

Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of *Scafisti* in Italy

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ABSTRACT

States increasingly prosecute irregular migrants – asylum-seekers included – for their (alleged) involvement in human smuggling during their own migration journey. Based on a literature review and interviews with lawyers, prosecutors, judges, and migrants on Sicily, this article provides insight into the nature and scale of this phenomenon in Italy and discusses the effects of criminal prosecution on these migrants' asylum procedures. From 2015–2018, as a standard operating procedure, roughly 1,300 “captains” and navigators – *scafisti* (literally: smugglers by boat) – of small dinghies with migrants arriving in Italy have been arrested for suspicion of “aiding clandestine (or irregular) immigration”. Most *scafisti* are migrants themselves and there are strong indications that they were forced to steer or navigate the boat. These prosecuted migrants face many difficulties in proving duress and are often inadequately advised about the consequences of a criminal conviction on their subsequent immigration procedures. After a conviction, as well as after an acquittal, they are often excluded from official reception centres and have difficulties accessing asylum procedures. When they manage to apply for asylum, they will be denied international protection if they have been convicted. When they cannot be expelled, they may end up in a legal limbo, having to rely on a temporary humanitarian status with strict limitations.

KEYWORDS human smuggling, *scafisti*, self-smuggling, asylum-seekers, criminal prosecution, legal limbo

1. INTRODUCTION

While smuggling people across borders is not a new phenomenon, the criminalisation of what is nowadays referred to as “human smuggling” is relatively recent, in Europe as in other regions of the world. The facilitation of migration outside legal channels (or “irregular” migration) of certain groups of people, such as

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asylum-seekers, has not always been seen as harmful.¹ More recently, however, human smuggling is associated with organised crime and an undermining of the rule of law, as a result of an increasing securitisation of borders and, in Europe, events such as the infamous “Dover” incident in 2000.² An important landmark in the criminalisation of human smuggling is the adoption of the Protocol against the Smuggling of Migrants by Land, Sea and Air in 2000 (hereafter: the “Smuggling Protocol”).³ Article 3 defines human smuggling as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.

As a result, all over the world strategies have been, and continue to be, developed to counter irregular migration and human smuggling. Increasingly, such approaches are not limited to targeting organised crime groups. Particularly when governments are confronted with a considerable increase of irregular migrants, other – “innovative” – tactics to criminally prosecute the facilitation of irregular migration are explored. For example, in several European countries, professional humanitarian workers and volunteers who provided irregular migrants assistance during or directly after an irregular border crossing have over the past years been prosecuted for human smuggling.⁴ In various countries, there have also been attempts to criminalise the mere presence of undocumented migrants, a manifestation of a phenomenon dubbed “cimmigration” by Stumpf, who observed in the context of the US that “as criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals”.⁵

Another, lesser known, strategy to counter irregular migration is to hold irregular migrants criminally accountable for “smuggling” themselves and/or other irregular migrants during their migration journey.⁶ Even though Article 5 of the 2000

1 I. van Liempt, *A Critical Insight into Europe’s Criminalisation of Human Smuggling*, Policy Paper, Stockholm, Swedish Institute for European Policy Studies, European Policy Analysis Issue 2016:3epa, Jan. 2016, available at: http://www.sieps.se/en/publications/2016/a-critical-insight-into-europes-criminalisation-of-human-smuggling-20163epa/Sieps_2016_3_epa? (last visited 12 Sep. 2019).

2 This case, in which British customs found the bodies of 58 Chinese migrants who suffocated in a container, played a crucial role in discussions on penalising human smuggling in Europe (*ibid.*, 3).

3 Protocol against the Smuggling of Migrants by Land, Sea and Air, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, adopted by General Assembly resolution 55/25 of 15 Nov. 2000 (entry into force: 28 Jan. 2004).

4 S. Carrera, L. Vosyliute, S. Smialowski, J. Allsopp & G. Sanchez, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update*, Brussels, European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs, Dec. 2018, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU\(2018\)608838_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf) (last visited 4 Oct. 2019).

5 J. P. Stumpf, “The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power”, *American University Law Review*, 56(2), 2006, 367–420.

6 This should be clearly distinguished from situations in which migrants *after* having arrived in a country of destination engage in human smuggling activities, for instance of their family members or fellow countrymen. This is a common and long-standing practice, which has already been elaborately discussed in academic literature. See e.g. N. Abdel Aziz, P. Monzini & F. Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean*, Roma, Istituto Affari Internazionali, Oct. 2015, available at: http://www.iai.it/sites/default/files/newmed_monzini.pdf (last visited 4 Oct. 2019); G. Sanchez, “Critical Perspectives on Clandestine Migration Facilitation: An Overview of Migrant Smuggling Research”, *Journal on Migration and Human Security*, 5(1), 2017, 9–27.

Smuggling Protocol dictates that the objects of human smuggling should not be criminalised,⁷ and even though Article 31(1) of the 1951 Refugee Convention contains the fundamental principle of non-penalisation and prohibits the prosecution of refugees “coming directly from a territory where their life or freedom was threatened in the sense of Article 1”,⁸ there have been attempts to criminalise irregular migrants for facilitating their own and other irregular migrants’ “smuggling”. A famous example is the “Maricopa Migrant Conspiracy Policy”. After human smuggling was criminalised by the Arizona State Legislature in 2005, Sheriff Joe Arpaio – known for his ruthless stance on immigration – and County Attorneys of Maricopa County in Arizona arrested, detained, and prosecuted up to 300 migrants for “conspiring to transport themselves” by paying smugglers for their services. Due to the harsh conditions in detention, many migrants pleaded guilty.⁹ In 2013, federal courts banned this policy for being at odds with federal law.¹⁰ In another infamous example, as part of a campaign to deter future “irregular arrivals” by boat, Canada prosecuted four Sri Lankan Tamil asylum-seekers in 2009, who in the company of some 80 other Tamils landed on the Canadian coast with the vessel MV Ocean Lady. The captain, an engine room worker, the chief engineer, and the transportation provider were charged with aiding and abetting human smuggling. After lengthy procedures, the British Columbian Supreme Court in 2017 acquitted the men, stating that while there was evidence of organised criminal activity, the prosecution had failed to prove beyond a reasonable doubt that the activities of the four men were connected to that activity or helped to further it.¹¹ A year after the Ocean Lady had arrived, Canada was confronted with the arrival of more than 490 Tamils on the MV Sun Sea. Again, four Sri Lankan asylum-seekers who were on the ship – this time the captain, an engine room worker, the chief engineer, and the transportation provider – were prosecuted for organising the smuggling operation; one of them was also convicted.¹² Recently,

7 Art. 5 Smuggling Protocol reads: “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.”

8 In this regard, the Canadian Supreme Court concluded in *R v. Appulonappa* that in order for Art. 31(1) to be effective, “the law must recognize that persons often seek refuge in groups and work together to enter a country illegally”. To comply with Art. 31(1), “a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety”. *R v. Appulonappa* [2015] SCC 59 [42] and [43].

9 E. Y. H. Lee, “Undocumented Border Crossers Won’t Be Charged as Conspirators for Paying Smugglers in Arizona”, *Thinkprogress* weblog, 30 Sep. 2013, available at: <https://thinkprogress.org/undocumented-border-crossers-wont-be-charged-as-conspirators-for-paying-smugglers-in-arizona-ba825cb3b008/> (last visited 12 Sep. 2019).

10 M. Hendley, “Joe Arpaio Can’t Arrest People for Smuggling Themselves Into Country, Judge Rules”, *Phoenix New Times*, 30 Sep. 2013, available at: <https://www.phoenixnewtimes.com/news/joe-arpaio-cant-arrest-people-for-smuggling-themselves-into-country-judge-rules-6649488> (last visited 24 Aug. 2019); M. Hendley, “Maricopa County Won’t Appeal Ban on Self-Smuggling Prosecutions”, *Phoenix New Times*, 31 Jul. 2014, available at: <https://www.phoenixnewtimes.com/news/maricopa-county-wont-appeal-ban-on-self-smuggling-prosecutions-6658062> (last visited 24 Aug. 2019).

11 D. Quan, “Years after Two Ships Brought 568 Migrants to Canada, Seven Acquittals and One Conviction”, *National Post*, 27 Jul. 2017, available at: <http://nationalpost.com/news/canada/years-after-two-ships-brought-568-migrants-to-canada-seven-acquittals-and-one-conviction> (last visited 3 Oct. 2019).

12 *Ibid.* For more information on the Sun Sea case, see United Nations Office of Drugs and Crime (UNODC), Sherloc Case Law Database, No. CANx011, available at: https://sherloc.unodc.org/cld/case-law-doc/migrantsmugglingcrimetype/can/2013/mv_sun_sea_canada.html (last visited 4 Oct. 2019). For

the discussion whether or not to prosecute irregular migrants for their own or other migrants' smuggling made headlines in the US again, when then US Attorney General Jeff Sessions noted in a speech in May 2018 that parents "smuggling" their child will be separated from that child and prosecuted.¹³

Cases in which asylum-seekers and other irregular migrants are prosecuted for the role they fulfilled during their own migration journey are not isolated incidents and are not limited to North America. Holiday reports about cases from the UK where asylum-seekers have been prosecuted for taking on the role of "smuggler".¹⁴ Most striking in this regard are however reports from Italy, where over the last years large numerous irregular migrants have been prosecuted for driving and navigating dinghies with migrants across the Mediterranean.¹⁵ These "*scafisti*" (literally "boat drivers") are often asylum-seekers.

Apart from the legal question whether and to what extent prosecuting asylum-seekers for their involvement in human smuggling during their own travels is allowed considering restrictions posed by Article 5 of the 2000 Smuggling Protocol and Article 31(1) of the 1951 Refugee Convention,¹⁶ this relatively new phenomenon also leads to a number of "empirical legal" questions that have so far not been addressed in academic literature.¹⁷ This contribution aims to answer these questions based on a case study of Italy, where the phenomenon seems – judging on public information – to have manifested itself on the most considerable scale. It first discusses

additional information, including the political consternation it caused in Canada, see Canadian Council for Refugees (CCR), *Sun Sea: Five Years Later*, CCR, Aug. 2015, available at: <https://ccrweb.ca/sites/ccrweb.ca/files/sun-sea-five-years-later.pdf> (last visited 4 Oct. 2019).

