The criminalisation of migration in Italy: current tendencies in the light of EU law

Abstract. The word *crimmigration* first appeared in the USA about 20 years ago, following some studies that for the first time had observed a general tightening in the instruments available for managing the migration phenomenon. More specifically, these studies observed a progressive and real hybridisation between the administrative tools (usually adopted in the management of migratory flows) and criminal law instruments, obviously much more incisive on the personal freedom of foreigners. While retaining this feature, recent studies show that today, crimmigration results, also, in few more related features: an *overcriminalisation* that affects the foreigners and those who, for solidarity purposes, provide them with assistance (as in the case of the incrimination of the conduct of NGOs); or, again, in the inappropriate use of administrative law instruments, loaded with purposes and modalities typical of criminal law.
Starting from these premises, the aim of the article is to assess whether the *rationale* of crimmigration is present in the instruments set up by the Italian Legislator for border control and migration management. To this end, these instruments will be taken into consideration by analysing their contents and their possible compliance with the logic of crimmigration, contextualising them in the broader and more debated European framework of measures on the matter.

1. Introduction

The migration phenomenon is constantly intensifying in many European States and the tools for its management are many, complex, and increasingly inspired by a securitarian-repressive logic. At least since the 2000s in the United States - a reality that has long been affected by significant migratory flows - scholars have begun to use the term *crimmigration* (a crasis between the words *crime* and *migration*) to describe an overlapping in the form and in the contents between administrative law - normally adopted in management of immigration - and criminal law. In general, in crimmigration was included the widespread tendency to use criminal law as an ancillary tool of immigration law: a feature observable, for example, in the creation of crimes that can only be committed by the foreigner (such as illegal border crossing or violation of residence permit provisions) or, again, in a greater propensity for arrests among foreigners by police forces. Crimmigration, in extreme summary, resulted in an increasing interference of security and repressive instruments in migration policies, a sector that, *per se*, does not present higher or disproportionate levels of crime as compared to the rest of society[1].

[1] The word *crimmigration* was used for the first time in Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' [2006] 56(2) American University Law Review 367; see also: David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (The University of Chicago Press 2002); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007); Stephen Legomsky 'The new path of immigration law: asymmetric incorporation of criminal justice norms' [2007] 62(2) Washington and Lee Law Review; David Alan Sklansky, 'Crime, Immigration, and ad hoc Instrumentalism' [2012] 15(2) New Criminal Law Review 157-223; Ana Aliverti, 'Making People Criminal: The Role of Criminal Law in Immigration Enforcement' [2012] 16(4) Theoretical Criminology 417-434; Valsamis Mitsilegas, 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European

Following this approach, its characteristics can be traced, essentially, to an overabundant use of the criminal instrument (*overcriminalization*) or, just as frequently, to the use of ambiguous administrative instruments affecting migrant's fundamental rights with an intensity comparable to that of criminal law but lacking the guarantees that normally surrounds the State's exercise of force.

More specifically, these features result in two types of intervention. With regard to the use of the criminal instrument, Legislators tend to create *ad hoc* crimes that can only be committed by a foreigner or criminalise the mere assistance to migrants or even self-smuggling; as for the use of administrative instruments, the hybridisation with criminal law's purposes and contents originates an arsenal of securitarian measures among the instruments for managing migration.

The purpose of this article is to investigate whether and to which extent crimmigration is also present in Europe, having Italy as a point of reference. To this end, we will proceed as follows: first, will first investigate the presence of crimes that directly and exclusively affect foreign nationals (para. 2 and 2.1), the so-called '*ad hoc* crimes'. They represent, in fact, the most evident form of overlapping between immigration and criminal law and, at least in theory, constitute the most sever and explicit tools in the fight against irregular immigration. Still among crimes, we will then see how the migration phenomenon - when not affected by *ad hoc* offences - is still indirectly criminalised, through the incrimination of the conducts of aid or assistance to migrants (para. 2.2). Here, in particular, it will be interesting to observe how the incrimination of these conducts takes place through the broad formulation of the crime of aiding and abetting irregular immigration, introduced into Italian law to counter the very different phenomenon of smuggling and now used to target the activities of NGOs or *self-smuggling* (para. 2.3).

Then, after looking at criminal law, we will dwell on the presence of some instruments that, albeit in the forms of administrative law, seem to follow this criminalising intent against the migration phenomenon (para. 3). The reference, in particular, is to expulsions (para. 3.1) and administrative detention (para 3.2): compared to the normal measures of administrative law that affect citizens, these instruments, reserved for foreigners only, present exceptional characteristics both in terms of content (they, in fact, heavily affect the personal freedom of the foreigner) and of purpose, often coming to replace criminal law itself, which is 'too slow and guaranteed' for the objectives and needs of the Legislator in this field.

The instruments we will examine correspond, essentially, to the different ways in which crimmigration manifests itself. To date, many scholars, in Italy and the in the rest of the world, have addressed these topics providing interesting and useful insights but dealing with the issues disjointedly, one at a time, without taking into account their intrinsic correlation. The reference is to the extensive literature - national and European - that has dealt with the criminalisation of migrants and NGOs, or the studies that have delved into the legitimacy and purposes of forms of administrative detention and expulsions. While these contributions certainly represent the starting point for this paper, our purpose is to try to give an overall reading of the phenomenon (para. 4) by observing how,

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Union Law' in Guia and others (eds), *Social Control and Justice in the Age of Fear* (Eleven International Publishing 2012). In Italy: Gian Luigi Gatta, 'La pena nell'era della "crimmigration": tra Europa e Stati Uniti in Carlo Enrico Paliero, Francesco Viganò, Fabio Basile and Gian Luigi Gatta (eds), *La pena, ancora: fra attualità e tradizione. Studi in onore di Emilio Dolcini* (Giuffrè, Milan, 2018); Luca Masera, '"Terra bruciata" intorno al clandestino: tra misure penali simboliche e negazione reale dei diritti, in Oliviero Mazza and Francesco Viganò (eds.), *Il "Pacchetto sicurezza"*, (Turin, 2009). More recently, with an interdisciplinary slant and a look at the realities of different European countries as well as at the EU legislation itself: Gian Luigi Gatta, Valsamis Mitsilegas, Stefano Zirulia (eds), *Controlling Immigration Through Criminal Law. European Perspectives in 'Crimmigration'* (Hart Publishing, 2021).

beyond the single critical points of each of the instruments examined, it is their combination and coexistence that allows to fully grasp the extent of crimmigration and the effects on the rights of the persons involved.

Auspicably, the picture that will emerge in in the following paragraphs will allow us to draw some conclusions with respect to the degree to which crimmigration is widespread in Italy and on the role that European law plays in this situation.

2. The role of Criminal law for the migration phenomenon in Italy

In the Italian legal system, when the Legislator decides to resort to criminal law, it must respect the principle of subsidiarity. This principle, deriving directly from Article 13 of the Constitution (which affirms the inviolability of personal freedom), postulates that a criminal punishment could be used only when no other instruments less invasive are equally capable of protecting a legal asset against a form of aggression. In other words: given that every criminal sanction affects personal liberty, the Constitution requires the Legislator to make as limited use of punishment as possible: only as a residual tool (as an *extrema ratio*) when there are no other tools capable of ensuring equal protection[2].

The use of criminal law in the area of immigration, however, does not seem to fully comply with this principle. First, some doubts already arise about the identification of the legal asset that here criminal law aims to defend (border protection? the orderly management of migration flows?). Secondly, and this is what interests us most here, an *ex post* look at the results achieved by immigration crimes (see *infra* para. 2.1.) shows not only the existence of far more adequate instruments (social policies, administrative disciplines...) but also the ineffectiveness of criminal instruments, which, therefore reveal their nature as 'symbolic crimes'[3].

By resorting to criminal law in this area the Legislator, in the one hand, conveys to the society the idea of an intrinsic dangerousness of the migration phenomenon[4] (such as to merit the use of the most severe instruments available); on the other hand, the provision of a strong response is instrumental in achieving a hoped deterrent effect on new departures. Considering these aspects - which will be explored in more detail in the following paragraphs - it is possible to recognise a distorted of criminal law in this field, in the form of an overcriminalisation that, as we said, is a recurring feature of crimmigration. The analysis of the main figures of crimes that both *directly* and *indirectly* affect the migration phenomenon in Italy today, as well as their evolution, represent the indispensable starting point of this work: their existence, besides being a clear sign of the presence of

[2] Giorgio Marinucci, Emilio Dolcini and Gian Luigi Gatta, *Manuale di diritto penale, parte generale* (11th, Giuffrè, Milano, 2022) 15

[3] Massimo Donini, 'Il diritto penale di fronte al "nemico"' (2006) 2 Cass pen 735

[4] The association of the irregular foreigner with the criminal world contributes to strengthening the already widespread perception of the foreigner as a dangerous subject whose management is a matter of public security, see on this: Gian Luigi Gatta, 'Global trends in "Crimmigration" policies: From the EU to the US', in Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (eds), *Controlling Immigration Through Criminal Law. European Perspectives in "Crimmigration"* (Hart Publishing, 2021) 47; Ana Aliverti, 'The wrongs of Unlawful Immigration' (2017) 11 Criminal Law and Philosophy 375; Alvise Sbraccia, *Migranti tra mobilità e carcere: storie di vita e processi di criminalizzaizone* (Franco Angeli, Milano, 2007); Dario Melossi, 'The Connections Between Migration, Crime and Punishment. Historical and Sociological Questions' in Gian Luigi Gatta, Valsamis Mitsilegas and S. Zirulia (eds), *Controlling Immigration Through Criminal Law. European and Comparative perspectives on "Crimmigration"* (Hart Publishing, 2021) 81-99; Stefania Crocitti, Immigration, Crime, and Criminalization in Italy' in Sandra Bucerius and Michael Tonry (eds) *Ethnicity, Crime, and Immigration* (New York, Oxford University Press, 2014) 791

crimmigration, is also a fundamental junction for understanding the role of the 'other' measures provided.

