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Criminalizing migrants who steer the dinghies in the
Mediterranean:
A collateral effect of migration management?

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Abstract

Amidst the increased irregular sea migration in the Central Mediterranean in recent years (2014-2017), one issue remained greatly overlooked: that of migrants' who become involved in steering the dinghies (as driver or helper) bringing them and others from Libya to Italy (scafista). The paper examines some of the contentious questions that arise from the criminalisation of alleged 'boat drivers' who are often chosen by the Libyan smugglers among the other migrants and international protection seekers; at times under coercion and threat. Based on case law analysis, as well as information collected through qualitative interviews and desk research, the paper analyses to what extent the conditions under which migrants/international protection seekers are pushed to drive the boat can be taken into consideration to prevent their criminalisation. The penal principle of 'state of necessity' – that enables to lift the criminal liability- and the argument that some situations of coercive recruitment of 'transporters' may be considered trafficking in persons are discussed.

Keywords

Smuggling, Trafficking, Central Mediterranean Migration, Italy.

Introduction

The management of irregular migration, via land or the sea, raises many contentious issues regarding the protection of migrants and the implications of border control practices. This is no news. But the surge in numbers of migrants crossing the Central Mediterranean route has amplified those challenges. This paper looks at one particular issue amidst the current migration context of sea arrivals in Italy: that of migrants' involvement in the facilitation of irregular migration – by being the driver of the boats from Libya to Italy. The fact that migrants steer the dinghies bringing them, and other migrants, to the Sicilian shores, has become a common pattern of sea arrivals in recent years. The delicate and political issue of criminalising humanitarian assistance in relation with irregular entry or stay in a country, or commonly referred to 'humanitarian smuggling' (e.g., fishermen or NGOs who rescue vessels in distress with migrants onboard), has been the subject of analysis and criticisms, but the sensitive issue of criminalising migrants who get engaged in steering risky and unseaworthy boats for the purpose of their own migration and the manifold challenges it raises, has not been the object of the analysis it deserves.

With this *modus operandi* – meaning using migrants to steer the boats instead of 'professional' transporters - smugglers pass on to migrants all the risks of the sea crossing: risking their lives given the unseaworthy conditions of the dinghies, and being automatically intercepted by law enforcement and criminalised as 'boat captains' after the rescue. This type of situation is complicated by the climate of widespread violence perpetrated against migrants in Libya, and the pre-departure conditions when migrants are 'recruited' or forced to do so. Hence, conditions under which migrants engage in steering the dinghies may conceal intricate factors including deception, at times coercion and violence, that put into questions the criminal figure of *scafisti* (term used in Italy as an equivalent to smuggler).

The objective of this paper is to examine some of the contentious issues that arise from the criminalisation of alleged 'boat captains' who may be nothing more than a mere passenger. In order to avoid criminalisation, and legally recognise that some of these migrants acted out of constraint, coercion and at times violence, two avenues will be discussed: the penal principle of "state of necessity" – enabling to lift the criminal liability of the presumed boat captain – and the argument that some situations of coercive recruitment of 'transporters' may be considered trafficking in persons. Similarities between smuggling and trafficking in situations of migrants being involved as drivers have been explored in the central Mediterranean context, Libya to Italy passage (Borghi & Biondo 2017), as well as the sea crossing from Indonesia to Australia (Palmer & Missbach 2017).

This paper is based on eight qualitative interviews conducted in Sicily, Italy, in early 2017, informal consultation with key stakeholders, as well as desk review of recent studies and grey literature providing empirical evidence on the topic and court cases¹. Interviews were conducted with lawyers, workers of local and international organisations and representatives of law enforcement.

The paper first reviews relevant elements of legal and political frameworks related to smuggling/facilitation of irregular migration at the international, European Union (EU) and national (Italian) levels. Then, the paper will discuss the Central Mediterranean context, zooming on the particular issue of the figure of 'smuggled migrant/boat captain'. Third, specific cases of criminalised migrants are examined, looking at how the principle of "state of necessity" is being interpreted in

¹ This paper is based on a sub-set of a qualitative study conducted in Italy between January and June 2017 (Lazio and Sicily) which aimed at examining the interconnections between trafficking and smuggling in the context of the Central Mediterranean migration in recent years. In total, interviews with 25 stakeholders and practitioners in the field of asylum and migration were interviewed. One key theme that came out in the interviews conducted in Sicily concerned the 'systematic' criminalisation of smuggled migrants for having steered the boats. In light of this finding, it was decided to further deepen this question through case law analysis.

court' decisions. The analysis will then turn to explore the similarities and the thin line between smuggling and trafficking in certain situations.

1. The legal framework

In this section, we will look at the definition of facilitation of irregular migration (or smuggling of migrants), and safeguards (absence of thereof) for the protection of smuggled migrants as established in the legal framework. The international, EU and national (Italy) legal frameworks will be examined, namely the United Nations Convention against Transnational Organized Crime adopted in November 2000¹, and its Supplementary Protocol Against Migrant Smuggling, the EU so-called Package on facilitation of irregular migration² (including the Council Directive 2002/90/EC and the Council Framework Decision), and the Italian legal and policy framework.