- 13 Sessions stated: "If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law" [...] "If you don't like that, then don't smuggle children over our border." A. Jenkins, "Jeff Sessions: Parents and Children Illegally Crossing the Border Will Be Separated", *Time*, 7 May 2018, available at: <https://time.com/5268572/jeff-sessions-illegal-border-separated/> (last visited 7 Oct. 2019).
- 14 Y. Holiday, "The Prosecution of Asylum Seekers", in S. S. Juss (ed.), *Research Handbook on International Refugee Law*, Cheltenham, Elgar Publishing, 2019, 224–237. For example, in *R v. Makuwa* [2006] EWCA Crim 175, an asylum-seeker who entered the UK with her children was convicted of a false passport offence and two counts of facilitating an illegal entrant (her children) (Holiday, "The Prosecution of Asylum Seekers", 226, footnote 20).
- 15 Z. Campbell, "The Wrong Catch", *The Intercept* weblog, 16 Sep. 2017, available at: <https://theintercept.com/2017/09/16/italy-imprisons-refugees-who-were-forced-to-pilot-smuggling-boats-at-gunpoint/> (last visited 24 Aug. 2019); A. Ricard-Guay, *Criminalizing Migrants Who Steer the Dinghies in the Mediterranean: A Collateral Effect of Migration Management?*, Florence, European University Institute, Working Paper RSCAS 2018/32, Jun. 2018, available at: <https://cadmus.eui.eu/handle/1814/55645> (last visited 25 Aug. 2019).
- 16 The scope and interpretation of Art. 31(1) have been discussed extensively by *inter alia* Hathaway, Landry, and Holiday. See J. C. Hathaway, *Prosecuting a Refugee for "Smuggling" Himself*, Michigan Law Public Law and Legal Theory Research Paper Series, Paper No. 429, Dec. 2014, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2536983 (last visited 4 Oct. 2019); R. Landry, *The "Humanitarian Smuggling" of Refugees, Criminal Offence or Moral Obligation?*, RSC Working Paper Series, Paper No. 119, Oct. 2016, 1–32, available at: <https://www.rsc.ox.ac.uk/publications/the-humanitarian-smuggling-of-refugees-criminal-offence-or-moral-obligation> (last visited 4 Oct. 2019); Holiday, "The Prosecution of Asylum Seekers".
- 17 Empirical legal research – or Empirical Legal Studies as it is often referred to – may be helpful by observing how and how often legal rules are actually applied in real-world situations and what laws bring about in practice. See B. C. J. van Veldhoven, "A Young Person's Guide to Empirical Legal Research. With Illustrations from the Field of Medical Malpractice", *Law and Method*, Apr. 2016, 1–16.

how often and in what ways irregular migrants travelling to Italy become involved in smuggling – that is, facilitating their own or other migrants' irregular border crossing during their own migration journey. Secondly, it focuses on the question how often, why, and in what ways such prosecutions occur. Thirdly, it explores what repercussions such prosecutions have for possible asylum claims of these migrants. Depending on the country's policies, a conviction for involvement in human smuggling could result in exclusion from refugee protection or other forms of asylum,¹⁸ as happened in Canada to some of the migrants on the MV Sun Sea.¹⁹ If the excluded asylum-seekers can subsequently not be removed, they could end up in a "legal limbo".²⁰

Based on a literature review and interviews, and with a specific focus on the island of Sicily,²¹ this explorative article aims to provide insight into the nature and scale of the criminal prosecution of irregular migrants for their (alleged) involvement in human smuggling during their own migration journey to Italy and discusses the effects of the criminal prosecution on these migrants' asylum procedures. After briefly discussing the methodology, Section 2 discusses the historical context of human smuggling policies in Italy. Section 3 describes how irregular migrants (may) get involved in their "own" smuggling. Sections 4 and 5 look at the criminal prosecution of the *scafisti* and the consequences these prosecutions have for their asylum procedure. Section 6 summarises the main findings and reflects on their implications.

1.1. Methodology

This article is based on a review of academic literature and a set of expert and migrant interviews. In total, 25 interviews were conducted on Sicily in the provinces Catania, Palermo, and Syracuse, between May and June 2019. The interviewed experts ($n = 18$, referred to as R#) included members of the prosecutorial services, the judiciary, criminal defence lawyers, and immigration lawyers, as well as an asylum adjudicator, a psychologist, and a cultural mediator. The interviewed migrants ($n = 7$, referred to as M#) came from four different countries, namely Guinea Bissau, Nigeria, Senegal, and Syria. All interviewed migrants had been arrested and prosecuted for migrant smuggling in the areas within the competence of the tribunals of

18 Art. 1F of the 1951 Convention Relating to the Status of Refugees, Refugee Convention, 189 UNTS 150, 28 Jul. 1951 (entry into force: 22 Apr. 1954), dictates that individuals believed to be guilty of serious crimes should be excluded from refugee protection. For a discussion of whether Art. 1F applies in these cases, also see A. Aagten, "Migrant Smuggling in the Mediterranean. An Excludable Act under Article 1F(b) Refugee Convention?", *Crimmigration & Recht*, 2(2), 2018, 59–75.

19 Some of the migrants on the Sun Sea who during the venture assisted by cooking, collecting rain water, or by looking out for other vessels, later had their application for refugee status refused and deportation orders issued against them, because it was found that they aided migrant smugglers and, as such, were inadmissible to Canada. The Federal Court of Canada, however, reversed some of these decisions, ruling that the Immigration and Refugee Board had applied an overly broad interpretation of the relevant provisions and concepts. See UNODC, *Sherloc Case Law Database*, No CANx011.

20 For more information on the legal limbo, see the special issue in an earlier volume of this journal, "Undesirable and Unreturnable" Aliens in Asylum and Immigration Law, *Refugee Survey Quarterly*, 36(1).

21 Between 2015 and 2018, a very considerable number of migrant landings in Italy took place in the region of Sicily. For instance, at the peak of the influx – with 181,436 arrivals in the whole of Italy in 2016 – about 50 per cent of the landings (91,084) took place between the Eastern part of Sicily (Catania, Syracuse, and Messina) and Palermo. See Ministero dell'Interno, *Cruscotto Statistico*, available at: <https://immigrazione.it/docs/2016/cruscotto-statistico-giornaliero-12-dic.pdf> (last visited 31 Oct. 2019).

Catania, Palermo, Ragusa, and Syracuse between 2015 and 2019. Before going to Italy, a number of potential respondents were contacted. Appointments for the first days after arrival were made via email and some of the interviewed became key informants that established contacts with other experts (snowball sampling). As there are only a few organisations in Italy that work specifically with migrants who are alleged smugglers, and as the topic is rather sensitive, this “convenience” sampling made the most sense. Through this type of non-probability sampling, the pool of respondents was gradually built up. Once an interview was conducted, the interviewee would be asked if he knew anyone else who could provide interesting insights concerning the research question. These referrals would then be contacted via email or a phone call. An advantage of this method was that the approached experts were very willing to speak, as the contact was established through an acquaintance, work colleague, or friend they trusted. A disadvantage of this approach is that it is selective, which means the sample – apart from being small – is not representative and the generalisability of the findings is limited. This underlines the explorative nature of this contribution.

The interviews were conducted in person ($n = 21$) or via phone ($n = 4$), all by the first author of this contribution, who speaks Italian. All the migrants interviewed were older than 18 years; none of them was detained when the interview took place, none was offered any material benefits. Before migrants were interviewed, they were contacted by their defence criminal or immigration lawyer, who made sure they wanted to share their experiences. For each interview, full oral consent to participate in the study was acquired. Most conversations took place in an informal setting and were carried out either in English or in Italian. When needed (because of the particularly vulnerable state of the respondent or language barriers), an experienced cultural mediator assisted in the interview (who was also one of the interviewed experts). Semi-structured interviews were conducted, using topic lists.

In addition to the interviews, a literature review was conducted. The consulted literature consisted of academic publications, books, non-governmental and governmental reports, and websites, as well as newspaper and radio publications. These sources were also used to gain a better understanding of new topics that were brought up by respondents in the interviews. Since the phenomenon under study is relatively underexposed, some information could only be found in popular news sources, which may be biased. This can influence the reliability of the information. To improve overall reliability, multiple perspectives were included, by speaking to people from diverse backgrounds and with different roles, and cross-checking obtained information in different sources.

2. HISTORICAL BACKGROUND: ORIGINS OF PROSECUTORIAL POLICIES AGAINST MIGRANT SMUGGLERS IN ITALY

Perhaps the most famous historical example of “self-smuggling” of irregular migrants to the Italian coast is the so-called “Vlora” case. On 7 August 1991, with the fall of communism, up to 20,000 Albanians gathered in the port of Durrës in Albania, where a cargo ship by the name of Vlora was docked to unload and undergo repairs. Hoping to get passage to Italy, the crowd forcefully boarded the ship by climbing the

ropes. With no one to stop the refugees from storming the ship, Captain Halim Milaqim decided to follow their command and sail to Bari, Italy. Within two weeks after their self-organised journey to Italy, the migrants were returned to Albania (evoking criticism on the Italian authorities).²²

More cases of detected smuggled migrants arriving in southern Italy by sea took place already from the mid-1990s.²³ According to a deputy prosecutor who was working in Syracuse at the time,²⁴ these first landings were quite isolated and usually took place in the southern territory of Sicily, on the coasts between Pachino and Augusta in the province of Syracuse. In those days, criminal investigations into human smuggling in Sicily were not organised systematically, and that case law on smuggling was negligible. He also said that usually none of the migrants was detained after the arrival; they would just be free to go after the landing.²⁵

Things started to change around 2011. In the aftermath of the Arab Spring and especially after the start of the Syrian civil war, the migratory pressure increased substantially in southern Italy. It has been estimated that between 2011 and 2018, about 768,000 irregular migrants (of whom 536,000 requested asylum) reached southern Italy through what is commonly called the “Central Mediterranean route”.²⁶ The characteristics of this route have changed over the years, in terms of points of departure, nationalities of migrants, and *modus operandi* of the smugglers involved. In the years 2011 and 2012, vessels transporting migrants would leave mainly from Egypt and landings would usually take place on the coasts of the Syracuse and Catania areas. The smugglers behind these flows were organised in criminal groups that used a main vessel as a way to travel on the high seas (the so-called “mother-vessel”) and then transferred migrants to a smaller boat, which was usually unfit for sailing on the high sea.²⁷ As was soon discovered by Italian prosecutors, this method was aimed at staying out of Italy’s jurisdictional reach on the activities of the smuggling organisation, by keeping the mother vessel on the extra-territorial waters.²⁸

22 A. Reich, “Der Rostige Kahn der Hoffnung”, *Neue Züricher Zeitung*, 8 Aug. 2016, available at: <https://www.nzz.ch/international/das-historische-bild/albanische-auswanderer-der-rostige-kahn-der-hoffnung-ld.106649> (last visited 24 Aug. 2019).

23 For more about the human smuggling across sea borders in this early period, see F. Pastore, P. Monzini & G. Sciortino, “Schengen’s Soft Underbelly? Irregular Migration and Human Smuggling across Land and Sea Borders to Italy”, *International Migration*, 44(4), 2006, 95–119.

24 R15.

25 R15.

26 For the number of arrivals, see Frontex, “Migratory Routes”, n.d., available at: <https://frontex.europa.eu/along-eu-borders/migratory-routes/central-mediterranean-route/> (last visited 25 Aug. 2019). For the number of asylum applications, see Richieste di asilo, “Italian Ministry of Interior”, n.d., available at: http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/quaderno_statistico_per_gli_anni_1990-2018.pdf. (last visited 25 Aug. 2019).

