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**Fighting for the Right to Save Others:
Civil Society Responses to the
Criminalisation of humanitarian assistance**

A Research Paper presented by:

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Disclaimer:

This document represents part of the author's study programme while at the International Institute of Social Studies. The views stated therein are those of the author and not necessarily those of the Institute.

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List of Acronyms

ARCI	Associazione Ricreativa Culturale Italiana
ASGI	Italian Association for Juridical Studies on Migration
CEPS	Centre for European Policy Studies
CSA	Civil Society Actor
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRONTEX	European Border and Coast Guard Agency
GLAN	Global Legal Action Network
HRW	Human Rights Watch
ICC	International Criminal Court
IOM	International Organisation for Migration
IMO	International Maritime Organisation
INGO	International Non-Governmental Organisation
LIBE Committee	Civil Liberties, Justice and Home Affairs Committee of the European Parliament
MOAS	Migrant Offshore Aid Station (NGO)
MPG	Migration Policy Group
MSF	Médecins Sans Frontières
NGO	Non-Governmental Organisation
PETI Committee	Petitions Committee of the European Parliament
PICUM	Platform for International Cooperation on Undocumented Migrants
PROEM-AID	Professional Emergency Aid (NGO)
ReSOMA	Research Social Platform on Migration and Asylum
SAR	Search and Rescue
SAROBMED	Search and Rescue Observatory for the Mediterranean
SHRL	Strategic Human Rights Litigation
TAN	Transnational Advocacy Network
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees

Abstract

The purpose of this study is to analyse the various ways in which civil society has mobilised against the practice of criminalising humanitarian actors who bring migrants into Italy and Greece subsequent to search and rescue in the Mediterranean Sea, an offence referred to as ‘facilitating entry’ in the EU. This research is extremely pertinent at this time given the significant increase in criminalisation of humanitarian assistance since the 2015 EU Refugee Crisis. As an on-going problem, the criminalisation of humanitarian assistance has wider implications for both migrants and EU citizens involved in humanitarian work. By looking at both the legal and non-legal forms of mobilisation involved, the aim is to consider how civil society, especially humanitarian actors, justify their actions, and challenge their criminalisation. Based on thirteen semi-structured interviews with researchers, activists and lawyers in different EU member states, qualitative data was obtained on on-going practices of harassment, suspicion, tightening access, and other forms of criminalisation. Secondary sources have also been an important source of data, including court cases, investigative reports, policy reports and academic articles. The findings reveal that humanitarians rely on both legal and moral justifications for their continued search and rescue activities. Additionally, these acts of criminalisation can be conceptualised as acts of lawfare being engaged in by states. Finally, there are various challenges to and potential for legal mobilisation by civil society, which would ultimately need to be weighed before determining whether to pursue strategic litigation against states. Whilst civil society has in fact mobilised against this practice of criminalisation in both legal and non-legal ways, needed policy and legislative reform to curb this practice of criminalisation has not yet occurred. Much will depend on the outcomes of court cases currently working their way through regional and international courts, however, one cannot be certain how these will be decided.

Relevance to Development Studies

This research paper insofar as it addresses responses by civil society to the criminalisation of their actions, seeks to address alternative perceptions of the violations of citizens’ rights and how citizens (as individuals or through organisations) can reclaim their rights. It also seeks to highlight the myriad ways in which political decisions in the field of migration-management taken at a national or regional level can have (un)intended consequences, for migrants as well as humanitarian actors and the wider society at large.

Keywords

Humanitarian actors; Search and Rescue; Mediterranean Sea; criminalisation of humanitarian assistance; lawfare; civil society; legal mobilisation; strategic litigation.

Chapter 1 : Introduction

This research analyses the extent to which civil society has been able to mobilise against laws passed and actions taken by European Union (EU) Member States that criminalise humanitarian actors' facilitation of migrants' entry into the EU, using the concepts of criminalisation and lawfare. For the purposes of this research, the term migrant is used to refer to both potential economic migrants and asylum seekers. Furthermore, consideration of humanitarian action revolves around not-for-profit search and rescue operations at sea and the subsequent action of bringing rescued migrants to Europe, namely into Italy and Greece, thus, particular focus is given to preventing migrants' entry into Italy and Greece, subsequent to search and rescue operations in the Mediterranean Sea. I also analyse civil society's justification for their actions, modes of social and legal mobilisation and possible results of said mobilisation.

1.1 Statement of the Research Problem

This research is particularly topical at this point in time. Through the EU's decreased search and rescue (SAR) operations in the Mediterranean Sea, civil society has stepped in and supplemented national and regional SAR efforts, aimed at still large numbers of migrants departing Libya, and other parts of North Africa and Turkey, and attempting to reach Europe. During the course of 2018 and the first six months of 2019, there have been many specific cases of criminal charges imposed in Italy against sea captains of NGO vessels who had rescued drowning migrants or those whose vessels had run into difficulty in the Mediterranean Sea. These include German nationals, Pia Klemp and Carola Rackete, both of whom captained vessels owned by the NGO Sea-Watch, and who eventually disembarked migrants on Italian shores. Additionally, in Greece there have also been several noted cases of criminalisation, including that of volunteers such as Sarah Mardini and Sean Binder, and also those of the PROEM-AID and Team Humanity workers, both of which involved volunteers working with an NGO involved in SAR efforts.

Subsequent to the much-publicised death of 3-year-old Syrian refugee Alan Kurdi¹, there was a mass movement of solidarity and compassion across Europe, which was encouraged by some governments and even lauded by high-ranking European officials, for example, former EU Commission President Juncker, who stated at the time that “this was the kind of Europe I want to live in” (Juncker, 2015). However, since this statement made in an op-ed, the tide has quite demonstrably shifted away from such solidarity. Whether this is due to the rise of populism and numerous right-wing parties across Europe or for other reasons, there no longer appears to be common support for solidarity and humanitarian assistance to migrants

¹ A 3-year-old Syrian boy who died by drowning in the Mediterranean Sea in September 2015, when the boat he and his family were traveling on capsized on its way from Turkey to Greece. (Walsh 2015)

and refugees, which in turn has been accompanied by a shift towards prioritising the criminalisation of supposed smugglers over saving lives of people at sea.

The large scale of civil society action as it relates to SAR, as well as the provision of basic services to migrants and ongoing advocacy and mobilisation on behalf of migrants within EU Member States, cannot be overstated. In fact, at this stage, SAR particularly in the Mediterranean Sea, is now almost exclusively undertaken by civil society, as EU member states have ceased to conduct national SAR operations. Back in October 2013, with the launch of Operation Mare Nostrum, the approach had been quite different. Mare Nostrum was a naval and air SAR operation undertaken by the Italian government in response to the large number of migrant deaths occurring off the coast of Italy as a result of migrant shipwrecks. The Operation remained in effect for 1 year and led to the successful rescue of approximately 150,000 migrants in the Mediterranean Sea. Mare Nostrum was subsequently replaced by Operation Triton, which was managed by Frontex, the EU's Border Management Agency.

Whilst Mare Nostrum was authorised to carry out SAR operations and patrolled a very wide surface area (even close to the Libyan border), Operation Triton was far more limited in scope, with a budget of approximately one third of that which had been in place with Mare Nostrum, and a much more limited patrol range (authorised to operate only within Italian waters). Furthermore, not only had there been an outcry against the costs associated with maintaining Mare Nostrum amongst EU Member States, but there were even instances where Operation Mare Nostrum was touted as being a “pull factor”, thereby encouraging migrants to undertake the perilous journey from Libya or other parts of Northern Africa, with the hope that they would be rescued and taken to the EU. Interestingly enough, it is now civil society actors conducting SAR efforts who are now being hailed as “pull factors” or a “taxi service” for migrants. This shift from Mare Nostrum to Operation Triton therefore clearly highlighted the EU's shift in approach from one focused on humanitarian efforts, that is, focused on saving lives, to one that more primarily concerned border protection.

In June 2019, the case of Carola Rackete, captain of the rescue ship Sea Watch 3, which is owned by the German NGO, Sea Watch, came to prominence. Subsequent to rescuing 53 migrants off the coast of Libya and with the NGO having already stated its position that it would not forcibly return rescued migrants to Libya (which was not considered to be a place of safety), a decision was taken by the NGO to transport the migrants to the next nearest port, namely the Italian island of Lampedusa. However, due to a ban instituted by the Italian government barring rescue ships carrying migrants from docking in Lampedusa's port, the vessel was forced to remain in international waters for two weeks. On 29th June 2019, Ms. Rackete made the decision to dock in Lampedusa's port, without government permission, noting concerns for the health and safety of those on board. She was subsequently charged with abetting irregular migration and resisting the orders of a warship. Whilst her actions

were condemned by the Italian government, she has maintained that her actions complied with obligations under international law.

In Greece, there have also been numerous examples of humanitarian actors being charged for their role in facilitating the entry of rescued migrants onto Greek shores. One such example concerns that of 5 volunteers – 3 Spanish firefighters (PROEM-AID) and 2 Danish aid workers (Team Humanity)- who were conducting SAR operations in Greek waters and were subsequently arrested in January 2016 and indicted on charges of illegal transportation of irregular migrants into Greek territory without authorisation, and were accused of “using rescue as a pretext” (Conte & Binder, 2019). They were eventually acquitted in May 2018. Additionally, is the case concerning Sarah Mardini and Sean Binder, both of whom were volunteers with the Emergency Response Centre International (ERCI) and who were arrested in Greece in February 2018 and charged with several felonies including espionage, assisting human smuggling networks, membership of a criminal organisation and money laundering (ibid).

1.2 Contextual Background

The EU’s adoption of the Facilitator’s Package forms the basis of the EU’s legislative action to tackle migrant smuggling into the EU, and many states’ anti-smuggling legislation and other laws under which humanitarian actors have been charged are grounded in the EU Facilitator’s Package. The Facilitator’s Package comprises the EU Council Directive 2002/90/EC of 28 November 2002, defining facilitation of unauthorised entry, transit and residence (the Facilitation Directive) and the Council Framework Decision 2002/946/JHA28, on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence in the EU.

The EU Council Directive defines the facilitation of unauthorised entry, transit and residence as:

- (i) intentionally assisting a non-EU national to enter or transit through the territory of an EU country, in breach of laws [Art 1(a)]
- (ii) intentionally assisting a non-EU national to reside in the territory of an EU country, for financial gain [Art 1(b)]
- (iii) instigating, assisting in or attempting to commit the above acts. [Art 2]

All EU Members are required to adopt effective, proportionate and dissuasive sanctions for these infringements in their national laws. Additionally, Article 1(2) of the Facilitation Directive contains an optional clause for Member States to explicitly exclude humanitarian actors from criminal sanctions. It provides:

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.

Thus, it is a discretionary decision to be taken by individual EU Member States as to whether or not to exclude humanitarian acts from criminalisation under the Facilitation Package, giving “a wide margin of appreciation to the member states as to whether to criminalise actions that have a not-for-profit intent and whether to exclude humanitarian assistance from criminalisation” (Vosyliute and Conte, 2018). Such a discretion has led to a lack of certainty and consistency surrounding what type of conduct might be considered illegal, as different States have incorporated this EU Directive in different ways into their national laws. Currently, facilitating irregular entry is punished in all 28 EU Member States, yet only nine have a form of humanitarian safeguard in accordance with Article 1(2) including Greece, Spain and France, among other countries (Allsopp, 2017).

The definition employed by the EU’s Facilitator’s Package, in its attempt to fulfill the EU goal of reducing human smuggling into the region, goes beyond the international definition of human smuggling as employed by the UN. The UN Protocol against the Smuggling of Migrants by Land, Sea and Air provides for a financial or other material benefit requirement in order to establish the facilitation of entry as the base crime. However, similar to the EU Facilitator’s Package, the UN Protocol does require financial benefit for the facilitation of residence. The UN Protocol differs from the EU legal framework in three main ways: “i) the extent of the inclusion and definition of an element of financial gain in the description of facilitation of irregular entry, transit and stay; ii) the inclusion of an exemption of punishment for those providing humanitarian assistance; and iii) specifying safeguards for victims of smuggling” (Allsopp, 2017: 9). Thus, under the UN Protocol, in order to be found guilty of facilitating a person’s entry into a country, the alleged smuggler would have had to receive either directly or indirectly, some form of financial gain, which is not a requirement under the EU’s Facilitator’s Package. Additionally, the UN Protocol contains an explicit exemption for those who may have facilitated entry for humanitarian purposes whilst the EU Facilitator’s Package grants individual Member States the discretion to decide whether to create a humanitarian exemption or not.