The legal framework regarding facilitation of irregular migration in Italy is addressed in the article 12 of the Immigration Law (Legislative Decree 92/2008, Consolidated Text of the Provisions on Immigration and the Norms on the Status of Foreigners (L.D. No. 286 of 1998)). The offence of facilitating unauthorised entry is defined as a person who promotes, manages, organises, or finances the irregular entry of foreign persons into Italy or transports such persons into Italy, or commits any other acts meant to ensure the irregular entry into Italy or entry into another State. Different activities are included in the definition, but no distinction is made between the types of involvement or practices, such as organising and transporting for example (Belleza & Calandrino 2017). In addition, the law provides that if the activities of 'smuggling' (to procure or enable smuggling) are linked with organised crime (*associazione a delinquere*), then the offence falls under the Criminal code (Art. 416(1), art. 416(6)), leading to more severe penalties.

One important difference with the international legal framework concerns the 'intention to profit from smuggling activities'. The Protocol against Migrant Smuggling definition includes as a requirement for activities to be characterised as smuggling: the intent of gaining financial or material benefit as a result of procuring the irregular entry into a country (art. 3(a)). In the Council Directive 2002/90/EC, it is only a criminalisation requirement in the case of irregular *stay*, not irregular *entry* or *transit*³. However, both in the Italian and EU frameworks, financial gain is an aggravating factor. Profit may be direct or indirect. The profit/benefit element is crucial as it limits the scope of the offense and prevents from criminalising those who acted on humanitarian ground or on the basis of close family ties⁴. It also reflects the prime focus of the Protocol which was to combat smuggling that involves *organised crime* (art. 4).

² The EU framework related to smuggling of migrants, called the EU Facilitator's package, adopted in 2002, comprises the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (the Facilitation Directive) and the Council Framework Decision that sets the rules for penalties, and jurisdiction, and reinforces penal framework. The Council Directive defines the offence as *any person who intentionally assists a person who is not an EU national to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned; or who for financial gain, intentionally assists a migrant to reside within the territory of a Member State in breach of the laws of the State concerned*

³ It is interesting to note that the offense of smuggling that had already been included in the Schengen agreement, article 27 (1985) – which is replaced by the Facilitator Package – did include the element of financial gain in the definition of facilitation of irregular entry and transit. In the Facilitator Package, this element has only been kept as a requirement in the case of irregular stay.

⁴ This important explanation is set out in an Interpretative note of the Protocol, and discussed in a recent concept paper of the UNODC on the element of financial and material benefit in the definition of smuggling established in the Protocol (see UNODC, 2017: p.10)

Further, the EU Facilitator Package does not provide for a mandatory exemption of punishment for humanitarian facilitation, leaving open the door to criminalise those who help⁵. More recently, the EU Action Plan Against migrant smuggling (2015-2020) mentions that efforts to criminalise smugglers should avoid risking to criminalise humanitarian smuggling. The EU Action Plan – as well as the SAR operations SOPHIA - focuses on dismantling the *business* of smuggling networks, and those who make profits out of it. Despite this, there is still no ‘humanitarian exemption clause’.

With regards to the protection and the rights of smuggled migrants, the Protocol explicitly provides that migrants shall not be criminalised for the fact of having used smugglers⁶ (article 5) (which does not prevent from being intercepted/criminalised for immigration law violations). The Protocol against Migrant Smuggling states that its implementation should not impact on human rights of smuggled migrants (art. 16(1), art. 2, art. 19). In other words, the implementation should be done while preserving the basic rights of the migrants – including existing rights in international human rights law, refugee and humanitarian law (art. 16(1), art. 2, art. 19) (e.g. right to life; not to be subject to torture or other cruel, inhuman treatment, right of *non-refoulement*). In the same line, the EU package mentions that its application should not prejudice international law on refugees or human rights. Further, in its article 16 (2), the UN Protocol calls for states parties to provide to smuggled migrants protection against violence (perpetrated for reason of being smuggled), and provide assistance to migrants whose life or safety has been endangered (e.g. rescue in case of risky sea crossings) (article 16(3)). However, no detail is given on what such measures of protection and assistance should include. The Protocol also foresees (article 16(4)) to take into account the special needs of women and children. Hence, the Protocol recognises the vulnerability of smuggled migrants to violence or exploitation, although the term ‘victim’ of crime is not used in the Protocol to refer to ‘smuggled migrants’ (see Gallagher & David 2014).

In conclusion, there is one loophole in these legal instruments – either international, EU or Italian levels – there are no considerations or guidelines regarding smuggled migrants who simultaneously hold the role of facilitator of irregular migration. It constitutes a grey zone, especially considering situations of coercion and victimization that may experience migrants, including forced recruitment, violence and threats.

