



PROVEDOR DE JUSTIÇA

Gabinete da Provedora

Impact on NGO activities, particularly humanitarian efforts targeting refugees and other migrants, of changing criminal law approaches or provisions in Council of Europe Member States

The Portuguese Ombudsman institution, in its capacity of national human rights institution fully in line with the Paris Principles and accredited with “A” status since 1999, hereby replies to the call for input received from the Expert Council on NGO Law of the Conference of INGOs, for contributing to the report “*Impact on NGO activities, particularly humanitarian efforts targeting refugees and other migrants, of changing criminal law approaches or provisions in Council of Europe Member States*”. The current mandate holder is Maria Lúcia Amaral.

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2. Legal framework

2.1. Domestic anti-trafficking and anti-smuggling legislation

Portugal is bound to all EU legislation on borders management, visa, immigration and asylum common law and policy.

Anti-trafficking legislation is set forth in the Criminal Code, whereas anti-smuggling acts are foreseen in the Portuguese Immigration Law.

Article 160 of the Criminal Code punishes whoever offers, delivers, recruits, entices, accepts, transports, lodges or accommodates a person for the purpose of exploitation, including sexual exploitation, labour exploitation, begging, slavery, organ extraction or the exploitation of other criminal activities, by specific means, such as: a) violence, abduction or serious threat; (b) deception or fraudulent manoeuvre; c) with abuse of authority resulting from a relationship of hierarchical, economic, work or family dependency; d) by taking advantage of the psychic incapacity or situation of special vulnerability of the victim; or (e) by obtaining the consent of the person having control over the victim;

Article 183 of the Immigration Law (Law n. 23/2007 of 04/07), on its turn, foresees the crime on smuggling of migrants. Anyone who favours or facilitates, in any way, the illegal entry or transit of foreign citizens in the national territory is punished under this provision. Article 184, on its turn, sets forth the crime of association to illegal immigration aid. It is aimed at punishing those who promote or found a group, organization or association whose purpose or activity is directed to the commission of the crimes on smuggling of migrants. This being the case, one can conclude that an association which is created *with the purpose* of favouring or facilitating, in any

way, the illegal entry or transit of foreign citizens in the national territory is deemed illegal and may be criminally persecuted.

In both cases, the attempt is punishable.

It is worth noting that the Portuguese legislation does not provide an exception to these offences on the grounds of humanitarian assistance. However, general clauses set forth in the Criminal Code, such as necessity (Article 34 of the Criminal Code), may, in thesis, exclude the wrongfulness of these acts. Nevertheless, due to the particular nature of this clause, it may only act in the context of particular or specific cases of favouring or facilitating illegal entry in the territory of a person or persons when a paramount fundamental good is at stake. This clause, thus, cannot be invoked in cases where an association was created with the purpose to provide illegal entries in a systematic basis. On the other hand, one must highlight that this criminal law only aims at punishing the *actual helping to illegal entry or attempting to it*, and not other acts, such as, for example, the rescuing of persons in distress at seas or at the State border.

2.2. Legislation regulating the operation of nongovernmental organisations

NGOs which are qualified as “cooperation and development NGOs”, are especially protected by the Portuguese Law, due to their recognised role in the design and implementation of social, cultural, environmental, civic and economic programs, namely in humanitarian assistance, emergency aid and protection and promotion of human rights. They have a special legal statute¹. NGOs which are duly registered may be inspected by the government, namely in what regards the use of public funds and tax obligations.

Specific legislation on associations representative of women, migrants, youth, persons with disabilities and involved in environmental protection was also enacted. This recognition is particularly evident in the relevance given to these associations in the establishment of national action plans and strategies that provide concrete measures to fulfil State’s responsibilities under the Constitution, international obligations and the law. In this context, it is particularly important to mention the Law n. 115/99 of 3 August, which sets forth the rules to recognition of migrants’ associations, guaranteeing their right to intervene in defence of migrants’ rights.

