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Controversies in European Migration Policies – Granting Protection vs. Border Control

The project at a glance

Irregular entries to Europe have been a key topic on the European migratory agenda in recent years. They also expose deep divisions between fundamental European values and current migratory regimes, where those searching for protection encounter border controls that make it almost impossible for them to exercise their right to seek asylum.

The project 'Controversies in the European migration policies' aims at analyzing this phenomenon from a multidisciplinary perspective. Within the Framework of the EU programme 'Europe for Citizens', this project is being conducted by several NGOs all around Europe: Asyl in Not (A), Borderline-Sicilia (I), DIKTIO (GR) and borderline-europe (D).



EACEA - working meeting in Palermo, Sicily, March 2016

The project runs from 01.10.2015 to 31.03.2017. During this time, all partners are involved in research about ongoing European controversies regarding illegal entries, and especially regarding the trials of 'suspected smugglers'. In order to publicise our findings, we will organize 10 public events in different European countries as a mean to facilitate public discussion on this important matter.

These pages are the result of our last meeting in Palermo, Italy (04th to 6th March 2016), and are conceived as an overview about the activities and the research lines pursued during the first year of the project by all our partners. From Germany to Greece and from Austria to Italy, we are seeking to understand irregular entries and the fight against 'smuggling' in a context where international, European and national laws and policies overlap.

Human Smugglers: A difficult definition

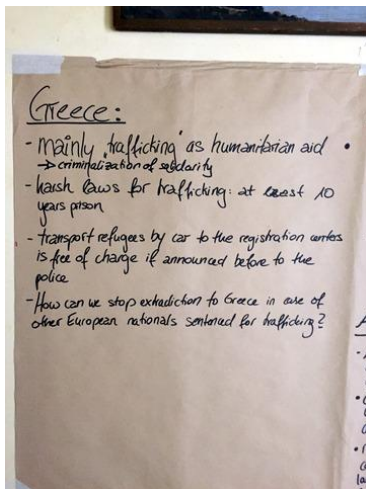
Human smuggling is not a new phenomenon; nevertheless, from a policy perspective, the 'criminalization' and 'penalization' of human smuggling began in the early 1990s. A newly emerging legal and political framework brought also new discourses about 'human smugglers'. Today most of them are conceived as criminals that threaten states' capacity to manage migration, and the



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wellbeing of those on the move (Van Liempt: 2016).

Our research finds that this phenomenon is more complex than usually suggested, and that 'suspected smugglers' may act due to different motivations: they might seek to help people in distress, bring family members across borders, or might act according personal or political values. Therefore, our project focuses on the analysis of the diverse realities, motivations, legal and political approaches in those cases where people have been arrested under the suspicion of being smugglers, and particularly on the legal development of these cases.

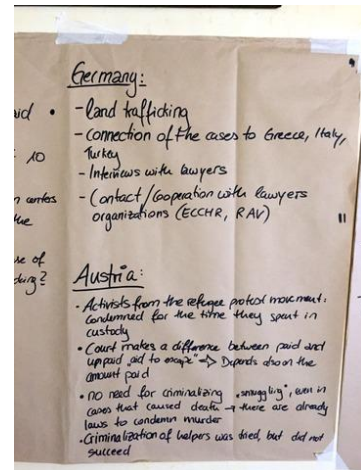


Working meeting in Palermo, March 2016

At first sight, the diversity of profiles, nationalities, motivations and backgrounds of the people under arrest, as well as diverse legal procedures, sentences and resolutions show how varied current legal and political frameworks in European countries are. Despite several international conventions on human smuggling, there are still many differences between local European legislations.

Therefore, we are currently analyzing around 20 legal cases against presumed smugglers in

Greece, Austria, Germany and Italy, aiming at analyzing differences and similarities in current legal interpretations, resolutions and procedures, and highlighting those practices that are more compliant with human rights protection.

