Trends in Organized Crime

Human smugglers or criminalised migrants? Securitarian bordering and the criminalisation of ‘captains’ in the Mediterranean

--Manuscript Draft--

Manuscript Number:	TIOC-D-24-00018R2
Full Title:	Human smugglers or criminalised migrants? Securitarian bordering and the criminalisation of ‘captains’ in the Mediterranean
Article Type:	Original Research
Keywords:	Crimmigration; Human Smuggling; Securitization; Bordering; Undocumented Migration
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Funding Information:	Middlesex University — Dr Nicola Montagna
Abstract:	Smuggling industry plays a key role in the international migratory processes; it is a world-wide and often misunderstood phenomenon which operates in a multiplicity of spaces and at different stages: at the beginning of the ‘journey’ and along the route, when migrants need to rely on supporting networks to cross borders and continue their journey. This industry also operates in a concatenation of loops involving different actors, which include migrants who pilot the small boats transporting migrants across the sea. Although these migrants are not formally affiliated with the smuggling organizations, they find themselves unwittingly drawn into the activity, compelled to operate the boats ferrying migrants at sea and consequently facing criminalization processes. Focusing on the Eastern and Central Mediterranean Sea routes and drawing insights from 22 in-depth qualitative interviews with key informants based in Greece and Sicily, this paper seeks to enrich the existing body of knowledge concerning border securitization and the intersection of immigration control with criminal justice, often referred to as 'crimmigration'. The merging of criminal law and migration law prompts an inquiry into whether the prosecution of people who steer the boats carrying unauthorised migrants across the Mediterranean serves to combat human smuggling or rather as an avenue to criminalise migration itself. The article’s central argument posits that ‘captains’, instead of being integral members of organised human smuggling networks, represent only a small aspect of migratory dynamics. They are vulnerable targets whose criminalization is indicative of a wider process of securitization in border control.

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Abstract

Smuggling industry plays a key role in the international migratory processes; it is a world-wide and often misunderstood phenomenon which operates in a multiplicity of spaces and at different stages: at the beginning of the 'journey' and along the route, when migrants need to rely on supporting networks to cross borders and continue their journey.

This industry also operates in a concatenation of loops involving different actors, which include migrants who pilot the small boats transporting migrants across the sea. Although these migrants are not formally affiliated with the smuggling organizations, they find themselves unwittingly drawn into the activity, compelled to operate the boats ferrying migrants at sea and consequently facing criminalization processes. Focusing on the Eastern and Central Mediterranean Sea routes and drawing insights from 22 in-depth qualitative interviews with key informants based in Greece and Sicily, this paper seeks to enrich the existing body of knowledge concerning border securitization and the intersection of immigration control with criminal justice, often referred to as 'crimmigration'. The merging of criminal law and migration law prompts an inquiry into whether the prosecution of people who steer the boats carrying unauthorised migrants across the Mediterranean serves to combat human smuggling or rather as an avenue to criminalise migration itself. The article's central argument posits that 'captains', instead of being integral members of organised human smuggling networks, represent only a small aspect of migratory dynamics. They are vulnerable targets whose criminalization is indicative of a wider process of securitization in border control.

Key words: Crimmigration; Human Smuggling; Securitization; Bordering; Undocumented Migration

Introduction

On 26 February 2023 one of Italy's worst migrant boat disasters occurred with at least 94 dying off the coast of Steccato di Cutro, a seaside village near the town of Crotone in the region of Calabria. At a press briefing on 10 March, the Italian Prime Minister Giorgia Meloni, introducing a law decree aimed to reduce departures from the southern Mediterranean coast, stated:

> "Hitting the traffickers [she used the word trafficker] on the boats also means hitting those who are behind human trafficking (...) What this government wants to do is to go after the *scafisti*[1]all over the globe because we want to break this trafficking" (*La Repubblica*, 10 March 2023)

Similarly, in the aftermath of the 14 June 2023 *Adriana* shipwreck off Pylos, Greece, where more than 500 people originating from Pakistan, Syria, Palestine, Egypt and Afghanistan were presumed dead, the Greek Prime Minister suggested, "And at the end of the day, we should hold the smugglers accountable, not the Coast Guard that is trying to do its job" (BBC One, 23 November 2023). This attempt to shift responsibility for the shipwreck from the Coast Guard to those in charge of steering the boat carrying migrants not only enhances an anti-migration narrative but also reinforces the notion of criminalising those identified in this role.

In both Italy and Greece, institutional and media discourse habitually conflates smugglers and captains, the latter defined as those people who drive boats carrying irregular migrants across the Mediterranean. In this capacity, they have become one of the main targets of the securitisation and criminalisation of migration. Given the failure in dismantling human smuggling networks, they have become easy scapegoats to blame for the EU border control crisis and ungovernable flows across the Mediterranean.

As this article aims to show, smugglers and captains cover different roles within the migratory process. The former are individuals or organised networks that facilitate the unauthorised entry of a person into a State to obtain direct or indirect material gains[2]. The latter are migrants who are forced by violence or the threat of violence to drive the boats, often highly dangerous inflatable dinghies bought cheaply on the internet, to carry other migrants across international maritime borders (Ambrosini and Hajer 2023; Cusumano and Villa, 2020). While they may be identified as those who take command of the vessels, which is why the terms captain or boat pilot are used in this article; they do not organise the voyages or share in the profits of the smuggling activity. Captains are therefore doubly victimised; by smuggler organisations, who often choose them at random and make them drive boats across the sea or until they are rescued by SAR missions; and by the authorities who prosecute them as smugglers and therefore as part of criminal organisations aiming to profit from exploiting other migrants.

[1]*Scafista* is the Italian name for people who steer the boats carrying unauthorised migrants across the Mediterranean. It is commonly used as a synonym for smugglers in the media and political discourse. For this reason, terms such as captains or boat pilots are preferred in this article, reflecting the maritime terms (ARCI Porco Rosso and Alarm Phone 2022), while *scafista* is only used when mentioned in participants' interviews.

