



DISCUSSION
BRIEF

July **2019**

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MIGRATION

**Strategic litigation: the role of EU and international
law in criminalising humanitarianism**





This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement **770730**



The **ReSOMA Discussion Policy Briefs** aim to address key topics of the European migration and integration debate in a timely manner. They bring together the expertise of stakeholder organisations and academic research institutes to identify policy trends, along with unmet needs that merit higher priority. Representing the second phase of the annual ReSOMA dialogue cycle, nine Discussion Briefs were produced covering the following topics:

- Secondary movements within the EU
- Implementation of the Global Compacts on Refugees (GCR)
- SAR and Dublin: Ad hoc responses to refusals to disembarkation
- Funding a long-term comprehensive approach to integration at the local level
- Public opinion on migrants: the effect of information and disinformation about EU policies
- Integration outcomes of recent sponsorship and humanitarian visa arrivals
- Strategic litigation of criminalisation cases
- Implementation of the Global Compacts on Migration (GCM)
- The increasing use of detention of asylum seekers and irregular migrants in the EU

Under these nine topics, ReSOMA Discussion Briefs capture the main issues and controversies in the debate as well as the potential impacts of the policies adopted. They have been written under the supervision of Sergio Carrera (CEPS/EUI) and Thomas Huddleston (MPG). Based on the Discussion Briefs, other ReSOMA briefs will highlight the most effective policy responses (phase 2), challenge perceived policy dilemmas and offer alternatives (phase 3).

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LINGUISTIC VERSION

Original: EN

Manuscript completed in July 2019

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Discussion Policy Brief

Strategic litigation: the role of EU and international law in criminalising humanitarianism

By Carmine Conte ([Migration Policy Group](#)) & Seán Binder¹

1. INTRODUCTION

The initial qualitative and quantitative overview carried out under the ReSOMA project demonstrates that since the emergence of the “refugee crisis”, there has been an escalation of judicial prosecutions and investigations against individuals on grounds related to the Facilitation Directive in the Member States, especially in France, Italy and Greece (Vosyliūtė & Conte 2018; Vosyliūtė & Conte 2019). The vast majority of investigations and formal prosecutions relate to the facilitation of entry or transit of migrants in the Member States, while a few cases are related to the facilitation of stay or residence and other grounds (Vosyliūtė & Conte 2019).

The ReSOMA synthetic report shows that the rate of cases has continued to increase despite the nearly 90% decrease of irregular arrivals in the EU in 2018 (Vosyliūtė & Conte 2019). The targets of this criminalisation are mostly volunteers, human rights defenders, crew members of boats involved in search and rescue (SAR) operations,

but also ordinary citizens, family members, journalists, mayors and religious leaders. The citizens or volunteers involved in these cases primarily acted on humanitarian grounds or without the intent to gain a financial profit.

As broadly discussed in previous academic and ReSOMA research, EU law recognises that Member States have considerable scope to decide what constitutes the base crime of migrant smuggling (Carrera & al., 2018, Vosyliūtė & Conte, 2018). The gaps within the EU legal framework seem to contribute to the increasing criminalisation of NGOs and volunteer helping migrants (Carrera & al., 2018, Vosyliūtė & Conte, 2018).

Several investigations and prosecutions are still ongoing as of August 2019. A brief overview of the most important cases at the national, EU and international level are provided below in order to identify key issues and controversies

¹ This paper has been written thanks to contribution of lawyers of NGOs and volunteers criminalised in Belgium, Italy and Greece: Alexis Deswaef (lawyer of Anouk Van Gestel, Belgian journalist prosecuted for hosting migrants), Zacharias Kesses and Haris Petsikos (lawyers of two volunteers criminalised in Greece, Sean Binder and Sarah Mardini), Nicola Canestrini and Alessandro Gamberini (lawyers of IUVENTA's crew member).



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of ongoing strategic litigation on criminalisation of humanitarianism.



2. KEY ISSUES AND CONTROVERSIES

2.1 Case law in Italy: IUVENTA

Another important case regarding the criminalisation of humanitarianism involves **ten volunteer** crew members of the rescue ship IUVENTA. The IUVENTA and its crew (in total more than 150 individuals) engaged in SAR operations in international waters off the Libyan coast between July 2016 and August 2017. The IUVENTA crew rescued more than 14.000 migrants in distress at sea, in fulfilment of international obligations under international maritime and customary law. The rescue ship IUVENTA was operated by the non-government organisation (NGO) Jugend Rettet e.V. (Berlin/Germany).