27 Eurojust, *Italian Jurisprudence on Illegal Immigrant Smuggling. Asserting Jurisdiction on the High Sea, Analysis*, The Hague, Eurojust, Mar. 2016, available at: [http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Italian%20Jurisprudence%20on%20Illegal%20Immigrant%20Smuggling%20\(March%202016\)/2016-03_IT-IIS-report_EN.pdf](http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/caselawanalysis/Italian%20Jurisprudence%20on%20Illegal%20Immigrant%20Smuggling%20(March%202016)/2016-03_IT-IIS-report_EN.pdf) (last visited 25 Aug. 2019).

28 Camera dei Deputati, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro*, Commissione parlamentare di inchiesta sul sistema di accoglienza, di identificazione ed espulsione, nonché sulle condizioni di trattenimento dei migranti e sulle risorse pubbliche impregnate, 9 May 2017, available at: <http://documenti.camera.it> (last visited 25 Aug. 2019).

In the years 2013 and 2014, the number of irregular migrant arrivals started to increase rapidly and several major incidents took place on the Mediterranean Sea, leading Italian institutions to intervene more systematically in the fight against migrant smuggling. In October 2013, after more than 360 migrants died in a shipwreck near the island of Lampedusa, Italy launched an unprecedented search and rescue (SAR) at sea operation called “Mare Nostrum” that saved and disembarked in Italy about 150,000 irregular migrants.²⁹ This operation, however, soon was criticised by some Italian politicians, who believed that Italy was unfairly bearing the brunt for all other Member States of the European Union (EU) and, therefore, ended 1 year later, when operation “Triton”, led by the EU border agency Frontex, took over patrolling activities in the Mediterranean Sea.³⁰ In the meantime, the Prosecution Office of Catania managed to assert Italian jurisdiction over the acts committed by the criminal smuggling organisations in extra-territorial waters, by way of an innovative legal reasoning that was endorsed by the Court of Cassation in 2014.³¹ According to this judgment, the smuggling organisations systematically transferred migrants in the extra-territorial waters from larger vessels to smaller vessels, that were then abandoned, in order to trigger the obligation of the boats passing by to rescue the migrants and take them to Italy. In this way, the larger vessels of the organisations never entered the Italian territorial waters themselves. The judgment established that the act of bringing irregular migrants to Italy, although carried out by rescuing boats, constituted the link between the Italian jurisdiction and the conduct of the smugglers, who started to be held responsible as the “mediated author” of the crime.³² This jurisprudence was a turning point in the fight against migrant smuggling in Italy, as it opened the way to more systematic and organised investigations. Italian prosecutors managed to get a hold on the members of the crews operating on the “mother vessels” and convicted them not only for migrant smuggling but also for participation as medium- to low-rank members in a criminal organisation.³³

29 International Organization for Migration [IOM], *IOM Applauds Italy's Life-Saving Mare Nostrum Operation: “Not a Migrant Pull Factor”*, Press Release, 31 Oct. 2014, available at: <https://www.iom.int/news/iom-applauds-italys-life-saving-mare-nostrum-operation-not-migrant-pull-factor> (last visited 25 Aug. 2019).

30 European Political Strategy Centre [EPSC], *Irregular Migration via the Central Mediterranean. From Emergency Responses to Systemic Solutions*, EPSC Strategic Notes, issue 22, 2 Feb. 2017, available at: https://ec.europa.eu/commission/sites/beta-political/files/irregular-migration-mediterranean-strategic_note_issue_22_0_en.pdf (last visited 25 Aug. 2019).

31 Court of Cassation, *Prosecutor v. H.H.*, Judgment, First Section, No. 14510, 28 Feb. 2014; Court of Cassation, *Prosecutor v. H.A.*, Judgment, First Section, No. 18354, 11 Mar. 2014.

32 *Ibid.*

33 G. Salvi, *New Challenges for Prosecution of Migrants Trafficking: From Mare Nostrum to EUNAVFOR MED. The Experiences of an Italian Prosecution Office*, The Hague, Intervention at the Consultative Forum of European Prosecutors General of the European Commission and Eurojust, 3 Jun. 2016, available at: http://www.questionegiustizia.it/doc/intervento_giovanni-salvi_consultative_forum_of_European_Prosecutors_General_della_Commissione_europea_ed_Eurojust.pdf (last visited 25 Aug. 2019). Particularly relevant in this context were the operations “Glauco I, II and III”, triggered by the Lampedusa shipwreck in 2013 and conducted by anti-mafia prosecutors in Palermo, which brought the arrest of dozens of members of an international organization that smuggled and trafficked migrants between Africa, Italy, and North European countries. For an overview of Glauco I and II, see UNODC, *Sherloc Case Law Database*, Nos. ITAh013 and ITAh014, available at: <https://sherloc.unodc.org/cld/v3/sherloc/cldb/search.html?tmpl=sherloc&lng=en#c={%22filters%22:%5B%5D,%22sortings%22:%22%22,%22match%22:%22glauco%22}> (last visited 12 Nov. 2019).

However, it did not take long for migrant smugglers' networks to develop new methods that would minimise both the costs of their activities and the risks to be apprehended or having their ships seized. As the coordinating prosecutor of the specialised task force against migrant smuggling and trafficking in Catania recalled, starting from 2015, Italian prosecutors noted that smuggling activities were transferred to Libya.³⁴ In addition, smugglers' *modus operandi* shifted; they started putting migrants directly on a small boat, already at the point of departure. Moreover, criminal organisations stopped making use of their own members as professional crew on boats.³⁵ As a consequence, the nature of the *scafisti* rapidly changed: they were no longer "professional transporters", but migrants themselves.³⁶

While it is not possible to establish exactly how many of these migrant-*scafisti* have over the past years been arrested, we can establish that according to the official reports of the Italian Ministry of Interior over the period between 2015 and 2018, the total number of *scafisti* arrested in the context of the migrant landings has been around 1,300.³⁷ While in Italy the number of migrant landings in 2018 has plunged by 91 per cent compared to 2017,³⁸ thus expectedly decreasing the number of newly initiated criminal proceedings for human smuggling, from the interviews it emerges that at the moment of data collection (May 2019), most of the *scafisti* who have been arrested in the last years were still on trial or had ongoing asylum procedures.

3. HOW IRREGULAR MIGRANTS GET INVOLVED IN SMUGGLING ACTIVITIES

As discussed above, because of the shift in the *modus operandi* of the smuggling organisations in North Africa, irregular migrants crossing to Italy have increasingly been employed in the smuggling, as boat drivers or navigators. Based on interviews with the Italian practitioners and the migrants accused of human smuggling, this section discusses how "migrant *scafisti*" who are involved in these activities can be differentiated as "professional *scafisti*" and "occasional *scafisti*", whereby the latter group is made up of "opportunistic *scafisti*" and "forced *scafisti*".

34 R14.

35 Camera dei Deputati, *Audizione del Procuratore della Repubblica presso il Tribunale di Catania, Carmelo Zuccaro*, 9 May 2017, available at: https://www.camera.it/leg17/1058?idLegislatura=17&tipologia=audiz2&sottotipologia=audizione&anno=2017&mese=05&giorno=09&idCommissione=69&numero&anno=2017&mese=05&giorno=09&idCommissione=69&numero=0083&file=indice_stenografico (last visited 29 Oct. 2019).

36 L. Borghi & A. Biondo, "Country Report Italy", in S. Belleza & T. Calandrino (eds.), *Criminalization of Flight and Escape Aid*, Hamburg, Borderline Europe, 2017, 168–201, available at: https://www.borderline-europe.de/sites/default/files/readingtips/Kidem%20final%20report%2005_2017.pdf (last visited 25 Aug. 2019).

37 This number emerges from the annual reports of the National Committee for Order and Public Safety, Ministry of the Interior, over this period. They are available at: https://www.interno.gov.it/it/sala-stampa/dati-e-statistiche?f%5B0%5D=field_tags%3A829. The number refers to the period from 30 Jul. 2015 to 30 Jul. 2019. It has to be noted (as will be elaborated on below) that not everyone who is arrested is also prosecuted, and that arrested *scafisti* may also be released after pre-trial detention without a trial.

38 Ministero dell'Interno, *Cruscotto statistico*.

3.1. “Professional *scafisti*” and “occasional *scafisti*”

From the interviews conducted in this study, it turns out that Italian prosecutors make a conceptual distinction between “professional *scafisti*” and “occasional *scafisti*”. The first type of *scafisti* is considered to be fully fledged members of the criminal groups organising the smuggling of migrants or otherwise linked to such organisations (in Italian, “*scafisti di professione*”). According to our respondents, this category of smugglers was predominant at the beginning of the increased influx of asylum-seekers in Italy, especially when the dominant migrant smuggling mode was to make use of big fishing vessels from Egypt. Prosecutors and lawyers we interviewed confirmed that, around the years 2014 and 2015, on many occasions, evidence collected through wiretapping indicated that connections existed between boat drivers who arrived in Italy and smugglers in Africa.³⁹ Moreover, during those years many boat drivers appeared to be working as professional *scafisti*, as they would be prosecuted and/or expelled by Italian authorities and later come back to Italy as drivers of another boat with migrants, under a new identity. For instance, the Tunisian “captain” of the boat shipwrecking in Lampedusa in October 2013 had already been arrested as a *scafista* in April of the same year and had later been repatriated.⁴⁰ He was eventually convicted for human smuggling and murder to 18 years’ imprisonment by the Tribunal of Agrigento.⁴¹ According to prosecutors, most professional *scafisti* stopped driving the boats from Libya around 2015 and 2016, while in the last few years a new group of professional *scafisti* emerged, namely Ukrainian boat drivers sailing from Turkey to the Italian coasts.⁴²

The second group of *scafisti* identified above, namely “occasional *scafisti*”, includes those migrants who are not recurring aiders or members of a criminal smuggling group, but rather passengers who by chance participate in the smuggling activities without any (prior) intent of becoming structurally involved in the commission of crimes (in Italian, “*scafisti occasionali*”).⁴³ As Borghi and Biondo report, such *scafisti* are typically recruited among young male migrants coming from sub-Saharan countries, especially the Gambia and Senegal, because they are considered to be good fishermen and particularly skilled at steering boats.⁴⁴ Our respondents said that these sub-Saharan migrants are often given the ungrateful task of steering the boat because

39 R5, R14, R15.

40 F. Gatti, “Io, scafista della morte”, *L’Espresso*, 16 Oct. 2013, available at: <http://espresso.repubblica.it/attualita/2013/10/11/news/io-scafista-della-morte-1.137322> (last visited 25 Aug. 2019).

41 Reuters, “Trafficker Gets 18 Years in Jail over Italian Shipwreck That Killed 366 Migrants”, *The Guardian*, 2 Jul. 2015, available at: <https://www.theguardian.com/world/2015/jul/02/tunisian-gets-18-years-in-jail-over-italian-shipwreck-that-killed-366-migrants> (last visited 29 Oct. 2019).