2. The Central Mediterranean migration and the figure of the *smuggled-migrant-scafisti*

The Central Mediterranean route, from Libya to Italy, has seen an exponential increase in sea migration, from 2014. Flows have been continuously significant, more than 150 000 per year, until the decline since summer 2017. Close to the entirety of sea migrants departed from Libya⁷, and used the services of smugglers - becoming the ‘new normal’ (Aucliffe 2017). The vast majority of arrivals in Italy follow search and rescue operations (SAR). Smuggling practices and SAR operations are more intertwined than ever.

2.1 *Smugglers’ practices and hardening of border control: more intertwined than ever*

The systematic use of migrants to steer the boat emerges in a specific context. Two elements are crucial to outline, as they impact on the conditions of sea crossings. The worsening of the situation

⁵ The Directive allows Member States (MS) to exclude humanitarian assistance from being criminally liable, but it is not an obligation. It is left at the discretion of the States to decide. In addition, there is no definition of humanitarian facilitation.

⁶ Article 5 of the Protocol: Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

⁷ 90% of sea migrants departed from Libya in 2016, and 97% in the first three months of 2017. Source: UNHCR, Update #10, December 2016; UNHCR, Update#13, March 2017.

in Libya, coupled with the hardening of border control and reinforcement of anti-smuggling approach of the SAR operations (and the changes in SAR operations as discussed below), have deteriorated the conditions under which migrants effectuate the sea crossing. Sea crossings became riskier.

Although violence against migrants in Libya, as well as labour exploitation, is not new, it has reached an unprecedented level. The post-Kaddafi war-torn country has become the theatre of widespread violence perpetrated against migrants. Recent reports provide empirical evidence of such abuses, including beatings, forced labour, torture for ransom, sexual violence and other exploitative practices (Galos et al., 2017; MEDU, 2015, 2017; OXFAM 2018; AI, 2015; UNICEF 2017a,b). Migrants may be kept captive for days or months until they pay the amount requested, either in detention centers or so-called connection houses. According to the IOM Displacement Tracking Matrix (DTM) Flow monitoring (FM) survey⁷ data, in the Central Mediterranean route, 75% of the migrants in the sample has experienced physical violence, 67% have been held against their will in a location, and 36% have been forced to work – majority of incidents occur in Libya (IOM 2017). Instances of arbitrary detention (for indefinite time), executions, torture, deprivation of food, water and sanitation in the detention centres, and other severe human rights violations against migrants, involving at times Libyan coast guards members, have also been documented by the United Nations (UN Support Mission to Libya, 2016; UN Security Council, panel of experts, 2017) .

In parallel with other measures and policy changes undertaken to tackle irregular sea migration, the SAR operations have also considerably changed. What started more as ‘ad-hoc rescues in the high sea’, with a humanitarian goal of saving lives (with Mare Nostrum in 2013), became a system of ‘institutionalised surveillance’ (EC 2017), always closer to the Libyan coasts (with first Triton operations, and then Sophia). Since summer 2015 the naval mission called Operation Sophia, was launched, which has an explicit mission and mandate to disrupt the smuggling and trafficking of migrants in the Southern Central Mediterranean.

Despite these efforts, continuous flows had not diminished until summer 2017, either the number of deaths. Indeed, after summer 2017, there has been a significant drop in migrant arrivals to Italy from Libya, following increased cooperation between Italy and the EU with Libya (with the (interim) Government of National Accord (GNA) led by Fayez Al-Sarraj). The controversial *Memorandum of understanding on cooperation in the field of development, combating illegal immigration, trafficking in human beings, smuggling and strengthening border security between the State of Libya and the Italian Republic*, signed in February 2017, seeks to counter irregular migration, and hence contain departures from Libya. The EU confirmed its support to the Italian MoU in the Malta Declaration (February 2017), and also committed to increasing its support to Libya, in a new action plan for extended cooperation presented in July 2017⁸. Through training, technical assistance and equipment, the EU support to Libya aims at strengthening the capacities of the Libyan authorities, including Libyan coast guards, to counter irregular migration toward Europe (Italy).

Before these combined efforts and intensified cooperation with Libya, changes in SAR operations – that focused on dismantling smuggling networks - have had the unintended consequence of changing smuggling modalities (EC 2017, Mandić & Simpson 2017). Libyan organisers made the sea crossing riskier, by using disposable dinghies, unseaworthy embarkations, with too many migrants on board. Smugglers send boats and dinghies knowing that it does not have the capacity (lack of gasoline, overcrowded) to make it to Italian shores and that SAR boat (either EU-led or humanitarian organisations) might rescue them. Migrants themselves became the ‘transporters’ of themselves and

⁸ On the topic see: European Commission – Presse release, ‘EU Trust Fund for Africa adopt €46 million programme to support integrated migration and border management in Libya, Brussels, 28 July 2017. Accessible at: http://europa.eu/rapid/press-release_IP-17-2187_en.htm ; and Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route. Accessible at <http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> the text of the MoU: <http://www.governo.it/sites/governo.it/files/Libia.pdf> .

others, by steering the dinghies. The figure of the ‘boat captain’ has changed (Borghi & Biondo 2017): from being an intermediary paid to drive the vessel, hence more or less ‘professional’ transporter, and not an *ad hoc* transporter, to being a mere passenger, selected and recruited by Libyans organisers (hence an occasional and ‘constrained’ transporter). In other words, smugglers shifted the risks⁹ taken, by delegating the tasks of steering the vessel to migrants who need a passage.

