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International Legal Principles, Penal Populism and Criminalisation of 'Unwanted Migration'

An Italian Cautionary Tale

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Abstract

The criminalisation of migration is one of the most explicit ways in which law generates, sustains, and even legitimizes hostility towards "unwanted migrants". This article will take into examination the criminalisation of "unwanted migration" by the Italian authorities and its relation to internationally established legal principles in the area of human mobility, arguing that the expansion of penal populism constitutes a danger for the balance among them. The article starts with an analysis of human mobility in international law and the "protection through prosecution" paradigm to highlight an inherent harmony of the aims of the legal systems dealing with human mobility from the humanitarian and criminal law perspective. Section two scrutinises the Italian case and the populistic distortion of the provisions and principles entailed in the field of transnational criminal law to counter human mobility. Section three reconnects the national criminalisation of migration with the international legal dimension and argues that the misuse of the transnational organised crime framework ultimately legitimises the violation of human and refugee rights and contravenes key international law principles.

Keywords

penal populism – irregular migration – international legal principles – international law – migrant smuggling – Italy

Introduction

Since the aftermath of World War II, the issue of transnational human mobility has been a transversal topic in various areas of international law, particularly in the field of protection of migrant workers and refugees fleeing persecution.[1] The political roots of the initial international legal developments on human mobility were based on the shared recognition of vulnerability of the people on the move, regardless of whether the move was motivated by the need to flee persecution or to look for more favourable working or living conditions. In the early 1990 the attitude of the international legislator towards the issue of human mobility changed, shifting from the recognition of the vulnerability carried by the people on the move and of the need to provide protection, to the need to counter the activities of those transnationally active Organised Criminal Groups (OCG) who seek to profit from these vulnerabilities. Indeed, in response to tighter immigration rules, the professionalisation of people aiding the illegal crossing of borders to obtain a material gain through the exploitation of the position of vulnerability of the migrants saw a substantial increase. This constituted a major push for the international legislator to shift the focus from the protection of the people moving across borders to the prosecution of those facilitating this move, consequently approaching the realm of criminal law to the regulation of human mobility.[2] It was this necessity to counter the surge of transnational organised criminal activities aimed at the exploitation of people on the move that gave rise to the Transnational Organised Crime Convention and its Smuggling and Trafficking Protocols in 2000.[3]

On the other hand, the European and national legislators dealing with the regulation of human mobility have been led by different aims and have shown an increased tendency to ratify and apply criminal law tools lacking normative

1 Among the most prominent examples of international legal instruments aimed at the protection of migrant workers and refugees see: International Labour Organization (ILO), Migration for Employment Convention (Revised) (1 July 1949) and UN General Assembly, Convention Relating to the Status of Refugees (28 July 1951), United Nations, Treaty Series, vol. 189, p. 137.

2 Elspeth Guild, 'Assessing Migration Management and the Role of Criminal Law', in Gian Luigi Gatta, Valsamis Mitsilegas and Stefano Zirulia (eds), *Controlling Immigration Through Criminal Law* (2021).

3 United Nations Convention against Transnational Organised Crime and the Protocols thereto, General Assembly Resolution 55/25 of 15 November 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime (Annex I) and Protocol Against the Smuggling of Migrants by Land, Sea, and Air, supplementing the United Nations Convention against Transnational Organised Crime (Annex II).

foundations and designed to suppress and deter the de-personalised phenomenon of unregulated human mobility, rather than those individual or groups profiting from the vulnerabilities deriving from it.[4]

The criminalisation of "unwanted migration" constitutes a paradigmatic example of the use of law as a deterrent to curtail undesirable conduct. It is one of the most explicit ways in which law generates, sustains, and even legitimises hostility towards "unwanted migrants". In recent times, populist political movements have instrumentalised criminal law precisely for the purposes of deterring and discouraging irregular departures and to create a hostile environment both for those irregularly crossing the borders and those assisting them. Against this backdrop, this article argues that the repressive function that the criminal law is increasingly taking vis-à-vis "unwanted migration" is the result of the creep of populistic political trends in the criminal domain, which results in incompatibilities with several internationally upheld legal principles.

To achieve this goal the article will be structured in three sections. Section 1 will examine the duality and compatibility of the protecting and criminalising functions fulfilled by the international law systems concerned with the regulation of human mobility, including refugee law, human rights law, the law of the sea and transnational criminal law. It will argue that although these systems are aimed at regulating different aspects of the cross-border movement of people, the legal interests that they seek to protect are similar. Consequently, the provisions included in them should not give rise to clashes between them. Nevertheless, the instances of penal populism contort the balance of the legal interests protected in the international legal system to 1. sooth the electorate's security needs against a perceived security threat posed by the de-personalised phenomenon of unregulated human mobility and 2. avoid compliance with the protection duties and obligations deriving from the international legal domain.

