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Special issue:

Enhancing the criminology of mobility: A need for interdisciplinary and multi-sited research approaches

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Cristina Fernandez-Bessa, Valeria Ferraris, Witold Klaus, Mieke Kox ■

Enhancing the criminology of mobility: A need for interdisciplinary and multi-sited research approaches. Introduction

Wzmacniając kryminologię mobilności. O konieczności interdyscyplinarnych i wielostanowiskowych badań i podejść. Wprowadzenie

Abstract: Scholars from various disciplines, geographic locations and research traditions have examined border dynamics – investigating what occurs at borders, how it happens, its origins, consequences and normative implications. This has given rise to the burgeoning field of the “Criminology of Mobility”, an academic discipline focussed on issues such as citizenship, race, gender, ethnicity and immigration control. This relatively new and innovative academic discipline delves into the processes of inclusion and exclusion both at and within state borders, often employing methods traditionally associated with the criminal justice system, law enforcement and military operations – frequently without the safeguards typically in place. Scholars in this field investigate how existing inequalities – particularly those related to gender, race, nationality and class – are exacerbated by new power structures and systems of belonging. We have observed that there remains a notable lack of diversity in research from global regions, as well as a lack of attention to the perspectives of those directly affected by or involved in border control mechanisms and their extraterritorial dimensions. This special issue is a step to address this gap.

Keywords: criminology of mobility, border criminology, crimmigration, criminalisation of migrants, border practices

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Abstrakt: Od wielu lat naukowcy z różnych dyscyplin, geograficznych lokalizacji i tradycji badawczych analizują dynamikę granic – badając, co się na nich dzieje, jakie praktyki są tam stosowane, gdzie te procesy mają swoje początki oraz jakie przynoszą konsekwencje. Ruch ten dał początek rozwijającej się dziedzinie „kryminologii mobilności” – dyscyplinie akademickiej koncentrującej się na takich kwestiach jak obywatelstwo, rasa, płeć, pochodzenie etniczne i kontrola imigracji. Ta stosunkowo nowa i innowacyjna dyscyplina zgłębia procesy włączania i wykluczenia, mające miejsce zarówno na samych granicach państwa, jak i w ich pobliżu. Działania państwa w tym zakresie często wykorzystują metody tradycyjnie kojarzone z systemem sądownictwa karnego, pracą organów ścigania i operacjami wojskowymi – często prowadzone są jednak bez typowych środków gwarancyjnych, które prawo powinno oferować. Naukowcy zajmujący się kryminologią mobilności badają, w jaki sposób istniejące nierówności – zwłaszcza te związane z płcią, etnicznością, narodowością i klasą – są pogłębiane przez nowe struktury władzy i systemy przynależności. W prowadzonych badaniach widoczny jest jednak brak różnorodności w odniesieniu do analizowanych regionów świata, mało uwagi poświęca się również perspektywom osób bezpośrednio dotkniętych mechanizmami kontroli granicznej lub w nie zaangażowanych oraz ich eksterytorialnym wymiarem. Ten numer tematyczny jest krokiem w kierunku wypełnienia tej luki.

Słowa kluczowe: kryminologia mobilności, kryminologia graniczna, kryminalizacja migracji, kryminalizacja migrantów, praktyki graniczne

European nation-states are actively seeking to regulate migration (Geiger, Pécout 2013). After periods of recruiting, welcoming and tolerating migrants, these states have shifted towards the belief that entry restrictions are necessary to manage migration flows and safeguard national security systems, particularly since the early 1990s (Burgers, Engbersen 1999; Franko 2020; van der Woude 2022). This shift has resulted in a growing emphasis on determining who is permitted to enter the country and who is not (Guiraudon, Joppke 2001; Staring, van Swaeningen 2021). Migration *policies* that once encouraged international migration have gradually given way to migration *controls* aimed at preventing the arrival of migrants deemed undesirable (Guiraudon, Joppke 2001; Bosworth 2008). Nation-states have introduced a broad array of control mechanisms to regulate entry and residency within their borders (Franko 2020). On the one hand, external migration controls are designed to prevent unauthorised entry by constructing so-called “metaphorical walls” (Finotelli, Sciortino 2013) based on, inter alia, joint visa policies, pre-admission screening, carrier sanctions, shared identification databases, standardised border control procedures, the operations of Frontex (the European Border and Coast Guard Agency), physical barriers, joint maritime surveillance and advanced technology (Carling 2007; Broeders 2009; Scholten 2014; Dekkers 2019; Vavoula 2022). On the other hand, internal migration controls focussed on preventing unauthorised residency and deporting illegalised individuals (Bauder 2014) have been developed, involving various exclusionary practices, identification mechanisms, immigration detention, re-entry bans and deportation (Brochmann 1999; Albrecht 2002; Brandariz 2021).

These control mechanisms aim to prevent the arrival of migrants without legal residency and to combat their unlawful presence. Whilst they are evolving in response to geopolitical, socioeconomic and sociocultural shifts (Franko 2020; Staring, van Swaaningen 2021), eight key trends have significantly reshaped the nature, structure and scope of migration controls in recent decades in Europe (cf. Kox 2024). Firstly, migration controls have become more restrictive, as European states have tightened immigration laws and introduced new mechanisms (Aas 2011; Aas, Bosworth 2013). Secondly, institutional cooperation has increased, shifting controls to international, intergovernmental and supranational levels (Guiraudon, Lahav 2000; Lavenax 2006). Thirdly, the EU and its Member States have increasingly externalised borders through agreements to monitor entry beyond their territories (Weber 2006; Gammeltoft-Hansen, Sørensen 2013). Fourthly, European authorities have adopted responsibilisation strategies, transferring some responsibility for migration control to local governments and non-state actors, compelling them to address unauthorised entry, unlawful residency and deportation procedures (Kalir, Wissink 2015; Kox, Staring 2022). Fifthly, the right to asylum has become central in policy and public discourse, to then be gradually restricted in practice through the development of strategies of pushbacks at borders and the new EU Pact (Goodwin-Gill 2011; Gammeltoft-Hansen 2013; Barnes 2022). Sixthly, scholars have observed the rise of “crimmigration”, the intertwining of migration control with crime prevention in laws, policies and enforcement practices (Stumpf 2006; 2013; van der Leun, van der Woude 2013). Seventhly, European states increasingly use digital infrastructures and databases to monitor and manage mobility (Kosłowski 2002; Ericson, Haggerty 2006; Lyon 2007; Ferraris 2023). Lastly, humanitarianism combines repressive control with care during migration enforcement (Pallister-Wilkins 2017; Kox, Staring 2022). These trends highlight the need for a more comprehensive and holistic approach to migration regulation and migration control practices (Kox 2024).

These developments have been accompanied by a surge in studies and publications on external and internal migration controls across Europe. Scholars from various disciplines, geographic locations and research traditions have examined border dynamics – investigating what occurs at borders, how it happens, its origins, consequences and normative implications. This has given rise to the burgeoning field of the “Criminology of Mobility”, an academic discipline focussed on issues such as citizenship, race, gender, ethnicity and immigration control (Aas, Bosworth 2013). This relatively new and innovative academic discipline delves into the processes of inclusion and exclusion both at and within state borders, often employing methods traditionally associated with the criminal justice system, law enforcement and military operations – frequently without the safeguards typically in place (Pickering, Bosworth, Aas 2015). Scholars in this field investigate how existing inequalities – particularly those related to gender, race, nationality and class – are exacerbated by new power structures and systems of belonging (Bowling 2013; van der Woude 2023). These issues are particularly pressing in light

of contrasting migration practices, such as the relatively welcoming reception of Ukrainian war refugees versus the broader crisis of receiving European asylum seekers, alongside the political shift towards far-right parties across Europe.

The term “Criminology of Mobility” is still widely used in academic debates. Yet, it has also been criticised as it supposedly does not quite convey that it is the movement of people itself being criminalised (Bosworth 2017). Some scholars prefer to speak of “border criminology” because the latter, according to Bosworth (2017), “captures more clearly the way in which this is a field of study which is trying to understand both things that are happening at the border but also things that are happening in our criminal justice system”. As we believe it is important to capture both what is happening at borders as well as what happens once migrants are en route, we prefer to speak of the criminology of mobility. By using this term, we aim to include the rationales and practices that are directly or indirectly associated with the current use of borders as well as all processes behind and because of the borders.

We have observed that there remains a notable lack of diversity in research from global regions (Brandariz et al. 2025), as well as a lack of attention to the perspectives of those directly affected by or involved in border control mechanisms and their extraterritorial dimensions (see also Pickering, Bosworth, Aas 2015). This gap, we believe, limits a comprehensive understanding of borders. To address this, the Working Group on Criminology of Mobility of the European Society of Criminology – formerly known as the Working Group on Immigration, Crime and Citizenship – seeks to bring together scholars from various disciplines, locations and research traditions across Europe to further advance the criminology of mobility. After all, a nuanced understanding of developments in migration, crime and citizenship requires collaboration among scholars with diverse backgrounds, who can share their insights and foster meaningful dialogue. To promote this collaboration, we strive to bridge gaps between scholars, disciplines, research traditions and methods to stimulate discussion and enhance this field of study. As part of this effort, we organised the conference “Migration, Crime, and Citizenship: Interdisciplinary and Multi-Sited Research Approaches”, held at Erasmus University Rotterdam in March 2023. Over 60 scholars from different backgrounds participated, exchanging ideas and research, and helping to create stronger connections between theories, insights and scholars working in the field of migration. Through these efforts, we hope to cultivate a more comprehensive and nuanced understanding of migration, crime and citizenship, paving the way for future research and informed policy development in this evolving field.

This issue

In this issue, participants of the conference are given the opportunity to present their findings to a wider audience in order to contribute – either directly or

indirectly – to the criminology of mobility scholarship. We present six articles which collectively examine various aspects of migration control, enforcement and migrant experiences across European borders, revealing common themes of procedural rigidity, the symbolic power of enforcement and migrant agency. By focussing on different localities and revealing both similar mechanisms and different outcomes, these contributions add to the criminology of mobility scholarship. For instance, Laure Deschuyteneer and Lars Breuls' study on return procedures in Belgium highlights how officials' decision-making often prioritises bureaucratic consistency over individual circumstances, echoing Perkowska's findings at the Polish–Belarusian border, where judges quickly process less serious cases by largely relying on indictments rather than personal investigation. Similarly, Carvalho da Silva's research on southern Spain reveals the criminalisation of young migrants labelled as human smugglers upon arrival, often without adequate understanding or legal representation, suggesting a systemic neglect of due process. Constanza Agnella and Eleonora Celoria's analysis of Italian immigration detention underscores the dual function of such policies: whilst detention has limited impact on actual deportations, it symbolically reinforces state sovereignty. In contrast, Michela Trinchese explores climate-driven migrations in Italy, advocating for legal reforms that recognise environmental migrants' unique needs, challenging traditional distinctions within migration law. Veronika Nagy's study shifts the focus to refugees' adaptive strategies along the Balkan route, highlighting how digital self-censorship practices enable them to navigate intense surveillance and assert their agency. Despite differing local contexts and case specifics, these studies expose a shared pattern of systemic control, legal rigidity and symbolic power, alongside different forms of migrant resilience and adaptation in the face of institutional constraints.

