

# From Sea to Prison

## The Criminalization of Boat Drivers in Italy

A report by ARCI Porco Rosso and Alarm Phone  
with the collaboration of Borderline Sicilia and borderline-europe



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# Executive Summary

Freedom of movement is a right, not a crime. But over the past decade, Italy has arrested thousands of people in connection with driving migrant boats across the Mediterranean Sea. Our report describes their journeys from sea to prison, examining and taking a stand against the criminalization of migration.

Italy has spent decades pursuing people who have done nothing other than drive a boat of migrants towards its shores, utilizing criminal law, undercover police operations and emergency anti-Mafia powers to re-enforce Europe's border regime.

We spoke to hundreds of people involved – persons accused of boat driving, ex-prisoners, lawyers, researchers, activists, judges and members of the police and Coast Guard – and studied dozens of court sentences to reveal the full extent of Italy's process of criminalizing migration.

## Life sentences

The prison sentences that have been issued range from 2 years to 20 years – and sometimes even more. Of the nearly 1,000 cases we have discovered through a systematic media review, we have found 24 people with prison sentences of over 10 years, and 6 people who have received life sentences.

## Imprisoning refugees

Boat drivers come from many countries, and are often migrants and refugees too. In 2018 and 2019, the police arrested around one person for every hundred migrants who arrived.

From a review of nearly one thousand cases, we estimate that over a third of the arrestees are from North Africa, 20% from Eastern Europe and 20% from West Africa. Many of the West and North African citizens arrested and imprisoned in Italy were forced to drive boats from Libya, a country they were fleeing from. In the case of the Eastern European boat drivers, many recount that they were tricked into people smuggling.

## Criminalization causes deaths

Italy, the EU and the UN have consistently claimed that arresting boat drivers is a way of cracking down on human smuggling, in order to prevent deaths at sea. But our report

demonstrates that criminalizing boat drivers has actually contributed to some of the worst maritime disasters in recent history.

## Our report examines:

- available official data on the arrest and imprisonment of boat drivers
- nearly 1,000 cases reported by the Italian media over the last 10 years
- how Italian law has been consistently modified over the last 25 years to criminalize and persecute boat drivers
- the different kinds of boat drivers punished under Italian law, including those forced to drive boats under threats of violence
- how all the different sea routes into Italy have been criminalized: from Albania, Algeria, Egypt, Greece, Libya, Tunisia and Turkey
- how boat drivers are identified at sea on the basis of faulty photography and unreliable witnesses
- court cases that fail to protect the rights of arrestees, sentencing people on flimsy evidence and with little access to defense
- how the Italian prison system fails to protect the rights of foreign prisoners, and how boat drivers are prevented from accessing house arrest
- the social and economic consequences for suspected boat drivers after leaving prison – even when they are found innocent

## Our report demonstrates that:

- criminalization of migrant boat drivers in Italy has consistently increased over the last 25 years, especially since 2015
- criminalizing boat drivers does not prevent deaths at sea – it actually contributes to shipwrecks and maritime disasters
- the consequences of being arrested as a boat driver has a serious impact on people's lives, even if the charges are dropped
- the rights of imprisoned boat drivers are being overlooked: contact with families is often non-existent, there are almost no translators in the Italian prison system, and access to adequate defense is not protected.

# Introduction

“Go and find me a culprit!’ That’s what the commander told us to do!”

— *M., a translator who used to work on board Italian Coast Guard ships.*

“I’ve thought about it a lot, and yeah, sure, the guys inside need shoes and clothes and some money... but what they really need is their freedom. They need lawyers.”

— *B., a Senegalese interviewee arrested in 2014.*

“Those guys who drive boat and they finish up in jail – you know, these people, some of them I see them like angel, like angels who have be in prison. People who save life and after they have to be in prison. It’s a crazy one that this Italian government, this Italian justice has to look into. Because some of those guys who have be arrested as the boat captain, they run for their lives. So God help them, because they save other people’s lives as well. Like my own life.”

— *F., a Biafran activist.*

The current report results from the urgent need to bring to public attention the criminalization of migrant boat drivers in Italy.

Its basic premise is a criticism of Europe’s border closure, an act that has meant the almost complete elimination of every method of entering Europe through safe channels, above all for people living in the Global South. The report recognizes the application of criminal law as a functioning aspect of this border policy, and positions itself in a radical criticism of the criminalization of border crossing – a criminalization embodied in the figure of the boat driver. It proposes a vision of these events that might perhaps be interpreted by some as controversial and taken for granted by others: that crossing a border – or helping someone to do so – should not in itself be a crime. The criminalization of people who cross borders simply shifts attention away from the racist violence which Europe enacts through the border itself.

The problem, in fact, does not lie with those who are crossing borders, but with a border regime that forces hundreds of people every day to embark on dangerous and often lethal journeys. The abolition of this regime, rather than the criminalization of those who are challenging it, represents the only adequate response to our current situation.

The persecution of boat drivers (and suspected boat drivers) in Italy – through the use of the tools of criminal law – thus needs to be understood in the wide and expanding context of the criminalization across Europe more generally. In the case of boat drivers, this means the criminalization of the act of driving a boat with migrants on board, i.e. people who enter Europe without a visa. It is important to observe, however, that criminal proceedings against boat drivers are underway not only in Italy but also in Greece, Spain, the Canary Islands and the UK: the tragic situations highlighted by the research at hand thus represent one element in an international event. Simultaneously, these episodes must also be understood and analyzed within the Italy's own political context, a country where acts of migrant solidarity have been targeted by public prosecutors, as demonstrated by the criminal proceedings underway against the crews of civil rescue missions ([\*Juventa\*](#), [\*Mediterranea\*](#)) as well as the sentencing of the Mayor of Riace, Mimmo Lucano, to 13 years imprisonment.

Despite the media and public attention rightly dedicated to the criminalization of European civil society organizations, and European citizens who have acted in solidarity with migrants, little is known about the criminalization of people who themselves cross Europe's borders.

The Italian right wing presents the boat driver as the main culprit for an “invasion of foreigners”; for the Italian left, on the other hand, the boat driver has instead too often been identified as the scapegoat for disasters and deaths at sea. In both of these versions, the boat driver is someone who exploits and profits from migrants, the villain within the entire system produced by the border regime. But as we show in this report, both of these hypotheses are politically damaging and have nothing to do with the facts.

The truth is that the world created by the border regime is a complex one, in which the people who drive the boats do so for a vast range of reasons, that can only be simplified through a work of strenuous simplification, and who essentially represent the last links in a much greater chain, the most important links of which remain in the shadows. Furthermore, far from being guilty for deaths at sea, the people who drive the boats are often themselves migrants who have been blocked from entrance into Europe and who risk their own lives to cross the border. All of this unfolds in an extremely variety of ways: from people who find themselves unwittingly within networks of exploitation, violently forced to drive a vessel; through to people who are agents of noteworthy acts of heroism and solidarity, saving the lives of those they have transported. In some cases, boat drivers can be described in both such ways.

But whether heroes or victims, the criminal proceedings initiated by Italy continue all the same: it is the suspicion of *the act* of having driven a boat with migrants on board that triggers investigations and prison sentences, whatever the motivations that brought someone to do so

might be. The criminalization of the act of boat driving, and therefore of the people who commit this act, is not an inevitable consequence of migration, but the result of a very precise decision taken by European countries.

The increasing refusal by all European countries to allow people from the Global South to enter Europe has produced results that are both predictable and abominable. On the one hand, a proliferation of militarized borders – that extend from the European frontier through to countries of departure and transit – has generated an unprecedented level of violence, transforming the Mediterranean Sea into a cemetery in itself. On the other hand, the policy of border closure has led to the development of a whole range of practices, organizations and networks – some well-structured, others entirely informal – that facilitate entrance into Europe in way that been rendered illicit and illegal by European policies. Border closure, in this context, has not only been enacted through physical means, but also with the legal tools developed by each individual country, persecuting every form of unregulated entrance and every act that facilitates this.

In Italy, this criminalization has been effected first and foremost through the establishment of the crime of ‘aiding and abetting illegal entrance’, written into the law books 25 years’ ago following two horrendous maritime disasters. Particularly after the insurrections in the Arab world from 2011 onward, and the rise in departures along Mediterranean shores, this law has been increasingly applied, subjecting thousands of people to criminal proceedings, with a considerable cost both on the public purse and on the lives of those arrested.

Examining the Italian context, the current report brings to light the extremely high number of criminal proceedings in Italy – over 2,500 – that have been opened since 2013, for the most part in relation to people accused of having driven vessels with migrants on board. This figure provides an impression of the scale of the question which – far from representing a marginal application of the crime of aiding and abetting illegal immigration – represents the principle mode in which the law has been applied. The number, furthermore, indicates the clear failure of Italian migration policies according to any point of view: instead of blocking the arrival of migrants – as politicians claim they aim to – European policies have managed to do no more than criminalize them while increasing the risks for migrants themselves and fomenting new forms of racism. Every Italian government – from Renzi to Gentiloni, from Conte to Draghi – has continued to support this same twisted logic.

The analysis undertaken reveals the devastating impact that these criminal proceedings have had on the lives of the accused, who in the majority of cases have had neither full access to an effective defense nor full safeguarding of their fundamental rights. Furthermore, over the period examined, still more laws and regulations have been introduced that have actually worsened the situation, deepening the criminalization of boat drivers – such as limitations on the recognition of international protection and on access to house arrest – contributing to an increased prison population and, above all, to a veritable “factory” of invisible people deprived of European documents and thus all too easily exploited in labor markets of every kind.



## *The authors and the research method*

The report was drafted by the organization ARCI Porco Rosso in Palermo with the support of the transnational network of Watch the Med Alarm Phone, and in collaboration with the NGOs Borderline Sicilia and borderline-europe. The aim of the current research is to reconstruct an up-to-date overview of the breadth of the criminalization of boat drivers, in order to bring public attention to the very serious violations of human rights in relation to the accused. We underline the urgent need for Italy to review the legislative framework that currently allows for the criminalization of the act of driving a boat of migrants attempting to enter Europe.

[ARCI Porco Rosso](#) is a cultural center in the heart of Palermo, Sicily. Since 2016, its migrant drop-in space – the ‘Sportello Sans-Papiers’ – has provided support and solidarity to people living in or passing through the city. Many of the criminalized migrants who participated in the research did so thanks to the dedication of Porco Rosso’s many members, who contributed in a variety of ways. The core team who worked on the report include a social support worker, a paralegal and a community organizer – the last of whom was himself arrested for driving a boat and experienced the consequences of criminalization.

[Watch the Med Alarm Phone](#) was created in October 2014 by a network of activists in Europe and North Africa. The project established a grassroots hotline to support migrants in distress in the Mediterranean Sea, with the aim of offering greater visibility to SOS calls. In direct and constant contact with people crossing the Mediterranean, Alarm Phone’s activists fight for freedom of movement and the abolition of Europe’s border regime. Over recent years, the network has mobilized against the criminalization of search and rescue operations carried out by civil society organizations, and in solidarity with people who cross European borders.

[borderline-europe](#) has been monitoring and systematically documenting news relating to arrests for aiding and abetting illegal immigration into Italy since 2016, coordinating, contributing to and publishing “Criminalization of Flight and Escape Aid” (2017), the first in-depth report on the subject. In 2020, borderline-europe published a further report into the situation – “Incarcerating the Marginalized” (together with CPT-Aegean Migrant Solidarity and bordermonitoring-eu) – which reveals the extent to which boat drivers are criminalized and imprisoned in Greece, where sentences often exceed 100 years of detention.

[Borderline Sicilia](#) has monitored migration, detention and reception in Sicily since 2008, and has been following the process of criminalization of NGOs and boat drivers since the accusations in 2004 against the German NGO *Cap Anamur* and the case of the 7 Tunisian fisherman in 2007. The Italian chapter of the 2017 report “Criminalization of Flight and Escape Aid” was authored by Borderline Sicilia, focusing on the situation of migrants forced to drive boats by necessity or through force. The organization’s lawyers

continue to be engaged in defending people accused of aiding and abetting illegal immigration, including providing administrative and immigration advice.

The current report provides an overview of the criminalization of migrants who are accused of driving boats across all of the sea-routes in the Mediterranean, analyzing each step of their journey: departure, crossing, arrival in Italy, arrest, criminal proceedings, imprisonment and, finally, the consequences for people's lives outside of prison.

In order to provide an analytical framework of every aspect, we interviewed a large range of actors during the research period (January – June 2021). We listened, first and foremost, to the accounts of people accused of driving boats: people who deny the accusations, and people who proudly claim their actions; detainees and ex-prisoners; people from Eastern Europe, Africa and the Middle East, and who are now living in Italy, France, Germany, Malta and the UK among other countries. In all, almost fifty people who find themselves at the center of this juridical storm gave us their precious time – whether through a spirit of generosity towards us, or in solidarity with people who continue to be criminalized like themselves – people to whom, we hope, this research will be of assistance.

Their personal stories can be read in different points in the report, providing a direct account of the trials and tribulations faced by each person. People like N., a Ukrainian refugee who passed two and a half years in a Calabrian prison after having driven a boat in 2015, from Greece to Italy, with 70 Syrians and Iraqis on board; or the two Syrian refugees who were arrested after a rescue mission by an NGO in 2019, who are currently serving out a prison sentence of two years and ten months; or B., a young Senegalese asylum seeker, found guilty on appeal in 2018 after having spent two years living in Italy at freedom, and who was only released from prison two months ago.

We also interviewed lawyers, researchers, activists and social workers, as well as members of the police, the judiciary and the Italian Coast Guard. Interviews with a few lawyers in particular, who follow cases in Ragusa, Catania and Palermo, and kindly shared sentences with us, were of the utmost importance for our research and analysis.

Nevertheless, the number of cases analyzed, in relation to the extraordinary breadth of the problem, could not fully capture the complexity of the criminalization underway. As we explain better in the first chapter, we therefore aggregates available data from reports published by the police forces, and set this alongside information extracted from hundreds of news articles – relating to the arrests of boat drivers, analyzing them in a systematic manner.

### *A note on language*

Studying the criminalization of migration over the last 25 years means, inevitably, coming face to face with a series of terms that have developed within this context. Some of these terms have been contested and defined institutionally and legally, such as 'people smuggler' and 'human trafficker', or the nautical terms 'skipper', 'commander' and 'crew'. Others are more closely associated with the jargon of mass media, such as the Italian term '*scafista*', which

means literally ‘ferrier’ but has come to mean variably a smuggler or trafficker of many kinds. And there are other terms yet again which derive from the non-European lexicon used by migrants themselves: ‘*porteur*’, ‘*cockseur*’, ‘connection man’.

This report focuses exclusively on the Italian prosecution of people accused of facilitating illegal immigration by sea, and who have themselves arrived by sea. It does not examine the accusations leveled at people in connection with aiding and abetting illegal immigration who have been in Italy or Europe for a significant period of time, nor does it examine the facilitation of entrance by land routes. This focus on maritime entrance not only reflects the priorities of the organizations involved in the research but has also been necessary to lay some boundaries around an already expansive topic.

We have thus chosen to use the terms ‘boat driver’ and ‘captain’ in the report, reflecting this maritime focus. The former term is the most neutral, and the second – ‘captain’ – because it represents the main word used by the accused themselves to describe the act for which they have been criminalized.

Our thanks to everyone who has contributed.

Palermo, October 2021.

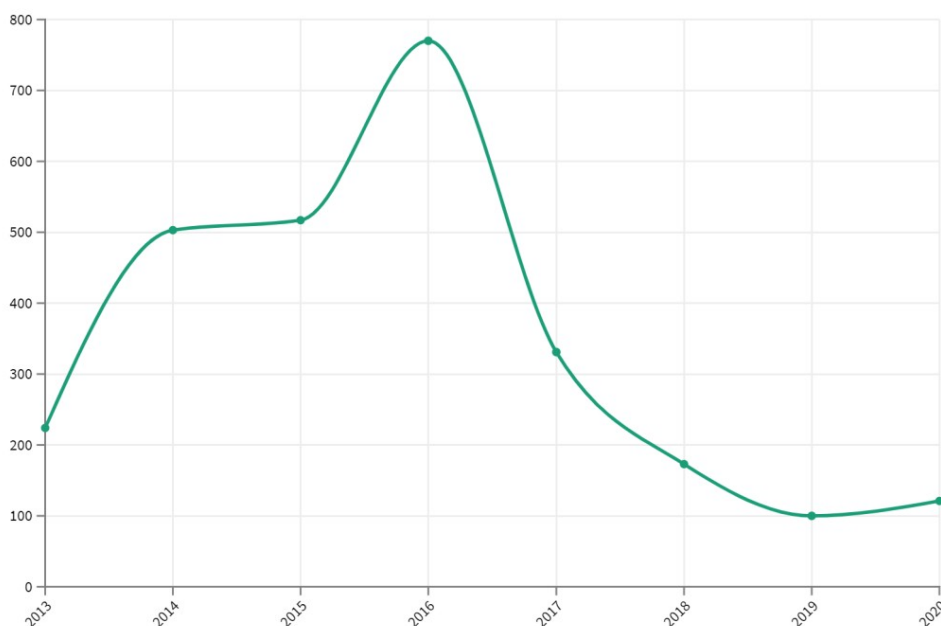
# 1. Data

One of the difficulties in discussing the issue of migrant boat drivers has been the lack of easily accessible data relating to the total number of arrests, the number of people imprisoned and how many people are still in prison. Unfortunately these data sets – which would make it possible to describe the past situation in detail and compare it with the current one – have not been made public. In the research for this report we have used two methodologies: a quantitative approach that consists in verifying and aggregating the fragmentary data available from official sources (for the most part, from the Italian *polizia di Stato*), and on the other hand a qualitative approach, through extracting information based on articles published in the Italian press.

## 1. Data from the police and military

The first data groups to analyze are the official numbers from the [annual reports of the Italian police](#), available for the years 2013–2020. From these we can gather that 200 “boat drivers, organizers and assistants” were arrested in 2013; 503 “boat drivers and assistants” in 2014; 517 in 2015; 770 in 2016; 33 in 2017; 173 in 2018; 100 in 2019; 121 in 2020. (With data released by the [Ministry of the Interior](#) in August 2021, we know that there have been at least a further 44 arrests this year). The sum total of arrests for the last 8 years is therefore 2,559 arrests, represented by the graphic below.

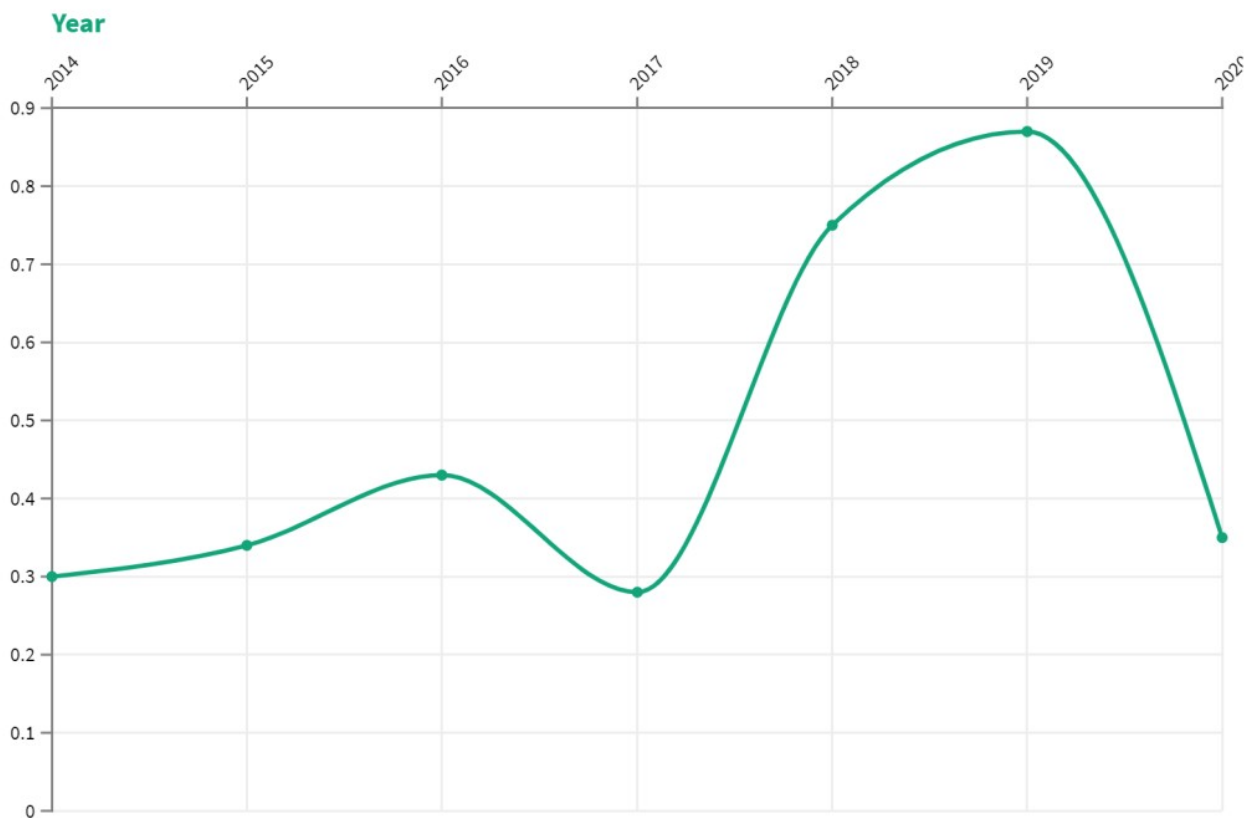
**Total arrests**



According to a [Ministerial report](#), 728 boat drivers were arrested over the period of the operation *Mare Nostrum* (October 2013 – October 2014) meaning that the period October–December 2013 had a maximum of 224 arrests: we have used this figure instead of the ‘200’ published in the police data. It should be noted, furthermore, that the numbers relate to “boat drivers and assistants”, without specifying whether this only involved arrivals by sea or arrests in relation to people already present in Italy.