2.1. The direct incrimination of migrants: looking for *ad hoc* crimes in Italian law

All offences affecting foreigners are found outside the Criminal Code, in the Consolidated Act on Immigration (TUI, following the Italian acronym)[5].
There are about ten crimes ranging from the use of false documents or failure to prove the regularity of the stay to more complex figures concerning the violation of previous deportation orders or re-entry bans, or illegal entry or stay. As for the sanctions, today mostly pecuniary penalties are provided for, except for a few cases where imprisonment is imposed.

As we will see shortly, in the last ten years (with one recent exception) the Italian legislature has no longer resorted to the creation of ad hoc offences to intervene in the migration phenomenon and this choice, far from representing a change in approach to the matter, is rather the effect of certain pronouncements of the European Court of Justice that have strongly influenced the use of the criminal instrument in the management of immigration in Member States.
But let's take a step back. The first use of imprisonment to punish the irregular presence of a foreigner dates back to 2002 when the Legislator introduced the crime of failure to comply with a removal order (art. 14 co. 5 *ter* TUI) which provided for arrest from 6 months to 1 year, then replaced in 2004 by imprisonment from 1 to 4 years (by d.l. no. 241/2004). Until 2011, this offence - which in fact punished the foreigner who, despite having received an order to leave the country, remained there - has been widely applied[6].

Saved by the Italian Constitutional Court[7], the criminalisation of irregular foreigners practised by the Legislator has suffered a setback only with the famous *El Dridi* judgment of April 2011[8], which, in short, prevented the use of criminal detention to punish the conduct of non-compliance with the removal order, considering this sanction to be incompatible with the objectives pursued by the EU Legislator with the so-called return directive (Dir. 2008/115/EC). The CJEU ultimately held that the directive's useful effect - e.g., an effective and prompt repatriation respectful of the fundamental rights of the person - was undermined by the imposition of a prison sentence to be executed in Italy.

After *El Dridi*'s pronouncement, the Italian Legislator had to adapt its regulations (Decree-Law No. 89/2011, converted into Law No. 129/2011) but despite the occasion did not choose to decriminalise such conducts, and preferred instead to replace the detention penalty with a fine (the penalty still provided for today for the crime of failure to comply with the removal order is a fine from 6,000 to 15,000 euro). *De facto*, however, the elimination of the custodial penalty for Article 14 para. 5 *ter* has resulted in the loss of centrality of the criminal sanction in the overall arsenal of measures to combat irregular immigration.

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[5] Decreto Legislativo 25 luglio 1998, n 286-Testo Unico delle Disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero.
[6] Luca Masera, 'Art. 14 t.u. imm', in Emilio Dolcini e Gian Luigi Gatta (eds), *Codice penale commentato* (4th edn.,Wolters Kluwer, Milano 2015) 2790.
[7] Corte cost (2007)22; Guido Savio, 'Il diritto degli stranieri e i limiti del sindacato della Corte Costituzionale: una resa del giudice delle leggi?' (2007)1 DirImmCitt 173.
[8] Case C-61/11PPU *El Dridi,* [2011] ECR I-3031

Followed this predicted trend also the introduction in 2009 of Article 10bis TUI[9]. While representing the peak in the fight against irregular migrants, going so far as to incriminate the sole irregular presence[10] – it was immediately modelled as a misdemeanour sanctioned (only) with a fine of 5,000 to 10,000 euro[11].

Today, then, the most widespread criminal offences (Art. 10 *bis* and Art. 14 co. 5 *ter* TUI) are punished only with the pecuniary penalty, which, however, is completely devoid of effective afflictive capacity against irregular migrants who are almost always destitute; the custodial penalty, on the other hand, remains applicable only for the cases of illegal re-entry under Art. 13 co. 13 and 13 *bis* TUI[12] (which in practice has marginal weight) and, from 2018, for cases of entry and re-entry in violation of a deferred refoulement order (Art. 10 co. 2 *ter* and 2 *quater* TUI)[13]. Ultimately, after 2011 the Legislator seems to have abandoned the path of criminalising irregular presence in the territory[14], even though the previous offences remain in force [15] and there have been other interventions of a securitarian nature in the field of immigration.

At the same time, pecuniary sanctions introduced are scarcely effective and seem essentially destined, as we shall see, to be replaced by expulsion: a real sanction still available to the Legislator[16] (see

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[9] Introduce by Law July 15, 2009, No. 94 (the so called '*security package*'). See specifically on art. 10 bis: Gian Luigi Gatta, 'Il "reato di clandestinità" e la riformata disciplina penale dell'immigrazione' [2009] Diritto penale e processo 1323

[10] The incriminated conducts are: entering (*crossborder*) and staying (*overstayer*) in the territory of the State in violation of the regulations dictated by Article 4 of TUI. With regard to entry, commits the offense any foreigner who enters Italy: a) without using the specially established border crossings (except in cases of *force majeure*); b) without being in possession of a valid passport or an equivalent document; or c) without an entry visa. Just a year after its introduction, the offense came under constitutional scrutiny The Court 'saved' the offense with a ruling (Constitutional Court No. 150/2010) much commented by scholars. See on that: Luca Masera, 'Corte costituzionale e immigrazione: le ragioni di una scelta compromissoria' (2010)2 RIDPP 1373; Francesco Viganò, 'Diritto penale e immigrazione: qualche riflessione sui limiti alla discrezionalità del legislatore' (2010)3 DirImmCitt; Luigi Ferrajoli, 'La criminalizzazione degli immigrati (note a margine della legge n. 94/2009)' (2009) 5 Questione giustizia < https://www.francoangeli.it/Riviste/SchedaRivista.aspx?IDArticolo=37800&Tipo=Articolo%20PDF&idRivista=37> acccessed 116 September 2022. On the relationship between Article 10a and the Return Directive: Gian Luigi Gatta, 'Il "reato di clandestinità" (art. 10 bis t.u.imm.) e la "direttiva rimpatri"' [2012] Diritto penale contemporaneo <https://archiviodpc.dirittopenaleuomo.org/d/1243-il--reato-di-clandestinita--art-10-bis-tu-imm-e-la--direttiva-rimpatri> accessed 8 July 2022; Angelo Caputo, 'Il reato di immigrazione clandestina' [2009] Criminalia, 389.

[11] In *Achughbabian (*Case C-329/11 *Achughbabian v Préfet du Val-de-Marne* [2011] I -12709*)* the Court said that the Directive « does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence» as long as such an offence does not undermine the *effectiveness* of the Directive (i.e., effective repatriation that respects the fundamental rights of the person).

[12] In *Celaj* (Case C-290/14 Celaj), the Court saved Art. 13 para. 13 and 13bis, excluding any profile of incompatibility with the Return Directive; see. Andrea Romano, ' "Circumstances... Are Clearly Distinct": la detenzione dello straniero per il delitto di illecito reingresso nella sentenza *Celaj* della Corte di giustizia' (2015) 2 DirImmCitt. 109.

[13] Introduce by Law Decree n. 113/2018 converted into Law n. 132/2018. See for a comment Luca Masera, 'La crimmigration nel decreto Salvini' [2019] LP 7

[14] A direction that, it should be remembered, has very little to do with rights or a more forward-looking integration policy, but boils down to an assessment the useful effect. See Francesco Viganò, 'La Corte di giustizia dichiara incompatibile con la direttiva rimpatri l'incriminazione di cui all'art. 14, co. 5-ter, T.u.imm.' [2011] DirPenCont < https://archiviodpc.dirittopenaleuomo.org/d/555-corte-di-giustizia-dell-unione-europea-sent-28-aprile-2011-hassen-el-dridi-causa-c-6111-ppu-diretti> accessed 16 September 2022.

[15] Carol Ruggiero, 'La depenalizzazione del reato di "immigrazione clandestina": un'occasione mancata per il sistema penale italiano' (2017)2 DPC 135

[16] As noted by many commentators, the introduction of Article 10 bis concealed an attempt to circumvent the Directive by taking advantage of Article 2(2)(b) of the Directive, which allows member states not to apply the Directive (and thus to continue to use coercive accompaniment to the border, instead of voluntary departure) to foreigners subject to return as a criminal sanction or as a consequence of a criminal sanction. Such a broad reading of the content of Article 2, however, has not been applied so far and would certainly have exposed Italy to a conviction at the European level for blatant conflict with the Directive's useful effect. However, to dispel any doubts as to the Legislator's real intention, we

Paragraph XX). The obstacles posed to the use of custodial sentences by the *El Dridi* judgment seem to have made the use of the criminal instrument against migrants much less attractive, pushing, however, towards a change in the targets of criminal offences.

2.2. The indirect incrimination of migration: criminalising solidarity and rescue activities

Closely connected to the criminalisation project inferred from the crimes analysed in the previous section is the presence of crimes that though designed to incriminate the smuggler, end up affecting people who provide assistance to undocumented migrants.

In this case the mechanism is more articulated: as mentioned, the ideal author of this crime is the smuggler i.e., a person who, for a fee or other material benefit, illegally brings foreigners from one State to another. However, despite the intention, this offence produces a different effect, also affecting people who clearly are not smugglers (and least of all traffickers). In fact, due to a broad and imprecise formulation of the provision very often fall within the meshes of this crime the conduct of persons and NGOs who are not traffickers but, out of a pure spirit of solidarity or family ties, aid migrants who are in difficulty at the border.