42 R14, R15. The modus operandi of these *scafisti* is quite different from the ones coming from North Africa: they transport only a few dozen migrants per journey (usually upper-class citizens from the Middle Eastern countries), they use safer boats and are arguably highly paid for their services: Corte di Appello di Catania, *Relazione sull’amministrazione della giustizia nel periodo 1° luglio 2015 – 30 giugno 2016*, Assemblea Generale, 28 Jan. 2017, available at: <http://www.giustizia.catania.it> (last visited 25 Aug. 2019).

43 The expression “*scafisti occasionali*” was first used by the Tribunal of Catania in Dec. 2016, as reported in Corte di Appello di Catania, *Relazione sull’amministrazione della giustizia nel periodo 1° luglio 2016 – 30 giugno 2017*, Assemblea Generale 27 Jan. 2018, available at: <http://www.giustizia.catania.it> (last visited 25 Aug. 2019).

44 Borghi & Biondo, “Country Report Italy”.

their lives are meaningless to the organisers of the journeys, who treat them as “expendable crew”.⁴⁵

Within the category of “occasional *scafisti*”, we identified two general subcategories, according to the level of voluntariness of the conduct. A first subcategory consists of those who opportunistically accept to steer or navigate the boat in exchange for a free ride to Italy. They are usually people who do not have the financial means to pay for their travel to Europe; we refer to them here as “opportunistic *scafisti*”. A second subcategory of occasional *scafisti* consists of migrants who drive the boat or hold a compass or GPS device during the journey because they are forced by duress or necessity to do so: we refer to them as “forced *scafisti*”. Although the individuals in both subcategories are “occasional” *scafisti*, there is a clear distinction: while the former typically participate in the crime voluntarily by making agreements with the smugglers on forehand, the latter pay for their journey like any other passenger, but are nevertheless recruited as *scafisti* under threat, right before departure, or on board.⁴⁶

While it is impossible to estimate how many of the arrested and/or prosecuted boat drivers are professional *scafisti* or occasional *scafisti*, all our respondents indicated that from 2015 onwards, the majority consists of occasional *scafisti*. A deputy prosecutor in Catania, for instance, observed that “[w]ith the change of the *modus operandi* of the criminal groups organising smuggling from Libya in 2015, everyone driving the boat from there started to be a *scafista occasionale*.”⁴⁷ Various respondents reported that in their assessment approximately 80 per cent are occasional *scafisti*.⁴⁸

3.2. The phenomenon of “forced *scafisti*”

As was noted above, one general subcategory of the occasional *scafisti* are irregular migrants who are, either by necessity or duress, forced to drive the boat or otherwise contribute to the smuggling of other irregular migrants. The phenomenon of these “forced *scafisti*” was extensively discussed by our respondents. It appears that in particular *scafisti* arriving from Libya fall within this subcategory. In the past years, it has been well established that smugglers recruit migrants in transit, transport them to the Libyan coast, and keep them in the so-called “connection houses” for weeks or months, before smuggling them to Europe. As reported by the United Nations (UN), in these connection houses migrants are often beaten and women are sexually abused.⁴⁹ Once the migrants are scheduled for the crossing, they are taken to the beach – usually at night – and are boarded on rubber dinghies or wooden boats. Right before departing, the armed group of Libyans overlooking the boarding choose

45 R8, R10, R14, M3, M6.

46 It should be noted, however, that this is a rough distinction that cannot always be clearly drawn. For instance, one of the interviewed migrants (M1) said he paid for his travel but still accepted to be trained as a boat driver in the weeks preceding the journey because, despite not receiving a direct threat, “he had been told” that the smugglers were dangerous.

47 R14.

48 R5, R6, R7, R9.

49 United Nations Support Mission in Libya [UNSMIL] and Office of the High Commissioner for Human Rights [OHCHR], “Detained and Dehumanised”. Report on Human Rights Abuses against Migrants in Libya, 13 Dec. 2016, available at: https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf (last visited 25 Aug. 2019).

one or two of them to act as a *scafista* and force them to take the helm of the boat or navigate.⁵⁰

Acknowledging that they may have an interest in claiming this, and noting that we have no other means to verify their trustworthiness, six of the seven migrants interviewed for this study alleged to be forced *scafisti*. The characterisation that migrants were commonly forced to act as *scafisti* was also confirmed by many other respondents (R3, R5, R6, R7, R8, R9, R10, R11, R16, R17, R18). All interviewed migrants were from sub-Saharan countries (Senegal, Guinea Bissau, and Nigeria) and arrived in Italy departing from the beach of Zuara or Sabratha, on the Libyan coast. They all said they contacted the smugglers through fellow nationals acting as mediators and paid about 500 euros for their travel. They were arrested upon arrival in Italy and declared they had been forced to steer the boat or to be the compass man by a group of armed Libyans, which some of them referred to as “Asma boys”.⁵¹ Each of them had been chosen as a *scafista* because of a particular skill, quality, or knowledge. A Nigerian respondent who arrived in Italy in July 2016 said that the Libyans on the beach of Sabratha chose him as the compass man because he used to be a soldier in his home country. The following quote illustrates his account of how he became a forced *scafista*:

When I was queuing to get into the boat, one Libyan called me and told me “you are going to use this”, showing me a compass. When I asked “why me?” he said: “we heard you tell you are a soldier, so you know how to use it. Every military man knows about geography”. I replied: “But I paid you for this job, why are you telling me now to do your job?” Before I could argue more, I was beaten in my mouth and got this [the respondent showed his missing teeth]. I was forced to agree and told them, with blood in my mouth, that I would do it. I did know that conduct constituted a crime; however, I had no choice, I did not want to lose my life. Then they called a Senegalese guy and told him to drive the boat, because they presume that every man from Senegal can drive a boat. He refused and got shot in his leg: later he drove with the open wound in his leg. When the ship of *Médecins Sans Frontières* rescued us, he was immediately taken to Ragusa’s hospital where he stayed for one month and a half before being transferred to Ragusa’s detention centre.⁵²

Other respondents reported that right before departure they were given a phone to call the rescuers at sea. A young migrant from Guinea-Bissau, who was 20 years old when he was arrested, shared his experience:

One day I was sitting in my spot at the connection house in Sabratha, waiting to leave for Italy. One Libyan came to me and asked me if I could speak

50 *Ibid.*

51 For more information about the Asma boys, see S. Scherer, “Migrant Boys Tell of Attacks, Murder in Libyan ‘Hell’”, *Reuters*, 10 Jun. 2016, available at: <https://www.reuters.com/article/us-europe-migrants-libya-gangs-idUSKCN0YW187> (last visited 25 Aug. 2019).

52 M7.

English. When I said “yes” he grabbed me by the neck and dragged me to a group of armed Libyans who gave me a phone. They explained to me that we would leave that night and that, since I could speak English, I had to call the Italian Coast Guard and ask them to come save us. They gave me the number to call and told me I had to do it, otherwise, they would kill me. I said yes because I had no choice and no one was there to help me. No one would say no against this type of threats.⁵³

At times, *scafisti* were not identified before departure, but migrants were told to steer the boat when they had already started the journey. The account by a 24-year old Senegalese migrant illustrates this: “On the beach, I queued like all the other passengers and jumped into the boat. One of the Libyans who was giving us orders drove the boat for a couple of miles, then he told me: ‘now you need to drive’, and dove into the sea”.⁵⁴ Two of the interviewed migrants who have been prosecuted for steering the boat on which they were travelling said that Libyans chose them because their “friends” holding the same nationality (migrants who act as mediators between sub-Saharan and smugglers), pointed them out as experienced sailing people.⁵⁵

4. CRIMINAL PROSECUTION OF SCAFISTI

Having described that the typical *scafista* in Italy since 2015 became the “occasional migrant *scafista*”, this section provides an overview of the criminal proceedings these migrants typically face upon arrival in Italy. It starts by providing the relevant legal framework in Italy, then describes the different prosecutorial approaches that exist in Sicily, and concludes by critically evaluating a number of legal and normative issues that arise during these trials. At the outset, it should be noted that there are two types of criminal proceedings that a *scafista* can face: “ordinary” trials and special pre-trial proceedings. Because of the specific issues relating to the latter type of proceedings, the latter will be discussed in a separate subsection.

4.1. Relevant legal framework

A fundamental legal principle that is important to keep in mind concerning prosecution of *scafisti* is enshrined in Article 112 of the Italian Constitution, according to which public prosecutors have an obligation to initiate a prosecution every time a crime has been reported. This mandatory rule compels prosecutors to initiate a criminal proceeding every time a new rescue or landing of migrants is reported, since this by definition constitutes a report that the criminal offence of “human smuggling” has been committed. As a consequence of the principle of mandatory prosecution, it is also required that anyone who has played a role in the smuggling activities, even if this role is marginal, *has* to be prosecuted. The coordinator of the specialised task force against migrant smuggling and trafficking in Catania we spoke to linked this principle to the prosecution of “occasional *scafisti*”:

53 M3.

54 M5.

55 M1, M5.

I am aware that putting occasional *scafisti* in jail does not have any deterrent effect on the criminal groups organising the smuggling. It is clear, by now, that prosecuting them is not an effective measure against those criminals. However, we need to apply the law, we have no discretion in prosecuting them or not and therefore we cannot inquire whether it is effective to prosecute them.⁵⁶

Already in 2016, the Prosecutor General of Rome declared that the Italian authorities were aware that *scafisti* often are “migrants press-ganged as part of the payment or obliged to take the helm” and that their prosecution was no longer a deterrent in the fight against immigrant smuggling, because they were migrants with no value for the criminal organisations.⁵⁷ Nevertheless, *scafisti* have continued to be arrested upon arrival and prosecuted ever since.

The legal source for prosecuting human smugglers can be found in Decree-Law No. 286/98,⁵⁸ which regulates immigration in Italy. A key provision is given by Article 12 of this law, as amended by Law 189 in 2002 (the “Bossi-Fini” law),⁵⁹ which establishes penal sanctions applicable to the crime of “aiding clandestine (or irregular) immigration”. It aims at criminalising whoever “promotes, directs, organises or finances the illegal entry of irregular migrants in the territory of the State, as well as whoever simply transports them or carries out other acts aimed at their illegal entry”.⁶⁰ Notably, the intent of achieving financial gain is provided as an aggravating circumstance, rather than an element of the crime. This, in fact, broadens the scope of the crime of migrant smuggling compared to the definition provided by Article 3 of the Smuggling Protocol, because the latter establishes a profit motive as an element of the crime (the procurement of the illegal entry of a person, “in order to obtain, directly or indirectly, a *financial or other material benefit*” (emphasis added)). The penalty provided by Article 12 on “aiding clandestine immigration” ranges between 1 and 5 years’ imprisonment, plus a fine of 15,000 euros for each person entering irregularly. Apart from the aggravating circumstance of financial gain, Article 12 provides for higher penalties *inter alia* when the number of persons transported is more than five or when they are exposed to high risks for their lives. Several respondents pointed out that in relation to *scafisti* driving boats from the African coasts, the latter two aggravating circumstances apply in most cases. As a consequence, the usual penalty applicable to cases of *scafisti* goes from 5 to 15 years’ imprisonment, in addition to the fine of 15,000 euros for each person transported.