We can compare these numbers from the police statistics with those of arrivals according to each year, in order to arrive at a percentage of arrests, i.e. how many arrests for every 100 migrants who land. This varies between 0.3% and 0.9%, i.e. almost one in a hundred for the years 2018 and 2019. The percentages are summarized in the graphic below:

### Arrests per 100 arrivals



A data survey covering 600 cases up to October [2017](#) (carried out by the [European Observatory on Migrant Smuggling and Human Trafficking](#), a Frontex project) describes only 28 concluded criminal proceedings, of which 13 concluded in definitive sentences. Another 100 cases examined by the Observatory at the end of the year [2018](#) describe 151 new arrests, of whom 20 people were under trial. A third report was promised for July [2020](#) but has apparently still not been published: probably due to an internal reorganization and the closure of the project. The imprecision of this data is in itself noteworthy, given that these figures on trials have only been published in a Libyan context about the trafficking and smuggling of

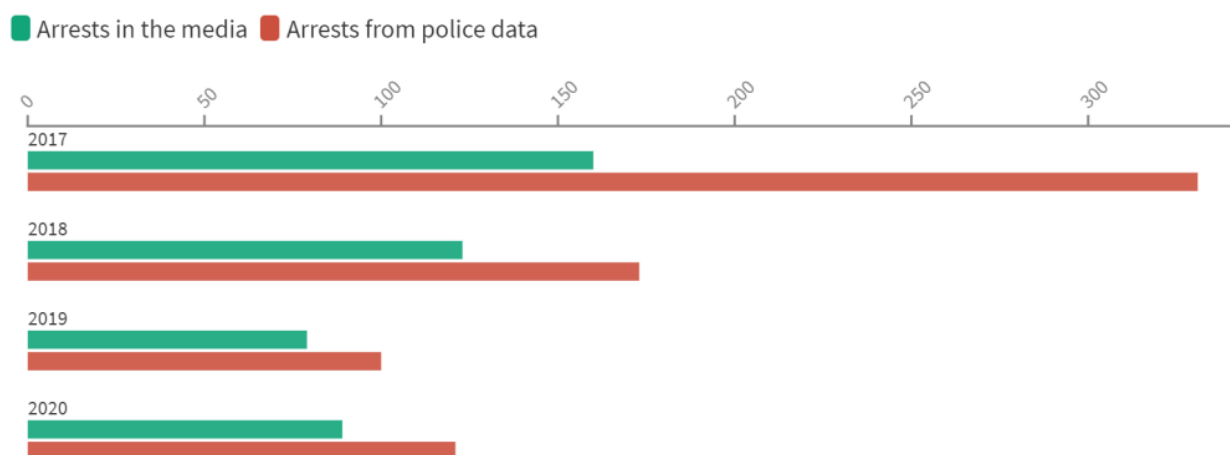
persons: it is not clear whether the figures are indeed only about arrivals from Libya, nor how many of those found guilty proposed a defense of the ‘state of necessity’.

We can then analyze the numbers published by the [Italian customs police](#), but these are even less clear than those of the state police. They report 33 migrant boat drivers arrested in 2016, 751 ‘boat drivers and drug dealers’ arrested in 2017; 68 boat drivers in 2018, 46 persons “responsible” for migrant smuggling arrested in 2019, and 73 boat drivers in 2020. We have deemed these figures too generic to take into consideration for the current research.

## 2. Media reports

Since 2016, the NGO *borderline-europe* has monitored news items in the Italian press relating to the arrests of boat drivers: for the current report, we expanded and updated these lists. The articles available online for the years prior to 2017 do not provide statistically significant information about the cases, but from 2017 onward the number of arrests that can be counted in the media reports are constantly closer to the estimates of arrests published by the police. Specifically, in 2017 the police reported 331 arrests, while we can count 160 from media reports; in 2018 the police reported 173 arrests, and we can count 123 cited in press articles; in 2019 the police reported 100 arrests, and we can count 79 in the news; finally in 2020 the police reported 121 arrests, and we have counted 89 in the Italian press. These numbers are summarized in the chart below.

### Arrests counted in media review

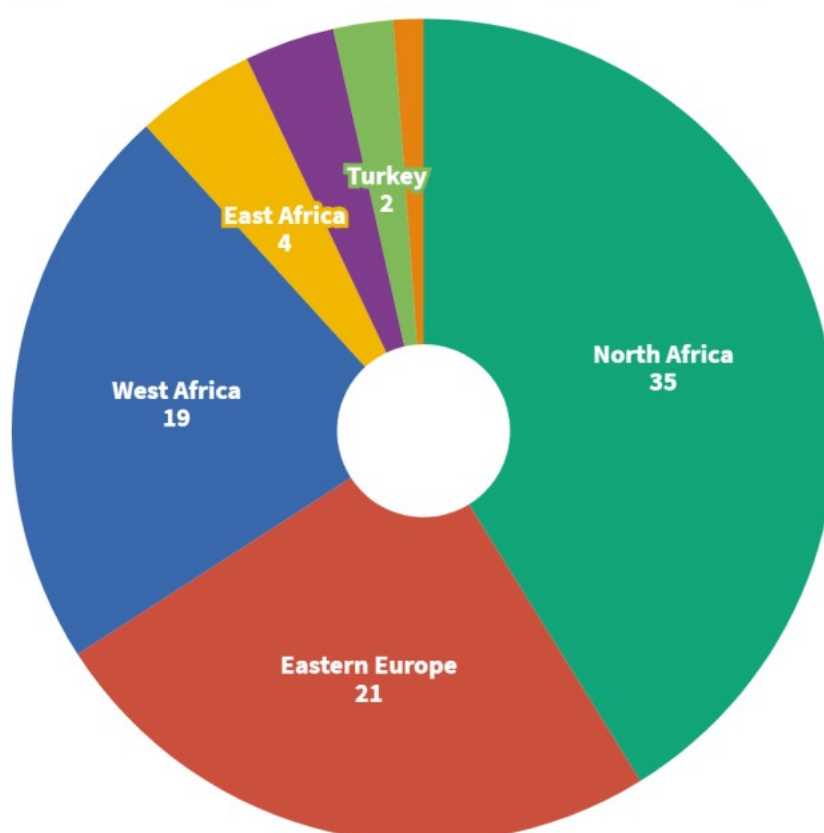


Through a review of articles in the Italian press over the first 6 months of the year 2021, we have counted 44 arrests of suspected boat drivers. This information – combined with what we have found out from interviews with lawyers, and data extrapolated from numerous court sentences – provides a more complete overview of what has happened over recent years.

Indeed, out of the 2,515 arrests claimed by the police – including those relating to 2021 – we have found that 950 can be found trace of in the national press, i.e. a just over one third. We then studied these cases to discover the nationality of the arrestees, which represents the one factor which is reported with some consistency in media reports (around 85% of the articles reviewed). The countries or geographical zones of origin of the arrestees that can be extracted from the articles are represented in the chart below:

### Geographic Zone of Boat Drivers, % of 950 Cases Studied

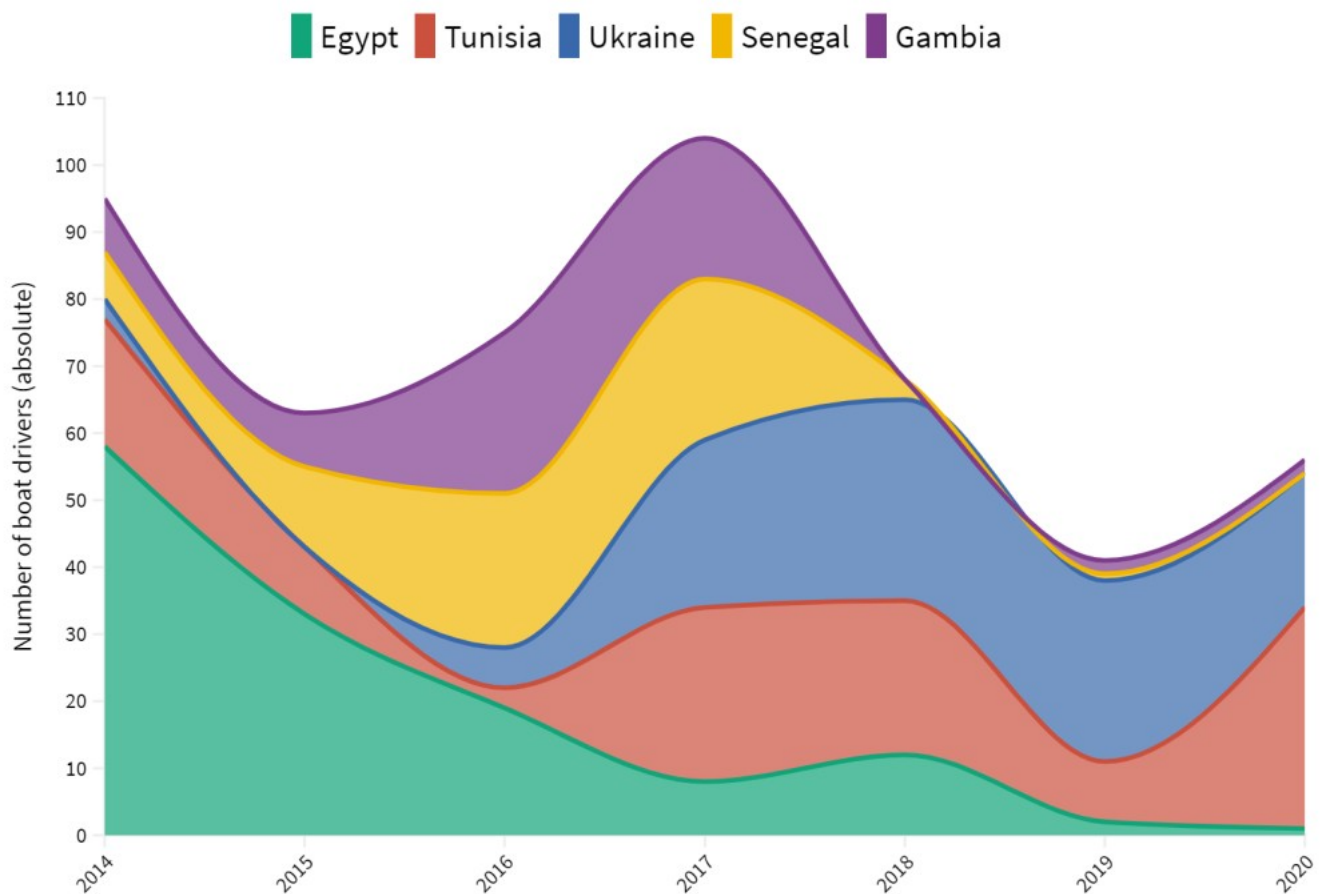
■ North Africa ■ Eastern Europe ■ West Africa ■ East Africa ■ Middle East ■ Turkey ■ Balkans



The chart shows the proportion of people arrested according to geographic origins for the period 2013–2021, according to our analysis of 950 cases. The break down is as follows: 35% from North Africa, 21% from Eastern Europe, 20% from West Africa and only in 2%–4% of cases was the arrestee from East Africa, from the Middle East or from Turkey. As we have already stated, for around 15% of the cases we have not managed to identify the geographical zone of origin of the arrestees.



## Principal nationalities of arrested boat drivers



From a projection of the most significant countries of origin (in numerical terms) of the arrestees, in relation to the number of arrests each year, we find a general decrease in the number of arrests between 2014 and 2021, with a counter-tendency that peaks in 2017; in 2020, furthermore, we can also infer the trend in relation both the routes and to the nationalities of the people who are arrested as boat drivers along these routes. Between 2014 and 2021, we note a general decrease in arrests of Egyptian citizens, due to the gradual abandoning of the Egyptian route, and at the same time an increasing use of boat drivers from West Africa along with Libyan route, above all Gambian and Senegalese migrants. We can also see here the increasing arrests of boat drivers from Ukraine from 2016 onward, who continue to represent a high proportion of arrestees. The same can be seen for Tunisian arrestees. Indeed, taken together, the arrests of Ukrainian and Tunisian citizens after 2017 (i.e. after the near-closure of the Libyan route) reflects an increase in landings from the non-Libyan routes.

In the above we have managed to provide an overview of the arrests of boat drivers and the make-up of the people arrested. This provides a basis on which to open much more, and much needed research. In the section on prison we will further confront some statistical problems in relation to the number of people who have been put on trial and imprisoned.



## 2. Legal framework

### 1. Facilitating illegal immigration

The accusation leveled at someone identified as having driven a boat of migrants directed towards Italy, or at someone who has taken on some other role during the crossing, is the crime established by [Article 12](#) of the Immigration Act, a series of measures introduced into Italian law to discourage, punish and block entrances into Italy which violate the rules that regulate and protect the nation's borders.



*A boat driver is arrested, port of Pozzallo, 2016. Source: Polizia di Stato.*

Italian law does not only punish people who ‘promote, direct, organize or finance’ people trafficking, but also anyone who physically transports migrants who do not have an entrance visa – and, in general, anyone whose actions facilitate illegal entrance into Italy or, indeed, into any other country. It is immediately clear that the way the law is written does not aim to punish only members of any apparent organization that manages human trafficking, but anyone who has even the most minimal or insignificant role that contributes to the illegal entrance of migrants. The members of a smuggling organization and anyone who drives a boat are thus put onto the same level, including anyone who drives the boat in circumstances that have forced them to “contribute” to the illegal entrance of migrants.

It is clear from this that what interests the Italian state is to do everything possible to avoid people entering Italy without a visa, and to punish anyone who contributes to the journey of migrants into Italy, willingly or otherwise. Indeed, the juridical 'good' that is protected by the criminalization of facilitating illegal immigration is the country's borders; the consequence of this is that migrants who risk their lives and/or are economically exploited to undertake this journey are not considered to be the offended persons – unless they demonstrate to have been subjected to a serious form of harm (violence, torture, the loss of a relative during the journey).

Facilitating illegal immigration – in its 'simple form' (we will return to the 'aggravated' forms) – can earn a punishment of between one to five years in prison and a fine of €15,000 for every person whose entrance into Italy has been facilitated.

Sentencing can be increased or decreased according to aggravating and attenuating circumstances included in the same law. In particular, so-called 'aggravated' facilitating of illegal immigration applies if there are at least five passengers; if their lives have been put at serious risk; if the migrants brought to Italy have been treated inhumanely; if the crime has been committed by at least three people; if fake documents are used; if the criminals used weapons. In these circumstances, sentencing can be increased to between 5 and 15 years imprisonment. The most frequently contested of these aggravating elements are the number of passengers and the risky situation of the vessel. We have also seen the accusation of the use of weapons applied when someone was found with a knife on their person, or if someone was accused along with other 'persons unknown' (referring to the smugglers still in the country of departure) who operate weaponry. The law establishes an even higher sentence if multiple aggravating factors are confirmed.

A further important aggravating element, above and beyond the others already listed, is applied if the crime has been committed for the ends of an 'unfair profit' – i.e. earnings gained through illegal actions, even if this profit is 'indirect' – by recruiting people for sexual exploitation and/or exploitative work, especially minors. The law establishes that this increases the sentencing between one third to one half. If someone is caught during the act of the crime, the law establishes their arrest and imprisonment awaiting trial (so long as there is no other possibility of method of detention that compromises their personal freedom less).

It should be noted that the punishments established for this crime, above all in aggravating circumstances, are extremely harsh. Someone can be sentenced to fifteen years in prison and still have the sentence increased for making an unfair profit. In the example of a captain who drives a boat with drive people on board – perhaps even a migrant themselves who has nothing else to do with people smuggling (*see the section Spectrum of Captains*) but has been paid for that single voyage – they could in theory be sentenced to nearly 20 years of prison simply for having driven the boat. In reality, the highest sentences that we have seen for a case in which no one has died during the crossing are five years' imprisonment – but it is concerning that this is, in a certain sense, 'lenient' in the eyes of the Italian law.

Even if the prison sentence represents the punishment which people experience directly and with great difficulties (*see section 8*), the monetary aspect of the punishment should not be forgotten. The fines are applied systematically and with surreal consequences: it is entirely normal for someone to be sentenced, for example, to three years in prison and one million Euros in fines. As the fines are practically impossible to pay in that situation, they largely go ignored, but could potentially have consequences later on in the lives of those found guilty.

Another extremely important aspect of the Italian law is that the crime of facilitating illegal immigration *does not require that the action has been committed for profit*. In other words, paradoxically, facilitating, organizing, financing, promoting or effecting the transport of migrants into Italy is still considered a crime even if you have not done so for personal gain.

This is crucial because, in the Italian judicial system, for any law that establishes that a particular action can only be considered a crime because it was carried out to achieve a certain aim, this aim (that has effectively driven the action of the criminal) must be demonstrated by the public prosecution. If it does not exist, or cannot be proven, then no crime has been committed. An example of this principle in another law is in relation to facilitating the illegal presence of a foreigner in Italy (Article 12, comma 5 of the Immigration Act). In this case, it does not constitute a crime simply to host a foreign citizen without documents in your house – it only becomes a crime if you try to make an unfair profit. This means that the accusation of the crime can be levelled in many fewer cases than can be for facilitating illegal entrance – i.e. only in those cases in which the aim of economic exploitation can be demonstrated. On the contrary, facilitating illegal entrance does not require personal profit for it to be considered a crime : it represents a crime whatever the motivation behind the person's action.

This simply makes it even more evident the architecture of Article 12: to put the member of a human trafficking organization, a mercenary, and forced migrant-captain all on the same level.

## 2. Homicide and other crimes

Article 12 of the Immigration Act is not the only crime of which the boat drivers are accused. In many cases, this represents the basic crime, focusing on the act of actually having driven the boat and in general for having had a role – or supposing to have had one – in the navigation. Unfortunately, other incidents and circumstances can take place at sea which, even if not directly caused by the suspected boat driver, can nevertheless be attributed to them by the police (even if the accusations could often be more accurately attributed to actions or omissions perpetrated directly by institutional bodies, and indirectly by policies of European border closure).

Further accusations occur when the boat capsizes or, for other reasons, some of the passengers die during the journey. In this case, the crime of manslaughter or multiple homicide is sometimes attributed to the boat drivers. Manslaughter (article 589) is punished

with a sentence of up to 5 years' imprisonment, which can be increased up to 15 years if there are multiple victims. The second, "death as consequence of another crime" applies if, as a consequence of another crime of which the accused is found guilty, someone dies or is harmed even without the accused's intention of doing so. In this case, the sentencing either follows that of manslaughter, or unintentional bodily harm (art. 590), but is increased due to the criminal context. Added to the punishments established by Article 12, the sentencing can become even harsher, and go all the way to life sentencing (*as we see in the section on long-term prisoners*).

### 3. Criminal association and anti-Mafia law

All cases relating to Article 12 of the Immigration Act are marked for attention by the District Anti-Mafia Directorship (DDA), a specialist section of the public prosecutor's office that is only present in specific local courts (determined by the presence of an appeal court: in Sicily they are in Palermo, Catania, Caltanissetta and Messina). When the crime of 'criminal association' is contested, the cases are dealt with directly by the DDA. The process that has led to the Anti-Mafia prosecutors taking such close interest in cases of facilitation of illegal immigration was neither straightforward nor inevitable; it was marked by a series of official notes, laws and decrees that represent in and of themselves important moments in the criminalization of migration.

The role of the Anti-Mafia prosecutors in Italy is to investigate and put on trial both national and international criminal organizations. The Italian criminal code establishes that the crime of criminal association (according to article 416) has been committed when 3 or more people conspire to commit a series of crimes, and is punished with sentencing of between 3 and 7 years imprisonment. The prosecutors that handle such cases are the DDA, so they are not distributed across all the different courts, in order to facilitate greater national coordination and repression of organized crime.

How did it happen that cases of migrant boat driving have garnered so much interest from [Anti-Mafia prosecutors](#)? What does immigration have to do with anti-Mafia legislation? The crime of facilitating illegal entrance does not necessarily include the accusation of criminal association, and even less of 'Mafia-type' criminal association. Nevertheless, almost since the very introduction of the Immigration Act in 1998, we note repeated attempts to hand the investigations and prosecution of cases of boat-drivers over to Italy's anti-Mafia offices (i.e. the DDA, the DIA and the DNAA). The basic reason for this, it would seem, is that the Anti-Mafia prosecutors, even if they do not necessarily want to limit themselves to prosecuting the last links in the chain of smuggling – i.e. the boat drivers –, are involved in these cases to pursue all the information they can in order to try to reach the higher levels of the international smuggling of persons.

With the Palermo Convention in 2000 – which established the UN department on organized crime (UNDOC) – efforts were made to trace a single line connecting the smuggling and

trafficking of persons with international organized crime. The proposal was that Italy's experienced anti-Mafia prosecutors would serve as a model for the war on international trafficking in drugs, guns and human beings. With the ratification of the Palermo Protocol in the Italian parliament in 2006, Italian law involved the offices of the Anti-Mafia in a disturbing way, [allowing the use of undercover police operations](#) (article 9, Law 146/2006) in any investigation into the 'aggravated' crime of Article 12 of the Immigration Act, and passing over to the anti-Mafia prosecutors all the investigations with a 'transnational' character.



*Opening of the Palermo Convention, 2000. Source: Keystone*

At least since 2010, following the increase in arrivals of migrant boats along the Calabrian and Apulian coastline, the anti-Mafia prosecutors began to take greater interest in the cases against boat-drivers. In this period, significantly, the cases appear to have been aimed less at prosecuting those who materially drove the boats, and more at uncovering the hierarchy of international criminal organizations.

In the Summer of 2013, the anti-Mafia prosecutors in Catania began to follow a series of cases of boat landings connected to the use of mother-ships crewed by Egyptians, even attempting to level accusations of criminal association (i.e. Article 416). At this point the anti-Mafia engagement became a national question, with a note from the national directorate (the DNAA) that tried to clear up the issue of jurisdiction, which was becoming a key problem in trials against the facilitation of illegal immigration. An Egyptian citizen accused of smuggling, who protested against the interventions of the Italian authorities in international waters, put it quite clearly (in words picked up in a wire-tap): [“They can’t do it: they can come on board and do what they want there, but then they have to let them go.”](#) In brief: up until 2013, the Italian police had no way of arresting crews on mother-ships operating in international waters.

To deal with this – and to ensure that the arrested would be imprisoned while awaiting trial – [the national anti-Mafia directorate](#) (the DNAA) constructed a long and complex argument about the existence of Italian jurisdiction in international waters, essentially proposing its own authority as the main body engaged in the war against international organized crime (we return to this in the following section).



In the same year, attempting to increase their chances of reaching the higher levels of organized crime, the anti-Mafia directorate requested that all ordinary courts communicate any information about cases of facilitating illegal immigration to the anti-Mafia prosecutors, in any instance where there was even *potential* for an accusation of criminal association.

This did not mean, however, that all cases were immediately assigned to the anti-Mafia prosecutors; e.g. many cases passed through the courts of Agrigento, Ragusa and Trapani. The attempts to pass the cases over the anti-Mafia offices continued in the following years: the ‘[Minniti Decree](#)’ of 2017 established that all cases of criminal association (art. 416) finalized towards the ‘aggravated’ facilitation of illegal immigration should be handled by the anti-Mafia prosecutors. Finally, in 2019, the so-called Second Security decree (under minister Salvini) handed over to the anti-Mafia prosecutors such cases [even without aggravating factors](#) (as well as re-enforced and provided financing for undercover police operations in Article 12 cases).

Until now, the accusation of criminal association has mainly been contested in relation to the ‘upper levels’ of smuggling organizations operating, for the most part, outside of Italy (representing a series of cases which are [outside of the remit of this report](#)). Yet even as recently as August and September this year, the DDA in Palermo and Cagliari are actively prosecuting cases focusing on suspected boat-drivers.

## 4. National jurisdiction

Italy considers the crimes supposedly committed by boat drivers to fall under its own national jurisdiction, i.e. that they fall under Italian law, even when the transportation of migrants occurs on board a vessel without any national flag (i.e. without a country of registration), in international waters and when the only infraction that occurs in Italian waters is the actual entrance of migrants into Italian territory. The Italian supreme court decreed in 2014 that:

“As for illegal immigration, national jurisdiction applies even in the case in which the transportation of migrants, occurring in violation of Article 12 [...] on board a vessel (specifically, a rubber boat with more than 100 people on board) without flag and, therefore, not pertaining to any country [...] in international waters but, following this, the crime of entrance and landing of non-EU citizens has taken place in national waters through the intervention of rescuers, with a predictable and desired outcome due to the conditions of the boat, the excessive number of passengers and the conditions at sea.”

This means that the number of criminal cases against boat-drivers in Italy is extremely high – not only due to Italy’s geographic position but also because Italy actively tries to prosecute actions which, having taken place outside of Italy, it could potentially ignore.