To conclude, we discuss the contributions to this special issue in more detail. Firstly, Laure Deschuyteneer and Lars Breuls delve into the decision-making process in return cases in Belgium. Their work is based on extensive research, including ethnographic fieldwork in the Immigration Office of Belgium in Brussels and interviews with the officials responsible for decisions in return procedures. Their findings were supplemented by the analysis of written decisions made by officials in return procedures. The paper aims to take a closer look at the work of street-level bureaucrats (Lipsky 1980) and the factors that influence their decision-making processes. The authors found that the main reasons are bureaucratic and pragmatic in nature and heavily rely on what they are used to doing and what solution they are used to choosing, which is supplemented by fears about what would hold up before the administrative court should the decision be appealed. The individual and their story, which should be at the centre of the procedure, seem to be of less importance to the officials than the procedural aspects. Such an approach raises questions about the legitimacy of such procedures and decisions that result from these processes, as they rather seem to be a form of structural violence imposed on people with precarious legal status – in this case, immigrants (cf. Borrelli 2018).

In a similar vein, Magdalena Perkowska's article analyses criminal court decisions in cases of facilitating irregular border crossings at the Polish–Belarussian border. Whilst the very topic of the cases differs significantly from Laure Deschuyteneer and Lars Breuls's study and just some of the research methods are mirrored in this paper – for which only court files constituted the basis of the research – several main findings remain similar. It seems that the judges wanted to make the cases quickly go away. They relied heavily on information from indictments prepared by prosecutors and rarely delved into the cases themselves, to the point that they did not take enough time to prove the perpetrators' guilt. The cases judges were dealing with were of low severity and mostly concerned random people who had assisted border crossers by transporting them. The sentences were rather repetitive across the cases and their pragmatic character was highly visible. The findings not only echo other research on the Polish justice system (Klaus 2024), but also contradict the assumptions that judges have more reflection on the cases they adjudicate upon and their decisions are more just. But this does not seem to be the case, since the similarities of decision-making processes between the judges in Perkowska's research and the administrative professionals in Laure Deschuyteneer and Lars Breuls's work are striking and highly disturbing.

Jacqueline Carvalho da Silva examines the consequences of judicial decisions on irregular border crossings, with a particular focus on the imprisonment of individuals accused of human smuggling. In this case study, we shift our focus to another external border of the European Union, namely the southern one, with a view to analysing in the context of anti-smuggling policies the response of EU Member States to the arrival of boats on their coasts. After contextualising the criminalisation of boat captains in Europe, this paper analyses the profile and the testimonies of young people imprisoned in southern Spain, who reported having gone to prison directly following their arrival on Spanish shores in dinghies. The research team identified this population profile whilst conducting fieldwork to ascertain the various profiles of individuals aged 18 to 30 incarcerated in Andalusian prisons. The significance of this finding prompted the research team to develop a targeted questionnaire for this particular group, which yielded distinctive insights into the Western Mediterranean route. The findings of the study – consistent with observations made regarding the Central Mediterranean route to Italy and the Atlantic route to the Canary Islands – indicate that detainees frequently demonstrated a lack of comprehension regarding their legal circumstances and often reported limited access to legal counsel. This suggests the potential for violations of due process.

The article by Constanza Agnella and Eleonora Celoria invites us to shift our attention towards an examination of the political implications of migration control. In particular, their work analyses the symbolic use by a number of Italian governments of immigration detention, or administrative detention as it is called in Italy, as a means of managing migratory flows. However, as the researchers demonstrate, this strategy does not appear to yield significant practical outcomes.

To this end, the authors relate the reforms of immigration detention to the quantitative data available on detained migrants. Whilst the recent reforms of the far-right government led by Giorgia Meloni include lengthening the detention of migrants to expand the deportations as a response to the increasing number of migrants arriving at Italy's borders, the researchers demonstrate that the capacity of detention centres has not increased significantly and that the rate of returns has remained stable. They conclude that whilst the detention of migrants serves practical purposes with regard to the deportation of a relatively small percentage of asylum seekers and irregular migrants, its symbolic function as a means of conveying a political message of strong state sovereignty and harsh border control are equally significant.

The fifth paper by Michela Trinchese explores climate change-induced migrations in Italy, examining the legal and social challenges through a sociolegal perspective. It is based on the concept of borders as tools of control and resistance, analysing the struggles related to international protection for environmental migrants. Migrations due to climate change challenge traditional legal and policy distinctions between persons in need of protection and economic migrants. The analysis of the Italian legal system highlights how case law has recognised forms of protection for environmental migrants, particularly through the so-called humanitarian protection, a national form of protection. The article argues for the need to reform legal frameworks to more comprehensively address climate migration, advocating for an approach that recognises the centrality of human rights and promotes social justice and inclusion.

Finally, the article written by Veronika Nagy explores a relatively unexplored topic: the bottom-up dynamics of avoiding surveillance. In particular, it focusses on how Syrian and Afghan refugees, especially along the Balkan migration route, engage in self-censorship practices in response to surveillance by state actors and border authorities. Rather than concentrating on traditional forms of self-censorship (e.g. restricting speech or written content), the paper emphasises how refugees manage the material aspects of their digital connectivity, such as selecting specific mobile devices, disabling certain features and altering how they use mobile networks to avoid detection. The text addresses the ubiquitous nature of mobile technologies, which contribute to empowerment, but also expose refugees to increased scrutiny, whilst avoiding oversimplified narratives that portray refugees solely as objects of control. Instead, it emphasises their resilience, tech-savviness and ability to assert autonomy in a heavily monitored environment. In conclusion, the study advocates for recognising refugees as active participants in shaping their digital identities and highlights the need for a more inclusive discourse that acknowledges their resistance to surveillance and their capacity for self-determination.

References

- Aas K. (2011). 'Crimmigrant' bodies and bona fide travelers: Surveillance, citizenship and global governance.' *Theoretical Criminology* 15(3), pp. 331–346. <https://doi.org/10.1177/1362480610396643>
- Aas K.F. and Bosworth M. (eds.) (2013). *The Borders of Punishment: Citizenship, Crime Control, and Social Exclusion*. Oxford: Oxford University Press.
- Albrecht H.J. (2002). 'Fortress Europe? Controlling illegal immigration.' *European Journal of Crime, Criminal Law and Criminal Justice* 10(1), pp. 1–22. <https://doi.org/10.1163/15718170220519506>
- Barnes J. (2022). 'Torturous journeys: Cruelty, international law, and pushbacks and pullbacks over the Mediterranean Sea.' *Review of International Studies* 48(3), pp. 441–460. <https://doi.org/10.1017/S0260210522000110>
- Bauder H. (2014). 'Why we should use the term 'illegalized' refugee or immigrant: A commentary.' *International Journal of Refugee Law* 26(3), pp. 327–332. <https://doi.org/10.1093/ijrl/eeu032>
- Borrelli L.M. (2018). 'Using ignorance as (un)conscious bureaucratic strategy: Street-level practices and structural influences in the field of migration enforcement.' *Qualitative Studies* 5(2), pp. 95–109. <https://doi.org/10.7146/qs.v5i2.104421>
- Bosworth L.M. (2017). 'Mary Bosworth on border criminology.' *Social Science Bites Podcast* 6 January.
- Bosworth M. (2008). 'Border control and the limits of the sovereign state.' *Social & Legal Studies* 17(2), pp. 199–215. <https://doi.org/10.1177/0964663908089611>
- Bowling B. (2013). 'Epilogue. The borders of punishment: Towards a criminology of mobility.' In K.F. Aas and M. Bosworth (eds.) *The Borders of Punishment: Citizenship, Crime Control, and Social Exclusion*. Oxford: Oxford University Press, pp. 291–306.
- Brandariz J.A. (2021). 'An expanded analytical gaze on penal power: Border criminology and punitiveness.' *International Journal for Crime, Justice and Social Democracy* 10(2), pp. 99–112. <https://doi.org/10.5204/ijcjsd.1659>
- Brandariz J.A., Fabini G., Fernandez-Bessa C., and Ferraris V. (2025). *Border Criminologies From The Periphery. Cross-national Conversations on Bordered Penalty*. London, New York: Routledge.
- Brochmann G. (1999). 'The mechanisms of control.' In G. Brochmann and T. Hammar (eds.) *Mechanisms of Immigration Control: A Comparative Analysis of European Regulation Policies*. New York: Routledge, pp. 21–28.
- Broeders D. (2009). *Breaking Down Anonymity. Digital Surveillance on Irregular Migrants in Germany and the Netherlands*. Amsterdam: Amsterdam University Press.
- Burgers J. and Engbersen G. (1999). *De Ongekende Stad I: Illegale Vreemdelingen in Rotterdam [The Unknown City I: Illegal Aliens in Rotterdam]*. Amsterdam: Boom.
- Carling J. (2007). 'Migration control and migrant fatalities at the Spanish-African borders.' *International Migration Review* 41(2), pp. 316–343. <https://doi.org/10.1111/j.1747-7379.2007.00070.x>