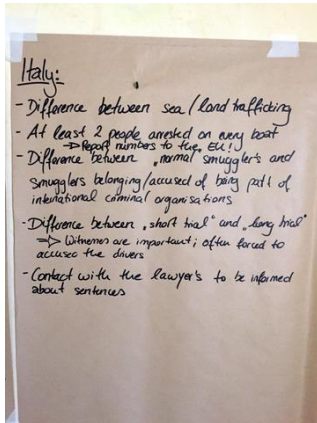


Beginning with the Austrian cases, most of them are linked to the transportation of refugees within Austrian territory. The Austrian Supreme Court determined that human trafficking in the sense of §114 FPG (Foreigners Law) ought to be prosecuted only in cases of 'illegitimate enrichment', but not if the smuggler earns only a 'reasonable remuneration'. The court used the current tax rate as reference guide to establish what could be reasonable. According to this guideline, some people were found not guilty in the first instance. However, in other cases, the same court sentenced individuals considered to be professional smugglers or organized traffickers to up to two years of prison.

In the Greek context, there have been several shifts in the interpretations and resolutions of human smuggling. In several cases the 'accused' were activists or people who helped refugees by providing some type of transportation. According to the former Greek legislation, any kind of support to transport refugees to detention or



registration camps was considered as 'facilitation of illegal entry'. However, an amendment to the Migration Code (4251/2014 article 30) was approved in July 2015, which decriminalized solidarity practices such as the transport of refugees on land.



This was an important step towards a more humanitarian approach in this matter; however, its implementation is still partial and controversial, i.e. in Lesbos police ask to be informed for every transfer that happens. Despite the positive changes in Greek law, Greek legislation remains one of the most restrictive in Europe, with punishments of at least 10 years for human smuggling. In addition, some trials seem also to be resolved following the lines of the current political situation. For example, with the closure of the Balkan route and the militarization of the Aegean Sea the situation in Greece is changing again. NGOs and activists became more active, especially in rescue operations at sea, and some of them have been accused as 'facilitators' of illegal entry, which means a turn back to former interpretations of human smuggling before the 2015 reform. In light of these developments, it is possible that we might witness the re-criminalization of solidarity practices.

Another important aspect and a most recent phenomenon is the criminalization of migrants, which means that after every arrival or rescue operation, migrants are investigated for possible links with smuggling organizations or blamed as being smugglers themselves. The accusation and detention of 'suspected smugglers' relies mostly on testimonies of other migrants travelling with them, who pointed them out as being the ones driving the boat, organizing the trip or having any kind of contact with the smugglers.

This practice is becoming more common in Italy, where people are being arrested as soon as they arrive in the country, including many minors. In Italy, we contacted several lawyers in charge of the defense of presumed smugglers. Some of them have informed us about practices that undermine the right to due process. Some of those practices are considered by the lawyers as 'institutional discrimination'.

For example, they have noticed some problems regarding the testimonies made by the arriving migrants. These centrally include shortcomings in terms of translations, the absence of accurate and timely information about individuals' rights, as well as the content of the documents suspects or migrants were requested to sign. In some cases, arrests were made following testimonies made under duress or without a full understanding of the situation. Often, documents were not available in the language of the suspects, nor was a cultural mediator present when they gave their testimonies. Access to a good defense lawyer also seems to be a problem, especially as access to assigned counsels is still a challenge in some locations in Italy.

Therefore, we will continue with the follow-up of these cases to see how legal and political decisions in this matter are made and to denounce any kind of irregularity or



practice that could constitute a breach of individuals' fundamental human rights.