The juridical approach has fundamentally been established by the Anti-Mafia document mentioned in the previous section. The logic is based on the concept of the ‘mediated author’ of the crime. This means that even if there are a range of actors in the “chain” of the crime, who perhaps did not want to commit it or contribute to it, their presence in the chain does not break the connection between the original act and the final effect. In our case, the actions of the crew on board the mother-ship remains a crime even if the final and eventual illegal entrance of migrants is committed by a rescue ship of some kind. For the Italian supreme court, a rescue ship simply represents “an essential and premeditated link in a well-planned chain of actions”. [This remains the same for a naval ship, Frontex or an NGO.](#)

The question of Italian jurisdiction over cases against boat drivers continues, however, to be contested in court, even if the supreme court – and the Italian government – seems to have taken a final decision. This applies not only in the cases described above, which focus above all on the relation between mother-ships and rescue ships, but is also important in relation to acts committed by non-Italian citizens in international waters, or at least non-Italian waters. That includes crimes other than facilitating illegal immigration – e.g. multiple homicide in the context of a shipwreck – in which even the victims are not Italian. Despite the many obstacles, Italy continues to defend its jurisdiction in such cases.

## 3. A Spectrum of Captains

Over recent years, the boat driver has become a central figure in Italian discussions around migration, the constant scapegoat for the deaths and disaster caused by Europe's policy of border closure. Yet even in periods when there have been daily articles in the news about their arrest, there has been very little analysis and discussion of the different reasons that lead people to drive migrant boats, or their specific roles within smuggling organizations. In the following chapter we aim to describe the very different ways in which people come to drive migrant boats, in order to contribute to an honest and clear debate in which the protagonists are not reduced to either helpless victims or heartless assassins, but are rendered as complex and varied individuals.

As laid out in the introduction, our firm belief is that the act of boat driving and of transporting migrants should not in itself be a crime. The reasons behind someone's decision to drive a boat – whether for their own project of migration, or under threats of violence, or for monetary incentives – does not modify that position. The analysis given here, instead, aims at providing professionals, campaigners and the public at large with a better understanding of who drives the boats and their position in wider smuggling networks, in order to help separate out the act of physically transporting migrants from other activities.

In order to conceptualize the differences in reasons behind boat drivers' decisions and organizational positions, we first imagine a 'spectrum', ranging from people who seem to have the least choice over their decision to drive the boat (i.e. people who have been physically coerced into doing so) through, on the other end of the spectrum, to people who have driven the boat for financial gain. These distinctions are partly based on how people are treated by the legal system, but are also distinctions that arise from interviews with the accused themselves, who often stress such distinctions. In this section we use the term 'captains' to describe anyone who has physically driven, or helped to navigate, a migrant boat (whereas in other sections we also discuss people erroneously accused of having transported migrants). This 'spectrum of captains' allows us to provide an initial typology, that guides the reader in understanding the different motivations involved. This will also be important further on in the report as the basis for better understanding how the different maritime routes function and the legal defense strategies in criminal proceedings. Like all categorizations, however, it provides an initial tool but cannot fully describe the situations that we have come across. For this reason, we immediately provide examples of 'mixed cases' that overturn these categories, demonstrating the complexity of boat drivers' motivations, and how these relate to the operations of the upper echelons in smuggling organizations. Finally, we examine and question the 'defendability' of these different kinds of boat driver; the aim is to challenge the juridical and popular framework by which boat drivers are judged.





*An interviewee from the Gambia explains how he was forced to drive the boat. Credit: Francesco Bellina.*

## 1. The forced migrant-captain

The role of the boat-driver – above all in the departures from Libya from 2014 onward – has been performed by migrants who have very little or no knowledge of the sea, who are forced to drive the boat shortly after the moment of departure. The boat-driver himself is often assisted by two other persons: the ‘compass-man’, and the migrant entrusted with handling the satellite phone (*we will return to these roles in the section on Libya*). The account by L.M., 15-years old, describes the situation very well:

“Before being pushed, an Arab man came with a gun and told me that I had to take the compass while the guy behind me – we were the last in line – was told to steer the boat, telling us that otherwise they would shoot us. It was only after that I found out that for all three of the boats they pushed, the last two people in line were picked to drive the boat. You can’t do anything, everyone in Libya has guns. Who can’t say no when someone tells you to do something.” (*account provided to the project OpenEurope, 2016*).

In these cases we have often been told about accounts not only of threats of violence but also acts of violence: boat-drivers have shown us scars left from blows inflicted on the beach or on the boat, or have told us about the violence they saw meted out on other passengers who initially refused to accept the role (e.g. a case from the court of Ragusa: “During court interview, the accused admitted to have driven the boat, but said that he had been forced to do so, after having been beaten for days on end by the Libyan organizers”). In terms of the organization of the immigration ‘business’, these boat-drivers are entirely external to the network of professionals, not receiving any remuneration for their dangerous work. Indeed, frequently the accused complain that they paid the price for their journey (between 500 to 1000 dinars, more or less, from Libya) the same as all the other passengers, and feel defrauded for having been forced to take on the responsibility of driving the boat – with very serious legal consequences if identified as having done so. It should also be noted that, in the situation of a calm sea, the action taken on by the captains can be near to nothing (“...at the arrival of the rescuers, the accused did not do anything special aside from switching off the engine and sitting down”, as we read in a sentence from the court of Palermo).

## 2. The migrant-captain by necessity

A further element perceived as a form of injustice is connected to those episodes in which someone has had to take charge of the boat during moments of difficult and collective trauma (e.g. an attack by pirates that steal the motor; high waves; arguments on board), up to the point in which the accused, even though not having been forced to drive at the point of departure, has needed to take over driving the boat in moments of extreme difficulty – and has then been arrested at the point of rescue. The account of a young Gambian man, who arrived in Italy in early 2021 from Libya, describes a similar situation: the captain chosen shortly before the departure tried to steer the boat but was not in truth able to do so; another migrant, with more experience of the sea, therefore took charge of the motor and drove the boat to the point of rescue.

## 3. The remunerated migrant-captain

During the last decade of migration between Africa and Italy, there have always been cases in which the role of captain has been taken on by people who have been paid to do so – in money or in kind. Beyond this extremely limited role, a great many of these drivers had nothing else to do with the organization of the journey or the business of migration. The account of C., a Senegalese man:

“The cockseur [i.e. the connection man] told me that I could take two people with me on the journey, either people that I wanted to bring with, or two people that would pay me for the ride. There was a Nigerian girl who was sick, and then a group of four people who couldn’t put enough money together. I chose one of

them, so that they would have enough for all four to leave.

“They sorted ten boats, I saw six of the other captains. Everyone arrived safely. The day before leaving, they put a barrel at the centre of the connection house, with a motor mounted inside, and full of water. They have us the pump to refill the motor with petrol, and then we had to start it up... that’s how they see if you know how to drive. They do this in front of all the other passengers. Someone who fails the test is beaten by the Libyans in front of everyone. So some of the people who know how to drive don’t even try the test, because they know that with all the pressure, maybe they’ll do it wrong and then they’ll get a beating... There were three guys who were beaten very badly because they got it wrong. They told me to take the test and it went OK. We left in the boats directly from the beach, without any bigger ones accompanying us... We knew that there were a lot of ships near the coast at that time [March 2016] because the situation in Libya was very bad. After a couple of hours we were saved by a Germany navy ship. I stayed next to the engine till the end, to protect the boat and make sure everyone had arrived safe – there were a lot of families on board.”

The mercenaries are not necessarily held along with the other passengers prior to departure, but are often held separately, and join the others only at the point of departure. In general they are paid in money or – more frequently – offered two or three places on board to sell. Sometimes they are treated better than the other passengers, viewed as specialized workers essential for the smugglers’ work. In many cases they leave their countries of origin already knowing that they can take on this role, i.e. that there might have been the chance of paying for their journey directly with their own labor power instead of earning its exploitative work beforehand.

It is important to note that there are always many candidates for this role. In the camps in Libya, prior to departure, there are test moments in which the candidates must demonstrate their necessary skills, as described above. Frequently this is performed in front of other passengers in a form of collective control over their professionalism. Finally, these captains are themselves also migrants: the role is performed as part of their own migratory project.

## 4. The organization captain

The final category is the boat-driver who is integrated into the organization of the journey, in the sense that they are paid for their work and have an economic interest in its success and in that of other journeys that have been or will be organized by the same group. A typical example of this group are the Libyan drivers who accompany the smaller boat – either directly or in a ‘mother ship’ – up until a few hours before the point of rescue (if all goes well). As we

read in a sentence from the court of Crotone in 2015: “The wooden ship was used by the Libyan captains who, after around a day, drove away saying that the rescue would arrive soon.”

In this category, however, we also need to include all those who intend to return to the point of departure after having brought the passengers to Italy. This role is most noticeable in the cases in which the captains are arrested during the return journey, confirming that in these cases they are not migrants themselves who have been forced to drive the boat, or who have taken on some other role during the journey, but rather someone who is performing a job of transportation. Here we find not only non-EU citizens (e.g. Libyans, Turks, Ukrainians) but also sometimes EU citizens: e.g. the Greeks who have been arrested. This is also a typical, if not constant, mode of operating among Tunisian fisherman, who are enrolled in the organization of journeys: [“Someone came to ask my dad \[a fisherman\], and he said ‘no’... Then the family was having a hard time, so I decided to go myself.”](#)

These are, nevertheless, people involved at very different levels of the organization of the journey, ranging from the traffickers who effectively have a long-term role in the affair, through to the captain who is not only responsible for the journey but paid well, down to the young fisherman who is brought in to the group but otherwise has no other understanding of the organization. The most obvious parallel here is the trafficking of drugs, but a comparison could equally be made with any non-criminalized sector, e.g. the difference between a shopkeeper who drives a car, a bus-driver, an Uber taxi-driver: all make up part of a commercial organization but in ways very different from each other.

## 5. Mixed cases

These definitions include both cases that we are used to discussing, as well as others that are less familiar: we begin to understand the complexity of the organizational situations at play in the Mediterranean crossing. To recognize the complexity in full, however, here we underline a series of ‘mixed’ cases that cannot be easily placed in any of the categories listed above. For example:

- ➔ A court sentence regarding A., a young Senegalese man: “As recounted by the accused, he was identified by the traffickers as one of the people who could drive a boat... when he was still on the shore in Libya. The accused recounted that the Libyans briefly showed him how to drive the vessel, making him perform a series of run-throughs. It would have taken very little to clearly reject the proposal .... for example making them believe that he was not able to drive the boat adequately.”

We might say that the case demonstrates elements of the ‘forced migrant-captain’ type, but for the judge the situation fell into the category of a remunerated migrant-captain.

- ➔ N., a Ukrainian man: At the age of 35 he learns how to drive a sailing boat, a change of profession after years as a photographer. He makes several trips in the Black Sea before heading to Turkey to work in the tourist season on the Aegean Sea. As soon as

he gets to Turkey, he finds out that the job that he has taken on does not involve driving a boat full of tourists, but 70 Syrians and Iraqis who want to arrive in Italy – and will pay well for his work. Unaware of the penal consequences – or, perhaps, not fully aware – N. arrives on the coast of Puglia in a sailing boat and is arrested. He passes over two years in prison. Once he is released, he decides to remain in Italy; he presents a request for asylum and is recognized as a refugee.

In this instance, the captain begins as a being remunerated but finishes as a refugee; he is enrolled in an organization, but does not entirely understand what kind of work he is taking on.

- June 8th, 2020. [Four people are sentenced for smuggling goods and for aiding illegal immigration](#): two Italian citizens (from Palermo) and two Tunisians, one of whom resident in Marsala for many years, and tracked down in Germany in January 2019 (after being on the run). Another five Tunisian citizens – all resident in Sicily – remain in prison awaiting trial. Another seven Tunisian citizens cited in the court papers have not been apprehended, two of whom are also held responsible for being in contact with extremist religious groups between Tunisia and Europe. Their group surely includes some of the boat drivers, but these are journeys – and juridical events – that have little to do with the business of immigration, and principally concern other economic interests active in the Mediterranean.

Let us return also to the account of C., whose words we reported above as an example of a ‘remunerated’ boat-driver. We can now, however, add the first half of his account, of facts which took place prior to the events recounted above, in which he describes in great detail how he ended up driving the boat:

“I paid the cockseur because he hosted me when I was in Libya... That man, I knew he was a person who did a good job. He came to pick up four guys from our group in Tripoli, from our house, and while I was chatting with him I said I needed to leave as well. I told him I didn’t have time to lose and that I could pay. I paid him 800 dinars, and he took me to the connection house. Then we heard that there was a boat going from Sabrata and we went there. But there was bad weather and we couldn’t leave. After a couple of months, there was a problem with the captains, because there weren’t enough in the connection house.

“There was a Libyan soldier, who wanted to push lots of boats at the same time, and he needed captains... The problem was that some of the previous captains didn’t know how to drive, and they came back several times with the boat still full of people... Some of the Gambians, fishermen that I know, they told the Libyans that I was also a fisherman. The Libyans asked me if I knew how to drive, and I said no – because I’d paid already. They came back again, they told me that they knew I could drive, and they separated me from the others, closing me in a small room, a



kind of isolation, to convince me. I didn't want to drive because I knew it could go badly – I'm from Mbour, I know other people who have driven and got there and ended up in prison in Italy. But then a friend from Senegal made me understand that if I kept saying no, then sooner or later the Libyans would have killed me. So the next time, I said yes."

The varied mix of roles, responsibilities, crimes, goals and motivations complicate not only how things look in court, but also how humanitarian organizations, observers and political networks can react to the accusations leveled at the boat-drivers. Every individual and network has to decide for themselves, within this spectrum, where they want to place the limit to expressions of solidarity and support, what are the principles and values that ought not to be transgressed and which, on the other hand, are the actions that we simply might not want to be concerned with.

## 6. The concept of 'defendability'

It should be noted that by following this model of a spectrum of boat-drivers, the role can be understood both in juridical as well as political terms by moving the marker on the symbolic scales from one side to another according to a measure of 'defendability'. At one extreme we find the cases of mistaken identify, in relation to whatever kind of accusation (whether trafficking or aiding entrance or violence): these cases concern technical problems in court and with the investigations, and the only choice can be to defend the innocence of the accused. Then there are the cases of the 'forced' captains and those who drive 'by necessity', intention or aim to make profit: these are generally the cases on which human rights and migrant solidarity groups have concentrated up till now. Even while surely guilty of having assisted in illegal immigration in the strict sense, the political defense of the people who take on this role not only has a good footing among public opinion but also in the court room (*we return to this in the section on the state of necessity in Chapter 6*).

Moving along the scale, we then find those who have driven the boat in exchange of remuneration, who are perhaps even aware of the potential penal consequences, but do so in order to effect their own migratory project, forced to sell their labor-power in this way as a strategy to overcome the policies of European border closure. In this case, there are many activist networks who might defend their actions, but the political defense of this figure has little success in the Italian court room – and possibly even less in public opinion.

Finally we come to the captain of the organization, who ferries between the coasts, without any personal migratory project: now the defense in court and possibility of exoneration is close to zero, as well as their defendability in public opinion. In the world of political organizations for the defense of migrants and migration, the situation is similarly blurry: these

are people who in some cases may exploit the vulnerability of migrants themselves to maximize their profiting from the border closures.

We believe it is possible to defend all of the accused on the basis of a criticism of the criminalization of migration in and of itself, which upholds the system that produces all these situations. This can be achieved by opposing the existence of the borders and of any law that criminalizes border crossing, and boat driving because of that. In this framework, even some of the more seemingly controversial cases described in the report can be defended, on the basis that the accused could perhaps be put on trial for crimes in relation to smuggling illegal goods or violence against persons, but not for aiding and abetting the smuggling of human beings. This constitutes a final point on the spectrum that also destabilizes it. At this point, the different motivations behind migrant boat drivers' decisions to take the helm become less important for understanding what is happening at sea. Instead, to help understand the reasons for this variety of roles and modes of organization within the journeys, and how they have been successively opposed by European investigations and criminal proceedings, we now return – quite literally – to the point of departure.

## 4. Departure

In this section we describe the different maritime routes into Italy, examining them from the point of view of the development of the role of the captains themselves and the activities that Italy has advanced in order to criminalize them. The historical development of each route not only helps understand our current situation, but also provides the context for past arrests that still have consequences on the lives of the accused.

In each description, our concerns are:

- Who are the captains and how do they work?
- What have been the main police operations employed on the route?
- What are the current methods for criminalizing the route?

### 1. The Egyptian Route

The Egyptian route connects Egypt to Greece and Southern Italy. It should be noted from the start that the different routes to Italy require different kinds of captains on the basis of the different kinds of vessel and journey necessary: the Egyptian route is very long and requires larger boats that can deal with the distance (which is not the case, for example, with the Tunisian route).

The route has been marked by court cases at least since the shipwreck of the F174 in Christmas 1996, a cargo ship that served as the “daughter ship” to a much larger vessel, onto which 300 people were transferred who had originally left from Cairo. Though originally bound for Italy, the survivors were taken to Greece in February 1997; their witness accounts, however, were not believed for many years. An important element in the judicial events is that the trial only took aim at people who were already outside of Italy, without undertaking any accusations against migrants who had landed in Italy itself. In other words, it was the upper ranks of the trafficking organization and those directly responsible for managing the journey who were in the court’s cross-hairs.

As we will also see in cases of the Adriatic route, the criminalization of the Egyptian route was initially formulated through a collaboration between the Italian customs police and Frontex, well before the Mare Nostrum mission. The authorities’ first reaction can be seen in the Aeneas operations between 2011 and 2014, in response to the growing presence of small landings arriving on the coasts of Calabria and Puglia (Southern Italy) from 2009. This operation, which had a scope across the Egyptian and Adriatic routes, already included the



identification and arrest of the boat drivers: e.g. a group of Egyptian migrants arrested in 2012, or the arrest of the crew of a ‘mother ship’ in 2013 (operation ‘Never More’).



*Seizure of a mother-ship during the police operation ‘Never More’, 2013. Source: Guardia di Finanza.*

Over these years, Egyptian citizens represent a very high proportion of those arrested immediately following landings in Italy; it should be noted, however, that Libyan organizations also used Egyptian captains. Indeed, in Summer 2013, the Italian anti-Mafia judiciary in Catania began a series of investigations into the arrival of Syrian refugees along the coast of Syracuse (Eastern Sicily), partly following a shipwreck on 10th August 2013. The investigations culminated in the arrest of several ‘mother ships’ and around 50 Egyptians, who were accused of a range of organizational roles both at sea and in Italy (operation ‘Markeb el Kebir’). In these cases from 2013/14 against the crews of Egyptian mother ships, the accused were also charged with the crime of ‘criminal association’ (even if we do not know how these cases finished and if they were sentenced for article 416), triggering a new level of intervention from the national anti-Mafia directorate.

The police operations flowed into the Mare Nostrum gradually from 2013 onward (and then after, at a European level, into Triton from 2015, and Themis from 2018 till 2020), with joint Frontex operations that continue until the present day.

The shipwreck of September 2016, which took place only a few miles from the Egyptian coast, provoked the greatest shift in the Egyptian route. In a way that can be compared to European reactions in relation to the shipwrecks of 3 October 2013 and April 2015 (as we will see), in Egypt the death of c. 600 people five years ago triggered a man-hunt for trafficking

organizations and boat drivers. In October 2016, a new law against human smuggling was introduced, alongside an intensification in police operations. Even if it might be an exaggeration, the Egyptian government and Frontex currently claim that there have been no departures of migrant boats since September 2016. Indeed, the number of arrests of Egyptian citizens effected in Italy – as we have learned from our media review – shows the same trend (as seen in the table below). It is only in the Summer of 2021, at the time of writing, that this trend seems to be changing with a series of arrests of Egyptian citizens. It is not clear to us still whether this is resultant from the Libyan or Egyptian routes.

Year	2014	2015	2016	2017	2018	2019	2020	2021
Arrests	58	33	19	8	12	2	1	18

## 2. The Algerian Route

The Algerian route connects the North African country with the Italian island of Sardinia. Unlike the Egyptian route, the Algerian route not only continues but has even seen an increase in recent years (1,390 arrivals in 2020). Cases of arrested boat-drivers, however – as far as we know – are few and far between: only in 2015 have we found news articles reporting a few arrests.

In a couple of cases these arrests also relate to people already resident on the island, or who have been residents in the past, even if this is not always the case. A boat landing in this period also opens a window on the police operation *Arruga*, which led to a series of arrests of Algerian citizens in 2017, among others – including Italian and Nigerian citizens – at the end of 2018. The operation, however, seems to have brought together a range of accusations (aiding illegal immigration, exploitation, drug trafficking) even if the role of ‘boat driver’ is mentioned.

In general, however, we can say that route between Algeria and Sardinia has not been significantly marked by the arrest of boat-drivers, probably as a consequence of the fact that the route is utilized by small vessels self-organized by very small groups of friends and acquaintances. When the vessels are intercepted, or the groups of migrants found walking along the roads shortly after disembarking, either the police recognize the absence of any criminal episode, or have no method of identifying those responsible. In the cases in which the police do ask who drove the boat, the passengers respond honestly that each of them took turns driving during the journey.

A quite different episode, which nevertheless we note here, is that connected to the Sardinian prisons, which enclose an extremely high proportion of foreign prisoners, who are transferred to the island given that the prison capacity is very high in relation to the scarcely populated island. From here, the prisoners are often accompanied to the detention centre at Macomer for deportation. In this context, we can also note a case from last year in which an Afghan citizen was transferred in the opposite direction: 'found' in the detention centre, he was then taken to one of the Sardinian prisons to complete a sentence of 4 years for aiding illegal immigration.

### 3. The Libyan Route

The Libyan route has taken a central place in discussions around the criminalization of migration, and tends to be more widely understood than other zones. Here we want to underline some aspects of the departures, the methods of organization and those processes of criminalization that have perhaps been underestimated.

The Libyan route is characterized, more than any of the other routes, by the presence of boat-drivers who have been forced to take on the role; indeed, hundreds of this type of boat driver have been arrested and imprisoned since 2014, with a peak in 2015-2017. The reasons for the change in the mode of organization of smuggling from Libya, that led to forcing migrants themselves to drive the boats, can be traced between the effects of the civil war, the effects of police operations, and the pressure to make arrests following mass disasters. Below we attempt to trace these developments.

#### *2007 – 2013*

The Italy-Libya agreement of 2007 – which essentially lasted up until the Libyan civil war – underscored the importance of patrolling the border as a method for stopping the departure of smugglers. A little before the agreement, the first Frontex mission in the Central Mediterranean was launched, operation *Nautilus*, between 2006-2009, a border patrol mission in the Canal of Sicily, organized by Frontex in response to the change in the migrant route (and the traffickers' organization) from the Canary Islands towards a great use of Lampedusa and Sardinia. The operation, however, did not specifically focus on criminalization. In this period, there was a noted prevalence of the 'migrant-captain by necessity' type [see section above], i.e. those boat-drivers who attempt to migrate to Europe themselves, and are essentially forced to drive the boats due to the conditions at point of departure.

The shipwreck of 10/04/2011, at the beginning of the Libyan civil war, in which 63 people died following abandonment by European countries, did not lead to any investigations into the survivors as smugglers, nor – unfortunately – into the actions of European authorities.