[2]This definition is in line with the Article 3, Smuggling of Migrants Protocol, United Nations' (2000). Alternative distinct definitions and interpretation of the phenomenon can be found in Aziani (2023); İçduygu (2020); Siegel (2019); van der Leun and Staring (2014).

By comparing the criminalisation of captains on the Central and Eastern Mediterranean routes, this article aims to contribute to the literature on bordering, securitisation, and 'crimmigration' – the merging of criminal law and migration law that involves restrictive measures against migrants who cross borders without documents and, more generally, those individuals accused of facilitating irregular migration. It interrogates whether the criminalisation of people who steer the boats is a way of tackling human smuggling or an opportunity to criminalise migration. The article's central argument is that captains rather than being part of organised human smuggling are the tip of the iceberg of migratory processes, an extremely vulnerable target whose criminalisation is part of a broader process of securitarian bordering.

The article is structured as follows: the first section provides the theoretical framework. The second section focuses on the methodology, while the third examines the legal framework for facilitating undocumented migration in Greece and Italy. In the following sections the empirical findings will be presented. The fourth investigates the recruitment of migrants who pilot boats by human smuggling networks. The fifth focuses on how the process of judicial criminalisation of captains takes place from when the boats are rescued until they land on EU shores. The sixth section discusses the implications of and the reasons behind this criminalisation.

Securitising the borders through the criminalisation of migration

Two theoretical frameworks inform this article: the critical security approach and the crimmigration approach. Combined, they provide an understanding of why boat pilots become scapegoats for smuggling networks and are undergoing processes of criminalisation. An ever-growing body of literature in migration studies interrogates why the nexus between migration and security has dominated EU policy making and the public discourse since the late 1990s. According to these scholars, there has been a shift from viewing migration mainly as a socio-economic issue to regarding it as a major social (crime), cultural (identity) and political (terrorism) concern, with the consequence of increasingly securitised and draconian migration measures (Andreas 2003; Bigo 2002; Campesi 2015; De Haas 2023; Huysmans 2002; Yuval Davies et al. 2019). Alongside traditional forms of entry control, such as the construction of barriers and walls and policing of these through the use of military forces, others have emerged that rely on more sophisticated technologies such as biometric identification, body scanners, data systems and drones, or agreements with rogue undemocratic states such as Libya and Turkey that use detention and systematic violation of human rights to restrict people's mobility (Amoore 2013; Montagna et al. 2024; Squire 2015)

However, the securitisation of migration and borders is not simply a response to increasing flows of unauthorised migration. In this regard, securitisation theory and its focus on the discursive turn in international relations, proposed by the Copenhagen School, is crucial to understanding the critical security approach. In their seminal work, Buzan et al. (1998) argue that securitisation is a process by which state actors transform subjects into matters of security by framing them as existential threats to the state. This process is neither a question of an objective threat or a subjective perception of a threat. Instead, political actors construct a narrative that legitimises extraordinary measures to address perceived threats (Buzan et al., 1998). The securitisation of migration, therefore, is not about the inherent objective threat posed by migrants, but rather about how migration is framed and perceived as a threat. As part of this process, it is not only migration policies that have become increasingly securitised. With the aim of consolidating a sense of a shared collective identity, mobilising loyalty to the relevant political community and legitimising the state in its function of protecting citizens from external threats, even public discourse has undergone this process, with migration becoming a major public concern (Geddes et al. 2020).

Within the critical security scholarship, other scholars focus less on the discursive shift and look at the wider process of the redefinition of the state and how it tries to expand its power by applying securitarian practices in many areas, including migration. As Didier Bigo (2002: 65) has put it, securitisation 'is anchored in the fears of politicians about losing their symbolic control over the territorial boundaries. It is structured by the habitus of the security professionals and their new interests not only in the foreigner but in the "immigrant." These interests are correlated with the globalisation of technologies of surveillance and control going beyond the national borders.' Securitisation is therefore more than a point defining the political right and the political left: a securitarian approach to migration appears to be a mantra shared by both. The securitisation of immigration is "a transversal political technology used as a mode of governmentality by diverse institutions to play with the unease, or to encourage it if it does not yet exist so as to affirm their role as providers of protection and security and to mask some of their failures" (Bigo 2002: 65).

Rather than being a policy response to the challenges to public order and internal stability posed by unauthorised migrants and asylum-seekers, the development of security discourses and policies is the outcome of deeper transformations in states. It is an integral part of the wider technocratic and political process in which professional agencies debate and decide the criteria for legitimate membership of west European societies (Huysmans 2002).

A main consequence of the securitarian bordering processes is the growing convergence of immigration and criminal law (Coutin 2011; Gatta et al. 2021; Stumpf 2006). Residual in the early 2000s, this convergence is now visible in many areas given the diffuse border crisis and the

growing politicisation of migration - in public and political discourse, in policies and laws as well as in certain immigration or law enforcement practices.

The entry of migrants into the justice systems for crimes they commit rather than for migration offences has been widely documented as part of the process of 'othering' ethnic minorities and of the criminalisation of the poor more generally (Fabini et al. 2022; Goodman and Ruggiero 2008; Melossi 2021; Palidda 2011; Ruggiero 2001). However, the criminalisation of migration, or crimmigration, means more than "aliens [who] become synonymous with criminals." (Stumpf 2006: 419). It is the expansion of criminal law in the wide area of migration to the extent that migration itself is increasingly treated through criminal law through coercive tools as responses to the perceived disruptive aspects of the mobility of people (Mitsilegas 2021; Montagna 2024; Woude, 2022).