The criminalisation of those deemed to facilitate sea migration to Italy is not a new matter in Italy. There were two important law cases of criminalisation of humanitarian assistance (humanitarian smuggling) in Italy, the case of the Cap Anamur (2004-2009) involving a humanitarian organisation and the case of the seven Tunisian fishermen (2007). In both cases – crew members of the NGO and the fishermen – were charged with the offence of facilitating irregular migration, whereas they helped and rescued boats in distress. While in both cases they were acquitted, it raised the multiple tensions and legal issues in the way states’ respond to and manage sea migration. The accusation/criminalisation of boat drivers and rescuers – while the criminal charges are the same – relate to different ‘actors’ in the chain of the facilitation of irregular entry. Yet, both situations have in common that a security and criminalisation approach prevails, and that the actors involved are ‘collateral’.

2.2 A mere passenger/migrant or a smuggler? From more to less voluntary boat driver

The phenomenon of migrants being simultaneously passenger/migrant on the boat and “active” actor in the smuggling/passage process has become a characterising feature of the central Mediterranean Sea migration (2016-2017)¹⁰. The police of Ragusa counted that in 2016 alone there were 200 ‘*scafisti*’ arrested by the judiciary police (*Polizia Giudiziaria*), including 29 minors, and in 2017 112, among which seven were underage¹¹. Given the conditions of sea crossings, namely the endangering of migrants’ lives by embarking on unseaworthy dinghies, some additional aggravating offenses can be charged. For example, in the situation of shipwrecks causing the loss of migrants’ lives the criminal offence of non-intentional homicides can also be charged.

On the basis of the information available in recent empirical studies (EC 2015; Borghi & Biondo 2017), case law and corroborated in our interviews, we can trace common features regarding the *modus operandi* and preparation of embarkation in Libya. Prior to departure, migrants are usually placed in houses or warehouses near the shores where they wait for days or weeks before being sent to embarkation sites, at gun points. Another element that coincides across different accounts is that boat drivers are housed separately from the rest of migrants, in another place. Frequently these sites are guarded by armed people. Hence, once ‘selected’ by the organisers of sea crossings, the boat drivers are brought to a house with few others, the others that will also have to take part in steering the vessel. Migrants are chosen by Libyans to drive the dinghies because of their knowledge of English, of their mere knowledge of navigation (for example migrants coming from countries where there are traditionally many fishermen are assumed to have basic knowledge), and/or because of their vulnerability and incapacity to pay the passage¹². Boat drivers will then receive basic instructions

⁹ On the concept of shifted risk in the context of migration at risk, and how the risks are being transferred to migrants and refugees, see Mandić & Simpson (2017).

¹⁰ According to interviews conducted in Sicily, as well as on the basis of a recent report (Borghi & Biondo, 2017), there has been an increase in the number of accusations being laid against migrants in Sicily in 2016, as compared to 2015.

¹¹ Source: <https://questure.poliziadistato.it/it/Ragusa/articolo/125059e7454fad841886122934> ; <https://questure.poliziadistato.it/it/Ragusa/articolo/12505a70b7a8c1268894330203> . These numbers concern only the province of Ragusa, whereas the main port of disembarkation, Pozzalo, has received 11,707 migrants arriving via the sea in 2017, and 18,970 in 2016, Source: Ministero dell’Interno Curcotto statistico gionaliero, 31 December 2017 and 31 December 2016.

¹² According to the report from Borghi & Biondo (2017), some nationalities are also more likely to be selected. The preferred nationalities picked up by Libyans in 2016 were: Gambia, Nigeria and Senegal (p. 180)

regarding the motor, the manoeuvres for steering the boat and keeping the route. They will be given the instruction to call with the satellite phone for help after a certain distance has been reached, in order to be rescued. There are also situations in which migrants will willingly propose themselves to the smugglers to drive the boat in exchange for a free passage. Even in these scenarios, deception as well as coercion can be used later on.

In sum, migrants may ‘agree’ or be ‘coerced’ to participate in driving the boat. They may have agreed because they have no money to pay the crossing (and this is the way of paying back), or for a reduction of the fees. Alternatively, migrants may have been forcibly recruited and coerced to do so. At times, there are no clear-cut ‘voluntary’ or ‘coerced’ situations. Migrants may have agreed to drive the boat, while being unaware of the conditions under which the sea crossing would take place, on flimsy and overcrowded vessels without the necessary gasoline to reach much beyond Libyan waters. However, when realising – at the moment of embarkation – that the conditions put everyone’s lives at risk, including theirs, it is too late to retract and smugglers can use violence or threat to prevent them from backing down. Migrants act under conditions of vulnerabilities or duress, and lack of other better option, in addition in a context of general violence. All of these elements put into question the notion of voluntariness.