The IUVENTA was sailing under the Dutch flag and rescue operations were authorised and coordinated exclusively by the competent Maritime Rescue Coordination Centre (MRCC) in Rome. In August 2017, the rescue ship IUVENTA was searched for weapons and seized in the port of Lampedusa, Italy. The relevant warrant and confiscation order were signed by the prosecutor in Trapani on grounds of **possession of firearms, collusion with organised crime and aiding and abetting illegal immigration**. These accusations are related to three different events that took place on the 10 September 2016 and on 18 June 2017 (Gostoli 2018). The Iuventa crew members, who were conducting SAR operations in the Mediterranean, were accused of arranging the direct handover of migrants by

smugglers, and returning to the smugglers the empty migrant boats for reuse. These accusations were rebutted by the Forensic Oceanography report that aimed to re-create the events from the aerial and other surveillance devices and signals (Heller and Pezzani 2018).

Jugend Rettet e.V. has submitted two appeals against the seizure of the vessel. However, the IUVENTA remains confiscated in the port of Trapani since 2017. In June 2018, an official notification of an investigation against a total of 22 individuals of three different NGOs (Jugend Rettet e.V., Doctors Without Borders and Save the Children) was issued by the prosecutor of Trapani. Among them, ten crew members of the ship IUVENTA have been accused of 'aiding and abetting illegal immigration'. If convicted, they risk a sentence of up to 20 years in jail (with a minimum of five years) and a fine of € 15,000 for each irregular migrant brought to Italy (Art. 12 of the Consolidated Immigration Act).



2.1.1 Legal defence: the duty to assist individuals in distress at sea

The lawyers defending the IUVENTA's volunteers put forward international law and national law provisions.

First of all, the **Italian Code of Navigation** (Codice Italiano della Navigazione) imposes on the captain of a ship the duty to provide assistance in cases of people in distress at sea. According to Art. 1158 of this Code, "the captain of a ship, a float or a national or foreign aircraft, who fails to provide assistance or attempt to rescue in cases where he is obliged to do so under this code, shall be punished with imprisonment for up to two years". The lawyers point out that even if the conditions of the sea were not particularly problematic, migrants were on a precariously overcrowded boat which put their lives at high risk. Moreover, the duty to render assistance is embodied in the **United Nations Convention on the Law of the Sea**. According to Article 98: "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him".

The reference to international law is very significant in the Italian legal framework because it represents a limit to the legislative power exercised by

the State, as envisaged by Article 18 of the Italian Constitution. The State cannot derogate from international law provisions by means of discretionary decisions of the political and judicial authority. The Montego Bay Convention (UNCLOS) is not the only international instrument to provide such a duty of assistance at sea. Other fundamental international conventions such as the **London International Convention on Salvage (1989)**, the **International Convention for the Safety of Life at Sea (SOLAS, 1974)** and the **International Convention on Maritime Search and Rescue (SAR convention, 1985)** also impose obligations to render assistance to individuals at sea. Therefore, international law sets out a clear duty to provide humanitarian assistance at sea, in any maritime space, regardless of the legal status of the person. Humanitarian assistance should be provided without discrimination to any human being. Article 2.1.10 of the SAR Convention specifies that "parties shall ensure that assistance be provided to **any person** in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found". "An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety" (Chapter 1.3.2 of SAR Convention).

Also, the **Guidelines on the treatment of people rescued at sea** (IMO, 2004) contain the following provisions: "the government responsible for the SAR region in which they have been recovered survivors are responsible for providing a safe place or to ensure that this place



is provided (para. 2.5). A safe place is a place where rescue operations can be concluded, and where: "the safety of the survivors or their life is no longer threatened"; primary human needs (such as food, housing and medical care) can be met; the transportation of survivors in the near or final destination can be organised (para. 6.12). Although a ship that provides assistance may temporarily constitute a safe place, it should be relieved of this responsibility as soon as alternative solutions can be undertaken (para. 6.13). The landing of asylum seekers and refugees recovered at sea, in territories in which their life and freedom would be threatened, should be avoided" (para. 6.17).