### *2013 – 2015*

It was, instead, the shipwreck of 3rd October 2013, in which 366 people lost their lives, that led to intense media and political attention, with a series of important consequences: the beginning of the *Mare Nostrum* sea operation, and the trial of the boat-driver for multiple homicide. The communiqué from the President of the European Commission in the days following the disaster promised to “re-enforce our joint actions to stop the criminals and trafficking in persons”. It is in this context that the Italian authorities – including the anti-Mafia directorate – leveled up their war on the mother-ships, including [shooting at a fishing boat](#) and arresting the crew in November 2013.



*Fishing boat shot at by the Italian military vessel Aliseo, 2013. Source: Melting Pot.*

A fundamental decision of the *Mare Nostrum* operation was to bring all of those migrants rescued in Libyan waters to Italy, automatically involving the Italian authorities – and not those in Malta or other nations – in the judicial investigations. In November 2014, the Italian Minister of the Interior declared that 728 boat-drivers had been arrested during the mission. We can also note, on the other hand, that it is in May 2014 – still very much within the year-long operation of *Mare Nostrum* – that we probably find the first cases of arrests of ‘boat-drivers by necessity’, with the arrest of six Gambian citizens in Messina (Eastern Sicily).

The journalist and researcher Nancy Porsia maintains, however, that even before the launch of the *Mare Nostrum* mission, there had been a change in organization along the Libyan route. In

reaction to the closure of Libyan shipyards (under the pressures of the civil war), those organizing the migrant journeys preferred to re-use old boats. This was the reason that they began to rely heavily on mother ships that then launched small, unseaworthy boats not far from Libyan waters to then be rescued; the activity was not caused by the proximity of the *Mare Nostrum* mission, as European authorities have often claimed.

With the end of *Mare Nostrum* in November 2014 and the beginning of *Triton*, the number of military vessels employed in search and rescue was severely reduced, and the patrol zone pulled back. This, however, does not seem to have had any significant effects on the methods of organizing the departures from Libya, nor on the judicial approach (even the Italian minister of the Interior at the time underscored that the new operation would essentially be contiguous with the previous one).

### *2015 – today*

The shipwreck of 18th April 2015, once again, pushed international governmental organizations to intensify the war on the boat-drivers and traffickers. A month later saw the creation of the *Eunavformed* operation by the Council of the EU. A resolution from the UN Security Council in October 2015 requested that states “investigate and pursue those responsible” for the trafficking of migrants by sea “with necessary jurisdiction according to international and national law.” The operational area of *Triton* was extended, furthermore – even if not up to the limits of *Mare Nostrum*.

Frontex’s operation *Sophia* – begun in June 2015 – was even more explicit in wanting to “interrupt the business model” used by Libyan traffickers. Between 2015 and 2017 a series of initiatives were introduced on a European level to further this aim. An important moment, from our perspective, was the Phase “2A” of operation *Sophia*, which began in October 2016, which sent a European-coordinated military fleet into international waters specifically to combat and arrest ‘smugglers’. The operation included not only collaboration with the Italian anti-Mafia directorate, but also utilized ‘Frontex Liaison Officers’ to assist vessel commanders from different states in arresting and investigating ‘smugglers’. According to a judge in Catania interviewed in 2016, the Liaison Officers were also present to resolve the problem of jurisdiction, in that only one of the Frontex ships operated under an Italian flag – despite the fact that all of the arrests then took place in Italian ports.





*Source: Flickr, public domain*

During the period of operation *Sophia*, the mother ships continued to remain within Libyan territorial waters. Frontex itself maintains that the smaller boats, brought into international waters by the Libyan mother ships, were – for the most part – driven in this period by “a few migrants who are taught how to steer the boat with GPS and make an emergency call with a satellite phone, before the boats are pushed off, and then the migrant boat moves on its own towards the planned area to make the call.” Indeed, in this period one finds years of arrests that, as a rule, include three people for every small boat, i.e. one using the compass, a boat-driver, and someone who makes the satellite call, tasks delegated to them by the traffickers “precisely so that they avoid arrest” – as the admiral of the Italian navy noted. Furthermore, in the reports from the UN Security Council in both 2019 and 2020, Frontex maintains that this business model of human trafficking atsea has substantially remained the same: the use of migrants themselves as the ‘crew’, with little training and only enough fuel to reach the 12-mile point. (In fact, the consistency of this method has also been cited in court as a factor *against* the state of necessity, inasmuch as information regarding the model is well-known among migrants themselves).

In March 2019, the naval assets of *Eunavformed* and operation *Sophia* were suspended, and the whole operation moved into airspace; in February 2020, the operation was officially concluded. A new naval operation has been initiated, the principle aim of which is to enforce the arms embargo in Libya, and only secondarily to combat human trafficking. With the shift in Frontex operations into aerospace, the possibility to intervene directly in the identification of maritime crews has radically diminished.

The attitude of the UN in relation to the Libyan route, however, remains unchanged: the resolution passed by the security council in 2020 condemns once again all acts of ‘smuggling’ and the trafficking in migrants, “that put thousands of human lives at risk.”

## 4. The Adriatic and Ionian Routes

If the Libyan route has been the object of a large amount of attention and analysis in recent years, we believe that this has been at the cost of not focusing on the Eastern route enough, i.e. across the Adriatic and Ionian seas. This is has not only been the most active route since the 1990s, but is also the location of the genesis of a range of police paradigms that concern today’s criminalization of migration.

The route is characterised by a range of geopolitical and historical factors which have led it to be the most constant maritime access point for migrants arriving from the Middle East and Central Asia into Italy. A first factor is the proximity of the Italian coastline to two non-EU countries situated on the other side of the Adriatic sea, i.e. Albania and Montenegro: it was, in fact, during the period of Albanian immigration to Italy in the 1990s that the term ‘*scafista*’, i.e. ‘boat-drivers’ became popularized. The maritime route thus takes people from these two countries over to Calabria and Puglia, a route historically used for smuggling of goods more generally, and not only people.

A second and equally important aspect is the proximity of Greece and, relatively speaking, Turkey: there are cases from many years of people who arrive from these two countries in boats of various kinds, above all following the Syrian war. For the most part these are sail boats, with fibre-glass hulls, which carry high costs and transport relatively few passengers. Along this route there is plenty of evidence of connected organized groups based in Turkey, working with smugglers in Greece and along the Italian coast, an organization that can be glimpsed, for example, in the arrest of a Greek citizen that brought a group of Somali and Pakistani people to Novaglie, before attempting to sail the boat back East. The investigations and arrests of smugglers active in Greece that facilitate departures towards Italy were also publicized by Europol in 2019 and 2020.

An aspect that unites both of the routes is the perhaps surprising presence of boat-drivers from Eastern Europe. Certainly in the 1990s and 2000s there were plenty of boat-drivers from Albania. The sinking of the *Katër i Radës* on 28 March 1997, which had left Albania with around 120 people of whom only 34 survived, forms the prelude to the criminalization of boat-drivers in Italy. The ship was rammed by the *Sibilla* of the Italian navy, engaged in a mission to block the arrival of Albanian migrants fleeing the economic crash and chaos of that year; in the trials that followed – only confirmed in 2014 in the Italian supreme court – both the Italian and Albanian commanders of the respective vessels were found guilty and sentenced (to 2 years,

and to 3 years, 6 months respectively). It was the following year that the Italian government introduced the Immigration Act, and with it the crime of aiding illegal immigration.

In 2009 the arrivals across the Adriatic increased significantly once more, with Eastern European captains arrested on landing – probably in connection with Frontex operations active in the Western and then Central Mediterranean. The increase in arrivals meant that Frontex launched a joint operation with the Italian customs police in 2011. For example, already in 2012 the police HQ in Gallipoli (Calabria) reported the rescue of 200 migrants and the arrest of 10 boat-drivers. In 2013/14, according to the former prosecutor of Lecce, there was a drop in arrivals from Albania, which reprised in 2015. Frontex's engagement in the Adriatic has been constant, with the co-management of operations (Aeneas 2011-2014, Triton 2015-2017, Themis 2018-2021) along with both the Italian navy and the customs police, the latter focusing on aerial surveillance. The Calabrian customs police recently stated that they currently identify the boat-drivers in more than 90% of landings, claiming that these arrests have a “dissuasive effect.”



*Migrant boat seized near Bari, 2012. Source: Guardia di Finanza.*

Among the many Ukrainian citizens arrested, we can note Y. B., arrested in 2014 and sentenced to 9 years in prison, who had departed from Turkey and picked up passengers in Greece; three Ukrainians who brought into port at Syracuse 50 refugees from Iraq in 2015; two men intercepted by Frontex in 2017 near Salento with 72 people on board; two men and a woman, all Ukrainians, arrested in 2019 for having brought 45 Iraqis and Iranians into the Gulf of Taranto; two Ukrainians – one positive to Covid-19 – arrested for having disembarked around 50 Iranians and Iraqis near the port of Augusta, departing from Turkey. The cases are many, and continue to grow every week. In 2018, the Ukrainian police began an investigation which, they claim, has managed to identify the organizers of the journeys, using information provided by an insider.



Aside from the Ukrainian boat drivers we can also note the presence of people from other Eastern European countries, e.g. two Russians sentenced to 4 years in prison in 2020; as well as boat-drivers from Georgia, Kazakhstan, Kyrgyzstan, Lithuania, Moldova and Serbia. The account by N. provided in the previous section explains well the method by which the accused are sometimes embroiled in the smuggling operations. Others, on the other hand, are aware not only of the task being delegated to them, but also the potential penal consequences.

We can probably put into this category a series of cases of arrested Italian citizens. Certainly we are not dealing here with the criminalization of migrants, but the events are important for better understanding the dynamics both of the organization of the journeys as well as the eventual criminalization of the boat-drivers. In 2014 the customs police in Lecce launched operation *Sestante*, focusing on the transformation of organized groups of goods-smugglers in Puglia – together with contacts in Montenegro, Greece and Albania – from specialising in counterfeit cigarettes into facilitating immigration. The operation concentrated on six landings between summer 2014 and 2015, and led to 13 arrests in 2019, in collaboration with the anti-Mafia directorate, Europol and the Greek police and judiciary; the first sentencing arrived in April 2021: nine years for an Italian citizen. We can also note two arrests of Italian citizens in 2015 for having brought 21 Syrians from Greece to Otranto, and 28 Syrians and Iraqis to Torre Canne respectively. These arrests led to the police operation *Caronte* and the following accusations, in 2017, of ten Italian citizens, a Greek citizen and an Iraqi resident in Greece. In 2016, on the other hand, two Puglians were sentenced to 4 years and 9 months imprisonment for bringing 15 Somalian migrants to Otranto. It ought be noted that one of them had previously been arrested in 2012 for burglary; indeed, various of the Italians arrested for boat-driving appear to have connections to the ‘Sacra Corona Unita,’ i.e. the Puglian mafia.

This is not to say, however, that the entire operation of irregular immigration along the Adriatic coast can be defined as an affair entirely of the Italian Mafia: among those accused with the crime of boat-driving we also find people belonging to nationalities associated with immigration to Italy: e.g. Afghans, Iranians and Syrians – and these are only from 2020. The customs police themselves also admit that the captains arrested include both those well-inserted into organizations as well as migrants who are remunerated.

At the beginning of this year, two police investigations attempted to uncover and dismantle the organizations of the Adriatic route: one issuing from the prosecutors in Catania, Bari and Genoa that includes a vast range of collaborators (boat-drivers, an accountant, and staff in the Prefecture), while another investigation by the anti-Mafia prosecutors relates to two Ukrainian citizens, originally arrested after a boat-landing in August 2019 and currently in prison, accused of criminal association (art. 416) and people smuggling, after the police read through their phone messages.

## 5. The Tunisian Route

The Tunisian route poses further reflections relating to the concept of ‘defendability’ in relation to those arrested for having driven the boats from point of departure. Arrests often occur on the Tunisian side – much more than in other routes – even if various sources claim that the Tunisian coast guard regularly block departures of boats carrying non-Tunisian passengers, letting Tunisian drivers and boats pass through.

Cases of Tunisian captains being arrested in Italy can be followed back through many decades, but a notable increase is to be found in 2011, during the Tunisian revolution. Following the deals between Italy and Tunisia that facilitate the deportation of Tunisian migrants if intercepted shortly after arrival, many of those identified as part of the crew – according to a lawyer in Agrigento we interviewed – have apparently been deported along with the passengers, without any criminal proceedings being activated. In other cases, the accused is released after around one year of detention and the trial then goes ahead even after the migrant has made their way independently to another European country. We know of one case in which the accused was exonerated 8 years later. In at least one other case, from 2015, on the other hand, the proceedings came to a conclusion (and a guilty verdict) after only five months.

An assumption frequently instrumentalised by the police to ‘pick out’ the Tunisian crew in these cases is to identify those who have previously been deported from Italy, weak proof by which the police deduce that the individual has been involved in ferrying people back and forth between the coasts. In some cases this related to people with a whole series of expulsion orders (e.g. 7 or 8), but in at least one case of this kind, the accused was later exonerated after three years in prison due to a case of mistaken identity.

In many cases we note the accusation of the use of mother-ships by Tunisian organizations, such as in the case of the *Hadj Mhamed*, the crew of which – all 22 of them – was arrested near to Lampedusa in July 2020, 11 of whom were taken to prison. On other occasions – and apparently much more frequently – small fishing boats are used for a single journey, driven by young migrant-mercenaries (themselves also fishermen) who ride for free in exchange for driving the boat. In many cases, the boats arrive independently (i.e. without rescue) along the Sicilian coastlines, so-called ‘phantom landings’, as we have also seen in the case of the Algerian route. As we can see in a case from 2019, there are also instances of ‘ferrying’, in which the captains try to turn back to Tunisia after having left their passengers on the Italian shores (in this instance, they were then reported by a passing Italian fishing boat that observed the scene).

The criminalization of Tunisian fishermen who, on the other hand, have upheld their legal responsibility to save people's lives again goes back many years. The case of two fishermen arrested in 2007 for having saved the lives of 44 people at risk at sea led to a sentence of 2 years, 6 months of prison, before being overturned in appeal in 2011. Another important case is that of six fishermen – including the president of the Fishermen's Association of Zarzis – arrested for having saved 14 people in 2018; they spent a month in prison in Agrigento before being deported. The case was later shelved. Finally, we can note the case of Vincenzo Partinico, an Italian fishermen and local councilor in Lampedusa, who saved the lives of 24 people in July this year, an act of heroism for which he has been charged with fishing outside of territorial waters.



*Seizure of boats on the Tunisian route, in the ambit of the 'Scorpion Fish' operation. Source: Guardia di Finanza.*

Partinico, however, is not the only Italian name in the court files: as with the Adriatic route, the Tunisian route is used for smuggling not only people but also cigarettes and other goods, with connections to the Sicilian Mafia. We find cases of people accused and sentenced for a mixture of crimes, i.e. both for having driven a boat with migrants as well as having imported illegal goods. In June 2017, the customs police issued an order of arrest for 15 people – Tunisians and Italians – that led to 12 sentences a year later, for trafficking of drugs and people. The case – which makes up part of the police operation 'Scorpion Fish' – included Hamrouni Chiheb, who later died in prison at the beginning of 2021. Furthermore, it should be noted that the Tunisian citizen believed to be the leader of the gang – based in Florence but now in prison in Palermo – has been repeatedly maltreated in prison. With the success of the first operation, the police then launched another – 'Scorpion Fish 2' – leading to 13 arrests in April 2018. The existence of a third operation, 'Scorpion Fish 3', was mentioned by the press in relation to the death of Chiheb, described as an insider collaborating in the case.

In parallel with these police operations, we find others: the operation *Sea Ghosts*, begun in 2016, focusing on five ‘phantom landings’ that were intercepted, leading to the arrest of 17 people, including 6 ‘boat drivers’; while two landings in 2017 led to the operation *Caronte* (different from the operation cited above in relation to the Adriatic route) and the arrest of three Italians and one Tunisian boat-driver, sentenced earlier this year to six years and six months imprisonment.

## 5. Sea and arrival

The journey at sea – or more precisely, the moment that migrant boats are intercepted by a range of vessels active in the Mediterranean – is usually the first moment of the identification of the boat driver, or of the so-called ‘crew’. In this moment, the rescue operation transforms into a police investigation, which is then crystallized into a juridical accusation. In this section, we first look at the locations and agents of this identification – the ships of the Italian Coast Guard, the merchant navy and the rescue NGOs, as well as the ‘Hotspots’ – before then moving on to the methods of identification which drive forward the court proceedings; These are first and foremost interviews with some of the passengers, but also include the use of photography on board and from the sky; in some cases, simply the accused person’s nationality is perceived as an indication of guilt in the eyes of the investigators.



*Landing in Pozzallo, 2016. Source: Polizia di Stato*

# 1. Moments of Identification

## *Coast Guard ships*

“The police inspector related that immediately after the sea rescue, the Coast Guard personnel initiated an investigation – to be inserted into the context of the police’s own activities – in order to ensure sources of evidence and to research the crime, and to identify anyone responsible for the transport that may have been hidden among the migrants.”

As we can read from this extract from a sentence issued by the court of Palermo in 2016, the crews on board the large ships of the Italian Coast Guard used for migrant rescue – the *Dattilo*, the *Diciotti* and the *Gregoretti* – carry out a first identification of the suspects in the hours immediately following the rescue and then landing. The agents of the Coast Guard themselves interrogate the passengers, looking for anyone who might be able to provide information about the captain’s identity and any ‘crew’ members. The same process is followed even if the rescue was initially carried out by a different kind of vessel (e.g. by an NGO ship): when the passengers are transferred to a large ship of the Italian Coast Guard, the identification procedures begin on board. The questions posed are always aimed at discovering who drove and operated the boat, and do not inquire about any trafficking/smuggling organization or the modality of departure. The suspects are separated from the other passengers, either during the journey or just before the final moment of landing. They are frequently identified by use of a wristband: either wristbands of a different color from those placed on other passengers, or with two wristbands instead of one. In one case that was recounted to us, those suspected of being boat drivers were told that they were being separated off because of health problems – and only understood the real reason later, following the landing.

While the large ships of the Italian Coast Guard effect the identifications on board, the smaller vessels take the migrants to the island of Lampedusa, where they are transferred to the Hotspot, and only then are the identification processes and investigations initiated. Even when cases of initial identification happen on board, the investigations nevertheless still need to continue on land, above all to gather witness statements (*see section on Witnesses*).

## *Military vessels*

The same processes of on-board identification used by the Coast Guard – i.e. before disembarking – also take place on military ships of both Italy and other countries, or at least used to take place when there were Frontex agents on board. By way of example here is an extract from a court case in 2015, referring to the identifications on board a Norwegian naval vessel utilized by Frontex:



“the witness stated that all of the Italian agents came on board the Norwegian ship before the landing operations, in order to carry out an initial investigation. In this moment the migrants spontaneously broke into different groups... The officer from the Italian Judicial Police continued that, together with other agents, they acquired a set of information on board the Norwegian ship from the commander, who pointed out to them that he had already identified some of the migrants who would be ‘ready’ to collaborate with the authorities and identify who had driven the boat.”

We have also come across identifications that took place on board Portuguese, British and Norwegian military vessels. It is significant to note that in one case, the initial rescue was carried out by an Italian navy ship, who then transferred the survivors to the Frontex-controlled *Siem Pilot*. In this case, Frontex also provided reports that were utilized in the Italian court.

### *The merchant navy (the case of the ‘Vos Thalassa’)*

We have not come across identifications carried out on board in cases of rescue operations effected by commercial vessels, nor information that has been handed over to the investigating authorities. The only exception to this, that we are aware of, is the case of the *Vos Thalassa*.

On July 8, 2018, the commercial tug *Vos Thalassa* – a support vessel in the oil sector – rescued 68 people at sea. After initially making way towards Lampedusa, the commander received an order – apparently from both Italian and Libyan maritime coordination – to turn back towards the African coast. Having learnt about the change of direction, the passengers interacted with the commander, explaining that if they were brought back to Libya there would be violent repercussions. Two migrants in particular were identified as leaders of the group, who supposedly convinced and encouraged the others to maintain their protest.



*The Vos Thalassa. Source: Magistratura democratica*

During the criminal proceedings that were initiated against some of the rescued passengers, the authorities attempted to clarify if this interaction with the commander and crew had been violent or not, as well as to reconstruct the context in which the events occurred. The case hinges on the interpretation of the gesture of ‘cutting one’s throat’, which can be seen either as a threat towards the crew, or as a description of the violent ending that the passengers themselves would meet if they were returned to Libya. In an analogous way, a gesture of ‘throwing oneself overboard’ was interpreted by some as a potential form of protest (the migrants would throw themselves overboard if the ship turned back) or instead as a threat about what they wanted to do to the crew.

There have been two levels of proceedings against the supposed ring-leaders of the mutiny, with very different results. In the first trial, the main accusations included violence and threatening a public officer as well as facilitating illegal immigration. After an extensive analysis of the facts – and above all the context of the conditions in Libya, and the right to be taken to a port of safety – the judge found the accused not guilty of any crime. In the appeal court however – an appeal requested by the state prosecutor – the decision was overturned, and the accused were sentenced to 3 years and 6 months imprisonment. The case is currently pending decision in the Italian supreme court.

### *The civil fleet*

Collaboration between NGO rescue ships and the Italian authorities has represented a flash point in recent years. The [regulations for their activity proposed](#) by the Minister of the Interior in 2017 state that the NGOs should:

“when requested by Italian authorities, receive on board, if and when necessary, agents of the Judicial Police so that they can gather information and evidence for investigations relating to human trafficking and migrant smuggling, without compromising the humanitarian activities being carried out.”

The NGOs, for the most part, refused to agree to these regulations (with some exceptions), with extremely serious consequences. Indeed, the investigation by the public prosecutor in Trapani into the activities of several NGOs operating sea-rescue missions includes an important element about the lack of communication with the police about the identification of a potential boat driver. The undercover agent infiltrated on board a ship managed by an NGO investigated for facilitating illegal immigration later produced photographs that appear to demonstrate the use of violence by one passenger towards the other migrants. This demonstrates that the aim of the ‘code of conduct’ introduced by Minniti was to gather information from the NGOs that could be used as evidence against people driving the boats.

Despite this, the different NGOs do not have a shared approach towards the identification of so-called boat drivers. Indeed, we only know of one case – in relation at ship run by MOAS – of a direct collaboration with Italian police for identifying a suspected boat driver (the case,

from 2016, relates to a Libyan citizen who was accused of being not only part of the crew on a mother-ship, but also of the murder of a person on the ‘daughter’-ship).

It should be noted, however, that *arrests* of suspected boat drivers following rescues effected by NGO ships are plentiful, and increasingly frequent over the years 2020-2021 along the Libyan route, given the scarce presence of military and Coast Guard vessels at sea. An important case of this kind concerns two Syrians arrested in 2019 following a rescue by the NGO *Open Arms* – following which the ship was detained in port for two weeks before being authorized to disembark the migrants. In this case, the two Syrians had helped the NGO with translation on board, one of them even gave an [interview to a journalist](#) during the fortnight of the ship’s being blocked in port. They were subsequently arrested in the Hotspot following the identification procedures, and unfortunately lost contact with the NGO.