Within this process, four trends whose aims are to create new spaces of securitarian bordering can be identified (Gatta 2021: 48). First, the introduction of criminal law consequences for violations of immigration law, by expanding the variety of immigration crimes. For example, foreigners who face criminal consequences for violating migration laws. The so-called 'status crimes' (Gatta et al. 2021: 3), i.e., crimes connected to migration law, not only include entering without a regular document, overstaying visa durations or facilitating the crossing of national borders for people without documents (Melossi 2021: 86). Recent legislation has also included renting lodgings or employing a worker without regular immigration documentation; not only the factual and physical act of border crossing, but also all those actions that facilitate undocumented migrants to stay in the country of transit or destination. Second, the expansion of the cohorts of actors involved in undocumented migration-related crimes. This trend is a consequence of the previous one. It is not only undocumented migrants who are criminalised, but a plethora of actors that, in one way or another, are involved in facilitating or not opposing unauthorised migration, regardless of whether they are smugglers or do so for profit as part of the construction of a 'hostile environment' against migration (Goodfellow 2019). As it will be seen in the section on Greek and Italian legal frameworks, landlords who rent a room to undocumented migrants can be prosecuted for facilitation of undocumented migration. In the UK, the hostile environment has turned teachers, landlords, and employers who must check the regularity of their staff's documents into 'border officers' (Luo et al. 2023; Montagna 2020; Goodfellow 2019). With regard to the Mediterranean, Tazzioli (2018) speaks of "crimes of solidarity" in relation to NGOs and people who provide health care and logistics to undocumented migrants and are criminalised by the justice system. Boat pilots fall into this second trend. Third, consequences on migrants and their status deriving from criminal convictions that are not related to immigration. This point is specular to the first one. While in the first immigration law was increasingly becoming a matter of criminal justice, here people pay in terms of repatriation or deprivation of

citizenship rights. The revoking of Shamima Begum's British citizenship because of her involvement in the ISIS exemplifies this third typology of crimmigration. Here, a terrorism related impacts on the status of a member of ethnic minorities and in which they are denied citizenship and the rights that go with it, to further militarise the state and its borders against migration (Williamson and Khiabany 2022). Fourth, the introduction of criminal type measures, such as custody or deportation, for immigration law violations. As part of the expansion of crimmigration, restrictive measures, including apprehension, being turned back at the border, being confined in detention and repatriation centres or ships and barges until asylum seeker applications are examined have become increasingly common (Luo et al. 2023; Montagna 2024; Stefanelli, 2020). These measures turn administrative violations such as unauthorised entry into acts to be punished as if they were criminal offences.

Crimmigration, therefore, becomes a tool of bordering and governing unauthorised migration, not only targeting migrants but also all those figures who may somehow facilitate them. Immigration violations have thus become the subject of criminal law and criminal penalties. This is a parallel process to the reduction of legal entry opportunities for both economic and humanitarian migrants and the precarisation of the status of legal migrants and refugees (Maneri, 2021). Closing borders incentivises opportunities for undocumented entry, expands the range of migration-related offences, the pool of those who can commit them, and thus the possibility of criminalising migration – with the consequence, how unintentional is unclear, of increasing precariousness and irregularity of status, and therefore more spaces for crimmigration, rather than the opposite.

An example of crimmigration concerns the criminalisation of those migrants who steer small boats across the sea. Although they occupy a central position in the public debate on migration in the Mediterranean and in other areas involving sea crossings, such as the Pacific between Mexico and the US or the Atlantic between Western Africa and the Canary Islands, the presumed role of captains in the human smuggling industry and their criminalisation has been scarcely researched, with few studies written so far.

With the exception of Patanè et al. (2020), who discusses the effects of criminal prosecution on migrants' asylum procedures from a purely academic perspective, research into the criminalisation of people for their alleged role in steering dinghies and small boats has mostly been carried out by activist-academics. *The Fight Against Alleged 'Smugglers' on the Greek Hotspot Islands* (Hänsel et al. 2020) investigates the prosecution and the system of punishment and incarceration of alleged smugglers at the EU-external border in the Aegean. The research covers the years 2014-2019 through an analysis of the implementation of anti-smuggling policies on the Greek Aegean islands and the collection of quantitative data by observing 48 court cases in Greece, monitored between 2016 and 2019. *From Sea to Prison: the Criminalisation of Boat Drivers*

in Italy (ARCI Porco Rosso and Alarm Phone, 2021), written by NGOs operating in Sicily, is based on primary sources including interviews with captains and other key informants, and focuses mostly on some judicial aspects and the consequences for those involved. *Incarcerating the Marginalized,* by Vicky Taylor (2024) focuses on the English Channel and shows how people have been imprisoned for arriving on a "small boat" since the 2022 Nationality and Borders Act came into effect. This report is also based on empirical findings, including the observation of more than 100 hearings in which people seeking asylum were prosecuted for their illegal arrival or for facilitating the arrival of others by driving the dinghy in which they were travelling.

There are several issues that arise from these researches. First, legal rights are barely granted, with hearings were often complicated and delayed by problems with interpreters and faulty video link technology, bail routinely denied without adequate consideration of each individual's circumstances, and defendants usually advised to plead guilty to "unlawful arrival" at the first opportunity to qualify for sentence reductions (Hänsel et al. 2020; Patanè et al. 2020). Second, captains are the last link in a much larger network, the leaders of which remain in the shadows. Far from being culpable for deaths at sea, captains are often also migrants who have been prevented from entering Europe (ARCI Porco Rosso and Alarm Phone, 2021). There is a general agreement that captains persecuted by judicial authorities are migrants who find themselves steering boats due to a variety of circumstances, including being forced through violence or in return for discounted passage (the majority in the Mediterranean routes), or having boating experience. This point leads us to a third, which is that most of the time those involved in captaining small boats are not aware of having committed a felony crime by driving a boat with asylum seekers through the Aegean Sea. Finally, the criminalisation described in this literature cannot be understood outside the broader framework of the anti-smuggling policies of the European border regime along with the narratives on human smuggling (Hänsel et al. 2020; Patanè et al. 2020). Therefore, according to these studies, there is a broader picture involving the evolution of anti-smuggling legislation within the European Union that explains the arrest and persecution of thousands of people steering dinghies.