2.1.2 Exemptions to the crime of human smuggling

According to the lawyers, the IUVENTA case is the first case where an NGO has been accused of abetting illegal migration, disregarding "**state of necessity**" (Art. 53 Criminal Code). 'State of necessity' was previously used to exempt organisations that are providing humanitarian assistance at sea. In addition, Italian law provides two exemptions from the crime of facilitating the entry of migrants based on **humanitarian assistance** and **rescue operations** (Art. 12 T.U. 286/98) (Trevisan and Moeller, 2019). They have a wider scope than the "state of necessity" clause, because they do not require for the individual to be in 'a serious danger', but in 'a state of need in order to be rescued'. However, the humanitarian exemptions have a geographical

limitation and apply only if the activities take place in Italian territory.

The concept of humanitarian assistance is not defined by Italian law or jurisprudence and it is broadly encompassing. It should include all those activities carried out without intent to gain profit that aim to help other individuals pursue their rights, such as immediate safety and gaining international protection. The activities performed by the IUVENTA crew members to assist migrants in distress fall under the category of humanitarian assistance, as justified by domestic and international law. Italy also agreed on the European High-Level Consensus on Humanitarian Aid in 2008 which defines humanitarian assistance and the principles and safeguards for the Union humanitarian aid operations (Carrera et al 2018, Vossliūtė & Conte, 2018).

By contrast, the **Italian Court of Trapani precluded the applicability of the humanitarian exemption** in this case alleging that Iuventa's crew members collaborated and colluded with smugglers to collect migrants at Mediterranean 'rendezvous points' (Tribunale di Trapani, 2017). According to the Italian judge, photos taken by undercover officers show that Iuventa's crew members returned empty boats to smugglers and communicated with smugglers before and during rescue operations. These elements seem to corroborate the judicial hypothesis of an existing collusion between smugglers and the Iuventa's crew. According to the Court, the actions carried out by the crew members contributed to realise



the criminal intent of the smugglers aiming to facilitate the entry of irregular migrants to Italy (Tribunale di Trapani, 2017). The humanitarian exemption therefore was considered as not applicable in relation to this alleged conduct, which instead triggers the crime of aiding and abetting illegal immigration. The exemption can only apply in case of rescue operations of migrants that are in danger or in a state of need.

It is worth noting that according to the investigation by Forensic Architecture (FA) and Forensic Oceanography (FO), the *luventa* crew did not return empty boats to smugglers nor did they appear to communicate with anyone potentially connected with smuggling networks, as suggested by the Italian authorities. In contrast, it shows “the *luventa* crew’s professionalism and commitment to saving lives at sea” (Heller and Pezzani, 2018).

2.1.3 The problem of jurisdiction

Another argument used by the defence lawyers against the seizure of the *luventa* boat is the **lack of jurisdiction of Italy** in this case. As the ship “*luventa*” flew the flag of the Netherlands and all the main activities under investigation took place in international waters, the exclusive jurisdiction of the flag State (the Netherlands) and not of the coastal State (Italy) should apply according to Art. 92, paragraph 1 of the Montego Bay Convention (UNCLOS). The UNCLOS Convention points out that “ships shall sail under the flag of one State only and, save in exceptional

cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas”. However, the Italian court considered this defensive argument irrelevant and recalled Art. 6 of the Criminal Code, according to which the crime is considered committed in the territory of the State, when the action or omission took place in whole or in part in its territory, or when the final event that is consequence of the action or omission occurred within the Italian territory. The jurisdiction of the Italian judge is based directly on Art. 6 of the Criminal Code because the crime event (the entry of illegal immigrants) occurred in Italy.

The Italian court concludes that the illicit conduct of the Libyan smugglers is linked to the subsequent action of the rescuers (mediating actors) who led the migrants to the Italian territory. Therefore, the final part of the action occurred in Italy.

The applicability of **domestic jurisdiction to events occurring in high seas** seems to validate the assumption of an existing link between the illicit conduct of smugglers and the humanitarian actions carried out by NGOs. Researchers have found the tendency to relabel NGOs conducting SAR operations from allies of national border and coast guard authorities to a ‘pull factor’ very problematic (Carrera et al, 2018; Carrera et al., 2019).