*Landing of a ship from the NGO MOAS, with Frontex agents and forensic police present. Source: Frontex*

## 2. Methods of identification

The identification of suspected boat drivers takes place through a range of techniques that depend on the route, the availability of resources and readiness of the passengers to collaborate with the police. The [manual for the Frontex operation ‘Sophia’](#) from 2017 summarizes the official methods of identification of smugglers but includes extremely contradictory information. According to the manual a smuggler can be identified because “too polite and collaborative, or because they show signs of being nervous and uneasy”, because they influence the group, or because the group fears them. Because they are older, or much

younger. This kind of 'profiling' is clearly not, therefore the actual method that has been followed.

Instead, the principal method is the use – and often abuse – of witnesses.

### *The selection of witnesses*

The most important method in the identification of suspected boat drivers is the use of statements provided by other passengers who are listened to as persons informed about the facts during investigations and then, during a trial, as witnesses. On the large Coast Guard ships, witnesses are identified at the same time as the boat drivers, in the sense that the Coast Guard agents ask groups of passengers who had driven the boat until they have reached a pre-determined number of people who respond and are then selected and often put to one side.

A translator who used to work with the Italian Coast Guard explained to us that on the vessels there is a single line of reasoning that leads the investigations on board: "find us a culprit." This logic, described by everyone we interviewed – from witnesses to ex-prisoners, lawyers, police, judges – is then transformed into the constant question: "who drove the boat?" and perhaps "who was part of the crew?" It should be noted here that the apparent simplicity of the questions is then complicated by translation which if done inaccurately can distort the question, i.e. : "who was the captain?", "who steered the boat?", "who was the commander of the ship?", etc. – with unpredictable consequences during criminal proceedings.

This represents the beginning and usually also the end of the questioning: with very few exceptions, nothing is asked about who organized the journey, i.e. the upper levels of potentially criminal organizations that organize people smuggling in countries of departure. It is rarely asked, furthermore, if someone died during the journey – the police concentrate solely on the identity of a potential criminal, at the expense of identifying the victims. As a police officer explained to us, the officers do not ask if the captain or their assistants were forced to drive the boat: they are only interested in identifying the person who physically drove the boat, without investigating the context or circumstances in which the crime was committed.

This last point reveals a further manipulation of the passengers, who become witnesses to a presumed crime against the state of Italy, but not witnesses more generally: there are very few cases in which other crimes are investigated, and almost never crimes in which the accused might be European actors or authorities (*for an exception, see the case of the shipwreck of 3 October 2013 in Chapter 7*). An interviewed lawyer compared the situation to a road accident in which several people have died and 200 people saw the tragic event: the police arrive and the officers only ask who drove the cars, without asking any other dynamics of the accident. Furthermore – to continue the comparison – the police only ask a group of 3 or 4 people, even though 200 were present. To provide a real example outside of the metaphor, here is an extract from a court sentence relating to a landing from 2016:



“On the basis of statements from a group of 23 rescued migrants, 17 men of various nationalities were identified, suspected of having contributed to the transportation of 1,052 migrants from Libya to Italy. The potential witnesses ... and the migrant suspects ... were separated at this point, in order to avoid any possible contact or risk of influence.”

As can be seen, a ‘sample’ of passengers is used, even if – as the judge claimed in the sentence from the same case – “we cannot call this a representative sample as such of those on board”, given the low number.

A Frontex agent boasted in 2015 to a researcher – shortly following a landing – that “[migrants are like books](#)”. And yet, it’s important to specify that even if the *identification* of the witnesses can be carried out by Frontex agents at the landing or on the ships, the statements have to then be given to the police in order to be used in criminal proceedings. As a judge underlined in the court of Crotone in 2015: “the Frontex staff, not having the powers of the Judicial Police, could never have proceeded to make a direct criminal accusation”. This is also the reason that the regulations from 2017 for the NGOs necessitated that the judiciary police have to board the NGO vessels at the moment of the landing: because even if Coast Guard or Frontex agents identify or interview passengers, a police officer is always necessary for official statements to be made. Furthermore, in order for these statements to be utilized in a criminal proceeding, they need to be given in the presence of a lawyer, due to the fact that the witnesses are also persons investigated for a crime, i.e. illegal entrance into Italy (*see the section on the use of witnesses in court in Chapter 6*).

### *Incentives for witnesses*

The passengers who are questioned by the police to identify the boat driver are often given incentives to identify members of the ‘crew’ through being offered documents in Italy and other benefits. In one case, a Nigerian witness told us that the police officers promised him that by providing an accusatory statement he would be allowed to go to school and have a bed in a hostel; he did not know then that these are basic rights due to any asylum seeker such as himself and which certainly do not depend on collaboration with judicial investigation. The Senegalese captain identified with his collaboration was sentenced to 2 years and 6 months in prison.

In another a case, a man from Morocco told us that at the police station in Palermo – utilized in that period as a ‘Hotspot’ after landings – the translator had told him and another migrant that all of the Moroccans would be deported, but that if he collaborated as a witness he would have documents and a place in a migrant hostel. The incentive, in this case, was only partially based on a lie: in truth, all of the Moroccan migrants were notified with a deferred *refoulement* – i.e. with an order to leave Italy within seven days – and then abandoned in the street; they then continued their journeys in Europe independently of any state assistance.

One of the witnesses was given a place in an asylum seeker hostel and given documents as a participant in a court case. These documents, however, have a very limited time frame and cannot be converted; after three months, the witness in question requested asylum, which was denied him. He is currently present in Italy illegally, without documents.

There are other cases of witnesses who instead of benefiting from facilitated procedures have instead been detained and maltreated, such as the [witness detained in a deportation centre](#) on Lampedusa for 70 days in inhumane conditions in 2013, or the [witnesses blocked in the Hotspot of Messina in 2016](#).

The passengers, however, often do not collaborate in the identification of boat drivers. A professional who once worked with the Coast Guard told us about a rescue mission in which, when asked to indicate who had driven the boat, every single passenger replied that they themselves had done so. Unfortunately in the face of such striking and human moments of solidarity, technology can enter into the mix.



*Aerial shots of the sequestering of a sail boat, 2021. Source: Guardia di Finanza*

### *Videos and photography*

When there are no witnesses to identify the boat divers, the police make use of any videos and photography taken during the rescue operation, either from sea vessel or from aircraft.

From our interviews, we learned that air-identifications are understood by captains themselves to be the main mode in which people are identified. The Coast Guard in Calabria claim the importance of aircraft for identifications – even if from court papers we have not seen cases in which such photographs are used directly. In some cases, the presence of aircraft can actually worsen the situation on board, due to the fact that the person driving the boat moves away from the engine in order to not be filmed too close to it (and thereby



identified as the boat drivers). This movement and the abandoning of the motor puts the vessel at risk.

The most widely-used method source of photography, however, is that taken by ships engaging in rescue operations, first and foremost the Coast Guard and military vessels. In a court case from 2019, a soldier on board the Swedish naval vessel *Poseidon* related that: “we had a lot of photo cameras on board, and we had them at the ship’s entrance points, so we can take photographs of all the passengers as they get on board.” We read of the same method in the cases of a British naval vessel in a sentence from the court of Ragusa in 2020: photos taken by the British military who undertook the operation show the accused at the stern of the rubber boat, near the motor.”

### *Identification on the basis of nationality*

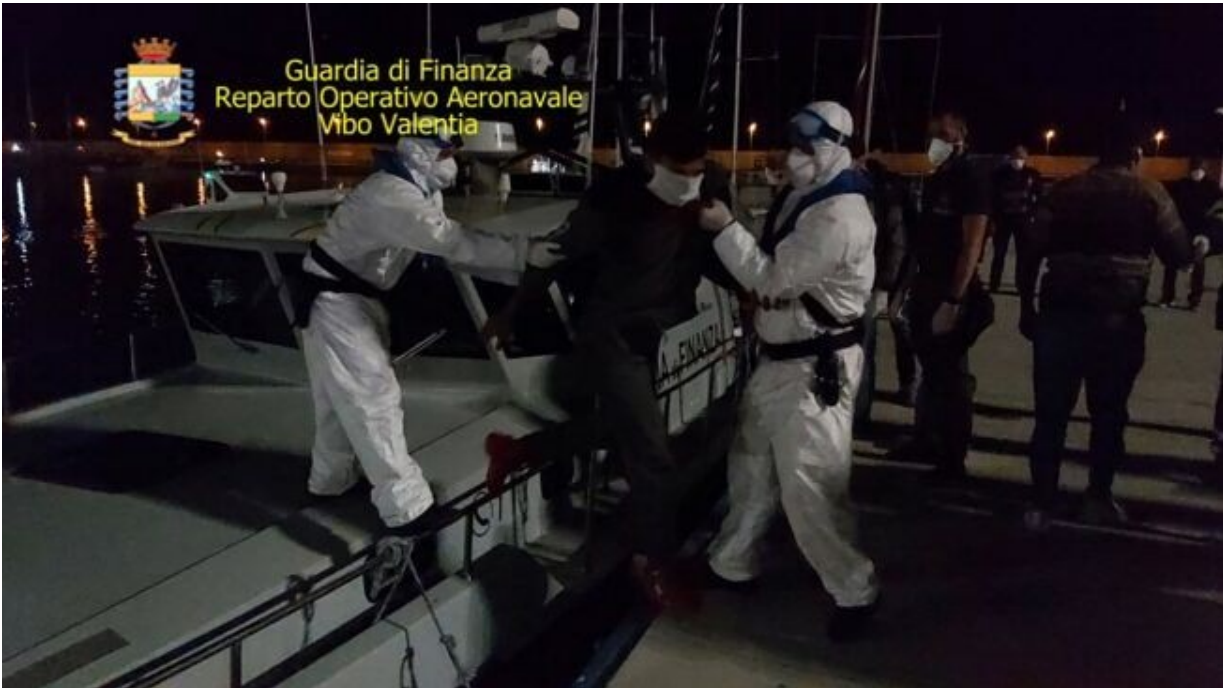
An important factor that is often used in court in relation to the possible identity of the boat driver is the difference in nationality: police and military officers often believe that if a migrant boat is mainly populated by one ethnicity with the exception of one or two people, then the latter must be the boat drivers. And this identification of the minority group – and thus of the guilty parties – often proceeds on the basis of skin color alone.

This is the case in reference to every possible combination of provenance: a Tunisian citizen set apart in a boat of Eritreans; the only Gambian migrant in a boat of Bangladeshis; a Syrian migrant separated from a boat full of migrants from West Africa, etc. This racist attitude emerges above all in relation to Libyan citizens. As a police officer told a court in Catania in 2015:

“A group of people, apparently Libyans, seemed to us to be trying to join the other African migrants. But they pushed them back with force, trying to get the attention of the police officers.”

There are, of course, many reasons why two groups of people of different nationalities might have a conflict, without this indicating guilt of a crime: in the above case, the prosecution requested a life sentence for the accused (he was later exonerated).

In nearly all cases, the nationality of the witnesses is also different from that of the accused. For example, the case of B., from 2014, a Malian citizen who – along with the co-accused – represented the only migrants from West Africa on a boat made-up otherwise of East Africans. Or a case in 2018 in which two Libyan citizens, and one from Guinea Bissau, were identified as the crew by a group of Bangladeshi witnesses. Or criminal proceeding from 2016, in which among the 10 people accused and the 18 passengers questioned by the police, there was not a single episode of a witness accusing someone of the same nationality. In these cases we find that it is precisely the sheer diversity of the people immigrating to Europe via Italy – and the pre-existence of linguistic, racial and ethnic conflicts – which is being instrumentalised by the police in order to find a ‘guilty party’ on board.



*Arrest of a boat driver, 2021. Source: Guardia di Finanza*

### *Identification on the basis of using a satellite phone*

The Frontex manual from 2017 (mentioned above) indicates the use of phones of any kind as a method of identifying a smuggler. That said, we are not aware of anyone found guilty of facilitating illegal entry solely on the basis of having used a satellite phone, but only of arrests of migrants identified as those who have made the call, e.g. the case of a minor arrested in Palermo in 2016, or that of a young Senegalese man arrested in Pozzallo in 2018. Another case is that of E., arrested along with two other Moroccan citizens, identified as having called the rescuers in Italian: he was found guilty – but inasmuch as he was also accused of having driven the boat for a part of the journey.

A final case is that of A., an Egyptian refugee, arrested and identified for having “made telephone communication with the organization” on board. He was then found innocent after nine months in an Italian prison, due to inconsistencies in the method of photographic identification (in the interview with us he proudly claimed to have called the maritime coordination and thereby to have contributed to saving the passengers’ lives).

Despite this, captains fear that they can be identified through possession of a satellite phone, with very serious consequences. According to wiretapped conversations gathered during investigations into the shipwreck of 3 October 2013, the Tunisian boat driver threw his satellite phone into the water in order to not be found together with it and thereby identified as the boat driver. The action meant that there was no longer any direct communication with the maritime coordination, contributing to the death of more than 360 people.

# 6. Court

## 1. Strange trials

Many defense lawyers we spoke to defined the trials against boat drivers as some of the most difficult cases they have dealt with in their careers.

These difficulties arise above all from the fact that the trials have a heavy political context. In the man-hunt for boat drivers – the scapegoat on whom to blame everything – normal guarantees of a fair trial slip away and the basic principles of criminal proceedings are violated with little care as to the consequences. Lawyers demonstrated to us how an extremely punitive attitude in the courts in relation to boat drivers is motivated, fundamentally, by the fact that the accused are foreign nationals with neither economic resources nor a network of support in Italy. The most base kind of racism is soldered to the knowledge that very few people will make any complaints or even pay attention to the rights that have been violated.



*The Italian supreme court in Rome. Source: Edoardo Busti*

The public prosecutors arrive at the trials already set for battle, requesting extremely high sentencing, right up to requesting life sentences (*see the section on long-term prisoners in Chapter 7*). The circumstances and complexity of the cases are relegated to a secondary level. The prosecutors see the suspected boat driver as an enemy and, when there have been victims during the crossing, identifies him as the only person responsible for these deaths – and attempt to extract an exemplary sentence as the only method of finding justice. To

provide an idea of the sparring attitude of the prosecutors, one defense lawyer compared the trials to a war, one in which you must maintain the utmost clarity because you are faced with an adversary – the state prosecutors – who will concede nothing, will ask the most severe punishment and will do everything they can to obtain it.

We have seen, furthermore, too many cases of an extreme light-handedness from judges themselves in being ready to issue long prison sentences based on questionable evidence (e.g. the use of witnesses) or evidence that is insufficient for proving a level of guilt “beyond every reasonable doubt”, as the Italian legal system establishes ought to be the case. When there are doubts, in fact, the accused should be found innocent. Unfortunately, given that these are trials built on events that have taken place nearly always in another country, on the basis of witnesses that are unreliable because they are themselves often accused of connected crimes and are nevertheless questioned without a lawyer present, many judges pass guilty verdicts even when a “reasonable doubt” about the case is, quite simply, undeniable.

In summary, the trials against boat drivers are complex proceedings in which it is fundamental that the accused are assisted by a lawyer armed with all the weapons necessary to guarantee an adequate defense in this “war.”

## 2. Access to defense

A central problem we have found in these cases is access to basic legal rights by those accused of boat driving, given the particular condition of difficulty in which they are placed. As we have seen in the previous section, the boat drivers are frequently arrested immediately after landing, or very soon afterwards, in a foreign country whose language they do not know, where they have no family or friends, and where they have no knowledge of the law. Having arrived on the Italian coastline, therefore, they are arrested and taken to prison, the first place that ‘welcomes’ them to Europe, and face a range of forms of isolation: physical isolation (detained in one of the many non-places located at the margins of society), linguistic isolation (inasmuch as detained in a foreign country), moral and emotional isolation (inasmuch as having arrived in Italy usually without the social network necessary to ease the suffering of prison) and finally also a juridical isolation – in that they are not aware of their own rights and in many cases do not even know why they have been arrested. Furthermore, even before the Covid-19 pandemic, arrestees have often been put into a preventative quarantine following arrival in prison (suspected of carrying other contagious infections), worsening the situation of isolation experienced.

These different forms of isolation and marginalization imposed on people accused of Article 12 of the Immigration Act represent often insurmountable obstacles to accessing basic legal rights.

The first right which is far from protected for boat drivers is the right to a full and effective defense – in theory guaranteed in Italy through Article 24 of the Italian Constitution.



In the Italian penal system, the accused is obliged to have a technical defense: in other words, someone accused of a crime cannot defend themselves but has to always be defended by a lawyer. This means that if someone is investigated for a crime but has not chosen a specific lawyer (an 'entrusted lawyer') then Italy will provide a lawyer available on duty that day, chosen from a specific list – a 'duty lawyer'. (If the accused does not have the funds to pay for the cost of the defense, the state covers them – which applies both to entrusted lawyers and duty lawyers who are entered into a specific register).

In theory the right to defense should be guaranteed just the same with an entrusted lawyer and a duty lawyer. In practice, however, the kind and quality of defense provided is usually very different. The reasons for this can be found in the fact that the entrusted lawyer is chosen by the accused. A lawyer is chosen on the basis of their knowledge and experience in a particular sector of law, their professionalism and, not least, a particular ability to communicate with their client. A duty lawyer, on the other hand, is elected by the government, without any previous knowledge of the client, inhibiting a relationship of trust on both sides, and above all with the risk that the lawyer given the case has no particular knowledge of the kind of complex trials such as those around facilitating illegal immigration – with serious consequences for the effectiveness of the client's right to a defense.

Those accused of being boat drivers are, in the majority of cases, defended by duty lawyers. Indeed, essentially cut off from any Italian context upon arrival, they do not know the names of any lawyers that they could choose as an entrusted lawyer who might be able to guarantee them a full and effective defense based on experience developed through other trials against boat drivers – which, as we will see in the following sections, represent extremely difficult elements. In these circumstances, being defended by a duty lawyer can simply mean not having access to an adequate defense. We have found many, many cases in which the duty lawyer has failed to adequately engage themselves in a case given its complexity and importance, essentially sidestepping every defense strategy and opting instead for shortened trials or plea deals without consulting their clients adequately – choices that, more or less, admit their clients' guilt. Frequently they make no use of translators to communicate with their clients, instead using an insufficient third language (e.g. fragmentary English or French). This means that the accused cannot tell their own lawyers what actually happened, nor follow the process of the trial and make informed choices. We have come across these cases not only via former prisoners who have pointlessly passed years in prison, but also via other, more prepared lawyers who unfortunately are only asked to intervene in cases when the previous lawyer has already made procedural choices with irreversible effects. This is not to say that all duty lawyers fit this description – there are important exceptions of professionals who have gone above and beyond all for their clients – but it should serve as a warning about a situation which is at best unfortunate and, at worst, demonstrates a systematic failure.

A further problem is presented by the fact that for boat drivers – and indeed, for all foreign prisoners – leaving prison does not necessarily mean regaining your freedom. Every foreign national, in order to be free, will need to have the right to remain in Italy, without which they

are considered illegally present in the country and risk administrative detention, i.e. in a deportation centre. This risk becomes even more real if a boat driver is assisted exclusively by a criminal defense lawyer who has little knowledge of immigration law, and can often underestimate the importance of a foreign national having documents at the end of their prison sentence. This can occur not only to someone found guilty of Article 12 of the Immigration Act, but even to someone who has been found innocent and is then released from prison without documents.

It thus becomes essential that boat drivers are followed not only by a criminal lawyer but also by an immigration lawyer (or by a professional who is experienced in both fields), to assist them in requesting asylum when suitable and thus obtain documents that block deportation.

### 3. Criminal proceedings

The Italian legal system includes different kinds of trial in criminal cases, which have different procedural rules to ascertain the truth in court – or, more accurately, the criminal responsibility of the accused. On the one hand there is the classic approach for ascertaining responsibility, the regular criminal proceeding: collecting evidence, presenting witnesses on the stand in the presence of both parties, listening to the reasons of both prosecutor and defense, sentencing. On the other hand there are the ‘special’ proceedings, which can be applied under particular conditions and (for those that concern us here) by request of the accused. In these alternative proceedings, the ordinary rules for ascertaining the truth are modified for the sake of efficiency and brevity.

The ‘special’ kinds of proceeding most frequently applied in criminal cases against boat drivers are the ‘shortened judgment’ and ‘plea deals’ (or more accurately, application of the sentence by request of both parties). These are both essentially expressions of consensual justice: both parties agree to skip certain phases of the trial or modify them in order to receive a reduced sentence in the end.

#### *Shortened judgments*

The shortened judgment can be requested by the accused in the first stages of the hearings, and means that the judge must make a decision based on what they have in front of them: the prosecution and defense cannot produce any new evidence to support their arguments and the evidence already gathered in the investigations (e.g. initial witness statements) becomes the basis for deciding on guilt. The accused thus relinquishes a full ascertaining of their responsibility in order to receive a reduced sentence if found guilty. In terms of trials against boat drivers, choosing a shortened judgment implies reneging on the possibility of hearing and questioning witnesses, which, as we will see, are often essential for proving their innocence. (To avoid this and, for example, introduce useful witness testimony of people who were in the same boat, the accused can request a ‘conditional’ shortened proceeding, in which



the accused requests easily-accessed proofs that the judge maintains are coherent with the elements already present in the file and are useful for reaching a decision).

The classic situation of a shortened judgment is that all of the transcriptions of statements gathered during the preliminary investigations – both of the ‘boat driver’ and of the witnesses – become evidence in court, reneging on the principle of an adversary trial, i.e. without the opportunity for anyone to be heard or interrogated in the trial itself.

### *Plea deals*

The plea deal, on the other hand, concludes with the accused relinquishing a defense: the public prosecutor and the defense lawyer agree on the sentence to be applied and proposes it to the judge for approval. In this way, the accused reneges on the demonstration of their innocence, implicitly recognizing their guilt, and in consequence obtains a sentence that is much lower than that which would have been applied otherwise, if sentenced in a full trial. As with the shortened judgment, the plea deal implies a relinquishing of the fundamental guarantees of an adversarial trial, and can therefore only be applied with the explicit consent – either in a court hearing or in written form – of the accused.

We have come across serious violations of the right to defense and the right to information in relation to the use and abuse of plea deals applied to people accused of boat driving.

Directly and indirectly, we have heard of lawyers known as the ‘kings of plea deals’, who propose the strategy to the suspected boat drivers in a totally distorted or simplified fashion, laying out only the advantages of the choice and not its disadvantages. Essentially, these lawyers explain the plea deal in the following manner: if you sign this paper and give your consent, you will have a low sentencing and will get out of prison immediately, even if you might have some problems in the future; if you don’t sign it, there’ll be a long trial and you will definitely remain in prison, and risk being sentenced to many years imprisonment.’ Faced with this explanation, many people accused of boat driving obviously choose a plea deal, without knowing that signing the paper means admitting to having committed the crime and without knowing that the problems they will face in the future are those which a criminal record brings for a foreign national (*above all in relation to requesting asylum: see the section in Chapter 8*). This does not mean that plea deals represents the wrong strategy: on the contrary, it is an important tool in those cases where there is no evidence, witnesses or arguments in the accused’s favor – but it has to be chosen freely and with full awareness of the consequences.

We note here that in 2017 a new form of plea deal was introduced to the Italian legal system, the ‘plea deal in appeal’, which we have seen used by the lawyer defending a Moroccan citizen in the court of Ragusa last year. The introduction substantially allows for a simplified decision to be reached before the beginning of appeal proceedings, in which the parties agree on some of the reasons for the appeal case and to abandon others. A typical case is that in which the defense appeals against a sentence, but then agrees to relinquish the request for exoneration

and instead establishes a reduced sentencing together with the prosecution. This is, to all effects, a plea deal applied in the appeal court: I renounce my declaration of innocence and in return I'm given a lighter sentence, with the agreement of the state prosecutor.