In the coming sections a specific case of criminalisation of migration will be analysed; particularly at how the nexus between securitisation, and crimmigration is constructed through the criminalisation of people who pilot the boats across the Mediterranean and transport migrants to the other side of the sea.

Methodology

This paper is based on a comparative project involving Greece and Italy and aiming to explore the criminalisation of captains within the wider process of crimmigration and border controls in the aftermath of the EU-Turkey deal signed in 2016 and the 2017 Italy and Libya memorandum.

The project was carried out in 2023 and relied on both descriptive and explanatory qualitative methods to obtain, on the one side, complementary sources of information and, on the other, analytical reconstructions and interpretative frameworks. Accordingly, the researchers conducted semi-structured interviews with 10 key informants from Greece and 12 from Italy (22 participants in total). An initial group of participants were recruited from contacts established through the 2022 project funded by Middlesex University, London, on "Evaluating the refugee crisis response in Greece and Italy" and the 2015-17 ESRC research project EVIMED that investigated the flows through the Mediterranean in those years (d'Angelo et al. 2017). Subsequently, other participants were recruited either with the support of those participants already contacted (snowball technique) or via email where the topic and aims of the project were presented along with the nature of their proposed participation. Key informants included professionals – such as police officers, border control officials, magistrates, etc., and practitioners from INGOs and local NGOs. The study purposely aimed to select key informants from Greece and Italy on the basis of their professional history, position, and experience within their institutions (either local NGOs, legal professional bodies, the police, and border control). Among the questions developed in the interview guide, key informants were asked to provide accounts about changes in the human smuggling industry and its tactics as a result of policy measures such as the EU-Turkey deal and the Italy-Libya memorandum. In addition, questions were asked regarding the role played by captains in the people-smuggling networks operating on the Central and Eastern Mediterranean migration route, the political and media narrative around boat pilots, and the judicial approach and proceedings involving them. Interviews were conducted in Italian, Greek and English. All the researchers involved in the study are either Italian or Greek native speakers and were in charge of translating data collection tools as well as the data collected during the interviews.

Subsequently, thematic analysis was conducted on the interview transcripts to compare information provided on the role, background and ways in which boat pilots have been approached and criminalised by the two states, as had emerged from the discussions. At the same time, cases and information provided by local and international NGOs (such as the IMO, UNODC, the Red Cross) research reports, and an analysis of the legal frameworks in the EU, Italy, and Greece were used to further inform the study. Participants' anonymity and data confidentiality were guaranteed before, during and after the data collection completion. Each participant was given a code such as IP1-IP2-IP3 (Italian participants) or GP1-GP2-GP2 (Greek participants); moreover, the signed consent form has been kept separate from the data. The data from two

humanitarian research reports based on primary sources on the legal distortion against pilots have been used for this article.

Findings

The criminalisation of unauthorised migration and entry facilitating In the Italian and Greek legal framework

Combating migrant smuggling and those who facilitate border crossings has been a major concern of EU border control policies at least since the early 2000s, following the UN Protocol against the smuggling of migrants by land, sea and air that supplemented the UN convention against transnational organised crime. The obligation for Member States of the European Union to address the facilitation of undocumented immigration with criminal penalties has its origins in the combination of two provisions. Directive 2002/90/EC7 requires States to first and foremost adopt 'appropriate sanctions' against anyone facilitating the entry or transit of foreigners into the territory of a Member State in violation of the relevant immigration legislation. The scope of unauthorised is extended to cases of incitement and complicity, as well as attempted offences. It is worth noting that 'profit' in exchange for facilitation is not envisaged as a constitutive element of the offence (Zirulia 2021). This element, which was present in the UN protocols about trafficking and human smuggling, is introduced at EU level in Framework Decision 2002/946/JHA, which stipulates that when facilitation is committed as an activity by a criminal organisation for financial gain while endangering the lives of the persons who are the subject of the offence, it is punishable by custodial sentences with a maximum sentence of not less than eight years. Adopted together, the two instruments complement one another and are known as the Facilitators Package. Under the Facilitators Package, any person who intentionally assists, for financial gain, the unauthorised entry, transit, or residence of a non-EU national into the EU or to reside there is to be sanctioned unless they are doing so for humanitarian reasons.

Before these two EU provisions, Member States' anti-smuggling sanctions measures did not include penal prosecution. While the first sanctions introduced by the 'Martelli Law' in 1990 were exclusively administrative, involving the expulsion of undocumented migrants and thus remaining outside the realm of criminal relevance, regulatory activity against the facilitation of irregular immigration experienced further impetus following the implementation of the Schengen Agreement, which abolished internal borders and transformed Italian borders into entry points to the free common European space. In fact, from the Schengen Agreement and the subsequent Convention implementing it, came the obligation to extend criminal relevance to

those facilitating the unauthorised stay of foreigners within European borders. The penal persecution of aiding and abetting undocumented immigration was first introduced in the Turco-Napolitano Law (n.40 -06/03/1998) and then amended by Law 189/2002 (the so-called Bossi-Fini Law): anyone who promotes, directs, organises, finances or transports foreigners into State territory, or commits other acts aimed at irregularly procuring their entry into Italy or another State of which the person is not a citizen or does not have the right to residence, shall be punished by imprisonment of one to five years and a fine of €15,000 for each person.