3. Unravelling circumstances under which migrants become a transporter

Procedures to identify and arrest alleged boat drivers are embedded within disembarkation operations. Identification of alleged drivers may start already on the SAR boats (that have on board representative of law enforcement, such as Italian coast guards, Frontex) or upon (soon after) disembarkation. Suspects are separated from the rest of the rescued migrants. The rescued migrants are asked to identify who was steering and/or taking part in steering the boat, and statements are collected. Once identified as alleged drivers, and once disembarked, they are put in a state of arrest and detained (then within 48 hours, there will be a confirmation or not of the arrest, if there is ground for the arrest). The law enforcement and justice authorities of the city where disembarkations occur will conduct the arrest and investigation (e.g. Catania, Ragusa, Palermo). In the case of organised crime related to smuggling of migrants, the investigations and prosecutions are dealt with in Palermo by the Special Anti-Mafia Directorate at *Procura della Repubblica di Palermo*.

Migrants’ statements used to identify the ‘transporter’ can also be used as part of the proof, to support the facts and accusations of facilitation of irregular migration. However, the circumstances under which such statements are collected raise some issues, namely given the fact that they are collected in the aftermath of traumatic experiences. Migrants risked their lives and in some instances witnessed others die. Also, declarations may be taken without the presence of an interpreter of the same origin/mother tongue, or with a non-professional interpreter – which may lead to inadequate translation (Interview, Lawyer, no 3).

In order to expedite the procedures, migrants may also be advised by the lawyer representing them to plead guilty, in which case alleged drivers avoid detention (and trial) and can be immediately released¹³. However, once released they risk being given an expulsion order. Hence, without having had the opportunity to give their version of the facts, testify and to defend themselves, alleged drivers are deprived of the right to claim international protection.

¹³ The practice of advising alleged boat drivers to plea guilty (either by the public defender or the lawyer being referred or proposed to migrants) has been reported as being commonly used during 2016, however we do not have had access to empirical data confirming this information collected through interviews, as well as in the report of Borghi and Biondo (2017, p. 186) (Interview, Lawyer, 3; Interview, NGO, 4; Interview, NGO, 5)

In this section, we will discuss three courts' decisions that illustrate, clarify or establish courts' interpretation of important issues, such as: the element of profit and the conditions required to admit and prove the state of necessity.

3.1 The criminal liability of improvised, sometimes coerced, migrants-boat drivers

As explained previously, the element of profit is not a criminalisation requirement in the Italian legislation, but constitutes an aggravating factor. It includes both direct and indirect profits. In that perspective, Italian courts' decisions have established that situations where **a migrant steers a vessel in exchange for a reduced fee or a discount for a family member, this would be considered a form profit**¹⁴. For example, in the sentence from the Court of Catania, Proc. n. 675/2016 R.I.M.C.11 April 2016, the fact that the migrant who drove the boat obtained in exchange a reduced fee was considered indirect profit, and as such an aggravating factor.

Court of Catania, Proc. n. 675/2016 R.I.M.C.11 April 2016

This case concerns a vessel bringing migrants that was rescued on the 10 December 2015, and brought to Pozzallo. Five migrants on board of the vessel testified and identified the driver of the boat, whom himself confirmed the alleged accusations that he was the driver. However, the defendant pleaded that he acted out of a context of necessity, that he was at the origin a mere passenger – as the other migrants – but was forced to steer the vessel. The court ruled that the state of necessity could not be recognised in this case.

The defendant was charged with facilitating irregular migration, art. 12 with aggravating circumstances, article 12 (3), Decree Law 286/98. The aggravating circumstances related to the number of persons and the conditions that posed risks to the lives of migrants, to have submitted them to inhuman and degrading treatment in view of gaining profit (free passage) (Sentence, p. 1).

One line of defence of alleged transporters has been to attempt to lift their criminal liability by proving that the migrants cooperated with the smugglers in a situation of a state of necessity. It is a legal mean to take into consideration the conditions and circumstances that led to the 'cooperation'.

According to the Italian Penal Code,

“Is not punishable who has committed the matter [criminal act] to have been forced by the need to save him/herself or others from the present danger of serious injury to the person, danger he or she has not voluntarily caused or otherwise avoidable, taken [always considered] that the fact is proportionate to the danger.” (art. 54)¹⁵

If elements of the context under which the crime has been committed amount to a state of necessity – based on the court' assessment – the offender can be exempted from responsibility. At the core of the definition of a state of necessity are the notions of 'danger', being forced, and of proportionality between the crime committed and the danger. The state of necessity is of very narrow and restrictive use in the penal law.

In the decision mentioned above, the court ruled that the defence of a state of necessity could not prevail. First, the decision states that the defendant made a voluntary decision to engage into the activities of driving the boat, and made himself available to the Libyan organisers from the beginning, in exchange for a free passage. Second, the court decision outlines that the defendant did not back down from his decision or express doubts even after having seen the unseaworthy vessel. However, the defendant alleged that threat and physical violence were used against him at the time of embarkation and - as a result - he was coerced to steer the boat, even if he had initially agreed. The

¹⁴ See the sentence from the Court of Catania, Proc. n. 675/2016 R.I.M.C.11 April 2016. An explanation of the sentence is provided by UNODC in a recent concept paper on the element of profit (2017: 40).