- Dekkers T. (2019). *Mobility, Control and Technology in Border Areas: Discretion and Decision-Making in the Information Age*. Leiden: University of Leiden. PhD Thesis.
- Ericson R.V. and Haggerty K.D. (eds.) (2006). *The New Politics of Surveillance and Visibility*. Toronto: University of Toronto Press.
- Ferraris V. (2023). 'Entangled in the technology-driven borderscape: Border crossers rendered to their digital self.' *European Journal of Criminology* 20(5), pp. 1740–1758. <https://doi.org/10.1177/14773708221086717>
- Finotelli C. and Sciortino G. (2013). 'Through the gates of the fortress: European visa policies and the limits of immigration control.' *Perspectives on European Politics and Society* 14(1), pp. 80–101. <https://doi.org/10.1080/15705854.2012.732390>
- Franco K. (2020). *The Crimmigrant Other: Migration and Penal Power*. London: Routledge.
- Gammeltoft-Hansen T. (2013). *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*. Cambridge: Cambridge University Press.
- Gammeltoft-Hansen T. and Sørensen N.N. (eds.) (2013). *The Migration Industry and the Commercialization of International Migration*. London: Routledge.
- Geiger M. and Pécoud A. (eds.) (2013). *Disciplining the Transnational Mobility of People*. London: Palgrave Macmillan.
- Goodwin-Gill G.S. (2011). 'The right to seek asylum: Interception at sea and the principle of non-refoulement.' *International Journal of Refugee Law* 23(3), pp. 443–457. <https://doi.org/10.1093/ijrl/eer018>
- Guiraudon V. and Joppke C. (eds.) (2001). *Controlling a New Migration World*. London: Routledge.
- Guiraudon V. and Lahav G. (2000). 'A reappraisal of the state sovereignty debate: The case of migration control.' *Comparative Political Studies* 33(2), pp. 163–195. <https://doi.org/10.1177/0010414000033002001>
- Kalir B. and Wissink L. (2015). 'The deportation continuum: Convergences between state agents and NGO workers in the Dutch deportation field.' *Citizenship Studies* 20(1), pp. 34–49. <https://doi.org/10.1080/13621025.2015.1107025>
- Klaus W. (2024). 'The meaning of 'just punishment' and the role of courts in transnational criminal justice procedures.' In J.A. Brandariz, W. Klaus, and A. Martynowicz (eds.) *Forced Mobility of EU Citizens: Transnational Criminal Justice Instruments and the Management of 'Unwanted' EU Nationals*. Abingdon: Routledge, pp. 70–99. <https://doi.org/10.4324/9781003254584-5>
- Koslowski R. (2002). 'Immigration, border control and aging societies in the European Union.' *The Brown Journal of World Affairs* 8(2), pp. 169–180.
- Kox M. and Staring R. (2022). 'If you don't have documents or a legal procedure, you are out!' Making humanitarian organizations partner in migration control.' *European Journal of Criminology* 19(5), pp. 974–993. <https://doi.org/10.1177/1477370820932079>
- Kox M.H. (2024). *Unravelling Unauthorized Migrants' Legal Consciousness over Time*. The Hague: Eleven.

- Lavenax S. (2006). 'Shifting up and out: The foreign policy of European immigration control.' *West European Politics* 29(2), pp. 329–350. <https://doi.org/10.1080/01402380500512684>
- Leun J.P. van der and Woude M.A. van der (2013). 'Ethnic profiling in the Netherlands? A reflection on expanding preventive powers, ethnic profiling and a changing social and political context.' In L. Weber and B. Bowling (eds.) *Stop and Search: Police Power in Global Context*. London: Routledge, pp. 92–103.
- Lipsky M. (1980). *Street-Level Bureaucracy. Dilemmas of the Individuals in Public Service*. New York: Russell Sage Foundation.
- Lyon D. (2007). 'Surveillance, security and social sorting: Emerging research priorities.' *International Criminal Justice Review* 17(3), pp. 161–170. <https://doi.org/10.1177/1057567707306643>
- Pallister-Wilkins P. (2017). 'Humanitarian rescue/sovereign capture and the policing of possible responses to violent borders.' *Global Policy* 8(1), pp. 19–24. <https://doi.org/10.1111/1758-5899.12401>
- Pickering S., Bosworth M., and Aas K.F. (2015). 'The criminology of mobility.' In S. Pickering and J. Ham (eds.) *The Routledge Handbook on Crime and International Migration*. London: Routledge, pp. 382–395.
- Scholten S. (2014). *Privatisation of Immigration Control? A Socio-Legal Study on the Role of Private Transport Companies in the Netherlands and the United Kingdom*. Leiden: Brill Nijhoff.
- Staring R. and Swaaningen R. van (2013). 'Irreguliere migratie en illegaal verblijf: Beleid, conflicten en contradicties' [Irregular migration and illegal residence: Policies, conflicts and contradictions]. *Tijdschrift over Cultuur and Criminaliteit* 3(1), pp. 3–14.
- Stumpf J. (2006). 'The crimmigration crisis: Immigrants, crime, and sovereign power.' *American University Law Review* 56(2), pp. 367–419.
- Stumpf J. (2013). 'The process is the punishment in crimmigration law.' In K.F. Aas and M. Bosworth (eds.) *The Borders of Punishment: Citizenship, Crime Control, and Social Exclusion*. Oxford: Oxford University Press, pp. 58–75.
- Vavoula N. (2022). *Immigration and Privacy in the Law of the European Union: The Case of Information Systems*. Leiden: Brill Nijhoff.
- Weber L. (2006). 'The shifting frontiers of migration control.' In S. Pickering and L. Weber (eds.) *Borders, Mobility and Technologies of Control*. Dordrecht: Springer, pp. 21–44. https://doi.org/10.1007/1-4020-4899-8_2
- Woude M.A. van der (2022). 'Criminology of the borderlands.' In D. Nelken and C. Hamilton (eds.) *Research Handbook of Comparative Criminal Justice*. Cheltenham: Edward Elgar, pp. 207–224. <https://doi.org/10.4337/9781839106385.00022>
- Woude M.A. van der (2023). 'Securitizing mobility: Profiling 'non-core' Europeans.' *Security Dialogue* 54(6), pp. 620–638. <https://doi.org/10.1177/09670106221125041>



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Behind the desk: Examining the decision-making and legitimization practices of immigration officials in return procedures in Belgium

Za biurkiem. Badanie praktyk podejmowania decyzji i ich uzasadniania przez urzędników imigracyjnych w procedurach powrotowych w Belgii

Abstract: Scholars have highlighted the crucial role that immigration officials play as “street-level bureaucrats” in the implementation of restrictive immigration policies. This study describes the working and decision-making practices of immigration officials in return procedures in Belgium, based on observations, expert interviews, and an analysis of case law. We demonstrate that their work primarily involves desk work and writing justifications in their decisions. Their decision-making is characterized by a heavy sense of pragmatism and standardization, primarily focusing on “what holds up in administrative court.” In return procedures, Belgian immigration officials therefore experience little need for legitimization work: from their perspective, legitimization primarily entails meeting administrative burdens of proof. Our analysis indicates that this distanced administrative system disadvantages the affected migrants, especially considering that the appellate body evaluates procedural aspects of the decision-making rather than conducting in-depth case (re-)evaluations.

Keywords: immigration officials, administrative decision-making, desk work, legitimacy, legitimization work, crimmigration

Abstrakt: Uczeni podkreślają kluczową rolę odgrywaną przez urzędników imigracyjnych jako „biurokratów pierwszego kontaktu” we wdrażaniu restrykcyjnej polityki imigracyjnej. W niniejszym artykule, na podstawie obserwacji, wywiadów z ekspertami i analizy orzecznictwa, opisaliśmy pracę

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urzędników imigracyjnych w procedurach powrotowych w Belgii i ich praktyki podejmowania decyzji. Pokazujemy, że praca urzędników polega przede wszystkim na pracy przy biurku i pisaniu uzasadnień decyzji. Proces decyzyjny charakteryzuje się w dużym stopniu nastawieniem na pragmatyzm i standaryzację oraz koncentruje się przede wszystkim na tym, „co utrzyma się w sądzie administracyjnym”. W związku z tym w procedurach powrotowych belgijscy urzędnicy imigracyjni nie skupiają się na uzasadnianiu: z ich punktu widzenia uzasadnienie polega głównie na spełnieniu administracyjnych wymogów dowodowych. Z przeprowadzonej przez nas analizy wynika, że ten zdystansowany system administracyjny jest niekorzystny dla migrantów, których dotyczą te decyzje, zwłaszcza w świetle faktu, że organ odwoławczy ocenia proceduralne aspekty procesu decyzyjnego i nie przeprowadza pogłębionej (ponownej) oceny sprawy.

Słowa kluczowe: urzędnicy imigracyjni, podejmowanie decyzji administracyjnych, praca biurowa, prawomocność, proces uzasadniania

Introduction

In an increasingly globalized world marked by enhanced mobility, an apparent paradox arises: the dissolution of national borders and the increased movement in an interconnected, yet stratified world paradoxically heightens the need to regulate and control migration (Barker 2012; Aas 2013; Bauman 2013). Since the 1980s, the blurring of the once-dominant significance of national borders has pushed migration control to a level transcending individual nations, evolving into a complex, supranational phenomenon (Leitner 1997). Emerging from concerns associated with transnational crime and mobility, migration policies have become intertwined with broader considerations of domestic and foreign security and crime governance (Huysmans 2000). As migration control intertwines with crime regulations, it propels the development and enforcement of more restrictive migration policies (Barker 2012). These policies aimed at “fighting illegal migration” (Broeders, Engbersen 2007) encompass diverse strategies – from coercive measures such as detention and expulsion (Barker 2017) to preventive measures such as risk assessments and risk analyses during preventive police or immigration controls (Rodrigues, van der Woude 2018; van der Woude 2019).

However, the most profound implications of these rigorous migration policies materialize through the “criminalization of migration” itself, where the previously distinct domains of criminal and immigration law now intersect (Miller 2002; Stumpf 2006). Introducing the concept of “crimmigration,” Juliet Stumpf (2006) points out the heightened criminalization of immigration law violations and the growing association between criminal convictions and immigration consequences. For example, following a criminal conviction, residency rights may be revoked by administrative decision (Bosworth 2011). In Belgium, the Immigration Office can, after an individual assessment, proceed to the revocation of a residence permit of convicted migrants in prison due to “public order or national security concerns.”

This phenomenon was further exacerbated following the 2016 Brussels shooting, prompting an amendment to the Belgian Immigration Law (Act of 15 December 1980) in February 2017 aimed at “fighting serious forms of criminality” (Macq 2018). This amendment extended the revocation of residency rights to apply to all migrants regardless of their previous residence status (e.g., long-term resident). In 2018, 83 foreign nationals lost their residency rights due to “public order or national security concerns,” rendering them deportable. This trend persisted in subsequent years, with 68 people losing their residency rights in 2022 (Immigration Office 2022).