Given the far reaching ramifications of the Facilitator’s Package, within the EU Action Plan against Migrant Smuggling (2015-2020) of May 2015, it had been expressed that the European Commission would make proposals to improve the Facilitator’s Package. Consequently, the Action Plan had stated that the Commission “will seek to ensure that appropriate criminal sanctions are in place while avoiding risks of criminalisation of those who provide humanitarian assistance to migrants in distress” (Carrera, Guild et al, 2016). However, subsequent to a study commissioned by the European Parliament, a decision was taken in March 2017 declaring that there was insufficient evidence that humanitarian assistance was being criminalised to make the humanitarian exemption in the Directive mandatory (Fekete et al, 2017). Thus, no further action was taken to seek to introduce a mandatory exemption for humanitarian action, as exists for example under the UN Protocol.

In addition to the reduction of nationally led SAR efforts by EU Member States, one must also note the EU's general policy of externalisation of border control, which also greatly impacts upon the manner in which SAR efforts in the Mediterranean are now conducted. Consequent to this policy of externalisation of border control, agreements have been struck with both Libya and Turkey², which arguably are more focused on ensuring migrants are kept out of the EU. The agreement struck with Libya is particularly relevant in this context, since the EU has embraced SAR conducted by Libyan authorities over those conducted by civil society actors, and there have been instances where calls have been made for criminalising civil society actors who refused to hand over rescued migrants to Libyan coastguard authorities while at sea. Civil society actors for their part have refused to hand over migrants to Libyan authorities on the basis of Libya not being considered a 'place of safety'. Such an assertion does in fact find support within the wider international community as not only the UN has made calls for the closure of all detention centres in Libya, citing that the facilities are not fit to house migrants (BBC, July 2019) but also given the generally high levels of crime, violence and political instability plaguing the country.

Given these circumstances, criminalisation of civil society's SAR efforts have had an alarmingly detrimental effect on the number of lives that are lost during attempts to cross the Mediterranean Sea. Whilst a comparison of figures of migrant deaths in the Mediterranean over the period 2015-2019 would seem to suggest that the numbers of persons losing their lives at sea is decreasing [moving from 3770 in 2015 to 1090 in 2019 [up to 8th November 2019] (IOM 2019), these figures are misleading, for even though numbers have decreased the death rate has actually been increasing (Vosyliute 2018). Vosyliute argues that the death rate for those crossing the Mediterranean had increased nine fold in the period 2015 to early 2018 (ibid). She further explained that in 2015, 4 persons would be reported as dead or missing out of every 1000 making the crossing, whereas in 2018, the number had sharply risen to 37 persons being reported dead or missing out of every 1000. This figure arguably correlates with the decreased presence of civil society led SAR which was a direct result of increased criminalisation of their activities.

1.3 Justification of the Study

It is important to study the criminalisation of humanitarian assistance due to the far reaching consequences it can have on humanitarian operations. Humanitarianism, which has been

² The EU's policy of externalisation of border control is illustrated by the deal between Italy (with EU support) and Libya whereby the Italian government funds the Libyan coastguard (money provided for equipment as well as training conducted) so that the Libyan coastguard can intercept any migrant boats which have left Libya headed to the EU, and subsequently return such migrants to Libya. The EU-Turkey deal, however, is an agreement aimed at addressing the flow of illegal migrants from Turkey to the EU (mainly Greece), wherein any asylum seeker who entered the EU from Turkey but whose asylum claim is rejected is then returned to Turkey. For each asylum seeker returned to Turkey, the EU is supposed to accept an approved refugee living in Turkey for resettlement in the EU. In exchange for this deal Turkey was to receive funding and more preferential visa arrangements for its citizens.

widely defined as the impartial, independent, and neutral provision of relief to those in immediate danger of harm (Barnett, 2005:724), is under threat in general. Humanitarianism is a universal principle, but is now being subjected to processes of othering as some European states seek to render illegal the actions of both organisations and individuals alike who dare to provide assistance to migrants. Notably, such acts of criminalisation and subsequent prosecution have not been targeted at a single category of humanitarian, and therefore the far-reaching impact such policies can have on ordinary individuals is potentially very expansive, which is why I have limited my research to not-for-profit SAR operations at sea.

Within Europe there have been several documented prosecutions of individuals and/or organisations who had been providing assistance to migrants, according to pre-existing anti-smuggling and immigration laws. It has even been argued that “the EU anti-migrant smuggling policies are intentionally or (un)intentionally having the impact of policing the movements of civil society actors and citizens, especially those monitoring the implementation of States’ migration practices and mobilising for migrants’ access to their rights” (Carrera et al, 2018(a)). It should also be noted that there have also been cases of criminalisation of professional humanitarians (e.g. Médecins Sans Frontières), notably in Italy³. For the purposes of this research paper, analysis will be restricted to criminalisation surrounding facilitation of entry, be it of individuals, NGOs or actors considered as professional humanitarians.

My particular motivation for undertaking this research lies not only in my interest as an attorney-at-law in promoting human rights protection generally, but particularly as it relates to migrants, the worldwide trend of subjugating their rights to security and border controls is especially troubling. Given my interest in migration related human rights, I was seeking to undertake research that would focus on these two areas: law and migration. During a study trip to Geneva in March 2019, I was fortunate to attend the International Film Festival on Human Rights which was occurring at that point in time, and I attended the screening of a film and debate which addressed the issue of the Criminalisation of Solidarity. The film looked at the work of Tunisian fishermen in carrying out rescue operations for migrants in distress at sea, and also looked at their actions in burying migrants who unfortunately perished at sea. The debate involved humanitarian actors, including one of the Tunisian fishermen from the film, NGO actors operating in the EU and a refugee, Sarah Mardini, who herself had been recently charged under Greek law for her actions in rescuing migrants and bringing them onto the Greek island of Lesbos. This film and debate opened my eyes to this disturbing trend of criminalisation which I then began to independently research.

³ In November 2018, Italian authorities ordered the seizure of the vessel “Aquarius” which was operated by MSF. Allegations were made that the NGO illegally disposed of waste including clothing, leftover food and medical waste - on 44 occasions in Italian ports between January 2017 and July 2018. (The Telegraph, 2018).

1.4 Research Objective and Questions

The objective of this research paper is to analyse cases where humanitarian actors have been criminalised for facilitating the entry of migrants into Italy and Greece, to conceptualise these cases as examples of lawfare and to better understand the nature of the response of civil society (including humanitarian actors, legal professionals, researchers, activists) to these cases. I aim to evaluate the various ways in which civil society has challenged these cases. In so doing I seek to examine what tools they have used to challenge the system and whether the forms of mobilisation that have been undertaken can be conceptualised as legal mobilisation.

Consequently, my main research question seeks to determine, *how has civil society mobilised against the criminalisation of the facilitation of migrants' entry into Italy and Greece following civil society-led search and rescue (SAR) activities?* Furthermore, I have chosen to elicit the information needed to answer the main question by addressing three sub-questions, namely: *(i) How have SAR humanitarian actors conceptualised and justified direct humanitarian protection for migrants in the Mediterranean? (ii) How has the criminalisation of facilitating entry been directed against these humanitarian actors, and how can this be conceptualised? (iii) What have been the challenges to and the potential for legal mobilisation by civil society against the criminalisation of facilitating entry subsequent to SAR?*

1.5 Structure of the paper

This paper comprises six chapters. Chapter 1 introduces the topic by explaining the specific research problem and its contextual background along with the research objectives and specific questions that I am seeking to answer. Chapter 2 highlights my methods of data collection, wherein I also justify the choices I made with respect to secondary source selection and also choices as to persons interviewed. Within said chapter I also address the limitations to my study and ethical considerations. In Chapter 3, I address my methodology and analytical framework and highlight literature on the concepts of criminalising solidarity, lawfare and legal mobilisation so that one better understands my overall approach and the concepts which support my data analysis. Chapters 4 and 5 seek to present my findings with respect to the three sub-questions: Chapter 4 addresses sub-questions 1 and 2, while Chapter 5 deals with sub-question 3. Finally, I conclude the research in Chapter 6 and seek to answer the main research question of how has civil society mobilised against this practice of criminalising SAR activities.

Chapter 2 : Methods of Data Collection, Limitations and Ethical Considerations

2.1 Methods of Data Collection

This research was grounded in qualitative methods and I used a combination of primary and secondary data. Insofar as the research questions I am addressing seek to allow for an exploration and understanding of the issue of not just the criminalisation of humanitarian assistance but also an understanding of how, if at all, civil society has responded in turn, use of a qualitative tradition is most suited since it allows the researcher to gain information that explains individuals', institutions' and/or groups' beliefs and behaviours in a nuanced and contextual manner (Hennink et al 2015:10).

Primary data was collected via thirteen (13) semi-structured interviews conducted with civil society actors, researchers, and academics in Italy, Greece, Belgium and The Netherlands and attorneys in Italy and Greece, all of whom consented to being interviewed. A complete list of interviewees is contained in Appendix I. However, none of the interviewees worked directly in SAR but instead had themselves either conducted research on the topic of criminalisation and therefore had cause to engage directly with those conducting SAR activities; alternatively, they themselves provided services to persons/organisations conducting SAR activities, for example, most of the attorneys interviewed may have provided guidance to NGOs conducting SAR or providing other services to migrants. Additionally, 2 of the interviewees also worked with UNHCR in Greece. Interviews sought to gain information on how criminalisation has affected civil society's functioning, how civil society has legally mobilised against same, if at all, and how they have sought to form strategic alliances locally, nationally and regionally as it relates to tackling the effects of criminalisation. These interviewees were also selected since they could provide current information on criminalisation activities and how such practices are affecting civil society; this was particularly important in the absence of me being able to interview any SAR workers directly.

The vast majority of my interviews were conducted via Skype and two interviews were conducted via WhatsApp call. In most cases, the interviewees expressed that they would have preferred to be provided with the questions beforehand so I would have sent the questions via email and subsequently conducted the interview. Additionally, in one of the cases, due to the attorney's extremely busy schedule, whilst the interview was initially commenced via WhatsApp call, it could not be concluded on that occasion and I subsequently sent her the questions via email to be completed and returned to me via email.

I also sought to generate findings from other sources of data (including newspaper articles, policy reports, investigative reports) regarding civil society actors operating in Italy and Greece so as to gather information on their prior and present attempts at mobilisation as well as their outlooks on the possibility of future mobilisation with respect to the issue at

hand. Other methods included analysis of international conventions, EU secondary legislation (particularly the Facilitator's Package), national legislation implementing the Facilitation Directive in Italy and Greece and other laws in those two states which have been used to criminalise humanitarian actors, along with court cases concerning the criminalisation of humanitarian assistance, and court cases filed by civil society in response. Additionally, I engaged in an analysis of policy/research papers produced by INGOs, NGOs, and think tanks and academic articles on criminalisation of humanitarian assistance, lawfare and legal mobilisation.

I would have consciously chosen to not only resort to academic writings on the issues of criminalisation, lawfare and legal mobilisation, but also actively sought to engage with reports from certain agencies which dealt primarily with humanitarian issues worldwide, for example, articles written by the news agency, 'The New Humanitarian' (which was previously a project of the UN Office for the Coordination of Humanitarian Affairs). I also utilised reports emanating from newly established research platforms such as ReSOMA, which is a "partnership started in 2018 among European civil society, local authority organisations, think tanks and research networks" (ReSOMA, n.d.) to deal with research generation and policy-making in the fields of migration, asylum and integration. Notably, one of the ReSOMA reports utilised on Strategic Litigation, was co-authored by someone who is currently facing charges for his actions in carrying out SAR in Greece.

In terms of the cases of legal mobilisation which I have decided to highlight and examine, these were also purposely chosen for the potential insight they could bring. The cases filed at the ECtHR were cases filed against both Italy and Greece but moreso, because the Court acts as a supranational judicial body for the EU, these cases, once finally determined, have the potential to completely change the situation as operates at present since the Court can make pronouncements which can affect current EU policies such as the Facilitator's Package. Also, a case filed at the ICC is highlighted due to the tactical strategy that is employed through the filing of said case.