This is not a mistake, but a choice: policymakers are aware of this 'side effect' and, not only do they not intervene in the wording so as to exclude assistance conduct, but they continue to exalt the role and usefulness of this crime. The situation then presents the characteristics of an *overcriminalisation*, resulting in an unnecessary and distorted use of the criminal instrument, completely subservient to border protection and deaf to the principles that inspire the Constitution and European Charters[17]. In order to try to better understand the role of these crimes we will proceed as follows: first, we will see which, in Italy, are the cases concerned and their evolution; then, we will

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can recall the words of the former Minister of the Interior, Mr. Maroni, who in 2008, during a hearing in front of the Parliamentary Committee for Control and Supervision in the field of Immigration, defending the introduction of the crime of illegal immigration (art 10bis), said: «*On this point the Government insists, even though it envisages a fine and not imprisonment, because the European Directive states that the rule for the removal of non-EU citizens will be the invitation to leave and not expulsion, unless the expulsion measure is a consequence of a criminal sanction. Therefore, we want to design the crime of illegal immigration or illegal entry by focusing mainly on the accessory sanction of the expulsion order issued by the judge, rather than on the main sanction which will be a fine. In this way we can proceed with immediate expulsion with a court order, applying the European directive but eliminating the inconvenience that would undermine its effectiveness, because as the Italian experience has shown, the invitation to leave means that no one would be expelled any more*» (unofficial translation).

[17] Widely on the crime of smuggling among European and international scholars: Valsamis Mitsilegas 'The Normative Foundations of the Criminalisation of Human Smuggling: Exploring the Fault Lines Between European and International Law' (2019) 10 NJECL 68–85; Marta Minetti, 'The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy' (2020) 11(3) NJECL 335-350; Alessandro Spena, 'Migrant Smuggling: a Normative and Phenomenological View from Italy' in Vincenzo Militello and Alessandro Spena, *Between Criminalization and Protection. The Italian Way of Dealing with Migrant Smuggling and Trafficking within the European and Internationale context* (Leiden-Boston, Brill Perspectives in Transanational Crime, 2, 2019); Id, 'Human Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation? In Sergio Carrera and Elspeth Guild (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings* (Brussels, CEPS, 2016); Sergio Carrera, Valsamis Mitsilegas, Jennifer Allsopp and Lina Vosliute, *Policing Humanitarianism. EU Policies Against Human Smuggling and their Impact on Civil Society* (Oxford, Hart PUblishin, 2019); Anne T Gallagher, Fiona David, *The International Law of Migrant Smuggling* (Cambridge, Cambridge University Press, 2014); Alberto Di Martino, Francesca Biondi Dal Monte, Ilaria Boiano, Rosa Raffaelli, *The Criminalization of Irregular Immigration: Law and Practice in Italy* (Pisa, Pisa University Press, 2013); Lina Vosyliute, Carmine Conte, *Crackdown on NGOs and volunteers helping refugees and other migrants* (ReSOMA Report, June 2019) < https://migrationresearch.com/item/crackdown-on-ngos-and-volunteers-helping-refugees-and-other-migrants/471875> accessed 16 September 2022

see how they are closely related to some European regulations that, upstream, reveal the same problems and a shared criminalising intent.

In Italy, the 'criminalisation of solidarity' experienced a particularly hot season between 2017 and 2019, but the instruments used in that two-year period were already present in the system. The crime of "*aiding and abetting illegal immigration*" - or simply, smuggling - (under Article 12 of TUI) has been present in Italy for more than two decades and has been amended many times but, until a very recent ruling of the Constitutional Court (No. 63/2022, to which we will refer later), it has never undergone substantial reorganization.

Article 12 is the pivotal instrument by which the incrimination supportive conducts in favour of migrants is expressed. Alongside this crime, however, in 2019 were added the bans on entry and transit in territorial waters, whose violation by NGO's rescue boats is now a criminal offense. While they remain in the legal system, the insignificant frequency of their use has made them a secondary tool, if not a relic of the past. More than a tool to counter smuggling, their enactment represented the "peak" of the institutions' fight against NGO's operations in the Mediterranean[18].

Briefly: in 2014, Italy ended the *Mare Nostrum* operation and the management of rescue operations in the Mediterranean shifted to the European Union's *Triton* operation, whose priority was the control of the Union's external borders rather than the rescue of migrants in distress. Because of a great number of departures and fatal shipwrecks, at least until 2017 NGOs helped Frontex (the European Agency for the Management of the EU's External Borders) and the Italian Coast Guard in *search and rescue* activities in the Mediterranean.

The situation changed in 2017. While shipwrecks and landings on the Mediterranean coasts were increasing, Frontex published its Risk Analysis Report stating that since June 2016 *SAR* operations carried out by NGOs had reached 40% of total activities, implicitly suggesting that requests for aid would seem to have been diverted directly to NGOs and that the conspicuous intensification of NGO activities has acted as a *pull factor* on departures, facilitating (even if unintentionally) traffickers[19].

Sentiments towards NGOs changed abruptly and - in a real escalation of measures - suspicions of alleged links between NGOs and traffickers spread, fuelled by a (still present) confusion between subjects, roles and conducts. In July 2017 the Italian government enacted the *Code of Conduct* for NGOs which subordinated the possibility for NGOs to collaborate with Italian authorities to the signing of a commitment «not to enter Libyan territorial waters [...] and not to hinder the search and rescue activity by the Libyan Coast Guard». This was the beginning of the so-called "*porti chiusi"* (closed ports) season during which Italian ports were systematically closed to NGO's boats that, refusing to recognize Libya as a place of safety, were demanding to land in Italy migrants rescued at sea[20].

Charges of aiding and abetting irregular immigration for NGO's captains multiplied as well as denials of disembarkation, at first informally flaunted and, later, crystallized in the aforementioned

[18] Luca Masera, 'L'incriminazione dei soccorsi in mare: dobbiamo rassegnarci al disumano?'[2012] QuestGiust <https://www.questionegiustizia.it/rivista/articolo/l-incriminazione-deisoccorsi-inmare-dobbiamo-rassegnarci-aldisumano-_549.php > accessed 10 July 2022

[19] On the proven non-existence of the pull factor see Eugenio Cusumano and Matteo Villa, *Sea Rescue NGOs: a pull factor pf Irregular Migration?* (Policy Brief, European Univerity Institute, Issue 2019/2022)

[20] Federico Ferri, 'Il Codice di condotta per le Ong e i diritti dei migranti: fra diritto internazionale e politiche europee' (2018) 1(1) Diritti umani e diritto internazionale 189-198

bans. In 2020, a change in the governing majority led to the end of 'porti chiusi', marking the end of that dramatic season of almost daily forced standoffs in front of Italian ports[21].

But while the 'migration emergency' was being replaced by the new (real) health emergency, landings and shipwrecks continued[22] as well as the incrimination of rescuers.

Leaving aside the violations of the entry bans, the charges against NGO's captains and crews rested on Art 12. This crime has existed in our legal system since 1990 and, since 1998, found place in the Consolidated Act on Immigration. The basic hypothesis punishes with imprisonment from one to five years, as well as a fine of 15,000 euros for each person favoured «anyone who promotes, directs, organizes, finances or carries out the transportation of foreigners into the territory of the State or performs other acts aimed at illegally procuring their entry into the territory of the State»; then a variety of aggravating hypotheses have been added over the years, potentially raising the punishment well beyond 20 years of imprisonment.

This offence has always been closely linked to European law. Its very formulation is due to the thrust of the Convention implementing the Schengen Agreement, which trying to balance the abolition of internal borders, bound Member States «to establish appropriate sanctions against any person who assists or attempts to assist, for financial gain, an alien to enter or reside in the territory of a Contracting Party in violation of that Contracting Party's legislation on the entry and residence of aliens»[23]. Then in 2002 the European Union with the so-called *Facilitator Package* introduced real obligations of incrimination; in particular, Directive 2002/90/EC gave a definition of unlawful conduct and Framework Decision 2002/946/JHA demanded the incrimination for the unlawful conduct described by the Directive.

Much has been said about these instruments[24]. Here we limit to recall that in the request for incrimination coming from the Facilitators Package, *profit* is a constituent element of the sole case of aiding and abetting irregular stay, while it constitutes a mere aggravating circumstance in the case of aiding and abetting irregular entry or transit. This wide formulation - which is not in line with the definition of smuggling outlined by the Palermo Protocols in 2000[25] - allows Member States to provide incriminating norms that affect, in addition to the actions of genuine smugglers, the different

[21] Legislative decree n 130/2020 converted into Law n 173/2020

[22] These are the numbers collected by the Ministry of the Interior: 119,369 (2017), 23,370 (2018), 11,471 (2019), 34,154 (2020), 67,477 (2021) and, finally, 31,339 (as of July 13, 2022)

[23] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239, 22/09/2000 P. 0019 – 0062 - Art 27 «1. The Contracting Parties undertake to impose appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of aliens».

[24] See Valsamis Mitsilegas, 'The Criminalisation of Migration in the Law of the European Union. Challenging the Preventive Paradigm', in Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (eds), *Controlling Immigration Through Criminal Law. European and Comparative perspectives on "Crimmigration"* (Hart Publishing, 2021) 22-45; Marta Minetti, 'The Facilitators Package, penal populism and the Rule of Law: Lessons from Italy' (2020) 11(3) NJECL 335-350 ; Sergio Carrera, Elspeth Guild, Ana Aliverti, Jennfier Allsopp, Maria Grazia Manieri and Michele Levoy, *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants* (Study Commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the Request of the LIBE Committee, 2016) 22–29

[25] In 2000, the UN General Assembly negotiated the Convention against Transnational Organized Crime (8 January 2001, A/RES/55/25). Two protocols – the Palermo Protocols – were attached to the Convention which require states to create crimes of smuggling (UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime - 15 November 2000) and trafficking of human beings (UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime - 15 November 2000). See Guild (n 13)

conduct of those who, without any profit but out of altruism, humanitarian reasons or family ties, provide relief or assistance to irregular foreigners, facilitating their entry within European borders.