## 4. Defense strategies

In trials against suspected boat drivers, there are different strategies that a lawyer can use to aim at the exoneration of their client or, at the least, in a sentence that represents the best outcome possible in the circumstances.

### *The witness is under investigation*

The first step in a good defense strategy is to check for procedural errors committed by the police or prosecution and try to see whether the accusations can be dismantled on this basis. An important and ironic example is when the accusations are based on accounts provided by other passengers at the port landing, as is often the case. The passengers, however, can also be accused of the crime of illegal entrance to Italy, and are thus considered persons investigated into a crime connected to that of the boat driver. For this reason, they too should only be interviewed by the police in the presence of a defense lawyer. If the witnesses are heard without a lawyer, in this case, then their statements cannot be admitted in court and the prosecutor is left without support for their accusations.

This error was committed by the police in Ragusa in 2011 and on the basis of the procedural violation many suspect boat drivers were acquitted. Furthermore, a lawyer we interviewed spoke about how in 2014 a client was exonerated in the court of Syracuse – a Ukrainian accused of having brought a group of migrants in a sail boat – due to the fact that the declarations of the passengers could not be admitted in court.

### *That's not him!*

Another valid strategy for defending an innocent person is to demonstrate that it was not, in fact, the accused who was driving the boat, or to have had any role in the navigation. This can be used, above all, when the prosecution evidence is based not on witness accounts but on videos and photographs taken by the military and police involved in the rescue, or through documents such as the 'crew list'. In the cases in which video and photos are provided from military vessels or planes that observe the migrants on board, the first task a lawyer must undertake is to obtain all the footage and watch with attention to see if the identification of their client is due to a visual error or if there has been a case of mistaken identity. A very experienced lawyer told us that the rare cases in which the footage is available, it has turned out to be of huge help to the defense. On one occasion she observed that the apparent proximity between her client and the boat engine was due to a simple optical illusion: on closer examination the supposed boat driver was actually on the other side of the vessel.

### *Forced migrant captains as victims of human trafficking*

Another defense strategy which needs greater attention in the courts is the interpretation of people forced to drive migrant boats as victims of human trafficking. There are important precedents for this interpretation, including very recent case law, even though the argument has still not been recognized in relation to a boat driver arrested in Italy.

Human trafficking, by convention, means the recruitment, transport, transfer, housing and hosting of people, through the threat or actual use of force or other forms of coercion, or through theft, fraud, deceit, abuse of authority or the abuse of a vulnerable condition, or through the offer or acceptance of payment or advantages to obtain someone's consent, by someone who has authority over another, for the ends of exploitation. Exploitation includes, as a minimum: prostitution or other forms of sexual exploitation, forced or slave labour, slavery or practices similar to slavery, and the removal of organs.

The fundamental document is the [European Convention on Action Against the Trafficking of Human Beings](#), signed in Warsaw in 2005, which Italy ratified in 2010, and reinforces elements of the Palermo Protocol of 2000. As confirmed in a sentence from the European Court of Human Rights in January 2020 (*Rantsev vs Cipro and Russia*), trafficking falls within the ban on slavery and forced labour. Furthermore, article 4 of the Convention against human trafficking obliges signatory states – including Italy – to not only proceed with investigations into human trafficking, but also to protect the victims.

It is worth noting that according to an [important sentence from the 1980s](#), the European Court for Human Rights established that consent has only a 'relative value' in such cases: even if someone formally consents to be exploited, this needs to be understood within the context and circumstances that led to this consent.

This point is important, because it means that the concept of consent is neither simple, nor necessarily useful for understanding where free choice ends and force begins. The model for understanding this is human trafficking for sexual exploitation, a world in which some people have no idea of what awaits them, and others are entirely aware – and yet, even if someone wants to become a sex worker, this does not mean that they have consented to suffer abuse of any and every kind. This is what Article 4 of the Convention establishes: that trafficking can occur even if someone formally consents to their own exploitation.

Migrant boat drivers who have been forced to take the helm fall within this remit: they take on the role due to threats or the actual use of force and psychological violence, and the abuse of authority over vulnerable persons. The act of driving can thus be understood as 'forced labour', a broad category of which the Convention on human trafficking does not provide a strict definition.

In the context of boat drivers, these arguments can be proposed when the act of driving the boat has been committed under physical or psychological coercion, a context that applies principally to Libyan departures in which principally West African migrants are physically

threatened in order to drive the boats. We can also note, however, the cases of Ukrainian skippers on the Adriatic route who were unaware that they would be transporting people, and were threatened – or had their families threatened – in order to compel them to continue the job. The legal argument follows, in these cases, that the transgression of Art. 12 of the Immigration Act has been committed by a victim of human trafficking, a victim who has special guarancies by European convention.

The European Court of Human Rights made an important ruling on this question, in [relation to two Vietnamese migrants](#) who were trafficked to the UK and then arrested for cultivating cannabis; the court established that they should not be punished for a crime they committed as part of forced labour, as it opposed their guarantee to be protected as victims of trafficking.

### *You can't smuggle yourself*

Before describing the argument about the 'state of necessity', which perhaps represents the most important strategy described here, we would like to illustrate another argument which has been used much less but that we believe has important potential.

Many jurists – and in some cases also courts – have questioned the use of Article 12 in the instance in which the facilitation of illegal immigration has been committed by one of the migrants who are themselves involved in the illegal entrance, even if also facilitating the entrance of others making the same crossing. The classic case is that of a group of migrants who are abandoned by human traffickers in the last miles of the journey towards Italy, on board a boat that they themselves then drive.

A sentence from the court of Marsala in 2004 (the arguments of which were repeated in the supreme court in 2010) claimed that the crime of facilitating illegal entrance structurally presupposes “a division of roles between he who facilitates the illegal entrance into the state and he who is facilitated by the same entrance.”

This reflection means that even in cases in which the supposed boat driver facilitated the illegal entrance of other migrants, in order to attribute a criminal context to this conduct, the court must demonstrate a distinction from the action carried out to facilitate his own entrance into Italy. In other words:

“... an activity that goes beyond that strictly necessary for facilitating his own illegal entrance by including actions clearly adapted to procure the entrance of others who would otherwise not have the same opportunity... This is the case, for example, in which there is an organizational figure among the migrants, who – even while wanting himself to enter Italy illegally – is a promoter of the journey, identifying other subjects who will benefit from the transport, who collects a sum of money for the ends of acquiring the vessel and anything else necessary for the journey.”

According to this theory, the facilitator and the facilitated must be distinct persons: an irregular migrant cannot be punished for the crime, not even if they themselves drove the boat, if nothing other than this action distinguishes them from the other passengers. Even if proposed more than a decade ago, this line of reasoning allows one to focus on the absurdity of the current system, attempting instead to avoid a law introduced to punish people who profit from, manage and organize human trafficking from being applied to people who have nothing different from other migrants, aside from having driven the boat or used the satellite phone. In this light, and with this interpretation, the law actually helps avoid irrelevant acts (such as simply passing a bottle of water) from being read as actions of facilitation and thereby punishable under law.

### *State of necessity*

Italian law establishes that someone who has committed a particular crime cannot be found guilty if, in some way, they were forced to commit it. Their being forced to do so can occur either by the actions of another person, or according to external circumstances: the important element is that the restriction was so strong that they would have been seriously harmed – or others would have been seriously and unjustly harmed – if they had not accepted to commit it. On the basis of this juridical instrument, someone can admit to have driven a migrant boat in a manner considered to be facilitating illegal immigration according to Article 12 of the Immigration Act – but if they did so to save themselves or others from serious and unjust harm, they should not be considered guilty because they did so out of necessity.

After first being applied in 2016, the state of necessity has become recognized in Italian courts in relation to forced migrant captains (*see section*) with less difficulties than before: if the defense manages to prove that the migrant was threatened with or subjected to violence to make them drive the boat, the state of necessity is conceded and the accusations are dropped. (*On the difficulty of proving this, see the section below on defense investigations*).

An important turning point was the sentence from the court of Palermo, [issued by Judge Modica in 2016](#), who recognized the discriminating fact of the state of necessity in relation to two people accused of facilitating illegal immigration, who claimed to have been physically forced to drive the boat and threatened with death if they did not do so. The sentence laid the basis of the main principles, and is extremely useful for preparing any defense in relation to boat drivers of this kind. We provide a brief summary:

- ➔ the defense of the state of necessity applies even if there is doubt about its existence: in cases of doubt, juridical reasoning must always favor the accused
- ➔ the situation of violence in Libya makes the accused's claims more believable in relation to violence utilized by Libyan organizers to make them drive the boat
- ➔ witness testimony should be approached with caution because they themselves have an interest in indicating who drove the boat, first and foremost in relation to regularizing their presence in Italy as participants in a trial

- the way in which the police gather witness accounts at migrant landings is inadequate: too few people are interviewed; they are only asked who drove the boat and not – as the practice should be – whether someone was forced to do so
- contradictions in declarations given by the accused are often connected to a lack of clear communication with the interpreter.

Nevertheless, there remain significant difficulties in having the context in the country of departure as a factor that contributes to the state of necessity. On this point we are referring in particular to the Libyan route and to the generalized context of violence and violation of human rights in Libya since the civil war. The violence that forces someone to drive a boat can be either direct or indirect: it can be the result of a specific threat or violent action or due to a violent and insecure context from which you have to run away at all costs – even at the cost of driving a boat. It might seem clear that the state of necessity applies in these cases – but Italian judges still resist this interpretation, perhaps out of fear of opening up a generalized recognition of the state of necessity in trials against boat drivers arriving on the Libyan route.

We have also seen, furthermore, that a factor which can influence the recognition or denial of the state of necessity is the nationality of the suspected boat driver. If they come from a war-torn country, or at least one that is perceived as a country with good reasons to flee from, it is more likely that the state of necessity is taken into consideration and potentially conceded (if evidenced by the defense). When the suspected boat driver is from a country perceived as a place where you 'do OK', then the state of necessity is usually denied, simply because the prosecution – and often the judge – do not accept that someone would give in to embarking on a boat in a forced manner if they have the option of returning to their own country. This is a frequent attitude in relation to persons starting their journeys from North African countries (especially Tunisia, Morocco and Egypt) and reflects not only a worrying ignorance and simplification of the situations in various countries of emigration, but – in reference to the Libyan route – also an underestimation of how much the context of a transit country can generate a necessity to move on. Finally, it seems perhaps superfluous to point out how racial prejudices should not influence any decisions, and above all the delicate decisions of a criminal trial that have to be based on demonstrable fact.

## 5. Defense investigations

In criminal proceedings against presumed boat drivers, it is vital that defense lawyers engage in defense investigations. As we have seen in the previous section, the demonstration of guilt usually relies on witness statements provided at the moment of the boat landings, in which only a few very basic questions are posed to the passengers (e.g. who drove the boat, and not the conditions under which the driver acted) without the presence of a lawyer. The defense lawyer thus nearly always finds themselves handling accusatory statements provided by witnesses (or to be precise, persons informed of the facts) who cannot be cross-examined due to the fact that very often the people who had provided statements in the preliminary



investigations can no longer be found by the government months later, and therefore cannot be heard in court.

This can turn out to be in the accused's favour: in absence of a request of a presentation of evidence by the prosecution (when the witnesses can be heard before the trial proper, when there are concerns that they will not be present for the trial), and in absence of other key elements, then the accused must be exonerated due to lack of evidence. If, however, the case rests on witness statements provided before the trial, it becomes extremely important for the defense lawyer to undertake defense investigations to prove their client's innocence. This evidence is usually represented by statements given by other passengers who have not been interviewed by the police following the landing and who might be able to testify – for example – that the accused was forced to drive the boat.

We interviewed several lawyers who, strongly convinced of their clients' innocence, engaged in extensive defense investigations which ended up being essential for demonstrating the innocence of the accused. An emblematic case is that of a duty lawyer who found himself in the position of defending several persons accused of being boat drivers in the same case. Having interviewed his clients in prison, he requested that the police hand over the list of all the passengers disembarked from the boats along with the accused, in the hope of finding someone who would accept to testify in his clients' favor. After having obtained the lists – and not without some difficulty – of the names and nationalities of the passengers, he gathered some basic indications from his clients and identified around 30 names that might be useful. He then began to call immigration departments in police stations across Italy to find out where the passengers could be found. He then traveled to Venice, Piedmont and Tuscany to meet the former passengers and ask them questions about the journey. The interviews were recorded and transcribed with the assistance of an interpreter. Following this, one of the passengers was also head in court as a witness. All of the defense witnesses testified that the accused were forced to drive the boats. The judge recognized the factor of the state of necessity, and all of the accused were exonerated.

It is important to note that some lawyers – including those who are used to undertaking defense investigations – emphasized that an important obstacle to this work is the cost implied both in terms of time and money. Not having any income, the accused nearly always have to make a request to state-funding for their lawyers' costs. Defense investigations, however, do not fall within the activities which the Italian state is prepared to pay for, meaning that either the lawyer undertakes them because they feel passionately about the case – or they make some mental calculations and opt for the more 'convenient' option, advising their client to make a plea deal or choose a shortened judgment.

A further obstacle to take into account in relation to defense investigations is when they needed to be carried out in another country – for example, when the person who could potentially provide a witness statement regarding the accused's innocence lives in another country. The Italian legal system establishes that when a lawyer needs to carry out investigations abroad, they need to formally request that the public prosecutor do so. The

prosecution are this provided with a seemingly limitless power: the government lawyer can decide if the evidence that the defense wants to obtain are necessary or otherwise, and if there is an element of importance to the accused's case, they can still decide whether or not to submit it to the court – even if the witness was requested by the defense but in the end works against the accused's case (something that would never happen is the investigations were undertaken directly by the defense lawyer). Formally requesting that the prosecution undertake defense investigations can thus be useless or even damaging. To avoid this paradox, a very experienced lawyer explained to us that when she needed statements from someone resident in Sweden, she went there and took the statements herself, presenting them in court in Italy. The strategy worked because even though the judge had to declare that the evidence could not be submitted in court (because it had not been obtained through a formal request to the prosecution), the judge nevertheless had to read the statement before declaring it unusable – and was thus still influenced by the content. The accused was found not guilty.

Despite the importance of defense investigations in trials against suspected boat drivers, and the enormous work effected by some lawyers towards this end, it is important to note that many lawyers we interviewed – including some with significant experience in these proceedings, and chosen by their clients for their reputation – claimed that such investigations are impossible in these kinds of trials. The emblematic cases described above – which are far from the only examples of this kind – demonstrate instead that defense investigations are often essential for demonstrating the innocence of many arrestees.

## 7. Prison

In this section, we describe the situation in prison faced by people arrested and/or found guilty of driving migrant boats. We divide this into three sections: first, we provide an overview of the problems that the boat-drivers must deal with on an immediate level, including the obstacles to requesting alternative measures of detention. We then focus on prisoners with long-term prison sentences, i.e. people that have been sentenced to more than 10 years in prison, or even to life sentences.



*The 'Pagliarelli' prison in Palermo, Sicily. Source: Antigone.*

### 1. Foreign prisoners

Any overview of the situation in prison of people accused as or found guilty of being boat drivers must first of all take account of the more general situation of foreign nationals in Italian prisons.

For the vast majority of the accused, Italy represents a new country; they do not know its language, laws and culture, and they are forced to comprehend within an extremely difficult context – i.e. detention, or even isolation. Many of the former prisoners we interviewed speak of the desperation they experienced during their detention, the difficulty in being understood, of being recognized as human beings with all their human rights. It is particularly important to emphasize this aspect of the criminalization of boat drivers not only because it has not been reported until now (to our knowledge) but also because it needs much greater attention in the future.

The Italian NGO *Antigone* – the main independent organization that monitors prison conditions in the country – reports that foreign prisoners currently make up [32.5% of the prison population](#). This is a particularly high percentage even in comparison with other countries: Italy is in first place among the large member states of the EU. It is extremely difficult to clarify how many of these people have been detained for crimes and investigations in connection with facilitating illegal immigration. The Italian Ministry of Justice states that the number of people detained for crimes connected to the Immigration Act is currently 1,267. This figure, however, includes not only the crime established by Article 12 of the Immigration Act (i.e. facilitating illegal entrance) but also many other crimes that are not the focus of this report (e.g. connected to being in Italy without documents, sentencing for human trafficking – including within Italy – exploitation of migrants in workplaces, etc). The annual figures published by the Ministry are the following:

Year	2012	2013	2014	2015	2016	2017	2018	2019	2020
Number of detainees	1.949	1.174	1.305	1.496	1.797	1.668	1.521	1.535	1.267

## 2. House arrest

The majority of foreign prisoners share the same problems in relation to accessing alternative prison measures, above all house arrest. Unlike Italian prisoners, it is very common for foreign prisoners to not have a house address to indicate as a location in which to carry out house arrest, especially if they have only just arrived in Europe and lack any family or social networks in the country, or alternatively because they continue to be forced into situations of economic poverty, [without any fixed abode](#). Furthermore, if a prisoner does not have documents in Italy – which is always the case for someone who has just arrived along one of the criminalized maritime routes – a judge will maintain that there is an extremely high risk that they will run away from the country, with a consequent strong resistance to conceding house arrest or other alternative measures to prison.

It is important to note here that Italy makes a distinction between ‘house arrest’ and ‘house detention’. While the first relates to the period of detention before a definitive verdict, the latter describes a form of detention that a prisoner can request only after a definitive verdict. A definitive verdict, to be clear, is only reached once the accused definitively accepts the sentencing, i.e. when there are no active levels of appeal.

The effect of this discrimination between Italians and foreign citizens is clear from the statistics regarding the duration of definitive prison sentences. Foreign prisoners punished with definitive sentences of 3 years or less (i.e. relatively light sentencing) [number just over](#)

3,000, while the number of Italians in the same situation is just under 4,000. In other words, the number of Italians and foreigners in prison for relatively 'light' sentencing is very similar, despite the fact that foreigners represent only one third of the prison population (and less than one tenth of the Italian population as a whole). To reiterate: the reason for this is that Italian prisoners often have the possibility, after a definitive verdict, to pass their sentence in a home – their own, or that of family or friends. It should be noted, furthermore, that house arrest is frequently followed by other alternative measures (e.g. community work through social services, parole) according to a principle of gradual liberation. Foreign prisoners, on the other hand, frequently not having a home available for house detention, pass the entire period in prison, expanding the percentage of foreign prisoners even with low sentences.

This all holds true both for suspected boat drivers awaiting trial and for those who have already been sentenced. The difficulties in accessing alternative measures means that suspected boat drivers usually remain in prison for the entire period of the trial, right through to the end of their prison sentence – including in situations when an Italian accused of more serious crimes (e.g. against persons) would easily be ceded house arrest.

The situation of boat drivers thus does not only concern how they are treated in Italian courts, but also their lives in prison, and how the Italian prison system discriminates against foreign prisoners more generally. This can result in a paradoxical situation in which even patently false accusations levelled against boat drivers can often lead to a prolonged period in prison while awaiting trial and a definitive verdict. If the accused admits their responsibility and chooses a 'special' proceeding, aside from obtaining a reduction in sentencing, they can also curtail their period in detention – while someone who decides on a defensive strategy to demonstrate their innocence risks passing through various levels of appeal, and of remaining in prison for the entire period. The situation is described very well by a lawyer we interviewed, about one particular case he followed:

“The young man [*arrested for art. 12*] chose me as his lawyer for the appeal case, but unfortunately we lost. The judge had written the sentence very badly, however, and if we'd gone to the high court, we probably could have overturned the decision. But my client – who'd been in prison since his arrest – had already served out most of the sentence, so the choice was between accepting the guilty verdict and getting out of jail almost immediately, or taking the case to the high court – where he would probably win, but would need to stay in prison while awaiting the decision. He chose to accept the verdict. These kinds of situation are really difficult for us lawyers, but you have to remember that it's them who stay in prison while waiting for a full victory. We can't even imagine what one day in there means really.”

A further aspect of Italian law contributes to the imprisonment of boat drivers, in that the guilty verdict represents an 'obstacle' to house detention. In Italian law, being found guilty of a



[particular group of crimes](#) is considered to imply that someone is 'socially dangerous', and this is considered to represent an 'obstacle' to the possibility of various benefits established by the prison regulations that aim at facilitating a prisoner's re-introduction into society. [In April 2015](#) – at the beginning of the most intense period of the criminalization of migrant captains – the crime of facilitating illegal immigration was introduced into this list. This means that even if someone sentenced definitively for Article 12 can name an address and house where they could pass their sentence, the parole judge can deny access to house detention based on the supposed social danger of the prisoner. This was the case of G.A., for example, who was denied house detention with his sister (who arrived along with him in 2017) despite recommendations from the social services.

### 3. Difficulties in prison

#### *Language and school*

The first challenge faced by foreign prisoners is linguistic. Even if the Italian prison code establishes that no discrimination should be made based on nationality or race, this precept is essentially ignored. From registration to medical visits, through lawyers' visits and official notifications, interaction with other prisoners, prison wardens and requests for basic goods, the entire arch of a foreign prisoner's time inside – above all for those who are imprisoned immediately following arrival in Italy – is transformed into a traumatic experience. Solidarity between prisoners, whether Italian or otherwise, is often the only way for a boat driver to fill out forms to make basic requests, to communicate with the outside world, understand their legal rights and handle institutional practices of detention. For the year 2018, *Antigone* reported the presence of only [165 interpreters](#) across all Italian prisons, equivalent to one interpreter for every 122 detainees. In almost 60% of the prisons visited by the NGO, this professional figure was entirely absent. According to the report for 2020, a trained interpreter was present in less than 10% of prisons. Furthermore, it is clear that the interpreters who are present cannot speak all of the necessary languages: it is more likely that an Arab-speaking prisoner will find a translator than a prisoner who speaks Twi, Russian or Tigrin.

Access to education in prison is, from this point of view, a vital element for foreign prisoners and thus also for boat drivers. Indeed, out of the 20,000 people enrolled in school in prison for the academic year 2019/2020, just less than half were foreigners – and almost half of these again were enrolled in basic literacy courses. This situation dramatically changed, however, [with the pandemic](#), during which lessons have been essentially suspended (even if in some prisons there are attempts to continue 'distance learning'). According to our experience, however, the state school system within Italian prisons works relatively well and can achieve



fundamentally positive results, up to the point that often boat drivers who have passed time in prison end up speaking Italian better than other migrants who have perhaps arrived on the same boat but have, unfortunately, have not had the same opportunities to access schooling due to defects in the Italian hostel system for asylum seekers. An example is the case of a Moroccan citizen, accused of driving a boat in connection with a shipwreck, who after three years in prison awaiting trial provided a statement in the Court of Assise in Catania “directly in good Italian” according to the sentence.

### *Contact with family and friends*

A fundamental aspect that differentiates foreign prisoners from Italians is the method – or lack – of possible contact with family and friends.

In terms of lack of contact, there are shocking examples of detainees who have not been able to inform their relatives of having arrived in Italy and their condition of detention. This was the case with E., arrested in Palermo in 2016 and imprisoned for more than two years before being found innocent of the charges against him; it was only on getting out of prison that he managed to call his family and inform them about what had happened – at which point he found out that his family believed him to be dead and had already performed the funerary rites.