To support this point, section 2 will take into examination the criminalisation of human mobility and its facilitation operated by the Italian legislators. The section will show how the creep of the populistic anti-immigration political rhetoric has instrumentalised the transnational criminal law framework on migrant smuggling and human trafficking to "invade" the national legal domain. This, in turn, has enabled the compulsive production of norms carrying punitive powers deriving from the criminal law domain, lacking normative foundations and aimed at the creation of a legally hostile environment both for people on the move and for those assisting them. It further argues that this expansion of the populistic attitudes within the legal domain – showing

4 Marta Minetti, 'The Facilitators Package, Penal Populism and the Rule of Law: Lessons from Italy' [2020] New Journal of European Criminal Law 335.

a largely nationalistic character – threatens to erode the international legal dimension by pushing for interpretative changes of well-established legal principles.[5]

Ultimately, section 3 will reconnect the analysis of the Italian criminalisation of migration, (legitimised not by the compliance with constitutional principles, but by electoral consensus) to the international legal dimension. It will show that this pervasive countering action against irregular(ised) human mobility results in violation of judicially established legal principles. It furthermore will show that the distorted application of transnational criminal law legitimises the violation of human rights of the migrants, creating clashes among several international legal regimes.

1 Human Mobility in International Law: Protection, Prevention and Prosecution

As stated in the introduction, since the aftermath of WWII, the attention of the international legislator to the issue of cross-border human mobility shifted from the recognition of the vulnerability of the people on the move and the necessity to offer them protection, towards those individuals and/or OCGs profiting of these vulnerabilities, and the necessity to counter their activities.

In fact, the ratification of the International Labour Organisation Convention 97 of 1949 was led by the recognition of the increased mobility caused by the aftermath of the global conflict and the necessity to protect migrant workers' rights.[6] In addition to the provisions included in international labour law, the issue of the protection of people on the move fell into the umbrella reach of the legal triad composed by international humanitarian law-international refugee law-international human rights law.[7] In fact, the origin of the post-WWII conception of the three systems is rooted in the recognition of the inherent dignity and worth of every individual,[8] of the vulnerability of these individuals

5 Heike Kreiger, 'Populist Governments and International Law' (2019) 30 *The European Journal of International Law* 971.

6 Ibid., p. 3.

7 Frances Nicholson and Judith Kumin, *A Guide to International Refugee Protection and Building State Asylum Systems: Handbook for Parlamentarians N 27, 2017* (Inter Parliamentary Union and United Nations High Commissioner for Refugees 2017).

8 Recognised and codified in law in art. 1 of the Universal Declaration of Human Rights.

exacerbated by armed conflicts,[9] and of their right to flee these conflicts and look for safety in other states.[10]

More specifically, the *travaux preparatoires* as well as article 1 of the Refugee Convention highlight the "well-founded fear of persecution" on a variety of grounds for anyone outside the country of nationality. The wording of article 1 suggests that vulnerability of the people falling under the definition of refugee is originated by their move across borders and by the persecution they would face if returned to the country of origin.[11] The aims of the international legislator drafting and ratifying the legal instrument are to identify migrants who cannot be returned, in order to assess their vulnerability to future persecution and serious harm and to provide protection against that risk. Asylum seekers and refugees are thus protected by two set of rights: those rooted in their humanity and codified in international human rights law and those specifically granted to migrants fleeing persecution or war. The same aims of provision for protection are also at the root of the customary international law principle of *non-refoulement*, forbidding States receiving asylum seekers to return them to the country of origin where they are at risk of persecution.[12]

The other side of the coin for the protection aims fulfilled by the humanitarian-refugee-human rights legal triad and its complementary principles, is considered to be filled by the field of international criminal law: the body of law aimed at punishing and prosecuting criminal conduct in armed conflict.[13] The main aims of the Rome Statute and the constitution of the International Criminal Court, however, were led by the need to end impunity for those crimes which until then were considered to be part and consequences of armed conflict.[14] The crimes codified in article 5 to 8 of the Rome statute

9 The regulation of armed conflicts and the protection of civilians are the main subject of international humanitarian law, the most part of which is codified in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977.

10 Guy S Goodwin-Gill, 'International Refugee Law in the Early Years' in Cathryn Costello, Michelle Foster and Jane McAdam eds. *The Oxford Handbook of International Refugee Law* (2021); Rafiqul Islam, 'The Origin and Evolution of International Refugee Law' in Rafiqul Islam and Jahid Hossain Bhuiyan (eds.) *An Introduction to International Refugee Law* (2013).

11 United Nations General Assembly, Convention Relating to the Status of Refugees (28 July 1951), United Nations, Treaty Series, vol. 189, p. 137.

12 Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interceptions at Sea and the Principle of Non-Refoulement' (2011) 23 *International Journal of Refugee Law* p. 443.

13 Ibid., p. 8 and United Nations General Assembly, Rome Statute of the International Criminal Court (17 July 1998).

14 United Nations General Assembly, Rome Statute of the International Criminal Court (17 July 1998), preamble.

create obligations on the international legal level that are directly applicable to the individual without needing the transposition in the domestic legal frameworks of the states. The scope of the Statute, despite including specific provisions against slavery, rape, and forced prostitution, is mostly limited to the crimes committed in the context of armed conflict, leaving a criminal law vacuum between the international dimension of armed conflict and the limited national law jurisdiction in terms of enforcement and provision of protection for people on the move.[15] It is in the need to fill this void perceived both by the national and international legislators, particularly in the areas concerned with the crimes of migrant smuggling and human trafficking, that the field of transnational criminal law (TCL) has its roots.[16]

