In Court for Saving Lives

The Binder and Mardini case

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The trial against human rights defenders (HRDs) Séan Binder and Sarah Mardini was supposed to start on 18 November 2021 at the criminal Court on the Greek island of Lesvos. The core charge of the prosecution, the facilitation of irregular entry of third country nationals, is based on the EU Facilitator's Package and Greek anti-smuggling laws, which both are at variance with international law standards related to smuggling. The remaining charges pressed upon Binder and Mardini are excessive and likely to be proved unfounded for lack of sufficient evidence. The whole process is just another example of the ongoing criminalization of humanitarian assistance to refugees and asylum seekers in Europe.

Binder, an Irish national, and Mardini, a Syrian national and refugee, were volunteers at the Emergency Response Centre International, an NGO that was operating in Greek waters, helping refugees and asylum seekers to disembark in Lesvos. The two volunteers provided search and rescue services, patrolling the coasts, spotting vessels in distress, and providing assistance to people arriving on shore. On 17 February 2018 they were stopped by the Greek police and allegedly found in possession of two unlicensed radios, while the car they were using, leased by the NGO, was allegedly found to have fake military plates. In August 2018 they were arrested on accusations of facilitating people smuggling and kept in pre-trial detention for more than 100 days. The charges they currently face include facilitation of irregular entry, espionage, money laundering, and forgery. On 18 November the proceedings of the trial were adjourned and it is unclear when it will resume.

The case is one in a series of unfounded or excessive prosecutions of individuals that provide humanitarian help at the EU's external borders. Individuals and NGOs assuming humanitarian action linked to refugee rescue have recently become increasingly targeted by State authorities. This reflects the EU's shifting attitude towards refugees and migrants. It is not the first time that Greece is using anti-smuggling laws against NGO volunteers. Individuals working in Lesvos with the NGOs 'Proem-Aid' and 'Team Humanity' were similarly accused of smuggling. They were all acquitted in May 2018, three months before the Binder and Mardini case opened. Similar domestic cases against HRDs have been reported by Amnesty International in Croatia, France, Italy, Malta, Spain and Switzerland.

Facilitation of irregular entry - the EU's and Greek vague legal framework

The prosecution believes that Binder and Mardini hindered the Turkish coast guard from pulling refugee boats back to Turkey and prevented the Greek coast guard and Frontex from intercepting them by failing to notify the authorities about the departure, journey and location of arrival of the boats. According to the prosecution, this conduct amounts to facilitation of irregular entry of third country nationals into EU territory. The charges are based on Greek law and the EU Facilitation Directive.

In 2002 the EU sought to harmonize Member States' legislation on human smuggling and issued the 'Facilitators' Package,' consisting of the EU Facilitation Directive and the Council Framework Decision. The Directive defines facilitation of unauthorized entry, transit and stay, while the Framework Decision strengthens the relevant penal framework.

Two types of conduct are criminalized under article 1 of the Facilitation Directive: (a) the intentional assistance of a person who is not a national of a

Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State; and (b) the intentional assistance, for financial gain, of a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State.

The Directive only makes the element of financial gain a constitutive element of the crime of facilitation of residence and not of the facilitation of irregular entry or transit. Even for the crime of facilitation of residence, for which financial gain is an essential element, the Directive fails to distinguish between exploitative provision of assistance with the purpose of financial benefit and non-exploitative provision of assistance for example by property owners or friends and family. Furthermore, the text does not clarify which precise conduct constitutes 'facilitation', giving Member States a wide margin of discretion in implementing the Directive.

Paragraph 2 of article 1 introduces an exception for humanitarian assistance. It stipulates that Member States may decide not to sanction the behaviour defined in paragraph 1(a) if the aim of the conduct is to provide humanitarian assistance to the person concerned. The Directive thus applies the humanitarian exception only to the facilitation of irregular entry or transit and not to the facilitation of residence. As a result, individuals who facilitate irregular residence without requesting an exploitative financial benefit for their services continue to be criminalized. Even worse, the introduction or not of the humanitarian exception in the domestic legislation of Member States is left to the discretion of the latter. The same applies to the determination of which acts qualify as humanitarian assistance.

A 2016 study commissioned by the European Parliament pointed out that the Directive is permeated by a 'high degree of legislative ambiguity and legal uncertainty'. In the same vein, Amnesty International has argued that the vagueness of the provisions and the extent of States' discretion has led to criminal proceedings and undue interferences with the rights of HRDs.

The charges in the Binder and Mardini case are based on the Greek Migration Code, which implements the Facilitator's Package. Greek law criminalises both the facilitation of irregular entry and transit of third-country nationals as well as facilitation of residence as per the Directive. However, the Greek law does not define which acts or omissions constitute facilitation. Article 29 for instance merely provides that 'persons who facilitate the entry into or exit from the Greek territory of third-country nationals without performing the controls provided by law' are punishable. Thus, a broad range of conduct by volunteers and NGOs can become the target of enforcement authorities. More importantly, the facilitation of irregular entry or residence is treated as a criminal offence irrespective of any financial benefit. Such benefit is only considered an aggravating circumstance.

Article 30(6) of the Migration Code introduces an exception from punishment (not from prosecution) for humanitarian actions. This exception is arguably applicable in the case of Binder and Mardini. However, as the law does not prohibit prosecution of those who rescue and assist people at sea, it exposes them to long judicial proceedings with overwhelming material and psychological effects.

Incompatibility of the EU's & Greek legal framework with the UN Protocol against smuggling

Moreover, the Greek law and the EU's facilitation package deviate from the internationally accepted definition of smuggling and are at variance with international obligations assumed by Greece and the EU.