Compared with the original 1998 regulation, the Bossi-Fini law included criminal provision for aiding the entry of foreigners into other States and also introduced some hypotheses of aggravated aiding and abetting. There were further changes aimed at tightening the penalties already provided for, such as the increase of the prison sentence to a maximum of five years – compared to the original three – under Law 241/2004. Notably, citizens who help migrants to cross national borders are prosecuted in Italy under the same law that punishes smugglers who take money from migrants. This is in line with demands coming from the EU on the one hand and with the politicisation of migration and security issues more generally on the other. The so-called Security Package (Law 125, 24/07/2008) introduced other types of the facilitation of undocumented migration, including granting accommodation to migrants without a resident permit (with the confiscation of the property and imprisonment for between 6 and 36 months) or employment (with a fine of €5,000 for each migrant-employee and imprisonment for between 6 and 36 months). Similarly, Law 94 (15/07/2009) introduced the crime of unauthorised entry and unauthorised stay. Finally, while the criminalisation of migration facilitation in recent years has mostly focused on solidarity at sea and on land with a number of measures against SAR NGOs (Tazzioli 2018; Zirulia 2021; Dadusc and Mudu 2022), after the deadly shipwreck near Cutro on the east coast of Calabria (Italy) on 26 February 2023, the government passed a Decree Law making the punishment harsher (from 2 to 6 years imprisonment instead of 1 to 5), for anyone who 'promotes, directs, organises, finances or *carries out the transport* (editor's italic) of foreigners in the territory of the State'. In the presence of aggravating circumstances – including exposing migrants to danger to life or limb, or subjecting them to inhuman or degrading treatment – the incarceration framework moved to 6 to 16 years (from 5 to 15).

Greek laws on migrant smuggling are also very stringent, reflecting EU requests to tackle undocumented migration and those who facilitate it, and a deep concern to regulate the influx and stay of third-country nationals within Greek borders. Under Article 87, various obligations are imposed on individuals and officers to control and report the movement of such individuals. Specifically, hotel and resort managers are mandated to notify authorities of the presence and departure of third-country national guests. Failure to comply with these laws leads to severe penalties, including substantial fines ranging from €1,500 to €3,000 for violations. Moreover,

severe consequences, such as imprisonment for up to ten years and hefty fines starting at €20,000 and increasing to €50,000, are prescribed for those facilitating unauthorised entry for circumstantial profit or as part of more regular involvement in the smuggling processes. Further, facilitating unauthorised residence or obstructing police investigations into such cases can result in imprisonment and significant monetary fines, reflecting the seriousness with which these offences are regarded. A similar restrictive approach is adopted for the illegal possession, use, or withholding of passports, where imprisonment and substantial fines are the norm. In addition to penalties for individuals, managers or agents of travel and migration agencies also face stringent consequences, including imprisonment and hefty fines, highlighting the emphasis given on law implementation.

"Those who drive the boats, who depart from Libya, are forced migrants not *scafisti*"

As it was observed in the previous section, there has been increasing criminalisation of those accused of facilitating irregular migration since the early 2000s. This growing criminalisation targets a variety of actors and takes place at every level of migrant journeys: from those who organise and promote the sea voyages of undocumented migrants to those who facilitate irregular entry or provide unauthorised residence. Criminalisation is not only about progressively increasing punishments, but also about expanding and broadening the categories of figures criminalised. With regard to boat pilots, they can be identified as those who 'carry out the transport' of foreigners in the State territory (Italy) and those who facilitate unauthorised entry for profit or through professional habits (Greece).

The conflation between captains and smugglers exists not only in public discourse, as indicated in the introduction, but also in the criminal justice system. There is a convergence between smugglers facilitating unauthorised entry for profit and captains who drive the boats through the Mediterranean (Andreas 2003; Collyer 2007; Mountz 2020). It is a parallelism that is refuted by all our participants, in both Italy and Greece, who generally agree that, "Those who drive the boats, who depart from Libya, are forced migrants not *scafisti*. None of them is a smuggler" (MEDU – Doctors for Human Rights – Practitioner, IP7). The same discourse emerges from Greek participants. While the goal of captains is to cross the sea to migrate, the goal of smugglers is to profit from people's desperation to migrate. Their aim is to provide a service and be paid for it; they have no economic interest in crossing the sea themselves. Most importantly, they are aware of the combination of legal and life risks involved in sea crossing. As one participant put it:

> "The heart of the problem is the following and I'll express it with a rhetorical question: if you were a trafficker and you had the opportunity to keep earning that amount of money for the next 100 years, because the global policies are not changing, would you be that stupid to put yourself on the boats and drive, and risk going to jail once you arrive in Italy? Are you that stupid? And by the way they are very sly people. From the criminal point of view, we are talking about excellence, so could you imagine them driving the boats? With such a high risk of landing in Sicily and being caught?" (Public Prosecutor, Palermo, IP2)

In addition, since the growth in demand for passage in 2015 and the destruction of at least 545 vessels as a result of the EUNAVFOR Med anti-smuggling operation 'Sophia' between 2015 and 2018, the use of more dangerous vessels has been incentivised (Heller and Pezzani 2018, Crawley 2018). Increased pressure from law enforcement agencies, rather than reducing offences, had the unintended consequence of 'displacing crime' (see Campana 2022). Libyan smugglers have increasingly used cheap inflatable boats with low-cost engines bought in China (Ambrosini 2018; Cusumano and Villa, 2020). These boats are disposable and do not involve any large investment. The risks have become even higher for those who leave from Tunisia, which has increasingly become the major port of departure, where 'boats are made of iron sheets loosely welded together, which makes it easier for water to enter and cause them to sink, or for them to break on the way' (Humanitarian volunteer, IP10).

Migrants are thus forced and tales of violence are frequent, for example during the trials where captains have shown the scars from the violence they have suffered on the beach or on the boat, or relate the violence they have witnessed when other passengers have refused to play those roles, or in other circumstances (ARCI Porco Rosso and Alarm Phone 2021). As one migrants' lawyer put it,

> "Many told us that they were beaten up. A guy we are defending was broken all his teeth with a kick of a weapon. Another one, they separated him from his pregnant girlfriend, they told him "You drive the boat, when you send us a message saying you got there, we'll send her." This girl never got there." (Lawyer, IP3)

There are various ways to appoint captains. They are mostly picked from migrants waiting to leave and the process always involves the use of force rather than financial gain, on both the Eastern and Central Mediterranean routes. First, at the moment of boarding, smugglers order under the threat of shooting the last two in line to drive the boat and hold the compass. Sometimes they are chosen randomly, other times they are forcibly chosen because they seem to have the

skills needed to steer a boat; smugglers may know that they used to live by the sea or were sailors (ARCI Porco Rosso 2020), or seem to have the right attitude for driving a boat:

> "Usually, though, when they are on the coast and have to appoint someone to drive, they choose the guy that seems smarter, and they give him the satellite. They tell them, here, drive the boat, etc. So, it is a state of necessity where they are chosen only for being smarter. The most dynamic person. I am myself a very dynamic person and would probably be chosen in that situation as the one to drive the boat." (Lawyer, IP6)

Once they are identified as the right persons to steer the boat or hold the compass, the chosen captains have no room for negotiation. Migrants may also be forced to become captains at sea by smugglers who drive the boat for a few miles or minutes and then jump on another boat that arrives to collect them. This is the only time a member of the smuggler network pilots a boat, and only for the time necessary to direct the migrants' boats; they then leave it to the migrant sitting closest to the helm. Many migrants find themselves helming in the middle of the sea in circumstances that are out of their control:

> "At times, that is the moment where the threats start. Most of the time it is unnecessary, because it is obvious that once you are in the middle of the sea and you are identified to be the pilot, what are they gonna do? Go back?" (Public Prosecutor, Agrigento, IP4)

Finally, migrants become captains to pay for the journey, where driving the boat becomes a method of payment. This is the closest form to what some participants identify as an agreement, albeit a forced one. Thus, for some migrants, driving a boat is a means of reaching the other side of the sea and paying for the lift that provides a service. This form is very common in both Greece and Italy when migrants have run out of family money or have not found labour opportunities, including forced labour, to pay for their journey:

> "If they do not have the entire amount of money to be able to cross the borders, they pay part of the amount and then they are asked to drive/lead the boat. In essence, they force some of the refugees to captain the boat and move it to the other side. Let's say that this has a discount in the fee because in reality the refugee does their job." (Lawyer, GP3)

This is the only form of co-responsibility, so to speak, between migrants and the human smuggling organisation as a sort of "forced agreement", because, as one participant said, "how ridiculous is an agreement where you don't pay but you are forced to drive" (Public Prosecutor, Palermo, IP2).

As is rightly implied, the conditions leave very little room for any kind of negotiation and smugglers act more as traffickers than smugglers by exploiting through force and violence migrants' urgent need to reach a safer place.

The criminalisation of captains after rescue

"Crucial to investigators were the statements of the migrants on board who recognised the three as their smugglers." With this meagre sentence on 23 October 2023, a police briefing announced the arrest of three people of Egyptian nationality by the Agrigento Mobile Squad. They were charged with the alleged crime of facilitating irregular immigration. The briefing was covered by major media outlets and the picture of a human smuggling network involving pilots was constructed and ready to be served to the public.

The process of the criminalisation of captains by the criminal system starts as soon as rescue operations end with the identification and arrest of the alleged captain. If the SAR operation involves larger vessels, other members of the "crew", like those who hand out food or water, are also identified. When identification takes place on military vessels or coast guard boats, the suspects are separated from the other passengers, either during the journey or just before the final moment of landing, and often made identifiable using wristbands of different colours. The investigations still need to continue on land in order to collect and gather witness statements (ARCI Porco Rosso and Alarm Phone 2021). In all other cases, when boats arrive independently or on the civil fleet SAR ships, the identification processes and investigations start on land in the hotspots where migrants are taken. As one participant recounts about their experience:

> "What happened was, at the landing stage there was a scan of all those arriving. Then a part of these were taken to the mobile team's office and they started with detectives and mediators, they spent 12 hours or so without breaks in interrogating (...) they took 10/15 people and if they all gave a similar account of the events and they identified 1/2/3 people – it was usually 3 people, one that drove, one on the satellite phone and maybe a third. If the accounts of those 10/15 people were similar, then they would continue with the administrative action against the defendants. And then the smugglers would be questioned. (Practitioner at 'Centro Astalli', Palermo, IP1)

Other options for identification include the use of pictures taken by Frontex or by military and coast guard vessels during patrol of the sea (ARCI Porco Rosso and Alarm Phone 2021) and what investigators identify as clues, such as wearing rubber boots or handling the satellite phone.

Similar practices are also found in Greece. As soon as migrant boats land on the shore or are picked up at sea, they are interrogated by the authorities – the Hellenic Police, or FRONTEX / Hellenic Coast Guard if they are picked up at sea – to find out who was driving the boat. Sometimes, migrants are directly asked who steered the boat and admit to having done so themselves as they are not aware of having committed an offence. In other cases, the group of people on the boat are asked to identify the pilot. The person identified as captain is then taken directly from the arriving boat and arrested.

In both countries, humanitarian organisations and lawyers report serious human rights violations alongside the criminalisation process. The process of identification is arbitrary, based on the words of a small sample of migrants, and no lawyer or legal representative is present during the procedure. No explanation is provided to the individual detailing the reason for their arrest and, for the most part, there are no interpreters present. Assumptions based on gender – males are more likely to be targeted – and nationality play a major role in the process (Hänsel et al. 2020). In Greece, Turkish nationals are more readily identified by the authorities as captains, while in both countries it can happen that migrants of the same nationality combine against each other, making identification even more farcical:

> "Then there is also an interesting phenomenon by which they know that someone will go to jail, so if the main ethnicity is Bangladeshi, they will accuse the Tunisians who are fewer. So, they look after each other." (Medici per i Diritti Umani [Doctors for Human Rights] IP7)

While the witnesses are sent to reception centres or dispersed around Europe, the alleged captains are imprisoned awaiting trial. Proceedings and outcomes against captains vary enormously from country to country, but also between localities within the same country, and the discretionary process in the identification of captains beginning on the coast guard vessels continues in court. In Italy, the court approach depends on where the hearing takes place. The outcome of a trial may be influenced by circumstances out of the captain's control, such as a serious accident with fatalities. The concrete facts and complexity of the case takes second place (ARCI Porco Rosso and Alarm Phone 2021). As one lawyer points out:

> "We follow many cases. There is one court, who usually does not find them guilty, and another where they are always sentenced with harsh sentences. Now we are appealing for two sentences of first and second degree. People who had the same behaviour, the same evidence, the same exact trials, in one court they were absolved and in the other they were sentenced. Today there is lots of talks about smugglers and them being the

problem, but the judges shouldn't be influenced by this. But we also know that they are human beings and are affected by all sorts of pressures and so…" (Lawyer, Catania, IP3)

However, there are judges who are less influenced by the political climate and public opinion and who make unconventional choices, for example, by applying Article 54 of the Criminal Procedure Code regarding a state of emergency. According to Article 54 a person shall not be punishable if they committed the act out of necessity to save themselves or others from danger of grievous bodily harm. As the same lawyer puts it: "There is a Palermo court ruling that has been revised thanks to the UN commissioner's report, who explains how things work in Libya: traffickers board the boats, choose who drives and send the boats. They are the same as others. However, here the court applied the code 54 to everyone. But these people go from prison to prison before being absolved: they are foreigners who don't speak the language, that have no contacts" (IP3). The judicial treatment of people accused of driving boats as smugglers is therefore a flip of the coin, with a great deal of discretion deciding the judicial fate of captains.

The particularly harsh anti-smuggling legislation in the Greek system has led to large-scale imprisonment of migrants and severe punishments for any sort of facilitation, even if this does not involve financial gain. Over 11,254 people were arrested for human smuggling between 2013 and 2020, the largest group in prison after those convicted for drug-related offences (Greece 2023; Hänsel et al. 2020). Although this number does not differentiate between those accused of facilitating undocumented entry via sea (captains) or land, it has been reported that over 80 percent of migrants entering irregularly come to Greece via the sea (Hellenic Police Report 2022). Thus, it can be assumed that the vast majority of those arrested were involved in migrant smuggling by sea. As a result, in less than five years, the number of people convicted of human trafficking offences by sea has doubled, from 951 people in 2016 to 1,905 in 2019, while the number of arrivals in the same period decreased from 173,000 to fewer than 60,000 as a result of EU-Turkey agreements (Hellenic Police Report 2021).

By monitoring 48 trials of human smuggling by sea (first-instance and second-instance) between 2014 and 2019, Hänsel et al. (2020: 70) found that most of the defendants were not simply convicted on the charge of facilitating unauthorised entry, but also for additional offences, including entry without permission, endangering human lives and disobedience. For those convicted for unauthorised facilitation only, which accounted for 15 out of 48 cases, the average sentence administered was 48.1 years, with an average mandatory sentence of 17 years. These long sentences can be explained for two reasons. Firstly, the Greek legislation is particularly strict against those who facilitate border crossings, punishing up to 10 years for facilitating irregular entry of a third national (see the relevant section in this article). On the other hand, in most cases, the defendants were not simply convicted on charges of facilitating irregular entry, but were also

sentenced for additional offences such as entering without permission, endangering lives and disobedience (Hänsel et al. 2020). In addition, it should be noted that sentences for facilitating unauthorised entry suspend the right to asylum of forced migrants. Those who are identified as boat pilots are seen by Greek authorities first as offenders and then as asylum seekers, even if they are granted refugee status. As a key informant explains, "if someone is a refugee and has a conviction [as a smuggler for having facilitated the arrival of other people], he has first to pay the debt to the society" (Lawyer, Athens, GP4).

Finally, Hänsel et al. (2020: 70) also observed that these trials, whose average duration was 38 minutes, were conducted in the absence of compliance with some basic legal procedures: lack of either adequate legal representation or translators for the defendants, violation of procedural rights, including repeated arbitrary and lengthy postponements, introduction of key witness testimony without allowing cross-examination, and rejection of legal grounds for acquittal, such as when people were forced to drive boats to save the lives of those on board (Hänsel et al. 2020: 49).

Discussion

Securitisation of borders, criminalisation of migration and the scapegoating of boat captains

The criminalization of captains in the Mediterranean is not an isolated case. As sea crossings on other migration routes increase, it is also happening elsewhere, particularly in those countries where arriving at sea has become a humanitarian and politicized issue. In the UK, the Nationality and Borders Act (2022), which expanded the scope of immigration crimes in the UK in response to people arriving in Dover on 'small boats', introduced the offence of 'illegal arrival' (Section 24), increasing, the maximum penalty to 4 years imprisonment, and expanded the scope of the more serious offence of 'facilitating arrival' (Section 25) increasing the maximum penalty to life imprisonment. As a result of this in the first year (June 2022 – 2023), 240 people arriving on 'small boats' were charged with 'illegal arrival' (Section 24), while 49 people were charged for 'facilitating' the arrival of others (Section 25). In 2022, 1 person in every 10 dinghies was arrested for their alleged role in steering. In 2023, this was 1 in every 7 dinghies. Sentencing varies from 9 months imprisonment 'illegal arrival' (Section 24) to several years imprisonment (a starting point of 3 years after trial) for those convicted of 'facilitating arrival' (Section 25).

The widening use of criminal law to punish immigration law breaches, with custodial and penal measures and related enforcement procedures, is a worldwide process (Gatta et al, 2021). It started at the turn of the century as part of securitarian bordering processes and has since become ever more crucial in attempts to regulate and control migration. In migration studies the concept of bordering designates social and spatial forms of delimitations that take place at several levels and in a variety of contexts – within, outside and along official state borders and along routes (Montagna et al. 2021) – aiming to delineate foreigners' access to citizenship and membership and to 'demarcate categories of people so as to incorporate some and exclude others, in a specific social order' (Guentner et al. 2016, 392). Through the criminalisation of migration using penal instruments, such as arrest, detention, administrative confinement, and deportation, often without human rights or due process being guaranteed, spatial and symbolic boundaries are redefined (Gatta 2021: 59; Montagna 2024). Bordering through criminalisation of migration redefines certain categories of belonging, citizenship and crime, and reconsiders hierarchies and relations among actors (Yuval Davies et al. 2019). The undocumented migrant is constructed as the 'other' threatening the security and identity of the country of destination by attempting to cross its borders.