International attention to the issue of 'Migrant Smuggling' has been triggered by the *Golden Venture* events of 1993, which culminated in the drafting of the International Maritime Organisation's (IMO) resolution on "Enhancement of Safety of Life at Sea by the Prevention and Suppression of Alien Smuggling by Ship": the precursor of the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol).[17] In December 1993, the UN General Assembly called for the addition of migrant smuggling to the agenda of the annual meeting of the Commission on Crime Prevention and Criminal Justice, shifting the international public discourse towards the criminal law framework. Parallelly, with the surge of crimes harming both public and private interests and occurring across borders, the international (and national) legislators found themselves and their countering actions blocked by jurisdictional barriers and a lack of common definitions, resulting in inefficient law enforcement response and increased impunity. The term "transnational crime" was first used in the international legislative context in 1975 at the fifth UN congress on Crime Prevention and the Treatment of Offenders, referring to those

15 Ibid.

16 Neil Boister, *An Introduction to Transnational Criminal Law* (2012).

17 The *Golden Venture* was a Chinese vessel carrying 236 Chinese migrants who had each paid a large amount of money to reach the US irregularly. The Vessel was run shore the coasts of New York and the migrants were told to jump in the water to be picked up by another vessel, which never arrives. Ten of the migrants died and the rest was deported back to China. More information on the events available here: The Golden Venture, Plus 100,000' *The New York Times* (9 June 1993) p. 20 available at: https://www.nytimes.com/1993/06/09/opinion/the-golden-venture-plus-100000.html. The draft resolution by the IMO refers to International Maritime Organization, 'Resolution A. 773(18) Adopted on 4 November 1993 – Enhancement of Safety of Life at Sea by the Prevention and Suppression of Unsafe Practices Associated with Alien Smuggling by Ships'. The Palermo Protocol refers to the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime.

crimes transcending international borders and having an impact on more than one state.[18] The field of TCL was born to respond to these coordination and cooperation needs on the law enforcement level and to harmonise the understanding of cross border crimes globally. TCL is a system that is aimed at the suppression of transnational organised crime, and at "transnationalising" criminal law by diffusing criminal offences that originate in one or more states through the agency of international law into other states.[19]

TCL has a horizontal and vertical nature: it consists of treaty obligations between states in criminal matters (horizontally binding) and vertical application of criminal law to individuals to meet the state's treaty obligation.[20] The main target of transnational criminal law is the criminal market. It is in this context and with these aims in mind that the UN Transnational Organised Crime Convention (UNTOC) and its additional protocols dealing with cross-border movement of people were ratified: to harmonise the legal frameworks on trafficking and smuggling, consequently facilitating coordination and cooperation among law enforcement and judicial authorities in order to target the criminal groups profiting from (or causing) the increased vulnerability of people on the move, while leaning towards a logic that advocated for the protection of the migrants concerned.[21]

It is thus possible to conclude that the aims underpinning the various legal systems dealing with human mobility on the international level are operating in harmony with each other, balancing the protection-vs-prosecution logic to ultimately uphold the rights of the people on the move. Nevertheless, the relation between criminal and immigration law is subject to radical changes when moving from the global to the national dimension. In fact, since the issue of unregulated travel framed as a security threat entered the international legal and political arenas in the late 1990s and early 2000s, there has been an

18 Article 3(2) of the UN Convention against Transnational Organised Crime states that an offence is transnational if a) it is committed in more than one State; b) it is committed in one state but a substantial part of its preparation, planning, direction, or control takes place in another state; c) it is committed in one state but involved an organised criminal group that engages in criminal activities in more than one state; or d) it is committed in one state but has substantial effects on another state.

19 Ibid., p. 17.

20 Ibid.

21 United Nations General Assembly, 'Prevention of the Smuggling of Aliens' available at: <https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1990-1999/1993/General_Assembly/A-RES-48-102.pdf> accessed 17 May 2022 and United Nations Office of Drugs and Crime Divisions for Treaty Affairs, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols Thereto* (United Nations, New York 2004).

increased tendency (mostly among western and particularly European states) to apply a plethora of legal tools derived from the criminal law domain to counter unwanted arrivals.[22] From the international to the European plane, the target of anti-migrant smuggling legislation shifts from the OCGs towards the migrants and those assisting them: a move that is transposed in the MS' domestic legislation.[23] The change of logic suggests a re-interpretation of international law as an instrument to further nationalist interests. This is typical of the approach of populist governments to international law and impacts the interpretation of the relationship between national and international law: the former should prevail where international law is perceived to be detrimental to the interests of the population. This in turn results in a cherry-picking approach to the application of international norms and principles.[24]

2 The Populistic Abuse of the Transnational Organised Crime Convention: The Italian Criminalisation of Migration

Riding the wave of increased public attention on transnational organised crime, its association with the issue of transnational human mobility and the rhetoric advocating for the necessity to counter these crimes, the European legislator followed suit and 2002 ratified two regional instruments calling for the inclusion in the Member States' (MS) legal frameworks of provisions criminalising trafficking in human beings and the facilitation of irregular crossing of borders.[25] The shortcomings and defaults of the European Facilitators' Package are the subject of extensive analysis carried out in a previous study conducted by the author and published 2020.[26] For this reason, despite the close interrelation between the EU and the Italian criminalisation of human mobility, to

22 Eighth United Nations Congress on Prevention of Crime and the treatment of Offenders, Havana, September 1990, *Travaux Preparatoires* p. 13; For analysis of the historical-legal background, see Moreno-Lax, *Accessing Asylum in Europe* (2017) pp. 117–133.