In 2014, the Court of Cassation already recognised the Italian jurisdiction for human smuggling crimes taking place



in high sea, but it was clarified that the action of the rescuers (which in fact allows migrants to reach the Italian territory) is to be considered pursuant to Art. 54 of the Criminal Code paragraph 3, because they acted in compliance with the laws of the sea and in a "state of necessity", even if the situation was provoked by smugglers (Cassazione, 2014). The crime must therefore be completely attributable to the smugglers, as they operated in an extraterritorial context (Bernardi, 2018). By referring to Art. 54, the Cassation aimed to: 1) ensure the impunity of the rescuers obliged to act by internal and international norms in matter of rescue at sea and 2) extend the applicability of Italian criminal law to smugglers who try to take advantage of rescuers' intervention. As a result, solely the smugglers should be considered responsible for the illegal transportation of migrants in Italy and not the rescuers who acted under their separate mandate.

The Court of Cassation's reasoning has not been applied in the *Iuventa* case because the crew has been accused of carrying out (pre and post-rescue) activities that have no justification in a situation of danger for migrants, with the precise intention of allowing the greatest number of illegal immigrants to enter Italy (Bernardi, 2018). To debunk these accusations, it was crucial for the lawyers to demonstrate the lack of any previous agreement between the smugglers and the *Iuventa* crew members.

2.1.4 What could be learned?

- This case shows that actors providing humanitarian assistance to migrants are not fully exempted from the crime of facilitating the entry of migrants despite the existence of patchy notions of 'humanitarian clause'.
- The so-called humanitarian exemption has in practice a very narrow scope as it only applies to those humanitarian activities provided in the territory of Italy to third-country nationals in state of need (Vosyliute and Conte 2019). It does not directly apply to all actions carried out by volunteers and NGOs aimed at facilitating the entry, transit and stay of migrants for non-profit reasons.
- Also, the lack of a clear and exhaustive definition of humanitarian assistance may undermine the goal of creating a safe space for NGOs and volunteers who provide SAR operations and assist migrants in distress at borders.



2.2 Case law in Greece: Seán Binder and Sarah Mardini

One of the main cases proving the escalation of prosecutions against NGOs' volunteers is represented by the case of Seán Binder and Sarah Mardini, two young trained volunteers of Emergency Response Centre International's (ERCI), who were arrested by the police authorities in Lesvos, Greece on 9.2.2018. Seán and Sarah took part in SAR operations at sea helping asylum seekers within European waters (Binder, 2019). This ongoing prosecution is the largest case of criminalisation of solidarity in Europe, at its outset involving 37 persons of interest in the investigation, while 24 humanitarians are now being prosecuted, 5 of whom were already in pre-trial detention. They have been charged with several felonies including **espionage, assisting human-smuggling networks, membership of a criminal organisation, and money laundering** (Binder, 2019), if found guilty both face 25 years in prison.

The two volunteers are accused of joining the NGO ERCI, which is described as a 'criminal organisation', based on a perpetual action group of more than three persons, with internal and hierarchical structure, acting with the intent of facilitating movements of refugees flows from Turkey to the Northeast Aegean Islands (Lesvos and Samos) with illegal methods and procedures. As members of the NGO ERCI, they have also been charged with the felony of money laundering. According to the prosecutor, ERCI, despite its non-profit status, accepted donations of physical

objects and payments by private individuals or other collective bodies. Money laundering takes place by accepting donations of physical objects and deposits by private individuals or other collective bodies or by receiving other financial grants of unknown amounts, for the purpose of facilitating illegal entry. In addition, the prosecutor accused the volunteers of failure to disclose information regarding the departures of refugees to the relevant Greek authorities.

2.2.1 Legal defence

On the other side, Zacharias Kesses and Haris Petsikos, Sarah and Sean's lawyers, pointed out that an individual cannot be considered as belonging to a **criminal organisation** without committing another base crime. Therefore, it was urgent for the lawyers to prove that the two volunteers did not commit the base crime of illegal transportation of migrants. To rebut this accusation, the lawyers argue that while information shared between NGOs' networks periodically included real-time, assumed, positions of migrant boats, infrequently in Turkish territory, crucially, neither Sarah nor Seán received this information directly from, or had any contact with, any persons in Turkey or in transit, until they arrived on the southern coast of Lesvos. Moreover, the lawyers made multiple references to the general role of ERCI and how they actively cooperated with the relevant Greek authorities who were informed on a timely basis of new arrivals of migrants. They also emphasised the existence of the "Aegean Boat Report", an online



social-network page that recorded the movement of every refugee boat arriving at Lesbos from December 2017, clarifying that such information was public and accessible to everyone. ERCI attempted to be present at all strategic geographical points of the southern island in order to provide help and humanitarian assistance to refugees. As a result, in those circumstances where Sarah and Seán were found to be in direct contact with migrants, they were only assisting migrants in distress.