Bringing the Topic to the Public Sphere

In addition to our research, we place an emphasis on widely publishing and disseminating our results in order to inform public debate. Therefore, **10 public events** will be organized in all four countries; of which three already took place. **From 16th to 18th October 2015**, we hosted our first event, the Second International Smugglers' Conference in the **Kammerspiele** theatre in **Munich**, in cooperation with the Flüchtlingsrat Bayern and bordermonitoring.eu. The conference was made up of four expert panels on:



Glöde, Schmidt – borderline-europe (2., 3. from left). Foto: www.mucbook.de

- the history of the diverse terms used to describe the smuggling of fleeing persons - ranging from 'escape aid' to 'facilitators of illegal entry' or 'human smuggling' depending on the political context
- the varying practices of assisting with escape and smuggling
- Examples of criminalization of ordinary people, who aided refugees and were accused of smuggling, providing accounts of exemplary cases.
- campaigns and creative activism

Furthermore, three people, or rather groups, were awarded with a prize (The Golden Lisa) for their endeavors to aid refugees to escape out of a commitment to the ideals of humanitarianism and universal human rights. The attendance at the conference was high with more than 100 participants each day. A video showing the award ceremony as well as a video about the four panels and various interviews will soon be published.

Our **second event** took place in **Innsbruck (A)** in **December 2015** with an attendance of 52 participants. The main topic was about refugee support in times of securitised borders, mainly focused on different practices of direct support, the development of court cases against smugglers in Austria, and the historic significance and importance of the convoy created along the Balkan route during the summer 2015.

Diverse activists such as Michael Genner (Asyl in Not), Anahita Tasharofi (Flucht nach vorn), Stephan Blaßnig (Plattform Bleibrecht Innsbruck) and Lea Elena Mair (Binario 1, Bolzano, Italy) participated as panelists.

The activist Anahita Tasharofi informed about her participation in the grassroots escape convoy in which several people drove along the Balkan route to assist those travelling towards northern and western Europe, and about her meeting with Austria's former Minister of the Interior Mikl-Leitner in Nickelsdorf, where a Minister's escort maltreated her. Currently, the activist is under investigation as a suspected smuggler; there has however not been any official response or follow-up to her complaints against the Minister's escort.

Michael Genner talked about his experiences during the previous year, when migrants and organizations succeeded in creating a migratory corridor from Greece to central and northern Europe. The activist referred



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to this experience as 'our small September of Anarchy'.

A special focus was also given to the discussion about current court decisions on human smuggling in Austria (see last section), and their impact on future cases. The activist Lea Elena Mair presented the work of Binario 1 at Bolzano's train station during spring 2015, and also the current parliamentary discussions about refugee assistance and human smuggling.

Finally, Stephan Blaßnig provided an analytical overview regarding the politics of migration control discussed during the G7 summit and during the Bilderberg meeting in May-June 2015 where the blockage of the Alps passage to people on the move was discussed. He also informed about the new migratory path at the Brenner Pass. Other topics such as the tightening of migration laws, the establishment of a 'new anti-refugee iron curtain' in Europe, the shift to the right in European politics, and new ways of resistance, were also presented and discussed.

Finally, **the last of the three events** took place in **Palermo (I) on April 4 2016**, where a presentation and debate about discourses and representations on human smuggling in Italy and Greece was held. The panel was composed of Captain Stefan Schmidt (borderline-europe), Fulvio Vassallo Paleologo (ADIF), Leonardo Marino (Lawyer, Agrigento), Lucia Borghi (Borderline Sicilia) and Judith Gleitze (borderline-europe) and was moderated by Alberto Biondo (Borderline Sicilia). In this panel, different legal cases against suspected smugglers in Italy and the current practices of criminalization were analyzed (from the criminalization of humanitarian assistance to the current criminalization of migrants). The first two cases – that of the Cap Anamur (2004) and that of the Tunisian fishermen

(2007) – served as an example of the penalization of humanitarian assistance.