Other crimes for which *scafisti* are often prosecuted are murder (Article 575) or manslaughter (Article 589). It has been reported that during the rescuing operations, often several bodies were found of migrants who died of suffocation, stowed away in the hull of the ships, leading prosecutors to charge *scafisti* with *both* the crime of

56 R14.

57 Salvi, *New Challenges for Prosecution*.

58 Testo Unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero, Decree Law No. 286/98, 25 Jul. 1998.

59 Modifiche alla normativa in materia di immigrazione e di asilo, No. 189, 30 Jul. 2002.

60 Art. 12 of Decree-Law 286/98 (translation by authors).

“aiding clandestine immigration” and with more severe crimes such as murder.⁶¹ In such cases, the requested penalties may vary, going up to life imprisonment when aggravating circumstances are applicable (for instance when the intention to obtain profit is applicable). Finally, an additional crime that can be charged is defined by Article 416 of the criminal code, which prescribes a penalty of minimum 2 years’ imprisonment for membership in a criminal association aimed at committing certain crimes, such as illegal immigrant smuggling.

4.2. Identification of *scafisti*

Most respondents reported that nearly every rescue operation of migrants at sea near Sicily ends with the arrest of the alleged “boat driver” (also called the “captain”) and the “compass man”, that is, the helper holding a compass or a GPS device during the journey. On the larger vessels, other members of the “crew”, like those who hand out food or water, are also identified and apprehended. The identification of suspected *scafisti* takes place mainly in two ways. First, as reported by various respondents, investigations are typically already initiated by Italian law enforcement officers on board of the SAR boats of the Italian Navy, who have observed from a distance who played what role on the boat.⁶² Secondly, identification of the suspects takes place on the basis of statements of other migrants on the boat, collected by the Italian police right after the rescue. These migrants are selected depending on the availability of translators at the moment of rescue, because boat passengers are usually of various ethnicities and speak different languages. In the view of some respondents, relying almost exclusively on migrants’ statements to identify *scafisti* has proved to be controversial on a few occasions: they reported some cases where migrants had falsely incriminated other migrants in order to obtain a residence permit,⁶³ as Article 25 of immigration law entrusts judicial authorities with the power to grant a “residence permit for justice causes” to irregular migrants who have to be heard as witnesses in a legal proceeding. We could not confirm whether migrants have been promised or given residence permits for providing a witness statement; however, there is also a possibility that migrants have (falsely) incriminated others in the (unjustified) *belief* that they would receive a residence permit.⁶⁴

At the moment of disembarkation, the *scafisti* are separated from the rest of the passengers and often labelled with a wristband saying “suspect”.⁶⁵ Once on land, they are arrested and immediately detained. Within 48 hours, they are brought before a preliminary investigation judge, who has to validate the arrest and – when

61 S. Ragazzi, *New Experiences in Investigating and Prosecuting the Migrants’ Smuggling: From the National Dimension to a European Approach*, Seminar Report, London, Queen Mary University, 28 Jun. 2016, available at: http://www.fondazionebasso.it/2015/wp-content/uploads/2016/07/New-experiences-in-investigating-and-prosecuting-the-migrants_-smuggling.pdf (last visited 25 Aug. 2019).

62 R5, R15.

63 R9, R10.

64 Apart from the two mentioned strategies to identify *scafisti*, the Italian police also cooperates with Frontex. It should, however, be noted that Frontex reports cannot be used at trial as evidence, and that the Italian police always have to conduct their own investigations (R5, R9, R14).

65 R9, M3, M6; see also Campbell, “The Wrong Catch”.

there are grounds for precautionary measures, like evidence of guilt and flight risk – decide on the possible pre-trial detention of the suspect.

4.3. Different prosecutorial approaches in Sicily regarding occasional *scafisti*

Interviews with practitioners learned us that prosecution offices in Sicily have over time used different prosecutorial strategies in dealing with occasional *scafisti*. Members of the prosecution office in Syracuse soon realised that, notwithstanding the mandatory principle to prosecute *scafisti* as discussed in Section 4.1, a strict application of the legal framework against migrant smuggling in relation to occasional *scafisti* could result in disproportionate penalties. A former Deputy Prosecutor explained that in response, a solution was used that would allow for more appropriate charges against occasional *scafisti*:

The problem for us was that the norm on ‘aiding clandestine immigration’ is very rigorous and introduces a prohibition to balance mitigating circumstances with aggravating ones, that are always applicable to these cases. The only mitigating circumstance that could be applied was the ‘minimum participation clause’ of Article 114 of the criminal code: we started applying it by saying that the contribution of occasional *scafisti* was very limited in time – they were entrusted to drive the boat until the *rendezvous* with the rescuers. This, combined with an expedited trial chosen by the defence,⁶⁶ would result in a 2-year imprisonment penalty that could be suspended [...].⁶⁷

With time passing, also members of the judiciary in Catania started changing their approach to occasional migrant *scafisti*. For example, in December 2016 the Review Tribunal of Catania established that, in cases where the boat drivers or compass men appeared not to be “professional smugglers”, but rather “occasional or forced boat drivers”, pre-trial detention is not a reasonable measure; the Tribunal considered that in such cases there is no risk that such a suspect “could go back to Libya in order to reiterate migrant smuggling”.⁶⁸ This decision was soon followed by a directive from the Prosecutor of the Republic in Catania in December 2016, ordering all the prosecutors of the district to stop using pre-trial detention in cases of *scafisti* who are migrants not involved in criminal smuggling organisations.⁶⁹ For Catania, however, this did not mean that criminal proceedings against occasional *scafisti* were abandoned or – as was the case in Syracuse – that the approach changed. The only consequence was that the suspects’ liberty would not be restricted during investigations.⁷⁰

Several respondents pointed out that, different from the approaches mentioned above, in the Palermo district all *scafisti* – no matter if they were considered to be professional or occasional – were prosecuted rigorously. In this district, cases of

⁶⁶ See s. 4.4.

⁶⁷ R15.

⁶⁸ Tribunal of Catania, *Prosecutor v. A.S.*, Fifth Section, Re-examination of precautionary measures, No. 4894, 1 Dec. 2016.

⁶⁹ Camera dei Deputati, *Audizione del Procuratore*.

⁷⁰ Procura Distrettuale della Repubblica di Catania, *Direttiva in materia di indagini da effettuare in occasione di arrive via mare di migrant e conseguenti provvedimenti da adottare*, Dec. 2016.

migrant smuggling fall within the competence of a Group dealing with “trafficking and migration”, within the anti-mafia prosecution office (*Direzione Distrettuale Antimafia*). A criminal lawyer who has worked on about 20 criminal cases of *scafisti* in Palermo, as well as Catania and Syracuse, said that she has been experiencing a much harsher prosecutorial approach in Palermo than in other districts:

While in Syracuse crimes committed by occasional drivers were considered as minor offences and prosecutors recognised many *scafisti* as migrants, in Palermo charges are extremely severe and prosecutors act in a permanent state of emergency, which does not allow them to distinguish between those *scafisti* who are real smugglers and those who are vulnerable people like the other migrants. The latter run from war and despair, they come here to seek a better future and instead they stumble on our justice system, which sometimes crushes their lives.⁷¹

One of her clients was a Syrian asylum-seeker who escaped the war in 2012 and managed to leave for Italy after spending a long time in Libya. In 2015, at the age of 23 years, he was rescued and immediately arrested at the port of Palermo because he had been identified as a crew member of a ship on which 52 people had suffocated and died. He was charged with aiding clandestine immigration and murder. When we interviewed him, he said that he was acquitted in February 2019, because during the trial the two witnesses who had allegedly identified him as a smuggler changed their version of the story and admitted they had not told the truth. He also said that his experience in Palermo changed his life completely:

I stayed in jail twice for this charge. The first time I was arrested and released after two months. They did that in fact because grounds for precautionary measures were lacking, but I thought I had been acquitted. No one explained to me that the trial was still ongoing. After one year and a half, I was arrested again in Germany, where I was seeking asylum at the time, upon a warrant of arrest issued by the Italian authorities. This second time, I stayed in jail for about two years. Since the prosecutor had charged me with life-imprisonment, I was under the famous ‘4-bis regime’, which is the treatment applied to mafia criminals in prison. That means I could not talk to my family or my girlfriend. This destroyed my life.⁷²

Other respondents in Palermo confirmed prosecutors’ anti-mafia approach to these cases. A former criminal judge at the Tribunal of Palermo said that the governmental pressure to arrest those who are seen by the general public as “dangerous *scafisti*” has led many magistrates to prosecute migrants who have played a small or no role in smuggling activities. In his experience, prosecutors confine themselves to identifying two to three witnesses that can provide them the names of those who had an active role on the boat, “without trying to get a deeper understanding of how things really

71 R9.

72 M6.

went on the boat”.⁷³ A lawyer specialised in criminal and immigration law said that magistrates have been applying the anti-mafia approach to a “phenomenon they do not know as well as mafia”.⁷⁴ Another criminal lawyer emphasised that in Palermo, unlike other districts, all types of *scafisti* are arrested during the SAR operations and kept in detention for the entire duration of the trial, which is usually more or less 2 years. In his opinion, such lengthy pre-trial detention periods are problematic, not only because they restrict the liberty of migrants who might be found innocent later, but also because they expose the State to the risk of being condemned for unlawful detention.⁷⁵

4.4. Special proceedings

Criminal proceedings concerning *scafisti* in Sicily often do not reach the trial stage. The harsh penalties provided by law, the challenging search for evidence, and the long pre-trial detention often lead practitioners to opt for alternative and accelerated proceedings. It appears that in particular two types of “special proceedings” are preferred in this area: the summary trial (*giudizio abbreviato*) and the plea-bargaining procedure (*patteggiamento*).

The summary trial is provided by Article 438 of the code of criminal procedure: in this procedure, the defendant asks to be judged at an early stage of the proceeding, on the basis of the evidence collected by the prosecutor during investigations.⁷⁶ In such a case, the judge remains free to acquit or convict; however, when there is a conviction, the penalty applicable is reduced by a third. The plea-bargaining procedure, on the other hand, is provided by Article 444 of the code of criminal procedure and consists of an agreement between the Prosecutor and the Defence on the penalty. A plea bargain typically provides for a significant reduction of the penalty, but is based on the defendant giving up on proving his innocence. The agreement requires the consent of the defendant and can only take place if the applicable penalty, reduced by a third, is 5 or less years of imprisonment (for this reason, it is not applicable to the most severe charges).

