ReSOMA

RESEARCH SOCIAL PLATFORM ON MIGRATION AND ASYLUM

ASK THE EXPERT POLICY BRIEF

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MIGRATION

Strategic litigation against crackdown on NGOs: how to stop and prevent criminalisation of solidarity with refugees and other migrants?

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The **Ask the Expert Policy Briefs** are **highly informative tools** proposed in the framework of the ReSOMA project. They tap into the **most recent academic research** on the 9 topics covered by ReSOMA and map it out in a way that is **accessible to a non-academic audience**. By doing so, the briefs introduce the **policy-relevant research** conducted by researchers with different approaches and perspectives on the same topic.

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Ask the Expert Policy Brief

Strategic litigation against crackdown on NGOs: how to stop and prevent criminalisation of solidarity with refugees and other migrants?

By Magdalena Lesińska

Previous Discussion Brief and Policy Options Brief, the ReSOMA Final Synthetic Report on the crackdown on NGOs and volunteers helping refugees and other migrants highlights that EU's Facilitators Package law makes it optional for EU Member States to criminalise the facilitation of irregular entry when it is conducted on humanitarian grounds. This was identified as one of the key reasons of legal uncertainty that has enabled criminalization of humanitarian actors.

The fact is that in a half of the EU member states facilitation of entry is defined as a criminal offence which is punishable by either a prison sentence or a fine, even when assisting person does not obtain any financial benefit (Carrera et al. 2018, p.6). The increasing number of individuals providing humanitarian assistance to refugees and other migrants have faced prosecutions on the grounds of facilitation or other grounds, such as money laundering or membership of a criminal organization (in years 2015-2019 at least 158 of individuals have been investigated or formally prosecuted, see the ReSOMA Final Synthetic Report, p.25). Such misguided prosecutions in European countries have in turn led to appeals in defence cases rise before national courts (the ReSOMA Final Synthetic Report). So far only Salam Aldeen with support of GLAN has started strategic litigation before European Court of Human Rights.

The following brief highlights the opinions expressed by four experts who specialized in the fields of human rights, immigration and asylum: Frances Webber, vice-chair of the Institute of Race Relations; Dr Ioannis Kalpouzos, lecturer at City Law School, University of London and co-founder of the Global Legal Action Network (GLAN); Noemi Magugliani, Doctoral Fellow at the Irish Centre for Human Rights at the National University of Ireland, a legal researcher and coordinator of team working on Migration and Border Violence in GLAN; Dr Valentina Azarova, an international law practitioner and a visiting academic in the University of Manchester Law School.

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Currently, there is a high risk of criminalization of civil society organizations working with refugees, asylum seekers and irregular migrants inside the EU Member States and at the EU external borders. What are the most important legal arguments used by stakeholders to avoid criminalisation of solidarity?

Interviewed experts pointed out two main lines of arguments used by various stakeholders (lawyers, NGOs) to avoid criminalization of solidarity:

(1) Obligation to provide humanitarian assistance at sea (duty of rescue at sea)

The provision of assistance to save life at sea is in pursuance of obligations under international law for ships' masters to rescue any persons in distress at sea, including asylum-seekers, and to render them all necessary assistance. This has solid legal bases in both human rights law and law of the sea (e.g. *UN Convention of the Law of the Sea* and *International Convention for the Safety of Life at Sea*). The legal arguments based on the duty of rescue at sea are the first line of defence against a strategy to criminalise humanitarian work of individuals and organizations operating at the sea, including SAR operations conducted by NGOs.

(2) Obligation to provide humanitarian assistance on the territory (to uphold human dignity within the country, by providing food, water, shelter etc.).

It is generally accepted that provision of humanitarian assistance to keep someone alive (by providing food, shelter or clean water) does not amount to assisting illegal stay. Moreover, the state authorities should respect their own obligation to uphold human dignity for everyone including irregular migrants. The Facilitation Directive requires member states to adopt sanctions against any person who '*for financial gain, intentionally*' assists illegal stay and residence (Carrera et al. 2018). The evidence gathered in ReSOMA project shows that majority of the monitored cases was based on the facilitation of entry or transit of migrants (the ReSOMA Final Synthetic Report, p. 24). Francis Webber highlighted that although EU member states are not prohibited from criminalising those assisting illegal stay for no gain, it can be argued that EU law needs to be amended and applied in a manner consistent with the fundamental rights and other founding EU values and legal principles. Valentina Azarova underlined that the absence of a humanitarian exception in the Facilitation Directive is a serious concern that needs to be urgently addressed by policy makers and legislators.