23 Ibid., p. 1.

24 Ibid., p. 6.

25 The EU definition of trafficking in human beings is codified in Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA OJ L101/1. The so-called Facilitators Package is formed by the Council Directive 2002/90/EC of November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/17 and the Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L 328/1.

26 Ibid., p. 1.

avoid redundancies, this section will take into examination the Italian codification of the anti-smuggling provision and its relationship with the transnational law equivalent. It will be aimed at showing that the anti-immigration populist rhetoric that has characterised the national political arena has instrumentalised the TCL framework to purport its political agenda.

In fact, since Italy switched from a country of strong emigration to strong immigration in the 1980s, the national legislator has adopted the pragmatic and instrumental use of penal measures and created new offences tailored to respond to the perceived security threats posed by the irregular entry and presence of migrants in the territory.[27] The creation of criminal law tools to deal with breaches of immigration law developed jointly with EU efforts to securitise border controls culminated 1998 with the ratification of the so-called Consolidated Text on Migration (CTM), Article 12 of which criminalises the facilitation of illegal entry into Italian territory and was meant to transpose both the contents of the UN Smuggling Protocol and the EU Facilitation Directive.[28] The provision is extremely wordy and subject to heated controversy both in the academic and judicial arena due to its lack of normative foundations and the over extensive reach of its scope. In fact, similarly to the European codification of the crime, the Italian transposition of the of the facilitation of illegal entry omits the purpose element of financial or material gain. This results in a substantial broadening of the scope of the Italian anti-smuggling law, compared to its international counterpart. More specifically, the absence of the financial gain element as purpose element of the crime opens the scope of the criminalising action to include not only OCGs profiting of the vulnerabilities of people on the move but also actors facilitating or aiding the migration process for humanitarian reasons.[29] The wordiness and intricacy of this provision results in a lack of clarity surrounding the legal interest protected and the overall function fulfilled by the law. Additionally, the lack of one of the constitutive elements of the criminal offense (the *mens rea*) taints its legitimacy as a criminal law measure, since in Italian criminal law absolute liability crimes constitute a rare exception and thus both *mens rea* and *actus reus* elements are normally required for a criminal offence to be considered

27 Stefano Zirulia, 'Articolo 12-D. Lgs. 286/1998' in Emilio Dolcini and Gianluigi Gatta (eds), *Codice Penale Commentato* (2015).

28 Decreto Legislativo 25 luglio 1998, n 286-Testo Unico delle Disposizioni concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero, article 12.

29 Valsamis Mitsilegas 'The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law' in Maria Joao Guia, Maartjevan der Woude and Joanne van der Leun (eds), *Social Control and Justice in the Age of Fear* (2012).

as such.[30] Furthermore, this lack of clarity combined with the absence of interpretative guidelines results in inconsistencies and contradictions when applied by the courts. It also leads to an expansion of the arsenal of legal tools available to prosecutors to counter irregular arrivals and target the humanitarian assistance provided by search and rescue NGOs in the Mediterranean.[31] In this way, the Italian codification of the crime of facilitation of illegal entry constitutes an emblematic example of the expansion of populistic politics in the criminal law field on the normative, judicial, and prosecutorial levels.[32]

The Italian management of irregular migration has raised international attention, particularly since 2017: year in which the countering measures against irregular migration have shifted from the criminalisation of the irregular entry of the migrant to those actors facilitating their entry. In fact, Italian authorities have started applying criminal law tools to restrict the work of NGOs rescuing migrants in distress at sea and for their prosecution of civil society members, by accusing them of facilitating the illegal entry and stay of "unwanted migrants" in Italian territory.[33] The dangers of such an approach have already been highlighted by the Canadian Supreme Court in *R v Appulonappa* [2015] SCR 754. In that case, the provisions of the *Immigration and Refugee Protection Act* SC 2001 (IRPA) criminalising the smuggling of migrants were declared to be unconstitutional 'insofar as [it] permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members'.[34] The Court concluded that the provisions contained in s 117 of the IRPA were 'depriving the persons of liberty in a manner that violates the principles of fundamental justice against gross disproportionality and vagueness' and highlighted its incompatibility with the Canadian constitutional principles.[35]

30 Nicola Canestrini, 'Basic Principles of Italian Criminal Law' (Canestrinilex, 26 March 2012) available at <https://canestrinilex.com/en/readings/italian-criminal/> accessed 13 January 2022.

31 For more on the intricateness and shortcomings of article 12 of the Consolidated Text on Migration see Vincenzo Militello and Alessandro Spena, *Between Criminalization and Protection: the Italian Way of Dealing with Migrant Smuggling and Trafficking within the European and International Context* (2019). Examples of judgements highlighting interpretative inconsistencies are available at Cassazione Penale sez. un. 21/06/2018 no 40982; Cassazione penale sez. I, ordinanza 15 marzo 2018 (ud. 10 gennaio 2018) no 11889; Cassazione penale sez. I 31/03/2017 no 45734; Cassazione penale sez. I 31/03/2017 no 45734; Cassazione Penale sez. I 25/03/2014 no 40624.

