless of their irregular entry, is contradicting Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (ECHR, European Treaty Series, No. 46), as well as Article 31(1) of the Convention and Protocol Relating to the Status of Refugees (United Nations High Commissioner for Refugees 2010). Furthermore, under Article 6 of the ECHR, any criminal charges should undergo fair trial obligations, which in the cases of mass expulsions and criminalisation is not fulfilled (Guild 2010, 15).

As already mentioned, migrants are extremely limited in entering certain states by the visa requirements as well. Deciding who can obtain a visa and who is classed as undesirable can be highly subjective. Bigo (2004) warns that obtaining a visa is now more difficult than it has been before. The discretionary right of the officials who decide on visas without needing to provide any justification is "indeed the source of serious discrimination" (Bigo 2004, 21). The high level of discretion from officials, authorities, immigration and border guards must be taken into an account here as well. As Carrera and Guild (2016, 4–6) point out, the label of irregularity can never be determined in isolation – the exercise of sovereign power is what actually categorises someone as being present irregularly or not. There are very specific kinds of exchange of interactions and situations between migrants and immigration and border authorities that put certain people in their irregular presence.

By expelling certain groups of people, they become legally excluded as well, being caught in the space where state provides no protection and potentially even destructs the bare life. States even have the ability to kill, which can be seen at the Europe's Southern Mediterranean border (Franko Aas 2011, 339). Weber and Bowling (2008) also warn about the problems of statelessness and lack of cooperation between states. Due to often forged documents, some people become unremovable; as Bauman (2002) puts it, "the world is full" – there is no place on which the surplus of unwanted people can be put (Weber and Bowling 2008, 361).

The use and strengthening of surveillance systems is justified with an argument of preventing the cross-border crime – terrorism, trafficking, smuggling, illicit arms traffic. However, judging by the recorder activity of the Schengen system, illegal migration seems to be the system's main preoccupation. This control of migration is problematic and flawed, since it creates a divide between those who are able to move freely and those who must be heavily controlled. This control only reinforces the processes of economic marginalisation and social exclusion. Border controls are usually overly expensive and can even be counter-productive. They constitute the very conditions in which travelling becomes illegal, dangerous and clandestine: “[...] illegalized border crossers are dying ‘because migration itself has been redefined as a crime against the new economic order’” (Weber and Bowling 2008, 360). Aims of border control have therefore stayed the same through time – select, eject and immobilise. This selection is realised at the borders, where people are socially sorted through systems of visa regimes, biometrics and information databases (Weber and Bowling 2008). The research has shown that tighter border control is also rather unnecessary, since the majority of irregular migrants end up having irregular status due to overstaying a visa, and not an irregular entry. Tighter border control only pushes migrants in more dangerous forms of travel and force them to overstay a visa, since that is the only way they can stay in certain territory (Parkin 2013, 6).

Even when people do reach the territories they want to reach, they are caught in the web of surveillance through workplace, ID cards, even voucher-based welfare system for asylum seekers that limit their consumption possibilities. They are basically forced into a situation without opportunities and rights, which often results in what seems a voluntary departure to their countries of origin – thus the state succeeds in reaching its aim of ejection (Weber and Bowling 2008).

In addition, Weber and Bowling (2008) warn that when the connection between criminal justice and migration control systems is made, the non-natives become exclusive occupants of immigration detention camps, and are also convicted of criminal offences more often. Detention as a step between detection and deportation is now also perceived as having punitive, incapacitative and retributive qualities. This is consistent with the new security paradigm in which the criminal enemy should not only be punished, but fought against, excluded, or even extinguished; social enemies should thus be denied legal protection because they present a “fundamental threat to society” (Webber and Bowling 2008, 368–369).

2.2.5 Detention and expulsion

“[...] there is always a centre, a camp that at least potentially (rather than actually) hangs/looms over” (Rahola 2008, 50).

The main defining feature of the criminalisation of migration, i.e. the merge of criminal and administrative law, is most visible in the case of detention and expulsion. The majority of European countries define migrant detention as administrative detention, meaning that this measure formally does not constitute a punishment and therefore does not require a conviction of a crime (Parkin 2013). However, this line between administrative and penal measure is not visible in most of the states. The reason behind this is that criminal proceedings and administrative procedures governing detention and expulsion are being intertwined. In addition, there is no distinction between detention facilities used to detain criminals and those that are used for detaining migrants (Parkin 2013, 12).

The Schengen Borders Code governs the entry in the MS and requires that if person fails to fulfil the entry requirements, the State can refuse them at the border. Provera (2015, 9) mentions the two consequences that follow: firstly, they are considered as illegally staying TCN, thus subjects to entry ban and possible detention and finally removal. Secondly, the MS may decide not to apply the Return Directive and will directly proceed to the removal, which may be preceded by detention. Holding a valid visa is not necessarily enough to enter a MS if some other requirements have not been fulfilled, such as having sufficient resources for your stay. States also treat asylum seekers differentially, based on where they filled their application for international protection. There is a difference between those that apply at the border and those that apply anywhere else – the latter are usually removed from the territory without even having a right to apply for international protection. Those who do make their applications are usually detained under the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive II, Official Journal of the European Union L 180/96), in order to decide on the application. A concern has been raised about the fact that this actually gives the States a permission to detain asylum seekers automatically during the whole asylum application process. Provera (2015, 10) suggests that the border applicants are thus seen as an immigration control failure, to which the appropriate response is detention.

Guild (2005, in Parkin 2013, 12–13) distinguishes four scenarios that lead to administrative detention. The first one is detention on arrival, which is used by most MS to prevent unauthorised entry or while deciding whether the entry was unauthorised. It usually takes place in transit zones near national borders. The second one is detention as a part of asylum system, meaning a person is detained in the time when asylum application is being processed. The third scenario is being detained because of the irregular stay, where the detention is carried out not only on the grounds of irregularity, but is justified with the need of removal. This is thus connected to the fourth scenario, which is detention for the purpose of removal or expulsion.

Even though the Return Directive states that the detention should take place in specialised detention facilities, Provera (2015, 11) points out that MS are allowed to detain migrants in prisons where the special facilities cannot be provided. Not only both the Return Directive and the Reception Conditions Directive II include detention in prisons, migrants can also be kept together with the rest of the prisoners under exceptional circumstances. Both immigration detention facilities and prisons are governed by the same actors, which inextricably links the migrants with criminality.

Data shows that despite different national legislation determining the length of detention, individuals are detained for significant periods of time (Parkin 2013, 13–14). They are also often released and re-detained when deportations cannot be organised, thus only extending the whole detention periods. These periods of re-detention are not covered by the statistics of detention rates, which makes it very hard to chart the trends among the states. Nevertheless, there is proof that there is a dramatic increase in immigration detention rates across the EU in the last decade, such as the increase of detention facilities and legislative changes on the time limits for detentions. Again, these trends are put in practice both on national and European level, influencing the European legislation and directives. At the same time, European legislation was used as an argument for certain states to impose stricter measures on national level, for example Italy increasing the maximum period of detention from 60 days to 18 months in accordance with the Return Directive (Parkin 2013).

Parkin (2013) also discusses some alternative functions of detention mentioned by different authors, considering the high costs that these detention practices present, combined with relatively low rates of factual removals carried out by the states in general. The first would be to deter irregular residence, which would have effect both on detainees and potential, future migrants coming. It would make the detainees leave the territory voluntarily and discourage the future migrants from entering the state. However, there is no statistical evidence to support that theory, since the expansion of detention practices did not result in decrease of irregular migration flows, not in increase of expulsion rates. The second function would be management of external effects of poverty – detention being used as a form of “poor relief” (Parkin 2013, 15), keeping irregular migrants away from the public and thus incapacitating the marginal population. The third function could be management of public anxiety and assertion of state control, sending a message that the state still is in control of the territorial and social boundaries that their citizens want to maintain.

The last, fourth function suggested is the correction and rehabilitation with the aim to identify, classify and manage the groups that are defined as “dangerous” (Parkin 2013, 15). The logic behind this is that it is impossible to eliminate the crime, so the focus should be shifted to identification of the risk. Migrants are thus detained not because of their crimes or behaviour, but because they fall into the risk category, as those who are dangerous and least desired. Rahola (2008) similarly argues that the detention centres are indeed prisons for those

who have committed the crime of not belonging or even more so have exceeded the forms of belonging. Illegally crossing the border, is, legally speaking, not a crime, but merely an illegal action that is followed by an administrative consequence in the form of detention. Expulsion is then ratifying the fact that the detention punishment actually produces the crime – they produce a special crime of clandestinity and a special criminal of clandestine migrant (Rahola 2008, 55–56). The detention facilities are merely material manifestations of the border, without the real sanctioning function, but there to further threaten and push the migrants into precarious conditions of existence, both political and economic. At the same time, they define the lives of those who do not belong as potentially deportable, and precisely this potentiality is what threatens the migrants (Rahola 2008, 53–54).

Detention of migrants has to be in accordance with Article 3 and Article 5 of the ECHR. Article 3 of the ECHR prohibits torture, while Article 5 of the ECHR grants the right to liberty and security. It defines in which cases a person can be deprived of their liberty, granting the person the right to be informed promptly, in the language they understand, and the right to be processed individually, fairly and within a reasonable time. However, the evidence show that migrants are faced with abuse, assaults, threats, and torture in detention all across the EU. There are also breaches of the allowed detention time. Despite the requirement of Article 5 of the ECHR, detention is not dealing with individual cases, but has become a systematic response in national migration management approaches, targeting specific categories of people. As Parkin (2013, 16) highlights, we have to bear in mind “that barring capital punishment, deprivation of liberty is the most serious sanction that a state can levy against an individual”. This fusion of administrative and criminal law eliminates traditional principles, standards and procedures that get in the way of removing potential harm. This also means that the burden of proof is often shifted from the state, leaving very small chances for detainees to practice their rights and access to legal means in their favour. In addition, the use of waiting zones and extra-territorial detention puts people in legal grey area before they even reach the state territory (Parkin 2013).

Detention also reinforces the general perception of migrants as a risk category, demonising them and presenting them as criminals, security threats and welfare abusers. As Provera (2015, 10) warns, the Return Directive refers to the fight against illegal immigration, thus suggesting some criminal activity. This terminology only justifies the use of coercive force on migrants, so the removal process can be carried out. As a sanction, it aims at all migrants without distinction and processing individual cases. Migrants are all treated as a group, or further grouped based on their nationality usually, which presents an issue from the legal perspective. As stated by the European Agency for Fundamental Rights (2015, 149), “there is no catch-all provision, such as detention to prevent an unspecified crime or disorder in general. Failure to identify clearly the precise purpose of detention and the ground may mean that the detention is unlawful”.

The process of criminalisation of migration is most visible in the case of detention and expulsion, since the criminal and administrative procedures governing them are completely intertwined. The detention facilities used for detention of criminals and migrants are in most cases the same, or at least governed by the same officials, which even further reinforces the notion of criminality in immigration. Despite the fact that detention should be carried out according to international and national law, the detention time is extended, detainees are being abused, assaulted, threatened and tortured. Detention has become systematic, targeting specific categories of people, removing them from the society. It can function as deterrence of future irregular migration, as management of poverty, keeping away the marginal categories, as management of public anxiety and assertion of state control, or as the prevention of potentially dangerous actions by dangerous categories. Nevertheless, detention of migrants reinforces the general perception of migrants as a risk category, demonising them and presenting them as criminals, security threats and welfare abusers.

2.3 Criminalisation of solidarity

The fourth element that constitutes the broad trend of criminalisation of migration, i.e. criminalisation of solidarity, will be dealt with separately. Criminalisation of solidarity is both a constituent part of the criminalisation of migration, but is also a broader trend on itself, which can be described through its own key features. The latter will be first presented, then followed by the presentation of the results of the research by Vlasta Jalušič (2018). The same interviews have been analysed both from the perspective of criminalisation of migration and criminalisation of solidarity. First, the results on criminalisation of solidarity by Jalušič (2018) will be presented in this chapter. The results were published in the separate article that will be used as a source. In the second, empirical part of this thesis, the analysis of the answers concerning criminalisation of migration will be presented.

2.3.1 Definition

In the process of criminalisation of migration, the first category of crimes are the crimes of clandestinity, the criminal here being the irregular, “illegal” migrant. The second category of crimes are the crimes committed by those who assist irregular migrants. These crimes range from assistance to irregular entry, employing unauthorised people, to providing assistance to people fleeing persecution. Some states have the duty to report, meaning service providers, such as healthcare providers or schools, are obliged to report the presence of undocumented migrants to authorities, which exposes both irregular migrants and those who work with them (Webber 2017, 9).

As Provera (2015) defines, those in solidarity are either individuals or entities, either governmental or non-governmental, that are acting in solidarity with migrants. Acts of

solidarity are those that assist migrants to either enter or stay in the EU, which is described as facilitation in the Directive 2002/90/EC. These acts can be providing or assisting to access basic rights such as health care, education, accommodation, transport, food, clothing and similar necessities. This behaviour might be considered either as humanitarian, or as a subject to sanction. “The EU Directive 2002/90/EC and the laws of some Member States do contemplate “humanitarian assistance” as an exception to sanction with “financial gain” or “gain” as a determinative element warranting sanction – all three terms may be open to interpretation” (Provera 2015, 5). Humanitarian principles are, however, codified in Convention and Protocol Relating to the Status of the Refugees (United Nations High Commissioner for Refugees 2010), the Universal Declaration of Human Rights 217 A (III) (UN General Assembly 1948), and the ECHR. Various codes of conduct highlight that humanitarian assistance must be based solely on need, regardless of nationality, race, religion, political points of view or similar (Fekete 2017a, 1).

Through the criminalisation of solidarity on national and supranational levels the so-called hostile environment is created. In order to keep the migrants from coming and to discourage those who have already arrived to the country, states are striving to create such conditions that will not be the pull factor for migration (Edmond-Pettitt 2017, 22). This policy translates in practice in such a way that even providing food, water, clothes and shelter, just in the form of sleeping bags even, is seen as enabling irregular migration by those who are in solidarity with migrants (Edmond-Pettitt 2017, 23).

Since the majority of EU countries exempt humanitarian assistance in the case of illegal stay, the border crossing and activities in border regions in general have become a space where authorities can disregard the humanitarian factor completely. Not only transport, but every activity carried out in the border region is persecuted. Volunteers are continuously facing harassment by police, threats of arrest, house search without warrants, and accusations of different kinds. This is happening regardless of their activities, thus being persecuted for distributing food, clothes, or providing health care and other support (Webber 2017, 16.).

2.3.2 Legal framework

As Fekete (2017a) points out, the prosecution of humanitarian assistance is now becoming extremely visible and very politically pointed, but it is not a new phenomenon. The Institute for Race Relations (IRR) has reported on this issue for quite some time. The IRR reports from 2006 (Webber 2006) and 2008 (Fekete 2008) already criticised the Directive 2002/90/EC and the Framework Decision 2002/946/JHA and the fact that the laws are fighting the so-called illegal migration by fighting the aid of illegal entry. This fight against illegal entry was used as a mean in some kind of hunt in which different categories of people became potential targets, including teachers, social workers, politicians etc. (Fekete 2017a, 3).

Criminalisation of solidarity was made possible by creation of ambiguity between the concepts of trafficking, smuggling and humanitarian action that is built in the EU legal framework (Webber 2017, 7). This legal framework made it possible for MS to potentially criminalise humanitarian actions such as rescuing people from the sea, providing food, shelter and clear water at the borders, whether at formal or informal encampments or in the streets.