On the basis of the interviews, it appears that the summary trials have been widely used both in Catania and Palermo in the proceedings against *scafisti*. Plea bargaining, on the other hand, is not very common in the district of Palermo, because the crime of “aiding clandestine (or irregular) immigration” is considered to be very serious, on which prosecutors do not want to settle. Apart from Palermo, the practice of plea bargaining was reported as widespread in the areas of Syracuse, Ragusa, and Catania, where prosecutors are more willing to soften the applicable penalties. In these areas, very often it is the Defence that asks for an agreement on the penalty for alleged *scafisti*. However, some lawyers firmly oppose this practice in the cases of “occasional *scafisti*”: according to them, this type of proceedings is preferable only when an actual crime has been committed and not when there are elements to prove the innocence of the accused at trial.⁷⁷

73 R8.

74 R11.

75 R10.

76 Italian Code of Criminal Procedure, Decree of the President of Republic, No. 447, 22 Sep. 1988.

77 R5, R18.

Moreover, it was reported that when *scafisti* sign the plea-bargaining agreement upon recommendation of their lawyers, often they do not realise – because of language barriers or lacking understanding of the legal system – that they *de facto* admit to be guilty of the charged crimes.⁷⁸ Two of the migrants we interviewed confirmed this. One of them, a 28-year-old asylum-seeker from Casamance (Senegal), stated for example:

When I was released from jail after two months since my arrest, I just had to show up every day at the police office for 7 months. However, when the conviction became final, I was arrested again and had to serve my sentence in prison for almost 2 years. The problem was that I had been convicted without going to trial, because my lawyer had decided to bargain the plea without explaining to me what that actually means. At that point I felt betrayed: she was supposed to do what I thought was the best for me, not what she thought was the best strategy in court. I was innocent, I was just a traveller like any other one, and I wanted that to be recognised. Before convicting someone, you need to be sure of their guilt. I don't think lawyers work like this with Italian citizens. Now my criminal case is over. I got out of prison sooner than expected for good conduct. Nevertheless, I want to eliminate this conviction from my record, so I am asking another lawyer to work on the rehabilitation process.⁷⁹

4.5. Duress as an exonerating circumstance

Out of our seven migrant respondents, two were acquitted on appeal, while five were convicted after pleading guilty. When they do reach the trial stage, proceedings against *scafisti* can turn out to be quite complex, raising a plethora of legal issues. One of the most controversial issues is the application, in cases of forced *scafisti*, of Article 54 of the criminal code. This provision provides for a clause of exemption from criminal liability in cases of duress and state of necessity. It reads as follows:

No one shall be punished for acts committed under the constraint of necessity to preserve herself or himself, or others from the actual danger of a serious personal harm which was not caused by herself or himself and was not otherwise inevitable, provided that the acts committed are proportionate to the danger.⁸⁰

Although this exemption clause may often seem applicable to migrant *scafisti*, most respondents said that this clause has been hardly applied in the case law. The Deputy Prosecutor in Catania, for instance, mentioned that even when it is clear that the boat driver is an “occasional *scafista*”, “in 99 per cent of the cases, exonerating defences like duress cannot be recognised”.⁸¹

78 R5, R7.

79 M2.

80 Art. 54 of the Italian Penal Code, Royal decree, No. 1398, 19 Oct. 1930 (translation by authors).

81 R14.

Indeed, for the defence to prove in court that the conduct of a migrant *scafista* occurred in an actual state of duress or necessity is very challenging in practice. On this point, the Court of Cassation has stated that, for a *scafista* to be exempted from criminal liability under duress or necessity, he needs to prove that he has acted under a “insuperable coercion, after receiving a threat of an imminent danger that he could not avoid in any other way”.⁸² Such a threshold is usually met only when defence lawyers manage to track down eyewitnesses that can confirm such coercion took place. As emerging from the interviews, with the limited time and resources for lawyers to work on a case, the hectic situation of arrival and dispersion of migrants to different places, and the reluctance of some migrants to testify, collecting such eye-witness testimonies is extremely challenging.

In addition, it should be noted that, even when a certain type of coercion can be proven, this would not necessarily be enough to exempt “occasional migrant *scafisti*” from criminal liability. Indeed, some judges have taken the view that no duress or state of necessity can be recognised in these cases, since the state of danger claimed by the accused (namely threats forcing him to drive or navigate the boat) has been voluntary brought upon the migrant by himself, by contacting the criminal organisation for the purpose of entering Italy.⁸³

Not all the judges, however, have concluded that duress is usually not applicable in relation to “occasional migrant *scafisti*”. In September 2016, for example, there was a case – which respondents consistently identified as “the Italian Case” – that opened the door to acquittals of forced *scafisti*. The case concerned a 12-metre-long rubber dinghy carrying 106 passengers, who were rescued and brought to Palermo in July 2015. Since the dinghy was overcrowded, it had started to sink into the water and 12 passengers had died. The boat driver and the compass man that had been identified – two young men from Senegal and the Gambia – were charged with aiding clandestine immigration and murder. The judge in charge of the preliminary investigations of the case decided to acquit the defendants because, from the evidence collected, it appeared very likely that they had been forced to drive the boat right before departure.⁸⁴ When we interviewed this judge, he explained his position on the issue:

According to our code of criminal procedure, an acquittal should be rendered even when there is a well-founded doubt to believe that an exonerating circumstance, like duress, occurred. When you rule in a case of an occasional *scafista*, it is impossible not to have such a doubt if you keep in mind the Libyan situation: we know very well about the torture and the concentration camps where migrants are kept before leaving, and we know that the Libyans who put them on the boats carry weapons. If you are in a situation like that, it is obvious that, if asked to do so, you drive the boat.⁸⁵

82 Court of Cassation of Italy, *Prosecutor v. C.S.*, Judgment, First Section, No. 12619, 21 Mar. 2019 (translation by authors).

83 Tribunal of Catania, *Prosecutor v. A.S.*

84 Tribunal of Palermo, *Prosecutor v. S.J. and B.D.*, Judgment, Section of the Judge for the preliminary investigations, No. 4114, 7 Sep. 2016.

85 R8.

This acquittal was soon followed by other judgments that applied exonerating clauses to *scafisti* cases. Particularly noteworthy is that in October 2018, a criminal judge in Palermo acquitted 14 *scafisti* who had been charged with the crime of “aiding the clandestine immigration” of 1,052 migrants rescued by the Coastal Guard on eight different boats in May 2016. In the judgment, it was argued that the group of apprehended *scafisti* constituted an “improvised crew”: they had been recruited just before departing from Libya, after receiving life threats by armed Libyans acting like a paramilitary force.⁸⁶ Similar decisions were issued in Agrigento, Messina, Ragusa, and Trapani.⁸⁷ Lawyers we spoke to have reported that since 2018 acquittal rates have been increasing and that a growing number of judges is recognising forced *scafisti* as victims of the criminal smuggling organisations rather than perpetrators. Two criminal lawyers defending *scafisti* said that in their experience, out of all the accused *scafisti* who reasonably claim duress, about 30 per cent is acquitted.⁸⁸ Another criminal lawyer who has successfully defended *scafisti* in Palermo said:

After a long time, I was finally able to demonstrate the innocence of some *scafisti* and obtained their acquittal on the basis of duress. This was a success, but prosecutors keep appealing these decisions and people around me still believe I am defending the worst criminals.⁸⁹

5. THE EFFECTS OF THE CRIMINAL PROSECUTION ON MIGRANTS’ ASYLUM PROCEDURES

Above we described how migrants in the process of irregularly crossing the Mediterranean to apply for asylum in Europe may be arrested and prosecuted in Italy for the involvement in their own and others’ human smuggling. This section discusses how these criminal procedures impact the asylum procedures of these alleged *scafisti*. It describes how these criminal procedures can restrict their access to asylum procedures and their fundamental right to seek international protection, how they can result in denial or exclusion from national or international protection and finally how this denial or exclusion can result in prosecuted *scafisti* ending up in a “legal limbo”.

5.1. Restricted access to the asylum procedure

One major, and so far under-reported, consequence of criminal prosecution of *scafisti*, is that it restricts the prosecuted migrants’ access to asylum procedures. Immigration experts highlighted that, whereas the procedure for the recognition of international protection already is quite a long-lasting and difficult experience for

86 Tribunal of Palermo, *Prosecutor v. F.E. and Others*, Judgment, Third Section, No. 5602, 2 Oct. 2018.

87 Tribunal of Agrigento, *Prosecutor v. S.A. and M.A.*, Judgment, First Section, No. 1134, 12 Oct. 2018; Tribunal of Messina, *Prosecutor v. B.B.*, Judgment, No. 360, 17 Dec. 2015; Tribunal of Ragusa, *Prosecutor v. S.I.*, Judgment, No. 362, 6 Mar. 2018; Tribunal of Trapani, *Prosecutor v. A.A.*, Judgment, Section of the Judge for the preliminary investigations, No. 1129, 9 Nov. 2016.

88 R5, R6.

89 R9.

every asylum-seeker, it becomes even more complicated for an arrested alleged *scafista*. An interviewed immigration lawyer in Catania working on a project called “*Oltre i confini*”,⁹⁰ said that a pressing problem is that most *scafisti* are arrested immediately after their arrival and, as a consequence, never are informed about the rights and procedures regarding international protection.⁹¹ The respondent also explained that although by law nothing prevents *scafisti* from officially applying for asylum in a detention centre or prison, this does not happen in practice, because they are not given authorisation to go to immigration offices at the police headquarters to file their application. Both this respondent and another lawyer highlighted that there is no protocol guiding prison officers on this issue.⁹² Moreover, once released from detention or prison – in the pre-trial stage, after a conviction and sometimes even after an acquittal – *scafisti* are usually notified with a decree of expulsion, even when they expressed a desire to apply for international protection.⁹³ At that point, notwithstanding the outcome of the case, they are either forcibly repatriated or set free. Depending on the circumstances of the case, such treatment might breach the migrants’ fundamental right to seek international protection (Article 14 Universal Declaration of Human Rights and Article 18 EU Charter). A 44-year-old migrant from Nigeria, whose lawyer made him plead guilty despite his claim that he was a forced *scafista*, explained how difficult it was for him to go from being a convicted *scafista* to an official asylum-seeker:

When I was released from prison, I was expecting to be taken to an immigration centre; instead, they notified me with a decree of expulsion ordering me to leave Italy within 7 days and putting a ban on my entry for 5 years. After that, I was sleeping at the bus station for about 5 nights: I had no money with me, I did not know the language, other migrants were scared of me when I showed them the decree of expulsion and did not want to be close to me because I had been in prison. After those days, I called my lawyer and he forwarded me the contact of an immigration lawyer who is now following up on my case, helping me being accepted in a centre in Pachino [Syracuse].⁹⁴

90 The project “*Oltre i confini*” (“Beyond borders”) was initiated by public institutions and private actors in 2014 with the aim to provide legal support to, *inter alia*, 250 foreign nationals convicted for migrant smuggling and detained in 23 Sicilian prisons.