¹⁵ Translated by the author.

court did not retain the defendant version because it was not documented nor confirmed by other migrants' testimonies. There was no testimony to support accounts of violence, and hence no proof of coercion.

Another court decision (no. 4893/16, a court order regarding the re-examination of precautionary measures¹⁶) provides interesting elements of interpretation. In this case, the defendant opposed the accusation of having steered a vessel bringing 132 migrants from Libya to Italy in November 2016, and instead stated that he helped the "captain" by using the compass during the sea crossing. In its decision, the court acknowledges some incongruities in the testimonies of the three migrants regarding the role assumed by the defendant (helper versus captain). However, even if the defendant was not the captain, it specifies that acting as a helper (by holding the compass) is sufficient to correspond to the offence of facilitation of irregular entry.

Regarding the applicability of 'state of necessity', the defendant claimed that he had paid the passage as the others and that he was chosen by the Libyans to help the boat captain because of his knowledge of English. The defendant claimed that he was obliged to do so, given that the Libyans threatened him that if he refused, they would send him back and refuse him to embark. The court states that this type of 'threat' does not amount to an element of constraint, and even if it would be considered as such it would not amount to a state of necessity. Although migrants' testimonies converge in testifying the presence of armed Libyans, there is no proof of use of direct violence against the defendant.

However – and this is relevant for this paper - the court recognises the 'improvised' role of the defendant as a helper. The court decision states that the evidence collected has shed light on the practices used by Libyan smugglers (their *modus operanti*), which consist in 'selecting' among the passengers/migrants two to three migrants who will be involved in driving the vessel – either as the 'captain' or as helpers. As such, it provides 'an objective evidence of the role of the defendant as 'occasional and obligated *scafista*', rather than 'professional *scafista*', who in the pursuit of its personal objective to reach the Italian territory, as the other migrants, has also facilitated the irregular migration of others: "*an accessory fact to the finality of the defendant*" (p. 5). In the context of the re-examination of the use of pre-trial detention, the court order argued that the fact that the defendant was an 'occasional *scafista*' does not support the use of such precautionary measure, given the very low risk that the migrant return to Libya to get once again involved as a *scafista*.

In the third case¹⁷, the court decision ruled the absolution of the defendant for the charges of having facilitated irregular migration. The court has retained and considered a serious and well-founded doubt that the criminal conduct was carried out in a context of state of necessity. The court recognised that:

"It is likely that [the defendant] lent himself to acting as an operative arm of the perilous journey because he was forced by the state of necessity, that is, by the necessity of saving himself from the present danger of serious harm, a danger he did not voluntarily cause - not being considered voluntary causation the mere request to face the journey - or otherwise avoidable, given the enormity and imminence of the danger of life" (Trapani Tribunal, sent. N. 1129/2016: p. 13)¹⁸.

The court recognised the 'present danger of serious harm', given the direct threat to one's safety, and that the defendant's version of the facts was corroborated by the testimony of another migrant.

¹⁶ The tribunal of Ragusa had decided to apply pre-trial detention - the Court of Catania provides insightful elements of interpretation. Tribunal of Catania, re-examination of precautionary measures, no. 4893/16 (2 December 2016) (*Tribunale di Catania, Quinta sezione penale, Riesame contro provvedimenti in materia di misure cautelari*, no 4893/16, 2 Dicembre 2016)

¹⁷ Tribunale di Trapani, Sentenza No. 1129/2016, 11 novembre 2016 (Tribunale di Trapani, Ufficio del Giudice per le indagini preliminari, Sentenza a seugto di giudizio abbreviato, no 1129/2016, 9 November 2016.)

¹⁸ Translated by the author

The defendant stated that he was a mere passenger as the others and that he paid for his journey (1,200 euros). He was asked to drive at the same time than two other migrants, one of who was killed because he did not understand what was asked of him. Further, the defendant said that he had been threatened to be killed if he did not obey. In its testimony, the other migrant witnessed the Libyan talks with the defendant, with a high and overbearing tone of voice, giving orders and insults, and seemed to give instructions on how to drive. The defendant answered with few words and had a submissive attitude (p. 10).

These three courts' decisions provide a reconstruction of the events (through a recollection of testimonies), a portrait of the pre-departure conditions and the sea crossing preparation in Libya, and of the evolving practices of smugglers. As stated by a lawyer, in an interview:

Every process serves to build one piece of the puzzle, of the story, in order to understand better the phenomenon. My witnesses, are not only ocular witnesses, but they can also tell the stories in a courtroom of what happened on the boat, what is a SAR operation, what was happening in Libya. (Interview, Lawyer, no 3).