To enable data analysis, for each of the identified research questions, there were specific interview questions which had been posed seeking to elicit pertinent information which was subsequently analysed (see Interview Guide- Appendix II). I sought to determine whether there were trends/similarities reported by the various interviewees. Interview data was also assessed in line with the literature on criminalisation, lawfare and legal mobilisation. Interview data was also checked against data emanating from secondary sources such as news reports and up-to-date investigative reports and policy reports from think tanks and other migration-based research platforms, as a means of triangulation. This was done in acknowledgment of the fact that for the purposes of qualitative-based studies, triangulation can serve as a basis for increasing the validity of findings (Yeasmin and Rahman 2012:156).

2.2 Limitations

A key limitation has been the ability to gather empirical data from various civil society actors willing to speak about their past and present mobilisation efforts and specifically, possible future mobilisation to counteract/challenge the Facilitator's Package and national laws/policies implementing said Package. To counteract the inability to speak with civil society actors who are directly working in SAR in Italy and Greece, I instead opted to speak with other researchers and also attorneys who have been engaging with these actors and who may have also represented some of the civil society actors who were previously charged with offences related to SAR activities. A further limitation lay in the fact that I conducted all my interviews either via Skype or WhatsApp, thus, since they were not conducted in person, I was not always able to gauge interviewees' emotions, and in some cases, where the interview was conducted via phone call (e.g. via WhatsApp call), I was not able to see the interviewee's facial expression or other reactions at all.

In terms of my positionality, I would have introduced myself as an attorney who is currently seeking to gain expertise in the area of development studies and migration-related human rights issues, at the beginning of each of the interviews. I also indicated how my legal background featured in the topic I eventually decided to conduct this research upon. In the interviews with attorneys, I do believe that my background may have influenced the level of explanation they felt needed to be given in explaining certain legal concepts. In each interview, I nonetheless strove to stress upon the fact that while I did possess a legal background, I was new to the field of migration-related development issues.

2.3 Ethical Considerations

Whilst I was initially concerned about the ethical challenges which would arise in me interviewing those whose acts might be considered 'illegal', based on the pool of interviewees I was eventually able to target, such concerns are no longer so directly pertinent, as I did not ultimately speak with actors working directly in SAR activities. I instead dealt with researchers who have carried out extensive research in the area of the implementation of the Facilitator's Package and I have also interviewed researchers and attorneys who work with those engaged in SAR activities. Thus, in my interviews conducted, the persons were not at risk of revealing information which might have led to them personally being criminalised. I have nonetheless sought to be critically reflexive throughout the interviews, remaining aware of the ethical positions of those I am interviewing in addition to my own ethical position.

Chapter 3 : Criminalising Solidarity, Lawfare and Legal Mobilisation - Methodology & Analytical Framework

In order to answer the questions raised in this research paper, I applied a methodology that involved a critical analysis of the concepts of criminalising solidarity (situated within the wider topic of crimmigration), lawfare and legal mobilisation. I begin with an analysis of the practice of criminalising solidarity, so as to better understand the ways in which this practice manifests and whether the actions carried out in Italy and Greece against SAR NGOs fit established categories of criminalisation of solidarity. Secondly, the concept of lawfare has been chosen because of its ability to aptly describe and explain the criminalising actions taken by governments against those engaging in SAR activities. I therefore use this concept to show how the actions and discourse promoted by the Italian and Greek governments, media and other public figures, have been used to legitimise the scapegoating of civil society generally and SAR NGOs in particular, and the far-reaching consequences this has not only for migrants' rights, but also for the rights of European citizens who choose to engage in SAR activity. The concept of legal mobilisation has been chosen since it can provide a very interesting countermove to the negative use of 'law' by governments, whereby civil society also seeks to utilise 'law' as a form of counter power in support of their actions. Furthermore, since the increasing trend of criminalisation post 2015, civil society has in fact sought to legally mobilise against states' actions, and one such means has been through the avenue of strategic litigation. Thus, I use the concept of legal mobilisation as a means of assessing civil society's attempts at counteracting the criminalisation of the facilitation of entry.

3.1 Criminalising Solidarity

Several authors have written on the criminalisation of solidarity, with some noting that this is not a 21st Century phenomenon, but was a regular practice in all regimes that were proto- or entirely totalitarian (Jalušič, 2019). Some have remarked that this criminalisation began several decades ago and saw the prosecution of individuals, even of priests, who were involved in the sanctuary movement (Fekete et al., 2017). Others still observed that, "[criminalisation of migrants] has historic parallels in the evolution of liberal democracy with the criminalisation of slaves escaping from their captors and in the depiction by state authorities of those mobilising to help fugitive slaves as 'traitors'" (Allsopp, 2017).

Jalušič (2019) in addressing the underlying reasons for this most recent trend of criminalising 'pro-immigrant' initiatives in the EU, looks first at the concept of crimmigration, that is, the merging of criminal and immigration procedures and corresponding policies, whereby "criminal law is conflated with migration management to the point where they become indistinct" (ibid:107). Jalušič identified four main steps in the process of criminalising migration, which are contained in crimmigration literature. These steps include: the discursive creation of migrants as criminal suspects; legally defining those who enter a state

without permission as ‘illegals’ or ‘non-persons’; linking supposed increases in crime rates with increased immigration (even where there is a lack of evidence for same) so that migrants as a whole are constructed as ‘criminal migrants’; and the introduction of control policies over the entire population including criminalising not just human smuggling but also acts of solidarity. Jalušič has also noted that with the criminalisation of humanitarian assistance as entailed in the Facilitator’s Package, the citizen’s right to assist those in need of humanitarian aid, as a key function of democracy, has been jeopardised.

Lastly, Jalušič elaborates on the idea of a “continuum of the criminalisation of the organised and independent provision of assistance to (“irregular”) migrants” (ibid:118). This continuum occurs in five stages. The first stage is the discursive criminalisation, which involves public incrimination of NGOs through political and media discourses wherein NGOs are linked to criminals and smugglers and are accused of being ‘pull factors’ and traitors. Secondly, bureaucratic tightening of the space for civic action means that organisations and volunteers are required to register, cooperate, inform authorities and have a duty to report certain occurrences, along with obstruction of their work. Thirdly, banning of access and prohibition of monitoring means that many NGOs are no longer granted access to ‘hotspots’ or zones of entry. Fourthly, the labelling of NGOs and volunteers as ‘dangerous’ and the fifth stage is the direct criminalisation of assistance as provided for in national legislation.

Carrera et al., (2018)(a) in addressing the notion of ‘policing the mobility society’, have analysed the effects of criminalisation on civil society, particularly those organisations which go beyond providing humanitarian assistance and also engage in critical monitoring of states and/or seek to politically mobilise on behalf of migrants. The authors note that policing goes beyond traditional surveillance, prevention or traditional criminal law or other pre-emptive criminal law-like approaches, and cases of criminal prosecution and sentencing before competent courts. Instead, according to these authors “it refers to the wider set of practices and policies employed by the EU and member states which impact (directly or indirectly) CSAs activities and are aimed at (or have the effect of) limiting: dissent, monitoring, judicial litigation or political mobilisation against anti-human smuggling policies” (ibid:239). Policing can be said to encompass three ‘faces’ or stages, namely: suspicion/intimidation; disciplining; and criminalisation.

Allsopp (2017) identified the various ways in which civil society has responded to the increased monitoring and attacks on their operations. She noted that whilst some NGOs have chosen to leave the humanitarian field, others have chosen to try to continue operating within the restricted space, but operate in a very controlled manner so as not to jeopardise their funding. Whilst increased scrutiny has led to the “silencing” of some actors, others have become very vocal, “framing their work as an immanent critique of national or European values or in extreme cases, as civil disobedience against unjust laws” (ibid:15-16). She highlighted as well that “some civil society groups have suggested that in increasing their scrutiny of NGOs, certain government and EU actors are trying to distract attention away

from policy failures and find a common ‘scapegoat’” (ibid:17). Additionally, “the more political mobilisation is associated with the humanitarian assistance provided to migrants, the more authorities police and seek to discipline a group’s operations” (ibid:22). Lastly, Allsopp has observed that the nature and work of civil society groups in the EU changed during the refugee crisis in that the space for providing support to migrants and refugees expanded to include more informal and loose networks which are increasingly connected across borders.

Carrera et al, (2016), writing as a result of a study commissioned by the European Parliament, sought to examine the on-the-ground effects of the implementation of the Facilitator’s Package on migrants and those providing services to migrants. The study, subsequent to an analysis of statistics and court cases involving criminalisation of facilitation and humanitarian assistance, ultimately concluded that qualitative and quantitative data on the prosecution and conviction rates of those acting in solidarity is lacking at the national and EU level.

In direct opposition to the study conducted by Carrera et al (2016), are the findings of a report compiled by the Institute of Race Relations (UK) (Fekete et al., 2017). This report suggests that there have in fact been multiple examples of cases demonstrating the criminalisation of humanitarian assistance across the EU. The report highlights 26 cases studies involving 45 individuals, which all involve humanitarian actors prosecuted under anti-smuggling and/or immigration laws since September 2015. Moreover, the report stated that: “cases have not only been brought against left-wing politicians and No Border activists, but also against academics, journalists, interpreters, students, a former Children’s Ombudsman and her husband and the retired” (ibid:4). Finally, the report has also provided a timeline of the EU and its Member States’ activities and policies as it relates to the global crisis of displacement and it is asserted that the timeline establishes a link between these prosecutions and the EU’s downgrading of the humanitarian mission in the Mediterranean.

Throughout this study, having analysed the various ways in which SAR NGOs have been criminalised for their actions in ‘facilitating entry’ into Italy and Greece, I highlight how the various categories of criminalisation as identified by Jalušič and Carrera et al, have in fact been manifested, since the actions taken against SAR NGOs runs the gamut from discursive acts including labelling as dangerous, inciting intimidation and suspicion, tightening of the civic space, disciplining and direct criminalisation.

3.2 Lawfare

The literature reveals that there is no standard definition of lawfare. Some have chosen to define it in military terms⁴ focusing on its use to accomplish military objectives and thereby focusing on its use as an actual ‘weapon’; thus, Tiefenbrun (2010: 29) defined it as, “a weapon

⁴ Gordon (2014) citing Major General Charles Dunlap, noted that Dunlap defined lawfare as a “strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective...law in this context is much the same as a weapon”.

designed to destroy the enemy by using, misusing and abusing the legal system and the media in order to raise a public outcry against that enemy”. Handmaker (2019:9-10) defines it as “the illegitimate/hegemonic use of law by state and/or corporate bodies to suppress claims and to persecute individual advocates and NGOs”, whilst Goldstein (2013) defined it as “the abuse of Western laws and judicial systems to achieve strategic military or political ends”.

In addressing the confusion which these varying definitions may tend to bring, Werner (2010:62) notes that “the meanings of terms such as ‘lawfare’ are not set in stone, but rather evolve through their use in different social practices”. Werner also noted the importance of not just seeking a single meaning but rather comparing the varied meanings of the concept so as to explore the different contexts in which it is used and the distinct ways in which it has been framed in these contexts. Within this debate is Werner’s statement (2010:71) that “meaning is not pre-given but produced and reproduced in specific social contexts”. As such, the meaning which I believe is most apt for this current research is that utilised by Goldstein (2013, no pagination) where he notes that as a practice, lawfare entails “the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted”; in this case, the concept of lawfare is clearly illustrated through the use of national legislation meant to criminalise and penalise smugglers instead being wielded against those undertaking SAR efforts.

Yet another instructive concept highlighted in the literature is that of social lawfare. Social lawfare has been defined as “diverse strategies in which rights and legal institutions are adopted intentionally and strategically with the aim of helping to deliver, or at least catalyse, social transformation” (Gloppen and St Clair: 2012:171), which is also tied to the fact that lawfare may lead to changes in discourses and ideas (ibid:181). In said piece the authors also stressed the fact that the law is “the new politics in the sense that the legal field is expanding in social and political significance” (ibid:172).