Ultimately, all these conducts have been subject to legal equalization and this situation can not be remedied by Art. 1(2) of Directive 2002/90/EC) which establishes the possibility for Member States to provide for the possibility of not punishing a conduct carried out for the purpose of providing humanitarian assistance. This provision can not curb the risks of over-criminalization because its adoption by States is optional and its contours are too vague (in Italy, for example, it has been transposed with reference only to rescue and assistance activities provided to foreigners in need already present on Italian territory, see Art. 12 co. 2 TUI).

The criticisms directed to the Facilitators package soon proved to be well-founded. In transposing the indications coming from the EU into domestic law, States - like Italy - have ended up extending criminal repression to humanitarian conduct as well, making these criminal offences a real instrument for the protection of European borders[26].

It can come as no surprise, then, that a sentiment of hostility toward NGOs, rampant since 2017, has translated into an attitude of suspicion that keeps seeing in solidarity a latent purpose for circumventing immigration rules, as such deserving of sanction. This is where the *délit de solidarité* and the Court cases involving NGOs come from. The circumstance that, at least in Italy, there have been no convictions for these crimes does not exclude *per se* the relevance of the problem: on the one hand, the repeated confirmation by judges (think, to mention a few episodes, of the case of the *Sea Watch 3* commander Carola Rackete[27] or the (dis)seizure of the *Open Arms* ship[28]) that the incriminated conducts are in fact lawful and dutiful consolidates the doubts on the coherence and legitimacy of the Italian and European regulations[29]. On the other hand, can not be disregarded the *chilling effect* that the threat of criminal sanction has produced in the activities of NGO's operators that combined with the insufficiency of institutional SAR activities, has caused an increase in the number of deaths at land and, above all, at sea borders.

These elements seem to confirm that the criminalisation of solidarity can be read as a new trend in immigration criminal law and, ultimately, a new drift of *crimmigration*. What we discern is an overabundant use of criminal law whose (unintended?) effects are evident. First, the flattening of the case of aiding and abetting within which, without any possibility of distinction, fall with equal consequences smuggling, conduct without a profit motive (and perhaps moved by solidarity purposes

[26] Stefano Zirulia, 'Is that a Smuggler? The Blurring Line between Facilitating Illegal Immigration and Providing Humanitarian Assistance at the European Borders', in Gian Luigi Gatta, Valsamis Mitsilegas and S. Zirulia (eds), *Controlling Immigration Through Criminal Law. European and Comparative perspectives on "Crimmigration"* (Hart Publishing, 2021) 235-265

[27] Stefano Zirulia, 'La Cassazione sul caso Sea Watch: le motivazioni sull'illegittimità dell'arresto di Carola Rackete' [2020] SistPen <https://www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete> accessed 27 June 2022

[28] On the preventive seizure of the Spanish NGO Proactiva Open Arms' ship that had rescued 218 migrants at sea and brought them to Italy see Francesca De Vittor, 'Soccorso in mare e favoreggiamento dell'immigrazione irregolare: sequestro e dissequestro della nave Open Arms'(2018)12(2) Diritti umani e diritto internazionale 443-452; Marco Patarnello, 'Dissequestrata la nave Open Arms: soccorrere i migranti non è reato' [2018] QuestGiust < https://www.questionegiustizia.it/articolo/dissequestrata-la-nave-open-arms-soccorrere-i-migranti-non-e-reato_19-04-2018.php> accessed 10 July 2022

[29] Even today the activity of Prosecutors' Offices and Courts continues: on 21 May 2022, at the Court of Trapani started the preliminary hearing of the *Iuventa case*. To date, this is the biggest criminal trial (involving more than 20 people) initiated against NGOs active in the Mediterranean accused of aiding and abetting irregular immigration for having - according to the Prosecutor's Office - colluded with people smugglers to carry migrants to Europe.

or family ties) and even pure relief and assistance activities, which jurisprudence and other branches of law deem dutiful[30].

Finally, from a strictly legal point of view, the confusion between instruments and purposes cannot be ignored. In this framework, criminal law, losing its *extrema ratio* role, becomes a pivotal instrument in the protection of borders endangered by a supposed emergency whose outlines are indeed difficult to identify. Many authoritative voices are calling for a radical reform of the Facilitators package; the proposals are directed to: reformulating the obligations of incrimination, limiting them to only real cases of smuggling and distinguishing them, once and for all, from humanitarian conduct; making unjust profit a constituent element even of the case of aiding and abetting irregular entry; or again, making it mandatory for member states to adopt effective humanitarian exculpatory measures[31].

To, date, however, there is still no glimpse of the political will needed for such reforms, neither in Europe, where there is no lack of declarations of intent, nor in Italy. Here, however, something has happened, giving reason to those who, few years ago, saw in Courts «the path with the best chances» for the correction, at least, of the most controversial profiles of the current legal framework[32]. In a very recent ruling in February 2022, the Italian Constitutional Court has declared unconstitutional Art. 12(3)(d) TUI[33], in the part in which it provided as an aggravating circumstance the use of international transport services or counterfeited documents[34]. The ruling is extremely important: it is the first time in Italy (and the second in Europe, after the French *Conseil constitutionnel*'s decision on the *Herrou case* in 2018[35]) that the Constitutional Court has ruled on the crime of aiding and

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[30] Corte cass 3rd Section, Judgment n 6626/2020; see on that Stefano Zirulia, 'La Cassazione sul caso Sea Watch: le motivazioni sull'illegittimità dell'arresto di Carola Rackete [2020] SistPen <https://www.sistemapenale.it/it/scheda/cassazione-sea-watch-illegittimo-larresto-di-carola-rackete > accessed 2 November 2022

[31] Stefano Zirulia, 'Non c'è smuggling senza ingiusto profitto. Profili di illegittimità della normativa penale italiana ed europea in materia di favoreggiamento dell'immigrazione irregolare' (2020) 3 DirPenCont-Riv trim 143-177

[32] Ibid.

[33] Art 12 of the Consolidated Text says: « 1. Unless the act constitutes a more serious offence, whoever, in violation of the provisions of this Consolidated Act, promotes, directs, organises, finances or transports foreigners into the territory of the State or performs other acts aimed at illegally procuring their entry into the territory of the State, or of another State of which the person is not a citizen or does not hold permanent residence status, shall be punished by imprisonment from one to five years and a fine of 15,000 Euros for each person. 2. Without prejudice to the provisions of Article 54 of the Penal Code, rescue and humanitarian assistance activities provided in Italy to foreigners in need, however present in the territory of the State, do not constitute a crime. 3. Unless the fact constitutes a more serious offence, whoever, in violation of the provisions of the present Consolidated Act, promotes, directs, organises, finances or transports foreigners into the territory of the State or performs other acts aimed at illegally procuring their entry into the territory of the State, or of another State of which the person is not a citizen or does not hold permanent residence status, shall be punished by imprisonment from five to fifteen years and a fine of 15,000 Euros for each person in the following cases: (a) the offence relates to the illegal entry into or illegal stay in the territory of the State of five or more persons; (b) the person transported was exposed to danger to his life or safety in order to procure his illegal entry or stay; (c) the person transported has been subjected to inhuman or degrading treatment in order to procure his or her illegal entry or stay; (d) the act is committed by three or more persons acting in complicity with one another *or using international transport services or documents that are forged or altered or in any way unlawfully obtained*; e) the perpetrators have at their disposal arms or explosive materials».

[34] Corte cost (2022) 63. The case is indeed significant because, as the Court also pointed out, it is a case of aiding and abetting for family or solidarity reasons, totally unrelated to any kind of profit. See on this: Stefano Zirulia, 'La Corte costituzionale sul favoreggiamento dell'immigrazione irregolare: illegittima l'aggravante che parifica il trattamento sanzionatorio dei trafficanti a quello di coloro che prestano un aiuto per finalità solidaristiche [2022] SistPen < https://www.sistemapenale.it/it/scheda/corte-costituzionale-2022-63-favoreggiamento-immigrazione-irregolare-aggravato-nota-zirulia#_ftn1> accessed 14 July 2022.

[35] Sara Benvenuti, 'Il Conseil constitutionnel cancella il délit de solidarité… o no? L'aiuto all'ingresso, al soggiorno e alla circolazione di stranieri irregolari nel territorio francese in una recente decisione del Conseil constitutionnel'[2018]

abetting irregular immigration, reaching, as well, the first downsizing of an offence historically target of expansive interventions by the Legislator.

The Cour noted that in the considered aggravated hypothesis the penalty (5 to 15 years of imprisonment) was *disproportionate*, holding unlawful an aggravating circumstance that equates the punitive treatment of traffickers with that of those who provide aid for solidarity purposes. The Court said: «[t]he very high penalties established for the aggravated hypotheses of aiding and abetting immigration can reasonably be explained only from the point of view of combating international migrant smuggling, managed by criminal organizations that derive huge profits from this activity, but they are evidently disproportionate with respect to different situations, in which there is no evidence of involvement in such organizations»[36].

The Court, in essence, showed that distinguishing conducts on their concrete offensiveness is possible and indeed necessary. The hope is that the warning will not go unheeded.

2.3. Self-smuggling: when a migrant becomes a smuggler.

The incrimination of NGOs is not the only 'side effect' of the broad and imprecise wording - at national and European level - of the provisions against smuggling. As we have just seen, the strict response of States to smuggling is usually justified by the will to stem a dangerous phenomenon linked with organised crime.

As in the case of NGOs, the current wording of the provisions allows conduct other than 'real smuggling' to fall within it, triggering investigations and criminal proceedings as well as an indirect 'criminalisation' of the migration phenomenon whose facilitation, even when carried out for no profit, generates criminal liability[37]. Alongside the criminalisation of NGOs, the possible consequences of this situation undoubtedly include so-called 'self-smuggling', i.e., the practice of some States to hold irregular migrants criminally accountable for 'smuggling' themselves and/or other irregular migrants during their migration journey. This phenomenon - which some scholars arguably classify as a real 'strategy' of states in the fight against irregular migration - is particularly interesting for our purposes because it cut across both crimes of migrants and smuggling activities.