The lawyers noted that Greek legislation strongly protects members of NGOs. Paragraph 6 of Art. 30 of Law 4251/2014 states that "**...sanctions are not imposed in cases of rescue at sea**, in cases of transportation of persons under the need of international protection, in accordance with the requirements of international law, as well as in these cases of promotion or facilitating transportation within the country for the purposes of applying Articles 83 of Law 3386/2005 or Article 13 of Law 3907/2011, after informing the competent police and port authorities." Given the allusion to 'refugee flows' in the prosecution's file, it is clear the prosecution accepts the migrants in transit are in need of international protection, for whom the exemption clause should thus be applied. The Greek legislator however fails to include the financial profit as a criterion for the implementation of the sanctions. Therefore, Sarah and Seán risk not being included in the categories listed in Art. 30 exempted from the criminal sanctions under the law 4251/2014.

One of the main legal issues in this case regards the charge which refers to the **non-disclosure of information** regarding the departures of refugees from the Turkish coast. A critical point is the type of information that the volunteers were obligated to share with the Greek authorities and how they managed to obtain it. The information shared among the volunteers via private messages were taken from the "Aegean Boat Report" page on Facebook and Twitter, which publishes accessible and public information on the number of refugees who arrived in Greece. Moreover, of the 12 instances they are accused of failing to inform the authorities, on 4 occasions the authorities were already present, making contact redundant, in another 5 instances records show contact, or an attempt to make contact with the authorities, was made. During 2 other instances no inquiry or intervention were undertaken because the alleged migrant boat appeared to be in Turkish territory and was being responded to. Finally, during the remaining occasion, there was in fact no boat.

2.2.2 What could be learned?

Researchers have found that such allegations are often political, as in most the cases there was no sound evidence for convictions (Carrera et al. 2018; Carrera et al. 2019; Heller and Pezzani 2017). Moreover, the suspicions are indicative of the general political hostility against NGOs and policing of humanitarianism (Carrera et al. 2018; Carrera et al. 2019; Vosyliūtė & Conte, 2018).



As such, strategic litigation concerning volunteers providing humanitarian assistance to migrants in Greece shows some **crucial legal issues**:

- the wording of Article 30 par. 6 of Law 4251/2014 fails to specifically exempt “categories and members of official and licensed NGOs” from the scope of the law.
- the lack of the criterion of ‘financial gain and other material gift’ triggers the crime of facilitating the entry of migrants. If the financial profit was necessary for falling under the protection of Art. 30, the NGO ERCI would have never been prosecuted;
- The legal terminology of “facilitating” the entrance of third country nationals, not having visas and residence permits, is rather vague and its’ translation is left to the judges who might extend the scope of application broadly. In this case, for example, the gathering and transferring of allegedly ‘illegal information’ regarding the whereabouts of refugee boats was considered facilitating human smuggling. The ‘illegality’ stems from the notion that the position of boats may only be identified through official channels, thus by knowing it, one is assumed to have illegally accessed said channels. This is despite the fact that such information is accessible on open channels, such as channel 16 VHF used for emergency communication by all shipping in the area.

2.3 Case Law in Belgium: Anouk Van Gestel

Prosecutions against humanitarian action are not confined solely to SAR activity. Indeed, of the 158 individuals who have been investigated and/or formally prosecuted for offering humanitarian assistance to migrants and refugees since 2015, many have not occurred at the external border. Anouk Van Gestel is an editor in chief, who was one of two Belgian journalists accused of **human smuggling and considered members of a criminal organisation** that allegedly smuggled 95 people (including 12 minors). Anouk was one of the hundreds of Belgian citizens who helped asylum seekers that camped in Maximilian Park in Brussels. Many of these asylum seekers were suffering from the lack of basic services and subject to police raids.

On the 20th of October 2017, federal police officers searched Anouk's home and confiscated electronic and storage devices. At the time Anouk was hosting an unaccompanied Sudanese minor. Merely inquiring about transferring the minor to the UK, resulted in Anouk being accused of aggravated migrant smuggling. The investigators ostensibly established intent to commit this crime of smuggling via a wire-tapped conversation between Anouk and her colleague. During this conversation Anouk discusses the Sudanese minor's wish to gain international protection in the UK.