Finally, Gordon (2014), in dealing with the manner in which the promotion of human rights protections are increasingly being viewed as a security threat (the securitisation of human rights), has addressed the ways in which lawfare has moved beyond simply describing phenomena, and how it can also operate as a “speech act”⁵. The author notes that in describing lawfare as a speech act, the thinking underpinning such an assertion is that “saying something can produce certain consequential effects upon the feelings, thoughts or actions of the audience...and it may be done with the design, intention or purpose of producing them” (Gordon 2014:317). Thus, I contend that where specific words are used by government actors when describing the actions of those carrying out SAR activities, such as ‘pull factor’ or ‘taxi service’, so as to produce certain feelings in the wider public, this ‘speech act’ would constitute a form of lawfare. However, in order for this securitisation to be successfully executed, one notes that the following must be present: firstly, the securitising actors must utilise speech acts to designate a particular issue as an existential threat; secondly,

⁵ A speech act is an utterance considered as an action, particularly with regard to its intention, purpose, or effect.

the threat is framed in a way whereby it would require emergency intervention or special measures; and thirdly, this then creates legitimacy for demanding the right to govern actions by breaking free of rules and creating new priorities (ibid).

Thus, Gordon notes that lawfare has become the framework through which human rights promotion in liberal democracies is being securitised (ibid:312), as different securitising actors, including policy makers and legislators, mobilise the media, shape public opinion, lobby legislators and introduce laws that engender the limitation of human rights work (ibid:311). Furthermore, he makes mention of a ‘societal securitisation’ whereby the ‘universal human’ is increasingly viewed as the enemy and is promoted as such by neoconservative groups and the government; thus, those which human rights would dictate should be protected are instead made to be the “constitutive outsiders” who are pitted against the “ethnonational we” promoted by the government. Due to the fact that liberal human rights organisations (or in this case those undertaking SAR) support a universal notion of human rights, they are seen as aiding the enemy because their actions undermine the interests of the ethnonational group (ibid:338), and in these circumstances, it then becomes acceptable to subordinate human rights to the nation’s security agenda.

For the purposes of this research I align myself with the views expressed by Gordon in particular as I believe the criminalising actions taken against SAR NGOs in Italy and Greece are not only manifest through direct criminal charges/prosecutions, but are also inextricably linked to the goal of vilifying them in public discourse, in pursuit of a securitisation agenda. Furthermore, one also notes a clear societal securitisation in operation in both Italy and Greece, as attempts are made to frame migrants as the ‘enemy’ as opposed to human beings deserving of rights, not only by right-wing groups and populists, but also by mainstream media and political parties, in an attempt to gain political leverage.

3.3 Legal Mobilisation

As noted by Black (1973:126), “Without mobilisation of the law, a legal control system lies out of touch with the human problems it is designed to oversee. Mobilisation is the link between the law and the people served or controlled by the law”. Mobilisation, in general, refers to strategic actions undertaken by individuals and/or groups in order to engender or resist change in a particular policy area (Cichowski, 2011:80), and legal mobilisation in particular has been defined as “involving the strategic use of law by civic actors to advance human rights, social justice and especially equality as a legitimate political claim” (Handmaker, 2019:11). Legal mobilisation therefore encompasses the legitimate use of law as a means of buttressing one’s political claims (ibid:9). It has been highlighted that without continued mobilisation the law would lose its deterrent power, thus, legal mobilisation becomes the moral obligation of every citizen whose rights are infringed (Black, 1973:127).

To better understand the role and functions of legal mobilisation, a good starting point would be the assertion raised by Jacquot and Vitale (2014:600), that law can be framed as a weapon of the weak, and can be wielded as both a shield (to protect persons from abuse) and as a sword (by those intent on persecuting others) (Abel 1995). Legal mobilisation allows an individual/group to operationalise the law as a form of counter power (enabling one to use the law to fight back) and can even have the added benefit of transforming marginalised groups into political powers (Handmaker 2019). Law can and should be mobilised by both individuals and groups and as concerns the role of NGOs in legal mobilisation, one notes they can act in various capacities, for example, representing an individual in a claim brought before a court or by providing support for litigation through the production of specialised reports (Cichowski, 2011). Oftentimes civil society plays a crucial role in not just educating vulnerable populations about their rights but also in providing marginalised individuals with the necessary resources to undertake legal mobilisation, thus it is important to analyse the role that civil society plays in initiating legal mobilisation (Gleeson, 2009).

There is also an assumption that through litigation, a court's pronouncement on an issue can lead not just to clarification but also to expansion and creation of rules and procedures necessary for systems of governance (Cichowski, 2011:81). Despite the possible effectiveness of legal mobilisation, it is important to nonetheless note that legal mobilisation does not inherently empower or disempower citizens, particularly since the given impact of law often depends on the changing dynamics of the context in which the law is being applied (McCann, 2006:19). However, an important function of legal mobilisation is the resulting increase in consciousness of one's rights that it engenders (ibid:34).

Vanhala (2018), in addressing some of the factors which influence an organisation/group's decision-making as to whether to mobilise the law, notes that framing processes are also very important since this is the process by which issues are regarded as 'problems' and through these framing processes decisions are also taken as to the most appropriate forms of action (ibid:397). She notes that the framing of the relationship between civil society and the government can have a major impact on whether or not civil society takes a decision to engage in legal action against the state (ibid:400).

Whilst broad institutional theories are useful, the author also stresses on the importance of recognising the role (and agency) of individuals within an organisation in promoting the use of certain strategies such as legal mobilisation. These persons she has labelled 'strategy entrepreneurs' (ibid:398) and are thought to encompass the combined effect and/or role played by norm entrepreneurs (those who advocate for a particular type of behaviour in the hope of it leading to norm emergence or norm change); epistemic communities (knowledge-based experts in a given field who are able to diffuse ideas and develop particular strategies); and cause lawyers (who, as the name suggests, are lawyers working to advance a particular cause) (ibid).

There is no limit on the type of groups/organisations that can engage in legal mobilisation as Cichowski (2011:85) notes in referring to cases brought before the ECtHR. Moreover, one notices the increase in transnational advocacy networks (TANs) which may comprise domestic and international NGOs, national human rights institutions and epistemic communities (Anagnostou, 2010: 736). These TANs are able to frame issues, interpret particular social conflicts and establish broader campaigns or strategies, along with strategies of “shaming” governments into action (ibid), which though whilst not legal, can be effectively coupled with legal strategies. Thus, there is benefit to be had in combining strategic litigation with other forms of mobilisation.

One should not think that legal mobilisation always results in positive effects particularly for the weak, as there are occasions where the opening of new legal opportunity structures can sometimes further empower the already powerful, as opposed to aiding the marginalised (Vanhala, 2018:382). This may perhaps explain the reluctance that is often widespread, particularly since as noted by Black (1973:141), “In theory the law is available to all. In fact, the availability of law is in every legal system greater for the citizenry of higher social status, while the imposition of law tends to be reserved for those at the bottom”. Moreover, one must be mindful that legal mobilisation can possibly work as a setback towards a cause, particularly where a case has failed before the courts, and this failure is then coopted and becomes the focus of counter movements (McCann, 2006:32).

Perhaps most significantly, one needs to always bear in mind that context always shapes the socio-cultural possibilities for legal mobilisation (Handmaker, 2018). Additionally, a court’s decision is rendered in particular socially bounded contexts and as such their decisions may be delimited by prevailing social values (Anagnostou, 2010:725). Finally, in as much as sustained or repeated legal action may well garner increased support and advance mobilisation efforts, oftentimes what has been observed is that one still needs allies, within national institutions which are responsible for implementation of any court decisions, who are also influential enough to initiate change (ibid:737).

I would wish to now address the specific issue of legal mobilisation in the context of the ECtHR and the European Convention on Human Rights. Anagnostou (2010:735) notes that European human rights case law matters more in specific areas of law and policy, so, for example, as it relates to rights claims dealing with progressive social values (such as sexual minority rights) these are more widely upheld as opposed to matters which are deemed to be pertaining to issues of state security and national sovereignty (under which migration matters tend to fall). Additionally, the author has observed several preconditions which should be met in order to boost the influence of the Court’s case law. These include: repeat litigation and legal mobilisation by civil society; support by political and other influential elites; and advocacy by human rights organisations capable of exerting pressure and linking Court rulings to policy issues and reforms (ibid:738). The Court has ruled both in favour of and against individuals (ibid:723), and its judgments have been used as a point of reference by

national human rights institutions. It has also served as a venue for the engagement of strategic litigation by minorities (ibid:731).

A major downfall of the Court thus far is the Court's reluctance to pronounce on broader issues, laws and institutional structures linked to the case before it; thus, the judgment may be confined to the specific conditions of a case, which decreases its implications for broader legislative and policy changes (ibid:724). Lastly, one must be mindful that inasmuch as the Court may seek to take a liberal approach to some matters, there may nonetheless be need for support from legislative and executive officials at the national level, since courts are neither legislatures nor executive bodies (ibid:735).

Whilst this discussion has focused on the legal aspects of mobilisation, it would be remiss to not highlight that rights are oftentimes accessed outside of the legal (court) system and in those instances, such acts of social mobilisation can bring added publicity and awareness to ongoing legal mobilisation campaigns, or they may stand on their own in bringing about policy changes. Particularly given the increasing prominence and vocal nature of several INGOs, for example, MSF, HRW, Amnesty International, one cannot discount the significance of such campaigns of social mobilisation. However, in order to better understand why persons or groups may choose to mobilise the law, one must also be cognisant of the fact that there are occasions when other forms of (social) mobilisation, such as lobbying, advocacy and engaging in demonstrations, are not as effective on their own and therefore need to be combined with a legal approach.

Strategic litigation is litigation undertaken with the goal of achieving broader societal changes/reforms. It actively seeks to effect significant changes in law, practice and public awareness (Scott, 2015). It is considered to be different from normal litigation in that it seeks to combine legal tactics with other tactics so as to bring about changes in public and political opinions (Lesinska, 2019). Thus, it may result, for example, in one combining litigation strategies with advocacy and communication strategies, including improved public relations and targeted media campaigns (PICUM, 2017). One of the clearly identified strengths of strategic litigation as stated by Scott (2015), is its "ability to incrementally develop the law against real-life scenarios" and the fact that it often entails the identification of legal arguments that go beyond the perceived limitations of existing legal stock (ibid:48). Some of the key elements of effective strategic litigation include the ongoing cooperation among different actors (legal and non-legal, for example, researchers, knowledge-based experts, in addition to NGO staff and grassroots campaigners) and adequate financial support (Lesinska, 2019).

It is my contention that the increasing recourse to strategic litigation in the face of these increased acts of criminalisation, bears out the importance of the need to combine both legal and non-legal strategies. Such strategies illustrate how civil society has in fact begun to operationalise law as a form of counter power (Handmaker), whilst also seizing the impact that concerted and targeted media strategies and public advocacy can have on changing

public opinion. Nonetheless, I do also believe, as noted by Anagnostou, that context and prevailing social values can greatly impact Court decisions, and as such, whilst strategic litigation has its role to play, it should not be relied upon as the sole means of mobilising to bring about needed changes.

Finally, whilst numerous articles have been written illustrating the various ways in which humanitarian actors are being ‘policed’ or criminalised, the consequences of same, and invariably assessing the multiple rationales for the contemporary practice of criminalising humanitarian aid, there is, however, a lack of academic writing addressing the various ways in which civil society can and has responded to these acts of criminalisation. Allsopp (2017:3) went so far as to note that the “phenomenon of European citizen mobilisation [in response to criminalisation]” is not only “relatively new [but also] poorly studied”. I would therefore contend that my research, insofar as it seeks to highlight civil society mobilisation generally, and legal mobilisation in particular, will provide needed data moving forward, given the ongoing trend of criminalisation.

Having established my analytical framework, I will now analyse the findings with respect to my three identified sub-questions.

Chapter 4 : ‘Why’ do SAR actors do what they do and ‘What’ is the result?

In this chapter I develop arguments in relation to sub-questions 1 and 2:

- *How have humanitarian actors conceptualised and justified direct humanitarian protection for migrants in the Mediterranean?*
- *How has the criminalisation of facilitating entry been directed against humanitarian actors, and how can this be conceptualised?*

In so doing, I look at the explanations put forward by humanitarian actors as purported justification for their continuation of SAR activity in the Mediterranean Sea, despite governmental actions aimed at criminalisation. Additionally, I analyse how this criminalisation has been effected, namely, the various ways in which it has been manifested and how such actions can be conceptualised.