Let's start with a fact: although it is probably not an exclusive practice of Italy[38], recent studies show that in Italy in recent years numerous irregular migrants have been accused of smuggling and

QuestGiust < https://www.questionegiustizia.it/articolo/il-conseil-constitutionnel-cancella-il-delit-de-so_07-09-2018.php> accessed 14 July 2022

[36] Unofficial translation bu the Author

[37] Gabriella Sanchez, 'Beyond the Matrix of Oppression: Reframing Human Smuggling Through Instersectionality-Informed Approaches' (2017) 21 Theoretical Criminology 46

[38] With regard to Greece, see George Maniatis, 'Country Report Greece' in Sara Belleza and Tiziana Calandrino (eds.), *Criminalization of Flight and Escape* Aid, (Hamburg, Borderline Europe 2017) 202-234 <www.borderline-europe.de/sites/default/files/readingtips/Kidem%20final%20report%2005_2017.pdf> accessed 30 August 2022; Legal Centre Lesvos, 'Baseless Smuggling Charges Not Only in Italy, But Are a Regular Occurrence in Lesvos' (2 July 2019) <https://legalcentrelesvos.org/2019/07/02/baseless-smuggling-charges- not-only-in-italy-but-are-a-regular-occurrence-in-lesvos/> accessed 17 September 2022. For a broader overview: Ilse van Liempt, 'A Critical Insight into Europe's Criminalisation of Human Smuggling' (2016) 3 Policy Paper, Swedish Institute for European Policy Studies, European Policy Analysis Issue 1-12. For an international overview: James C. Hathaway, 'Prosecuting a Refugee for "Smuggling" Himself' [2014]429 Michigan Law Public Law and Legal Theory Research Paper Series 1-14.

prosecuted for having facilitated their own and other migrants' irregular border crossing during their own migration journey, e.g., by driving dinghies across the Mediterranean Sea[39].

The peculiarity of these accusations lies in the fact that unlike the ideal figure of the smuggler to whom Article 12 of the Consolidated Text on Immigration should be addressed (a criminal who earns money by illegally transporting people to other countries, probably inserted into a criminal network that provides him/her with the means), the accusations of (self)smuggling end up targeting irregular migrants - whose objective, like the other people transported, was to arrive in another country - for the role they fulfilled during their own migration journey.

To better understand this phenomenon and the reasons for its occurrence, it is necessary to briefly dwell on two interconnected aspects: the changing *modus operandi* of smugglers in the Mediterranean in recent years and some peculiarities of the Italian legal system which, as we will see, considerably increase the probability for a migrant travelling to Italy to become involved in smuggling.

With regard to the first issue, we have seen in paragraph 2.2 the evolution of roles and responsibilities in SAR activities in the Mediterranean following the intensification of migratory pressure on Italian coasts. Well, in those same years - and in particular from 2015 onwards - also affirmed in Italy some jurisprudential approaches to Italian jurisdiction over smugglers' conduct outside national waters.

Without claiming to delve into a vast and complex subject, until 2012 departures mainly took place from Egypt where smugglers were organised in groups and used to transport migrants at sea in large boats (so called mother-vessels) and then transfer and abandon them on smaller boats, as they approached Italian territorial waters[40]. In this way migrants were left to wait for the rescue of other passing ships or of the alerted authorities, who would rescue them and bring them to Italy. Thanks to this method smugglers staying on the mother-vessel remained outside Italian national waters, thus evading Italian jurisdiction[41].

The increase, however, in the number of shipwrecks and deaths in the Mediterranean pushed the Italian authorities to react against smuggling on two fronts: on the one hand, as we have seen, search and rescue activities were intensified (at least with the *Mare nostrum* operation); on the other

[39] For a comprehensive overview of the main issues related to the phenomenon of self-smuggling Italy a review of case law and interviews: Flavia Patanè, Maarten P. Bolhuis Joris van Wijk, Helena Kreiensiek, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy' (2020) 39 Refugee Survey Quarterly 123–152; see also Zach Campbell, 'The Wrong Catch' (The Intercept weblog, 16 Sep. 2017) <https://theintercept. com/2017/09/16/italy-imprisons-refugees-who-were-forced-to-pilot-smuggling-boats-at-gunpoint> accessed 5 September 2022; Lucia Borghi, Alberto Biondo, 'Country Report Italy' in Sara Belleza and Tiziana Calandrino (eds.), *Criminalization of Flight and Escape Aid*, (Hamburg, Borderline Europe 2017) 168-201 <www.borderline-europe.de/sites/default/files/readingtips/Kidem%20final%20report%2005_2017.pdf> accessed 30 August 2022; Alexandra Ricard-Guay, *Criminalizing Migrants Who Steer the Dinghies in the Mediterranean: A Collateral Effect of Migration Management?*(Florence, European University Institute, Working Paper RSCAS 32 2018) .

[40] See Eurojust, 'Italian Jurisprudence on Illegal Immigrant Smuggling: Asserting Jurisdiction on the High Sea, Analysis' [2016] The Hague https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_italian_jurisprudence_illegal_immigrant_smuggling_en.pdf accessed 15 September 2022. For an in-depth commentary on the subject: Stefano Manacorda, 'Tratta e traffico di migranti: il nodo della giurisdizione tra territorialità ed extraterritorialità' (2018) 3 Dir pen cont - Riv Trim 35-44; Silvia Bernardi, 'I (possibili) profili penalistici delle attività di ricerca e soccorso in mare'(2018) 1, Dir pen cont - Riv Trim 134 -144.

[41] Camera dei Deputati, Hearing of the Public Prosecutor at the Court of Catania, Carmelo Zuccaro, Parliamentary Commission of Inquiry on the reception, identification and expulsion system, as well as on the conditions of detention of migrants and the public resources deployed (9 May 2017) <http://documenti.camera.it> accessed 15 September 2022.

hand, the Italian judiciary, with a legal reasoning soon endorsed by the Supreme Court in 2014[42], affirmed the Italian jurisdiction over the acts committed by the criminal smuggling organisations in extra-territorial waters. According to this reasoning, the act of transporting the migrants to Italy - carried out by the rescuers and exempted from criminal liability by the state of necessity or duress clause under Article 54 of the Criminal Code (or by the exercise of a duty under Article 51 of the Criminal Code) - represents the link between the Italian jurisdiction and the conduct of the smugglers, now held responsible as 'mediated authors' of the crime[43].

This approach was a real turning point in the fight against migrant smuggling in Italy, giving broader powers to the judiciary by allowing Italian Prosecutors to also investigate and convict smugglers operating on the mother-vessels[44]. This new perspective, however, soon triggered a change in the *modus operandi* of the smugglers, concerned about being arrested or having their vessels seized. Thus, as of 2015, smuggling activities were transferred to Libya[45] while criminal organisations of smugglers stopped using mother-vessels, preferring smaller boats (on which migrants were embarked from the moment of departure) and stopped employing their own members as captains or helmsmen of the boats, entrusting these tasks to migrants picked at the very moment of departure.

Moving now on to the second issue, some features of the Italian legal system greatly increase the possibilities for a migrant travelling to Italy being charged and convicted for smuggling. This new method adopted by smugglers' networks causes that these migrants, once in Italy, could be investigated and held responsible for the crime of smuggling, even if their conduct was dictated by duress or by the need to save their own lives and those of the other migrants on board.

This is made possible by two circumstances: the first, once again, is the current wording of the provisions incriminating smuggling which, at present, do not include profit among the constituent elements. It follows that for the crime to be committed, there is no need to demonstrate that the

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[42] Corte cass , *Prosecutor v HH*, Judgment, First Section, No 14510 2014; Corte cass, *Prosecutor v HA*, Judgment, First Section, No 18354 2014; Specifically on these profiles: Stefano Manacorda, 'Tratta e traffico di migranti: il nodo della giurisdizione tra territorialità ed extraterritorialità' (2018) 3 Dir pen cont - Riv Trim 35, 36.

[43] These were the words of the Court of Cassation in 2014: «the jurisdiction of the Italian state must be recognised where, in the case of trafficking of migrants from the African coast to Sicily, they are abandoned at sea in extraterritorial waters on wholly unsuitable vessels, in order to provoke the intervention of the sea rescue and to have the persons transported accompanied in the stretch of territorial waters by the rescue vessels operating under the cover of the exemption of the state of necessity, since the action of placing persons in serious danger, which constitutes the state of necessity, is directly attributable to the traffickers for provoking it and is linked, without a break, to the first segment of the conduct committed in extraterritorial waters, thus coming under the provision of Art. 6 of the Criminal Code. The action of the rescuers (which in fact allows the migrants to reach our territory) is to be considered under Article 54, paragraph 3 of the Criminal Code, in terms of the action of the mediated author, operating in obedience to the laws of the sea, in a state of necessity provoked and instrumentalised by the traffickers and therefore fully ascribable to them and therefore punishable in our State, even though they have materially operated only in extraterritorial waters » Corte cass , *Prosecutor v HH 2014* (unofficial translation). Numerous doubts have been expressed among scholars in relation to this theory: Roberta Barberini, Roberta, 'La rilevanza penale del fenomeno migratorio' [2015] Questione giustizia <www.questionegiustizia.it/articolo/la-rilevanza-penale-del-fenomeno-migratorio_30-10-2015.php> accessed 17 September 2022; Maria Teresa Trapasso, 'Il richiamo giurisprudenziale all'"autoria mediata" in materia di favoreggiamento all'immigrazione clandestina: tra necessità e opportunità [2017] Archivio penale 583; Salvatore Orlando, 'Problemi di giurisdizione nel contrasto al traffico di migranti via mare' (2018) 1 DirPenCont - Riv Trim 1, 145-158. In particular, the authors express doubts as to whether the rescue intervention falls within the framework of the state of necessity, rather than within the fulfilment of a duty prescribed by domestic and international standards.