91 R3.

92 R3, R11.

93 Cooperativa Prospettiva Futuro et al., *Oltre i confini. Percorsi di recupero e di integrazione sociale dei detenuti stranieri presenti nelle carceri siciliane*, Report finale, 2017 (on file with the authors). As to the expulsion of convicted *scafisti*, they are typically expelled on the basis of a security measure provided by Art. 235 of the Criminal Code, according to which, when a foreigner is sentenced to imprisonment for a period of more than 2 years, a judge will order the person’s expulsion from the country. When the penalty applied is less than 2 years, *scafisti* are usually repatriated on the basis of Art. 16 of Immigration Law No. 286/1998 (expulsion as an alternative sanction to detention). As to the expulsion of acquitted, there seems to be no uniform policy or approach; however, in most cases, when released from prison, they are notified a decree of expulsion by the provincial authority of the Ministry of Interior (*Prefetto*), in accordance with Art. 13 of Immigration Law (administrative expulsion for illegal staying in the territory of the State).

94 M7.

Once formally expelled from the territory by means of an entry ban, *scafisti* have no right to be accepted in the official reception centres provided by the state. This is why NGOs and religious organisations started to provide shelter and legal aid to acquitted and convicted *scafisti*. The *Centro Sociale Ecumenico Valdese* in Pachino (Syracuse), for instance, is a privately funded centre, which has provided shelter and legal aid to about 13 *scafisti* (12 adults and 1 minor), coming from nine African states between May 2016 and June 2019. The director of the centre explained that after their release they had all been living in marginalised areas of Sicilian cities, without access to legal aid, and that the centre aims to “fill in the gaps” left by the official system when it comes to the protection of these people.⁹⁵ An immigration lawyer in Palermo commented on this: “Many times, they end up living in a situation of poverty and precariousness throughout their asylum procedure, which usually takes several months, or even years. Some of them end up in the street, become homeless, or become victims of labour exploitation in the farmlands.”⁹⁶

5.2. Denial of international protection

When *scafisti*, despite the challenges discussed above, do manage to access the procedure for the recognition of international protection, they are – again – confronted with the consequences of having allegedly taken part in human smuggling, especially when convicted, either through an ordinary trial or a special proceeding. The relevant legal framework in this regard is provided by Legislative Decree 251/2007, which implemented the EU Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection.⁹⁷ According to Article 12 of this law:

based on an individual assessment, refugee status will not be granted when:

[...]

- c. the foreigner represents a danger to public order and safety, having been convicted by a final sentence of the crimes provided by Article 407, comma 2, l. a) of the code of criminal procedure [...].⁹⁸

Indeed, based on this provision convicted *scafisti* may be denied international protection.⁹⁹ Article 407 of the code of criminal procedure (as referred to in Article 12 (c))

95 R17.

96 R13.

97 This Directive has in the meantime been updated by Directive 2011/95/EU, OJ L 337/9, 20 Dec. 2011.

98 Art. 12 Legislative Decree 251/2007 (translated by the authors). Art. 12(a) and (b) refer to “exclusion clauses under Art. 10” and “grounded reasons to believe that the foreigner represents a danger to the security of State”, respectively, but R4 noted that these grounds do not apply in the cases of *scafisti* because (a) is applicable only in cases of international crimes, serious non-political crimes committed outside the State territory or acts contrary to the purposes and principles of the UN, while (b) refers to individuals who represent a very substantial public threat, such as high-profile terrorists.

99 It should be noted that Legislative Decree 251/2007 provides for a similar provision in relation to subsidiary protection: however, unlike in the case of refugee status’s recognition, a final conviction for certain types of crimes is listed as a clause of exclusion from international protection and not of denial (Art. 16, comma 1, l. d)bis).

enlists a number of particularly serious crimes, including crimes for which *scafisti* are usually convicted, such as participation in an organised criminal group and the crime of “aiding clandestine immigration”. Some respondents criticised such an approach, arguing that the aforementioned provision should always be interpreted in a way that requires asylum adjudicators to assess the real social “dangerousness” of the asylum-seeker, without opting for an *a priori* denial of protection in case of conviction for particular crimes.¹⁰⁰ However, an interviewed commissioner working in one of the Territorial Commissions designated to examine and decide on international protection requests,¹⁰¹ observed that the wording of the norms does not leave any space for an examination of this type, as they introduce an absolute presumption:

When there is a final conviction for a crime of this type [under Article 407], the asylum seeker is automatically presumed to be a danger to public security. We cannot make an additional inquiry on the assessment made by a criminal judge regarding the guilt of the asylum seeker, we need to take the judgment for it and proceed consequently.¹⁰²

While judges often are not provided with the information required to properly assess whether they should recognise duress, or start from the presumption that the migrant has brought the situation onto himself and cannot claim duress anyway, as we have argued above, this in addition leads to a non-rebuttable presumption against the asylum-seeker that he forms a danger to public security. On this point, and in response to proposals to amend Article 12 of the Legislative Decree 251/2007, the UNHCR in 2018 recommended the Italian government to modify Articles 12 and 16 of Legislative Decree 251/2007 in order to include a necessary assessment of all the circumstances of the case and to ensure that a conviction would not automatically prevent the asylum-seeker from being recognised as a refugee.¹⁰³ However, after the adoption of the final text of the new legislation in 2018, the provision was not amended accordingly. This means that in the application of Article 12(c) *de facto* no distinction is made between an occasional *scafista* who under mitigating circumstances aided and abetted in human smuggling and a professional *scafista* who purposefully and willingly did so.

Another problem emphasised by some respondents concerns the practice of plea bargaining discussed above. Since a judgment based on plea bargaining equals a conviction (according to Article 445 of the code of criminal procedure), it precludes a migrant pleading guilty the possibility of later receiving international

100 R3, R8. See also United Nations High Commissioner for Refugees [UNHCR], “Associazione per gli Studi Giuridici sull’Immigrazione [ASGI] and Sistema di Protezione per Richiedenti Asilo e Rifugiati [SPRAR]”, in Ministero dell’Interno (ed.), *La tutela dei richiedenti asilo. Manuale giuridico per l’operatore*, UNHCR, 2018, available at: https://www.unhcr.it/wp-content/uploads/2016/01/1UNHCR_manuale_operatore.pdf (last visited 25 Aug. 2019).

101 The Territorial Commissions are the competent bodies for granting international protection in Italy. As of 2017, there were 20 territorial commissions operating in different regions of Italy.

102 R4.

103 UNHCR, *Decreto Legge 4 ottobre 2018, n.113, 10. Nota tecnica dell’UNHCR*, UNHCR, 2018, available at: https://www.unhcr.it/wp-content/uploads/2018/10/Nota-tecnica-su-Decreto-legge-FINAL_REV_DRAFT1_V2.pdf (last visited 25 Aug. 2019).

protection.¹⁰⁴ One criminal lawyer in Catania expressed her concern about the widespread practice of plea bargaining in cases of *scafisti* and warned that criminal lawyers should better bear in mind the consequences this may have for possible subsequent asylum procedures.¹⁰⁵ While one lawyer noted that after plea bargaining it is possible to ask for criminal rehabilitation and clear the criminal record of the convicted,¹⁰⁶ others said that this is not a viable option because it can be requested only after 3 years from the moment the sentence has been completed.¹⁰⁷ By then, the migrant has typically already been deported.

Interestingly, however, our interviews in Sicily suggest that asylum adjudicators in actual practice hardly use Article 12 in Legislative Decree 251/2007 to deny international protection to *scafisti*. In particular, interviewed convicted *scafisti* reported that, although their fingerprints had been taken at the time of the interview for the assessment of their asylum claim, no explicit reference was made to their criminal record in the decision denying asylum.¹⁰⁸ This seems to be due to the fact that the majority of boat drivers in the last years come from countries, which are generally considered to be “safe countries of origin”. Why opt for using Article 12 to deny international protection, the reasoning seems to be, if they will be denied such protection anyway? As put by one immigration lawyer in Palermo:

A typical ‘occasional *scafista*’ in Sicily is an asylum seeker who comes from a Sub-Saharan country like Senegal and the Gambia. In most cases, asylum seekers coming from these places are not considered as deserving international protection and therefore Territorial Commissions do not need to refer to a criminal conviction as a ground for denying asylum; it is much easier for them to state that the legal conditions for international protection are not met in the first place.¹⁰⁹

5.3. *Scafisti* “in limbo” and humanitarian protection

True as it may be that most of the arrested *scafisti* will be denied asylum anyway, the outcome of an asylum procedure of an arrested *scafista* is less straightforward when he *does* meet the requirements for international protection. He will be excluded from refugee protection or subsidiary protection because of his final criminal conviction for “aiding clandestine immigration” and problems may in particular arise when he cannot be expelled from the country because he faces a concrete risk of torture or ill-treatment if sent back to his home country.¹¹⁰ He becomes “undesirable but

104 Borghi & Biondo, “Country Report Italy”.

105 R7.

106 R6.

107 R13.

108 M1, M2, M7.

109 R13.

110 An absolute ban on deportation of foreign citizens to countries where torture or inhuman or degrading treatment or punishment is a genuine risk is provided by Art. 3 of the European Convention on Human Rights, ETS No. 005, 4 Nov. 1950 (entry into force: 3 Sep. 1953), as interpreted by the European Court of Human Rights (ECtHR). Italy has already been reprimanded several times by the ECtHR for breaching the *non-refoulement* principle under Art. 3 of the ECHR. See e.g. *Saadi v. Italy*, Judgement,

unreturnable” and may end up in a “legal limbo”.¹¹¹ From the interviews, it appears that until October 2018, the Italian solution for situations of legal limbo was provided by a special type of *national* protection (*protezione umanitaria* or humanitarian protection). The residence permit granted on this basis was regulated by Article 5 of the Law on Immigration (No. 286/98); it could be granted to those asylum claimants who were not eligible for a refugee status or subsidiary protection, but nevertheless could not be expelled from the country because of “serious reasons of humanitarian nature”.¹¹² The Court of Cassation in 2018 established that Italian authorities could provide for humanitarian protection in “situations of assessed or foreseeable vulnerability deriving from the repatriation of the asylum seeker, because of a ‘humanitarian need’ that concerns fundamental human rights, as protected by the Constitution and the international laws”.¹¹³ In line with ECtHR jurisprudence, it also specifically established that humanitarian protection could be recognised in relation to those asylum-seekers who have been convicted for a particularly serious crime, since the risk of a person being subjected to ill-treatment or torture cannot be balanced against the danger that that person poses to the national security of the State.¹¹⁴ The permit for humanitarian reasons was valid for 2 years from its issuance, gave access to work on the State territory and to health assistance. It could be converted into a temporary residence permit for work reasons.