32 Ibid., p. 1.

33 Ibid., p. 28.

34 *R v Appulonappa* [2015] SCR 59 [5].

35 Ibid.

Debates regarding the populist (ab)use and symbolic application of criminal law measures to counter human mobility and its facilitation have inflamed the academic and public arena. In fact, populism has normally been connected with the political rather than legal sphere and has been deemed to be setting its roots in the research of electoral consensus based on the rhetoric of exclusionary identity politics, on the mass clientelism that arises from the 'broken promise of democracy'.[36] In this climate of mistrust in the democratic processes, the field of criminal law, particularly due to its potential to be symbolically applied, becomes the preferential area in which the populistic discourse finds immediate application. It is in these diffused punitive instances and the expressive political orientation guided by electoral consensus gained through the promise of quick, exemplary, and definite intervention against a perceived common enemy that the concept of penal populism finds its expression.[37]

In this climate of insecurity in which the Italian and the foreigner are (artificially) counterposed, the compulsive production of criminal law measures to counter irregular migration has flourished. Among the characteristic aspects of penal populism in the field of the production and application of criminal law tools to counter irregular migration and its facilitation there is the shift from constitutional principles to electoral consensus as a form of legitimation.[38]

In this sense the TCL frameworks on smuggling and trafficking becomes instrumentalised by the Italian authorities in order to legitimise the application of the Anti-Mafia code: a criminal law provision at the centre of very heated debates concerning its ambiguous nature and the very extensive expansion of investigative and prosecutorial powers it enables. Indeed, the fact that article 12 should allegedly transpose not only the contents of the Facilitators' Package but also the contents of the Smuggling Protocol, which has at its origin the fight against TOCS, enables the Italian authorities to rely on the antimafia legislation, which has been and still is at the centre of numerous debates due to its preventive and repressive nature. It is in this context of mutation of the *raison d'être* of criminal law that the debates around the populistic entanglement of immigration law, criminal law and administrative law have

36 Populism has been defined as "a highly moralised approach to politics that pitches a homogeneous 'we the people' approach, often conceived in ethnic or national terms, embodied in a leader who speaks for and expresses the will of that undifferentiated community against a presumptively 'corrupt' […] 'elite'", Nicola Lacey, 'Populism and the Rule of Law' (2019) 15 *Annu Rev Law Soc Sci* 79, p. 89.

37 John Pratt, *Penal Populism* (2007).

38 Luigi Ferrajoli, 'Il Populismo Penale nell'Etá dei Populismi Giuridici' (2019) 1 *Questione Giustizia* p. 79.

been conducted.[39] The preventive function adopted by criminal law, fed by the need for reassurance of security from future crimes, results in an increased relevance and powers of law enforcement agencies in charge of combating a de-personalised criminal phenomenon (in this case the Mafia and irregular migration) rather than a specific perpetrator.[40] The connection between the concept of transnational organised crime and the Italian organised crime – *Mafia* – results in the applicability of a variety of preventive measures (including seizure and confiscation) to alleged trafficking and smuggling situation and in the investigations started against the humanitarian actors accused of those crime. These measures, however, have applied to frustrate the activities carried out by the NGOs saving lives in the Mediterranean.

The Courts have made significant efforts to counter this populistic creep, with the most prominent example being the decision of the judge of Agrigento, upheld by the Court of Cassation in 2020, acquitting Carola Rackete, captain of the NGO vessel *Sea Watch 3*.[41] This case has been particularly relevant for the evolution of Italian jurisprudence on the prosecution of NGOs active in the Mediterranean. For the first time since 2017, when the IUVENTA rescue vessel was impounded, the Court of Cassation released a judgment on the relationship between the duty of rescue at sea and the power and authority to detain vessels to counter irregular migration. The judgment clarifies a series of legal principles, establishing the prevalence of the duty to rescue over the sovereign prerogative to defend national borders.[42]

The analysis of the Italian case has shown how the populistic distortion and (ab)use of criminal law tools result in the proliferation of countering measures against human mobility. It has also shown how the aims and principles TCL can be instrumentalised to de facto pursue nationalistic interests. These interests however are in direct contradiction with those protected and upheld in the international legal arena, and consequently give rise to clashes with various internationally recognised principles, stemming from the Law of the Sea, Refugee law, Human Rights law, Transnational Criminal Law, and Customary Law.

39 Corte Costituzionale, sentenza 250, 2010.

40 Gunther Jakobs, 'Zur Theorie des Feindstrafrecht' in Henning Rorenau and Sanyun Kim (eds), *Straftheorie und Strafgerechtigkeit* (2010) p. 167.

41 Cass. Pen. Sez III, no 6626, 20 Febbraio 2020.

42 Ibid.; Francesca Cancellaro, 'I Soccorsi in Mare ai Tempi del Covid-19: Riflessioni a Partire dal Caso Rackete' (2020) Sistema Penale available at: https://www.sistemapenale.it/it/webinar/webinar-i-soccorsi-in-mare-ai-tempi-del-covid-19-riflessioni-a-partire-dal-caso-rackete.