2.3.1 No Crime of Solidarity

One of the key aspects of the charge of aggravated smuggling, is the telephone discussion between Anouk and a colleague about potential transfer of the minor to the UK. According to Anouk this conversation is the only “nearly illegal” (“frôlé l’illégalité”) action she undertook (Lallemand, 2018). Human smuggling is defined by **article 77a of the Belgian Aliens Act** (15 December 1980) as: “the act of facilitating, in some way or another, be it directly or by an intermediary, the unauthorized entry, transit, or stay of a non-EU citizen into or through an EU member state, in violation of state law, directly or indirectly, for financial gain”.

However, Alexis Deswaef, Anouk’s lawyer, characterises the case as a **political trial**, asserting that Belgium does not enforce a crime of solidarity. Notably, despite her telephone conversation about the minor’s wish to go to the UK, Anouk did not undertake material steps to achieve his transfer. Anouk denies ever receiving any remuneration for hosting the minor, who did not leave Belgian territory while under Anouk’s care in any case.

Deswaef characterises Anouk’s actions as purely humanitarian. Indeed, for Belgium the law requires there must be monetary transaction involved for an act to constitute smuggling. Anouk’s lawyer stresses that if such assistance is rendered on humanitarian grounds, ‘smuggling’ does not apply. This reflects the specification made by the Minister

for Justice, who affirmed the applicability of the humanitarian clause in Belgian law (MYRIA, 2016: 85).

Importantly, Anouk and her colleague were acquitted in December of 2018, as the **court accepted the humanitarian nature** of their actions. However, the general prosecutor appealed this decision in January 2019.

2.3.2 What can be learned?

- The acquittal of Anouk, in what is dubbed the “solidarity trial” sets a valuable precedent. Indeed, this acquittal is important as it separates humanitarian action from smuggling, and exemplifies the humanitarian exemption of the Facilitation Directive. This conclusion resonates with the report issued during the implementation of the amendments concerning European obligations vis-a-vis facilitation of unauthorised entry, transit and residence (Justice Commission, 2016). The Belgian Justice Minister specified that the humanitarian exemption clause can be applied irrespective of whether facilitation activities are committed or attempted (MYRIA, 2016: 85).



2.4 Case law at European level: European Court of Human Rights

In Greece, **5 volunteers**, including 3 Spanish firefighters working with **PROEM-AID** and 2 Danish aid workers working for **Team Humanity**, were providing SAR services in the North Aegean. They were arrested during a rescue mission in January 2016 and they were all indicted on charges of **illegal transportation of irregular migrants** into Greek territory without authorisation. They faced up to ten years in prison if convicted. The judge referred to the work of Team Humanity as using “rescue as a pretext” to pursue this crime. They were finally acquitted in May 2018, though in the interim, restrictive measures were imposed upon Salam Kamal-Aldeen of Team Humanity. Salam has for the first time lodged a complaint against Greece before the European Court of Human Rights to challenge the crackdown on NGOs rescuing refugees at sea (GLAN, 2019). The application submitted to the Strasbourg Court disputes the legality of the crackdown on humanitarian assistance rendered to those in distress at sea in Greece.

According to GLAN (2019) Greece's prosecution and exposure of Salam to a minimum 10 years imprisonment, should be viewed in the context of increasingly restrictive legal amendments and practices such as additional reporting and registration procedures; instances of police intimidation and harassment; undue arrest and detention; as well as public smear campaigns both in the press and on social media.

According to Dr Violeta Moreno-Lax (Queen Mary University of London), GLAN's legal advisor, rescue is a binding duty under international law and humanitarian assistance of persons in distress at sea should therefore never be prosecuted (GLAN, 2019).

2.4.1 Prosecutions may impinge human rights

The laws invoked within Salam's complaint are enshrined in the **European Convention on Human Rights**, and the **Universal Declaration of Human Rights** contained therein, of which Greece is a signatory state along with the other Council of Europe members. Thus, the complaint claims Greece did not honour its responsibility for the applicant's degrading treatment by failing to ensure that no one is subject to torture or to inhuman or degrading treatment or punishment (**Article 3**). Moreover, the right to liberty and security has also allegedly been offended, inasmuch as the manner of Salam's arrest did not constitute a “lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on *reasonable suspicion* of having committed an offence or when it is *reasonably* considered necessary to prevent his committing an offence or fleeing after having done so (emphasis added)”. The complaint suggests that, in contravention of articles 5.1c and 18, the facts were moulded to fit the offence. The complaint also alleges that the right to be protected from arbitrary prosecution that is not based in law (**Article 7**), to have your freedoms of assembly and



association respected (**Articles 10 and 11**), and to private, family and professional life (**Article 8**) have all been offended.