4.1 Justifying Humanitarian Protection for Migrants

I argue that SAR activity is legally justified in international law, which has indeed been a primary basis for SAR humanitarian actors’ interventions in the Mediterranean. In the absence of states fulfilling their duties with respect to the international protection regime, an implied obligation of sorts has now developed on the part of NGOs and volunteers carrying out SAR activities. Additionally, I contend that humanitarian actors have also found moral justification for their actions in a revised conceptualisation of solidarity; one that views true solidarity as making unpopular decisions, becoming far more political and requiring a more radical activism. It is within this context that these non-state actors would be seeking to frame their actions as necessary and legitimate.

This argument was confirmed by all interviewees, with some even going as far to note that SAR should actually be legally protected since it concerns persons’ right to seek refuge and prevents violation of the principle of non-refoulement. Some of the specific sentiments expressed during the interviews I conducted included the ideas that:

Governments should bear the responsibility for SAR but since they are not taking up their responsibility, it then falls to NGOs. However, NGOs should just be filling in the gaps when it comes to SAR (Wies Maas, International Programme Coordinator, Dutch Council for Refugees).

The replacement of Operation Mare Nostrum with Operation Triton led to an operational gap and civil society was forced to fill this gap. (Lina Vosyliute, Research Fellow, Centre for European Policy Studies).

Even the Facilitator's Package itself creates an option for a humanitarian exemption, which supports the idea and assertion that such actions are legal (Carmine Conte, Legal Policy Analyst, Migration Policy Group).

Given this ongoing state inaction, civil society has stepped in to fill this void.

“We are at sea because there are people who are forced to make the crossing without a legal system that can guarantee their safety. We are filling an institutional void and we respond to a humanitarian duty”. (Marco Bertotto, MSF cited in Maccanico et al, 2018:7)

Finally, one interviewee in confirming civil society's ongoing justification for engaging in humanitarian protection in the Mediterranean noted that:

It is absurd, even unthinkable, that we have to discuss the criminalisation of humanitarian assistance since there is a duty to rescue at sea enshrined in international law (Elena Fontanari, Post-Doctoral Researcher, University of Milan).

The duty to rescue persons in distress at sea is not just a foundational principle of international law but has been codified in treaties and through historic application (Papanicolopulu, 2016). This duty to rescue persons in distress at sea can be found in Article 98 of the UN Convention of the Law of the Seas (UNCLOS) (1982), which creates a duty to render assistance, so that the master of any ship - be it a humanitarian ship, fishing boat, commercial ship or even State operated SAR vessel – is obliged to render assistance to anyone found in danger at sea, insofar as doing so would not place his ship, passengers or crew in any serious danger (Human Rights at Sea, 2019). Article 98 also obliges coastal states to establish and maintain adequate SAR services, including through regional cooperation if necessary (ibid). Additionally, the duty to rescue persons in distress at sea can also be found in other international conventions including the International Convention for the Safety of Life at Sea (1974); the International Convention on Salvage (1989); and the International Convention on Maritime Search and Rescue (1979). Significantly, this duty to rescue must be adhered to without discrimination as to persons' race, nationality, age, gender, immigration status or any other characteristic.

Furthermore, even within national laws there are provisions mandating rescue for those in distress at sea. For example, the Italian Code of Navigation mandates that the captain of a ship provide assistance to persons in distress at sea. Art 1158 of the Code states that those failing to provide assistance or attempting to rescue, shall be punished with imprisonment for up to 2 years.

As concerns the policy of disembarkation of those rescued at sea, however, while there is no explicit duty placed upon states to allow for disembarkation on their shores, a recently released report of the UN Independent Expert on Human Rights and International Solidarity notes that, “the international treaties could not have established the obligation to rescue

persons in distress at sea without contemplating an implied requirement that such persons be allowed to disembark in as nearby a port as is practicable” (Human Rights at Sea, 2019:3). Whilst it has been acknowledged that international maritime law does not create specific rules with respect to disembarkation, the State responsible for the SAR region in which a rescue took place would normally be responsible for ensuring that survivors are disembarked at a place of safety. Place of safety is also not defined within international law, however, the International Maritime Organisation (IMO) in its 2004 Rescue Guidelines has indicated that a place of safety is a place: “where the survivors’ safety of life is no longer threatened; where their basic human needs can be met; and from which transportation arrangements can be made for the survivors’ next or final destination”.

It had been highlighted by one of my interviewees, that:

While SAR activity is legally justifiable, bringing migrants to a particular port, in direct contradiction of the directions of national authorities, may not always be viewed as legally justifiable (Lorenzo Durante, Intercultural mediator and researcher).

Such arguments have been utilised by those wishing to limit SAR NGOs’ actions. However, in countering such a position one should note the arguments raised by the UN Independent Expert on Human Rights and International Solidarity, who argued that international law instruments would not have created a duty to rescue without an implied correlating right to disembark those so rescued, at a place of safety (Human Rights at Sea, 2019:3).

As concerns NGOs’ arguments that their SAR activities help prevent the refoulement of those fleeing Libya, it should be noted that in the 2012 case of *Hirsi Jamaa et al vs Italy*, the ECtHR found that returning people to places where they will be tortured or suffer inhuman and degrading treatment is a human rights violation (Maccanico et al 2018: 10).

In these circumstances, legal mobilisation as a form of counter power (Handmaker 2019) can be seen as a necessary engagement by humanitarian actors, particularly in the absence of State action with respect to the execution of their duties/obligations under the international protection regime. In other words, justification for humanitarian protection for migrants in the Mediterranean, as confirmed by my interviewees, is based on the operation of principles of international law (both as it relates to the duty to rescue and to universal human rights law) and justified on the basis of social norms. Recognition of the universal nature of human rights would mean that value is placed on all lives (without distinction as to race or origin) so that one’s right to seek asylum, right to non refoulement, right to a decent standard of living and right to life would be held sacrosanct. Whilst governments may not have readily embraced such a justification for humanitarian action, the existence of these principles cannot be denied, and as humanitarians mobilise the existing international laws in their favour they find justification for their actions, which I would also argue is borne out by the fact that the trials which have been held for those criminalised, have almost always ended in acquittals.

As noted by one of my interviewees:

Whilst the level of persecution of SAR actors through prosecution is worrying, thankfully the Italian Judiciary has always acquitted these persons (Lorenzo Durante)

Yet another justification for humanitarian action in the Mediterranean can be found in literature which looks at the manner in which humanitarianism has been transformed. Garelli and Tazzioli (2019:no pagination) note that, “events in the Mediterranean have transformed the politics of humanitarianism; causing it to drift away from its traditional political neutrality, towards a more radical activism”. The authors further argued that present humanitarian action in the Mediterranean can be viewed as an “active way of taking sides against Europe’s harsh politics of migration containment and against the unequal access to mobility” (ibid). Barnett (2005:727) also notes that the “fast-growing human rights movement pulled humanitarianism from the margins toward the center of the international policy agenda”, which I would also argue supports the idea of humanitarians legally mobilising in these present times and also supports the arguments of Allsopp (2017) as identified earlier in my analytical framework, whereby civil society actors have framed their work as an immanent critique of national or European values.

Additionally, Barnett notes (2005:731) that, “humanitarian organisations see themselves as agents of humanity that operate with moral authority”, as opposed to being agents of a state operating with delegated authority. Finally, it has also been argued that, “the notion of solidarity might serve as a radical alternative to humanitarianism’s core principles of neutrality and impartiality” (Vandevoordt 2019:246; Scott-Smith (2016)). Citing the example of Sea-Watch, a SAR NGO started subsequent to the 2015 ‘refugee crisis’ and which presently engages in SAR, Vandevoordt (2019) notes that from its inception Sea-Watch expressed a clear political vision, noting that the loss of lives at sea was partly attributable to EU decision-making.

Thus, one notes there is a clear legal and moral justification expressed by humanitarian actors for their actions in the Mediterranean. Whilst this justification undeniably exists, there is nevertheless an equally undeniable wave of ongoing criminalisation for the facilitation of entry as a result of SAR, which will now be addressed.

4.2 Criminalising Assistance to Migrants as a Form of Lawfare

According to a monitoring exercise carried out by the ReSOMA platform, between 2015 and 2019, there were “at least 158 individuals who were investigated or formally prosecuted, and of this group, 83 individuals were exclusively investigated or prosecuted on grounds of facilitating the entry or transit of migrants” (Vosyliute and Conte 2019:25). Since the ‘refugee crisis’ of 2015, there has been a significant increase in the number of judicial prosecutions

and investigations, despite the fact that there has been nearly a 90% decrease of irregular arrivals to the EU in 2018 (ibid:31).

In terms of conceptualising this criminalisation, I would contend that these actions can most aptly be conceptualised as forms of lawfare. As noted previously, Tiefenbrun (2010:29) defined lawfare as, “a weapon designed to destroy the enemy by using, misusing and abusing the legal system and the media in order to raise a public outcry against that enemy”. Moreso in Italy than Greece, there has been ongoing negative publicity generated in the media against SAR NGOs, which had the effect of lowering public support and empathy for their cause and also the practical consequence of leading to a decrease in private sector funding.

Lawfare also entails “the negative manipulation of international and national human rights laws to accomplish purposes other than, or contrary to, those for which they were originally enacted” (Goldstein 2013). As noted by attorney Paula Schmid Porras, attorney for the PROEM-AID volunteers, “They’re using laws intended for international criminal organisations that are earning money from trafficking, smuggling, prostitution and slavery to prosecute humanitarian workers and volunteers who are just trying to save lives”. (Open Democracy, 2019).

It should be noted that criminalisation of the facilitation of entry took various forms, in keeping with the continuum of criminalisation identified by Jalušič (2019). Thus, there were several instances of discursive criminalisation. As noted by some authors, “particularly in pre-election periods, ‘fake news’ and conspiracies about humanitarian actors have been spread as well as accompanying outbursts of hate-speech and xenophobic rhetoric towards migrants and those who assist them” (Carrera et al, 2018: 22).

A major incident also revolved around the publication, in December 2016, of a leaked Frontex report by the UK Financial Times. The Frontex report had highlighted ‘concerns’ about alleged interactions between SAR NGOs and smugglers operating in Libya, however, the Financial Times article referred to ‘collusion’ between NGOs and smugglers, with said term being subsequently coopted by an Italian Prosecutor in Catania who publicly accused NGOs of criminal activity (Carrera et al, 2019). This particular incident also simultaneously illustrated another of the identified steps along the continuum, that being the labelling of NGOs and volunteers as dangerous. Note, even though the Catania Prosecutor subsequently admitted there was no solid proof behind the claims he had been making (pursuant to the leaked Frontex report), and no NGO was ever charged in this regard, the public defamation which resulted would have greatly affected NGOs. It is noted that the accusations made coincided with a period wherein Italians would decide upon which charities to invest in from monies collected through their tax returns, and NGOs engaging in SAR reported a significant decrease in financial support (ibid).

Examples of discursive criminalisation are rife and were also identified by interviewees:

In Italy, right wing parties developed hegemonic positions with respect to migration debates. Essentially there was a shift in the debates so that legal arguments including basic rights under UNCLOS and the Refugee Convention were completely destroyed in TV debates. Use of words such as, “invasion” and conspiracy theories that NGOs and leftist groups wanted migrants in Italy in order to replace locals instead became popular. Politicians and prosecutors also used term ‘taxis’ and made references to NGOs being in collusion with smugglers. (Giovanni Fassina, Italian lawyer and activist).

When Frontex released their risk analysis they also placed a veil of suspicion on humanitarian actors with the undertone that civil society rescued too many too quickly (Lina Vosyliute).

There were several highlighted instances of the intentional use of the media as a means of ‘scapegoating’ NGOs, and references were also made to the use of social media platforms by government officials and other entities, including right-wing politicians, so as to turn public support against SAR NGOs:

The use of social media and social media communication changed everything. Because of how social media works, it’s much easier to carry out their campaigns; their messages are easily understood by all - that migrants came to steal their jobs, their women etc. (Giovanni Fassina).