In many other cases, however, boat drivers manage to contact home, even if with great difficulty. Prisoners do not, of course, have free access to phone calls, but have to book calls and carry them out under supervision. The practice is that a first request has to be made to the section supervisor, presenting the number to be called. This presents the first obstacle, because it is easy for a migrant to lose the piece of paper with a phone number during the journey, and thus an imprisoned boat driver might not have the contact to call. The section supervisor then writes to the embassy of the country in which the lives to accept and authorize contact; the latter then receives a phone call from the embassy to authorize contact. Here we come across a further problem, in that if emigration is illegal in the country of origin, or the detainee is a potential refugee, both they themselves and the family in the country of origin cannot risk letting the consular authorities know that they have run away and are now in Italy.

Even if a first contact can be made, the frequency and regularity of calls becomes a further obstacle because the prisoner must buy a phone card and credit from the penitentiary in order to make the calls. In absence of resources – e.g. if the prisoner is not allowed to work inside the prison – the intervention of volunteers becomes all the more important, as does solidarity between prisoners. Given all these obstacles, it is easy for 4 or 6 months to pass before a boat driver manages to inform a relative about what has happened to them, and the following updates often take place only annually.

Prison visits are even rarer for foreign prisoners, especially those who have been arrested immediately following arrival who do not have family in Italy. We have come across extremely

few cases of boat drivers who have received visits during their detentions: a couple of people received visits from volunteers external to the prison workings. This situation, however, has slightly improved during the pandemic because all prison visits have been replaced by video-calls – a tool that has actually facilitated contact with foreign prisoners.<sup>15</sup> We note, for example, the case of B., detained in Sicily, who managed to have regular video-contact with his cousin, resident in Northern Italy but without the means to travel down to Sicily on a regular basis.

Contact with defense lawyers has also been facilitated through use of video-calls. This has had two effects: on the one hand the mode of contact certainly removes a sense of privacy between the accused and their lawyers, even if phone interviews in prison officially cannot be listened to. On the other hand, however, this has often contributed to more constant communication, given that the lawyers do not have to physically go to the prisons but can maintain contact from the legal studio.

These approaches activated for the pandemic period – reduced or canceled visits, replacement with phone calls and video-calls – remain active at the moment of writing this report, even when the entire prison population has been vaccinated. It should be noted that these are not modifications that have been introduced by law over the past year, but instead represent the first effective activation of decades-old regulations (introduced by Article 18 of Law n. 354/1975). Until now, prisoners have had to call or write to their lawyer to arrange a visit: with the pandemic, every penitentiary in Italy had to create an internal regulation for telephone and video visits, finally allowing wide access to this approach. We can only hope that this will remain the case in the future.

## 4. Long-term prisoners

A category of detainees that needs to be better understood is that of the people serving life sentences and long-term prisoners who are held responsible for the deaths of migrant passengers during maritime disasters, or when vessels arrive crammed with people, and with the cadavers of those who did not survive the crossing. During this research we have learned of dozens of people who are imprisoned in Italy in connection with disasters of this kind; in the vast majority of cases they serve merely as scapegoats for the tragic European policies of border control.

Below we provide a brief table that lists 14 cases that we have come across, relating to people found guilty of Article 12 of the Immigration Act (facilitating illegal immigration) and at the same time have been held responsible for the deaths that took place during the journey. The range of cases goes from the most notorious maritime disasters in the Mediterranean (e.g. the disasters of 3 October 2013 and 18 April 2015) to those much less well-known, in which only a few of the passengers did not survive the journey.

<b>Date of arrest</b>	<b>Number of dead</b>	<b>Number of accused</b>	<b>Prison sentence</b>
9.1.2004	21	1	25 years
1.10.2013	13	2	(?)
3.10.2013	368	1	18 years
14.5.2014	17	2	Life; 10 years
20.7.2014	60	5	All life sentences.
4.3.2015	10	2	11 years 8 months; (?)
18.4.2015	> 1,100	2	18 years; 5 years
17.7.2015	14	2	15 years; 18 years
5.8.2015	26	5	2 not guilty; 3 with 14 years
17.8.2015	49	8	4 with 30 years; 3 with 20 years
27.8.2015	56	7	All not guilty

Trials against boat drivers held responsible for these deaths contain all the same problems that we have seen in trials against boat drivers in general: an arbitrary choice of witnesses; lack of translation or an inexperienced use of translators; lack of communication to the accused of their fundamental rights, the forms of trials and a free choice of defense. All of these factors become even more serious, urgent and, indeed, tragic in the context of the sentencing requested by the public prosecutors. An example is the case of S., accused of having contributed to the death of 26 people in the crossing of August 5th 2015, along with four other migrants. To be precise, he was accused of the crimes of facilitating illegal immigration, with all the aggravating factors; murder with aggravating factors; and having acted for personal gain. The public prosecutor requested life sentencing with daily isolation for the first year of the sentence. Thanks to the hard work of his lawyer, S. managed to demonstrate that the proof was “insufficient and contradictory”, and he was exonerated of all charges. There is little doubt that if he had been defended by a lawyer with less capability and experience, S. would have faced the very real risk of being sentenced to life imprisonment and remaining in prison for 25 more years.

### *The shipwreck of 3 October 2013*

On the second day of October 2013, a boat left Libya with around 540 people on board. After one day at sea, the driver switched off the motor, probably due to an engine problem, and left the boat adrift for two hours in the hope that someone would come to their aid. Two other ships passed nearby but no one came to their rescue. To attract the attention of the passing vessels, the captain set fire to a sheet. This act, however, created panic on board, leading to the eventual capsizing of the boat and the drowning of at least 366 people.



*The wreck from 3 October 2013. Source: Vigili del Fuoco.*

The captain was not alone: the three witnesses who gave evidence spoke of another boat driver who himself died in the disaster. The accused captain first denied but then admitted his role not only in the disaster of October 2013 but also in having driven another boat in April the same year. He described how in April he had been deported from Italy on arrival. He claimed that on both occasions he drove the boat under threat – an explanation held to be unbelievable by the prosecutor. In the first section of this report, however, we documented how it is entirely possible that a remunerated captain is threatened by his superiors to drive a boat even if, for example, after enrolling as a boat driver, the captain refuses the drive the vessel chosen by the organization because he deems it unfit for the journey. A boat driver – even a remunerated one – can still receive threats from an organization, especially from one whose *modus operandi* is based on violence and within which he is, essentially, a low-cost laborer.

The judge maintained that the accused put the passengers' lives at risk not only by having created a fire on board (an act which, in any case, corresponds to an internationally recognized message of SOS at sea) but also for having over-crowded the boat at point of departure. Indeed, the main cause of the disaster was considered to have been the overcrowding of the vessel and the number of people packed into the hold – and the captain was held responsible for these conditions. It should be noted, however, that in other trials connected to the same disaster – e.g. that against a Somali citizen accused of being within the

organization of human trafficking – the boat driver was held responsible neither for the conditions on board the vessel, nor the number or people on board. A distinction therefore needs to be made between the captain and the organization that in these cases exploits people's desperation – otherwise the captain is the only person who risks being accused (and sentenced) for actions that can be attributed to people smugglers much higher up in the chain.

Finally, to return to the case, the judge also maintained that the boat driver did not switch off the engine due to a malfunction but because he did not want to be identified as the captain as such. The desire to then hide himself among the other passengers also drove him, according to the judge, to throw his satellite phone in the water.

The accused boat driver was sentenced to 7 years for facilitating illegal entrance (with aggravating factors), 6 years for having caused a shipwreck and 12 for murder, reduced to 18 years in total due to having chosen a shortened trial (*see the section on shortened trials*). The sentence was fully confirmed both in the court of appeal and in the supreme court. At the time of writing, therefore, this boat driver still has another ten years' sentence to serve.

### *The tragedy of 15 August 2015*

In the middle of August 2015, 49 people died by suffocating in the hold of a wooden ship, packed in there with another 100 people. The survivors – including those above deck – number 313. The witnesses refer to the vessel as having been managed by a group of Libyans who remained on dry land. When the passengers imprisoned in the hold attempted to escape onto the deck, the other passengers tried to stop them from doing so with every means possible, e.g. throwing bottles and beating them with their belts. The reason for this horrendous treatment relates to the stability of the ship: changing the weight on board or shifting all the passengers above deck can cause an overcrowded vessel to capsize. The decision taken by the organizers of the crossing to ignite the engine for two hours before departure, when dozens of people were already crowded in the hold, is considered to have been the action that effectively condemned so many people to death.

After the rescue of the survivors, eight people were accused of having been part of the ship's so-called "crew". Five of the accused chose an ordinary proceeding, and were accused of having brought people to Italy "for the ends of profit, including indirectly... putting themselves at command of the ship from the start". Of the other accused migrants who chose a shortened judgment one was accused of being the ship "commander" and two of having given "directions to the passengers regarding their positioning." During the trials, the three accused who chose the shortened proceeding received 20 years each. The others, who chose the ordinary trial received 30 years each, confirmed at every level of appeal.

One of those found guilty, C.H., belonging to the first group, actually admitted to having driven the boat, of having a satellite phone – and denied that there was a crew. To contradict



him, the trials relied on the witness accounts of 9 survivors who identified the other 7 people accused of collaborating with C.H. Another of those sentenced, S.M., recounted of having initially been in the hold himself, and to have escaped onto the deck. The witnesses, as is always the case, were very few: of the 305 passengers, only 9 were heard, and in some cases only those aspects of their testimony that supported the accusations were maintained to be credible. For example, A.A.F., who chose an ordinary proceeding, was accused of having used his belt against those who came up from the hold – but this action was only attributed to him by three of the nine witnesses. Another two referred to him as having only passed a bottle of water among the passengers on board – a very simple act which has nevertheless been historically deemed sufficient proof to accuse someone of having been part of a ship's crew.

Four of the five people who opted for the ordinary proceedings are Libyan citizens and semi-professional footballers, a group of friends who wanted to continue their sporting careers in Europe. The case is thus known as that of the '[Libyan Footballers](#)'. On 2 July 2021, the case was heard at break-neck speed in the supreme court, which confirmed the previous sentencing in the space of a few hours. At the moment we are in contact with only 5 of those found guilty, imprisoned in Caltagirone, Catania, Syracuse, Trapani and Volterra.



*Protest in Bengazi, Libya, by friends and family of the Libyan citizens sentenced to 30 years in prison for boat driving. Source: Middle East Eye.*

## 5. The grey zone

Before closing this chapter about long-term prisoners, we provide some space to cases that we have come to define as falling into a 'grey zone'. The phrase comes from an essay by the Jewish-Italian writer, resistance fighter and holocaust survivor [Primo Levi](#), who used the phrase to talk about those who collaborated in the Nazi concentration camps, whose actions cannot be easily explained or judged:

"We have a strong urge to divide the world between "us" and "them", to map things out onto a separation between 'friend' and 'enemy', which prevails over everything else. This *desire* for simplification is justified; but you cannot always justify the simplification itself. It serves as a working hypothesis that can be useful so long as it is not mistaken for the truth. The majority of historical and natural events are not simple – or they are not simple in the way we would like them to be. To return to matters at hand, there was nothing simple about the network of human relations within the concentration camps: it cannot be reduced to two blocks of the victims and the persecutors."

Over recent years, the camps in Libya have [often been compared to the Nazi concentration camps](#), perhaps polemically (these are not, after all, sites of systematic genocide) but nevertheless with the correct intention of emphasizing the abhorrent and frequent use of torture, murder and denigration of human life in the migrant 'connection houses'. If this comparison is to be used, however, it is also apt to look at events through Primo Levi's eyes, to try to understand the dynamics within a place of this kind.

There have been several cases of migrants imprisoned in Italian prisons for their supposed role in the Libyan camps. The accusations vary in nature – multiple homicide, torture, inhumane detention, sexual violence – and it might seem that such cases lie outside of the remit of this report. Before going on to examining them, therefore, we need to put them in context. The trials against eight people accused of the disaster of August 2015 (*the so-called case of the 'Libyan Footballers' described above*) did not, in fact, focus on boat drivers as such, but on people accused of having been part of the 'crew', based on even the smallest of actions: they have been sentenced, essentially, because they were accused of having been violent towards other passengers. But if one of the passengers is guilty of one clearly defined crime (e.g. bodily harm) in relation to another, this does not mean that they necessarily belong to a group that commanded the boat or indeed a smuggling organization. In this case again, therefore, the line between 'captain', 'crew' and 'aggressor' can be 'gray'.

Another exemplary case is that of three Moroccans rescued initially by the NGO *Doctors Without Borders* and then trans-boarded to an Italian Coast Guard vessel in November 2017. The main witness testified that the three men made up part of a small group that collectively

steered the boat (taking turns at the motor because they suffered sea-sickness) but also had a role in the Libyan prison, such as supervising the rooms and distributing meals. Even if they were accused of crimes separate from these activities in Libya – they were sentenced ‘only’ for facilitating illegal immigration – the description of these activities was used as proof of their proximity to a Libyan organization of human trafficking: i.e. that these were not simply remunerated captains but boat drivers integrated into a criminal organization. The economic priorities of the ‘criminal business’ seemed so explicit to the judge in this case that he categorically denied the defense’s thesis that the traffickers had entrusted the boat to inexperienced drivers – even though this had already been demonstrated. And yet, not only have we seen in the previous sections how it is entirely possible for the boat to be entrusted to people with no knowledge of the sea, but we maintain furthermore that the roles taken on in the Libyan camps by this group are very far from implying any close link to the organizational elements in Libya. We are discussing, instead, people who have perhaps profited from an advantageous position, who perhaps lacked solidarity with other migrants in the camp, who perhaps even committed acts of violence – but always in a situation in which they too were subjected to violence and risked their lives. This does not mean they are heroes, but nor does it mean that they are human traffickers.

More serious still were the accusations leveled at a group of three migrants arrested in 2019 in an operation that included the NGOs *Mediterranea* and *Sea Watch*. In July that year the vessel *Alex* rescued and landed 59 people. During the police investigations to identify the boat driver, the newly arrived migrants spoke about the torture suffered in Libya and provided names of some of their captors, who were later identified among a separate group of migrants rescued by Sea Watch. The three arrestees were accused of criminal association, kidnapping and torture. The roles described by the witnesses were the following: one kept the keys and decided who left and entered the camp; another was entrusted with calling in the guards if there was a rebellion; a third kept watch during meals. The torturers, and the bosses of the organization that ordered the torturing of the migrants, were not present in court because they had remained in Libya. The accused were not part of an organization, nor did they torture anyone, but were instead within that grey zone of collaborating in order to not be victims in turn.

In the appeal case, the defense lawyers pointed out various problems with how the first trial had gone. First of all, there was an imprecise procedure for identifying the accused, which – as is so often in investigations against foreigners in Italy – relied on the use of black and white photocopies of photos from an original album, depicting people with very dark skin that are little recognizable even in the original shots. There is then the difficult issue of jurisdiction: both the accused and the victims are non-Italians, in relation to facts not committed in Italy but nevertheless put on trial and sentenced there. Finally, the lawyers noted that the judge set aside the witness accounts of other migrants from the landing, who confirmed that the accused were themselves prisoners, forced to collaborate with their captors and who had fled

across the Mediterranean in the same fashion as the other witnesses, i.e. risking their lives at sea.

None of this denies the veracity of the accusations made by the migrants who have been victims of torture in Libya. The connection houses have been described in detail time and again, as have the actions of torture utilized. At the same time, however, trials against the apparent torturers have been dealt with the same light-handedness (e.g. black and white photographs of the accused, speciously adapted witness accounts) that we see in trials against boat drivers. Above all, even when episodes of violence have been described and attributed to the accused, the motivations behind their conduct have rarely been evaluated. Finally, it is worth stressing that the camp referred to in the above case is supervised by the International Migration Organization, and managed by Abdurhaman al-Milad, an infamous Libyan people trafficker who nevertheless enjoys a privileged relationship with transnational authorities, including Italy. This context should, yet again, push us to ask ourselves which actors end up being located far from any gray zone and who, instead, ends up being unjustly sentenced to twenty years prison.



*Protest by migrants in a Libyan connection house against the UN refugee council, May 2019.  
Source: Al Jazeera*

It is surely difficult for Italian judges to evaluate of all the complexities of the network of human relations that form in places such as the Libyan camps, or indeed on board a migrant ship in peril at sea. The actions of people who are sentenced as torturers and *kapos* often provoke ethical reflections once examined more closely and in the context and constrictions within which the accused operated.

From the examples that we have provided here, a strong note of prejudice and partiality can be seen within the reaction of European and Italian authorities towards the context and those involved in the events described above: a context determined first and foremost by the criminalization of crossing borders, a policy which the authors of this report criticize in the strongest terms. But, and perhaps still more problematically, it results from the dangerous mixture and confusion – both political and juridical – of the act of border crossing with the violence that takes place in the location from which people flee, and indeed with the violence that can take place on board the overcrowded vessels themselves. This confusion, while entirely convenient to those who try and discourage migration to Europe, presents a series of ethical, political and juridical problems that should be brought to the attention of all Italian and European citizens, and discussed accordingly.



## 8. Freedom?

In this final section we outline the problems that someone who is accused of – or sentenced for – having driven a migrant boat must then deal with outside of prison, in terms both of those who have never entered a penitentiary and people who have come out the other side. The section title includes a question mark because freedom, unfortunately, does not only depend on having a life outside of prison: suspected boat drivers must then deal with all of the difficulties associated with complex, obscure and often racist laws that are imposed on immigrants in Europe – alongside a whole series of challenges that are specific to the criminal accusation.

### 1. Requesting asylum

The 1951 Geneva Convention on the Status of Refugees established the reasons that people can be excluded from recognition of international protection. The EU adopted the Convention's rules in the directive 2004/83/CE, which was enacted in Italy in 2007, through law n. 251. Among other reasons (e.g. war crimes, genocide), it was established that people who have committed “crimes against humanity” are excluded from refugee status. The same law also established that some crimes that are considered to be particularly serious in Italy represent an obstacle to refugee status, as these crimes would indicate that the foreign citizen poses a “danger to public order and security”. In 2009, the ‘security packet’ legal reform added ‘aggravated’ cases of article 12 of the Immigration Act to this list; in 2018, the ‘Salvini law’ added all cases of article 12, including those without aggravating factors.

This series of legal interventions mean that someone who has been found guilty of facilitating illegal immigration has enormous difficulty in receiving documents that recognize international protection. The case of a Senegalese man is exemplary, who was told during his asylum interview that, despite the episodes of violence in his country that he related, his having been found guilty of facilitating illegal immigration “means that, according to the current laws, any recognition of international protection is excluded.” This does not mean, however, that he cannot receive other forms of protection, nor indeed that international protection is entirely precluded in reality.

First of all, the crime represents an obstacle to refugee status – and therefore also subsidiary status – but it is not an obstacle to secondary, national forms of protection, i.e. Italy's ‘humanitarian’ protection and ‘special’ protection. These forms of protection can even be recognized due to the dangers that someone might face if they were deported. A good

example is the case of a man from Mali who suffers from albinism, and was arrested as a boat driver. When he left prison he was given humanitarian protection because of the obstacles posed by his accusation to the recognition of any international protection – even though his case had all the necessary characteristics for receiving refugee status (i.e. because people with albinism are often maltreated in Mali).

It is important to understand how this law not only limits the life choices of people outside of prison, but also strategic choices to make in criminal trials. Let us take the example of Omar and Mustafa (*all of the elements in this case are based on a true case, even if names and nationalities have been changed for privacy*). The two Iraqi migrants were arrested as boat drivers in 2019. They were tried together – despite various elements that could have proven the state of necessity that forced them to drive – and they were sentenced initially to five years of imprisonment. In the appeal court, they had to make a difficult choice together with their lawyers: either to accept the guilty verdict, renouncing any defense of their innocence in the hope of receiving a reduced sentence; or to oppose the sentencing, re-open the possibility of exoneration, but also opening up the possibility of having the five-year sentence confirmed. The sentence in appeal court could go below three years: given that they had already passed two years in prison, the reduction could mean release after a short while. At the same time, accepting the sentence meant all being left with the penal obstacle to refugee status. Given that they are Iraqi citizens and therefore would not be deported, there is little doubt that they would have documents for ‘special’ protection on leaving prison. Yet there are reasons for concern: both of them originally planned to immigrate to Germany, not Italy, and one of them has a wife and children still in Iraq, who he would like to bring over to Italy through family reunification. This project would effectively be foreclosed by refusal of refugee status or, at the very least, would become much more difficult. The two men were thus subjected to making a strategic choice that pitted their personal freedoms against the rights connected to refugee status. In the end, they opted for a reduced sentence.

Second, it is possible for someone sentenced as a boat driver to be recognized as a refugee. In a civil court sentence from 2019, a Ukrainian citizen was recognized as a refugee despite having been found guilty of facilitating illegal immigration; the judge argued, very briefly, that the criminal sentencing “cannot be listed among reasons for the exclusion of refugee status established by Article 10” of the 2007 law we have discussed above – i.e. it does not count as a crime against humanity or a war crime.

## 2. From prison to deportation centres

Another problem associated with requesting international protection is the frequency with which foreign prisoners – whatever the crime they have been found guilty of – are taken to deportation following the end of their sentences.

One of the reasons for this is the specialization of the lawyers involved. Very often, the only lawyer with whom a prisoner interacts is a criminal lawyer, who is concerned mainly with the trial and perhaps also requests for alternative detention measures. Foreign prisoners, however, always need a lawyer who can follow their case from an administrative point of view as well, in relation to procedures for documents in Italy, someone who is ready to intervene in eventual hearings in the instance of administrative detention in a deportation center. We have often spoken with criminal lawyers who either have not thought about following administrative consequences for their clients, or do not understand them, or have lost contact with their clients following definitive sentencing. A translator for the NGO *Doctors for Human Rights* describes the situation well:

I remember a prisoner who was waiting till the end of his term to get a coffee in the bar opposite the prison. Throughout those years behind bars, he'd done everything he could to be a better person once he got out. He even got his school degree. "You need certificates out there", he used to say. Then came the awaited day – shirt ironed, beard trimmed and a smile on his face. But there wasn't a second chance awaiting him: instead there was a police car that took him to a deportation center. Everyone deserves to be listened to, everyone deserves to be seen, and everyone deserves a second chance.

A fundamental problem is the sheer range of practices followed by different prisons: if asylum requests are presented during the period of detention, it is always possible that an accelerated procedure is applied, without the possibility for a lawyer to prepare their client well for their asylum interview. On the other hand, if the request is made after the prison sentence has finished, the asylum seeker can arrive at their final day of prison without a document in Italy and can thus be taken to a deportation center – or left in the street with an expulsion notice. A solution that is often opted for is to present the request for asylum in the final period of the prison sentence.

It's worth noting an important legal distinction here. There is a difference between the *expression* of the desire to request asylum, as presented by a foreign citizen (often through a lawyer), and the formalization of the request for asylum in the police station, where the asylum seeker is photographed and finger-printed in order to receive an Italian document. Italian law establishes that, in both of these cases (i.e. even if only the subject has *expressed the desire* to ask asylum, without having formalized that request), a foreign citizen counts legally as an asylum seeker, and thus cannot be deported. Nevertheless, it is often the case that these unformalized intentions are illegitimately ignored by the police stations, who then deny access to the possibility of requesting asylum. When a boat driver directly expresses a desire to ask asylum in prison, therefore, they have to simply "hope" that their legal status as an asylum seeker will be recognized, and will thus be able to step into the free world without further juridical problems.