These court decisions cast light on the circumstances under which migrants are 'pushed' – with various degrees of voluntariness – to steer the boats. These examples have also shown the importance of witness' testimonies to prove the presence of coercion, violence, and threat – which in turn could amount to a state of necessity. The key element of evidence of the presence of coercion relies on other migrants' testimonies; testimonies that are difficult to collect if migrants are no longer traceable, and given the frenzy and chaotic climate in the pre-embarkation phase, there are often incongruence between different testimonies.

Although it is not sufficient to be considered a direct form of violence, and thus justifying a state of necessity, the general climate of violence in Libya – including the presence of armed guards during the preparation for embarkation – nevertheless pushes to put into question the voluntariness of migrants who 'agree' to cooperate with the smuggling organisers. The context of violence infers fears and create vulnerabilities that need to be taken into account.

In the law, as highlighted by Borghi and Biondo (2017), there is no distinction made between the different offences of facilitation of irregular entry, between being an organiser or an 'improvised' actor who steer the boat. This is with the exception of the differentiation between organised crime in the criminal code and facilitation of irregular entry under the Immigration law, as well as the different aggravating factors. As stated in one of our interviews (and illustrated in the court order no. 4893/16), "the situation is that even if they just helped on the boat, they are still accused of facilitating irregular migration" (Interview, Lawyer, no 3). Hence, there are no distinctions between degrees and types of 'cooperation'.

3.2 The nexus trafficking/smuggling and the victimization of migrants-transporter: a blind spot?

Another line of defence for the alleged 'transporters' resides in advocating to acknowledge some situations that involve coercion, deception and/or violence as trafficking. This argument has been put forward in a recent report, based on a study conducted in Sicily (Borghi & Biondo 2017), as well as by scholars in the context of the irregular sea migration from Indonesia to Australia (Palmer & Missbach 2017).

Parallels between situations of trafficking –when involving smuggling – and smuggling of migrants are very often drawn in the literature, in media coverage and political statements. In contexts of smuggling-related violence and exploitation, the line between the two can be indeed thin, while the implications of being or not identified as a victim of trafficking very important. These two issues are subjects of distinct Protocols attached to the *United Nations Convention against transitional organized crime* adopted in 2000 (UNCTOC). Despite the fact these crimes are distinct, they have historically been and still are frequently confused or conflated, given their common interconnections with the

irregular crossing of international borders. One element of distinction between the two revolves around the notion of consent. In the case of smuggling, migrants willingly engage with smugglers and the service-transaction stops theoretically once the service is provided. Whereas in trafficking cases, three elements have to be present: the act (e.g. recruitment, transportation, harbouring a person), the means and the purpose: exploitation. The consent of the victim is deemed irrelevant when the Protocol listed means are used (e.g. threat or use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of authority).

This distinction based on the notion of voluntariness or consent is not the best suited to capture the complexity of certain situations, and gives an over-simplistic view of both phenomena. While smuggled migrants may have agreed to engage in receiving services from a smuggler, they might not agree or consent to all the conditions under which the service will be provided, notably in case of smuggling-related violence. In reality, there is a wide spectrum – or continuum - of different degrees of deception as well as coercion that can surely blur the lines between trafficking and smuggling. Given the vulnerabilities that arise from the illicit and underground character of smuggling ventures, smuggled migrants face higher risks of exploitation.

While the Protocol against Migrant Smuggling does not establish specific rights and protection safeguards (with the few exceptions mentioned above), the Protocol against Trafficking in Persons (TIP) does. So, once identified victim of trafficking, migrants are entitled to a set of protection and assistance measures – as it is the case in Italy. The Protocol against TIP also provides for the non-punishment of trafficking victims taking part in criminal activities as a result or as part of the trafficking process. There are two dimensions of the non-criminalisation principle: that the unlawful act is caused by the trafficking process (causation) or is performed under duress (compulsion) (Gallagher 2011: 284). While contested and limited in its application, the non-punishment principle has also been included in the EU Anti-Trafficking Directive¹⁹. As such it recognises that a person in a trafficking situation may commit criminal offenses as part of the trafficking process, and that he/she should not be held criminally accountable for the offense. The non-punishment clause is close to the ‘principle of state of necessity’ previously discussed.

One key critic of the international definitions is that it establishes a dichotomous view and divides between victims of trafficking eligible to (and deserving of) protection and assistance and willing smuggled migrants who risk being criminalised. One overlooked element regarding the nexus trafficking/smuggling is precisely that of migrants becoming ‘transporters’, and their situations of victimizations leading them to cooperate with smugglers/facilitators of irregular entry (Palmer & Missback 2017).

As seen previously, in the Libyan context, the ‘boat drivers’ may have been recruited in exchange for free passage on a voluntary basis, while being deceived regarding the conditions, or selected and forced to do so. They can also be selected, recruited (even trained), and forced to steer the boat. Instances of forced confinement, the use of threats and maltreatment during the pre-embarkation period have been reported (Borghi & Biondo 2017, Interview Lawyer, 3; Interview, NGO, 4 and 5). The ‘selected’ drivers are housed separately from the other migrants in locations being guarded by armed Libyans, which prevent them from escaping and constitute a form of control. Hence, when including elements of coercion, the recruitment of obligated transporters may indeed resemble in some regards to trafficking.