Yet another stage of the criminalisation continuum, that of the tightening of space for civic action, was illustrated by the Hellenic Coast Guard, which introduced a vetting procedure for SAR NGOs in order to establish they met certain minimum standards (Carrera et al, 2019). Furthermore, suggestions for further tightening of the space for civic action were made in February 2017, when Frontex released its Annual Risk Analysis Report, which seemed to suggest that NGOs were acting as a ‘pull factor’ and thereby encouraging migration, with further assertions that such NGO activity needed to be more greatly controlled by the EU if there was to be a reduction in the flow of migration from Libya (ibid). Additionally, between April and May 2017, the Italian Senate Defence Committee issued non-binding recommendations to the government which advocated implementing compulsory registration and background checks for organisations engaging in SAR (Maccanico et al, 2018:19-20).

Perhaps the most flagrant illustration of the tightening of action space, along with the further identified stage of banning of access, was seen with the advent of the “Code of Conduct for NGOs involved in migrant rescue at sea” instituted in July 2017 by the Italian government. All NGOs were required to sign the Code if they wished to continue engaging in SAR activity in the Mediterranean. The Code of Conduct sought to limit/circumscribe NGO conduct and mandated allowing the presence of law enforcement personnel (e.g. police officers or military personnel) aboard ships, and the transmission of surveillance data about SAR missions, in addition to other requirements, many of which would incidentally run counter to humanitarian principles. Certain NGOs refused to sign the Code and therefore had to stop all SAR activity (e.g. MSF, Save the Children and Sea Eye), whilst some signed but

subsequently greatly decreased their SAR activity, or redeployed their vessel to other areas, for example, MOAS signed but later indicated that their vessel would instead move to conduct SAR in Asia.

Banning of access is also illustrated through the seizure of NGO equipment and vessels, for example, the ship *Iuventa*, the vessel belonging to the German NGO, Jugend Rettet, which was seized in August 2017 and remains impounded presently. This seizure of vessels essentially restricts the NGO's ability to engage in SAR and therefore prohibits access.

Carrera et al (2018(a)), in addressing the notion of the 'policing of the mobility society', had also identified three stages of policing: suspicion/intimidation; disciplining; and criminalisation. The stage of suspicion/intimidation was verified by several interviewees:

These state actions also negatively affect the trust between civil society and the public/general society. For example, in Italy, there has been a drop in the level of trust for NGOs and civil society is looked at with suspicion and there is also suspicion generated around NGOs funding sources (Lina Vosyliute).

General feeling was that if the NGOs had to be monitored with the Code of Conduct, then they must be doing something bad (Giovanni Fassina).

The final stage along Jalušič's continuum and Carrera et al.'s policing of the mobility society, that of direct criminalisation of assistance, has also occurred quite frequently. Thus, the actions of the Italian government in charging captains of SAR vessels, for example, Pia Klemp and Carola Rackete (as identified in my Introductory chapter) have both made headlines and have yet to be determined.

Another significant case of direct criminalisation, this time occurring in Greece, concerned that of three (3) PROEM-AID (Spanish organisation of firefighters and lifeguards) volunteers and two (2) Team Humanity (Danish humanitarian organisation) workers who were accused of facilitating migrant smuggling in January 2016. The volunteers had been accused by the Hellenic Coast Guard of having smuggled migrants by towing a sinking boat from Turkish waters into the Greek zone, however, the alleged day when this activity took place, they had not saved anyone. The Judge in their case accused them of using "rescue as a pretext" to pursue smuggling (Conte and Binder, 2019). Despite a long and arduous trial process they were eventually acquitted in May 2018.

In another case, Sarah Mardini and Sean Binder, volunteers with the Emergency Response Centre International (ERCI), were charged with multiple offences including espionage, assisting human smuggling networks, membership of a criminal organisation and money laundering, for incidents allegedly occurring while at sea. They were accused of joining ERCI, which has been described in the prosecution as a criminal organisation, and facilitating

movement of refugees from Turkey into Greece (Lesvos and Samos). This case remains ongoing.

Both support and opposition for the conceptualisation of these acts as lawfare were held by interviewees. One interviewee in particular felt that criminalisation was not initially at least, contemplated by EU governments:

I don't believe there was an initial intention to use these laws to marginalise particular groups. In this particular context however, due to the gaps in law created by the Facilitator's Package, governments have been able to undermine the work of civil society (Carmine Conte).

However, the contention that such acts can be viewed as lawfare did find support with another interviewee:

As I understand lawfare, it is not only about using existing laws/legal norms but also creating a new body of legislation which is completely detached from human rights protection and is only based on security. If lawfare is framed in this way, then yes, the actions currently employed against SAR NGOs in Italy can be classed as lawfare. Because for example, a certain prosecutor in Italy started investigating NGOs and he was saying that he needed more power because he didn't have the right 'tools'. Former Interior Minister Matteo Salvini created these 'tools' for them: namely Security Bis 1 & 2 (Giovanni Fassina).

In terms of better understanding these varying viewpoints, I was mindful of the positionality of these interviewees. Mr. Conte in his role as Legal Policy Analyst with MPG and also as a researcher with the ReSOMA platform, has had cause to engage on several occasions with representatives of the European Commission and consequently has been exposed to details concerning the Commission's functioning and rationale for their actions which others may not have, and which may help him develop a more open-minded outlook on the Commission's operations. However, such regular engagement may also colour his perception of EU and national level actors. Mr. Fassina on the other hand, as an activist, perhaps more instinctively would be more critical of the actions of EU and national level agencies. Notably, even though Mr. Conte acknowledged there may not have been an initial intention to use the Facilitator's Package as a means of criminalising humanitarians, he confirmed it has nonetheless, through its shortcomings, lent itself to such use in the way national laws (giving effect to the Facilitator's Package) have been developed and harnessed by individual governments.

Conceptualising these actions as lawfare, and governments' intentional aim in so doing can also be supported by analysing the EU's general policy of externalisation of migration control. As researcher Sara Prestianni (ARCI) noted in highlighting the shift in policy undertaken by the EU and how this has impacted subsequent campaigns of criminalisation,

“When they decided to externalise SAR [activities] to Libya, in some way NGOs had to be pushed back in the sea and the only way to do that was to create a kind of

criminalisation around them...One moment in 2016 when NGOs were considered something helping for an important action...one of the pillars of the Italian government, that was the SAR action, and they became in a few months the enemy and the people working with the traffickers, but they were always the same people. So, what really changed was the policy and the strategy, which decided to bring out NGOs from the sea and externalise SAR to the Libyan militia and coastguard” (Prestianni cited in Maccanico et al, 2018:8-9).

Having identified how the criminalisation of SAR can be conceptualised as lawfare, I will now move on to address civil society’s responses to this criminalisation, focusing on their attempts at legal mobilisation and the factors which have promoted or hindered this mobilisation.

Chapter 5 : The Opportunities and Pitfalls of Legal Mobilisation

In this chapter I develop my arguments further in reference to sub-question 3, namely: *what have been the challenges to and the potential for legal mobilisation by civil society against the criminalisation of facilitating entry subsequent to SAR?* In so doing I highlight the various ways in which civil society has sought to respond to the criminalisation of facilitating entry. Moreover, I analyse the varying factors which have both encouraged and stymied civil society's attempts at engaging in legal mobilisation in particular.

5.1 Challenges and Potential of Legal Mobilisation

It is my contention that unique situational contexts help determine both the challenges to and potential for legal mobilisation. Civil society has combined both legal and non-legal strategies in an attempt to mobilise against criminalisation and each of these strategies present unique hurdles and opportunities.

Duffy (2018:5) makes the important point that, “litigation is not an ideology: it is a tool. The extent of its impact or influence will invariably depend on how, where, when and perhaps by whom the tool is used”. Consequently, attention must be paid to the “unique situational, legal, cultural, institutional and other contexts in which cases arise” (ibid:7). The increased number of cases of criminalisation of humanitarian assistance have invariably led to an increase in litigation surrounding this matter before European courts (Lesinska 2019). Additionally, one notes that not only has civil society been involved in cases defending humanitarian actors, but they have also sought to initiate cases against states, as a form of strategic litigation.

5.1.1. Challenges to Legal Mobilisation

As concerns the challenges to legal mobilisation, one of the major challenges has been the fact that support for present actions by Italy and Greece can be found in the general EU policies of securitisation and externalisation of migration control prevailing today and the general feeling that criminalisation is impliedly supported by the EU. Support for such sentiments can be found within the research community: “I believe this refusal to change the Facilitation Directive...is deliberate [on the part of the European Commission]. I think they want to leave it there”. (Fekete cited in The New Humanitarian, Reidy 2019).

As noted by various interviewees:

There's almost a 'silent alliance' across and within the EU security framework relating to the securitisation of borders and those who seek refuge. Most criminalisation laws can be placed under the umbrella of securitisation (Meric Ozgunes, Liaison Officer, UNHCR Greece).

From an institutional point of view nobody is stepping back from the issue of cooperating with Libya and other general policies of externalisation, even though it is clear that supporting Libya means supporting the facilitation of serious crimes against migrants (Lucia Gennari, Attorney & Member of ASGI Italy).

Yet another challenge lies in the overwhelming lack of public trust for civil society and for SAR NGOs in particular, prevalent in both countries, which can arguably be linked to the increase in right-wing political parties' popularity (especially in Italy), and promotion of discourses inciting hate, xenophobia and discrimination. As noted previously, there have been deliberate attempts to engage in lawfare as 'speech acts' which has affected public opinion. Consequently, a distinct challenge which must be overcome is the changing of entrenched attitudes, which would require a clear media strategy and developing communication partnerships to change the discourse and public perception (Duffy 2018:235). Poor public opinion is also linked to other national level challenges to legal mobilisation, including attacks on judges who rule against the State⁶, and decreased funding by private donors.

With respect to Greece, resources are a major issue in the possible pursuit of strategic litigation, since sometimes there are good potential cases to pursue but lack of time and lack of resources prevent them from going forward (Eleni Takou, Head of Advocacy, Human Rights 360).

A further challenge is the current institutional structure of civil society organisations. As noted by an Italian activist I interviewed:

Many civil society groups in Italy lack long-term perspective. Many times campaigns are developed for 1-year max. Need complete change of strategy. Need to set up more structured organisations. Most political groups comprise volunteer staff – no one is paid. Movement needs to become more institutional and they need to set up long-term strategies, raise money to pay 2-4 people to work full-time because otherwise they won't be able to gain long-term leverage (Giovanni Fassina).

As noted by Duffy (2018:233), "strategic litigation is long-term and planning and investment must match this". Additionally, the author notes, "with strategic human rights litigation (SHRL), longer-term strategies are needed to enable movement towards the range of legal, political and social goals that may be pursued, the partners – and allies- that may be needed and the resources for the long-term commitment the enterprise entails" (ibid:235).

On the subject of civil society allies, one notes a further challenge, in that different NGOs hold different philosophies and views as to how the issue of criminalisation should be addressed.

⁶ Former Italian Interior Minister, Matteo Salvini, actively encouraged his supporters to attack judges on social media.

There are different existing views among civil society as to what should be the goal of mobilisation; some organisations are more activist, some more silent, some seen as cooperating with the EU or IOM (Lina Vosyliute).

Different NGOs have different identities and standpoints and it is not always easy to get these to converge (Lorenzo Durante).

Lastly, in terms of challenges to legal mobilisation, is the nature of the legal system itself. There is a general lack of certainty surrounding the legal process, particularly as it relates to SHRL against criminalisation. Thus, even where NGOs can devote the necessary resources, it is felt that legal processes take too long, can be emotionally draining, momentum may be lost in the interim, and border authorities can dispute the claims and present their own versions of events that nullify NGOs' claims (Topak 2019). Paradoxically, the success of SHRL has led to increased case filings before international courts, which in turn has increased the delays and overall length of time for the trial process (Duffy 2018). Moreover, there are concerns as to the willingness of courts (judges) to intervene in certain matters, so, as noted by Anagnostou (in my theoretical framework), the ECtHR has been more reluctant to rule against states in matters pertaining to issues of state security and national sovereignty (under which migration issues tend to fall).