Scholars in many countries observe this convergence between crime and migration control, particularly among foreign national prisoners, for whom an administrative decision such as expulsion becomes the concluding step in their criminal proceedings (Turnbull, Hasselberg 2017; Ugelvik 2017; Brouwer 2020). Despite the ostensibly administrative nature of such coercive measures, officially deemed non-penal and non-punitive (Wilsher 2004), they are often accompanied by deprivation, harm, and suffering (Barker 2017) and are rather experienced as punitive (Bosworth 2014). Consequently, the legitimacy of such return decisions is strongly contested by the people subjected to them (Bosworth 2013; Leerkes, Kox 2017; Eule et al. 2019; Brouwer 2020; Van Houte et al. 2021; Breuls 2022a). Their experience is primarily marked by the difficulties and uncertainties associated with the lack of residency rights: “The pains of detention are dictated by the absence of citizenship” (Bosworth 2012: 134). Scholars even speak of a “cumulative punitiveness,” considering that administrative decisions such as return decisions, re-entry bans, and detention can be imposed cumulatively alongside or as a consequence of a criminal conviction (van der Leun, de Ridder 2013).

Scholars highlight the crucial role that immigration officials play in making these administrative decisions as “street-level bureaucrats” (Borrelli, Lindberg 2018; Lipsky 1980). These officials interpret and implement immigration policies and laws through their administrative decisions, significantly influencing people’s lives and shaping migration control while contributing to ongoing migration policy development. Operating within established legal frameworks, immigration officials exercise a discernible degree of discretion in their decision-making (Pratt 2010; Eule et al. 2019; Schultz 2020). This discretionary capacity is intrinsic to the application of rules and laws, involving interpretative work and choices about their relevance (Miaz, Achermann 2022). Moreover, this discretion is not merely a matter of interpreting explicit legal guidelines; it also arises due to the intricacies of the multifaceted situations and cases that immigration officials face. This discretionary power is further shaped by resource constraints and overwhelming caseloads, demanding practical wisdom to navigate through diverse and complex cases (Borrelli 2018a; Eule 2018; Eule et al. 2019). While discretion in policy implementation and interpretation is deemed inevitable (Miaz, Achermann 2022), it is potentially problematic for it to extend beyond the stipulated contexts or diverge from legal precedents (Eule et al. 2019: 87). These discretionary practices markedly shape the practical implementation of migration policies, affecting the criteria and procedural aspects governing administrative decisions, thereby significantly

impacting the lives of those subject to such decisions (Miaz, Achermann 2022). A study of these decision-making practices is thus important.

As previously mentioned, this also raises questions about the legitimacy of return decisions. International research indicates that immigration officials, in their encounters with migrants in return procedures, must exert considerable effort in legitimizing decisions (Kalir, Wissink 2016; Ugelvik 2016; Leerkes, Kox 2017; Borrelli, Lindberg 2019; Brouwer 2020). This process of legitimation often involves highlighting the procedural and legal fairness of their actions (Ugelvik 2016; Miaz 2017; Wittock et al. 2023) and underscoring the administrative, non-punitive nature of their decisions while also linking them to the maintenance of security within the welfare state (Borrelli, Lindberg 2019). However, it has already been observed in Belgium that decision-makers in return procedures rarely, if ever, interact with the people about whom they are making decisions (Mascia 2021; Breuls 2022a; 2022b). Consequently, forms of relational legitimation work observed in other countries and settings are less relevant here (Ugelvik 2016; Jubany 2017; Miaz, Achermann 2022; Hertoghs 2023).

In this article, we demonstrate that the work of Belgian immigration officials responsible for making return decisions primarily involves desk work and writing justifications in their decisions. We argue that the distance between decision-makers and migrants can be seen as a bureaucratic and organizational neutralization technique, as decision-makers are not confronted with legitimacy questions expressed by migrants. Belgian immigration officials therefore experience little need for legitimation work. We demonstrate that, from their perspective, legitimation primarily entails meeting administrative burdens of proof. Moreover, their decision-making is characterized by a heavy sense of pragmatism and standardization, primarily focusing on “what holds up in administrative court.” Our analysis indicates that this distanced administrative system disadvantages the affected migrants, especially considering that the appellate body, the Belgian Council of Immigration Law Litigation, evaluates procedural aspects of the decision-making rather than conducting in-depth case (re-)evaluations.

1. Methodology

1.1. Ethnographic fieldwork at the “return departments” of the Immigration Office

In Belgium, decisions in return procedures are made at the headquarters of the Immigration Office in Brussels, in which people without legal residence stopped by the police may be subject to a return decision, potentially accompanied by a re-entry ban (decisions of departments A and B of the Immigration Office); the same applies to people whose residency is denied (follow-up by department C of

the Immigration Office); criminally convicted prisoners with legal residence may lose their residency rights as a result of their conviction and may subsequently be subject to a return decision, potentially accompanied by a re-entry ban; and prisoners without legal residence may also be subject to the same (decisions of department D of the Immigration office). There are also services responsible for identification procedures and the practical organization of forced returns (follow-up by department E). In 2022, we conducted expert interviews with the heads of these five departments within the Immigration Office of Belgium, with a specific focus on elucidating the (evolution of the) decision-making processes concerning return orders, revocations of residence permits, and the imposition of re-entry bans. It became evident that these diverse decision-making processes shared common elements, which we delineate in this article.

Additionally, in 2023, we started our ethnographic fieldwork at these departments, a study which remains ongoing at the time of writing. With their informed consent, immigration officials permitted us to observe their daily work throughout our fieldwork. We engaged them in discussions regarding their decision-making process, which they elaborated upon. The impact of jurisprudence on their decision-making was also discussed. Furthermore, we obtained internal documents detailing departmental procedures and guidelines for immigration officials' decision-making. Extensive fieldnotes were compiled and thematically analyzed.

All research steps were approved by the Ethics Committee for Human Sciences of the Vrije Universiteit Brussel and a research agreement was established in advance with the Immigration Office.

1.2. Analysis of written decisions

During our fieldwork, it became apparent that decision-makers primarily engage in desk work and follow a fairly standardized approach in making their decisions (see Sections 3 and 4). However, we also aimed to examine their written decisions in more detail. Due to privacy concerns, permission was only granted to study anonymized decisions. Therefore, we opted to utilize the database of the Belgian Council of Immigration Law Litigation (CALL n.d.). This free, public repository contains decisions regarding return orders, revocations of residence permits, and re-entry bans that have been appealed. These decisions are already anonymized and include the full rationale provided by the Immigration Office, as well as the arguments presented by the Council of Immigration Law Litigation on appeal. It is important to note that the Council conducts only marginal reviews. It is authorized, within its legal oversight, solely to ensure that the Immigration Office considered accurate factual information, assessed it "correctly," and did not "unreasonably reach its decision" based on that assessment (BSC 2001). Given the relatively standardized decision-making process and the numerous unsuccessful appeals, we can assume that there are no significant differences in the Immigration Office's rationales between appealed and non-appealed decisions. Therefore, the

selected method facilitated a systematic analysis of the decisions while adhering to the GDPR principle of data minimization.

We conducted targeted searches in the database of the Belgian Council of Immigration Law Litigation using three distinct keywords in both Dutch and French: “revocation of a residence permit” (“beslissing tot beëindiging van verblijf” / “décision de fin de séjour”), “order to leave the territory” (“bevel om het grondgebied te verlaten” / “ordre de quitter le territoire”), and “re-entry ban” (“inreisverbod” / “interdiction d’entrée”). We focused solely on rulings where a complete decision of one of these types was accessible. Consequently, we omitted cases in which the appeal ruling mentioned that the applicant had received a return decision, but the return decision itself was not contested in the appeal.

In 2023, the database recorded a total of 3,168 rulings containing the term “order to leave the territory,” with the highest number of rulings registered in January (n=417). Recognizing the significance of this month in terms of the volume of appeals and to ensure temporal consistency, January was selected as the sample month for analysis across all decision categories. From this dataset of 417 rulings, a random sample of 100 rulings containing the term “order to leave the territory” was chosen for analysis. Among these, 26 rulings met the inclusion criteria, while 74 did not (i.e., the return decision is only mentioned but not challenged in the appeal). Similarly, in 2023, there were a total of 560 rulings including the term “re-entry ban,” with January again having the most rulings (n=71). Of these 71 rulings, 20 met the entry criteria, while 51 did not. However, it is notable that in the entirety of 2023, only 40 rulings included the term “revocation of a residence permit.” This discrepancy is logical, as the Immigration Office issues fewer decisions to revoke a residence permit (e.g., there were 68 such decisions in 2022 [Immigration Office 2022]) compared to orders to leave the territory (3,951 such orders in the same year [Immigration Office 2022]). Acknowledging the disproportionate prevalence of orders to leave the territory and re-entry bans in comparison with revocations of residence permits in the appeals, we realized that a proportional sample approach towards the latter type of decisions was not feasible due to the significantly fewer rulings in January (n=1). Therefore, we opted for an approach wherein all appeal rulings against revocations of residence permits issued in 2023 were studied (n=40). Among these, 18 rulings met the inclusion criteria, while 22 did not.

This resulted in the analysis of 61 unique rulings: 18 rulings against the revocation of residence permits, 20 rulings against the imposition of re-entry bans, and 29 against orders to leave the territory.¹ Our analysis encompassed scenarios wherein decisions by the Immigration Office were annulled or upheld by the Council of Immigration Law Litigation. Through thematic analysis of the 61 rulings, patterns and themes began to surface, as well as indications that certain earlier key rulings established important principles or precedents that shaped subsequent legal interpretations and decision-making norms (e.g., pertaining to the right to be heard; see section 4.2). Consequently, we conducted further analysis

¹ We speak of 61 unique rulings, given that six of them involved appeals lodged against both a re-entry ban and an order to leave the territory.

focusing on six key rulings frequently mentioned by the Council of Immigration Law Litigation, from 2014 (2) and 2018 (4).

The analysis of the written decisions was further complemented with insights from the ethnographic fieldwork: we not only analyzed the written decisions, but also asked immigration officials what impact an appeal ruling has on their work and on their future decision-making processes (e.g., elucidating the implications of pivotal rulings on their working practices).

2. Remote desk work – a lack of dialogue

The legitimacy of decisions regarding returns is strongly contested by those subjected to them (Bosworth 2013; Leerkes, Kox 2017; Brouwer 2020; Van Houte et al. 2021; Breuls 2022a). Such legitimacy questions typically also impact the power-holders who, when faced with them, must develop “legitimation narratives” (Bottoms, Tankebe 2012; Ugelvik 2016). Anthony Bottoms and Justice Tankebe (2012) developed a relational and dialogical model of legitimacy, stating that “[l]egitimacy should not be viewed as a single transaction; it is more like a perpetual discussion, in which the content of power-holders’ later claims will be affected by the nature of the audience response” (Bottoms, Tankebe 2012: 129).