For example, in the Strategic Plan for Migrations (approved by the Council of Ministers Resolution no. 12-B/2015, March 20), the immigrants NGOs are supported by the State to develop projects to prevent and combat the exploitation of immigrants in an irregular situation in the country and to cooperate with the national authorities to provide a better service when

¹ Law n. 66/98, of 14 October.

dealing with administrative issues. In some areas, a close cooperation between the State and the NGOs was established. For example, the High Commissioner for Migration relies strongly on the role of the immigrants' associations to develop its activity, namely through the appointment of intercultural mediators, who are responsible for translating and providing other types of support to foreign citizens. Another example can be given by the Portuguese Asylum Law (Law n. 27/2008, of 30 July). According to Article 13 (3), the Portuguese Council for Refugees, an NGO responsible for providing reception to refugees and asylum seekers and who may act as representative of the UNHCR, must be informed of all asylum requests made in the national territory. The purpose of this provision is to enable this NGO to provide information and support to asylum seekers. Other examples can be provided by the composition of some governmental organisations that may encompass NGOs representatives. For example, some NGOs are represented in the Commission for Equality and Against Racial Discrimination, which shall encompass a representative of the migrants' associations, a representative for NGO's dedicated to fight against racial discrimination, a representative from the NGO's dedicated to the refugees' rights, and a representative of the NGO's dedicated to Human Rights defence.

There is also a special statute for voluntary workers that exercise their functions in NGOs², through which the State recognizes the social value of volunteering as an expression of the free exercise of an active and supportive citizenship and promotes and guarantees its autonomy and pluralism. Also regarding the voluntary work, there is a special statute for the members of NGOs governing bodies establishing, *inter alia*, that they may not be discriminated in their rights, in their employment by virtue of the exercise of management positions in NGOs.

2.3 Broad criminal law/constitutional law question – what are the criteria used by the State to determine whether a particular conduct (act or omission) should be criminalised?

In Portugal, the principle of the *ultima ratio* (last resort) of criminal liability is recognised. According to the general doctrine, in order to criminalize a certain action, two requirements must be met. First, the crime must aim at protecting a fundamental good in the society, which must reflect a fundamental value protected by the Portuguese Constitution. On the second hand, criminal law shall only be used in cases where other sanctions (for example, administrative sanctions) are considered insufficient for the adequate protection of the fundamental good. This imply the respect of the proportionality test, requested by Article 18 of the Constitution for every

² Law no. 71/98, November 3rd.

restriction of fundamental rights and liberties, including, thus, the right to personal liberty. The principle of proportionality encompasses three tests: the criminal punishment must be adequate, no other punishment with the same efficiency is available and, finally, the punishment cannot be excessive. That being said, criminal law is only used to punish a behaviour where no lesser means of control are possible.

Finally, it is important to highlight the principle of the rule of law, according to which only those acts that were committed before the entry in force of the criminal law may be punished (Article 29 of the Constitution and Article 1 of the Criminal Code).

2.4 Criminal law legislation (Criminal Code; Code of Criminal Procedure)

Consider :

i) generally whether there is a law prohibiting humanitarian assistance to migrants

Humanitarian assistance to migrants is not qualified as a crime as such. Thus, saving lives at sea, for example, cannot be considered as a criminal offence as such. However, technically, if migrants are led to enter illegally in the territory, there might be a crime of smuggling of migrants, as defined above, unless a case of necessity may be argued.

ii) consider particularly whether/how the law applies to staff of organisations and/or to the organisation itself;

The law does not provide specific rules. However, according to the Criminal Law's general rules, the liability of the moral persons does not preclude the liability of the individuals who, working on the behalf of the NGO, have committed the crime at stake (Article 11, n. 7 of the Criminal Code).

iii) what sentences apply to persons (or organisations found guilty?);

According to Article 183 of the Immigration Law, anyone who favours or facilitates, in any way, the illegal entry or transit of foreign citizens in the national territory is punished with imprisonment for up to three years. If these actions have a profit purpose the penalty is aggravated to imprisonment from one to five years. The same goes for situations where the foreigners are transported or maintained in inhuman or degrading conditions or endangering their life or physical integrity.