2.4.2 What can be learned?

This case may mark an unprecedented development under international law and eventually set out the incompatibility of the criminalisation of solidarity with the European Convention on Human Rights.

2.5 Case law at the international level: International Criminal Court

A communique submitted to the International Criminal Court, by Dr Juan Branco and Omer Shatz, ostensibly implicates officials and agents of the European Union and its Member States in Crimes Against Humanity (**Art. 5&7 of the Rome Statute of 1998**). The communique claims to evidence these crimes were committed (and omitted in the case of withholding SAR services) from 2014 to date as part of a premeditated policy to curb migration flows from Africa (Branco & Shatz, 2019). According to the communique, these policies bear criminal culpability within the jurisdiction of the Court, as they resulted in, firstly, the deaths by drowning of thousands of asylum seekers, secondly the refoulement of tens of thousands of asylum seekers who attempted to flee Libya, and as such, lastly, complicity in the subsequent crimes of murder, imprisonment, enslavement, torture, rape, persecution and other inhuman acts, taking place in Libya.

2.5.1 EU policy in breach of the Rome Statute

Crucially, one key policy pursued by the EU, according to the communique, is to deepen cooperation with the Libyan coast guard (LYCG) while “**ousting**” civilian SAR efforts from the **Mediterranean** (Shatz and Branco, 2019: para.6). Through a mix of legislative acts, administrative decisions and formal agreements, the EU and its MS provide material and strategic support to the LYCG enhancing the latter's ability to intercept asylum seekers, en route to EU territory via the Central Mediterranean route, and maximise their disembarkation in Libya. In short, the communique argues “Without the implementation of EU's [policy of deterrence] the crimes against the targeted population would not have ever occurred”, furthermore the accused are fully aware “of the lethal consequences of their conduct” (Shatz & Branco, 2019: para.10-15).

2.5.2 Constituting Crimes

Branco and Shatz argue these actions pursuant to an organisation policy constitute a widespread or systematic attack that is knowingly being directed against a civilian population, and thus satisfy the criteria of **Crimes Against Humanity** as outlined by Article 7 of the Rome Statute. The underlying crimes include murder; torture; persecution forcible transfer; unlawful imprisonment; enslavement; rape and other forms of sexual violence (Shatz and Branco, 2019).



This project has received funding from the European Union's Horizon 2020 research and innovation program under the grant agreement **770730**

2.5.3 What can be learned?

The prosecution has not taken substantive public action vis-a-vis this submission. This submission uniquely focuses on the highest echelons of the EU and MS officials. It has the potential of finding European policy, including prosecutions that effectively limit civilian SAR efforts, culpable under international law.



3. CONCLUSION

3.1 Legal discussion and lessons learned

The humanitarian cases outlined above exist within an extensive jurisprudential field. This section examines how the charges of the cases intersect with EU and International jurisprudence. Thus, allowing the reader to understand the compatibility of humanitarian activities with the large body of law, as well as the anomaly of adopting the Facilitation Directive without a binding and clearly defined humanitarian exemption clause.

3.2 European Union Law

As earlier ReSOMA analysis indicates the **Facilitation Directive**² is also central to the cases analysed above (Vosyliute and Conte 2018; Vosyliute and Conte 2019). *Prima facie* the charges of smuggling are consistent with the EU's Facilitation Directive, nonetheless they are contrary to the spirit of the discretionary exemption for humanitarian assistance in Article 1 (2).

Individuals are criminalised at national level despite the existence of **humanitarian exemptions** in the law (Carrera et al. 2018; Carrera et al. 2019). The exemptions are not adequately interpreted and implemented in the cases examined in this paper. Both in Greece and Italy, the content of 'humanitarian assistance' is not specified by the law. Judges therefore face several obstacles in identifying those legitimate conducts falling under the scope of the exemption.