Organizations, however, employ techniques to neutralize potential tension, conflicts, ambiguity, and legitimacy questions (Thompson 1980; Kraatz, Block 2008). One of these strategies – also used in immigration policy (Masocha 2014; Eule et al. 2019) – is the distribution of responsibilities among multiple actors. This strategy “enable[s] individual state officials to denounce responsibility and “pass the buck” of morally and emotionally challenging work tasks onto other actors” (Eule et al. 2019: 189).

In Belgium, this neutralization strategy is observable within the Immigration Office. A clear distance is created between immigration officials making decisions regarding returns and the people subjected to these decisions: they essentially never come into face-to-face contact with each other. Decision-makers handling residency-related and return decisions are based at the Brussels headquarters of the Immigration Office and thus operate remotely, creating a distinct physical disconnection from those whose futures hinge on their decisions (Breuls 2022a). The decision is always communicated by another actor, either police officers (during a police check), social workers in immigration detention centers (if the person is detained), or “return officers” in prisons (if the person is imprisoned). None of these actors make the decision. The actual decision-making occurs at the central offices of the Immigration Office in Brussels. Across all these scenarios, the prevailing characteristic of such decision-making is thus remoteness: decision-makers are disconnected from the immediate contextual realities of the situations. Their insight into the situation is derived solely from reports and files, while they remain behind their desks. “Desk work” aptly describes the work of the decision-makers

as we observed it. Throughout the majority of the day, they work in silence on their decisions.

During the fieldwork, we also observed that the organizational “neutralization technique” outlined above results in immigration officials/decision-makers at the headquarters in Brussels seldom questioning the legitimacy of their work and their decisions. These observations are vastly different from the fieldwork conducted, for example, in immigration detention centers (Breuls 2022a). When we as researchers explicitly raised such legitimacy questions at the headquarters in Brussels, the immigration officials stated 1) that they as decision-makers only apply the law and internal guidelines, 2) that the responsibility lies with the migrant who fails to comply with the law, and 3) that this especially applies if the migrant has committed criminal offenses, in which case, the aim of the Immigration Office is to protect public order. Considering the lack of dialogue between immigration officials and migrants, it becomes evident that a relational and dialogical model of legitimacy seems to have limited relevance here.

3. Legitimation as addressing administrative burdens of proof

3.1. Standardized reasonings

Within this context of distant decision-making, another “legitimacy question” looms large in the discourses of decision-makers: “Am I substantiating my decision in a manner that will withstand the scrutiny of the administrative appellate body (i.e., the Belgian Council of Immigration Law Litigation)?” Specifically, this question pertains to the “correct” application of human rights law – whereby “correct” should be interpreted as “in a manner that will hold up in court.”

Indeed, the Immigration Office has an important procedural obligation to conduct a “human rights assessment.” This assessment should strike a fair balance between state interests in upholding public order and immigration policies and the rights of individuals, including the right to privacy, family life, health, and the prevention of torture or degrading treatment. Decisions made by the Immigration Office, such as forced return decisions, have the potential to encroach upon a person’s right to respect for their private and family life, safeguarded by Article 8 of the European Convention on Human Rights (ECHR). Additionally, these decisions may expose people to the risk of torture or degrading treatment upon their return to their country of origin, which would violate Article 3 of the ECHR. Explicit reflections on these matters must be incorporated into the decisions.

Here again, we observe organizational tactics being employed to handle these questions related to human rights in a pragmatic, bureaucratic fashion. In particular, relatively standardized reasonings have been developed within the Immigration

Office and are commonly used by the decision-makers. Indeed, several examples consistently reappear in many cases:

Merely having built a private life in Belgium during one's illegal stay does not give rise to a legitimate expectation for permission to stay and protection against removal under Article 8 of the ECHR. (counted six times in the dataset; CILL 2023a; 2023b; 2023f)

Contact with [family members] can be maintained in other ways, either through visits (in a third country) or through modern means of communication. (counted 13 times in the dataset; CILL 2023e; 2023i)

Article 3 of the European Convention on Human Rights (ECHR) does not guarantee the right to remain within a State solely because that State can provide better medical care than the country of origin. Even the circumstance that deportation may affect the health condition or life expectancy of a foreigner is not sufficient to constitute a violation of this provision. (counted eight times in the dataset; CILL 2023n; 2023p)

In one of the interviews with a department head, the interviewee indicated that the need to provide extensive reasoning has significantly increased under the influence of European jurisprudence and the jurisprudence of the Belgian Council of Immigration Law Litigation. However, this has had little impact on the ultimate decisions:

I have the impression that I am still making the same decisions as 20 years ago. Now I just have to justify a lot more. In the past, with a third-country national, we could just say: "He has no documents and is convicted, so forced removal is needed." Now we also have to examine family life, his family situation, etc. (interview with department head)

Applying standardized reasoning and justifications based on paper records is therefore one of the core tasks of immigration officials at the headquarters in Brussels.

3.2. Instrumentalization of the right to be heard

A concrete example of how organizational techniques are deployed to facilitate the continuation of prior decision-making practices, despite judicial developments, is the swift instrumentalization of the right to be heard by decision-makers. In the 2010s, the European Court of Justice issued a series of significant judgments emphasizing the crucial role of "the right to be heard" in administrative procedures (ECJ 2012; 2013; 2014a; 2014b), allowing people the opportunity to be heard before any decision is made against them that may detrimentally impact their interests (i.e., an order to leave the territory, a re-entry ban, or a revocation of a residence permit) (see Arts. 3 and 8 of the ECHR).

The influence of this jurisprudence was also observable in Belgium. Those appealing before the Belgian Council of Immigration Law Litigation quickly recognized the strength of invoking this legal principle, fostering a discernible

shift in national jurisprudence. Aligning with the European Court of Justice, both the Belgian Council of State and the Belgian Council of Immigration Law Litigation adopted case law that reinforces the centrality of the right to be heard in administrative proceedings (CILL 2014b; 2014c; BSC 2016a; 2016b; 2017). This legal evolution resulted in the inclusion of the right to be heard in Belgian immigration law after a 2017 amendment (Act of 15 December 1980). This amendment specifically mandates “hearings” by the administration for people facing return decisions, such as orders to leave the territory or re-entry bans.²

Two significant observations stand out. Firstly, despite the obligation to hear people before making a decision, decision-makers continued to uphold the distanced procedure, wherein they do not directly interact with those affected by their decisions. Indeed, the “hearings” do not require face-to-face interaction with the decision-makers from the Immigration Office; instead, individuals are required to complete a “written” questionnaire within 15 days. This essentially asks people to not just write down, but distill, their life stories, familial ties, and health situations onto the stark, impersonal canvas of a paper questionnaire, with questions like:

Do you have reasons why you cannot return to your own country?

Do you have an illness that impedes your ability to travel or return to your country of origin?

Do you have children in Belgium or in another European Union member state?

The task of facilitating the right to be heard (i.e., administering the questionnaire) was delegated to the actors without decision-making powers described above: social workers administer the questionnaire in immigration detention centers, while return officers or prison clerks carry out this task in prison settings. During police arrests, the apprehended person completes the questionnaire, with or without assistance from the police officers. In all these instances, the person’s voice is only captured on paper and later evaluated by the decision-maker at their desk at the Brussels headquarters. The lack of direct interaction between the decision-makers and those involved raises important questions about the depth of understanding and contextual awareness that immigration officials have of the individuals’ circumstances.

Secondly, we noted that hearing the person – incorporating the person’s “voice” through written means – has not resulted in significant changes in the decision-making outcomes. Although the right to be heard requires immigration officials to engage in more thorough reasoning, provide additional substantiation, and allocate more time to make their decisions, we observe that the right to be heard is heavily instrumentalized by immigration officials in practice. Excerpts from the answers in the questionnaire are often copied by immigration officials and used to support the Immigration Office’s position, again relying on stand-

² Additionally, the Immigration Office reserves the prerogative, under circumstances deemed “exceptional” or in case of concerns regarding “national security” or unreachability, to proceed with decisions without engaging in a formal hearing.

ardized justifications, such as “[t]he person declares to not have a family life or minor children” (CILL 2023r), or “[t]he person fails to provide evidence of suffering from an illness hindering their return to their country of origin” (CILL 2023g). The latter justification also illustrates how the absence of information can be interpreted negatively by immigration officials. We can in this regard once again refer to the above quote: “I have the impression that I am still making the same decisions as 20 years ago. Now I just have to justify a lot more” (interview with department head). This process of justifying the decision is then supported by standardized arguments.

Even when elements are provided, such as those related to family life, the assessment will often be unfavorable to the person involved, again frequently based on standardized reasoning but tailored to the specific circumstances of the case or the information provided in the questionnaire:

The person declares not to have a family life or minor children in Belgium. She states she has a medical issue with her uterus, but this has not prevented her from voluntarily undertaking a journey to Kinshasa. A violation of Articles 3 and 8 of the European Convention on Human Rights (ECHR) is not demonstrated. (CILL 2023r)

It does not appear that the person can only have a family life in Belgium, and that it would not be possible to develop his family life in the country of origin or elsewhere. The mere fact that his partner cannot be compelled to leave Belgian territory does not imply that she could not voluntarily accompany the person to the country of origin or elsewhere. There are no significant obstacles evident in continuing the family life in the country of origin or elsewhere in this case. Both the person and his partner knew or should have known that the family life in Belgium was precarious from the outset, given the person’s illegal residence status in Belgium. A violation of Article 8 of the ECHR does not seem plausible at first glance in this context. (CILL 2023c; 2023d; 2023s; 2023t)

These examples make it clear that the right to be heard rarely influences the decisions made by immigration officials. Instead, the responses on the questionnaire from “illegalized persons, who generally hold weak rights’ claims on the state” (Borrelli, Lindberg 2019: 53) seem to be strategically used against those involved, ultimately failing to bring about significant changes in the decisions.

4. Immigration law litigation

It became evident that immigration officials primarily focus on the question of what holds up in administrative court. Therefore, an important question is how appeals are judged by the Council of Immigration Law Litigation. Out of the 61 rulings studied, the Council deemed the appeal unjustified in 44 cases and

justified in 17 cases, leading to the annulment of the Immigration Office's decision. This indicates that the Council of Immigration Law Litigation generally considers the reasoning of the Immigration Office to be sufficiently motivated. It is essential to recall that the Council of Immigration Law Litigation conducts only a marginal review: within its legal oversight, the Council is authorized solely to ensure that the Immigration Office considered accurate factual information, assessed it correctly, and did not unreasonably reach its decision based on that assessment (BSC 2001). Therefore, the Council's case law often implicitly aligns with the logic of the Immigration Office.