Article 184, on its turn, sets forth the Crime of Illegal Immigration Aid Association. It is aimed at punishing those who promote or found a group, organization or association whose purpose or activity is directed to the commission of the crimes on smuggling of migrants. The punishment is set in imprisonment of one to six years.

In cases where the agent is a moral person, the penalties applicable consist in fines, whose minimum and maximum limits are doubled, or of prohibition of the activity from one to five years.

The criminal liability for the commission of the offenses referred to shall be added to the civil liability for the payment of all expenses related to the stay and removal of the foreign nationals involved, including any expenses with shipping costs to the country of origin.

iv) Technically, is it possible under the domestic law of the State to prosecute an organisation?

Yes. According to Article 11, n. 2 of the Criminal Code, an organisation may be prosecuted in what regards specific crimes. On Migration matters, according to Article 182 of the Immigration Law, legal persons and similar entities are generally liable for the crimes provided for in this law, and also for the payment of fines, indemnities and other penalties in which they are condemned³. That being the case, and despite the freedoms, recognition and support described above, NGOs and associations may be deemed criminal responsible for illegal acts committed in the course of their activities.

2.5 Administrative law or regulatory frameworks – Has administrative law or regulatory frameworks (e.g., Health and Safety Legislation; Safeguarding regulations etc.) been used to stop, impede or prevent NGOs from providing assistance or support to migrants and refugees? In what ways?

According to Article 8 of the Immigration Law, access to international ports and airports is restricted and subjected to the Aliens and Borders' authorization. For the issuing of authorizations for access to the international port area and for entry on board vessels, a fee is due. The law sets forth that authorizations for access to the international port area may be granted by the head of the sea border post for certain purposes, such as visiting or providing services on board. However, it does not guarantee a right to access, since the authorisation is left at the discretion of the mentioned authorities. Article 146-A, on its turn, foresees the celebration of

³ General rules on criminal liability of moral persons are enshrined in Article 11 of the Criminal Code.

protocols with associations for the purposes of visiting migrants who are detained in the detention centres. However these protocols have been scarce and, as reported by the 2018 annual report of the National Prevention Mechanism⁴, detained migrants are often isolated. This situation is particularly serious in the airport detention centres, where only the *Médecins Sans Frontiers* and the National Portuguese Refugee Council are allowed to visit the migrants. Several NGOs have already asked to be allowed to enter in these areas, with no success. The Ombudsman has also been receiving complaints presented by lawyers who were requested to pay 13 Euros fees to enter in the detention centres located in the airports' international areas.

2.6 Migration and refugee law – there is a perception that any application of the criminal law to persons or organization assisting migrants and/or refugees stems from the criminalisation of the migrants/refugees themselves – how does the law deal with people who come and cross the border without a permit? For instance, are persons who enter a country without a permit deemed to be “illegal” entrants? If an individual or an organisation helps such an illegal entrant, does this constitute aiding and abetting under the criminal law?

According to Article 181 of the Portuguese Immigration Law, an alien is entering illegally in the national territory when it has not fulfilled the conditions to enter (has entered outside the official border post, without the necessary documents), its entry was refused or when it has not been authorized in accordance with the legal provisions. It is also considered as illegal the transit of foreign citizens in Portuguese territory when they are not guaranteed their admission in the country of destination. Persons who have entered illegally the territory do not commit any crime, but are subject an administrative fine (Article 192 and 197 of the Immigration Law) and to a removal measure (Article 138 and 145). Even though, Immigration and Asylum Law foresee detention of migrants in cases where they are found entering the territory without holding the necessary documents or when their entry is refused on other grounds, such as inscription on the Schengen Information System, or also in cases where an asylum request is present at the border point. A foreigner may also be detained during an expulsion procedure. In all these cases, immigration detention can only last for two months at maximum.