Moreover, categories and members of official and licensed NGOs are not expressly and formally excluded from the crime of facilitation the entry and stay of migrants. In Italy, the humanitarian clause is also characterised by a geographical limitation that leaves out those conducts taking place at the external borders. The so-called humanitarian exemptions therefore fail to fully cover the actions of NGOs and volunteers who help migrants. Clear guidelines clarifying the meaning of humanitarian assistance would be highly needed at EU level to fill the gaps existing in the Member States.

² The Directive's first article is crucial and reads:
1. Each Member State shall adopt appropriate sanctions on:

(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;

(b) any person who, for financial gain, intentionally assists a person who is not a national of a

Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

2. Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1 (a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.



Moreover, the charges seem to be incompatible with the **EU Charter of Fundamental Rights** and are breaches of the EU's founding values, notably the rule of law, democracy and fundamental rights (Webber, 2017).

3.3 International Law and Maritime Law

3.3.1 The obligation to save persons in distress

The status of maritime law has already been set out in the defence of the *Luventa* crew outlined above. Suffice it to say that it is incumbent upon the master of a ship to render assistance to persons in distress and not to refool such persons to unsafety, if they are reasonably able to do so, as per the **International Convention for the Safety of Life at Sea (SOLAS)** (1974); **International Convention on Maritime Search and Rescue** (1979); **UN Convention of the Law of the Sea (UNCLOS)** (1982); and the **International Convention on Salvage** (1989).

The obligations to provide basic lifesaving services that protect the rights to human dignity; to life without discrimination; to physical and moral integrity; to life; the right of children to protection and care, are all enshrined in international human rights and humanitarian law. Nevertheless, all of these rights are contravened by the aforementioned charges. Practically, such charges hamper the responsibilities of NGOs in their realisation of the right to health, despite the **Human Rights Defenders UN Consensus Resolution** 2017, prohibiting

harassment, criminalisation and abusive or politically motivated prosecution. In sum, this section outlined the well-established legal framework promoting and protecting the kind of activity presently being prosecuted within the EU at a growing rate.

3.3.2 What is “financial gain or material benefit”?

The defendants in the cases outlined above refer to the unpaid, voluntary, nature of their actions. This is expedient for their immediate defence. By not receiving any financial gain they argue to not have committed any crime of human smuggling. As argued in earlier ReSOMA briefs, this conforms to the standard of the **UN Migrant Smuggling Protocol** (Vosyliute and Conte 2018). The protocol defines smuggling as an intentional act “in order to obtain, directly or indirectly, a financial or other material benefit” (UN, 2002: Art. 3a). Voluntary activity is obviously not captured in this definition.

Are search and rescuers, when employed by humanitarian organisations, culpable for ‘material benefit’ under the Migrant Smuggling Protocol, or ‘financial gain’ under the Facilitation Directive? If so, rendering rescue is legal, only, when performed on a voluntary basis. Furthermore, would the provision of food, drink, accommodation or safety equipment to rescuers constitute a ‘material benefit’ (Ray, 2017: 1268)? If this is the case, it would set a precedent for sub-standard rescue activity.



In conclusion, though the voluntary basis of the defendants' activity may negate the charge of smuggling, focusing solely on non-remunerated activity risks being insufficient. Therefore, a more nuanced discussion, which sets out a framework that does not consider illegal any remunerated humanitarianism, is also vital. Particularly while there is a rise in prosecutions of ostensibly humanitarian activity.

Even if the 'benefit' clause of the Migrant Smuggling Protocol is often defined broadly, it was not originally intended to criminalise humanitarian activity (Interpretative notes, A/55/383/Add.1, 3 November 2000, para. 88). As such, calling for a distinction between remunerated humanitarian activity and smuggling is in keeping with the spirit of the Protocol. Ray (2017: 1268) alludes to analogous insider trading liability under US law to set out a

framework to distinguish the two. Applying these laws to the case of humanitarian action, Ray concludes, rescuers do not receive any financial or material benefit *from performing each instance of service of rescue and transport to a safe port per se*. Instead, rescuers receive a salary which has nothing to do with the particular act of service, although it might relate generally to the work. Carrera et al define this as the difference between 'just' and 'unjust' enrichment. "Bona fide service providers, such as humanitarians, acting in good faith are not unjustly enriched for work and should therefore not be understood as receiving illegal financial gain nor material benefit" (Carrera et al, 2018).



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