Such case law of the Council of Immigration Law Litigation is also regularly instrumentalized by the Immigration Office afterwards. For instance, immigration officials make reference to previous case law to strengthen their current reasonings, as in the following example:

The Council of Immigration Law Litigation already ruled that it is not manifestly unreasonable to infer from the fact that previous convictions did not prevent the person from committing new criminal acts that there is a current risk of recidivism. (CILL 2023o)

In 16 rulings, however, the appeal was deemed justified by the Council of Immigration Law Litigation. Below, we focus on several themes in these successful appeals.

4.1. Breach of the right to be heard

The imperative role of the right to be heard in administrative proceedings (see Section 4.2) is strongly emphasized by the Council of Immigration Law Litigation. In earlier rulings, it underscores that for the Immigration Office to effectively carry out an individual assessment, it is crucial to provide people with a fair opportunity to express themselves (CILL 2014a). In practice, however, the Immigration Office instrumentalized this right to be heard into written questionnaires, shifting the burden of proof onto the person who may be subject to an adverse decision (see Section 4.2).

Nonetheless, the Council of Immigration Law Litigation sets limits on this instrumentalization. According to the Council of Immigration Law Litigation, the Immigration Office cannot simply infer, from the applicant's failure to submit a questionnaire form or to provide information, that there are no individual elements that could potentially constitute a violation of fundamental rights. In a case where a man whose right to residence was revoked and who, after failing to complete the questionnaire within the stipulated time frame, became a father, the Council of Immigration Law Litigation ruled against the Immigration Office's omission of the applicant's new information, indicating that it could not use the lack of prior information to justify its decision: "The Immigration Office cannot hide behind the fact that the applicant failed to inform them that he had become a father" (CILL 2018b). In another judgment, where a decision was based on a blank questionnaire form that had been submitted, the Council of Immigration Law

Litigation also stated that “it is a mystery on what basis the Immigration Office concludes in its decision that there is no violation of Article 3 of the ECHR founded on the applicant’s declaration” (CILL 2023g).

Another question that arises is how long the Immigration Office can consider information provided in the questionnaire to be up-to-date. The legal articles concerning the right to be heard do not provide an answer. While delayed decisions might potentially violate the right to be heard and may require a second hearing, an important European Court of Justice ruling rejected a second hearing for a subsequent return decision (ECJ 2014a). The Court ruled that Mrs. Mukarubega was able to properly and effectively express her remarks regarding the illegality of her stay. She was able to articulate her views on various occasions during the asylum procedure and following her arrest, which took place shortly before her second return decision. In another case, however, the Belgian Council of Immigration Law Litigation specified that for subsequent or new return decisions, taken a year and a half after the first one and thus after completing the initial questionnaire, a different questionnaire must be administered (CILL 2018a). Even in the case of first decisions, if the Immigration Office decides eight months after the right to be heard was exercised, it breaches this right. The Council of Immigration Law Litigation pointed out that “[t]he applicant could reasonably assume that the Immigration Office had abandoned its original intention to revoke her residence after hearing her” (CILL 2018c).

While the Council of Immigration Law Litigation does set some boundaries on the instrumentalization techniques used by the Immigration Office, the Council’s influence in this regard remains somewhat limited: had the right to be heard been fully respected, people “might” have had the opportunity to present influential elements that “could potentially alter” the Immigration Offices’ decisions. However, the nuances in the preceding sentence are extremely important and reflect the limitations of the Council’s jurisdiction, primarily reviewing whether the Immigration Office’s decision was based on accurately evaluated facts and whether it exhibited manifest unreasonableness. The appeal process can only yield two potential outcomes: 1) annulment of the Immigration Office’s decision or 2) rejection of the appeal. While a number of violations of the right to be heard were identified in the aforementioned judgments, the authority of the Council remains circumscribed to considering the adherence to procedural rights rather than influencing the substantive determination of the case (i.e., marginal review). Indeed, the annulment of the Immigration Office’s decision does not prevent subsequent actions by the Immigration Office: if the Immigration Office re-evaluates the case considering the new elements, the Council’s decision does not necessarily serve as an impediment to, for example, the revocation of a residence permit.

4.2. Risk assessment

The revocation of a migrant’s residence permit is possible in Belgium due to “public order or national security concerns.” Although case law requires that the “current” nature of the threat is demonstrated by the Immigration Office, relatively low

requirements are imposed for such “threat analysis.” This aligns with what has been repeatedly observed in the crimmigration literature: legal safeguards within the realm of administrative law are less robust than those in criminal law (Stumpf 2006; Legomsky 2007; Aas 2014).

In criminal law, for instance, risk assessment tools are frequently employed. While these tools certainly do not go uncriticized (Krasmann 2007; Hannah-Moffat, Maurutto, Turnbull 2009), they are at least used under the assumption that risk is dynamic and can be subject to change. For instance, the risk-needs-responsivity model by James Bonta and Donald A. Andrews (2017) includes seven dynamic (i.e., changeable) risk factors and only one static (i.e., unchangeable) one: criminal history. Criminal justice interventions that aim to reduce the risk of recidivism should of course primarily focus on the seven dynamic risk factors. Strikingly, however, immigration officials often base their decision to revoke residence rights after a criminal conviction solely on the criminal history: the Immigration Office frequently uses the severity of past offenses to assert the “current” existence of the threat:

The enumeration of these severe convictions illustrates a concerning mentality, demonstrating a propensity for violence, the use of combat techniques, and a complete lack of respect for others’ physical integrity. [...] The personal behavior of the person constitutes a current, real, and sufficiently serious threat to the public order and national security. (CILL 2023m)

Even more strikingly, immigration officials sometimes disregard assessments by penitentiary actors that may indicate a low risk of recidivism:

The penitentiary actors may have assessed the risk of reoffending as “low,” but that by no means implies that he would no longer pose a danger to the public order. (CILL 2023k)

However, the latter approach came under criticism from the Council of Immigration Law Litigation in one case:

While the person was detained for a prolonged period, she has been under electronic surveillance since 2019. Contrary to opposing assertions, the assessment of a low risk of recidivism by the court for sentence execution is not negligible. (CILL 2023k)

In two annulments (CILL 2023h; 2023k), the Council also cautioned against solely relying on a person’s criminal record or their past or present incarceration to determine the “current” nature of the threat. It has stated that the Immigration Office cannot assume that several severe convictions from over 10 years ago support the “current” nature of the threat. The mere presence of a criminal record or a previous prison sentence, suggesting a risk to the public order, should not overlook a person’s existing circumstances, such as their release from prison, employment status, and family situation. The Council further stated that the Immigration Office’s reasoning concerning the immediacy of the danger should reflect that the person would persist, continue, or repeat their (criminal) behavior in the future (CILL 2023h).

4.3. Stereotypical reasonings?

We demonstrated that standardized reasonings are commonly employed by the immigration officials in their decision-making. An important question that then arises is how the Council of Immigration Law Litigation evaluates these standardized justifications provided by the Immigration Office. It becomes clear from their rulings that the use of a standardized “template” and decision-making process is not considered flawed per se (BCS 2006; 2007; CILL 2020). In fact, within its limited jurisdiction, the Council has ruled that this approach does not necessarily imply a lack of individual consideration for the person’s circumstances:

The applicant considers it a stereotypical rationale, yet this does not imply that it is inadequate, flawed, or irrelevant. (CILL 2023j)

This illustrates again a critical aspect of the appeal process: it is difficult to get a decision annulled and seemingly only possible in cases of explicit and evident errors by the Immigration Office. While such “mechanical” errors result in an annulment, getting a decision annulled in an appeal on grounds of stereotypical and standardized reasoning remains challenging. In only one case did the Council of Immigration Law Litigation cast a critical eye on this practice. The Council noted identical reasonings in earlier decisions by the Immigration Office despite a clearly different economic profile of the person, describing it as “a purely stereotypical reasoning” (CILL 2023l).

Conclusion

In this article, we took a closer look at the work and decision-making practices of immigration officials at the Belgian Immigration Office. Although scholars emphasize that immigration officials play a crucial role in implementing restrictive immigration control policies (Dahlvik 2017; Eule 2018; Borrelli, Lindberg 2019), our understanding of their daily administrative practices is limited. We tried to fill this gap, looking at the situation in Belgium, illustrating that decision-makers at the headquarters of the Immigration Office in Brussels are primarily engaged in desk work. Their main tasks are reviewing files and questionnaires related to the right to be heard and justifying their decisions based on this information. The focus of this article was on return decisions, revocations of residence permits, and re-entry bans. Although these measures are administrative in judicial nature, they clearly result in the imposition of deprivations, harm, and suffering – they are indeed punitive in practice (Barker 2017).

It became evident that at both the organizational and individual levels, various strategies are employed to approach the decision-making work in a pragmatic/bureaucratic manner. This includes neutralizing potential legitimacy concerns

by avoiding direct interactions between decision-makers and people who need to return, and thus working with intermediaries, using standardized reasonings in their decisions, instrumentalizing the right to be heard, and mobilizing previous reasoning from the Council of Immigration Law Litigation to back up a new argument – and in that sense also instrumentalizing earlier case law.

These strategies, such as the dependence on standardized justifications to cope with workload pressures, might contribute to what Borrelli (2018b) characterizes as “structural violence.” For instance, the use of questionnaires to facilitate the right to be heard runs the risk of inadequately capturing the nuances, emotions, and complexities often associated with personal experiences. This results in a bureaucratic system where people’s voices are merely “processed” on paper, with decision-makers primarily focusing on “what holds up in administrative court.”

Previous research has demonstrated that employing these pragmatic/bureaucratic strategies for making decisions that have a profound impact on the lives of those subjected to them contributes to the perceived injustice they have already experienced (Bosworth 2013; Leerkes, Kox 2017; Eule et al. 2019; Brouwer 2020; Van Houte et al. 2021; Breuls 2022a). Indeed, they feel they have little to no influence on these high-impact decisions: administrative decision-makers are invisible, lawyers often indicate no avenues for appeal, and judges – due to the principle of marginal review – adhere to the logic of forced return policies (see also Eule et al. 2019; Breuls 2022a). The people subjected to these return decisions thus do not have the feeling that there is a dialogue with the decision-makers. Given that legitimacy is a relational and dialogical concept (Bottoms, Tankebe 2012), it is not surprising that they continue to question the legitimacy of the restrictive immigration policy they are subjected to.