[44] See Giovanni Salvi, 'New Challenges for Prosecution of Migrants Trafficking: From Mare Nostrum to EUNAVFOR MED. The Experiences of an Italian Prosecution Office' [2016] The Hague, Intervention at the Consultative Forum of European Prosecutors General of the European Commission and Eurojust <www.procuracassazione.it/procurageneraleresources/resources/cms/documents/SALVI_forum_The_Hague_2016.pdf> accessed 8 September 2022.

[45] Flavia Patanè, Maarten P. Bolhuis Joris van Wijk, Helena Kreiensiek, 'Asylum-Seekers Prosecuted for Human Smuggling: A Case Study of Scafisti in Italy' (2020) 39 Refugee Survey Quarterly 123, 131

'smuggler' has made a financial gain from his conduct, since Article 12 aims at criminalising whoever "promotes, directs, organises or finances the illegal entry of irregular migrants into the territory of the State, as well as whoever simply transports them or carries out other acts aimed at their illegal entry". The second is the presence in Italy of a legal principle enshrined in Article 112 of the Constitution according to which public prosecutors have an obligation to initiate a prosecution every time a crime is reported (principle of mandatory prosecution). In accordance with this principle, Prosecutors must start a criminal proceeding every time there is a report that the criminal offence of 'human smuggling' could have been committed (for example when the police authorities give notice of a new rescue or irregular landing of migrants).

The combination of these conditions allows that a migrant departing from Libya who, under threat, was chosen by the traffickers to drive the dinghy or manage the GPS - maybe because he is a fisherman and knows how to drive a boat[46] -, once arrived in Italy can be charged with the crime of smuggling, be subjected to pre-trial detention, and finally receive a heavy sentence[47].

The injustice of this situation seems on some occasions to have been noticed by judges and prosecutors who have begun to distinguish between 'professional smugglers' and 'forced smugglers'[48]. Even regarding the latter, however, the practice shows great difficulty in acquitting suspects, as the application of Article 54 of the criminal code (the provision that provides for a clause of exemption from criminal liability in cases of duress and state of necessity) is hindered. On the one hand, for the defence it is difficult to prove in Court that the conduct of a migrant smuggler occurred in an actual state of duress or necessity[49] (defence lawyers need to track down eyewitnesses that can confirm such coercion took place); on the other hand, in many cases judges exclude the applicability of Article 54 since the state of danger claimed by the accused (namely threats forcing him to drive or navigate the boat) has been voluntary brought upon the migrant by himself, by contacting the criminal organisation for the purpose of entering Italy[50].

Self-smuggling stimulates some reflections on the meaning of the instruments deployed by the Legislator in the management of the migration phenomenon. As with the criminalisation of the conduct of NGOs, the accusations (and convictions) for smuggling of migrants who, under duress, end up playing some role (compass man, boat driver...) in the phases of the Mediterranean crossing are the serious consequence of an imprecise and superficial formulation of the rules and, perhaps, the result of a precise political design. If, in fact, the criminalisation of NGOs produces a 'chilling effect' on rescue activities and, in general, on solidarity with migrants, self-smuggling seems yet another

[46] It is not infrequent that the people identified by the traffickers as 'boat drivers' are even minors, see on this Cecilia Ferrara, Angela Gennaro, 'I minori incriminati per traffico di esseri umani' (L'Essenziale, 2022) <www.essenziale.it/notizie/cecilia-ferrara/2022/08/25/bambini-traffico-esseri-umani> last accessed 17 September 2022.

[47] Article 12 provides a penalty between 1 and 5 years' imprisonment, plus a fine of 15,000 euros for each person entering irregularly. The following paragraphs then provides several aggravating circumstances like financial gain, transport of more than five persons, exposure of the migrants to high risks for their lives etc. Since at least these last two circumstances apply in most cases, the usual penalty applicable to (forced) smugglers ranges from 5 to 15 years' imprisonment, in addition to the fine of 15,000 euros for each person transported.

[48] The Prosecutor General of Rome declared that the Italian authorities were aware that scafisti often are "migrants press-ganged as part of the payment or obliged to take the helm" (See again Giovanni Salvi, 'New Challenges for Prosecution of Migrants Trafficking: From Mare Nostrum to EUNAVFOR MED. The Experiences of an Italian Prosecution Office' [2016] The Hague, Intervention at the Consultative Forum of European Prosecutors General of the European Commission and Eurojust <www.procuracassazione.it/procurageneraleresources/resources/cms/documents/SALVI_forum_The_Hague_2016.pdf> accessed 8 September 2022.

[49] Corte cass, *Prosecutor v CS*, Judgment, First Section, No 12619 2019.

[50] On the contrary, for a decision on the applicability of Art. 54: Tribunal of Palermo, *Prosecutor v SJ and BD*, Judgment, Section of the Judge for the preliminary investigations, No 4114 2016.

deterrent to departures. In these cases, moreover, convictions not only affect the wrong people but may even have further consequences if, for example, the alleged smuggler is an asylum seeker: in these cases, conviction for the crime of smuggling may restrict the access to asylum procedures and result in denial or exclusion from international protection. Once again, we can see *crimmigration* making its way in the form of an evident overuse of criminal law. These prosecutions directly hit migrants and turn into another 'deterrence tool' against the migratory phenomenon. At the expense, as always, are the rights and personal freedom of migrants.

As in the case of the criminal prosecution of NGOs, an intervention by the Legislator seems indispensable. Without denying State's legitimate will to continue the fight against trafficking in persons, it is necessary that the current instruments used for this purpose (Article 12 Consolidated Text on Immigration) be revised in their wording, thus enabling prosecutors and judges to distinguish the 'real traffickers' affiliated and inserted in a criminal organisation from those who, forced by necessity, by the threat or by the need to leave their country at any cost have agreed to drive a dinghy in the Mediterranean or use a compass in order to save themselves.

The continued absence of intervention by the Legislator allows subjects other than the smugglers (the NGOs and the migrants themselves) to continue to be investigated and convicted. This is to be read as a desire to incriminate, albeit indirectly, the migratory phenomenon with the intention of achieving a deterrent effect on departures.

3. Administrative expulsions and detentions: the other instruments for crimmigration

After having observed the spread of crimmigration in criminal law, in the next paragraphs we will analyse the features of some instruments that, although formally unrelated to criminal law, present forms and effects typically attributable to it.

Right from the outset, we feel it is important to observe that, although different in form and substance, these instruments follow a criminalising intent: they are aimed at removing, isolating, and detaining the foreigner[51]. The overall view that this contribution wants to give requires to correlate the instruments of criminal law we have just seen with these 'other instruments', striving to understand how it is precisely in their combined use that the strength and insidiousness of crimmigration is shown. On the contrary, the use and preference given by the Legislator today to administrative instruments - ideally less afflictive and severe than criminal law - could suggest that the policy has chosen to soften its sanctioning response to the migration phenomenon. An overall

[51] Among the main theories investigating the reasons at the origin of crimmigration: David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (The University of Chicago Press 2002); Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2007); Stephen Legomsky 'The new path of immigration law: asymmetric incorporation of criminal justice norms' (2007) 62(2) Washington and Lee Law Review; David Alan Sklansky, 'Crime, Immigration, and ad hoc Instrumentalism' (2012) 15(2) New Criminal Law Review 157-223); the 'Membership Theory' elaborated by Juliet Stumpf observes a parallelism between expulsion and criminal punishment. In extreme synthesis, this reading of the theory sees in the membership theory - that is, in the tendency to reserve the enjoyment and respect of important individual rights only to 'members of the group' - the cause of the rapprochement between criminal law and administrative law, that is, of two instruments which, although born for different purposes, today find themselves pursuing the same end: the definition of the boundaries of society, establishing who can remain in society and who must instead be excluded, either by segregation from the rest of society (prison) or by physical removal (expulsion). See: Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56(2) American University Law Review 367.

reading of the phenomenon, however, allows us to observe that the weakening of the direct incrimination of migrants is not a symptom of a renewed criminal policy but the outcome of a choice dictated by the search for more efficient and effective instruments. This is the context in which expulsions and administrative detention of foreigners operate.

Compared to the criminal law instruments we have examined so far, these instruments prove highly effective 'useful weapons' in the fight against irregular migration. Their effectiveness derives, essentially, from a lesser set of guarantees: their use does not necessarily depend on the commission of a crime and therefore, the guarantees of the criminal trial do not intervene, leaving their application and execution to the administrative authorities (the Prefect, the *Questore* and the Police). The 'agility' of these measures makes them an indispensable tool for States that - especially after a number of rulings by the European Courts that have limited the use of criminal law in the management of migration - seem to have abandoned the slower path of direct incrimination. In the next paragraphs we will try to illustrate how in Italy *crimmigration* moves through two instruments of administrative law: deportation and administrative detention.

3.1. 'Instead of punish…expel'. The multiform nature of expulsion

The forced expulsion (or deportation) of foreigners consists in the removal from the territory of the State. Expulsion is the most widely used instrument in the management of the migratory phenomenon because it allows States to achieve the main objective of their immigration policies: to expel unwanted foreigners.

At the European level, expulsions are addressed by the *Return Directive*[52] whose objective is to provide clear, transparent, and fair rules to define an effective return policy as a necessary element of a properly managed immigration policy.

In Italy, multiple forms of expulsion could affect a foreigner who does not have, or has lost, the right to stay in the national territory. The provision of different types of expulsion, responding to different needs, is symptomatic of the Legislator's "obsession" with this instrument: the material removal of the foreigner from the State is very often the only aim pursued by the Legislator, both when he sanctions foreigners with criminal law or administrative law.