In EU and MS law there are numerous laws concerning human smuggling, trafficking and assisting illegal residence. But the only clear-cut ban is put solely on human trafficking. It involves the exploitation of human beings, forced labour, prostitution and/or organ donation – there is no such thing as humanitarian trafficking. There is no such clear distinction when it comes to smuggling, which was made obvious throughout European history when Jews were being smuggled out of Germany in the Second World War or Eastern Berliners were smuggled across the Berlin wall during Cold war (Webber 2017).

However, as Webber (2017) points out, trafficking and smuggling are still regularly used as synonyms in discourse. Consequently, all transport of migrants is seen as equally negative and unlawful in general, without looking into details and individual cases. The distinction is also reflected in the UN protocols dealing with the two actions. The UN Convention on Transnational Organised Crime and the Protocols thereto (United Nations Office on Drugs and Crime 2004) defines smuggling as acts that are done for financial or other material benefit. Despite the mentioned UN Convention being explicit on the definition of smuggling, it also declares that additional measures can be taken against actors that breach the domestic law of a certain state. This makes it possible for states to prosecute humanitarian aid and solidarity if they decide so. In 2002, the Council of the EU passed the so-called Facilitators Package, comprised of the Directive 2002/90/EC and the Framework Decision 2002/946/JHA, which requires MS to sanction those who intentionally and/or for financial gains assist a person from a third country to enter, transit or reside on the territory of the State in question. It leaves an option for MS: they “may decide not to impose sanctions [...] for cases where the aim of the behaviour is to provide humanitarian assistance” (Directive 2002/90/EC). This is an option, but not an obligation. States are also not obliged to prosecute only those who assist the migrants for gain, but may also prosecute actors that have no gain at all, thus acting in solidarity. The Directive 2002/90/EC does not define intentional assistance either, leaving a certain level of legislative ambiguity and legal uncertainty and giving the States an option to criminalise humanitarian assistance (Webber 2017, 8).

As Fekete (2017b) points out, there is no typical profile of the ones who fall under these laws – they range from left-wing politicians, NGO activists and journalists to academics, interpreters, students and the retirees. In Greece and Italy, NGOs volunteers are under investigation for carrying out the sea rescue missions, in Norway, Denmark, Sweden, Switzerland, France and the UK, people are prosecuted for giving undocumented migrants lifts. In Italy, activists have been banished from their home towns because they provided food

and showers. In Bulgaria, volunteers that wanted to help migrants crossing the country were warned by NGOs that their actions could be considered as criminal. In Finland, the legislation does not exempt assisting illegal stay as a humanitarian action, which is why a church that offered shelter for refused asylum seekers was potentially facing charges for hosting undocumented migrants (Webber 2017).

High level of arbitrariness led to a situation in which some MS' legislations follow the international human rights obligations, such as rescue at sea, preservation of human dignity and preservation of human integrity, prohibiting allowing people to starve, freeze or die preventable deaths (Webber 2017, 9). Since these legislations differ between the States and within certain states as well, there is a lot of uncertainty for humanitarian workers and also police and courts in some cases. This uncertainty makes the regulations very volatile and changeable as the case from Denmark shows. A couple wanted to help the migrants by giving them a lift in 2015. They first asked the police but the police were not sure whether that is legal. In just two days, hundreds of other people followed their action and the police changed its stance. Several individuals were later convicted of facilitating illegal transit and fined with fines from 3,000€ to 3,500€ (Webber 2017).

2.3.3 Process of criminalisation of solidarity

Szuleka (2018) recognises certain actions or policies that affect the work of NGOs and their space of action, such as administrative restrictions, stigmatisation, limiting the space for dialogue, physical harassment and intimidation, and criminalisation of different forms of engagement. In addition to that, recent studies have identified some new trends, such as implementing provisions that obstruct NGOs work through extensive reporting obligations or tax duties (Szuleka 2018, 9). Restrictions in NGOs' space of agency can also have a more systemic form, such as legislation affecting the financing of NGOs (Szuleka 2018, 15).

There are numerous reports on prosecution of humanitarian actors since September 2015 when the anti-smuggling and immigration laws have been imposed. After ending of the operation Mare Nostrum in 2014, a military-humanitarian mission in the Mediterranean Sea, rescuing people from boats that were close to Libya, the situation has changed on different levels. Number of deaths increased sharply. EU prioritised the destruction of smugglers' webs and thus militarised the Mediterranean rather than engage in rescue missions, which were mainly led by NGOs (Webber 2017, 10).

One of the commonly used techniques in order to deprive, delegitimize and undermine the NGOs is stigmatisation and smear campaigns. As Szuleka (2018, 11) analyses, NGOs are usually presented as "detached from reality, inspired by foreign governments or institutions, closely cooperating with political opposition". In addition to this, NGOs are presented as an "alien factor" in the state (Szuleka 2018, 13), thus not being considered for cooperation with

the state. The space for dialogue between the state and NGOs is limited, depriving NGOs of the possibility to participate in social consultations and discrediting their position altogether.

The demonization of the work of NGOs often starts with the media reports on different instances where NGOs were allegedly connected to smugglers and traffickers. This discourse was soon picked up by politicians and incorporated in the politics (Fekete 2017b, 32) – as the Austrian Minister of Foreign Affairs in 2017, Sebastian Kurz, repeated the message: “The NGO madness must be stopped” (Tragler 2018).

The downgrading of search and rescue missions in the Mediterranean took off. Verbal attacks, legal undermining and political isolation came from EU interior ministers, senior figures within border force and FRONTEX. This was furthermore strengthened by stripping NGOs of neutrality, for example forcing them to allow armed police on board of rescue ships, “so as to ensure that there are no independent witnesses to a process that institutionalises complacency in the face of human suffering – a complete absence of a moral compass and the complete opposite of the humanitarian ethos” (Fekete 2017a, 2).

In order to obstruct the work of NGOs, the officials can put them under investigation or just demand endless bureaucratic procedures to be completed before doing anything. NGOs’ volunteers have been under investigations due to anonymous complaints or false alarming articles, such as the one that appeared in Financial Times in December 2016 (Robinson 2016) and was followed by investigation and condemnation of search and rescue missions (SAR NGOs) in the Mediterranean. With NGOs having to deal with the bureaucracy, accusations and legal procedures in order to continue their work, this becomes the main focus and the work itself cannot be done anymore (Fekete 2017b).

As someone who assists the unwelcomed, people are faced with an unwelcoming approach not only from officials, but also from the locals (Edmond-Pettitt 2017, 26). The public discourse and criminalisation of solidarity by politicians and authorities legitimised right-wing extremism, accusing those in solidarity to be the so-called traitors of the nation. This stems from the belief that those in solidarity with migrants are one of the elements in the greater conspiracy to change the cultural landscape of Europe entirely: “Humanitarianism, equated with a lack of patriotism, civilizational vigour and racial pride, is something the hard Right despises” (Fekete 2017b, 31). Those who act in solidarity are “deemed guilty of unpatriotic displays of unacceptable solidarity” (Fekete 2017a, 2), since the priority remains the border defence instead of protection of life and human rights. The principle of providing humanitarian aid to anyone in need is now replaced by the hierarchy of those who shall receive it as well as those who shall provide it.

Furthermore, EU claims that the NGO search and rescue operations are the so-called pull factor for migrants, i.e. encouraging them to use smuggling networks to reach the EU (Webber 2017, 12). Official bodies also started taking legal actions against the NGOs staff.

Volunteers from a Spanish NGO Proem-Aid were stopped by the Hellenic coastguard while they were on a rescue mission and after they notified the coastguard about the two sinking ships. The coastguard escorted the crew to the shore, arrested them for human smuggling and for the possession of offensive weapons – knives on the boat for the ropes. They all got fined (5,000€ and 10,000€ fines), one of them was not permitted to leave Greece for two years and had to report to Greek police weekly until the trial (Webber 2017, 11). The latter took place on 7th May 2018 and all the volunteers were freed on the basis of discrepancies between the testimonies and evidence (Radwan 2018). This process happened despite the fact that illegal entry should exempt rescue at sea under the international conventions such as the International Convention on the Safety of Life at Sea 1184 UNTS 3 (International Maritime Organisation 1974), the Convention on Maritime Search and Rescue 1403 UNTS (International Maritime Organisation 1979) and the Convention on the Law of the Sea 1833 UNTS 399 (UN General Assembly 1982) (Webber 2017).

Since some NGOs and missions were funded from the Open Society Foundations, created by investor and philanthropist George Soros, he became the main target of far-right and the whole Hungarian government (Fekete 2017b, 33). The latter went as far as proposing a controversial law through which they could cut the funding for NGOs that are connected to him, Open Society Foundations or to working with migrants in any way. The NGO Hungarian Helsinki Committee, one of the most prominent Hungarian NGOs defending human rights, was directly attacked.

These actions are taken regardless of the fact that these organisations have been stepping in in where there were gaps, left uncovered by EU and/or national agencies and governments. The civil society actors have been saving lives in the Mediterranean, monitoring human rights, treatment and living conditions of migrants, making sure to uphold the rule of law and enable democratic accountability for everything that has been happening (Vosyliūtė and Conte 2019, 4).

2.3.4 Consequences

Szuleka (2018, 8) argues that the criminalisation of solidarity and the attacks on individuals and NGOs working with migrants is enhancing the process of the so-called “shrinking civil society space”. This term describes a situation in which the operational space for NGOs (understood as the capacity to function as an organisation and perform their tasks) is being limited by the policies or legal amendments adopted by the government” (Szuleka 2018, 8). NGOs are an essential element of democracy and the state ruled by law, since they are monitoring the state, collecting data and evidence, and holding the officials and authorities accountable together with independent media and judiciary. These organisations often represent a variety of minority groups that are exposed to state violence or are anyhow excluded from the mainstream policies. Through their work and activities, they can mobilise

the society and raise social pressure on the decision makers, thus affecting the societal and political changes (Szuleka 2018).

Criminalising the interaction with migrants means that any kind of human contact is risky, since it may result in criminal charges (Guild 2010, 39). Criminalisation of activities by those who assist foreigners enter the territory might have human rights consequences, as it does not necessarily respect the Article 8 of ECHR (right to respect for private life, family life, home and correspondence) (Guild 2010, 15).

As Edmond-Pettitt (2017, 23) states, the vital tool of criminalisation of migrants is denying them access to any kind of information about the asylum process. The same goes for information leaving the facilities where migrants are being held, or the general treatment of migrants by the state; it has been increasingly hard to report from inside the locations, despite the importance of free press which is recognised even in constitutions (McMahon 2017, 28). In order to obtain any kind of information for research purposes, researchers often resort to informal strategies, such as building relationships with local gatekeeper organisations and joining the informal structures of migrants and their support systems. Criminalisation of solidarity presents an additional obstacle in this information gaining process, since the securitisation and criminalisation of solidarity are intertwined. The process significantly affects the space for research and information sharing, leaving the observers outside, thus creating uncertainty and worry both among the researchers and migrants (McMahon 2017, 29–30).

2.3.5 *Research results on criminalisation of solidarity by Jalušič (2018)*

As a part of the research project *Crimmigration Between Human Rights and Surveillance* at the Peace Institute, Ljubljana, the interviews that were conducted were analysed both from the perspective of criminalisation of solidarity and criminalisation of migration. The latter aspect will be presented in the empirical part of this thesis, together with the methodology. The results on criminalisation of solidarity were published in a separate article by Jalušič (2018), and will be presented in this chapter.

The respondents of the interview were asked about their relationship with the authorities and cases of harassment, “policing” and criminalisation of their work, discreditation, public critique or defamation, obstructions or ignorance, and direct or indirect criminalisation they experienced at their work with migrants. A more elaborate and precise interview categorisation is presented in the Chapter 4.2.

As Jalušič (2018) reports, all the respondents had been active during the so called “long summer of migration”, engaging in monitoring and providing information, as well as offering humanitarian aid, such as collecting and donating clothing, cooking, providing fresh food.

Out of ten, only two recognised their organisation as mainly humanitarian. The rest described their work as advocacy, legal representation or help, monitoring, informing etc. All the organisations included in the research generate knowledge and produce studies, monitoring and research reports.

All of the respondents recognise the national and EU's policies as "very, very restrictive", "unwelcoming", and "aggravating and rigid". Especially Hungary is identified as "the leader in enforcing restrictive policies, by preventing arrivals and criminalising and punishing irregular migrants, including asylum seekers" (Jalušič 2018, 112). There is a notable connection between national policy changes and directions received from the EU – the Hungarian approach is widely tolerated since the EU migration policy in general collapsed, so it is acceptable for Hungary to be "building fences, pushing people back, torturing them, beating them" (Interview 6). Furthermore, it is also "in the EU's interest to keep the corridor closed, and the Hungarian fence is an important element" here (Interview 6).

Jalušič (2018) identified five categories of practices and approaches that are obstructing or precluding the work of NGOs, thus narrowing their space of agency.

First category includes criticism and public attack, through which the work of NGOs is discredited in media and public, disinformation about their work, and harassment from right-wing politicians and their allies. As one of the respondents from Slovenia reported, "It was said that we are importing migrants to Slovenia, work for them and take better care for the migrants than for Slovenians in need, and that we should take these migrants into our homes" (Interview 1). As Jalušič (2018) points out, these critiques and attacks were mostly coming from right-wing actors and not from the authorities, except for Hungary and Croatia. In Slovenia, one of the newspapers that is most vocal in these attacks, is directly aligned with Hungarian Prime Minister Orban. Both in Slovenia and Croatia the attacks through social media were not aimed only at their activities with migrants, but their work in civil society in general. One Croatian NGO was also publicly criticised by the authorities, being accused of being anti-Croatian. In Austria, many volunteers dealt with intimidation and hate speech, but not from the officials (Jalušič 2018).

Hungarian NGOs, however, faced the most powerful resentment. The attacks came from the media, right-wing parties and the government, and were aimed at all NGOs working with migrants or are financed by George Soros (Interview 7). They were publicly portrayed as "acting in opposition to the state interest, and dangerous to society; Soros' agents and soldiers, who are jeopardising Christian values and the safety of Hungarian citizens, want to fill Hungary with Muslims, and are connected to the terrorists" (Interview 7). The government even sent out the questionnaires to the citizens, asking them whether they support organisations such as Hungarian Helsinki Committee and Amnesty International, which are allegedly assisting terrorists. The Hungarian government proposed taxing up to

25% for organisations funded by Open Society Foundation. Slovenian and Croatian NGOs, particularly those financed by Open Society Foundation, were mentioned in calls to cease all state funding for them (Interview 7).

Those who were not facing criticism thought it was due to the nature of their work – they were either “primarily humanitarian and not advocacy-oriented” (Interview 2), or were reaching a relatively small, particular group of people with their information that they did not reach the public with their work.

The second category of actions against the work of the NGOs that Jalušič (2018) identified entails the bureaucratic tightening of the space for action, such as restricting access, obstructing the work of NGOs, and surveillance. Respondents had to be quite disciplined in order to get the access to information or to the migrants in detention centres or transit zones. Authorities often restricted or banned the access to the borders or detention centres for activists, volunteers and NGOs. They were obliged to register with the large humanitarian organisations, such as Red Cross, Caritas or UNCHR, in order to access to the area and work with migrants. Jalušič (2018, 115) identifies this as “the first steps of disciplining the work of NGOs in 2015/2016”. Slovenian Ministry of the Interior restricted access to parts of the refugee centre to one NGO after the latter publicly criticised the violations of the ECHR they witnessed at the centre.