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References

- Aas K.F. (2013). *Globalization and Crime*. Los Angeles: Sage.
- Aas K.F. (2014). 'Bordered penalty: Precarious membership and abnormal justice.' *Punishment & Society* 16(5), pp. 520–541. <https://doi.org/10.1177/1462474514548807>
- Barker V. (2012). 'Global mobility and penal order: Criminalizing migration, a view from Europe.' *Sociology Compass* 6(2), pp. 113–121. <https://doi.org/10.1111/j.1751-9020.2011.00444.x>
- Barker V. (2017). 'Penal power at the border: Realigning state and nation.' *Theoretical Criminology* 21(4), pp. 441–457. <https://doi.org/10.1177/1362480617724827>
- Bauman Z. (2013). *Globalization: The Human Consequences*. Hoboken: Wiley.
- Bonta J. and Andrews D.A. (2017). *The Psychology of Criminal Conduct*. London, New York: Routledge, Taylor & Francis Group.
- Borrelli L.M. (2018a). 'Whisper down, up and between the lanes: Exclusionary policies and their limits of control in times of irregularized migration.' *Public Administration* 96(4), pp. 803–816. <https://doi.org/10.1111/padm.12528>
- Borrelli L.M. (2018b). 'Using ignorance as (un)conscious bureaucratic strategy.' *Qualitative Studies* 5(2), pp. 95–109. <https://doi.org/10.7146/qs.v5i2.104421>
- Borrelli L.M. and Lindberg A. (2018). 'The creativity of coping: Alternative tales of moral dilemmas among migration control officers.' *International Journal of Migration and Border Studies* 4(3), pp. 163–178. <https://doi.org/10.1504/IJMBS.2018.093876>
- Borrelli L.M. and Lindberg A. (2019). 'Paperwork performances: Constructing legitimacy in and of the migration control apparatus.' *Journal of Legal Anthropology* 3(2), pp. 50–69. <https://doi.org/10.3167/jla.2019.030204>
- Bosworth M. (2011). 'Deportation, detention and foreign-national prisoners in England and Wales.' *Citizenship Studies* 15(5), pp. 583–595. <https://doi.org/10.2139/ssrn.1852191>
- Bosworth M. (2012). 'Subjectivity and identity in detention: Punishment and society in a global age.' *Theoretical Criminology* 16(2), pp. 123–140. <https://doi.org/10.1177/1362480612441116>
- Bosworth M. (2013). 'Can immigration detention centres be legitimate? Understanding confinement in a global world.' In K.F. Aas and M. Bosworth (eds.) *The Borders of Punishment*. Oxford: Oxford University Press, pp. 149–165.
- Bosworth M. (2014). *Inside Immigration Detention*. Oxford: Oxford University Press.
- Bottoms A. and Tankebe J. (2012). 'Beyond procedural justice: A dialogic approach to legitimacy in criminal justice.' *Journal of Criminal Law and Criminology* 102(1), pp. 119–170.
- Breuls L. (2022a). *Vreemdelingendetentie in de Lage Landen: Een etnografisch onderzoek naar uitvoeringspraktijken van vreemdelingendetentie in België en in Nederland* [Immigration detention in the Low Countries: An ethnographic study of immigration detention practices in Belgium and the Netherlands]. The Hague: Boom Criminologie.

- Breuls L. (2022b). 'Werken aan terugkeer in vreemdelingenbewaring? Een blik op de werkpraktijken van terugkeerfunctionarissen en hun interacties met opgesloten personen' [Working on return in immigration detention? A look at the practices of return officers and their interactions with detainees]. *Justitiële Verkenningen* 48(2), pp. 70–95.
- Broeders D. and Engbersen G. (2007). 'The fight against illegal migration: Identification policies and immigrants' counterstrategies.' *American Behavioral Scientist* 50(12), pp. 1592–1609. <https://doi.org/10.1177/0002764207302470>
- Brouwer J. (2020). 'Bordered penalty in the Netherlands: The experiences of foreign national prisoners and prison officers in a crimmigration prison.' *Punishment & Society* 22(5), pp. 703–722. <https://doi.org/10.1177/1462474520915825>
- Dahlvik J. (2017). 'Asylum as construction work: Theorizing administrative practices.' *Migration Studies* 5(3), pp. 369–388. <https://doi.org/10.1093/migration/mnx043>
- Eule T.G. (2018). 'The (surprising?) nonchalance of migration control agents.' *Journal of Ethnic and Migration Studies* 44(16), pp. 2780–2795. <https://doi.org/10.1080/1369183X.2017.1401516>
- Eule T.G., Borrelli L.M., Lindberg A., and Wyss A. (2019). *Migrants Before the Law: Contested Migration Control in Europe*. Cham: Springer International Publishing.
- Hannah-Moffat K., Maurutto P., and Turnbull S. (2009). 'Negotiated risk: Actuarial illusions and discretion in probation.' *Canadian Journal of Law and Society* 24(3), pp. 391–409.
- Hertoghs M. (2023). 'Suspicious compassion: On affect and state power in the Dutch asylum procedure.' *Ethnography* (published online ahead of print 30 June). <https://doi.org/10.1177/14661381231185943>
- Houte M. van, Leerkes A., Slipper A., and Breuls L. (2021). 'Globalised citizenship and the perceived legitimacy of immigration control: Narratives and acts of resistance in immigration detention.' *Migration Studies* 9(3), pp. 1269–1291. <https://doi.org/10.1093/migration/mnaa034>
- Huysmans J. (2000). 'The European Union and the securitization of migration.' *Journal of Common Market Studies* 38(5), pp. 751–777. <https://doi.org/10.1111/1468-5965.00263>
- Jubany O. (2017). *Screening Asylum in a Culture of Disbelief: Truths, Denials and Skeptical Borders*. Cham: Springer International Publishing.
- Kalir B. and Wissink L. (2016). 'The deportation continuum: Convergences between state agents and NGO workers in the Dutch deportation field.' *Citizenship Studies* 20(1), pp. 34–49. <https://doi.org/10.1080/13621025.2015.1107025>
- Kraatz M.S. and Block E.S. (2008). 'Organizational implications of institutional pluralism.' In R. Greenwood, C. Oliver, R. Suddaby, and K. Sahlin (eds.) *The SAGE Handbook of Organizational Institutionalism*. London: Sage, pp. 243–275.
- Krasmann S. (2007). 'The enemy on the border: Critique of a programme in favour of a preventive state.' *Punishment & Society* 9(3), pp. 301–318. <https://doi.org/10.1177/1462474507077496>

- Leerkes A. and Kox M. (2017). 'Pressured into a preference to leave? A study on the "specific" deterrent effects and perceived legitimacy of immigration detention.' *Law & Society Review* 51(4), pp. 895–929. <https://doi.org/10.1111/lasr.12297>
- Legomsky S.H. (2007). 'The new path of immigration law: Asymmetric incorporation of criminal justice norms.' *Washington and Lee Law Review* 64(2), pp. 469–528.
- Leitner H. (1997). 'Reconfiguring the spatiality of power: The construction of a supranational migration framework for the European Union.' *Political Geography* 16(2), pp. 123–143. [https://doi.org/10.1016/S0962-6298\(96\)00047-9](https://doi.org/10.1016/S0962-6298(96)00047-9)
- Leun J. van der and Ridder S. de (2013). 'Het cumulatief punitief karakter van het migratierecht' [The cumulative punitive nature of immigration law]. *Orde van de Dag* 61, pp. 29–36.
- Lipsky M. (1980). *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*. New York: Russell Sage Foundation.
- Macq C. (2018). 'Le point sur le retrait du droit au séjour et l'éloignement pour motifs d'ordre public des étrangers en séjour légal' [Update on the withdrawal of the right to stay and deportation of legally resident foreigners on public order grounds]. *Revue du Droit des Etrangers* 198, pp. 179–221.
- Mascia C. (2021). 'How bureaucracies shape access to rights: The implementation of family reunification in Belgium.' *Journal of Ethnic and Migration Studies* 47(9), pp. 2127–2143. <https://doi.org/10.1080/1369183X.2020.1726734>
- Masocha S. (2014). 'We do the best we can: Accounting practices in social work discourses of asylum seekers.' *British Journal of Social Work* 44(6), pp. 1621–1636. <https://doi.org/10.1093/bjsw/bct048>
- Miaz J. (2017). 'From the law to the decision: The social and legal conditions of asylum adjudication in Switzerland.' *European Policy Analysis* 3(2), pp. 372–396. <https://doi.org/10.1002/epa2.1018>
- Miaz J. and Achermann C. (2022). 'Bureaucracies under judicial control? Relational discretion in the implementation of immigration detention in Swiss cantons.' *Administration & Society* 54(4), pp. 629–659. <https://doi.org/10.1177/00953997211038000>
- Miller T.A. (2002). 'Citizenship and severity: Recent immigration reforms and the New Penology.' *Georgetown Immigration Law Journal* 17, pp. 611–666.
- Pratt A. (2010). 'Between a hunch and a hard place: Making suspicion reasonable at the Canadian border.' *Social & Legal Studies* 19(4), pp. 461–480. <https://doi.org/10.1177/0964663910378434>
- Rodrigues P. and Woude M. van der (2018). 'Preventieve politiecontroles en interne grenscontroles in het Schengengebied' [Preventive police controls and internal border control in the Schengen Area]. *Criminatie & Recht* 2(1), pp. 17–29.
- Schultz C. (2020). 'Ambiguous goals, uneven implementation – How immigration offices shape internal immigration control in Germany.' *Comparative Migration Studies* 8(10), pp. 1–18. <https://doi.org/10.1186/s40878-019-0164-0>
- Stumpf J. (2006) 'The crimmigration crisis: Immigrants, crime, and sovereign power.' *American University Law Review* 56(2), pp. 367–420.