Without the ambition to delve into the individual figures of deportation that coexist in the Italian legal system, we will try to offer a general overview to sketch out some possible reflections on the role of this instrument with respect to crimmigration.

First, we need to distinguish between administrative expulsions and judicial expulsions, depending on the authority appointed to issue them. In the first group, where the expulsion has an administrative nature, are included removals ordered by the Ministry of the Interior (for reasons of public order, state security or prevention of terrorism) or by the Prefect (in a series of cases referring both to the irregular presence and to dangerousness of the individual). The second group includes judicial expulsions which, ordered by the judge and related to criminal convictions, can be fully

[52] Council Directive (EC) 115/2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 (Return Directive). For a comment, among others: Diego Acosta Arcarazo, 'The Returns Directive: Possible Limits and Interpretation' in Karin Zwaan (ed), *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen, Wolf Legal Publishers, 2011); Anneliese Baldaccini, 'The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive' (2009) 11 European Journal of Migration & Law 1–17.

framed within the penal system. In fact, they can alternately take the form of a security measure (applied together with or instead of a sentence against a foreign offender deemed to be dangerous), a different sanction *in lieu* of the normal punishment or an alternative measure to detention. Often overlapping are the prerequisites underlying the different types of expulsion (irregularity of residence, danger for security and public order, thinning of the prison population, social dangerousness) but all, in general, seem to be united by an assessment of the unworthiness of the foreigner's stay in the national territory.

As for the way in which expulsions are carried out, we can observe that, despite the indications provided by the *Return Directive* regarding the preference for granting a time limit for voluntary departure, Italian law and practice continue to favour the forced accompaniment to the border; as a consequence the possibility for the foreigner affected by an expulsion order to request and obtain a deadline for voluntary departure becomes possible only in the rare cases in which the risk of absconding has already been ruled out. Finally, all expulsions are accompanied by a re-entry ban which, from the date of execution of the measure, prevents the foreigner from re-entering Italy for a period between three and five years (under the threat, again, of a custodial sentence).

There are essentially two problems associated with expulsions: first, it is not unusual that expulsion is used to achieve typical criminal law objectives, such as the maintenance of public order or the sanctioning of irregular migrants; as we mentioned in para. 2.1, the main offences that nowadays directly affect the foreigner are punished with a significant fine, which the foreigner is unlikely to be able to pay. However, the law also provides for various mechanisms to convert the unpaid penalty into expulsion (for example, the law provides the possibility to replace the fine provided for by the offence of illegal entry and stay in the territory with expulsion[53]). This is, on closer inspection, a unicum in the legal system: this is the only case where a fine can be replaced by a measure affecting personal freedom. Or again, only for the foreigner offender detention could be substituted by expulsion. It is easy to see how the normal aims pursued by alternative or substitutive measures (like the fight to the negative effects of short custodial sentences) seem to disappear. On the contrary, the foreign offender far from being set on a path of reintegration into society (like national offenders), is even more radically excluded from it: physically moved out of the national borders.

These features reveal the instrument's real nature: expulsion is a punishment reserved for foreigners only and its presence in the legal system is symptomatic of the Legislator's desire to hit irregular foreigners at any cost with sanctions - even non-criminal ones - that affect their freedom. In short, administrative detention replaces criminal detention in form and purpose.

3.2. The attack on the personal freedom of foreigners, the use of administrative detention as the last resort of crimmigration

The deprivation of liberty in the management of the migration phenomenon is the stage that more than any other highlights the hybridization between administrative and criminal law.

[53] See Art 16(1) Legislative decree 286/1998 (Consolidated Text on Immigration) and Art 62 bis Legislative decree 274/10 (Disposizioni sulla competenza penale del giudice di pace). Both articles provide for the possibility for the Judge to replace the penalty originally imposed with expulsion.

Normally, deprivation of liberty (a typical instrument of criminal law) expresses the maximum punitive severity allowed to the State and is therefore surrounded by robust safeguards, so that the power does not turn into arbitrariness.

Far less protected is the deprivation of personal liberty of foreigners implemented in Italy in the forms of administrative detention. In this context deprivation of liberty takes place in the absence of a criminal offence and of those basic guarantees (first and foremost, the rule of law) that normally surround the penal forms of deprivation of liberty. Since administrative detention is applicable only against foreigners, it ends up becoming a special form of detention.

This institution is nowadays an essential tool for European States in the management of the migration phenomenon after the CJEU's *El Dridi* judgment where a ban on use of criminal detention for irregular entry was affirmed. Administrative detention is thus the only way for States to detain irregular foreigners without even having to ensure the guarantees normally provided for by criminal law in similar cases.

In this paragraph we will try to enucleate the most significant profiles that make Italian administrative detention a clear instrument of crimmigration.

The ambiguity of the measure's content and functions already leaks out from the very name of the institution: in no text of domestic law does the Legislator use the word 'detention' that rather belongs to doctrine and jurisprudence; as a matter of fact, Italian laws prefer the use of the word 'trattenimento' (retention), without ever referring to the idea of detention or custody, thus formally ensuring to criminal law the exclusive power of detaining people[54]. This imprecision is far from unintentional[55]. Therefore, it seems that the Legislator has *avoided calling a spade a spade* in order to deny the existence of a real form of deprivation of liberty, reducing it to an organizational mode of reception or expulsion processes.

Administrative detention has been present in Italy for almost thirty years, since the southern coasts started to be affected by the first landings in the 1990s, coming at the time from Albania. There are mainly two type of administrative detention: *incoming detention* in *hotspots*, where migrants just after entering Italian territory wait to be sorted between those directed to expulsion and those who are allowed to apply for asylum; or *outgoing detention*, when the foreigner has already been tapped by a deportation order and, under Article 14 of CAI, has to stay in a Centre for repatriation (CPR) while waiting for repatriation to become materially possible. Alongside these two main hypotheses, administrative detention it is also implemented in other instruments, even less regulated, all having in common the deprivation of the foreigner's personal freedom: for example, detention in airport's

[54] This lexical phenomenon also affects other European countries. In France we find the *rétention administrative* (in the relevant *locaux de rétention* or *zones d'attente*); in Spain the Law refers to *internamiento* in the relevant *centres* in Spain. In the UK, where the word *detention* (as an alternative to *custody*) appears less timidly, the places where detention takes place continue to be called *processing centres* or *removal centres*.

[55] The intentionality of the terminological choice can be confirmed by the content of the report accompanying creation of migrant centres in 1998; here the Legislator which repeated that these places should be out of the penitentiary circuit (and its guarantees: one above all, Law n 354 of 26 July 1975). Nevertheless, the European Court of Human Rights showed to be disengaged from the literal qualification, paying more attention to the content of the measures than to the label given to them by States. The Court has on several occasions revealed the *true nature* of certain institutions which, behind names evocative of a humanitarian approach, concealed real forms of deprivation of liberty, as such deserving the guarantees offered by Article 5 ECHR. Even in Italy the Constitutional Court with Judgment n 105/2001 affirmed once and for all that the administrative detention of foreigners is a form of deprivation of liberty. In an *obiter dictum* destined to be recalled more frequently than the other principles expressed, the Judges saw in the administrative detention that "mortification of human dignity which occurs in every instance of physical subjection to the power of others, and which is a sure indication of the relevance of the measure to the sphere of personal freedom" (unofficial translation).

transit zones or border offices or, more recently, the practice of detention of migrants on ships while waiting for State authorities to allow them to dock in Italian ports[56].

All these forms of administrative deprivation of liberty raise questions of legitimacy due, essentially, to the inadequacy or even lack of a legal basis. In the silence of the law the discretionary powers of administrative Authorities and Police expand, threatening the fundamental rights of the persons targeted by these measures.

Among the various types of detention, the outgoing detention provided for in Art 14 is the most regulated at National and European level[57], but still faces many critical points, especially regarding the judicial authority that validates its application[58] and the absence of a valid normative source regulating the modes of detention, thus left to ministerial regulations. However, the level of protection is even more backward with regard to other forms of incoming detention, and it is on these, and in particular on *hotspots*, that we want to focus our attention.

The practice of detaining people who have just landed irregularly on Italian territory or have been brought there after rescue operations at sea goes back a long way (as early as 2011, the facts that led to the judgment *Khlaifia v. Italy* of the ECHR concerned the illegal detention of some Tunisian nationals who had just arrived on the Sicilian coast[59]). In 2015, the implementation of the *hotspot* approach adopted by the European Commission to cope with secondary movements within the territory of the Union, appointed Italy and other Mediterranean countries to carry out reporting operations on arriving foreigners (health screening, photo-identification, fingerprinting and a pre-identification) aimed at distributing them between asylum seekers (directed to the appropriate centres) and so-called economic migrants (transferred to CPRs, pending deportation). These activities, already affecting the personal freedom of the persons involved, until 2017 were *de facto* carried out towards people detained in *hotspots* in the absence of any legal basis. Only in 2017 the Legislator - prompted by the *Khlaifia* ruling that had condemned Italy by calling for an adjustment to the Convention of incoming detention practices – intervened with Law-decree n 13/2017[60].

Actually, the reform did not solve the problem: it provided that a foreigner tracked down while crossing the border irregularly or arriving in the national territory as a result of rescue operations at sea could be «led» (it did not use the word detain) «for the needs of rescue and first assistance at special crisis points» without giving any further information about the nature of such places and the modalities of detention. Then in 2018, Legislative Decree n 113/2018[61] provided for the possibility of detaining applicants for international protection in *hotspots* for identification purposes for a maximum of thirty days. This intervention had two consequences: *first*, it implicitly made clear that *hotspots* are 'closed centres', where detention of the foreigner takes place, despite being labelled as places deputed to assistance; *second*, it provided only a partial legal basis for the detention in *hotspots*,

[56] Francesca Cancellaro, 'Dagli hotspot ai "porti chiusi": quali rimedi per la libertà "sequestrata" alla frontiera?' (2020)3 DirPenCont-RivTrim 428

[57] At the European level some milestones are outlined by the *Return Directive* and others by the CJEU's interpretative work in the judgments, among others, Al *Chodor* (Case C-528/15 Al Chodor, C-528/15), *JN* (C-601/15 PPU - N) and *Kadzoev* (C-357/09 PPU [2009] ECRI-11189).