Webber also pointed out that the rule that provision of humanitarian assistance can never be a crime was recognized by national courts. She gave example of the appeal brought by Cedric Herrou, a French farmer who assisted refugees and other migrants to reside on his farm, and was accused of being a migrant smuggler. A French Constitutional Court took decision (Decision N° 2018-717/718 QPC, *Cédric H et autre*) accepting the principle of 'fraternity' as a constitutional principle preventing the criminalization of those providing humanitarian assistance to undocumented migrants and asylum seekers on the territory. This is linked to the issue of protecting the legal rights specifically associated with migration, for ex-

ample to the right to make a claim for asylum. However, this judgement was not applicable to the situations of entry and transit (ReSOMA Policy Options Brief). Frances Webber also mentioned that an attempt by the mayor of Calais to ban distribution of food to migrants was overturned by the Lille Administrative Court in March 2017 on the ground that the ban violated human rights guarantees and would have amounted to inhuman and degrading treatment contrary to Article 3 ECHR.

On which grounds prosecutors have accused NGOs (volunteers) and how lawyers are defending them? What could be learnt from defence cases at national level to address the ongoing criminalization of solidarity?

Experts mentioned several kinds of charges and accusations directed to volunteers and NGOs providing humanitarian assistance: assisting illegal entry, transit or stay, membership of a criminal organization, infringement of state secrets, forgery, false registration of a rescue boat, illegal management of waste, endangering airport security by stopping deportation flights, money laundering, human trafficking (also explained in the ReSOMA Final Synthetic Report). On the other hand, defense strategies are often drafted around the argument of positive obligation to protect life (in case of defense to charges arising from rescue at sea or first response - assisting illegal entry or transit), the duty of rescue in international maritime law, and humanitarian exemption clauses written in national laws. The later have been criticised for their partial and limited nature extending only to the questions of life and death (Discussion Brief).

Ioannis Kalpouzos emphasized that legislation as well as the surrounding official rhetoric, attempt sometimes to equate humanitarian assistance and search and rescue actions with migrant smuggling. This leads, in his opinion, to highlight an economic, self-interested aspect of humanitarian assistance and to delegitimize the rescuers by equating them with migrant smugglers.

Noemi Magugliani added, that in certain cases humanitarian actors have been threatened with the possibility of an investigation into human trafficking charges (e.g. Sea Watch 3 vessel case). In most cases, however, there is no evidence of the alleged collusion of humanitarian actors with traffickers, and the prosecution simply constitutes a form of judicial harassment, as well as deterrent for other NGOs to undertake pro-active SAR operations. ProActiva Open Arms, Sea Watch and Iuventa, among others, had been investigated by public prosecutors in Trapani, Catania and Palermo – in all cases, the investigations were shelved as no *actus reus* (guilty act) nor *mens rea* (guilty mind) of the alleged crimes were determined.

As far as assistance within a country is concerned, the Public Prosecutor's Office in Palermo has emphasized that, according to the Italian Criminal Code (art. 54), "the exercise of a right or the fulfillment of a duty imposed by a legal rule or a legitimate order of the public authority excludes the punishment of the act" and that, according to Article 12(2) of the Consolidated Immigration Act, "without prejudice to the provisions of Article 54 of

the Criminal Code, humanitarian assistance services provided in Italy to foreigners who are present in the territory of the State and in conditions of need, do not constitute a crime."

In the past, lawyers have often argued, and Courts have at times accepted, that measures criminalising solidarity were depriving "a very precarious population of vital food assistance" in a way that was "neither adapted nor necessary, nor proportionate" to the aim, representing a manifestly unlawful interference with the freedom to come and go, freedom of assembly and, by preventing migrants from satisfying basic needs, the right not to be subjected to inhuman or degrading treatment enshrined in Article 3 of the European Convention on Human Rights (The Administrative Court of Lille 2017).

What are the major issues on this topic that need further research to contribute to the policy field?

- An analysis of the phenomenon of criminalisation of humanitarian assistance in its historical perspective is also recommended.
- The particularities of the submitting cases need to be further studied. The comprehensive and detailed review analysing charges that have been brought against civil society for their humanitarian activities in different countries, their evidential basis for them and the defense arguments used at the national level would be valuable.
- Better understating the extent to which such practice as criminalisation of solidarity is a violation of the state's obligations towards refugees and other migrants as well as towards civil society is suggested. And how civil society could put forward strategic litigation before European and international foras.

To sum up, the experts agree that the role of the national courts increased profoundly in the process of protecting the migrants' rights. A number of NGOs that have faced prosecutions for providing humanitarian assistance to refugees, asylum seekers and other migrants have submitted appeals at national level. They have used human rights and international maritime law arguments in their defence.

However, the proactive strategic litigation before national and, especially, European and international courts is just starting and needs to be further explored in terms of framing claims and selecting the legal avenues (the ReSOMA Final Synthetic Report).

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ReSOMA - Research Social Platform on Migration and Asylum is a project funded under the Horizon 2020 Programme that aims at creating a platform for regular collaboration and exchange between Europe's well-developed networks of migration researchers, stakeholders and practitioners to foster evidence-based policymaking. Being a Coordination and Support Action (CSA), ReSOMA is meant to communicate directly with policy makers by providing ready-to-use evidence on policy, policy perceptions and policy options on migration, asylum and integration gathered among researchers, stakeholders and practitioners.

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