This is not, however, always possible. If some prisons – such as those in Catania and Palermo – have managed to create a series of procedures that allow people to request asylum without too many difficulties, other institutions still do not know how to accept and process these requests, even when prisoners themselves try to present them.

The case of A. is indicative – who at the time of writing is held in the deportation center in Potenza. A. came to Italy in 2017 and was found guilty of facilitating illegal immigration. He was detained in the detention center on the same day as his exit from the prison in Syracuse, despite having a relative in Italy and having presented an asylum request shortly before his leaving prison. The administrative detention was not only confirmed in court on the basis of his prison sentence, but also because he had not requested asylum earlier: the implicit accusation is that his asylum request was presented in an instrumental and disingenuous manner only to avoid detention. As we have seen, however, there are good reasons why an asylum requests would not be presented earlier, including obstacles presented by the penitentiary institution itself.

The probability that A. will effectively be deported is very low, given that deportations to his country of origin are very infrequent. We have not come across cases of people detained as boat drivers who have then been deported at the end of their sentence through a deportation center – even though it is very likely that it happens, above all in the cases of Ukrainian and Egyptian citizens. In the case of A., as with many other foreign prisoners, it is more likely that he will pass several months in administrative detention before being left in the street with an expulsion notice in his hands.

### 3. Economic and social hardship

Since 2015, anti-racist organizations in Sicily began to meet boat drivers on the street, along with many other migrants who – for one reason or another – had been blocked from entering into the official hostel system. In some cases people have been left in the street after only a few days of detention before being let out by the judge presiding over the preliminary investigations. In many other cases, however, people had passed four months or four years in prison before finding themselves in the street with an expulsion notice – ordering them to leave Italy within seven days – without any indications as to who they should go for healthcare, legal advice, social care, etc.

To get back into the official hostel system for migrants, an ex-prisoner with an expulsion order must first make an appeal against the expulsion, then formalize an asylum request (if there are criteria) and finally present a request to the local Prefecture for transfer to an ‘emergency’ hostel for asylum seekers. The possibility that this request will be met positively depends really on the availability of places in the hostels in the local area, as well as the readiness of the local Prefect to listen to the requests. Over recent years we have noted that

such access to migrant hostels had become easier along with the decrease of the number of migrants in the hostel system more generally. In the case of those who have criminal cases pending, however, on more than one occasion the Prefecture in Palermo has refused requests for hostel places on the basis of the accusations leveled at the asylum seekers.

Unfortunately we know of many cases of people who have not found an alternative road leading out of such a situation of marginalization and social exclusion. A sad example is the story of O., a Senegalese citizen born in 1996, who disembarked in Palermo in November 2016, and was arrested for having driven a wooden boat from Libya towards Italy with 35 people on board. He remained in prison throughout the trial, and in February 2018 was sentenced to two years and four months, along with his co-defendants – a sentence that was suspended due to his young age (under 21 years). Upon leaving prison, he was handed an expulsion notice. He managed to get a lawyer and successfully appealed against the order. In the meantime, however, O. was left in the street, without a support network. Despite having worked in prison and engaged in his studies – he had learned Italian already – he did not find a job or some other means of support. He turned, instead, to drug dealing and use, both to support himself and to confront his own solitude and lack of community. After two years of addiction, begging and exploitation, he was arrested after a fight and taken to prison – which is where he remains at the time of writing, and where he probably will remain until 2028.

O.'s situation is an extreme case, but it includes the elements that contribute to many other similar examples: that of H., a Gambian man sentenced to five years imprisonment by the court of Messina after a plea deal, then left in the street with an expulsion notice and, not long after, a crack addiction. The situation of M., who passed only a few days in prison in 2016 but is still awaiting trial – after five years his asylum request has been rejected and an appeal failed; furthermore he had remained outside of the hostel system and, due to the pending trial causing 'confusion' in the police station, he never even received temporary documents in Italy. The situation of A., from Guinea Conakry, arrested in 2015, then found not guilty and let out after three years while waiting for a decision in appeal: he was left in the street, outside of the hostel system, and blocked from requesting asylum due to the serious nature of the accusations (which went beyond Article 12); the same week that the sentence arrived confirming his exoneration of all charges, he was arrested for drug dealing and sentenced to 1 year, 6 months imprisonment.

It is significant that it is not being found guilty of the crime of facilitating illegal immigration that leads to social exclusion, but the administrative and juridical events that are connected to the accusations. People who have eventually been exonerated – about whom we discuss more below – almost always suffer the same destiny as those who have been found guilty: a period of detention, whether shorter or longer; an extended period of time on the street and homeless, or outside of the hostel system; the economic and social challenges that accompany exclusion from the welfare state. These problems are no doubt shared by many people who arrive in Italy by boat, victims of an essentially racist system that blocks freedom of movement and, intentionally or otherwise, creates an army of 'invisible' people who are



then exploited by the European economy. People who arrive by boat, are put into the Italian hostel system, leave it with papers, empowered and ready to enter the labor market are few and far between. For those who pass their first days in Italy in prison, however, only to then go through court and end up in the street, the situation of hardship is even more startling. In this sense, we note that the criminalization of boat drivers does not only put the lives of people at sea at danger (*as we explain in the conclusions*) but also the lives of people on dry land, often ruining the opportunities and hopes of people who have been accused of this crime – even when the accusations do not lead to a guilty verdict. Indeed, these opportunities are often foreclosed long before any verdict has been decided upon.

## 4. Release and re-imprisonment

In the sections above we have discussed detention, the problems that arise at the end of a prison sentence, and life after prison. As we have already mentioned, however, the challenges facing life outside of the hostel system touch everyone, including those who have not experienced prison, or only very briefly, and remain in a limbo, awaiting their trial. Indeed, release from prison can be effected at various points in the juridical process – always on the judges' decision – which we will examine here one by one.

The first possibility for release is if it is ordered by the judge presiding over preliminary investigations, before the beginning of the trial proper, i.e. if the judge suspends the order for detention due to absence of any danger of flight, of social danger or due to more general lack of strong evidence. This is the case with four people we met who all landed in 2016 and are still waiting their final court hearing of the initial trial. It is not unreasonable to ask why a trial should take five years, thus leaving these people in a state of limbo, constantly waiting for a decision that will shape their destiny. The reply is that in criminal cases, priority is given to trials in which the accused are detained, to correctly ensure that their detention is not unjustly prolonged. It would clearly be preferable if the Italian criminal justice system did not have to make choices of this kind and end up pushing on trials year after year. It should be noted, however, that this is why the Italian legal system includes the instrument of 'prescription', according to which after six years (or after a period equivalent to the maximum sentencing if this is over six years), the time to reach a decision on the case essentially expires and the crime is extinguished. We do not know yet of trials of boat drivers in which the crime has been extinguished in prescription, but given that the wave of accusations peaked in 2014/2015, it is quite possible that there will be some soon enough.

A second opportunity for release is after exoneration in court, even if the sentence is not definitive – i.e. even if there are still levels of appeal. In an important case – which, as it is ongoing, the lawyer has requested we do not describe in detail – all of the accused were found innocent in a first trial following a significant period in prison, and released. The public prosecutor, however, decided to appeal against the decision, and the accused have now been

waiting more than two years for a decision in appeal – free, but with a sword of Damocles hanging over their heads. A similar case is that of the people accused in the events of the *Vos Thalassa* (see section above): exonerated in a first trial and released from prison, the public prosecutor appealed and the appeal court accepted the appeal and sentenced both to five years' imprisonment. The case has been presented to the supreme court, and the prison measures suspended while waiting for a final decision.

A court order to return to prison is, unfortunately, not only an abstract possibility but a horrendous reality for many people. The case of C. is exemplary. Having arrived in Italy in 2017, C. was sentenced to two years, six months in prison. He was released after one year and six months while awaiting a decision from the court of appeal. Eight months later – after he had built a life in Italy outside of prison – the sentence was confirmed by the appeal court and an executive order to return to prison was issued, to finish the prison term. C. was thus faced with either choosing to try and evade the police – i.e. becoming a fugitive, blocking his future in Italy – or handing himself in. He chose the second option, and served his time.

B., arrested after his arrival in Messina in February 2016, faced a similar experience. After six months in prison, he was found not guilty. Following his release from prison he managed to enter into the official hostel system and continued his personal project in Europe. Two years later, he went to the police station to renew his temporary documents as an asylum seeker: to his surprise, he was notified with a sentence of two years, six months in prison for facilitating illegal immigration. He had been found guilty in the appeal court, and his lawyer had not managed – or not tried – to contact him following release. He was taken to prison, where he is currently serving his sentence.

The case of A., who arrived in Ragusa in November 2016 shares many elements with the above. He was sentenced (in a shortened judgment) to two years and four months imprisonment in February 2018. He remained free throughout both the first trial and the following appeal, but the sentence was confirmed in April 2019, and became effective in August that year. Thus three years after his arrival – in which time he had continued his project in the migrant hosting system – A. was arrested by the court police and taken to prison. Again, at the time of writing, he is still detained.

The order to effectively return to prison does not always arrive so quickly however. An extreme case is the situation of X., a young Gambian man, who arrived and was arrested – along with two co-defendants – in 2016. Despite choosing a shortened judgment, he was sentenced two years later to five years and six months imprisonment, confirmed in the appeal court in 2019. The final order to return to prison, however, has never arrived. X. has thus passed two years waiting for the moment when he will be obliged to return to prison and finish his sentence. In the meantime, despite the impossibility of requesting documents in Italy, he has continued to find small jobs and create a life in Europe, convinced that he will be able to stay here in the future. His life is, however, caught in an intolerable limbo that is undoubtedly also having an impact on his mental health.

## 5. Exoneration and reparations

We close this section with some cases that have reached a more positive conclusion. Among the many cases of injustice we have heard, there are some examples of people who have been defended well and have managed to be found innocent of all the accusations made.

Exonerations are in fact plentiful, and range from the more everyday cases – a simple accusation of having driven a boat – through to people found innocent even after the public prosecution had accused them of much more serious crimes. Extreme cases are represented by the shipwrecks of August 5<sup>th</sup> and 27<sup>th</sup> 2015. In the first case, among the five defendants, three were sentenced to 14 years prison each, while two were found not guilty. The two exonerations arrived in November 2017 and November 2018, i.e. after two and three years detention respectively. The state prosecution had asked for life sentencing for both of them.

The tragedy of 27 August 2015, in which 53 people died in the ship's hull, represents a similar example: all seven people accused were found innocent in February 2019, i.e. after three years and six months of unjust detention.

The case of an Egyptian citizen, already cited above, is worth citing as well – now resident in the UK. After six months of detention, he was found innocent in December 2015 along with three co-defendants. Another four Egyptian citizens were arrested after a landing in May 2015 and found innocent after three months for lack of proof. Another four people – this time from West Africa – who landed again in May 2015 received their verdict in November 2016, after more than a year of imprisonment: one was sentenced to four years prison, while the other three were found innocent due to lack of evidence. Four migrants arrested after a landing in July 2015 were also all found innocent for lack of evidence, after nearly five years – in their absence, given that in the meantime they had not been detained, and all of them had moved on. In this case, as with many others, the defense lawyer had no way of contacting his clients to tell them about the decision and thus to try and ask damages for periods of detention.

Indeed, reparations for unjust detention have to be requested within two years of the sentence becoming definitive. Someone who has been exonerated of all charges, therefore, has a limited time within which to ask economic damages for the years passed in prison. The maximum sum that can be requested is established at €500,000, and the basic calculation is around €200 for every day in prison; one year of unjust detention, therefore, is equivalent to around €80,000. These numbers are extremely approximate, but they give an idea of the importance of making these requests, numbers which become even more important when one considers the low economic class of most of the people who decide to enter Italy illegally through a maritime route.

Despite the countless cases of exoneration we know of, and the prevision for reparations for unjust detention within the Italian legal system, we have found very few cases in which a request has effectively been made and reached a conclusion. There are a range of reasons why the requests are not made or are blocked. First, as we have already mentioned, lawyers often

lose contact with their clients. Second, even when they do remain in touch, often they do not dedicate time to explaining the possibility of claiming damages. In the case of B., arrested in 2014, who then passed one year in prison before being found innocent, the lawyer (who we contacted) had never even thought of asking reparations for the detention.

There are then ways in which the bureaucratic procedure is blocked due to the condition of legal instability in which foreign citizens often live. Even when a sum of money has been assigned, those to whom it is due find there are problems with opening bank accounts because they lack an Italian identity document. Exemplary is the situation of A., found innocent after six months in prison, whose lawyer asked for damages. The request concluded well – but there was then a confusion about the steps necessary for opening a bank account and which documents to provide. A. has changed lawyer several times, frustrated by the slow pace of the process – but he has still not been able to resolve the situation.

## 9. Conclusions

Throughout the chapters of this report, we have attempted to demonstrate to the reader – in a clear and comprehensible manner – the different ways in which suspected boat drivers are criminalized by Italy. The 2,500 people arrested in connection with these accusations over the past 8 years have experienced aspects of this social process: in the police stations, the courts, the prisons and, finally, on the street. We have explained the historical development both of the transport of migrants along the maritime routes as well as that of the investigations operated by police and judiciary, in order to show how frequently the Italian state's reconstruction of the facts is very far from reality.

In the following conclusions we want to revisit some points in the report, in order to then formulate some initial recommendations for the authorities and – more generally – for anyone who anyone who wishes to make demands of the Italian state and the relevant bodies.

In the first place, the results of our research have shown that the political objective – so often described as inevitable – of unveiling the boat driver is used to justify violations of the most basic human rights. Those rights that every democratic country claims to protect – inasmuch as inalienable human rights, guaranteed to anyone who is subjected to a criminal proceeding – are easily set to one side in the context of the urgency of finding a culprit. We have seen how:

- Methods for identification are often extremely approximate, easily producing errors and biased reconstructions of the facts. The investigators' aim is, in fact, aimed exclusively at discovering who drove the boat, or had some role in the crossing, without any further investigation into the dynamics of the facts. This is also clear in the instrumental and biased use of witnesses;
- Access to a full and effective defense is rarely guaranteed;
- Even a noticeably weak preliminary investigation can be enough for an extremely heavy sentence, implying a serious violation of the constitutional principle according to which any doubt regarding the guilt of the accused must always leads to their exoneration. In trials against suspected boat drivers, the aggressive attitude adopted by the public prosecutors and the ease with which judges issue guilty verdicts demonstrates an open violation of this principle;
- As with foreign prisoners in Italy more generally, the life of boat drivers in prison is still harsher than for other prisoners, not only due to the social and linguistic isolation, but also due to the scarce access to alternative measures of detention;
- The effects of criminalization continue even after the conclusion of the criminal proceedings, in that a guilty verdict blocks recognition of international protection. The



fundamental rights of refugees to protection are thus annulled due to a guilty verdict achieved without guarantees of a fair trial.

The captain thus becomes a victim not only of a process of unjust criminalization that is not limited only to a criminal sentence, but also of an extreme light-handedness in the attribution of responsibility, with consequent violations of their fundamental rights.

Attempts to justify the aggressive behaviour by governments and the judiciary in relation to suspected boat drivers base themselves on the claim that they are responsible for having put the lives of migrants at risk, who find themselves in the vessel being driven by the accused. This justification becomes even more hollow and rhetorical when one considers that instead of protecting those migrant passengers evoked as the boat driver's victims, the process of criminalization actually worsens their lives, subjecting them to increased risks and directly, materially contributing to the most tragic catastrophes of the Mediterranean Sea.

A fundamental issue that has emerged during the research – and must take centre place in future interventions – is that the criminalization of the act of boat driving is not a problem only for those who are effectively subjected to criminal proceedings. Indeed, during the report we have indicated several moments in which the criminalization of boat drivers becomes a factor of risk for all migrants arriving by sea. To summarise these points:

- At the moment of selecting the captain for the journey, those migrants with more experience driving often do not come forward, as they are aware of the criminal consequences of doing so. This means that the boats are often captained by people with little experience of the sea. At the same time, the lack of expert captains who offer their services has also led the smuggling organizations to violently force the passengers to drive.
- The criminalization of migration in countries of departure also contributes to and increases the risks of disasters in the crossings. As recounted to us by two young migrants who recently arrived in Italy, the criminalization of migration in Libya has led to a greater use of underground organization. This has shortened the time taken for organizing journeys, including the moment of selecting the captain: the interviewees told us, in fact, how the driver initially chosen in haste for their journey was not able to drive the boat, and another passenger has to take the helm in order to save everyone on board.
- During the journey itself, in order to avoid identification, captains often adopt practices that put migrants' lives at risk: this is clearest in the Adriatic route, where passengers are forbidden from coming up from the hold, with the risk of death by asphyxiation. This is, on the one hand, in order to avoid the boat from becoming imbalanced, and on the other in order to maintain the illusion – in the instance of air-surveillance – of a normal luxury yacht with a skipper on board, and not a vessel with 50 migrants, and a skipper who risks years in prison.

- We were told many times over how, at the moment that a boat is intercepted by the authorities, the captains often move away from the motor in order to not be identified as the driver. This movement is, in itself, often a cause of confusion and imbalance on board, putting the boat at risk of flipping over. Furthermore, the boat is then left without a captain in the most critical moment of the journey, when the risk of disaster is very high. In a similar way, as was the case with the shipwreck of 3 October 2013, the captain sometimes thrown the satellite phone over board in order to not be identified, thus breaking of contact with the rescue missions, again in the very moment when the risks are highest. On the Tunisian and Adriatic routes, captains even sometimes dive into the water in order to avoid identification.
- During the rescue operations, precious time and resources are often channeled into identifying the driver, when the priorities ought be very different: taking care of the arriving migrants physically and psychologically; identifying the dead; reuniting families.

While the figure of the boat driver has been demonized in Italy as the villain of migration, the person responsible for tragedies at Sea, the analysis in this report shows the truth of the matter: it is the criminalization of the act of boat driving that contributes to these tragedies far more than the boat drivers themselves. If European countries really do want to protect the lives of migrants at sea, they should understand that not only can migration not be stopped, but it cannot even be reduced; they should put greater efforts into reducing the risks of migrant journeys, through the creation of legal channels of entrance – rather than criminalizing those who, in driving a boat, try and bring themselves and others to safety.

On the basis of our research, we feel the need to make an appeal to anyone who is interested in the questions at hand and wishes to unite their voice to our own in recommending that the Italian and European authorities:

- ➔ Completely review and replace current migration policies, abolishing the current regime of militarization and closure;
- ➔ Put an end to the criminalization of the act of helping people cross borders in general, and to the criminalization of people driving boats of migrants who cross – or are attempting to cross – the Mediterranean in particular;
- ➔ Redirect resources towards supporting and welcoming migrants instead of criminalizing themselves;
- ➔ **Abolish all the laws** – such as Article 12 of the Immigration Act in Italy – that criminalize the transport of migrants, instead making a clear distinction between the protection of a country's borders and the protection of the lives, rights and freedoms of migrants themselves;
- ➔ **Guarantee** the legal rights of those investigated and accused. In the context of criminal proceedings, it is essential that the rights to a full and effective defense, with an equal

and fair trial, are safeguarded to all of the persons accused. This means full access to specialist defense lawyers, full information on defense options, and the use of translators at every moment of the investigations, proceedings and trial, including every meeting with defense lawyers;

- ➔ Guarantee the legal rights of witnesses. In a similar way, not only the suspected boat drivers but also persons informed of the facts (later witnesses if the case goes to trial) need to receive adequate and precise information about the consequences of their statements; if they themselves are investigated for the crime of illegal entrance, their declarations must be given in the presence of an expert defense lawyer;
- ➔ Reduce the scope in which Article 12 of the Immigration Act can be applied. A preliminary step – however insufficient – would be to reform the crime of facilitating illegal immigration so that it applies only when the act has been committed “for the ends of an unfair profit”. Even though our aim must be to work towards the moment when the act of transport itself is no longer criminalized in any circumstances, this first provision would reduce the scope in which article 12 can be applied (e.g. not only in the cases of many temporary captains, but also in relation to people who act in solidarity with migrants). It would also mean that the public prosecutor would need to *prove* in court that the captain who drove the boat did so for an unfair profit; in the case that this cannot be proven that someone who drove made a profit – including someone who was not forced to do so – then the accused would have to be exonerated.
- ➔ Recognize the ‘state of necessity’. In criminal proceedings, the judiciary needs to evaluate the argument around the ‘state of necessity’ with greater attention, employing a juridical instrument that already exists in Italian law to recognize that someone cannot be held responsible for an act committed by force or through the necessity to save one’s own life or the lives of others;
- ➔ Put an end to the abuse of the detention of persons under investigation. The detention in prison of people accused of having driven boats is too often applied on the basis of societal prejudices in relation to the crime, rather than on the basis of individual elements of the case. We believe it is fundamental that personal freedom is the paramount principle in these cases, above all when the proof of guilt is fragmentary and based on the accounts of persons informed about the facts who are themselves easily influenced.
- ➔ Repeal the legal impediments to house arrest. Since 2015, people sentenced for Article 12 of the Immigration Act have been blocked from accessing house arrest and other alternative forms of detention. This represents a further level of criminalization, aimed at stigmatizing boat drivers on the basis of a supposed ‘social danger’ that should, instead, be valued in a precise way and on an individual basis;

- ➔ Immediately read and respond to prisoners' requests. Foreign prisoners in Italy need greater protections in order to guarantee their minimal rights and freedoms; the requests presented to communicate with relatives and NGOs, and to receive the most basic assistance (translation, clothing) need to be given greater attention and receive more rapid responses;
- ➔ Repeal the legal impediments to international protection. Since 2009, a series of norms have been introduced that exclude people sentenced for boat driving from being recognized as refugees. This represents a further step in the criminalization of boat drivers, denying many people the possibility of being recognized as refugees in Europe;
- ➔ Protect the rights of asylum seekers in prison. Greater attention needs to be given to requests for international protection that are expressed in prison; the refusal to formalize these with the relevant authorities – even when due simply to institutional disorganization – represents a very serious violation of the rights of asylum seekers. Furthermore, asylum seekers in prison need to be given places in relevant government hostels at the end of their sentences, and the same treatment as any other subject of the same legal status.

This report should just be a beginning. We hope that the widest possible spectrum of civil society organizations – informal groups, trade unions, non-profits, NGOs, political parties – take heed of what is contained herein and react in a whole range of ways, in accordance with their own methods and activities. Hundreds of people are still in Italian prisons, often without a support network or protection of their fundamental rights. Some of them, if there are no radical changes, will not see freedom until the next decade. And despite the fact that criminalized persons have been trying for years – through NGOs and journalists – to bring attention to what has happened to them, to the injustice they have received, the arrests continue every week and the court files are piling up, forcing the lives of a great number of people into an intolerable limbo, or even into indefinite detention.

At the same time as expressing solidarity with those who have been affected in the most dramatic way by these unjust laws – and finding ways to make that solidarity real – we also need to work and fight for the overcoming of an entire paradigm that criminalizes migration, and that uses criminal law as a tool for re-enforcing racist divisions on a planetary scale. Only when we have overcome this can we begin – together, collectively – to discuss in an honest way what justice might mean.