[58] The detention order, in fact, is validated by the Justice of the Peace, i.e. an honorary judge from outside the judiciary who, since 2000, has been entrusted with easy-to-solve issues. The detention of migrants is the only case in which the Justice of the Peace can take decisions concerning the personal freedom of persons.

[59] ECtHR, *Khlaifia and Others v Italy* [GC], Application No 16483/12 (15 December 2016)

[60] The Law-Decree was then convertend with amendments into Law 13 April 2017 n 146

[61] It was the so called 'Salvini decree' from the name of the former Interior Minister; the Law-Decree was then converted with amendments into Law 1 December 2018 n 132.

limited only to applicants for international protection: the presence of other migrants as well detained in such places still remains without any valid normative reference.
Another critical issue regarding incoming detention concerns the absence of any adequate means of judicial complaint to assert any possible violations of rights suffered by foreigners during detention. The issue was first raised by the Grand Chamber of European Court of Human Rights in the *Khlaifia*[62] judgment in 2016. This decision well photographed the Italian situation in 2016, which however little differs from the current one. While monitored by the Committee of Ministers of the Council of Europe, the first and only intervention on the matter can be found in Law Decree n 130/2020[63], which provided in favour of the foreigner administratively detained a complaint procedure through petitions or complaints to the National Guarantor of the Rights of Persons Deprived of their Liberty, a non-judicial Authority that can only make recommendations to the administration concerned.
Nonetheless, in December 2021 the Committee has decided to close the procedure having noted that the normative interventions adopted by the Italian authorities changed the legal framework governing detention in *hotspots*. Overcoming previous scepticism, the Committee found that preventive and compensatory civil remedies under Art. 700 Civil procedure Code (a fast-track procedure, of general scope, allowing to obtain the fulfilment of a civil obligation in simple cases) and Art. 2043 Civil Code (the general "tort" Italian figure), togheter with the new complaint to the National Guarantor are capable of ensuring to the migrant detained a concrete and effective possibility to address to a national judicial authority complaints regarding his or her conditions and obtaining adequate compensation when such conditions reach the threshold of severity required to qualify as inhuman or degrading treatment.
These profiles show the most obvious and serious problems with this instrument; however, it is its widespread use of administrative detention in the management of the migration phenomenon that is most perplexing. As with expulsions, this is a wholly exceptional measure reserved for foreigners only, which affects personal freedom in a way that is quite anomalous for administrative law: in fact, there are no other hypotheses of administrative deprivation of liberty provided for citizens in the absence of a crime. Its use seems to be a consequence of the impossibility, after the *El Dridi* judgment, of resorting to custodial criminal sanctions for immigration related offences, to avoid a slowing down in the process of deporting irregular foreigners. We have seen, in fact, that after 2011 the Legislator has 'lost interest' in crimes directly affecting the foreigner - now sanctioned only with fines - and has concentrated its interventions in expulsions and in the incrimination of different conducts, still related to the migration phenomenon. Administrative detention therefore remains the only way - even from a symbolic perspective - to detain irregular foreigners, showing the severity of the Legislator in this matter. The distorted use of an administrative instrument, its impact on the fundamental rights of the foreigner, its deterrent purpose and, last but not least, its close resemblance to criminal-type detention make it a typical instrument of crimmigration to be paid attention to.

[62] *Supra* (n 59)
[63] Law-Decree 21 October 2020 then converted with amendments into Law 18 December 2020 n 173

4. Conclusions: is this *crimmigration*?

The objective of this work was to investigate the presence and the extent of laws and practices featuring the crimmigration phenomenon in the Italian legal system: at the end of this path, it seems to us that the answer can only be affirmative. As immigration is often associated with public order and security issues, the instruments prepared for its management frequently resort to criminal law; even when administrative law is used, it affects foreigners with an outstanding intensity usually typical of criminal law.

These conclusions are based on the analysis of the instruments arranged by the Italian Legislator and, above all, on the observed effects that their combination produces. We started from the analysis of the most evident datum: the presence in the legal framework of crimes involving conduct that can only be held by foreigners (what we called *ad hoc crimes*). It emerged that, although still present in the Consolidated Text on Immigration, offenses affecting foreigners seems to be more symbolic than effective; at first sight they can be seen as 'blunt weapons' hardly used and (although still in force) now almost abandoned from the reform agenda, as the Legislator seems to prefer more agile and effective instruments like the ones offered by administrative law.

If a single instrument alone is already sufficient to raise suspicion about the existence of a project of criminalisation of the migratory phenomenon, its placement in a broader system, rich in intersections and cross-references, confirms this assumption. Consider, for example, the crime of irregular entry (Article 10bis): the strong limitations placed on this instrument just after its introduction, its scarce use and its substantial ineffectiveness would seem to show a weak response of the Italian Legislator to the entry and presence of irregular foreigners on Italian territory. However, we have observed that there are 'other instruments' alongside this crime, less visible but much more effective, that justify its permanence in the system. Looking at the mechanisms of substitution of punishment by deportation, for example, we have realised that the absence of prison sentences (since 2011 replaced by fines) in immigration offences has in fact been counterbalanced by a more intense use of deportation and administrative detention, i.e. measures that have a strong impact on personal freedom but are outside the criminal justice circuit. Crimes, still present in the system but 'ineffective', therefore operate as a *pretext* for the application of administrative instruments. The intense use of the 'other tools' - expulsions and administrative detention - ends up achieving the ultimate goal that Legislator had in mind when introduced immigration crimes: to remove and separate the irregular foreigner from the rest of society.

One exception to this trend is the use of criminal law no longer against migrants but rather against those who facilitate their entry or stay in the national territory. Here the sign of *crimmigration* is discernible in the way in which the incrimination of smuggling (Art. 12 Consolidatet Act on Immigration) have been formulated: the very vague and wide formulation – ad European and National level – allows not only the conduct of assistance to migrants provided by NGOs active in the Mediterranean but also some conducts of migrants themselves (self-smuggling) to fall in the meshes of this crime; once again crimmigration was present in the incrimination of the violation of the bans on entry and stay in the Italian territorial sea, specifically created to counter the docking in Italian ports of NGO ships returning from rescue operations.

These choices - of pure criminal law - appeared to us to be an exception to the general weakening of the use of criminal instrument and, as such, worthy of attention. In fact, these criminal policies - which do not introduce new offences, but exploit the broad wording of other offences, which already exist in the legal system to combat serious forms of crime - are as well expression of a will

to incriminate the migratory phenomenon through the repression of any conduct that shows solidarity with it: while not directly incriminating the migrant, these provisions formally introduced to counter the activities of traffickers give criminal relevance to helping behaviours, as well as what happens (also from a terminological point of view) for the support provided to criminals.

The absence thus far of convictions for NGOs (despite the many trials), shows the profound internal incoherence of the system that in a vicious circle, continues to prosecute conducts of solidaristic aid and assistance that international law and the judiciary recognize as legitimate and due. Apart from this trend, today the main features of the criminalization of migration are the administrative measures: expulsion and detention. The study of administrative detention in Italian law confirms the suspected presence of crimmigration, revealing the Legislator's intentions: after having chased the foreigner with a punishment that is practically impossible to execute (think of the fine for the crime of irregular entry or stay) or impossible to enforce (think of the strong limits on the use of custodial punishment coming from the CJEU's pronouncements), the only way to affect the personal freedom of the irregular foreigner is by administrative tools, in ways that, were they directed at citizens, would reasonably raise alarm and immediate declarations of constitutional illegitimacy. Instead, various forms of administrative detention of foreigners continue to be implemented and represent a key instrument of the entire system, presenting itself as a substitute for that prison sentence that, after *El Dridi*, the Legislator can not impose anymore. The serious gaps in guarantees that surround this instrument - from the absence of adequate legal bases to the lack of judicial remedies - have strong repercussions on migrants' rights and expose Italy to the risk of new condemnations by international courts.

At the end of this study, it seems reasonable to say that the whole set of instruments set up by the Italian Legislator to control and manage immigration have the typical characteristics of *crimmigration.* Criminal law - typically a symbol of the State's power to affect the fundamental rights of the individual - has become an instrument of immigration law, to which it lends its offensive capacity without, however, demanding the same guarantees, thus giving rise to a hybrid law, malleable and, above all, reserved only for foreigners.

Looking at Europe, the criminalistic approach to migration and its persistent perception as a security issue, is a test for the rights affirmed in its Charters and in Member States' Constitutions. The latent contradiction between the established principles and the reality, calls for a complete rethinking of the legal framework so that it may deal with the ever-increasing number of crises that today are unfolding on Europe's doorstep.

In the absence of a radical reform of the Facilitators Package as regards the incrimination of humanitarian operations and self-smuggling, some scholars propose that it be referred to the CJEU or at least that the requirement of profit among the constituent elements of the crime of aiding and abetting, and the mandatory provision of a humanitarian clause, be introduced.

Cautious optimism seems to have infiltrated the doctrine following the 2018 approval of the Global Compact for Safe, Orderly and Regular Migration in which, given the fight against smuggling and trafficking in human beings, more attention seemed to have been paid to the human rights of all those involved. The announced change, however, will have to be translated into concrete actions. Otherwise, the continuation or intensification of the repressive approach can only strengthen the links between immigration law and criminal law to the detriment of human rights, which would be valid only on paper.