I think that the authorities succeeded very quickly [...] in pushing out all of the informal groups from the refugee centres with the argument that they only create chaos, but they basically wanted total surveillance of all forms of humanitarian aid. And that was how humanitarian work was performed later: in an automatic manner, very technical. So, if you are distributing food or clothes or you carry a box then that was humanitarian work, yet talking to the people, providing them information, then that was not humanitarian work anymore. And talking to people, and providing them information, was the most unwelcome. (Interview 1)

The restrictions were not put only on the type of assistance that was provided, but also on the organisations that were providing the assistance. Even though volunteering groups and NGOs were active in providing assistance in the beginning, they were soon “kicked out” (Interview 5) and replaced by other organisations that were authorised by the state, but often failed to provide assistance in the end. “Our spaces for volunteers were continuously being reduced, and [...] there was a certain scheme behind this. [...] there was one scheme stopping the flow of people and another scheme stopping the access of volunteers” (Interview 5).

The authorities did not:

necessarily obstruct the NGOs’ work directly, but by not providing information, “or they put additional demands on us to provide non-essential information when it came to advocacy for asylum, for example. That way they made it harder for us to reach any constructive solutions” (Interview 2).

The third category present the actions that ban access and prohibit monitoring. Hungarian police cancelled the 15-year-old contract with the most important Hungarian human rights NGO (Interview 7). They also got cut out of the tripartite agreement on border monitoring with UNHCR. There were no explanations given. Hungarian authorities attempted to prevent the lawyers from accessing the transit zones, arguing that in “15 years we missed the deadline to send the report on these monitoring visits three times by couple of days. [...] It was a clear decision by the government to ban us from access” (Interview 7).

The very few organisations that were authorised to access the transit zones were strictly humanitarian and for the most part religious, i.e. the Charity Council that consists of Caritas, the Maltese Order, Interchurch Aid, the Red Cross, Reformed Church, and Baptist Aid. “There is no exact information about which activities each of these organisations perform there. If they have access, they do not have the permission to report anything about the situation in the transit zones to the public [...], everything is actually secret” (Interview 7).

The fourth category consists of actions of deterrence and marking the persons and organisations as “dangerous”. “Before the elections in 2018, the Hungarian government informed the public that they had a list of about 200 people who are closely connected with George Soros and his network and therefore act contrary to the state’s interests. After the elections, the magazine Figyelo Review, which is majority-owned by the state, published a list of “suspicious” people in an article that ran under a pseudonym [...]” (Interview 7). Similar lists of “corrupt” and “traitorous NGOs” (Jalušič 2016, 116) are also published by certain media in Slovenia. Furthermore, the Croatian respondent indicated their suspicion about being under surveillance by various intelligence organisations. They also pointed out that their work is often discredited by several institutions in Croatia. “That’s why there aren’t many people who would publicly expose themselves as working with migrants, since this has become a certain stigma, stretching from treason to Islamisation and beyond” (Interview 4).

In Slovenia in 2015, some informal volunteering organisations that were not registered with the large humanitarian organisations were often sanctioned for their actions, for example in the space between the borders. “[...] So, this was criminalised and after that no one in the public supported such actions any more. This was how activism was marked as an ugly rebellion against the system and made suspect” (Interview 1).

Jalušič (2018) highlights that the respondents did not mention any particular situations where their work would be directly criminalised at the time of the interviewing. The Croatian respondent did, however, express their belief that the Hungarian scenario will spread, since they faced anger and threats by the police, denigration and assaults by high state officials behind closed doors and similar.³

³ Considering the evolution of events, especially at the Slovenian-Croatian border and Croatian-Bosnian border and the situation of migrants being stranded in Bosnia and Herzegovina due to the

The last category Jalušič (2018) recognised is the direct criminalisation of assistance. The respondents often mentioned to the draft of Hungarian anti-immigration law that would “directly criminalise the provision of any kind of assistance to migrants, including basic help for migrants and asylum seekers” (Jalušič 2016, 117).

The law requires licenses and if an organisation performed activities without a licence, it would be a violation of the law, your tax number would be frozen, [...] the organisation would be banned. In the third part of the law there is a prohibition against people coming within eight kilometres of the border between Hungary and Serbia (Interview 7).

The respondent (Interview 7) recognises that the legislation is targeting those who are most active in supporting migrants and defending their human rights: “The law is really made in order to get rid of us [...] as we are the strongest organisation which criticises the acts of the state in the field of human rights”.

As Jalušič (2018, 118) concludes, the five categories that constitute the “continuum of the criminalisation of the organised and independent provision of assistance to (“irregular”) migrants” were all recognised in our research. The continuous restrictions on non-governmental actors and unwelcoming political culture all indicate the shrinking space of civil society (Szuleka 2018). The authorities not only attempt to control and prevent the spontaneous migration, but also to destroy “any spontaneity, one of the most important elements of human action” (Jalušič 2018, 119).

pushbacks from Slovenia and Croatia, it would be interesting to interview the respondents again. Particularly interesting is perhaps the case of Croatia; i.e. the case of the Croatian volunteer who helped the migrants reach the Croatian officials in order to apply for asylum, but ended up persecuted because of his assistance (Are You Syrious 2018b).

3 INTRODUCTION TO EMPIRICAL PART

Before we present the results of our empirical research, we would like to set the time frame and describe some of the most relevant changes that have been made in this time on both national and European level. The time frame we are looking at is from spring 2015 when the so-called migrant crisis started in the EU, affecting the states included in this research, to the fall 2017, when the interviews for our research were conducted. We will also present some arguments against the migration policies made on the EU level.

3.1 Timeline from spring 2015 to fall 2017

In 2015, following the events in the Mediterranean Sea in April 2015 when more than 800 migrants died as a ship off the coast of Libya sank (Grunau 2016). EU heads of state and government responded by agreeing to prevent people dying at sea and to address root causes of migration. At the special European Council meeting on the 23rd April 2015 they identified four main areas of response (European Council 2015):

- Strengthening the presence at sea; this should be achieved by reinforcement of EU Operations Triton and Poseidon through increasing the financial resources by at least three times in 2015 and 2016, and reinforcing the number of assets in order to increase the search and rescue capacities of FRONTEX.
- Fighting traffickers; the goal is to “disrupt trafficking networks, bring the perpetrators to justice and seize their assets” (European Council 2015), achieving it through action of MS cooperating with EUROPOL, FRONTEX, the European Asylum Support Office (EASO) and EUROJUST and intelligence and police from third countries. Vessels should be identified, captured and destroyed before they can be used by traffickers. High Representative should immediately begin with preparations for a possible Common Security and Defence Policy (CSDP).
- Preventing illegal migratory flows; by supporting Tunisia, Egypt, Sudan, Mali and Niger, among others, the forces should identify and prevent the illegal migratory flows in North Africa. EU should engage both in CSDP operations in the region, as well as has established regional cooperation frameworks, such as Khartoum process with Sudan. Besides reinforcing cooperation with and support of Africa, especially in North Africa and the Horn of Africa, EU also has to strengthen cooperation with Turkey regarding Syrian and Iraqi migrants. While respecting the right to seek asylum, EU should set up a new return programme “for the rapid return of illegal migrants from frontline MS, coordinated by FRONTEX” (European Council 2015).
- Reinforcing internal solidarity and responsibility; the Common European Asylum System should be implemented by all MS, joining forces to collect data, process applications, and carry out possible relocations and resettlements.

Few weeks later, on 13th May 2015, the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration (European Agenda on Migration, European Commission 2015) on migration was adopted, highlighting the need for better migration management and especially shared responsibility with it. It again identified four areas in which concrete actions and measures are needed: reducing the incentives for irregular migration, saving lives and securing external borders, building a strong asylum policy, and creating a new policy on legal migration (European Council n. d.). After the ship accident in April 2015, the EU border control and management of irregular migration have significantly shifted towards fighting human trafficking and smuggling. This fight has extended from surveillance and strict border control in the EU and in the Mediterranean to collaboration with third countries, where the EU is providing trainings, additional forces and financial support to border controls. This externalisation of border control is furthermore realised by military forces, thus consolidating the militarisation of border control and surveillance (Marin 2017, 6).

All the mentioned actions were created as a response to a tragedy that could and should have been prevented and ought to be prevented in the future by implementing the measures. However, not all responses and actions went as planned, nor were they implemented without significant consequences on international politics, conflicts and even further increase of migration flows, especially irregular ones.

Even though the European Agenda on Migration states that “the immediate imperative is the duty to protect those in need” (European Commission 2015), which implies a small shift to humanitarian direction, away from the regular focus on security, Marin (2017) argues that there none or very little possibilities to do so in the programme itself. Even when considering the resettlement programme, the ratio between the number of inhabitants in the EU (more than 500 million) and the number of resettled migrants (20,000 persons per year) does not show any serious engagement in opening up safe and regular routes for migrants (European Commission 2015, 2).

To further clarify the time frame, we present the timetable that highlights the main responses to the so-called migration crisis both on the EU level and national level of certain MS. The following table was created as a summary of Šeruga’s (2018) “Timeline of the Refugee and Migrant Crisis 2015–2016”.

Table 1: Timeline of responses to migration crisis 2015-2017

Time	EU level	National level – pro migrants	National level – against migrants
April 2015	EU responded to the shipwreck in the Mediterranean when more than 800 people died; they set out a plan to combat irregular migration on supranational level (European Council n. d.).		
May 2015	European Agenda on Migration is introduced, including the quota system for MS to relocate and resettle refugees (European Council n. d.).	MS with higher inflow of migrants, e.g. Italy, Malta, Germany, supported the system (Robert et al. 2015).	Hungary, Slovakia, and Estonia opposed the quota system from the very beginning (Robert et al. 2015).
June 2015			Hungary decides to close its border with Serbia, since 95% of migrants arrive from that direction; it also approved the plan for a four-metre-high fence on the 175 kilometres long border (AFP in Budapest 2015).

Time	EU level	National level – pro migrants	National level – against migrants
July 2015			<p>Slovenia passed the so-called Contingency plan of the Republic of Slovenia to ensure the accommodation and supply in case of increased number of applicants for international protection (Vlada Republike Slovenije 2019), which planned the long-term accommodation of a maximum of 900 people. It consisted of three phases, activated in the case of passing the threshold.</p>
Summer 2015		<p>Germany acquired the most welcoming position, accepting large numbers of migrants, and Austria helped with accepting the stranded migrants from Hungary (Graham-Harrison et al. 2015).</p>	<p>Hungarian fence was soon followed by the completion of Bulgarian razor-wire fence along its border with Turkey, of which construction began in 2013 and was completed in 2015 to completely seal the border (Lyman 2015a).</p> <p>North Macedonia sealed its border with Greece in August 2015 and declared a state of emergency (Reuters 2015a).</p> <p>The UK announced its building of more than two miles of high-security fencing at the Channel Tunnel port in Calais in June 2015 (Ross et al. 2015).</p> <p>Denmark cut benefits for new arrivals and restricted the right to residency (AFP 2015b).</p>

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Time	EU level	National level – pro migrants	National level – against migrants
September 2015	<p data-bbox="353 304 904 671">On 22nd September, the EU interior ministers voted for EU-wide relocation scheme of 120,000 refugees, despite the Czech Republic, Hungary, Romania and Slovakia voting against it. This number of refugees should be redistributed over the following two years: 54,000 from Hungary, 50,400 from Greece, and 15,600 from Italy (European Council n. d.).</p> <p data-bbox="353 719 904 874">Since Hungary opposed being considered a “frontline” state in the given situation, the plan was changed to adding more refugees from Italy and Greece (Keller 2019).</p> <p data-bbox="353 922 904 1077">The UK, Ireland and Denmark are exempt from this policy area, but Ireland volunteered to accept some refugees regardless (Lynch 2015).</p>	<p data-bbox="936 304 1352 544">Tens of thousands showed support for refugees across several European cities in the UK, Denmark, Sweden, France, Austria and the Netherlands (Zadner and Dauer 2015).</p> <p data-bbox="936 592 1352 874">German Chancellor Angela Merkel announced that there is no limit on the numbers of asylum seekers Germany will accept, since they can do so due to their economic stability and resources (beginning of September) (Sky News 2015).</p>	<p data-bbox="1384 304 2018 416">Thousands took part in demonstrations against mass immigration in Poland, Czech Republic and Slovakia (Euractiv 2015).</p> <p data-bbox="1384 464 2018 576">Austria introduced controls on its border with Hungary, having the army help at the border (DW 2015a).</p> <p data-bbox="1384 624 2018 863">Germany introduced temporary controls on its border with Austria in order to cope with the high numbers of migrants – more than 13,000 migrants arrived in Munich in one day, while another 40,000 were expected over the weekend (mid-September) (BBC 2015a).</p> <p data-bbox="1384 911 2018 1193">The same day the Hungarian-Serbian border was closed and Hungary declared a state of emergency in two southern counties. It introduced a new law which criminalised the illegal crossing of the border and destroying the fence at the border (BBC 2015b). Hungary soon started building a barrier at the border with Croatia as well (Lyman 2015).</p> <p data-bbox="1384 1241 2018 1353">Two day after the border closing in Hungary, Croatia closed seven out of eight road border crossings with Serbia. The officials said that this was due to more</p>

Time	EU level	National level – pro migrants	National level – against migrants
			<p>than 13,000 people entering Croatia in only two days (Leskovac 2015).</p> <p>In the same day, Slovenia introduced temporary border controls on its border with Hungary (Lovšin 2015).</p>
October 2015	<p>The European Council started the talks with Turkey to ease the flow of migrants to Europe. If the Turkey stems the influx of migrants, the visa liberalisation for Turks would be sped up and talks on Turkey joining the EU would be renewed (European Council n. d.).</p> <p>After Slovenia called for help, an emergency summit was held in Brussels, where the heads of 11 MS and three Balkan states came up with a 17-point plan of cooperation, agreeing upon increased information sharing, shelter provision, enhancing return procedures of migrants not in need of international protection, tackling smuggling and trafficking (European Council n. d.).</p> <p>The countries pledged 100,000 more spaces in refugee centres and 400 police officers were to be sent to Slovenia to help cope with the</p>		<p>After Hungary closed its border with Croatia too, the route redirected to Slovenia. Due to its size and population, Slovenia stated that it can only admit 2,500 people per day, which left thousands of migrants stranded in Croatia (Stranka modernega centra 2015).</p> <p>Slovenian government amended the Defence Act so soldiers could assist police in patrolling the border, detain people and hand them over to police, and issue orders to civilians in the border area (RTV SLO 2015a). After more than 12,600 migrants arrived in just one day, Slovenia called for help from the EU on 22nd October (Novak and Zuvela 2015).</p> <p>With significantly increased influx of migrants, Slovenia implemented a new system of receiving refugees in coordination with Croatia. Refugees were reaching Slovenia through Dobova border-crossing by train, where they were registered and then taken</p>

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Time	EU level	National level – pro migrants	National level – against migrants
	inflow (Reuters 2015b).		<p>to Šentilj border-crossing to be handed over to Austria (Radio Krka 2015).</p> <p>Soon after that, Austria began building a barrier along its border with Slovenia (BBC 2015c). Slovenia followed the example and build a razor-wire fence on its border with Croatia (RTV SLO 2015b).</p>
November 2015	<p>In Valletta Summit on Migration the European and African leaders signed an agreement for an Emergency Trust Fund, in order to help development in African countries and to encourage those countries to take back some of the migrants that arrived in Europe (European Council n. d.).</p> <p>A day after this summit, a terrorist attack was carried out in Paris, killing 130 civilians. Islamic State claimed responsibility. It later emerged that some of the attackers entered the EU with the flow of migrants and refugees, which made the States' officials re-evaluate their stance towards migrants and border controls. They all agreed that greater scrutiny is obligatory (Amanpour and Patterson 2015).</p>		Serbia and North Macedonia limited entry to migrants from Syria, Afghanistan, and Iraq only (Al Jazeera Balkans 2015).