As stated above, the Portuguese Law does foresee a crime on smuggling of migrants (see 2.1.).

⁴ http://www.provedor-jus.pt/site/public/archive/doc/MNP_2018.pdf.

We must also stress that the Immigration Law foresees several mechanisms that set forth regularisation mechanisms to illegally-staying migrants, such as for work purposes (Article 88), for the protection of other rights (Article 122) and even on humanitarian grounds (Article 123). These mechanisms were even broadened in 2019. For example, the Law 28/2019, of 29 March establishes a legal presumption according to which a foreigner citizens who work in the national territory and have paid their contributions for the social security in the last 12 months are deemed to have entered legally in the territory for the purposes of acceding to the regularization mechanism.

2.7 Freedom of Association and Expression – to what extent does domestic law protect against individuals and organisations who express support for migrants and refugees or join forces/meet to discuss such protection etc – how does this interact with the criminalisation?

Freedom of assembly is enshrined in the Portuguese Constitution as a fundamental right (Article 46) and may not be hindered or limited by any type or form of censorship. Armed associations, military, militarised or paramilitary-type associations and organisations that are racist or share a fascist ideology are expressly prohibited (article 46(4)). The Constitution acknowledges the role of private institutions for social solidarity and other non-profit institutions of recognised public interest in the pursuit of social solidarity objectives (article 63(5)). All the people have the right to form associations freely without the prerequisite of any authorisation, on condition that such associations are not intended to promote violence and their purposes are not contrary to the criminal law. Associations shall pursue their purposes freely and without interference from the public authorities, and may not be dissolved by the state or have their activities suspended other than in cases provided for by law and then only by judicial decision.

As pointed above, the State welcomes NGOs dedicated to the defence of Migrants' Human Rights through several means, namely incorporating them in the public policy-making. Some NGOs promote advocacy activities inclusively receive the State's welcome or even material support. For example, some conferences promoted by NGOs take place in the Portuguese Parliament and are attended by several members of this sovereignty organ. Thus, one may consider that the Portuguese society and public space is highly favourable to the NGO's activity. There is a broad understanding that the State must receive refugees and the public opinion has not, in general, supported hate speech or anti-immigration discourses. Currently, there are not also political parties with parliamentary seat that support anti-immigration discourses.

2.8 Law of the Sea – (relevant for countries bordering international waters or whose vessels operate on the High Seas) – how are law of the sea provisions incorporated into domestic law; how does the obligation to assist people in distress, translate into domestic law; how does it interact with anti-trafficking/smuggling and refugee law.

The International Convention on Maritime Search and Rescue (SAR) of 27th April 1979, was approved in Portugal by Decree no 32/85 of 16 August. According to Article 8, n.2 of the Constitution, after its approval, it becomes part of the Portuguese legal order *ipso facto*. Later, the Decree-Law n. 15/94 of 22 January adopted appropriate measures for the establishment of the structure, organization and duties of the Portuguese Maritime Search and Rescue Service, in order to ensure the attainment of the objectives outlined in the Convention. Decree-Law n. 106/2004 of 8th May has continued to deepen this regulation, encompassing measures aimed at supervising and inspecting vessels.

According to these legal acts, the Portugal has created a national system for maritime search and rescue, under the order of the Ministry of National Defence. It also comprises other entities, such as and the Ministry of the Seas and of the Health. The Marine Search and Rescue Service, which operates within the Navy, is the service responsible for search and rescue actions related to accidents involving ships or vessels. It comprises coastal surveillance units and search and saving units. The Portuguese Navy and the National Republican Guard have been cooperating in several operations in the Mediterranean, since 2015, during the so-called Migratory-crisis and contributed to save several lives. Moreover, the Portuguese system also encompasses an Air Search and Rescue Service, under the National Air Force.