5.1.2. Potential for Legal Mobilisation

In terms of the potential for legal mobilisation, however, one notes there is a current wave of litigation being engaged in, which seems to suggest that some of the uncertainty surrounding the legal process is being countered and civil society is becoming more comfortable engaging in legal mobilisation. It can therefore be argued, in keeping with McCann's contention (2006), that legal mobilisation is in fact serving the function of increasing persons' consciousness of their rights. Thus, one notes that Carola Rackete has filed defamation proceedings in the Italian courts against Former Italian Interior Minister, Matteo Salvini (Balmer 2019), and the Italian NGO Mediterranea has also filed a suit in the Italian courts against the Italian government based on a directive signed by former Minister Salvini (InfoMigrants, 2019).

Interviewees noted:

Organisations are careful to look for cases that can provide key jurisprudence. Usually cases they believe they have a strong chance of winning (Meric Ozgunes).

There will be many more cases being filed (at national, regional and international levels) in the coming years. The activity of European governments has been closely monitored by legal activists. Because of the atrocities carried out by the Italian government, there's a big team of people currently working on this. Likely to have more instances of strategic litigation soon (Giovanni Fassina).

Such sentiment is in fact demonstrated by civil society's filing of cases at the regional level, namely at the ECtHR, given the potentially far-reaching impact and reform they can possibly engender.

Case filed against Greece: (see Appendix III for further case details)

Case filed by Salam Kamal-Aldeen, 1 of the 5 volunteers who had been charged and prosecuted by Greece (PROEM-AID and Team Humanity). In April 2019, he filed a case against Greece before the ECtHR alleging illegality on the part of the Greek government by its crackdown and arbitrary prosecution of human rights defenders working to render assistance to persons in distress at sea Global Legal Action Network (GLAN, 2019).

According to GLAN legal advisor, Dr. Violeta Moreno-Lax (GLAN 2019:no pagination):

“The Strasbourg Court has now the opportunity to condemn the growing trend in Greece and Europe of criminalising solidarity. Rescue is not a crime; it is a binding duty under international law. Humanitarian assistance of persons in distress at sea should never be prosecuted. Attacking civil society constitutes an assault on the main values of democracy.”

Case filed against Italy: (see Appendix III for further case details)

Seventeen survivors of a fatal incident in which a boat carrying migrants found itself in distress off the coast of Libya, filed an application against Italy in May 2018, with the ECtHR. The application was filed by the GLAN and the Italian Association for Juridical Studies on Immigration (ASGI), with support from the Italian non-profit ARCI and Yale Law School's Lowenstein International Human Rights Clinic.

According to GLAN legal advisor Dr. Violeta Moreno-Lax:

“The Italian authorities are outsourcing to Libya what they are prohibited from doing themselves, flouting their human rights obligations. They are putting lives at risk and exposing migrants to extreme forms of ill-treatment by proxy, supporting and directing the action of the so-called Libyan Coast Guard” (GLAN, 2018).

These instances of legal mobilisation clearly illustrate how the law can be wielded as a shield (Abel 1995) and also operationalised as a form of counter power thereby transforming marginalised groups into political powers (Handmaker 2019).

Further potential is seen in the formation of specialised networks, which are actively engaging in SHRL and filing of cases at the international level. Of particular relevance is the GLAN, which has filed cases against both Italy and Greece on the issue of SAR policies and criminalisation, at the ECtHR. GLAN's website describes the network as:

“We are a team of lawyers who seek to break new ground on accountability for human rights abuses. Our work is guided by GLAN's Legal Action Committee, a

diverse and select team of experts drawn from legal practice, academia and investigative journalism. We mobilise legal research and expertise to develop cutting edge legal actions that push beyond the limits of conventional litigation and find new ways to use law for the protection of human rights internationally.” (GLAN, n.d.).

Such networks would overcome the hurdle of limited resources which often greatly impacts civil society’s decision-making on whether to engage in legal mobilisation (Jacquot and Vitale 2014), and may also be classified as a Transnational Advocacy Network (TAN) (Anagnostou, 2010), as noted in my analytical framework. Thus these TANs comprising domestic and international NGOs/institutions as well as epistemic communities, are able to frame the issues in a particular manner and establish broader campaigns of mobilisation.

Additionally, there has been concerted activity by lawyers, not necessarily engaged in formal networks, who nonetheless have been engaging in critical SHRL on the issue of criminalisation of humanitarian assistance and EU migration policies. Of note are the lawyers who recently filed a claim against the EU at the ICC.

Case filed before the ICC: (see Appendix III for further case details)

In June 2019, a case was filed against the EU at the ICC, by Juan Branco, who formerly worked at the ICC and Omer Shatz, an Israeli lawyer. The submission alleges that the EU has committed crimes against humanity, in contravention of Articles 5 & 7 of the Rome Statute of 1998. It is alleged that such crimes were committed (and omitted in the case of withholding SAR activities) from 2014 onwards, as part of a premeditated policy to curb migration flows from Africa to the EU. The attorneys argue that, “without the implementation of the EU’s policy of deterrence the crimes against the targeted population would not have ever occurred” and that furthermore, the accused was fully aware “of the lethal consequences of their conduct” (Branco and Shatz, 2019:para.10-15).

Also serving as potential has been lawyers’ actions in filing claims even outside of the courtroom setting. For example, in October 2016, Spanish lawyer, Paula Schmid Porras, presented a petition, pursuant to Article 227 of the Treaty on the Functioning of the European Union (TFEU)⁷ to the PETI Committee of the European Parliament (*Petition 1247/2016*). The petition is based on the PROEM-AID and Team Humanity case and her clients were the three Spanish lifeguards arrested together with Salam Aldeen. The petition calls for the European Parliament, the Commission, other institutions and Member States to “take steps to ensure that the Facilitation Directive is modified to require all Member States to exempt from criminal liability those humanitarian actors engaged with migrants in an irregular situation”. (Carrera et al, 2018:48).

⁷ Article 227 -“any citizen, acting individually or jointly with others, may at any time exercise his right of petition to the European Parliament”.

The role of non-legal partners, including parliamentarians, should also not be overlooked, as the European Parliament has not only called on the European Commission to clarify the Facilitator's Package and to prevent further criminalisation, but they have also taken the further step of adopting a resolution in July 2018, to end the criminalisation and punishment of humanitarian actors who assist migrants (Vosyliute and Conte 2019:15,35). Duffy (2018:268) also advocates the formation of partnerships with parliamentarians since their support will be needed for legislative reform.

Moreover, there has been a noted diversification of the actors involved in the litigation process. Thus, not only have newly established observatories⁸ (specifically started since the advent of the refugee crisis and the wave of criminalisation) been contributing data to litigation teams in support of their cases, but there has also been engagement even with scientific agencies specialised in forensic analysis and investigations, which have contributed their skills to the compilation of evidence to be used by litigation teams⁹. Specifically, in the case filed by GLAN against the Italian government, recourse was made to such expertise in building evidence to support GLAN's case. Such actions give credence to the notion that, "strategic introduction of expert evidence [from] multidisciplinary perspectives can help to tell a fuller story...it [is] critical to identify a range of relevant partners, allies and experts from disciplines beyond the law" (Duffy 2018: 244,246). It also establishes a crucial element of strategic litigation as noted by Lesinska (2019), that being, the ongoing cooperation among different actors, both legal and non-legal.

Further potential can be found in an analysis of the strategies employed by those legally mobilising. Thus, the filing of multiple contemporaneous cases (as has been done by GLAN), can serve to illustrate the severity and systematic nature of an issue (Duffy 2018:251). The actual manner in which specific cases are chosen for litigation is yet another strategy illustrating potential, as cases may be chosen that typify the injustice of the phenomenon in question and therefore cannot be dismissed as an anomaly (ibid:250). The choice of fora for litigation is further potential, where as in this instance, GLAN has chosen a forum with potentially far-reaching impact, since the ECtHR can issue binding decisions on EU Member States.

Moreover, the role of a 'sympathetic victim' in case selection can also be potentially significant, particularly given the role the media and public support can have in advancing civil society's causes (ibid:253). As noted by one of my interviewees:

People have really been moved by the case of Sarah Mardini, not simply because of her background but also because of how the case was built against her. You also see the same thing happening with Carola Rackete and Pia Klemp. People can be more easily mobilised when there is someone people

⁸ SAROBMED; ReSOMA

⁹ *Forensic Oceanography*-project that critically investigates the militarised border regime in the Mediterranean Sea. They analyse different data, including audio-visual recordings made by NGOs while at sea, in order to reconstruct events.

can connect to the cause, that is, 'a face' to the movement (Georgia Spyropoulou, Legal & Advocacy Officer, Hellenic League for Human Rights).

In keeping with this view, I would also contend that potential for legal mobilisation lies in the possibility of those who have been criminalised, developing into 'Norm Entrepreneurs' (Vanhala 2018). The mass of support mobilising behind persons such as Carola Rackete and Sarah Mardini, whose visibility has greatly increased (Rackete addressed the European Parliament on 3rd Oct 2019; Sarah Mardini was a panel member of a discussion that I myself attended in Geneva in March 2019), means that they are able to use their experiences to not only raise awareness but also to advocate for a certain type of behaviour and possible norm emergence.

Yet further potential for legal mobilisation can be found in the role played by local attorneys and judges, who can and have acted in support of decriminalisation:

Fact that rescue ships are acting legally is being stressed upon through the use of different legal tools, e.g. cases before ECtHR, Open Arms case in Rome this year – court ended up dismissing the specific decree against the Open Arms (a SAR NGO). The legal fraternity is also stressing the legality of SAR (Lucia Gennari).

Elements of Security Decree-Bis 1 have been declared void by local judges because it contravened fundamental human rights. These judges faced retaliation on social media, which was encouraged by Minister Salvini and his Lega party. However, there's a need to bring cases before the Courts and therefore push judges to dismantle the unjust elements of the law. And there's a role for local attorneys as well in bringing these cases to court (Giovanni Fassina).

As noted by Duffy (2018:270), "the judicial role makes a particular type of contribution to human rights that is not readily interchangeable with others. [They are] a unique legal authority and guardians of the rule of law".

Finally, a further strategy currently employed by civil society which illustrates potential for legal mobilisation, is their use of non-legal strategies in conjunction with their legal efforts. Thus, it has been noted that, "advocacy and mobilisation, rather than litigation, might drive an overall long-term strategy in which litigation only plays a small, though critical part" (Dugard and Langford 2011:48). Thus, one needs to ensure that legal mobilisation is used in conjunction with other mobilisation strategies. Such non-legal strategies have indeed been effected by civil society. Vosyliute and Conte (2019:35) note that independent monitoring efforts have been launched by various civil society organisations including: CIVICUS (2016); Civic Space Watch; PICUM's website of testimonies (2017); Institute of Race Relations' Calendar against Racism; and Open Democracy monitoring (2019). There have been joint statements, letters, press releases – undertaken by academics, INGO staff (joint letter released by UN Special Rapporteurs), and other researchers on this issue of criminalisation. Additionally, one notes the establishment of certain observatories, for example,

SAROBMED which “collects, analyses and disseminates data regarding human rights violations in the Mediterranean. NGO partners are actually the main end users of SAROBMED results; such evidence is then used to support evidence-based advocacy, strategic litigation and research-led lobbying and campaigning” (SAROBMED, n.d.).

Quite noteworthy is the ‘We are Welcoming Europe’ Campaign, a European Citizens Initiative which mobilised more than 200 civil society organisations in Europe calling for an end to the criminalisation of humanitarian assistance, and the ReSOMA Project, a collaboration among researchers, academics, lawyers, and other stakeholders in the areas of Migration and Asylum.

We are Welcoming Europe shows the willingness of NGOs to work together. The ReSOMA Project is a unique and successful venture. It brought together researchers, civil society, academics, lawyers and other stakeholders. Leads to combining advocacy work of civil society with more scientific work of researchers, think tanks - trying to inform political debates. (Carmine Conte)

Finally, Operation Meditteranea, an operation which sent an Italian flagged boat to sail in the Mediterranean to monitor and bear witness to human rights violations and violations of maritime laws, is highly lauded by activists as well.

Meditteranea is a very good example of a civil society response. Civil Society raised money to buy a boat and went to monitor the situation and possibly save people in the Mediterranean. They raised over 1 million euros in approximately 6 months in order to purchase the boat. They are radical activists but very pragmatic. Target group was very wide. They used a media campaign to target a broad group of people, especially Catholics, in order to fundraise. (Giovanni Fassina).