Time	EU level	National level – pro migrants	National level – against migrants
	<p>By the end of the month, the EU finalised the agreement with Turkey, committing to provide additional resources to help Turkey improve the situation of Syrian refugees (European Council n. d.).</p>		
December 2015	<p>In mid-December, European Court suggested the establishment of the European Border and Coast Guard that would have the right to act in cases when a MS would be unwilling or unable to deal with the critical situations (European Commission 2016).</p>		<p>On 2nd December, Slovakia filed a lawsuit at the European Court of Justice against the EU decision to redistribute asylum seekers among the MS. This was the first legal challenge to this European measure (Reuters 2015c).</p> <p>Hungary followed with the same lawsuit. Slovakia received 154 asylum requests and was supposed to take another 802 migrants under the relocation scheme. Hungary was supposed to receive 306 refugees from Italy and 988 refugees from Greece (DW 2015b).</p> <p>Austria put on a wire fence on the border with Slovenia (DW 2015c).</p> <p>In the Netherlands, 2,000 people protested against building an asylum centre in Geldermalsen (NOS 2015).</p>

Time	EU level	National level – pro migrants	National level – against migrants
			<p>Norway government decided to tighten their asylum regulation after receiving 30,000 asylum seekers in 2015 (Government.no 2016). It began offering a financial support to those who decide to leave the country voluntarily, saying that it is cheaper for the state to pay them to leave than to keep people in asylum centres (Dearden 2015).</p> <p>More than 890,000 people arrived in Germany in 2015. In the same year, more than a thousand attacks on asylum centres were reported. After the New Year's Eve, hundreds of sexual assaults, at least five rapes and numerous thefts were reported in German cities. This led to debates on Germany's asylum policy, attitudes against mass immigration and general social differences between European and Islamic countries (Fitzpatrick 2016).</p>

Time	EU level	National level – pro migrants	National level – against migrants
January 2016			<p>Denmark tightened border controls with Germany and Sweden introduced border checks with Denmark (Al Jazeera 2016).</p> <p>An employee at the Swedish asylum centre was stabbed by an asylum seeker, which led to a significant rise of far-right groups and violence against migrants (BBC 2016a).</p>
February 2016	<p>Turkey threatened to send millions of refugees to the EU if the EU did not increase the funds for Turkey to host the refugees (Agence France 2016).</p> <p>At the same time, NATO sent a patrol of three ships to the Aegean Sea in order to stop the migrants trying to get to Greece and to send them back to Turkey (MacAskill and Graham-Harrison 2016).</p> <p>All over Europe, states are introducing border checks, stricter criteria on who can enter and apply for asylum, and extraordinary measures that are often in conflict with the European</p>		<p>Slovenia started to reject people due to implementation of stricter conditions (Žurnal24 2016).</p> <p>On 15th February, the leaders of Visegrad Group⁴ met with Bulgarian and North Macedonian leaders and decided that the Balkan route should be closed at the Greek-Macedonian border in case Greece fails to protect the southern border (DW 2016).</p> <p>Austria introduced the checks on its borders with Hungary, Slovenia and Italy, and announced the introduction of daily limits for entering the country and applying for asylum, which is in conflict with EU and international law (BBC 2016b).</p>

⁴ A political, cultural and economic alliance of Czech Republic, Hungary, Poland and Slovakia.

Time	EU level	National level – pro migrants	National level – against migrants
	<p>and international law. Despite the efforts to work on the common legislation and strategies at the European level, states refuse to cooperate, implement their own rules and legislation, and decide on their own measures due to the fear of their safety and welfare (Šeruga 2018).</p>		<p>Austrian, Slovenian, Croatian, Serbian and North Macedonian police chiefs introduced joint registration of refugees crossing from Greece to North Macedonia and directly transporting them to Austria (Delo 2016).</p> <p>Slovenia implemented the list of safe countries of origin, which included Albania, Algeria, Bangladesh, Bosnia and Herzegovina, Montenegro, Egypt, Kosovo, North Macedonia, Morocco, Serbia, Tunisia and Turkey (Odlok o določitvi seznama varnih izvornih držav, Uradni list RS, 13/16 and 38/19). Due to the growing number of asylum seekers in Slovenia, the government activated a special Defence Act that gave the military extraordinary police powers for three months (RTV SLO 2016a).</p> <p>On 20th February, around 3,000 people protested against accommodation of asylum seekers in the town of Šenčur, Slovenia. In the following week, additional protests were organised in several cities across the country (RTV SLO 2016b).</p> <p>North Macedonia closed its border for all refugees except Syrian and Iraqi, which caused people to get stuck at the Greek border in the town of Idomeni</p>

Time	EU level	National level – pro migrants	National level – against migrants
March 2016	<p>The European Commission presented a plan that identified three action-points in order to restore Schengen area by the end of the year: assisting Greece in external border management, ending the simple transfer from one border to another by the states in order to get rid of the asylum seekers, and replacing the border patrols with a coordinated approach to temporary border controls (European Council n. d.).</p> <p>On the 7th March, EU and Turkey reached a deal that Turkey will accept the return of all migrants that are not in need of international protection, while Turkish citizens will not be needing a visa to enter the EU anymore. This deal also granted Turkey additional 3 billion euros funds (European Council n. d.).</p> <p>Later that month, they reached another deal to tackle illegal or irregular migration – those who arrive in Greece by irregular means, do not apply for asylum and/or their claim is rejected will be returned to Turkey and replaced by a Syrian citizen who is under</p>		<p>(Connelly 2016).</p> <p>Incidents, conflicts and protest start to emerge in greater number, the protesters being the stranded migrants, those who support migrants and those who oppose them. Last two groups are often protesting at the same time, against each other. Right- and far-right-wing parties got more numerous, vocal and popular due to their campaigns against mass immigration, highlighting the security issues, cultural differences and tax money being spent on the migrants (Šeruga 2018).</p> <p>On the 9th March, Balkan countries announced that the entry restrictions will get stricter and the Balkan route will be closed. Slovenia, Croatia, Serbia and North Macedonia all announced that only those who want to apply for asylum in one of those countries or those with clear humanitarian needs will be allowed to enter the countries (Kingsley 2016).</p> <p>On the same day, Hungary announced a state of emergency due to migrant crisis (Vinograd 2016).</p> <p>Slovenia started the implantation of Schengen rules at the border of Croatia – only those who fulfil the entry conditions, are applying for asylum in Slovenia</p>

Time	EU level	National level – pro migrants	National level – against migrants
	international protection (European Council n. d.).		or are granted entry on humanitarian ground are able to enter the country after an individual assessment (STA 2016).
April 2016			Austria started building a fence and a registration centre on its border with Italy, despite criticism from the EU and refugee agencies. The state also passed the law that allows the government to declare the state of emergency in case of greater numbers of migrants entering the country. Migrants are obliged to request asylum at the border and can be held for up to 120 hours in the process of checking (Reuters 2016).
May 2016	The European Court proposed fines for the MS that do not take their quota of asylum seekers. The States would be fined 250,000€ for each asylum seeker, and the money would go to States that have the highest number of migrants, such as Italy and Greece (Pop 2016).		

Time	EU level	National level – pro migrants	National level – against migrants
Summer 2016			Two attacks were carried out in Germany by asylum seekers, a 17-year-old attacking 20 people on a train with a knife, and another one setting off explosive, killing himself and injuring 12 others (BBC 2016c).
November 2016			More and more people left Germany voluntarily, since the state introduced financial aid for those who chose to leave voluntarily (Sanderson 2017).
December 2016			A failed asylum seeker drove a truck into a Christmas market in Berlin, killing 12 and injuring 56 people. This attack made the Chancellor Merkel's open-door asylum policy further publicly criticised (Oltermann 2017).
January 2017			Slovenia added an amendment to the Aliens Act, stating that asylum seekers at the Slovenian-Croatian border can be rejected in case of increased income of migrants that would threaten public order and internal security of the state, but no exact number was ever specified (RTV SLO 2017).

Time	EU level	National level – pro migrants	National level – against migrants
February 2017	The EU leaders adopted the Malta Declaration on an informal summit. This declaration focuses on stemming the flow of migrants in the Central Mediterranean, through breaking the smuggling business model. They all agreed on increased cooperation with Libya, since 90% of migrants departed from there in 2016 (European Council n. d.).		
March 2017			Hungary approved the automatic detention of all asylum seekers in container camps at the borders while their applications are processed. The measure was justified by the recent terrorist attacks in Europe, carried out by the migrants (Al Jazeera 2017).
June 2017	The EU launched the so-called infringement procedure against Czech Republic, Hungary and Poland for not complying with the 2015 agreement to harbour asylum seekers. This allowed the EU to take legal actions against the states, such as financial penalties (European Commission 2017).		Italy threatened to close its ports (Wintour 2017). France announced its intention to set up the so-called hot spots in Libya to deter people from the journey to Europe across the Mediterranean (BBC 2017).

Time	EU level	National level – pro migrants	National level – against migrants
July 2017			<p>Germany implemented the legislation that granted immigration officials access to migrants' cell phone data in order to be able to establish their identity. The measure also allowed a faster deportation, longer detention and monitoring with an electronic ankle bracelet for those asylum seekers who are deemed a security threat and are either still in process of application or have already been rejected (Toor 2017).</p> <p>Germany also decided to start sending migrants back to Greece in accordance with the Dublin Regulation, regardless of the fact that Greek reception centres are overcrowded and there is a significant backlog of processing claims (Strickland and Safdar 2017).</p>
August 2017	<p>Seven EU and African leaders (France, Germany, Spain, Italy, Niger, Chad, and Libya) gathered at the Paris summit on migration, agreeing on the emergence of the pre-asylum hubs in Africa for processing requests for Europe (Wintour and Willsher 2017).</p>		<p>A French farmer who helped migrants to cross the border illegally was given a four-month suspended jail sentence (PRI 2017).</p>

Time	EU level	National level – pro migrants	National level – against migrants
September 2017	The European Court dismissed Slovakian and Hungarian claims against the European relocation plan. The decision states that the EU was entitled to order national governments to take in mainly Syrian refugees from Italy and Greece (Rankin 2017).		

Vir: Šeruga 2018.

3.2 Consequences and concerns of EU external migration policy

As it is clear from the timetable, the responses became stricter and stricter as the number of migrants arriving to the EU rose. Tensions were obvious on all levels. The EU measures became stricter, focusing on managing the migration flows through battling human trafficking and smuggling, mainly through third countries, such as Turkey, Libya and other Northern African countries. On the national level, some states have been opposing to any kind of accepting migration policies since the very beginning, such as Hungary, Czech Republic, Slovakia, and Poland. Other states – Austria, Norway, and especially Germany, were much more welcoming in the beginning, accepting higher numbers of asylum seekers and supporting the common European migration policy. However, as the situation developed, all the states adopted more and more restrictive policies, introducing border controls inside of the Schengen Area, narrowing the lists of nationalities that can apply for international protection, and putting the fences on their borders.

Since the policies became more restrictive, more and more people got stranded in detention centres, the so-called hotspots, caught in the bureaucratic procedures, usually unemployed, with very little chances to engage socially, let alone politically, and left in complete uncertainty. In combination with various personal circumstances, some left the EU voluntarily – albeit the extent of volition is questionable here, since people are usually faced with extremely hostile environment which pushes them into this voluntary return back to their homelands. Some of them responded with violence and attacks that further fuelled the stricter policies and unwelcoming stances on national levels. The influence of inhospitable environment both on voluntary refoulement and on attacks should be further researched in order to be able to create better policies that would prevent the distress of all involved parties in the future.

The EU's collaboration with third countries in order to combat human trafficking, smuggling and to better manage the migration in the source countries bears a lot of its own negative consequences as well. By supporting the foreign border controls and military with trainings, additional staff, and financially, the militarisation and securitisation are externalised and can continue within the states that are not bound by European law, thus making it possible to avoid certain obligations, especially ones to human rights.

Furthermore, these collaborations have been established with some states that are politically instable and have ongoing internal conflicts which breach the international law.

As Haferlach and Kurban (2017) argue, the EU treats its neighbouring states as service providers and buffer zones to protect its own interest. These practices are not new and have been used since the 1990s. Gaddafi's regime in Libya was supported by the EU due to EU's

migration policies, regardless of the fact that the regime was in stark contrast to values and norms of the very EU's foundations (Haferlach and Kurban 2017, 86). Libya is still one of the key territories in EU's external migration management, despite the lack of an asylum law in general (Tubiana, Warin and Saeneen 2018, 13), and the numerous reports on the detention centres in Libya, where people are facing abuse, torture, sexual violence, and are even sold as slaves.⁵ These severe violations of human rights are seemingly being ignored by the EU who continues on supporting the devastating situation in Libya. In addition to this, the country has been politically instable since the fall of Gaddafi's regime and new clashes have started between the Libyan National Army under Khalifa Haftar and the UN-recognised Governments of National Accord. In these clashes, migrants in detention centres have been killed and forcibly enlisted in the fights, since the detention centres are often run by militias. This does not even make the very state of Libya a safe country, which is why the collaboration between the EU and Libya that keeps the people stranded in Libya, should be reconsidered immediately (European Council on Refugees and Exiles 2019).

Since Libya is becoming more and more dangerous, more and more people decide to continue their way to Europe, even though some of them wanted to reach Libya originally. Libya presented the main destination to the majority of North African migrants who usually came there to work seasonally and send remittances back home. The main origin countries of migrants are Niger, Chad and Sudan. There were 575,000 migrants from these countries in Libya in 2018, according to International Organisation for Migration (IOM). Due to insecurity and violence, more and more migrants, mostly Sudanese, choose to continue their way to the EU (Tubiana, Warin and Saeneen 2018, 12).

Supporting Sudan is also highly disputable for several reasons. Sudan is being presented mainly as a country of transit. It is one of the main transit countries for Horn of Africa migrants and the third largest refugee-hosting country in Africa. But the EU is at the same time ignoring the fact that it is also one of the largest producers of refugees in the world. It has the second largest population of internally displaced persons on the continent and a significant number of refugees due to continuous violent conflicts, mainly in Darfur. In addition to this, Sudan lacks the democratic rule. Border control and migration management is largely carried out by militia forces that have been tied to human rights violations and war crimes. Their main concern is mostly preventing the movement of Darfur rebels and renegades from their own forces (Tubiana, Warin and Saeneen 2018, 37–39).

One of the key allies of the EU in its migration policies is Turkey. Out of 2.8 million officially registered refugees (the unofficial number goes up to 3.5 million) only 10% actually reside in refugee camps, the majority of them being placed elsewhere, with severely limited

⁵ Amnesty International reports and appeals for action in Libya where migrants are trapped in detention centres after armed clashes have started in Tripoli (Amnesty International 2019). Al Jazeera reports on Libyan slave markets where African migrants are sold for 400\$ (Smith 2017).

access to basic services. Vulnerable groups of migrants, such as women, LGBT* or Kurdish minority, actually fear being deported to state-run facilities, since they are facing violence and maltreatment by the officials. This raises the question whether Turkey is in fact a safe country for refugees. Moreover, the situation regarding freedom of expression, academic freedom and human rights has worsened. In 2016, the UN has received numerous allegations of on-going violations of international law, human rights concerns, including civilian deaths, extrajudicial killings, and massive displacement. To this day, Turkey has not allowed any research, reports or even the UN investigation on the destruction of towns in the south-east region, which were predominantly Kurdish.⁶ Turkey has been in the state of emergency ever since the failed coup d'état in July 2016. Since the Turkish legislation fails to guarantee rights to refugees, the EU-Turkey Statement sees the EU departing from the legal obligations (Haferlach and Kurban 2017, 88, 89).