3 Human Mobility in National and International Law: Repression vs Protection

The analysis of the Italian case has attempted to show that the application of criminal law-derived tools used to perpetuate the populist anti-immigration agenda results in a distortion of the function of criminal law as a tool for repression and deterrence. It has further attempted to demonstrate that the vertical dimension of the transnational criminal law framework, opens the door to its instrumentalisation to fulfil nationalistic needs. This in turn results in the disruption of balance between the logic and aims underpinning the development of the international legal systems dealing with human mobility both with the aim of protecting people on the move and prosecuting those seeking to profit from their vulnerability, highlighted in section 2.

The criminalisation of humanitarian actors and the frustration of their Search and Rescue (SAR) activities through the seizure and confiscation of their vessel's rests on the applicability of the anti-mafia legal framework, enabled by the parallel created between the Italian codification of the facilitation of illegal entry and the transnational organised crime legal framework. The investigation against NGOs, and the consequent frustration of the SAR activities, result in the endangering of the lives of the migrants at sea and have effectively resulted in an increase in the number of migrants who lost their lives or went missing in the Mediterranean.[43] In this sense the instrumentalisation of the TCL framework has resulted in the violation of the legal interests protected by refugee and human rights law insofar as it not only allows but is source of legitimation for the criminalisation of the NGOs carrying out SAR operation. Human rights and refugee law should pose strong limitations on the ways in which States can regulate and respond against human smuggling.[44] Smuggled migrants are entitled to certain unalienable rights, including the right to life, by virtue of their humanity or by their status as asylum seekers or trafficking victims.[45] Additionally, the possibility that smuggled migrants might fall within the refugee definition is recognised in the Smuggling Protocol itself,

43 The IOM estimates that since 2014, the number of missing or dead migrants reached 24053. The latest shipwreck at the time of writing occurred on May 24, 2022, in the Central Mediterranean Route. For more information see International Organisation for Migration, *Migration within the Mediterranean*, available at https://missingmigrants.iom.int/region/mediterranean.

44 Anne T. Gallagher and Fiona David, *The International Law of Migrant Smuggling* (2015).

45 Ibid.

which makes specific references to rights, obligations and responsibilities arising under international refugee law.[46]

Yet, the Italian case shows that the expansion of the populistic anti-immigration discourse results in the compulsive ratification of legal instruments aimed at outlawing the entire category of migrants irregularly entering or staying within the territory of the state, regardless of the whether the border rules are breached in order to claim asylum. The criminalisation of irregular entry in these terms is therefore in direct contradiction with Article 31 of the Refugee Convention, concerned with the non-imposition of penalties on refugees on account of their illegal entry or presence in the territory.[47] Despite the right of the states to regulate and decide who can enter their borders and who cannot is one of the key features of state sovereignty, the international legal and political dimension has in multiple occasions highlighted the need for non-penalisation of irregular entry, as it increases the vulnerability of people on the move, including asylum seekers, by discouraging them from seeking assistance from the authorities for fear of prosecution or deportation.[48] Additionally, there is general consensus on the applicability of certain fundamental rights to all individuals stemming from international human rights law, regardless of citizenship, statelessness, or migration status, among which is possible to count the right to life, liberty and security of the person, freedom of movement, protection from inhuman and degrading treatment, protection from arbitrary expulsion, the right to recognition and equal protection before the law, and the right to non-discrimination.[49] The abuse of the criminal law framework to prevent and deter "unwanted arrivals" results in the endangering, if not the outright violation, of most of these rights, as the increase in the number of deaths at sea consequent to the obstruction of the SAR activities shows.[50]

46 Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime, article 19.

47 Ibid., 12; For more information on the provision see Cathryn Costello, 'Article 31 of the 1951 Convention Relating to the Status of Refugees', Legal and Protection Policy Research Series, United Nations High Commissioner of Refugees <https://www.unhcr.org/en-us/59afed607.pdf> accessed 1 February 2022 and Guy S. Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection' in response to the request of the Department of International Protection for the UNHCR Global Consultation, <https://www.unhcr.org/3bcfdf164.pdf> accessed 1 February 2022.

48 Ibid., p. 8.

49 Ibid., p. 45.

50 Isabella Lloyd-Damnjanovic, 'Criminalisation of Search-And-Rescue Operations in the Mediterranean has been Accompanied by Rising Migrant Death rate' (2020) Migration Policy Institute Information Source. https://reliefweb.int/sites/reliefweb.int/files/resources/

The fight against migrant smuggling at sea is also one of the political justifications behind the bilateral agreements between Italy and countries of origin and transit with the aim to externalise migration control.[51] The most prominent example involving the Italian case is given by the bilateral agreements and Memorandum of Understanding between the Italian and Libyan government. The prevention of irregular arrivals through the stipulation of bilateral agreements between the MSs and Third Countries has resulted in the established violation of the customary law principle *of non-refoulement*. In fact, in 2009 the former PM Berlusconi and the Libyan authorities signed the treaty of friendship, which led to the ECtHR *Hirsi Jamaa* judgment, establishing the violation of the *non-refoulement* principle by the Italian authorities.[52] The court expressed the judgment in favour of the applicants, finding that the undiscriminated return of the individuals without adequate screening violated the customary law principle of *non-refoulement*: the guarantee that no one should be returned to a country where they would face inhuman or degrading treatment.[53] Nevertheless, the judgement did not dissuade the Italian authorities from renovating cooperation with Libya through a dedicated Memorandum of Understanding, the implementation of which obviates the principle.[54]

Criminalization%20of%20Search-and-Rescue%20Operations%20in%20the%20Mediterranean%20Has%20Been%20Accompanied%20by%20Rising%20Migrant%20Death%20Rate.pdf.