Having addressed the existing challenges to and potential for legal mobilisation, I will now conclude by looking at the various ways in which civil society has actually mobilised, legally and otherwise, against criminalisation.

Chapter 6: Conclusion: Is Legal Mobilisation the Answer?

This study set out to determine *how has civil society mobilised against the criminalisation of the facilitation of migrants' entry into Italy and Greece following civil society-led SAR activities*. In this chapter I discuss and summarise the main findings of my three sub-questions before answering the main research question and addressing the wider implications of my analysis.

Sub-question 1 sought to determine how have humanitarian actors conceptualised and justified direct humanitarian protection for migrants, and my findings have shown that humanitarian actors have utilised both legal and moral justifications for their actions. Legal justification can be found in national and international laws that mandate the provision of assistance to those in distress at sea, as well as recognition of the universal nature of human rights which places equal value on all lives without distinction as to race or origin. Moral justification for their actions can be found in reliance on principles of solidarity, moreover a revised notion of both solidarity and humanitarianism so that true solidarity, which involves resistance and political action (Scott-Smith 2016:19), will serve as a radical alternative to humanitarianism's traditional principles of neutrality and impartiality. These justifications therefore bolster their subsequent acts of mobilisation.

In sub-question 2, which addressed how has the criminalisation of facilitating entry been directed against humanitarian actors and how this might be conceptualised, I noted that a range of criminalising actions have been taken against those engaging in SAR. These include: discursive or "speech acts"; encouraging negative publicity and increased suspicion in media coverage so as to decrease public trust; labelling NGOs as dangerous; tightening of the space for civic action; banning access to migrants; and direct criminalisation through the laying of charges. These actions can be conceptualised as lawfare since they involve the negative manipulation of laws to accomplish purposes other than or contrary to their original intent (Goldstein 2013). Moreover, I conclude that because of these acts of lawfare being perpetrated against them, humanitarian actors now have no choice but to mobilise if they wish for this phenomenon to cease.

Finally, sub-question 3 sought to determine what are the challenges and potential for legal mobilisation by civil society. My findings indicated that context, be it cultural, social, legal context, will largely determine the range of opportunities or hurdles which arise for legal mobilisation. Some of the challenges included: the general EU policies of externalisation of migration control and securitisation of borders; lack of public trust for NGOs; increase in right-wing parties and their promotion of discourses of discrimination and xenophobia; differing viewpoints and institutional structures among NGOs; and the nature of the legal system itself including the length of time for trials, the lack of certainty involved and possible judicial unwillingness to intervene. The potentials identified included: the current wave of ongoing litigation at national, regional and international courts; the formation of specialised

networks to fight against criminalisation; increased activism by individual lawyers; support among some EU Parliamentarians; diversification of actors involved including non-legal experts; the role of local judges and attorneys; and the use of non-legal strategies such as advocacy, independent monitoring, collaborative research platforms, petitions and joint statements. Thus, civil society will ultimately engage in a balancing of these competing factors in order to make decisions as to whether to engage in legal mobilisation.

Through an analysis of the identified sub-questions, it can be concluded, in answer to the main research question, that civil society has sought to mobilise both legally and socially, against the criminalisation of facilitating entry into Italy and Greece. Legal mobilisation has been undertaken at the national level with success and at the regional and international levels, where results of said legal mobilisation are still pending. Legal mobilisation has been preceded or accompanied by varied forms of social mobilisation, including ongoing advocacy, demonstrations, public awareness campaigns, joint statements by NGOs and international actors, and newly formed observatories and research platforms.

Thus, my findings illustrate that civil society has fought and continues to fight against the criminalisation of the facilitation of entry in various ways, embracing both legal and non-legal mobilisation. The identified ongoing attempts at legal mobilisation at the regional and international levels have not yet yielded fruit since these matters are presently pending before courts. Yet, so much seems to be hinging on these legal mobilisation efforts bringing about the needed change to this present situation. Many of the non-legal mobilisation strategies have been underway for some time, and whilst not discounting the roles they have played thus far nor the impact they have had on improving public awareness and garnering more long-term support, the reality is they have not propelled the needed policy and legislative changes.

Moreover, in the event these cases are decided in favour of the state(s), there is even the possibility that it can lead to setbacks for civil society and fuel counter movements (McCann 2006). In those circumstances, and given the fact that one cannot be sure what the outcome of these legal proceedings will be, whether they will be decided in favour of civil society or even whether the court may simply pronounce on the particular case before it and not on the broader issues, laws and institutional structures linked to the case (Anagnostou 2010), which would effectively limit the impact of the judgment, perhaps there is still need to think of further avenues of mobilisation. Thus, an identified shortcoming of this research is the fact that regional and international legal mobilisation efforts cannot be spoken on conclusively.

Furthermore, whilst my findings support civil society's justification for their continued SAR activity from a legal and moral perspective, the impact of law and thereby legal mobilisation, despite the potentials that may be evident for its utilisation, depends on the changing dynamics of the context within which the law is being applied (McCann 2006:19). Therefore, in the instance where the political, social and cultural context have not changed, and where

xenophobic discourses remain prevalent along with populist propaganda, and ongoing EU externalisation of migration control and securitisation of border policies, then any changes which legal mobilisation can potentially render may nonetheless be ineffectual, which may become yet another future challenge to legal mobilisation.

The continued acts of lawfare being perpetrated against SAR actors, through the various mechanisms of criminalisation, mean there will be an unending supply of viable cases to be utilised in legal mobilisation efforts, however, as a precaution, given the uncertainty which surrounds these cases' outcome, whilst strategic litigation has its role to play, perhaps further research needs to be conducted on the issue of effectively changing entrenched societal attitudes, and forms of mobilisation that can be used to advance such attitudinal changes.

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Appendices

Appendix 1: Table of Interviewees

Interviewees	Type of Interview	Organisation / Institution	Role	Date of Interview
Clio Papapantoleon	WhatsApp call	Human Rights Attorney in Private Practice	Part of legal team working on Sarah Mardini's case	02/09/19
Wies Maas	Skype	Dutch Council for Refugees	Coordinator International Programme	06/09/19
Lina Vosyliute	Skype	Centre for European Policy Studies (CEPS)	Research Fellow	09/09/19
Chrisa Giannopoulou	Skype	University of Aegean (Dept. of Geography)	Post Doc Student/Asylum Expert Consultant with UNHCR (Greece)	11/09/19
Eleni Takou	Skype	Human Rights 360 (CSO in Greece)	Deputy Director and Head of Advocacy	12/09/19
Carmine Conte	Skype	Migration Policy Group (MPG)	Legal Policy Analyst	24/09/19
Chiara Marchetti	Skype	CIAC Onlus - Centro Immigrazione Asilo e Cooperazione Internazionale Onlus	Sociologist (University of Milan); also member of Italian NGO working to support migrants and solidarity orgs	25/09/19
Meriç Özgünes	Skype	UNHCR (Municipality)	Liaison Officer	25/09/19

		of Thessaloniki)		
Georgia Spyropoulou	Skype	Hellenic League for Human Rights	Legal & Advocacy Officer	27/09/19
Lucia Gennari	WhatsApp call	ASGI (Italian Association for Juridical Studies on Migration)	Attorney in Rome (supports Mediterranea)	07/10/19
Elena Fontanari	Skype	University of Milan	Post-Doctoral Researcher in Sociology	09/10/19
Giovanni Fassina	Skype	European Legal Support Centre	Italian lawyer and activist	17/10/19
Lorenzo Durante	Skype	Asylum Seekers and Refugees Center in Italy	Intercultural Mediator	28/10/19

Appendix II: Interview Guide

The following questions were used as a guide for discussions and interviews were semi-structured. As discussions progressed, additional questions may have been raised based on the nature of the discussion. Both myself and each interviewee would have provided initial background information about ourselves before commencing each interview.

- Could you tell me more about the national laws/policies that can be considered to lead to criminalisation of “facilitating entry” in Greece/Italy?
- Where would you say these laws/policies stemmed from? That is, what was the motivation behind these laws in your opinion?
- What are some of the specific actions taken against NGOs and individuals?
- Are you familiar with the term lawfare? Would you consider these laws/policies/actions to be a form of lawfare?

- Can the actions of those carrying out Search and Rescue (SAR) operations be legally justified?
- How has civil society responded to these laws/policies that lead to criminalisation?
- Has there been a specific legal response by civil society?
- Would you consider that continued efforts at conducting SAR by individuals/NGOs, in spite of laws criminalising such actions, can thus be considered a form of mobilisation?
- What in your view are some of the challenges facing civil society as it relates to mobilising against these laws/policies?
- What are the specific challenges to legal mobilisation (that is taking legal action) against these laws/policies?
- What in your view is the future potential for civil society mobilising against these national laws/policies?
- Are you familiar with the EU Facilitator's Package? If so, would you say that civil society can successfully mobilise to take action against this Package? Should such mobilization take place at the national level or regional level?
- To your knowledge, have civil society groups sought to form strategic alliances with others locally, nationally and/or regionally?
- Are you aware of the case that has been filed against Greece at the European Court of Human Rights by Danish citizen Salam Kamal-Aldeen?
- In terms of the specific case filed against Greece by Salam Kamal-Aldeen and Team Humanity, what do you think is the likelihood of success? Do you think such a case is better classified as a form of strategic litigation?

Appendix III: Case Facts

Case filed against Greece at the ECtHR:

Case filed by Salam Kamal-Aldeen, 1 of the 5 volunteers who had been charged and prosecuted by Greece (PROEM-AID and Team Humanity). He was the captain of the vessel and had been subjected to far more onerous conditions than the other 4. In April 2019, he filed a case against Greece before the ECtHR alleging illegality on the part of the Greek government by its crackdown and arbitrary prosecution of human rights defenders working

to render assistance to persons in distress at sea (GLAN, 2019). He would have cited the infringement of several of his rights under the European Convention on Human Rights, including his: right not to be subject to torture, inhumane or degrading treatment (Art 3); right to be protected from arbitrary prosecution (Art 7); right to freedom of association and assembly (Arts 10 & 11); right to private, family and professional life (Art 8); and right to liberty and security of person (Art 5).

Case filed against Italy at the ECtHR:

Seventeen survivors of a fatal incident in which a boat carrying migrants found itself in distress off the coast of Libya filed an application against Italy in May 2018, with the European Court of Human Rights. The application was filed by the GLAN and the Italian Association for Juridical Studies on Immigration (ASGI), with support from the Italian non-profit ARCI and Yale Law School's Lowenstein International Human Rights Clinic.

On 6 November 2017, the Libyan Coast Guard interfered with the efforts of the NGO vessel Sea-Watch 3 to rescue 130 migrants from a sinking dinghy. At least twenty of them died. The intervention was partly coordinated from Rome by the Maritime Rescue and Coordination Centre (MRCC). The Libyan Coast Guard 'pulled back' the survivors to Libya, where they endured detention in inhumane conditions, beatings, extortion, starvation, and rape. Two of the survivors were subsequently 'sold' and tortured with electrocution.

The application detailed the ramifications of the February 2017 formal agreement between Italy and the Libyan Government of National Accord and also contends that the agreement establishes Italy's legal responsibility for the actions of Italian and Libyan vessels in this case.

Case filed before the ICC:

In June 2019, a case was filed against the EU at the ICC, by Juan Branco, who formerly worked at the ICC and Omer Shatz, an Israeli lawyer. The submission alleges that the EU has committed crimes against humanity, in contravention of Articles 5 & 7 of the Rome Statute of 1998. Such crimes were committed (and omitted in the case of withholding SAR activities) from 2014 onwards, as part of a premeditated policy to curb migration flows from Africa to the EU. The submission further alleges that these migration policies employed by the EU establishes criminal culpability for the deaths by drowning of thousands of asylum seekers, the refoulement of thousands of asylum seekers who attempted to flee Libya and consequent to this, the complicity in the murder, torture, enslavement, imprisonment, rape, persecution and other inhuman acts taking place against those migrants returned to Libya (Conte & Binder, 2019). The attorneys further argue that, "without the implementation of EU's policy of deterrence the crimes against the targeted population would not have ever occurred" and that furthermore, the accused was fully aware "of the lethal consequences of their conduct" (ibid).