This system does not provide any specific reference to the interaction with anti-trafficking/smuggling and refugee law. However, the Portuguese Navy also holds the mission to fight against maritime criminality, encompassing the prevention of illegal immigration. Nonetheless, it has not been faced with this problem yet, as Portugal is normally not used as port of entry of illegal migrants in Europe through the sea.

2.9. Also consider whether criminalisation is used as a threat or whether it is something that regularly leads to prosecutions. If criminalisation is more of a threat – what are the types of consequences short of prosecution (seizure; forced stoppage of work; forced use of armed police during search and refugee operations; general hostile environment...). Please consider: any criminal cases against civil society workers

(individuals). Criminal cases against the organizations themselves. Administrative or related proceedings against the organizations in lieu of or following criminal proceedings.

In Portugal, the majority of smuggling cases were dismantled by the Aliens and Borders Services in contexts where the migrants were already present in the territory, namely working illegally. Other cases concerned the activity of criminal networks that were dedicated to falsify documents and sell them to migrants. In 2017, there were 15 convictions for the crime of smuggling of migrants and 3 convictions for criminal association⁵.

Some cases of trafficking of human beings were also signalled lately. According to the Annual Report on Internal Security, there 81 cases of foreigner citizens trafficked in Portugal were signalled, and, in 18 cases, the Portuguese territory was reportedly used as country of transit. However, according to the latest official statistics (2017), there were only 3 convictions for trafficking on human beings in 2017.

However, we must point out that NGOs who work with irregular-staying migrants in order to provide legal help, namely as regards access to regularisation, have not been facing prosecution⁶. In this context, it is understood that their activity does not fall under the concept of smuggling of migrants. The common understanding, expressed by several NGOs contacted by the Portuguese Ombudsman, is that the authorities adopt a very narrow concept of “smuggling of migrants”, despite the reading of the criminalisation provisions. Some NGOs claim that there is, in this context, a gap between the law in books and the law in action. The general perception is that the authorities only prosecute the smuggling of migrants in cases where other crimes were committed (v.g. document forgery or labour exploitation) or when they were done with lucrative purposes. This goes in line with the public policies that set forth several mechanisms for regularisation. One of the NGOs, which receives public funding, reported that its activity on promoting the regularization of the migrants’ legal status is understood, by the public authorities, as *fostering the integration of migrants in the territory*. Also, other NGO provides legal and social support to migrants at the border area. This activity is also led without any type of hindrance from the State.

⁵ Official data available at the webpage of the Directorate-General for Justice Policy: <https://www.dgpi.mj.pt/DGPJ/sections/home>.

⁶ Data provided by NGOs working in the field.

3. Case examples. Please provide information on any cases, or patterns of cases, that you are aware of, which relate to the criminalisation of NGO activities in the context of humanitarian efforts targeting refugees and other migrants.

The Portuguese Ombudsman is not aware of cases, or patterns of cases which relate to the criminalisation of NGO activities in the context of humanitarian efforts targeting refugees and other migrants.

However, there was a case in 2015 where a Portuguese citizen collected money through crowdfunding for support a trip to Austria, which had the purpose of bringing a family of Syrian refugees to live in Portugal. The Aliens and Borders Service issued a public warning aimed at informing the population that such “acts of solidarity” could amount to illegal immigration aid and, thus, would be prosecuted⁷.

4. Cases involving vigilante acts against NGOs who assist migrants (violence; vandalism; threats...) or relates acts which may amount to “Hate Crimes”. Please provide any factual information on any known cases. Please explain the extent to which the State has a law against that kind of behaviour (nuisance; criminal law); are there any known instances in which vigilante attacks have been reprimanded (criminal/nuisance...)

The Portuguese Ombudsman is not aware of cases concerning such acts against NGOs who assist migrants. Any act of vandalism may be punished under the criminal law and give rise to civil liability as well. The crime of damages punishes those who destroy, in whole or in part, damages or disfigures an alien property, and may be aggravated when done with violence, according to Article 214 of the Criminal Code. Threats may be also punished under Article 153, which punishes whoever threatens another person with the commission of a crime against life, physical integrity, personal liberty, sexual freedom and self-determination or property of considerable value in such a manner as to provoke fear or disquiet or harm his or her freedom of determination.