In this context, an argument put forward is to consider coercive recruitment of boat drivers and forced cooperation with smugglers as cases of trafficking (Borghi & Biondo 2017, Palmer & Missback 2017). As stated by the authors Borghi and Biondo migrants in Libya are increasingly subjected to inhuman and degrading treatment, resulting in their being themselves victims of trafficking (p. 189). If

¹⁹ Directive 2011/36/EU of the European Parliament and of the council of 5 April 2011, on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

recognised as victims of trafficking, forcibly recruited boat drivers would benefit from the exemption of criminal liability – as it is foreseen with the non-punishment principle for trafficking victims, and the violation of their rights would be acknowledged, in other words, their victimization in the hands of the smugglers. So far, at the time of collecting the data for this paper, there was no jurisprudence available illustrating such legal attempt.

Although re-labelling specific situations of coercive recruitment and exploitation of transporters as situations of trafficking has its own merits, including the one of acknowledging the element of coercion, violence and violation of human rights, it is not a solution in itself to respond to the protection gaps of migrants who cooperate under constraint, or self-aiding themselves. What happens to those whose situation does not fit the criteria of trafficking, but have nevertheless acted out of vulnerability and constraints? Further, it risks eclipsing from the necessary political discussion on the rights of smuggled migrants who get involved in the facilitation of irregular migration themselves – as a result of the migration process and smugglers' volition.

Advocating for the expansion of the category trafficking to include 'borderline' situations of violent smuggling avoids addressing underlying issues (border control policies and measures which increase the risks taken in irregular migration routes) and disputing the binaries between victim/perpetrator. We remain within the dichotomous view of: you are a victim and deserving protection, or a perpetrator undeserving of protection. It does not resolve the logic of deservedness between trafficking and smuggling. The fuzziness of media and political discussions on trafficking and smuggling in the Central Mediterranean as two phenomena that mingle put the focus on criminal: either smugglers or traffickers. Meanwhile, the blind spot remains the impacts of migration policies and the absence of legal channels that push migrants to undertake risky migration paths. In the Libyan context – and not only – migrants in both situations (trafficking/smuggling) will face similar vulnerabilities, but these are asymmetrically acknowledged and responded to.

At the same time, the legal framework regarding the facilitation of irregular migration does not enable to sufficiently consider elements of victimization of those who cooperate with smugglers, particularly in situations of insecurity and lawlessness in Libya. The term victim here is not used to deprive or diminish any form of agency, but rather to acknowledge the constraints and/or coercion experienced by migrants. Hence, as a result, there is a legal void when dealing with smuggled migrants who are simultaneously taking part in the smuggling 'tasks' but who are obligated to do so.

Conclusions

While the case of the criminalisation of boat drivers might, at first sight, appear as a sub-topic amidst the so-called 'refugee or migration crisis' that Europe is facing, it, in fact, crystallises important dilemmas in irregular migration management. The risks of the transportation across the Mediterranean Sea have been shifted to the migrants/international protection seekers designated to steer the boat. Criminalising smuggled migrants who become 'improvised and occasional' boat drivers - under coercion and/or conditions of vulnerability - does not enable to identify and punish the actual organisers, "the people to whom migrants are forced to entrust their lives due to the lack of other legal routes for entering EU-Europe." (Borghi & Biondo, 2017: p. 175). This approach in dealing with smuggling – by targeting individual migrants disconnected from smuggling networks - merely touches the symptoms, the collateral actors of the organisation of sea crossing, the downstream rather than the upstream. By doing so, states fail to engage in a necessary political and ethical, even humanitarian, discussion that goes much beyond the legal and narrow considerations of lifting the criminal liability in cases of state of necessity. It fails to consider the conditions at the roots of the involvement of migrants into steering the dinghies.

The pre-departure conditions and the context of violence in Libya create acute vulnerabilities for migrants. The context of violence has changed the migration journey of many migrants who had not

originally planned to migrate to Europe. Yet, although there is recognition by European agencies and politicians that vulnerabilities have increased for migrants departing from Libya, there are not enough considerations for these vulnerabilities when comes the time to examine the role of migrants as boat drivers.

Targeting individual migrants (who are not part of the smuggling organisation) is not the solution nor a proven mean to reduce smuggling as it does take into account and acts upon the system, organisations, and dynamics behind smuggling practices. Further, without a due process in examining the conditions that push migrants to steer the vessels, there is the risk that the rights of migrants who drive the boats are sacrificed in the name of tackling the smuggling of migrants, including refugees' rights. The alleged and/or convicted boat drivers may be legitimate international protection seekers. While they might be refugees, there were not given the chance to access and claim their rights.

In conclusion, the legal framework regarding migrant smuggling fails to take into consideration the different types of 'cooperation' with smugglers, and the risk of victimization of migrants who are transporter as part/a result of the venture of the smuggling and sea crossings. We need new concepts and new policy frames to deal with evolving smuggling ventures and modalities, and more importantly in a context of very little or no legal channels for safe migration.

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