Borghi, Vassallo, Marino, Biondo, Schmidt, Gleitze (from left to right). Foto: Frank Jugert

During this period, people and activists helping migrants in distress at sea were investigated and arrested as smugglers. Captain Schmidt rescued 37 people from distress at sea in 2004. After finally being allowed to disembark them in Italy, the Captain, his first officer, Vladimir Dachkevitch and the president of the humanitarian association for which they were working, Elias Bierdel, were accused of aiding and abetting illegal entry and therefore sent to trial at Agrigento. The prosecution requested 4 years of imprisonment and a fine of 400,000 euro. The Cap Anamur case was used as an example of discouraging people to help others at sea and to bring them to Europe. After 5 years of investigations and trial, the suspected smugglers were acquitted.

Another similar case was reported by Leonardo Marino: the Tunisian fishermen Bayoudh Abdelkarim, Zenzeri Abdelbasset, Bayhoud Mohamed Amine, Hamza Brahim, Ben Kalifa Kamel, Gharred Lassaab, and AbdelWahed Ben Hayadi saved 44 people in the Mediterranean Sea in August 2007 and brought them with two boats to Italy. The entire crew was charged with facilitation of



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illegal entry to the Italian territory and arrested. After a two-year trial with 21 hearings, the ordinary members of the crews were released. The two commanders saw their trial continue until 2011, when the appeal court in Palermo finally acquitted them.

After an introduction of Lucia Borghi, who presented on the current practices of the Italian authorities, which are focused on the criminalization of migrants as smugglers (*see previous section*), the panel discussion focused on:

- The fact that "alleged smugglers" arrested are corresponding to standard calculations; for each landing and rescue event, there are very specific numbers of arrests. This strategy is mostly based in numbers and statistics, as main criteria to evaluate the effectiveness of the fight against smugglers. Nevertheless, this perspective does not go deeper into the phenomenon of smuggling, i.e. its origins; therefore, a real impact against human smuggling is not to be expected. This is an illusory fight, since it excludes the roots of human smuggling, for example, nonexistent legal ways that refugees could use to come to Europe.
- The concern that witnesses are put under pressure with the promise of a residence permit and a better future in Europe. Many of them are abandoned after giving testimony for legal ascs without an effective opportunity to follow pathways to integration or to request protection. In addition, testimonies that are collected immediately after the rescue are often very different from those issued at a later time. In spite of this, they tend to constitute the grounding for assumptions which are central to the charges against and convictions of suspected smugglers.

Judith Gleitze summarised the Greek situation in three phases that characterise the approach of the Greek government against smugglers in recent years, and that are linked to the economic and political transformations of Fortress Europe.

- 1) May to November 2015: criminalization of support practices. Indictment of the "transporters";
- 2) November 2015 - February 2016: step-by-step closure of the border with Macedonia, Hotspot Lesbos = "European agenda" and indictment of rescuers at sea;
- 3) Since February 2016: the total closure of the border with Macedonia, NATO mission in front of Turkey to defeat "the smuggling networks" and the indictment of migrants.

Our upcoming events are planned in Italy, Austria and Germany. Our main goal with these events is to highlight the diverse facets of human smuggling, and to inform the public debate on this important issue. In particular, we emphasise that smuggling should not only be understood as a consequence of organized crime, but also as a response to an extremely restrictive migratory regime that blocks the movement of those it deems 'undesirable', including refugees. In many cases, the 'smuggler' becomes the only choice for people who are forced to leave their countries of origin or residence because of war, persecution, or extreme poverty.

The main objectives of this project are to take all scenarios that reinforce the smuggling of people into consideration, to highlight its varied consequences for the human rights of migrants, as well as to understand the current European legal frameworks that deal with this matter.

Our hope is that with the results of this project, we will be able to propose better models to deal with this phenomenon. Importantly, fighting against the



criminalization of human mobility is perhaps the most effective way to fight against human smuggling. As such, we work for the construction of a European migratory framework that is ruled by the full respect for the human rights of everyone, including those on the move, and is based on respect and solidarity for every human being.

Editorial:

This report was written by Alejandro Calzada and edited by Judith Gleitze, borderline-europe, Palermo, May 2016

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