These collaborations with the mentioned third countries and the ones not mentioned here play significant role not only from the perspective of migration, but also politics and international relations in general. From EU's point of view, the externalisation of border control and migration management transfers and diffuses any kind of political responsibility. This makes it hard to even identify the states and bodies that are responsible for numerous breaches of international law, and consequently to hold them accountable (Haferlach and Kurban 2017, 86).

Through this collaboration, these countries are becoming increasingly militarised and by growing power of militias also destabilised since they undermine the state (Tubiana, Warin and Saeneen 2018, 1). By cooperation with authoritarian and human rights abusing regimes the EU actually legitimises them and even further strengthens their forces, thus increasing their ability for internal repression (Akkerman 2018, 35):

The consequences in terms of non-respect of human rights are heavy: repressions, unfair trials, arbitrary detention, police violence, expulsions. Moreover, this repressive situation is pushing people on increasingly dangerous roads, to bypass the most heavily used roads now excessively controlled and militarized. Pushed into the hands of criminal actors, people on the move find themselves in situations of slavery, trafficking, ill-treatment, sexual violence or gender-based violence.

Furthermore, the policies against smuggling in these areas are not taking into account the internal and regional conflicts that may occur in the future (Tubiana, Warin and Saeneen 2018, 35). Even more so, it does not take into account an important migration-based economy in North Africa for example, which could also lead to conflict (Akkerman 2018, 36).

It is obvious that EU migration policies are raising a lot of questions and doubts after they are analysed and all consequences are considered. Additional research from the perspective of

⁶ The deal between Turkey and the EU has silenced the criticism from the EU regarding the Turkish military operations against Kurds (Bilgic 2018).

criminalisation of migration would be needed in the mentioned countries that are included in EU external migration policies. It would be interesting to compare the practices of criminalisation of migration in third countries, those MS which border on the third countries, and other MS. In this research, we focused on the MS that border on third countries in the Balkan region.

4 EMPIRICAL PART

This part will present the analysis and results of our research on the practices of criminalisation of migration and consequences of those practices that NGOs and more loosely organised groups in Slovenia and its neighbouring countries (Austria, Croatia, Hungary, Italy) have witnessed at their work with migrants. To meet the goal of better understanding the discussed issue, we addressed the following research questions:

- What forms of criminalisation of migration have the groups witness at their work?
- Do the criminalisation practices differ from country to country? If so, how?

We would also like to propose some alternative solutions for the current situation and hopefully give ideas for new international projects or policy-making in general.

4.1 Purpose of the research

The purpose of this research was to understand the extent to which the practices of criminalisation of migration are present in Slovenia and its four neighbouring countries. Final results and conclusions will:

- fill an academic and practical gap in the analysis of criminalisation of migration in the mentioned area;
- contribute to the broader academic research of these phenomena;
- contribute to a better understanding of the development of the criminalisation of migration and especially the effects it has on the society in general.

This geographical area is particularly relevant because of its geopolitical position. Located on the so-called Balkan migration route, the countries that form part of it offer the entering point to the Western Europe. Additionally, the states that were included in this research also have different membership statuses. Croatia and Hungary both border on states that are neither in the Schengen zone nor members of the EU. These results provide critical information on the practices in border regions not only when it comes to state borders, but also the EU's borders.

This research also aims to connect the phenomena of criminalisation of migration and criminalisation of solidarity and show that both of them are essential in the process of achieving the ultimate goal, i.e. removal from the territory. As the interviews conducted in this research were analysed separately from the perspective of criminalisation of migration and criminalisation of solidarity, the analysis on the latter issue has already been presented, since it was separately published by Jalušič (2018).

4.2 Methodology

The research was carried out as a part of the project *Crimmigration between Human Rights and Surveillance* at The Peace Institute, Institute for Contemporary Social and Political Studies, Ljubljana. We collected nine anonymous qualitative interviews with the members, employees or volunteers of different NGOs or other organised groups which provided some kind of assistance to migrants. These interviews have been conducted by Vlasta Jalušič and Arijana Radić, two of them were answered through e-mail. Five of the interviewees are from Slovenia, two from Hungary, one from Croatia and one from Italy. The interviews were carried out between November 2017 and May 2018.

The interviews were conducted with 4 Slovenian respondents, 2 Hungarian, 1 Austrian, 1 Croatian and 1 Italian respondent. First four interviews (Interviews 1 to 4) were Slovenian, all registered NGOs that are funded both by the state and through some European tenders. Interview 5 was conducted with an Austrian respondent that is a part of a volunteering initiative which is not officially registered; hence it does not receive any funds except for individual donations in form of donations to the migrants. Interview 6 and 7 were conducted with Hungarian respondents; 6 being a respondent from a knowledge-producing volunteering organisation that receives no funds, and 7 being a respondent from a registered NGO that is funded through projects and European funds, but not by the state. Interview 8 was conducted with a Croatian correspondent from a registered NGO, mostly financed through European projects and funds. Interview 9 was conducted with an Italian registered NGO which is funded through projects and funds both on national and European level.

The interviews consisted of five groups of questions. The first set was focused on presentation of organisations, the work they do and the principles their work is based on, funds they receive and possible requirements they have to fulfil, and the number and structure of people they work with (gender and age). The second set of questions aimed to assess the migration policies and the direction they should take. The third set of questions was dealing with the practice of criminalisation of migration or other practices by the authorities that the interviewees found problematic. The fourth set described organisations' relationship with the authorities, state bodies and the state in general. The fifth set presented the criminalisation of their activities, the practices of discrediting, hindering of their work and public criticism they are faced with.

The fifth set of questions was already analysed by Jalušič (2018; discussed in the Chapter 2.3). The original empirical work by Arijana Radić for the purpose of this thesis is the analysis of the third set of questions, which deals with the practices of criminalisation of migration that the interviewees have witnessed at their work.

4.3 Limitations

This work does not come without limitations. Some of the critical ones include:

- limited space to discuss all the characteristics of the phenomenon, mainly because the topic is fast-changing and this is an ongoing issue;
- due to the fast-changing nature of the issue, there is some new development of the phenomenon in this geographic area as well that should be taken into further consideration;
- empirical research focuses on NGOs and other loosely organised civil groups, which all do various activities, not only humanitarian ones.

The research could be further upgraded by:

- analysing the experience of solely humanitarian organisations;
- analysing the experience of those organisations who still have access to now mainly closed ‘hot spots’, refugee camps and detention centres for migrants;
- expanding the research in states that are not a part of the EU but are bordering to it, since they play an important role in border control (e.g. Bosnia and Herzegovina, Serbia, North Macedonia, Turkey, Morocco, and states in Northern Africa).

4.4 Interview analysis

In this analysis of the phenomenon of criminalisation of migration we will follow Provera’s (2015) division of four main elements:

- discourse;
- repressive actions of police and later of judicial proceedings;
- immigration detention;
- criminalisation of those in solidarity with migrants.

According to Provera (2015), the aim of these practices is the isolation of migrants, both legal and social, through which the ultimate goal is reached – removal or deportation from the territory.

Since the fourth element was already analysed and discussed in Chapter 2.3, the remaining three are the focus of this empirical research.

4.4.1 Discourse

Discourse is one of the essential elements in the process of criminalisation of migration that both creates a certain climate in which the process can happen, and also ties all the remaining elements together, closing the process' development. By using certain discourse, creating the image of migrants and those in solidarity with them as a group of people whose actions or even beings are irregular, against the common values, culture, country, freedom, rights, or even the foundations of the whole continent, it is possible to create an atmosphere in which the process of criminalisation can evolve.

In the discourse development, “[...] it is more about the demonization than criminalisation” (Interview 4). As one of the respondents described, this whole special climate and attitude towards the migrants has been created. It makes the public demand certain policies and politicians are therefore obliged to make them in order to “not be eaten by their own electorate” (Interview 4). By creating the stigma around migration and migrants it affects both the migrants itself and the people working with them, since people do not want to expose themselves as working with migrants.

The discourse on immigration builds on “use of collective categories that lack any descriptive coherence or precision” (Parkin 2013, 4), but have strong connotations and imply associations, e.g. “gypsies”, “Muslims”, and also “illegal migrants”. The additional confusion comes from usage of the terms “economic refugee” or “economic migrant” which influences the level of protection given to a person in a negative way (Bigo 2004, 7). When it comes to illegal migrants, this term clearly implies that these people have criminal status based on administrative misdemeanour of lacking proper documentation, and that their whole existence is therefore illegal. This simplification of an otherwise very complex terms and issues complicates their status and affects the very treatment of migrants by authorities, officials and the public in general.

As our respondent from Hungary said, migrants are presented as a threat for the whole country and the media reports are very selective in information they are passing on to the public. Another Slovenian respondent agrees, saying that the whole discourse is “racist, evolving around the question whether we are going to send another boat in the Mediterranean to pick those people out and let them survive” (Interview 3). In Hungary, the situation is even worse, since the direct attack on migrants is usually coming from the right-wing media, “which is the main media in Hungary, so they attack from everywhere. [...] it’s not just some crazy conspiracy guys from the internet. Here the government are the crazy conspiracy guys” (Interview 6).

This discriminatory and racist discourse significantly affects various levels of migrants' lives. The general sentiment towards them becomes highly negative, which can be reflected on the official policies and in their efforts to access basic social services or building their social

network. In Croatia, the report on how many people support the refugees showed that a rather significant number of citizens “feels a threat and danger with being surrounded with refugees” (Interview 8).

As all the Slovenian respondents report, they came across discriminatory practices when the migrants sought medical help. Those who are granted the international protection have a right to choose a doctor. When they visited one, they were faced with various discriminatory practices and insults, such as doctors denying them help because they are not a “migrant hospital”, or being asked “whether he is related to Osama bin Laden because his name was Osama” (Interview 2). In transit zones, police denied access to doctors to adult migrants, with an argument that “they do not look sick, they are just pretending to have medical problems” (Interview 1).

In Slovenia, the respondents report of a highly racist housing market. “I am certain that if the refugees were calling the landlords by themselves, they would be committing mass suicides. Things you hear when you call twenty people and ask whether a refugee can take the room or the apartment and of course pay for it... It’s horrible” (Interview 3). Since housing is essential in building their lives here, they need help from activists, otherwise they would not succeed at all.

Another huge problem is the reverse side of the discourse – communication with the migrants themselves. Respondents from all the included countries say that there is an extreme problem with withholding the information from migrants. There are huge language barriers, revealing the lack of officials who would be able to communicate with people in their own language and interpret for them, which they are entitled to. They are denied the access to information about their rights, the processes of appealing to their rights, they were denied contact to lawyers that could help them with their applications and communication with the officials (Austria and Hungary were mentioned specifically). The officials also treated them in discriminative manner based on the communication. Namely, in the last few weeks of so-called Balkan refugee route only Syrians, Afghans and Iraqis were allowed to cross the borders and apply for international protection. Officials, however, denied the protection even to those groups based on the interviews that contained some “tricky questions”, with an aim to reject as many people as possible: “They would ask someone for example from Syria where are they headed. If they said they want to go to Germany because they have relatives there, their application would be denied with an explanation that the person is not fleeing war, but wants to travel to their relatives in Germany” (Interview 1). The same respondent said that the officials in general did not treat everyone equally, giving them different information, making differences in processes, issuing different documents.

One of the respondents also pointed out the fact that there is “not one single media in Arab language from Greece to Vienna. I believe there is one in Vienna. But what is with this vast

Balkan space that functions as an entrance, as a wormhole? People crossed it without even knowing what they are crossing, what they are leaving behind and how things change as they do” (Interview 3). Through this discursive isolation, they are also denied their own agency and involvement in society and politics, not having a voice at all.

This stigma created through public discourse and media goes beyond the collective categories of people (Parkin 2013) – as Bigo (2004) explains, it touches upon the very core values of different societies. Our respondents confirmed that migrants and everyone who is working with them suddenly become the opposite of “liberal, enlightenment values, but are instead representing some kind of medieval religion and medieval attitude towards women, authoritarian, semi-religious state structures, while the ones opposing the migration are defending the enlightened and European values” (Interview 4). After the creation of this opposition, the public is not inclined to support any kind of action to help the migrants in any kind of way.

4.4.2 Repressive actions by state officials and law enforcement

In the theoretical part, there is an extensive presentation of the process of securitisation and increase of surveillance when it comes to repressive actions by the officials. Those who carry out the surveillance and are securing the borders are concrete individuals whose behaviour and treatment of migrants reflect both the general public sentiment towards those who arrive and the official policies.

All of our respondents were actively working with migrants on the borders and later through the process of either crossing the countries or applying for international protection. They worked as volunteers at the border, providing humanitarian aid, monitoring the work of officials, and/or gathering information. They all report on police violence, inhumane, degrading treatment, shouting, insults and similar. People reported that they have a feeling they are treated as numbers and not as human beings. Italian respondent reports on racist treatment by the police: “[...] they take the right to stop the migrants in the street, asking several questions in a bad way, treat them as objects and let them feel that they do not have any rights and no value as human beings” (Interview 9). The provincial Italian police, Questura, in Palermo was demanding the passports to all unaccompanied minors, regardless of the Zampa law granting the permit to stay for minors even without the passports. This resulted in only a few of them requesting the permit to stay, applying for international protection and thus waiting for more than one year to be interviewed.

The situation was reported as bad on the border crossing, especially on Hungarian borders with Croatia and Serbia. There are reports on violent pushbacks that involve beatings and actual injuries: “We have clients with crushed skulls, dog bites and similar serious cases that are happening on the systemic level. There are a lot of reports on these cases, not only in

Hungary, but also in Croatia” (Interview 7). People were denied crossing the border to Hungary despite their needs or medical conditions (Interview 4):

[...] around 200 people, children, elders, with broken limbs, women that do not know where their children are, children without anything, trying to cross the Hungarian border and not succeeding. People waiting, without any infrastructure, outside, in the mud, in the field, waiting and wondering whether they will make it through or not.

All of them also reported on violent pushbacks at the borders in all five countries that are included in this research. All five countries were pushing back people, tossing them from one border to another in order to get rid of people. As one of the respondents describes, the first reaction from the police when migrants arrived was not violence, but simply transferring people to the next border (Interview 6). That soon changed with the implementation of much stricter policies in general. After that, police started to push back migrants on all borders. In Austria, 700 people were pushed back to Slovenia in just 21 days. In Hungary, there were people pushed back to Serbia, being beaten up, with visible wounds, reporting on Hungarian police using dogs, tear gas or water cannons to push them back and make them so tired that they cannot try again (Interview 6). As one of the respondents pointed out at the time of interviewing, the Hungarian case is to some extent special, since the country is extremely focused on a national solution, not taking into consideration the warnings from the EU. Hungary even has a law that enables the police to deport anyone who is found to be in the territory of Hungary illegally. They are usually deported to Serbia. “This law exists despite the fact that this constitutes a collective deportation of people, which is against Article 4 of the ECHR” (Interview 7).

People are also violently pushed back from Croatia to Serbia, Bosnia and Montenegro, which is well documented by numerous organisations: “Normally, it all goes hand in hand with massive violence, and regularly crossing the line of torture” (Interview 6).