51 Bill Frelick, Ian M. Kinsel, Jennifer Podkul, 'The Impact of Externalization of Migration Controls in the Rights of Asylum Seekers and Other Migrants' (2018) 4 *Journal on Migration and Human Security* 190.

52 *Hirsi Jamaa and others v Italy* App no27765/09 (ECtHR, 23 February 2012).

53 Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This principle applies to all migrants at all times, irrespective of migration status. More information on the principle of non-refoulement available at European Commission, 'Non-refoulement' (Migration and Home Affairs Glossary) <https://ec.europa.eu/home-affairs/pages/glossary/non-refoulement_en#:~:text=The%20principle%20of%20non%2Drefoulement,the%20Geneva%20Refugee%20Convention%20Protocol.&text=Initially%2C%20the%20prohibition%20on%20refoulement,to%20the%20protection%20of%20refugees.> accessed 9 January 2022. For more information on the violation of this principle by the Italian authorities see also Stefano Zirulia, 'I Respingimenti nel Mediterraneo tra Diritto del Mare e Diritti Fondamentali', (2012) Rivista AIC.

54 Governo di Riconciliazione Nazionale dello Stato di Libia e Governo della Repubblica Italiana, *Memorandum d'Intesa sulla Cooperazione nel Campo dello Sviluppo, del Contrasto all'Immigrazione Illegale, al Traffico di Esseri Umani, al Contrabbando e sul Rafforzamento della Sicurezza delle Frontiere tra lo Stato della Libia e la Repubblica Italiana*; for an analytical perspective in English see Elisa Vari. 'Italy-Libya memorandum of Understanding:

February 2nd, 2020 the two governments extended the memorandum enshrining the Italian obligation to provide economic assistance and technical support to the Libyan authorities (particularly the coast guard) to help preventing the departures of the migrants from the Libyan coasts.

In this sense, through the bilateral agreement, Italy is operating an extraterritorial migration control through political and economic pressure on the "weaker" geopolitical actor, who in turn forfeit international law duties deriving from the freedom of movement.[55] Departing states, in fact, have a dual duty: 1) not to impede departure and 2) to issue the relevant documentation for departure.[56]

In the context of border control today, the negative duty of States involves the not impeding any person from leaving, in line with ICCPR article 12 (1), of which Libya is potentially in breach as a result of these bilateral agreements.[57] Libya, as Italy, has defended their policies by arguing that the restrictions to the enjoyment of these rights are in line with their national laws and consistent with the anti-trafficking and anti-smuggling protocols, however the UN office of drugs and crime has repeatedly stated that the protocols do not permit border controls to interfere with the free movement of people.[58]

Moreover, the extraterritorial expansion of jurisdiction operated by the Italian authorities and enabled by the reliance on the anti-mafia measures is at odds with the provisions included in the Search And Rescue (SAR) Convention and the International Maritime Organization guidelines.[59] SAR zone designation, rather than expanding jurisdictional powers, instead allocates key search and rescue responsibilities, requiring States to intervene, to assist and

Italy's International Obligations' (2020) hastings International and Comparative Law Review.

55 Violeta Moreno-Lax, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control' (2012) 12 *Human Rights Law Review* 574.

56 Ibid.

57 United Nations General Assembly, International Covenant on Civil and Political Rights, United Nations Treaty series, vol. 999, 171.

58 UN Office on Drugs and Crime, International Framework for Action to Implement the Smuggling of Migrants Protocol (2011), p. 43 "[w]ithout prejudice to international commitments in relation to the free movement of people"; Migrant Smuggling Protcol, article 5.

59 Chapter 3 of the International Convention on Maritime Search and Rescue (SAR Convention) specifies that the State designating a SAR zone is not given additional jurisdictional powers beyond those recognised in UNCLOS in the provisions concerning territorial waters, the contiguous zone, and the right of "hot pursuit".

to retrieve those in distress at sea and deliver them to a "place of safety" on dry land.[60,61]

Furthermore, chapter 3 of the SAR convention as well as the guidelines developed by the International Maritime Organization specify that the State of the SAR zone is not given additional powers through the convention, but its signature instead endows the state with the responsibility of intervening with the aim to rescue the lives of those in distress.[62] On the other hand, and in complete contrast with the obligations rising from the mentioned international legal instruments, the Italian (and European) framework is aimed at protecting the legal interest of the integrity of the borders, territorial sovereignty, welfare of the Member State and public order.[63]

Ultimately, the repressive configuration of the criminal law to counter "unwanted migration" results in the frustration of the aims of the UNTOC and its Protocols, both in terms of the protection of victims and the prosecution of offenders. As the Italian example illustrates, the facilitation of unauthorised entry is prosecuted under the same provision regardless of whether the crime is committed for the purpose of trafficking and exploitation of migrants or of providing assistance in situations of distress at sea.[64] This results in a miscategorisation of trafficking victims as smuggled migrants (and consequently as offenders, according to the Italian legal framework) reducing access to the protections available for this recognised vulnerable group of victims.