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in 2000 and ratified by the EU and its Member States defines smuggling as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident' (article 3; see also article 6). The aim of obtaining a 'financial or other material benefit' is thus a constitutive element of the crime. And indeed, according to the travaux préparatoires '[t]he reference to "a financial or other material benefit" as an element of

the definition [...] was included to emphasize that [...] it was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.' Regrettably, neither the EU Directive nor Greek law seem to take this background into account.

However, by virtue of a savings clause, the Protocol allows States to take more rigid measures in their own domestic laws. Article 6(4) stipulates that 'nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law'. Therefore, although deviating from the international accepted definition, Greek and EU law do not violate the binding obligations assumed under the Protocol.

Saving lives is not a crime - unfounded and excessive accusations against human rights defenders

Binder and Mardini are charged with additional accusations, the seriousness of which does not seem to be reflected in their conduct. Such accusations serve the purpose of undermining the role and the function of NGOs and their humanitarian action.

Money laundering accusations (articles 1, 2, 3 and 45 L3691/2008) are linked to fundraising activities of the two volunteers on behalf of the NGO. According to Amnesty International the evidence presented so far and the police investigations into the defendants' bank accounts have not uncovered any unlawful activity. Fundraising is a legal and vital activity for the operation of NGOs. Such persecutions compromise public trust in them, sabotage their funding ability and can very well result in them having to stop their activities. As the UN Special Rapporteur on the situation of HRDs has observed, governments' justifications to restrict foreign funding for HR organisations in order to prevent money laundering are in many cases 'merely rhetorical and the real intention [...] is to restrict their ability to carry out their legitimate work'. The rest of the extreme accusations, such as espionage and violation of the State's secrets (articles 148, 146 Greek criminal code) serve similar purposes. The volunteers are accused of monitoring Greek coast guard and Frontex radio channels to identify refugee boats in distress. However, Amnesty International points out that the police report has acknowledged that the radio channels are not encrypted and can be accessed by anyone with a VHF radio. Additionally, the positions of the vessels are published in real time on commercial ship-tracking websites. As for the forgery charge (article 216 Greek criminal code) linked to the alleged use of a fake military license plate, it is unclear how the volunteers could have pretended to be driving a military vehicle in order to enter restricted-access military areas where asylum seekers sometimes disembarked. According to witnesses and photographs, their car displayed the NGO's logo. Finally, the charge for unlicensed use of radio frequencies was based on the Law 4070/2012, which was repealed with the Law 4727/2020.

The conduct of the prosecution, the pre-trial detention, and the delays in progressing the case have given rise to claims of violations of the human rights of the defendants. Potential violations concern the right to liberty and the right to a fair trial (articles 5(3), 6(1)(3) ECHR and 9, 14(3)(b)(c) ICCPR). In addition, after their release on bail, the Greek Immigration Office imposed an entry ban on Mardini that prevents her from re-entering Greece, and thus preventing the exercise of her fair trial rights, including the right to a fair and public hearing, to hear and challenge the prosecution and to present a defence.

It must be noted that the information on the evidence and content of the relevant case documents and summonses are derived from secondary sources since police reports and other official documents are not publicly accessible.

Violation of the right to life and the obligation to rescue people at sea

Coordinating humanitarian assistance, e.g., by organising to be present in an area where refugee vessels arrive in order to provide first aid, is a key activity of volunteers and NGOs and extremely critical for the lives of those that arrive on shore. Putting HRDs on trial undermines the work of the NGOs per se, but also violates State obligations with respect to refugees and asylum-seekers.

In particular, States have the obligation under the law of the sea to render assistance to persons in distress at sea (article 98 UNCLOS; see also SOLAS Convention and SAR Convention). The obligation includes that States ensure that people rescued at sea are brought to a safe place as soon as possible. HRDs very often save the lives of those who enter a country irregularly. OHCHR's report with the title 'saving lives is not a crime' argues that by obstructing the provision of life-saving services and criminalizing acts of solidarity by HRDs, States violate their obligation to respect the right to life (article 6 ICCPR, article 2 ECHR) and that any death linked to such prohibition would constitute an arbitrary deprivation of life.

Criminalization of solidarity

Greece is bound by all the above-mentioned international obligations by virtue of article 2 of the Greek Constitution which provides that (1) respect and protection of the value of the human being are the primary obligations of the State and that (2) Greece, adhering to the generally recognised rules of international law, pursues the strengthening of peace and of justice, and the fostering of friendly relations between peoples and States.

Disappointingly, current policies have led to the disregard of constitutional calls for upholding the rule of law and humanitarian values. The case analysed here is just one of the many examples of criminalization of solidarity in Europe and Greece. Recently, a new legislative proposal has been presented that introduces further restrictions and conditions on the operation of NGOs in areas of competence of the Greek coast guard. The Council of Europe Commissioner for HR has already expressed her dissatisfaction and called on Greece to align its policies with human rights standards. Hopefully, the new EU Pact on Migration and Asylum, proposed by the EU Commission in 2020 will strengthen solidarity and create more efficient and fair migration processes.

As a last note, it must be added that States at the external borders of the EU have long voiced their discontent with the Dublin Regulation system which assigns the responsibility for registering and processing asylum applications to the country of first arrival. Those States are overburdened with the process of receiving, processing, integrating or returning asylum seekers crossing their borders. The non-equitable distribution of this burden has been used as a pretext to States and certain governments to adopt hostile policies against refugees and against those who aim to help them.

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