Article 240 of the Criminal Code, on its turn, punishes the crime of discrimination and incitement to hatred and violence. It punishes those who found or form an organization or conduct organized advertising activities which incite discrimination, hatred or violence against a person or group of persons on grounds of race, colour, ethnic or national origin, descent, religion,

⁷ <https://sol.sapo.pt/artigo/532827/nuno-felix-o-transporte-ilegal-de-sirios-que-valeu-um-puxao-de-orelhas-do-sef>.

sex, sexual orientation, gender identity or physical or mental disability, or that encourage it; or participate in or assist the organization or activities referred to in the preceding paragraph, including financing thereof.

5. Coverage by media, IGO or NGO policy reports, governments/parliaments
Please provide any links to media, intergovernmental and NGO policy reports, as well as government statements and reports.

Portuguese Media has been widely covering some news regarding the criminalisation of NGOs' personnel who engaged in activities abroad related to saving lives of migrants at seas. A specific case where a Portuguese citizen is facing criminal prosecution in Italy raised a strong public commotion and led to a massive movement of financial help collection⁸. This citizen was working on ship operated by an NGO, which was seized by the Italian authorities. The same attention was paid to similar cases, which were also widely reported by the NGOs working on the field. In general, both the media, the NGOs and the Portuguese public are very sympathetic with the activists working in saving lives at seas.

6. Additional information? Please provide any additional factual information relevant to this study, not already provided above. Please provide any reflections on the context in your particular country, the reason(s) for the resort to criminalisation and any recommendations about how to resolve the underlying problems.

The Portuguese Ombudsman has reached several NGOs on the process of responding to the present questionnaire. All of them responded that they have not felt any hindrance to their activity or pressure whatsoever from the Portuguese authorities. The only reported difficulties concern the delays on the administration responses to address the NGOs' requests. This situation is particularly serious as regards the Aliens and Borders Service, which in 2019 no longer could respond, due to lack of human resources, to all requests for regularisation, renovation of residence permits or even family reunification requests. These delays hinder migrant's access to several fundamental rights, such as the right to education, health, social security, etc. Besides these delays, NGOs also report difficulties with the articulation of the several public services and also the administrative beaurocracy as obstacles to the full enjoyment of migrants' rights in the territory.

⁸ <https://www.publico.pt/2019/06/17/p3/noticia/miguel-duarte-1876705>



Another well-reported problem consists on the difficulties faced by NGOs to access to migrants' detention centres. This situation may jeopardize the health and well-being of the detained migrants, who will be kept in isolation. This situation has also been reported by the NPM's 2018 annual report.

Moreover, it is worth noting that the Portuguese Government has been demonstrating good-will and solidarity towards vessels who have rescued migrants at seas and whose entrance was refused by other States. It has, for several times, volunteered to receive migrants who were rescued by several vessels controlled by NGOs (v.g. *Lifeline*, *Aquarius I*, *Diciotti*, *Aquarius II*, *Sea Watch III*, *Alan Kurdi*⁹, *Open Arms*¹⁰).

However, and despite these welcoming efforts, the Portuguese authorities are also aware of the risks that an “open borders” policy may encompass. It is particularly worrisome the increasing numbers of trafficked or smuggled persons arriving to Portugal, namely to work in the agriculture. NGOs must, then, be also attentive and cooperative with the government's efforts to fight against these serious phenomena.

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⁹ <https://www.portugal.gov.pt/pt/gc21/comunicacao/comunicado?i=portugal-recebe-migrantes-resgatados-ao-largo-da-costa-da-libia>.

¹⁰ <https://www.sabado.pt/video/detalhe/portugal-vai-receber-ate-10-migrantes-do-navio-open-arms>.