These repressive, violent and illegal actions by police were reported to authorities and judiciaries on several occasions, but as the Croatian respondent points out, “the slow and on-an-obstacle-based investigation of the police misconduct on behalf of higher levels of the police system and the state-judiciary bodies” have to be taken into consideration as well (Interview 8). All these practices, including the ignoring and not resolving the charges against the police, shows how violently the borders are protected: “It all just shows that the fence is not enough, because of course there is always a ladder, there are always scissors to pass this fence. But what you need are these practices to protect the fence” (Interview 6).

As far as the procedures are concerned, not only the procedures against the officials are slow and inefficient – the same goes for the procedures that migrants are caught in. There are reports from Slovenia, Croatia and Italy about the biased, subjective and discriminatory decisions from state officials. In Croatia, they have come across copy-pasted decisions for asylum seekers, despite the fact that they should be regarded as individuals. Some decisions

were fast-tracked, without any research conducted on the specific individual case. They also contained information from the international humanitarian or state organisations which have been complicit with some problematic international politics in the field. In Italy, the asylum seekers are collectively refused the international protection if they mention their extremely poor living conditions, since this is regarded as economic reason for migration. In Slovenia, there are reports of officials being very uncooperative, demanding additional evidence or documents that does not need to be provided, but is only an exercise of their discretionary power (Interview 4):

There is no problem with Slovenia not having a functional asylum policy. It has a perfect asylum system when it comes to legislation and all that. The problem is that no one is granted an asylum and that it is one big Potemkin village, the whole system namely. The procedures are prolonged on purpose, people are mistreated, I mean those 18 euros per month and that quasi asylum centre ... I believe everything is designed in a way that people are discouraged and will surrender at some point, withdraw their applications that more than 1,000 people can simply disappear from the system every year. The whole system is designed for people to give up.

Even when people do reach the territories and succeed in remaining there, they are caught in the web of surveillance through accommodation, workplace, ID cards, even voucher-based welfare system for asylum seekers that limit their consumption possibilities, and similar. They are basically forced into a situation without opportunities and rights (Parkin 2013, 6).

According to the theory, our respondents from Slovenia report that even those that are granted international protection are left without any integration system. After exercising the right to remain in the asylum centres for a month, they are left to their own devices. Even if there are some integration systems, they tend to be quite disorganised. As the Italian respondent describes, people are often moved out of cities to small villages and back again, which breaks down their learning paths and forces them to keep starting their life over and over again, leaving them feeling excluded all the time. In Slovenia, there are reports on migrants that are residing in Slovenia for years already, who are still being caught in the same precarious employments, are facing obstacles in renting the apartments, are forced to work illegally, or are even erased from the official records if they temporarily work abroad. Not only their employment is precarious, “their whole existence here is precarious” (Interview 3).

Migrants are basically forced into a situation without opportunities and rights, which often results in what seems a voluntary departure to their countries of origin – thus the state succeeds in reaching its aim of ejection (Parkin 2013, 6). One of the Slovenian respondents told a story about an Afghan migrant that spent more than half of his life as a migrant and joined their group in 2016. He was completely ruined both physically and emotionally, being unable to work, speak or continue his way anyhow. After numerous failed attempts to help him find a job and accommodation, all they could do was help him file the papers for voluntary return to Afghanistan; “[...] it is horrible and you do not agree with it, but you really do not know what else to do” (Interview 3).

Repression can also be seen in the neglect of the living conditions of migrants. In Croatia, there were reports on people trying to commit suicide, on cases of sexual violence against women and minors, violence among the frustrated and exhausted people living in uncertainty and general bad living conditions. There were also reports on migrants being given cold showers by public servants and institutions treating them as “socially dependent number cases while not ensuring opportunities for education or work” (Interview 8). In Slovenia, problems regarding the living conditions came out during a course of Slovene language for migrants, where someone pointed out that there are social workers constantly entering their rooms, giving them no privacy or personal space whatsoever. They spent the whole lecture learning how to say to someone to go away, since the lecturer recognised the need for them to learn these phrases in order to both understand them and to be able to say them themselves (Interview 3). As already mentioned, migrants are constantly moved in Italy, not being able to proceed with building their lives and not having any support from the municipalities.

As our respondents highlight, the purpose of these restrictive policies and actions by the officials is not to protect the rights of the migrants, but to end the procedures as fast as possible, with rejecting as many people as possible. Since the policies and legislation is following these repressive actions, the latter have the support of politics. Especially interesting is the combination of policies and pushbacks for example in Slovenia, which is a part of Schengen zone, pushing back people to Croatia, which is in the EU but not in Schengen zone yet, and furthermore Croatia pushing people back in Bosnia and Herzegovina or Serbia which are third countries and not under the influence of European common migration policies.

As one of the respondents from Slovenia warns, the closing of borders does not mean that people are gone. It just means that they are pushed into illegality even further, that they are exposed to state violence and violence in general. “Everyone can do with them what they wish, there are no mechanisms, legal or any whatsoever, that would grant them any rights or sanction the violations they are facing” (Interview 4).

4.4.3 Detention and expulsion

Under the Reception Directive II, the state has the right to detain migrants in order to decide on the application, during the whole asylum application process. Despite the Return Directive stating that the detention should take place in specialised detention facilities, MS are actually allowed to detain migrants in prisons when the special facilities cannot be provided. Furthermore, migrants can be kept together with other prisoners in exceptional circumstances. Both immigration detention facilities and prisons are governed by the same officials, additionally linking the migrants with criminality (Provera 2015).

As already mentioned, according to Guild (2005; Parkin 2013, 12–13), there are four scenarios in which migrants can be detained:

- detention upon arrival in order to prevent unauthorised entry or while deciding whether the entry was unauthorised;
- detention during the asylum application process;
- detention because of irregular stay, justified with the need of removal;
- detention for the purpose of removal or expulsion.

Our respondents reported on detention in transit zones on borders of all countries included. In Austria, they were “trapped in the so called no man’s land without any kind of care or blankets or shelter for up to three days, trying to cross the border” (Interview 5). In the time of increased arrival of migrants, our Austrian respondent witnessed some very concerning nights, when temperatures dropped below zero. Sick children and babies without shelter were left outside, stranded in the transit zone. The volunteers and other aid workers were not able to access to them either: “we could reach through the fence and hold their hands, but not doing anything more than that” (Interview 5).

In Hungary, people are detained in transit zones on the border with Serbia throughout the whole asylum application procedure, some living in the containers in all possible weather conditions, without any aid, up to ten months. This includes families with small children, people with medical conditions, and unaccompanied minors. Their rights are violated daily and their situation is not improving. This detention is carried out without any official orders on the restriction of movement, or the chance to file a complaint either against the detention or the violation of rights. This is clearly against the national, European and international legislation (Interview 7).

In Slovenia, the Aliens Act defines the detention centre as a closed police centre, thus making little or no distinction between the administrative and punitive detention. Slovenian and Croatian respondents report on children and families being detained in those centres, which is against the ECHR. Some people were also detained at police stations in Slovenia for more than the allowed 48 hours after which they should be transferred to another procedure and facility, if necessary, or set free.

Another problem that was pointed out by a Slovenian respondent is the fact that people who are detained and are in the procedures are not allowed to work for 9 months. The issue here is not the fact that they receive only 18 euros per month, but the fact that they are actually forced into inactivity, not being able to become independent economically and to be included into society, and consequently facing even deeper despair and deterioration.

As far as the expulsion is concerned, some examples have been described in the previous chapter on violent pushbacks. These are part of both repressive actions by the officials and

the expulsion element in the process of criminalisation of migration. As mentioned, there are different dynamics at play with states having different statuses when it comes to EU and Schengen zone, and also the fact that they are bordering third countries. The latter seem to play a significant role in keeping the migrants away from the EU's territory, "transforming from the periphery to the central issue" (Interview 8).

One Slovenian respondent (Interview 1) also warned about a rising issue of marriages in the process of criminalisation of migration and especially detention and expulsion. There was a case of an asylum seeker who wanted to get married, but was instead detained (he was not detained prior to this) and handed an order on his expulsion, due to a suspicion that this is a marriage of convenience. This is another problematic practice on systemic level that is discriminatory and presents another ground for detention and expulsion of unwanted migrants, furthermore strengthening the implication of inherent criminality among the migrants.

Detention is an important part of the process of criminalisation of migration also because it presents a solution to making the problem of migration invisible by hiding and erasing it. In order to do so, "the question is not if people can get out, the question is also who is allowed to go in, and journalists were not allowed to go in, activists were not allowed to go in, media was not allowed to go in, and the problem was solved by making it invisible" (Interview 6).

4.4.4 Recap

This isolation brings us to the fourth element, criminalisation of solidarity, explained in the Chapter 2.3. It also brings us back to the discourse, since the information is being withheld both from the migrants and the public, thus affecting the media reporting, information access and the public discourse in general. It is clear that the four elements of criminalisation of migration form a closed circle in which all of the elements affect and additionally reinforce each other.

As the respondents say, these processes and working with migrants enable us to get to know some additional layers of the state and authority that were previously unknown to the citizens, since different laws apply to citizens of the MS from the very beginning. Through these practices it becomes clear that the EU policies are forcing the economic migration of talented and skilled migrants, while pushing away the unwanted and criminalising the so-called economic migrants that come from different backgrounds. The European migration policies and the consequences they bring become very clear when you look at the individuals that are affected by them (Interview 3):

When you see someone that has been in Europe 11 years already and who has been continuously crushed and grinded by these policies, you can see what is left of a person – nothing. This man was nothing, he was like a stick, retarded, could not speak, he drank half a litre of vodka and

started crying but still not speaking. This is the perfect example of how the migration policies work in Europe. That is what happens to you.

5 CONCLUSION

After presenting both the theoretical, general definitions of the process of criminalisation of migration and the four elements that constitute it, plus results of our own empirical research, we would like to conclude our work. First, we will provide a summary on our findings on the criminalisation of migration in the specific area we were researching. We will also present suggestions for policy changes and actions that need to be carried out by different levels of government, media, and individuals in order to change the current situation that is clearly negatively affecting the involved parties.

5.1 Research conclusions

The results of this research were to answer the following main research questions:

- What forms of criminalisation of migration have the groups witness at their work?
- Do the criminalisation practices differ from country to country? If so, how?

Throughout the analysis of the research results, we were following Provera's (2015) categorisation of constituent elements of criminalisation of migration: discourse, repressive actions by the state officials and law enforcement, detention and expulsion, and criminalisation of those in solidarity with the migrants. This thesis focused on the first three elements.

All respondents have witnessed all three categories of criminalisation of migration. The discursive element plays a big role in creating certain "demonised" categories of people and a certain stigma around migrants, the whole phenomenon of migration, and also around the people working with them. Discourse creates an environment in which certain policies are created but that are also demanded by the public. The public is basing their demands on the information received by that stigmatising discourse. This also affects the discriminatory practices by the public, which can be seen on housing market or with medical help, and the officials. Within the discourse category, the communication with migrants was also pointed out as problematic. They are given no information, there are significant language barriers, and migrants have no option to follow or participate in any kind of media in their own language, meaning their voice is taken away entirely.

This construction of certain groups of others affects the political context as well, which can be seen in policy-making and actions by state officials and law enforcement. All respondents reported on police violence, degrading, inhumane treatment, and discriminatory practices. An important issue is the violence witnessed on the borders. Especially because borders present entering points to the state territories, making them points at which migrants can be easily rejected. The issue of pushbacks is on the rise, and it is accompanied by violence and violation of human rights. When these repressive and often illegal actions by state officials

are reported, the processes are prolonged on purpose. The same goes for the asylum applications processes, with the intention to reject or deter as many people as possible. All respondents report on slow, biased, subjective and discriminatory processes. Often, the cases are not regarded individually and applicants are asked “tricky questions” in order to give the wrong answer that results in rejection. If the migrants manage to stay, they face an uncertain situation with no integration system, being moved from place to place, not being able to create a life. They are stranded in poor living conditions that lack privacy, and they are faced with violence, sexual violence, and deepened frustration and despair.

Expulsion and detention are the main defining features of criminalisation of migration. Respondents from all the included countries reported on detention in transit zones that was often inhumane, with people being left outside in all weather conditions, without any shelter, medical help or other aid, while the aid workers were denied access to them. In Hungary, some were detained in transit zones up to ten months, until their application processes were concluded. There are a lot of reports on children and families being detained in detention centres that function as prisons, which is against the ECHR. While migrants are being detained in often dislocated and restrained centres, their right to work is restricted, which is an additional obstacle in creating a life, and it makes it impossible for them to become economically independent. The restrictive policies and treatments are also aimed at creating such conditions that people are eventually pushed into so-called voluntary return. That way, the ultimate goal of migration policy is reached, the expulsion.

Coming from five different states, our respondents described very similar cases of criminalisation of migration. There are, however, slight differences between the states, mostly when it comes to policies and legislations. In general, they all follow some directives from the EU, but they still have some national adjustments. Hungary has taken the harshest stance on migration, being the state that first started building fences on their borders and publicly rejecting migrants, going even against the EU quota system and relocation scheme. Since it borders to Croatia, which has only recently joined the EU but it still not in the Schengen zone, and Serbia, which is a third country, Hungary presents an entrance point to the EU and Schengen zone. One of our respondents believes that is the reason why EU is somehow tolerating the Hungarian policy, since all MS benefit from protection of the entrance to the common Schengen zone.

Despite Hungary being the most vocal about migration, that does not mean other states are doing much better in practice. Fences soon arose on all borders and all of the respondents reported on violent pushbacks from the state borders – Austria pushes back people to Slovenia, Slovenia to Croatia, Croatia to Serbia and Bosnia and Herzegovina, Hungary to Croatia and Serbia, and Italy both to Slovenia and to the Mediterranean, forcing boats to take refuge somewhere else or return to Libya, where they usually come from.

To sum up, this research has provided an insight to the practices of criminalisation of migration in a specific geographic area, including Slovenia and its four neighbouring countries, thus covering the research gap on this area. It shows the trend of criminalisation of migration is developing equally in all states, regardless of their position, membership status, or public stance on migration in general. This highlights the broadness and scope of the issue and gives us a better insight to all the aspects that need to be addressed in order to tackle this issue properly and achieve some positive changes for the future.

5.2 Recommendations for policy development and further research

Considering the fast-changing nature of this issue, there has been some development regarding the process of criminalisation of migration and especially solidarity, both globally and in this particular geographic area. As mentioned in the limitations, all the changes from the end of 2017 on could not be covered due to limited space and also time frame we have covered in this research. These new developments and especially new reports that are being published on violence on the borders should be taken into consideration and researched further. It seems as though the situation is getting more severe both in practice and also in political sphere, with the rise of right-wing political parties and governments (especially in Italy). These developments should be closely monitored in order to report and prevent violations of human rights, and changing the migration policies to a more humane, legal and respectful way.

We propose the following policy changes which we will expand on in this chapter:

- creating secure and legal ways of migration to and staying in the EU;
- creating a general information sharing platform and improving the current communications;
- putting criminalisation of solidarity to stop;
- improvement of public and political discourse on migration.