However, the criminalisation of migration also responds to a process of the politicisation of migration. With migration becoming a divisive and political issue, its criminalisation is the response that politics gives to people's fears of this phenomenon. In both Greece and Italy migration is also politicised, a process that was fuelled by their being border countries with Northern Africa and Middle East regions. The result is an anti-migration agenda that cuts across centre left and centre right parties and the growth of populist parties that equate migrants and elites and frame migration as a threat to national identities (Urbinati 2020).

In this context of politicization and securitarian bordering, captains become easy scapegoats in the dynamics of criminalization of migration, particularly in relation to campaigns against human smuggling, which have been at the heart of European policies aiming to tackle unauthorised migration and to hide their own failures. As has been noted, the outcomes of anti-smuggling measures introduced by European institutions and the Member States – the NATO operation in the Aegean Sea and the EUNAVFORMED 'Sophia' in the Central Mediterranean – especially in criminal law enforcement, proved inadequate (Zirulia 2021). Apart from arresting thousands of migrants accused of being captains, neither challenged the human-smuggling criminal networks. Instead, the militarisation of the sea and the destruction of vessels at sea as part of the Sophia operation has caused serious violations of migrants' fundamental rights and those of persons assisting them, and has caused the smugglers to shift from using wooden boats to rubber dinghies, increasing the risks involved in sea crossings (Ambrosini and Hajer 2023). If

the aim of these operations was to overturn the business model of people smuggling and reduce arrivals, they failed. As one participant put it:

> "The operation aimed to seize the traffickers' fleets, but if we look at the numbers, we only see hundreds of ship rescues. Why do you not obstruct human traffickers at sea? Because they are simply not there. We look for an elephant in the pool but cannot find it. Human traffickers are not at sea, and you can look for them as hard as you want, with all the tools you have available, but you will not find them because they are not there." (Public Prosecutor, Agrigento, IP4)

Captains become useful and more identifiable as public targets because they are more exposed. They can be easily racialised – the majority are Sub-Saharan on the Central Mediterranean route and Turkish on the Eastern Mediterranean route – and therefore go through a process of *othering*. It does not matter if the charge of human smuggling against them falls in most cases. Italian data, for example, shows that between 2013 and 2020, some 2,559 captains were taken into police custody (77.7 percent of these between 2013 and 2016) for facilitating border crossings in the capacity of smugglers. Only 30 of those were convicted of smuggling, most between 2014 and 2015. Captains become the only 'trophy', to use terminology adopted by a participant (Public Prosecutor, Agrigento, IP4), that EU member states can offer their publics, and are turned into scapegoats for failed migration policy who can be easily displayed in the spectacle of border control. They respond to the "need to identify the villain" (Cultural Mediator, IP5) at the origin of an uncontrollable phenomenon and exhibit them to the public. What matters is to identify a vulnerable and visible target that can reinforce the narrative of the relentless fight against unauthorised migration and the commitment of national and European institutions to counter arrivals and restore the threatened border regime. The construction of captains as smugglers and the mirroring of the criminal law system with migration law implemented through custodial measures typically used for criminal law provide the general public and the political class alike the illusion of regaining control of borders.

Conclusion: smugglers or criminalised migrants?

As shown by a vast literature, the human smuggling industry is a complex phenomenon involving a variety of actors and forms of relationship between migrants and smugglers (Frank-Vitale 2023; Raineri 2021; Sanchez and Antonopoulos 2023). Alongside organised networks operating not dissimilarly from trafficker, actors who operate more horizontally and are involved in empathetic

relations with people on the move can also be identified. In some areas, and depending on the border to cross, smugglers can be migrants who know the route and facilitate the passage of other migrants (Achilli 2018; Maher 2018). Aziani (2023) recognises six dimensions in human smuggling according to the target/victim relationship, the purpose of this activity, its geopolitical dimension, its intensity in terms of continuity, the geographical operation scale, and the form of organisation. Based on these six dimensions, he identifies two ideal extreme poles – the 'migration facilitator' and the 'professional smuggler' – with reference to the work of Sanchez (2015) and İçduygu (2021). To put it briefly, the former is motivated by empathy, covers short distances, and provides these services occasionally. While they violate state law, they do not commit any crime or any violence against the migrant. The latter is primarily driven by economic incentives and his activity is recurrent over a longer period, may cover long distances if necessary, and not only violates the law but also victimises migrants in various ways (Aziani 2023: 85).

Because of the forced nature of their activity, captains do not belong to either of these poles. They are third-party actors to the two ideal figures just mentioned. They are not professional smugglers in so far as their activity is not driven by economic incentives, organised or recurrent over a period. But neither are they facilitators, because their action is driven by violence and its threat and by circumstances external to their will rather than solidarity with other migrants. So, to respond to the initial question of whether the criminalisation of pilots is a way of tackling human smuggling or an opportunity to criminalise migration, as our discussion of the findings shows, their criminalisation is part of a wider process of the criminalisation of migration. Pilots can be easy targets and useful scapegoats within this process. On the one hand, the way anti-smuggling legislation in Greece and Italy is designed makes them easy targets. The pool of acts –promoting, directing, transporting undocumented migration, facilitating unauthorised residence or obstructing police investigations – and therefore people who can be prosecuted has purposefully become so wide that it is easy to be identified as an undocumented migration facilitator. By piloting boats transporting migrants across the Mediterranean, captains can therefore be easily identified as those committing the offence of favouring migrant entry. On the other hand, as it was discussed in the previous section, migration has become such a sensitive and politicised issue that tackling its unauthorised form has become a priority for all governments. While the real outcomes are very poor, the border regime is still in crisis and the human smuggling networks continue to operate, the criminalisation of captains is a way of showing that governments are active in tackling irregular migration.

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