Furthermore, the hardening of punitive measures for breaches of immigration law, with the concomitant reduction of channels to obtain international protection, results in the migrants entering into criminality as the only viable

60 Violeta Moreno-Lax, 'Protection of life at Sea and the Denial of Asylum' in Cathryn Costello, Michelle Foster and Jane McAdam (eds) The Oxford Handbook of International Refugee Law (2021); Violeta Moreno-Lax, 'Seeking Asylum in the Mediterranean: against a fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) *International Journal of Refugee Law*. Further information on the SAR obligations of both State and provate actors are available at Richard L Kilpatrick Jr and Adam Smith, 'Balancing the SAR Responsibilities of States and Shipmasters' in Valsamis Mitsilegas, Vileta Moreno-Lax and Niovi Vavoula (eds) *Seuritising Asylum Flows* (2020).

61 Enclosed in the United Nations Convention on the Law of the Sea (UNCLOS) 1994 UNTS 31363; International Convention on the Safety of Life at Sea (SOLAS),1980 UNTS 18961; International Convention on Maritime Search and Rescue (SAR Convention) 1985 UNTS 23489; International Convention on Salvage, 1989 UNTS 33479, This last one also states that specialised rescuers should receive a remuneration to compensate for their preparedness.

62 Cesare Pitea, 'I Soccorsi in Mare ai Tempi del Covid-19: Riflessioni a Partire dal Caso Rackete' (2020) Sistema Penale available ay: https://www.sistemapenale.it/it/webinar/webinar-i-soccorsi-in-mare-ai-tempi-del-covid-19-riflessioni-a-partire-dal-caso-rackete.

63 Ibid 4.

64 Ibid.

alternative to reach safety and access their (international law) rights, which also feeds the narrative of the "foreigner offender" on which the populist rhetoric is based. In fact, the relationship between populist political movements and international law is usually anything but idyllic; not least because international law and international legal institutions are often targeted by populist politicians.[65] Populist movements counterpose the global dimension to the national one and claim that international law infringes upon State sovereignty.[66] Accordingly, compliance with the international political and legal dimension is seen as an infringement, too. In Europe, and particularly in Italy, a large number of populist leaders have turned their critiques unto the EU and called for protection of national sovereignty against foreign intervention in the legal and political spheres.[67] Therefore, combining the narrative of the populist leader embodying "the true people's will" with the protection of national interests and State sovereignty, any measure that opposed the supposed "peoples' will", would be taken to violate State sovereignty.[68] Consequently, the upsurge and expansion of populist governments and the legislative and, in some instances, constitutional changes it enables, raises concerns on a potential broader crisis of an international legal dimension.[69]

4 Conclusion

The article has taken into examination the populistic roots of the criminalisation of migration by the Italian legislator to support the thesis that the

65 For more on the debated relation between national populist politics and the international law dimension see Paula Sandrin, 'The Rise of Right-Wing Populism in Europe: A Psychoanalytical Contribution' in Bettina de Souza Guilherme, Christian Ghymers et al. (eds), *Financial Crisis Management and Democracy: Lessons from Europe and Latin America* (2021); Christine Scwhoebel-Patel, 'Populism, International Law and the End of Keep calm and carry on Lawyering' (2019) *Netherlands yearbook of International law* 97.

66 Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2010) 17 *International Journal of Constitutional Law* pp. 576–578.

67 Peter Visnovitz, Erin Kristin Jenne, 'Populist Argumentation in Foreign Policy: the Case of Hungary under Viktor Orban, 2010–2020' (2021) *Comparative European Politics*; Franco Zappettini, Marzia Maccaferri, 'Euroscepticism between Populism and Technocracy: the Case of Italian Lega and Movimento 5 Stelle' 17 (2021) *Journal of Contemporary European Research* 22.

68 Ibid., p. 67.

69 Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1; Harold Hongju Koh, 'Is Trump's assault on international law working?' *Oxford University Press Blog*, (England, 11 March 2019), available at https://blog.oup.com/2019/03/trumps-international-law/.

repressive function that criminal law is taking in relation to unwanted immigration is the result of the creep of populistic political trends in the criminal law domain. It furthermore results in substantial incompatibilities with the aims of a variety of international legal systems stemming both from international humanitarian law and international criminal law.

The analysis conducted in section two focused on the systems of international law regulating aspects of human mobility. It has shown that the aims underpinning the various legal systems dealing with human mobility on the international level are operating in harmony with each other, regardless of whether the core of the legal system pivots around the aims of protecting those on the move or of prosecuting those aiming to profit from their vulnerabilities. On the international legal dimension there is a balance between the protection-vs-prosecution logic to ultimately uphold the rights of the people on the move.

Furthermore, the article has then taken into examination the Italian approach to irregular migration and its facilitation and has argued that the populistic creep into the penal field with the aim to counter human mobility endangers this balance. It also reveals a largely nationalistic character of the provisions and threatens to erode the international legal dimension by pushing for interpretative changes of well-established legal principles.

Ultimately, this study has argued that the distorted application of legal principles stemming from the TCL framework to counter human mobility through criminal law tools result in 1. non-compliance of the States to duties and obligations deriving from international law domain and in 2. the misuse of the transnational criminal law to legitimise the non-compliance with principles of refugee and human rights law.

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