As far as concrete policy changes are concerned, there is an absolute need for a better migration policy on the European level, which was also pointed out by our respondents. The current system, including the Dublin Regulation, the MS' opposition of quotas, and strengthening of outside borders, makes it impossible for migrants to migrate in a safe and legal way. This is one of the reasons why they are forced to resort to illegal ways of migrating, enriching human smugglers and traffickers in the process, and avoiding official ways of entering and residing in states. They are often trapped in third countries that are bordering Schengen area, such as Bosnia and Herzegovina or Serbia, being forced into horrible living conditions and facing violations of their rights on a daily basis. The bi- and multilateral agreements with third countries, such as Turkey, Libya or Sudan, restricts their movement even more, stranding them either in the camps that resemble concentration camps.

This leaves them exposed to human rights violations, sexual violence, physical violence, mental deterioration and even slavery. Even if the situation would improve overnight and all of them would be granted international protection and could move anywhere, severe consequences on their mental health are to remain forever. This is not limited only to adults, but is also seen in children, who would need years of help to overcome the struggles they faced.

In order to at least begin to tackle these severe issues, secure and safe options should be granted for travelling, entering and residing in the MS. The relocation and quota schemes are not bad ideas in theory, but their execution should be done together with the migrants. As one of our respondents pointed out, it makes no sense to send a person who speaks French to Norway. Migrants should have a say in these plans and their individual circumstances should be taken into consideration.

To make that possible, another issue that we are sensing as the most crucial one, has to be resolved and that is information sharing. In order to be able to give migrants an opportunity to express their needs and requests of any kind, also the ones regarding their desired destination, there should be an efficient information sharing system. This includes overcoming the language barriers – people should be available to access information in their own language as often as possible. This could be solved by including the migrants that are already in the country in the official procedures as interpreters and/or consultants. It would be more efficient to train them to be able to work in the process than to teach someone else a whole new language or make someone else migrate because of the vacancy. Most importantly, it would offer the migrants a chance to participate in the labour market, being included in society and starting their life here as soon as possible.

Inclusion in the labour market is an essential part of the inclusion of migrants into society in general. They should be able to obtain a work permit as soon as possible, making them economically independent, reducing the time they must rely on social transfers, and making it possible for them to stay active and become a part of the community they are in. This would also reduce the potential irregular situations they can find themselves in, with a proper control of the employers and sanctioning the exploitation of migrant workers.

Information sharing would also be an efficient manner of tackling the smuggling and human trafficking business. Migrants should be able to access legitimate information about the journey they are making, the states they are arriving to and procedures they are about to go through, together with clear information on what their rights are and who they can turn to for legal help and consults. Together with access to secure and safe travelling options, people would not have to resort to illegal options. They are the ones that are usually giving migrants the information on where they should go, how to proceed when they arrive and also what awaits them at the reached destination. The information about the latter can be very

misleading since their only motivation is profit. This is why an open platform of information sharing should be created in the EU, with a joint effort of governments, non-governmental and civil society actors, and migrants who have the experience of migration. It is essential to include migrants and NGOs in the project, since they present a social network which people can rely on and can trust. The reason behind it is because there is more caution when it comes to trusting governments and officials, especially if people have bad experience with it.

That said, the criminalisation of solidarity should be put to an end immediately. The civil society actors and organisations that are lately facing allegations and sanctions are the ones that are presenting an important bridge between the migrants and officials. They form a social network for migrants that can ease their migration and help them with various aspects of their transition, i.e. social services, legal help, housing, access to labour market. They are the ones that are filling the gaps that MS cannot fill when it comes to dealing with migration. They are also an important factor in preserving the democratic rule and rule of law by monitoring the governments and reporting on breaches and discrimination. In order to preserve our civic and political space of agency, the agency of civil society actors should be defended and continued.

All these changes should go hand in hand with the shifts in the public discourse on migration, from media to politicians and back. The public should be provided with factual, valid information. Media should use the proper, correct terms, definitions and explanations, without the statistics being manipulated in order to invoke certain reactions that later resonates in policy-making and politics in general. Hate speech ought to be properly addressed and sanctioned. Space and voice should be given to migrants in public as well, not just through others who work with them, but to them directly. This would be an important part of their emancipation and empowerment process, since that is an essential part of inclusion in community and active citizen life.

All these processes and changes are gradual and require a lot of work and time from all involved individuals and communities, but they have to be triggered as soon as possible, since the current situation is much more than a question of traditions, cultures, states, rule of law or politics. It is literally a question of life and death and so far, the answers of discrimination, racism, violation of human rights and ignorance have all been wrong.

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SUMMARY IN SLOVENE

KRIMINALIZACIJA MIGRACIJ: TERENSKE PRAKSE IN POSLEDICE

Kriminalizacija migracij je trend, ki vse bolj prevladuje pri obravnavi migracij v EU. Prek združevanja prvin upravnega in kazenskega prava se oblikujejo prakse, s katerimi se migrantom preprečuje bivanje, vstop ali celo dostopanje do ozemlja EU. V zadnjih letih se trend kriminalizacije migracij pojavlja kot glavna tema raziskav o migracijah. Z dodatnim zaostrovanjem politik in praks se potreba po raziskavah o razvoju tega trenda še povečuje. Pričujoče delo analizira prakse kriminalizacije migracij v Sloveniji in njenih sosednjih državah in z rezultati odgovarja na sledeči raziskovalni vprašnji: kako se kriminalizacija migracij udejanja v praksi in v kolikšni meri se prakse razlikujejo med državami, vključenimi v raziskavo.

Namen raziskave je preučiti, v kolikšni meri je kriminalizacija migracij prisotna v Sloveniji in njenih sosednjih državah. Ugotovitve in zaključki bodo zapolnili manko informacij z omenjenega geografskega področja, prispevali k dosedanjim akademskim razpravam in boljšemu razumevanju razvoja ter posledic kriminalizacije migracij. Območje Slovenije in sosednjih držav je posebej pomembno zaradi lege, saj je del t. i. Balkanske migracijske poti, na kateri države, vključene v raziskavo, predstavljajo vstopne točke v EU. Poleg tega so zanimive tudi razlike v članstvu EU. Hrvaška je del EU, ni pa še del Schengenskega območja. Hrvaška in Madžarska mejita na države, ki niso niti del Schengenskega območja niti del EU. Rezultati raziskave tako prispevajo k boljšemu razumevanju dogajanja ne le na mejah posameznih držav članic temveč na meji celotne EU. V pričujočem delu je poudarek na povezavi trenda kriminalizacije migracij in kriminalizacije solidarnosti. Namen tega je dokazati, da sta oba trenda ključna pri doseganju končnega cilja evropskih migracijskih politik – odstranitve z ozemlja.

Stumpf (2006) definira kriminalizacijo migracij kot presek med kazenskim in upravnim pravom. Ti dve pravni področji prvotno obravnavata dve različni kategoriji kršitev, zaradi česar se razlikujeta tudi v praksah. Kazensko pravo obravnava kršitve posameznika, pri čemer pravo nastopa kot država. Država ščiti družbo pred nasiljem, prevarami in drugimi zločinskimi nameni tako, da sankcionira tiste, ki kršijo kazensko pravo (Guild 2010, 8). Upravno pravo ureja odnose med posamezniki in državo, vendar pa se pri tem pomembno razlikuje od kazenskega prava, saj ne uporablja sankcij. Obe pravni področji sicer imata skupno točko in sicer to, da obe delujeta kot sistema vključitve in izključitve – upravno pravo določa, kdo lahko prečka mejo in biva na določenem ozemlju, kazensko pravo pa prek sistema sankcij izključuje tiste, ki kršijo pravo (Stumpf 2006). Kot izpostavlja Stumpf (2006, 385), se pri kriminalizaciji migracij ti dve področji prava začneta prekrivati in nastane novo pravno področje, v katerem so ohranjeni najbolj ostri elementi kazenskega in upravnega

prava. Posledice kršitev obeh pravnih področij se ohranijo in uveljavljajo za iste prestopke, pri čemer lahko pride tako do odvzema prostosti kot do deportacije. Kršitve upravnega prava tako postanejo sankcionirane, kot da je kršeno kazensko pravo, za kršitve kazenskega prava pa pride kot sankcija v poštev tudi deportacija.

Medtem ko gre tu za bolj ozko, pravno usmerjeno definicijo, pa Palidda (2008b) kriminalizacijo migracij opredeljuje veliko širše. Pri tem upošteva tudi vse diskurze, dejstva in prakse, ki migrante opredeljujejo kot tujce in kriminalce, ki pogosto kršijo kazensko pravo. Provera (2015) kriminalizacijo migracij definira skozi štiri glavne elemente:

- diskurz,
- represija državnih in pravnih organov,
- pridržanje migrantov,
- kriminalizacija solidarnosti.

Vsi štirje elementi se vse bolj nanašajo na tiste migrante, ki lahko *potencialno* kršijo kazensko pravo oziroma ogrožajo nacionalno varnost (Stumpf 2006). Spena (2014) poudarja, da je cilj kriminalizacije migracij izključitev iz družbe, pri čemer se izključuje določene skupine ljudi. Pri tem ne gre le za migrante, kot opozarja Provera (2015), temveč tudi za tiste, ki so v solidarnosti z migranti. Kombinacija kriminalizacije migracij in kriminalizacije solidarnosti potiska migrante v izoliran in marginaliziran položaj tako pravno kot socialno, kar olajša njihovo odstranitev z ozemlja EU.

Pri izključevanju določenih skupin ljudi je ključna konstrukcija teh skupin, ki se prične prek javnega diskurza. Uporaba jezika je politična izbira in zelo pomembno je, na kaj se osredotočamo pri govoru v določeni situaciji (Guild 2010). Parkin (2013) ugotavlja, da se prek diskurza o migracijah ustvarja neizogibna povezava med grožnjo kriminala in samim karakterjem migrantov. Kategorija migrantov se uveljavlja kot kategorija, ki predstavlja tveganje in grožnjo nacionalni varnosti. Kot ugotavlja Spena (2014, 16), gre pri konstrukciji stereotipov za več faz. Najprej se stereotip utrdi na družbeni in politični ravni s tem, ko se izpostavi določene domnevne značilnosti, npr. narodnost, rasa, brezposelnost in potreba po socialni pomoči in podobno. Na podlagi predsodkov se tem značilnostim pripiše ustrezna kategorija normativnih sodb, npr. nevarnost, deviantnost, sovražnost ipd. Ti stereotipi nato služijo kot instrument prepoznavanja določenih tipov ljudi, ki so lahko nevarni. Sum se tako poveže s kazenskim pravom in se začne v njem tudi odražati, posredno ali neposredno. Posledično so sankcionirani vsi tisti, ki ustrezajo stereotipom (Guild 2010, 10).

Tako kategoriziranje in izključevanje je prisotno že od nekdaj in je bilo vedno povezano z ekonomskim razredom, revščino, pa tudi raso, saj je slednja najbolj očitni element drugačnosti. Zakone proti klatežem, potepuhom in brezdomcem so poznali že v Angliji za časa Tudorjev (Weber in Bowling 2008), pa tudi v Habsburški monarhiji (Becker 2010). Fekete (2001) izpostavlja, da danes ne gre več za rasizem, ki se odraža znotraj meja

nacionalnih držav, temveč za globalizirani rasizem, ki je prisoten že v nadnacionalnih strukturah. Sivanandan (2002) to imenuje »kseno-rasizem«, saj je osnovan na strahu pred tujim (kseno), a obenem deluje proti njim (rasizem). Izključuje na podlagi rase in ekonomskega razreda, pri čemer je dodan neoliberalni element – tisti, ki so izključeni, so dodatno označeni kot ekonomsko in produkcijsko manjvredni.

Diskurz o migracijah uporablja »kolektivne kategorije, ki nimajo nikakršne opisne skladnosti ali točnosti«, vsebujejo pa močne konotacije in asociacije, kot npr. »cigani«, »muslimani«, pa tudi »ilegalni migranti« (Parkin 2013, 4). Kategorija »ilegalnih migrantov« neposredno vzpostavlja povezavo med kriminaliteto in pomanjkanjem dokumentov, pri čemer ilegalnost vpisuje v njihovo celotno bit. Namesto izraza »ilegalni« bi moral biti v uporabi izraz »neregularni migranti«. Kot opozarja Koser (2007, 55), je koncept neregularnih migracij izjemno kompleksen in raznolik, saj migranti lahko postanejo neregularni na številne načine: prečkanje meje z neveljavnimi dokumenti, bivanje na ozemlju države po izteku vize ali delovnega dovoljenja, sodelovanje s tihotapci, zlorabe azilnega sistema ipd.

Na podlagi omenjenih kolektivnih kategorij in stereotipov, ki se uveljavijo v javnem diskurzu, se ustvarjajo tudi politike in prakse državnih in pravnih organov. Politiki in vlade označujejo migracije kot varnostni problem, kar pogosto nosi simbolni pomen. Kot razlagata Van der Berg in Hutten (2018), je t. i. sekuritizacija proces označevanja določenih problemov kot varnostnih problemov in tveganj, pri čemer gre za povsem arbitraren proces, ki je posledica političnih odločitev in razumevanja pojma varnosti na splošno. Tako Palidda (2008a) in Provera (2015) kot tudi Kralj (2008) poudarjajo, da je cilj politik zadnjega stoletja oblikovanje združene, obvladljive in normalne družbe s pol-odprtimi mejami. Skozi te lahko prehajajo kapital, delovna sila, komunikacije in določene kulturne prakse, ostajajo pa zaprte za vse ostalo, vključno z nezaželenimi tujci.

Močno vlogo pri tem igrajo varnostni strokovnjaki, ki prek uporabe raznih varnostnih mehanizmov, sistemov, podatkovnih baz in druge opreme še dodatno poudarjajo varnostno grožnjo v dani situaciji (Parkin 2013, 6). Varnostne grožnje se ne odpravljajo le, ko do njih pride, temveč se vpeljuje preventivne prakse, ne le na ozemlju EU, temveč vse bolj tudi neposredno v državah izvora. Organi kazenskega pregona držav članic izvajajo aktivnosti in krepijo zmogljivosti v državah izvora in tretjih državah, ki mejijo na EU. EU je sklenila bilateralne sporazume z državami, kot je Libija, z namenom okrepitve mejnega nadzora in omejitve ter zaustavitve migracij iz Severne Afrike. Med avgustom 2016 in avgustom 2017 je EU namenila 17 milijonov evrov za program krepitve mejnega nadzora v Libiji (European Union External Action 2016). Pri sklepanju sporazumov in izvajanju programov se ne upoštevajo notranji politični spori, diskriminatorne prakse, kršitve človekovih pravic ali

podatki o tem, da se npr. migrante, ki so zaprti v migracijskih centrih v Libiji, muči, spolno zlorablja in celo prodaja kot sužnje.⁷

Vse prakse povečanega nadzora se utemeljujejo z argumentom preprečevanja čezmejnega kriminala – terorizma, tihotapljenja in prekupčevanja z ljudmi in orožjem. Kljub temu podatki kažejo, da se schengenski nadzorni sistemi ukvarjajo predvsem z neregularnimi migracijami. Weber in Bowling (2008) opozarjata, da je nadzor nad migracijami problematičen, saj ustvarja delitev na tiste, ki se lahko prosto gibljejo, in tiste, ki morajo biti pod nenehnim nadzorom, kar pa dodatno utrjuje proces ekonomske marginalizacije in socialne izključenosti. Poleg tega raziskave kažejo, da poostren mejni nadzor ne zmanjšuje števila neregularnih migrantov, saj je večina v neregularnem položaju zaradi izteka vize in ne zaradi neregularnega vstopa v državo. Poostren mejni nadzor pa po drugi strani sili migrante v bolj nevarne oblike potovanja ali bivanje po izteku vize, saj lahko le na ta način ostanejo na ozemlju določene države (Parkin 2013, 6).