Because the majority of *scafisti* come from designated “safe third countries”, as noted above, only a minority of the convicted *scafisti* will end up in a situation of limbo and need such humanitarian protection. That said, exceptions certainly do exist. One of our respondents, for example, informed us that humanitarian protection was granted in the case of a Malian *scafista* who in principle qualified for a refugee status, but was denied such a status after being convicted as a smuggler in Palermo, under Article 12(c) Legislative Decree 251/2007.¹¹⁵ Acknowledging that it is difficult to come to an adequate estimate, one could argue that it is likely that with the high number of *scafisti* being prosecuted throughout Italy at least dozens of other convicted *scafisti* have been, or will in the future be, ending up in a limbo situation. This could, for example, be the case for *scafisti* coming from countries where there is indiscriminate violence in situations of international or internal armed conflict, such as Eritrea, Libya, Somalia, Syria, and South Sudan.¹¹⁶

Moreover, and very relevant in this regard, since the introduction of the Law 132/2018 (transposing the Decree-law No. 113/2018) also known as the “Salvini decree”, no humanitarian protection can be offered anymore. From October 2018, in cases where a Territorial Commission does not grant international protection, but

Grand Chamber, Appl. No. 37201/06, 28 Feb. 2008; *Hirsi Jamaa and Others*, Judgement, Grand Chamber, Appl. No. 27765/09, 23 Feb. 2012.

111 For an overview of national responses to the “limbo” situation, see the special issue in an earlier volume of this journal, *Refugee Survey Quarterly*, 36(1).

112 Text of former Art. 5 of Decree-Law 286/98.

113 Court of Cassation of Italy, *Ministero dell’Interno v. Y.M.*, Judgment, First Section, No. 4455, 23 Feb. 2018 (translation by authors).

114 Court of Cassation of Italy, *Ministero dell’Interno v. E.A.*, Sixth Section, Order, No. 21667, 20 Sep. 2013, referring to, *inter alia*, ECtHR, *Saadi v. Italy*.

115 R13.

116 R3, R4, R17.

where a risk of an individual persecution or torture upon return exists, a new type of residence permit based on “special protection” shall be issued by the Chief Police (Article 32 of the Legislative Decree No. 25/2008, comma 3). While the “special protection” overlaps with the abolished “humanitarian protection” in cases of unreturnable asylum-seekers,¹¹⁷ it provides for a lower degree of protection. While previously the residence permit for humanitarian protection was valid for 2 years and could be converted into a regular and renewable work permit, the residence permit for “special protection” is valid for only 1 year. During this year, the individual is still allowed to work, but without a possibility to obtain a regular work permit afterwards is lacking. This means that when the grounds for temporary protection are over, the migrant has to be returned. According to the interviewed immigration lawyers, the rationale behind this type of residence permit is to merely tolerate the “really unreturnable ones”, until they can be returned, following the examples of other European countries.¹¹⁸ In other words, while earlier on, convicted “migrant *scafisti*” in need of international protection could still hope for an alternative type of protection that would allow them to obtain a more permanent legal status, today they are not given the opportunity to remain in the territory of the State for a very long, if not indefinite, period.

6. CONCLUSION

Based on a literature review and interviews with practitioners and asylum-seekers, this article discussed the nature and scale of criminal prosecutions of irregular migrants for their (alleged) involvement in human smuggling during their own migration journey to Italy and the effects of these prosecutions on asylum applicants’ procedures. It focused on the prosecutions of the so-called *scafisti* (“boat drivers”) in Sicily. While the data presented in this study are explorative in nature and may not be applicable to all the prosecutorial and judiciary offices in Italy, we have no reason to believe that the results constitute an exceptional representation of the Italian practice in dealing with *scafisti* since 2015.

After discussing how irregular migrants may get involved in smuggling activities and presenting the different categories of *scafisti* present in Italy – namely “professional *scafisti*” and “occasional *scafisti*” – we explained that as a standard operating procedure all “captains” and “navigators” of small dinghies with migrants arriving in Italy have since 2015 been arrested and prosecuted for suspicion of “aiding clandestine (or irregular) immigration”. At least 1,300 *scafisti* (most likely often migrant-*scafisti*) have between 2015 and 2018 been arrested. Although the Italian constitution dictates mandatory prosecution of all these *scafisti*, across different jurisdictions different prosecutorial approaches exist, from relatively lenient to very stringent. During criminal proceedings, the distinction between different categories

117 M. Benvenuti, *Il dito e la luna. La protezione delle esigenze di carattere umanitario degli stranieri prima e dopo il decreto Salvini*, Diritto, Immigrazione e Cittadinanza, Fasc. No. 1/2019, available at: <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-1-2019-1/345-il-dito-e-la-luna-la-protezione-delle-esigenze-di-carattere-umanitario-degli-stranieri-prima-e-dopo-il-decreto-salvini/file> (last visited 25 Aug. 2019).

118 R3, R12.

of *scafisti* is oftentimes blurred; whereas there are strong indications that many *scafisti* have been forced to steer the boat or make a phone call to rescuers at sea, the hurdles encountered by lawyers in proving duress may lead them not to undertake a trial and to insist on their clients' acceptance of a plea bargain instead. Interviews with legal professionals and migrants themselves suggest that migrants may not understand that in this way they accept criminal responsibility, and that migrants are inadequately advised and informed about the consequences of a criminal conviction on their subsequent immigration procedures.

The study showed the significant consequences that migrants face after being prosecuted for human smuggling. They are often excluded from official reception centres and have difficulties accessing asylum procedures. When they do manage to apply for asylum, convicted *scafisti* can be denied international protection because of their criminal conviction. When they cannot be expelled, some may end up in a legal limbo, having to rely on a temporary humanitarian status with strict limitations.

Although the influx of asylum-seekers to Italy is at the moment of writing (Autumn 2019) relatively low, the possibility cannot be excluded that large numbers of asylum-seekers will, under similar circumstances as those described above, again land on Italian shores. It remains to be seen if and to what extent prosecution of *scafisti* will continue to take place. Our findings suggest that prosecutors are increasingly uncomfortable with prosecuting occasional *scafisti*, while judges seem to increasingly acknowledge that a considerable number of *scafisti* may act under duress. At the same time, Italian politicians have over the years continued to propagate anti-immigration policies, emphasise the need to more rigorously prosecute alleged smugglers, and further limit the rights of asylum applicants.¹¹⁹ In 2018, new legislation on “security and immigration” was introduced,¹²⁰ which will create even more obstacles for alleged *scafisti* who want to regularise their immigration status. For example, the new law has introduced an accelerated asylum procedure in cases where an asylum-seeker has been convicted by either a final or a non-final judgment, for one of the crimes that constitute a ground for denial of refugee status or subsidiary protection, including human smuggling. This will allow the competent authorities to proceed to the interview of the asylum-seeker “immediately” and, in case of rejection of the request, proceed more swiftly with the expulsion of the asylum-seeker. An additional new norm has provided that, when the expulsion procedure has already been started and the asylum-seeker is already in a centre for expulsion, his or her asylum request automatically has to be declared “manifestly unfounded” and consequently rejected.¹²¹

Beyond the case study of Italy, the results of this study raise further empirical, legal, and normative questions with regards to the European and the global “fight” against irregular migration and human smuggling. Empirically, these findings beg the

119 See e.g.: “Scafisti assolti a Palermo, Salvini non ci sta: giustizia faccia la sua parte”, *La Sicilia*, 2 Oct. 2018, available at: <https://www.lasicilia.it/news/palermo/192389/scafisti-assolti-a-palermo-salvini-non-ci-sta-giustizia-faccia-la-sua-parte.html> (last visited 25 Aug. 2019).

120 Law No. 132 of 1 Dec. 2018.

121 Art. 28 *ter* of the Legislative Decree 25/2008, as amended by Law No. 132/2018.

question whether and to what extent other (European) jurisdictions have used similar approaches to hold migrants criminally accountable for their own and other migrants' human smuggling and how this impacted asylum claims. Is the Italian approach exceptional or have similar policies become common practice in other European countries in the Mediterranean? A quick-scan, based on public information, learns that there are indications that also in Greece, asylum-seekers have been prosecuted for smuggling other asylum-seekers. Various websites (of which we could not establish the reliability), for example, refer to the case of Nour al Sameh, a Syrian man who crossed the Aegean Sea in a small boat together with other migrants. Being the only person on the boat who could speak English, he called for help using the walkie-talkie when the boat was about to sink. Upon arrival in Greece, he was reportedly convicted for human smuggling in June 2016.¹²² In addition, the Legal Centre Lesbos reported in July 2019 that it has also become common practice on the island of Lesbos that local police arrest migrants who drive dinghies with migrants and charge them with smuggling.¹²³ Whether or not countries like Spain or Malta have been responding in similar ways is yet unknown. More research is needed to make a proper assessment in this regard.

From a legal and normative perspective, the question arises how these prosecutions affect the system of international refugee protection. As argued in the introduction, Article 31(1) Refugee Convention in principle forbids a state to impose a criminal sanction on refugees because they have aided others to enter illegally in their collective flight to safety.¹²⁴ Prosecuting *scafisti* can be regarded to be part of a wider trend to explore “innovative” possibilities to use criminal prosecution to deter and discourage migrants to irregularly cross borders, including those who wish to request for international protection. Apart from prosecuting migrants for the alleged involvement in their own and other migrants' irregular border crossing during their migration journey, also professional humanitarian workers and volunteers have more recently been prosecuted all over Europe for assisting migrants for gaining entry to Europe, as already pointed out in the introduction.¹²⁵ As this article demonstrated, the prosecution of *scafisti* might not only discourage migrants from crossing the border, the mere fact that they are prosecuted also restricts their fundamental right to seek international protection and negatively impacts their asylum claim. Holding migrants criminally accountable for facilitating their own and other migrants' border crossing, may mean that individuals who otherwise qualify for international protection are denied such protection. From a criminal law perspective, one might argue that *scafisti* could indeed be guilty of a (very serious) crime, yet given the extremely dire conditions “occasional *scafisti*” typically escaped from in Libya, it begs the

122 See: Grenzenlose Solidarität campaign, “[Greece] Free Nour – Criminalization of Refugees as Human Traffickers”, n.d., available at: <https://cantevictsolidarity.noblogs.org/post/2019/10/05/greece-free-nour-criminalization-of-refugees-as-human-traffickers/> (last visited 4 Oct. 2019).

123 Legal Centre Lesbos, “Baseless Smuggling Charges Not Only in Italy, But Are a Regular Occurrence in Lesbos”, 2 Jul. 2019, available at: <https://legalcentrelesvos.org/2019/07/02/baseless-smuggling-charges-not-only-in-italy-but-are-a-regular-occurrence-in-lesvos/> (last visited 4 Oct. 2019).

124 Supreme Court of Canada, *R v. Appulonappa*.

125 Carrera et al., *Fit for Purpose?*.

question how the prosecution of such *scafisti* should be balanced against an individual's right to international protection. There is a general understanding among all respondents we talked to that the deterrent and retributive effects of the current Italian approach on curbing irregular migration are limited – it targets the wrong people – while the effects on the immigrants concerned are disproportionately harsh and may violate their human rights.