Tudi ko migrantom uspe ostati na ozemlju EU, so večinoma ujeti v mrežo nadzorovalnih sistemov prek delovnega mesta, dokumentov, zdravstva, šolstva in podobno. Tako so potisnjeni v situacijo brez možnosti in pravic, kar pogosto privede do prostovoljne deportacije. S tem je dosežen končni cilj migracijske politike EU – izgon (Parkin 2013). Tako pridemo do tretjega elementa kriminalizacije migracij, pridržanja in izгона. Pri tem elementu je prekrivanje kazenskega in upravnega prava najbolj vidno.

Kot poudarja Parkin (2013), večina držav članic opredeljuje pridržanje migrantov kot upravni postopek, kar pomeni, da uradno ta oblika pridržanja ni definirana kot sankcija in obsodba ni potrebna. Kljub temu pa meja med upravnim in kazenskim pridržanjem v praksi ni vidna v večini držav. Razlog za to je dejstvo, da se tako kazenski kot upravni postopki za pridržanje in izgon prekrivajo, pri čemer so običajno tudi mesta pridržanja ista tako za kriminalce kot za migrante (Parkin 2013, 12). Direktiva 2008/115/ES Evropskega parlamenta in Sveta o skupnih standardih in postopkih v državah članicah za vračanje nezakonito prebivajočih državljanov tretjih držav (Directive 2008/115/EC) sicer narekuje, da se mora pridržanje migrantov odvijati v posebnih, za to namenjenih objektih, a Provera (2015) opozarja, da v primeru, da ne morejo zagotoviti posebnih objektov, države članice lahko pridržijo migrante v zaporih. V izjemnih okoliščinah ni potrebno, da so migranti ločeni od drugih pridržanih oseb, ki so tam zaradi zagrešenih zločinov. Poleg tega so za objekte za pridržanje tako migrantov kot zločincev pristojni isti organi, pri čemer se še dodatno utrjuje povezava med migranti in kriminaliteto (Provera 2015, 11). Ob vsem tem je izjemno pomembno zavedanje, da je »po smrtni kazni odvzem prostosti najhujša sankcija, ki jo država lahko naloži posameznikom« (Parkin 2013, 16).

⁷ Amnesty International poroča in poziva k ukrepanju v Libiji, kjer so migranti zaradi oboroženih spopadov v Tripoliju ujeti v ti. namestitvenih centrih (Amnesty International 2019). Al Jazeera poroča o trgu s sužnji, na katerem se afriške migrante prodaja za 400\$ (Smith 2017).

Četrty element, ki ga Provera (2015) prepoznava kot del kriminalizacije migracij, je kriminalizacija solidarnosti. Provera (2015) kot solidarne opredeljuje tiste posameznike ali subjekte, vladne ali nevladne, ki delujejo v solidarnosti z migranti, pri čemer gre lahko za zagotavljanje ali omogočanje dostopa do zdravstva, šolstva, nastanitve, prevoza, hrane, oblek ali podobnih potrebščin. V nekaterih državah so uslužbenci v šolstvu ali zdravstvu dolžni sporočiti pristojnim organom, če vedo za migranta v neregularni situaciji, pri čemer so izpostavljeni tako migranti kot tisti, ki z njimi delajo (Webber 2017, 9).

Kriminalizacija solidarnosti je mogoča zaradi nejasnosti med koncepti tihotapljenja ljudi, trgovanja z ljudmi in humanitarne pomoči, ki je prisotna že v evropskem pravnem okvirju (Webber 2017, 7). Ta državam članicam pušča odprto možnost kriminaliziranja humanitarne pomoči, saj Direktiva o opredelitvi pomoči pri nedovoljenem vstopu, tranzitu in prebivanju (Directive 2002/90/EC) navaja izpustitev humanitarne pomoči pri sankcioniranju kot možnost, ne pa kot dolžnost. Prav tako ne opredeljuje humanitarne pomoči, pri čemer ohranja določeno stopnjo pravne dvoumnosti in negotovosti (Webber 2017, 8).

Szuleka (2018) navaja določena dejanja oziroma politike, ki vplivajo na delo nevladnih organizacij in njihovega prostora delovanja: upravne omejitve, stigmatizacija, omejevanje prostora za dialog, fizično nadlegovanje in ustrahovanje ter kriminalizacija različnih načinov delovanja. Nove raziskave prepoznajo tudi uvajanje dodatnih predpisov, ki otežujejo delo nevladnih organizacij, kot je obveznost poročanja v povečanem obsegu ali dodatne davčne obveznosti (Szuleka 2018, 9). Omejitve lahko zavzamejo tudi bolj sistemsko obliko, kot je vpeljevanje zakonodaje, ki vpliva na financiranje nevladnih organizacij (Szuleka 2018, 15).

Vsem omenjenim praksam smo bili priča na evropski ravni od začetka t. i. migracijske krize pa do danes. Kot poroča Fekete (2017b), so se nevladne organizacije najprej znašle pod medijskim napadom, pri čemer se jih poveže s tihotapci in preprodajalci. Demonizirajoči medijski diskurz se je nato prenesel v politiko; kot je rekel tedanji avstrijski zunanji minister, Sebastian Kurz, »ustaviti moramo norost nevladnih organizacij« (Fekete 2017b, 22). Reševalne akcije v Sredozemlju so bile označene kot t. i. dejavniki potega (pull factor), ki spodbujajo migrante k sodelovanju s tihotapci, da bi dosegli EU (Webber 2017, 12). Sledile so zakonodajne spremembe, ki so onemogočile delovanje nevladnih organizacij, kot so razne preiskave ali birokratske zahteve, ki ovirajo delovanje, pa tudi kazenske sankcije (Fekete 2017b).

Kriminalizacija solidarnosti poteka kljub dejstvu, da nevladne organizacije že od začetka t. i. migracijske krize delujejo na mestih, ki jih vladne organizacije niso zmožne ali jih ne želijo pokriti. Nevladne organizacije kot del civilne družbe rešujejo življenja, spremljajo in nadzorujejo izvajanje človekovih pravic, obravnavanje migrantov in življenjske pogoje migrantov ter ohranjajo vladavino prava in zahtevajo demokratično odgovornost (Vosyliūtė and Conte 2019, 4). S kriminalizacijo solidarnosti se krepi proces t. i. krčenja prostora civilne

družbe. Nevladne organizacije so namreč ključni del demokracije in vladavine prava, saj spremljajo in nadzorujejo državo, zbirajo podatke in dokaze ter skupaj z neodvisnimi mediji in sodstvom nalagajo odgovornost državnim organom (Szuleka 2018, 7–8).

Kriminalizacija solidarnosti je sicer eden izmed elementov, ki definirajo kriminalizacijo migracij, a je vseeno lahko obravnavana posebej kot samostojen trend. V sklopu raziskave, ki smo jo izvedli, je kriminalizacijo solidarnosti posebej obravnavala dr. Vlasta Jalušič (2018). Rezultati njene raziskave so predstavljeni v samostojnem članku in povzeti v pričujoči nalogi (poglavje 2.3). V empiričnem delu te naloge smo predstavili rezultate raziskave, ki se osredotočajo na preostale tri elemente kriminalizacije migracij – diskurz, represijo državnih organov in pridržanje.

Raziskavo smo izvedli na Mirovnem inštitutu v Ljubljani v sklopu projekta »Krimigracije med človekovimi pravicami in nadzorom«. Dr. Vlasta Jalušič in Arijana Radić sta izvedli devet intervjujev s člani, zaposlenimi ali prostovoljci pri nevladnih organizacijah ali drugače organiziranih skupinah, ki nudijo različne oblike pomoči migrantom. Pet korespondentov je bilo iz Slovenije, dva iz Madžarske, en iz Hrvaške in en iz Italije. Intervjuji so bili izvedeni med novembrom 2017 in majem 2018. Sestavljeni so bili iz petih sklopov vprašanj. Prvi sklop se nanaša na predstavitev organizacije, delo, ki ga opravljajo, vire financiranja in število ter strukturo migrantov, s katerimi so se srečali (spol in starost). Drugi sklop vprašanj se nanaša na njihovo oceno migracijskih politik in sprememb, ki so po njihovem mnenju potrebne. Tretji sklop vprašanj se nanaša na prakse kriminalizacije migracij ali podobne prakse, ki jih korespondenti vidijo kot problematične. Četrty sklop vprašanj se nanaša na odnos organizacij z oblastmi in državnimi organi na splošno. Peti sklop vprašanj se nanaša na kriminalizacijo njihovih aktivnosti, diskreditacijo, oviranje ali javno kritiziranje njihovega dela.

V tej nalogi smo predstavili analizo tretjega sklopa vprašanj. Pri tem smo poskušali odgovoriti na sledeča raziskovalna vprašanja:

- kakšnim oblikam kriminalizacije migracij so bili intervjuvanci priča pri svojem delu?,
- Ali se kriminalizacijske prakse razlikujejo med državami? Če da, kako?

Kot je predstavljeno v teoretičnem delu naloge, pri analizi rezultatov raziskave sledimo Proverovi (2015) kategorizaciji elementov kriminalizacije migracij: diskurz, represija državnih organov in pridržanje (kriminalizacija solidarnosti je obravnavana posebej).

Vsi korespondenti so bili priča vsem trem kategorijam kriminalizacije migracij. Diskurz tukaj igra precej veliko vlogo, saj ustvarja določeno demonizirano kategorijo ljudi in s tem stigmatizacijo migrantov ter tistih, ki se z njimi srečujejo pri svojem delu. Prek diskurza se odlikujejo določene razmere, ki narekujejo tudi oblikovanje politik, spremembe zakonodaje in splošno družbeno in politično ozračje v državi. Te spremembe se v družbi odražajo in zahtevajo na podlagi informacij, ki so ji posredovane prek medijev. Vidne so tako v

zdravstvu, upravnih postopkih, pa tudi na stanovanjskem trgu, ki je izjemno diskriminatoren do migrantov. Ko je govora o diskurzu, je pomembno opozoriti tudi na samo komunikacijo z migranti, ki se kaže kot problematična. Migranti namreč nimajo zadostnega dostopa do informacij, pri čemer igrajo veliko vlogo jezikovne ovire, ki niso ustrezno naslovljene. Poleg tega nimajo dostopa ali možnosti informiranja prek medijev v svojem jeziku, kar pomeni, da jim je povsem odvzet glas.

Konstrukcija določenih stereotipov vpliva tudi na politični kontekst, kar se odraža pri oblikovanju politik in na dejanjih državnih uslužbencev in organov pregona. Vsi korespondenti poročajo o policijskem nasilju, ponižujočem in nehumanem obravnavanju ter diskriminatornih praksah. Kot najbolj problematično se kaže nasilje na mejah, saj slednje predstavljajo vstopne točke na državna ozemlja in s tem točke, na katerih je migrante najlažje nadzirati in tudi zavračati. V porastu so predvsem nasilni izgoni (push-back), pri katerih je prisotno nasilje in kršitve človekovih pravic. V primeru, ko so represivna dejanja s strani organov pregona prijavljena, se postopki namenoma zavlačujejo. Enako velja za postopke o odločanju glede statusa mednarodne zaščite, pri čemer je cilj, da se odvrne čim večje število migrantov. Vsi intervjuvanci poročajo o počasnih, pristranskih in diskriminatornih postopkih. Pogosto se prošnje ne obravnavajo posamično, kot bi se po zakonu morale. Velikokrat so prisotna tudi zahtevna in zapletena vprašanja, pri katerih zlahka pride do napačnih odgovorov in posledično izгона. Tudi če migrantom uspe ostati v določeni državi, so soočeni z negotovim življenjskim položajem, brez stabilnega integracijskega sistema, pogosto se morajo tudi večkrat seliti, kar še dodatno otežuje grajenje novega življenja. Ujeti so v slabih življenjskih pogojih, kjer pogosto primanjkuje zasebnosti, prisotno pa je fizično in spolno nasilje ter poglobljanje frustracij in brezupa.

Pripor in izgon sta najbolj očitni značilnosti kriminalizacije migracij. Korespondenti iz vseh sodelujočih držav poročajo o pridržanjih v obmejnih tranzitnih conah, ki jih pogosto spremljajo nehumane okoliščine. Ljudje so bili zadržani zunaj v vseh možnih vremenskih pogojih, brez strehe nad glavo, medicinske ali druge pomoči, medtem ko je bil humanitarnim delavcem dostop do njih onemogočen. Na Madžarskem so bili migranti v tranzitnih conah priprti tudi do 10 mesecev, dokler niso bile njihove prošnje za mednarodno zaščito dokončno obdelane. Veliko poročil vsebuje podatke o tem, da so v centrih za pridržanje prisotni tudi otroci in družine, kar je v nasprotju z Evropsko konvencijo o človekovih pravicah. V času, ko so migranti pridržani, jim je odvzeta tudi pravica do dela, kar predstavlja dodatno oviro pri urejanju življenja, saj so tako potisnjeni v ekonomsko odvisnost. Cilj restriktivnih politik in obravnave je ustvarjanje pogojev, v katerih so migranti potisnjeni v t. i. prostovoljno vrnitev. S tem je dosežen glavni cilj migracijske politike, odstranitev z ozemlja EU.

Korespondenti iz vseh petih držav, vključenih v raziskavo, poročajo o podobnih praksah kriminalizacije migracij. Kljub temu opazamo določene razlike med državami, predvsem kar se tiče politik in zakonodaje. V splošnem vse države sledijo direktivam EU, vendar se

konkretne nacionalne zakonodaje do določene mere razlikujejo. Madžarska je zavzela najbolj ostro stališče glede migracij. Prva izmed vključenih držav je pričela z gradnjo ograj na svojih mejah in se v javnosti odzvala z jasnim odklonilnim stališčem do migracij. Je ena izmed največjih nasprotnic premestitvene sheme in kvotnega sistema. Ker meji na Hrvaško, ki je sicer članica EU, ni pa še v Schengenskem območju, in Srbijo, ki je tretja država, Madžarska predstavlja vstopno točko v EU in Schengensko območje. Eden izmed intervjuvancev meni, da je to razlog, zaradi katerega EU tolerira madžarsko migracijsko politiko, saj z obrambo meja Schengenskega območja praktično ščiti vse države članice.

Kljub temu, da je Madžarska najglasnejša nasprotnica migrantov, to ne pomeni, da so prakse v ostalih državah drugačne. Ograje so se kmalu začele graditi na mejah vseh petih držav in vsi korespondenti poročajo o nasilnih izgonih na državnih mejah. Avstrija migrante potiska nazaj v Slovenijo, Slovenija na Hrvaško, Hrvaška v Srbijo oziroma Bosno in Hercegovino, Italija pa tako v Slovenijo kot tudi nazaj v Sredozemsko morje, pri čemer so čolni in ladje z begunci primorane poiskati zatočišče v drugi državi, ali pa se vrniti v Libijo, od koder običajno izplujejo.

Pričujoče delo tako ponuja uvid v prakse kriminalizacije migracij v Sloveniji in njenih sosednjih državah in tako zapolnjuje vrzel v raziskavah na danem geografskem področju. Rezultati kažejo, da se trend kriminalizacije migracij v vseh državah razvija in napreduje enakovredno, ne glede na njihovo lego, status članstva ali javnega stališča o migracijah. Pričujoči rezultati razkrivajo razsežnosti problematike kriminalizacije migracij in omogočajo vpogled v vse vidike, ki jih moramo nasloviti, če želimo problematiko ustrezno nasloviti in doseči pozitivne spremembe v prihodnosti.