- Thompson D.F. (1980). 'Moral responsibility of public officials: The problem of many hands.' *American Political Science Review* 74(4), pp. 905–916. <https://doi.org/10.2307/1954312>
- Turnbull S. and Hasselberg I. (2017). 'From prison to detention: The carceral trajectories of foreign-national prisoners in the United Kingdom.' *Punishment & Society* 19(2), pp. 135–154. <https://doi.org/10.1177/1462474516660695>
- Ugelvik T. (2016). 'Techniques of legitimization: The narrative construction of legitimacy among immigration detention officers.' *Crime, Media, Culture: An International Journal* 12(2), pp. 215–232. <https://doi.org/10.1177/1741659016648180>
- Ugelvik T. (2017). 'The limits of the welfare state? Foreign national prisoners in the Norwegian crimmigration prison.' In P. Scharff Smith and T. Ugelvik (eds.) *Scandinavian Penal History, Culture and Prison Practice*. London: Palgrave Macmillan UK, pp. 405–423.
- Wilsher D. (2004). 'The administrative detention of non-nationals pursuant to immigration control: International and constitutional law perspectives.' *International and Comparative Law Quarterly* 53(4), pp. 897–934. <https://doi.org/10.1093/iclq/53.4.897>
- Wittock N., Cleton L., Vandevoordt R., and Vershraegen G. (2023). 'Legitimising detention and deportation of illegalised migrant families: Reconstructing public controversies in Belgium and the Netherlands.' *Journal of Ethnic and Migration Studies* 49(7), pp. 1589–1609. <https://doi.org/10.1080/1369183X.2021.1965470>
- Woude M. van der (2019). 'Criminalisering van migratie en grensmobiliteit als een legitieme zorg voor de publieke criminologie' [Criminalization of migration and border mobility as a legitimate concern for public criminology]. *Tijdschrift voor Criminologie* 61(4), pp. 405–420. <https://doi.org/10.5553/TvC/0165182X2019061004009>

Internet sources

- Council for Alien Law Litigation – Belgium [CALL] (n.d.), [Rvv-cce.be](https://www.rvv-cce.be/). Available online: <https://www.rvv-cce.be/> [07.05.2024].
- Immigration Office (2022). *Activiteitenverslag 2022 Dienst Vreemdelingenzaken* [2022 Activity report of the Immigration Office], [Dofi.ibz.be](https://dofi.ibz.be). Available online: https://dofi.ibz.be/sites/default/files/2023-07/2022%20Activiteitenverslag%20NL_1.pdf. [07.05.2024].

Court decisions

- Belgian Council of State [BSC] (2001). December 7, 2001, No. 101.924.
- Belgian Council of State [BCS] (2006). October 27, 2006, No. 164.171.
- Belgian Council of State [BCS] (2007). June 27, 2007, No. 172.821.
- Belgian Council of State [BSC] (2016a). February 3, 2016, No. 233.719.
- Belgian Council of State [BCS] (2016b). April 26, 2016, No. 234.511.

- Belgian Council of State [BSC] (2017). February 28, 2017, No. 237.502.
- Council of Immigration Law Litigation (Dutch) [CILL] (2014a). June 20, 2014, No. 152.856.
- Council of Immigration Law Litigation (Dutch) [CILL] (2014b). June 24, 2014, No. 126.158.
- Council of Immigration Law Litigation (French) [CILL] (2014c). August 21, 2014, No. 128.207.
- Council of Immigration Law Litigation (Dutch) [CILL] (2018a). December 10, 2018, No. 213.716.
- Council of Immigration Law Litigation (Dutch) [CILL] (2018b). September 28, 2018, No. 210.344.
- Council of Immigration Law Litigation (French) [CILL] (2018c). December 20, 2018, No. 214.435.
- Council of Immigration Law Litigation (Dutch) [CILL] (2020). March 3, 2020, No. 233.519.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023a). April 27, 2023, No. 288.221.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023b). January 10, 2023, No. 282.949.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023c). January 12, 2023, No. 283.102.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023d). January 12, 2023, No. 283.103.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023e). January 16, 2023, No. 283.195.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023f). January 26, 2023, No. 283.879.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023g). January 27, 2023, No. 283.961.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023h). January 27, 2023, No. 283.973.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023i). January 27, 2023, No. 283.975.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023j). January 30, 2023, No. 284.041.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023k). July 18, 2023, No. 292.150.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023l). July 19, 2023, No. 292.169.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023m). March 31, 2023, No. 287.038.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023n). October 30, 2023, No. 296.475.

- Council of Immigration Law Litigation (Dutch) [CILL] (2023o). September 18, 2023, No. 294.249.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023p). January 26, 2023, No. 283.881.
- Council of Immigration Law Litigation (Dutch) [CILL] (2023r). January 26, 2023, No. 283.874.
- Council of Immigration Law Litigation (French) [CILL] (2023s). October 31, 2023, No. 296.544.
- Council of Immigration Law Litigation (French) [CILL] (2023t). September 29, 2023, No. 294.890.
- European Court of Justice [ECJ] (2012). November 22, 2012, C-277/11, *MM v. Ireland*.
- European Court of Justice [ECJ] (2013). September 10, 2013, C-383/13, *PPU M.G. and N.R.*
- European Court of Justice [ECJ] (2014a). November 5, 2014, C-166/13, *Mukarubega v. France*.
- European Court of Justice [ECJ] (2014b). December 11, 2014, C-249/13, *Boudjlida v. France*.

Others

- Act of 15 December 1980 on the entry, stay, settlement and expulsion of foreign nationals. Belgian Gazette 31 December 1980, 14.584.



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Magdalena Perkowska ■

Facilitator or victim? On punishment for facilitating illegal border crossings during the Polish–Belarusian humanitarian border crisis

Pomocnik czy ofiara? O karaniu za ułatwianie nielegalnego przekraczania granicy podczas polsko-białoruskiego humanitarnego kryzysu granicznego

Abstract: Punishing perpetrators for facilitating illegal border crossings or illegal stays is one of the priorities of the European Union's migration policy. The author decided to take a look at the practice of such criminal proceedings before Podlasie courts (a region bordering Belarus). In this case, does it truly involve organising an illegal procedure – especially when it comes to family members or co-workers? The purpose of this article, therefore, is to examine the criminal case files of those convicted of organising illegal border crossings – individuals whose behaviour consisted solely of picking up migrants who were already in Poland. Law enforcement authorities charged such people, mainly foreigners, with aiding and abetting the organisation of illegal border crossing. The author addresses the question of whether such behaviour fulfils the elements of the crime specified in Article 264 (3) of the Criminal Code, and what scope of freedom the actors have when deciding on the charges and convictions.

Keywords: facilitation, illegal border crossings, discretion, criminal liability, family members

Abstrakt: Karanie za ułatwianie nielegalnego przekraczania granicy lub nielegalnego pobytu jest jednym z priorytetów polityki migracyjnej Unii Europejskiej. Autorka postanowiła przyjrzeć się praktyce prowadzenia postępowań karnych przed podlaskimi sądami (region graniczący z Białorusią) przeciwko organizatorom nielegalnego przekroczenia granicy. Czy w tym przypadku rzeczywiście mamy do czynienia z organizowaniem nielegalnego procederu, zwłaszcza gdy są to członkowie rodziny lub współpracownicy? Celem niniejszego artykułu jest zatem omówienie wyników analizy akt spraw karnych osób skazanych za organizowanie nielegalnego

przekraczania granicy – osób, których zachowanie polegało wyłącznie na odbieraniu migrantów przebywających już w Polsce. Organy ścigania postawiły takim osobom, głównie cudzoziemcom, zarzut pomocnictwa w organizowaniu nielegalnego przekraczania granicy. Autorka pragnie udzielić odpowiedzi na pytanie, czy zachowanie takich osób wypełnia znamiona przestępstwa określonego w art. 264 § 3 k.k. oraz jaki jest zakres swobody podmiotów podejmujących decyzje o przedstawieniu zarzutów i skazaniu.

Słowa kluczowe: ułatwianie, nielegalne przekraczanie granicy, uznaniowość, odpowiedzialność karna, członkowie rodziny

Introduction

In the 20th and 21st centuries, states have reinforced the trend of criminalisation in the area of immigration. International and regional bodies such as the United Nations and the European Union have mandated the criminalisation of certain immigration violations. Global trends have also been used to prevent economic migrants from abusing the asylum system (Aliverti 2013: 118). European institutions indicate that most irregular migrants travelling to the EU used the services of smugglers (EUROPOL 2016).¹ Therefore, punishing facilitators has become a priority of the European Union's migration policy (Arrouche, Fallone, Vosyliute 2021: 3; Carrera 2021: 8; European Commission 2021: 17–19; Garcia 2023: 198). International law and European law provide the basis for establishing “immigration offences” in the national laws of individual countries. Some immigration offences are intended to deter people from violating immigration laws in order to ensure the smooth and effective operation of the immigration control system (Aliverti 2013: 119). They are also used to implement current state policy that is not always in accordance with the *ratio legis* of these laws, and sometimes not in accordance with the principles of criminal responsibility.

In Poland, the issue of liability for immigration offences has resounded loudly since the 2021 Polish–Belarusian border crisis. The Border Guard consistently reports violations of criminal law constituting immigration offences committed mainly by foreigners – in particular, third-country nationals, but also EU citizens. Practically every day there is information about the number of third-country nationals “trying to illegally enter the territory of Poland” as well as “couriers”² transporting those who managed to cross the Polish–Belarusian border. As indicated by the Border

¹ Similar estimates have also been made in the past. See e.g. the Migration Policy Institute (Securing Borders: The Intended, Unintended, and Perverse Consequences 2014) or the Global Initiative against Transnational Organized Crime (Smuggled Futures: The Dangerous Path of the Migrant From Africa to Europe 2014), according to which more than 80% of irregular migrants from Africa reach the EU with the help of smugglers and criminal groups.

² The Border Guard uses the term “couriers” to describe people who come to the border area to pick up people who have crossed the border with Belarus and transport them into Polish territory (Dobuszyńska 2024; Grzech 2024).

Guard itself, such couriers are charged with aiding and abetting the organisation of illegal border crossings, and administrative proceedings are initiated to oblige them to return to their country of origin and to ban them from entering Schengen countries for 5 to 10 years (Na granicy 2023; Szczepańska 2023a; Szczepańska 2023b; Szwed 2023). According to Border Guard statistics, there has been an increase in the number of acts qualified under Article 264(3) of the Criminal Code (hereinafter “PCC”; Journal of Laws of 2022, item 1138), i.e. organising the crossing of the border of the Republic of Poland in violation of the law. In 2019 there were 193 suspects, whilst there were 135 in 2020, 390 in 2021 and 664 in 2022. Thus, between 2019 and 2022 the number of persons suspected by the Border Guard of violating Article 264(3) more than tripled. Compared with the total number of suspects in Poland, these numbers are insignificant, however, because the Border Guard reported 4,821 suspects in 2022 and the police reported 317,077.

Starting in 2021, the migration crisis, or rather the humanitarian crisis (Kubal 2021; Balicki 2022: 84–85; Grześkowiak 2022), was also experienced by Poland. This had to do with the development of the eastern border route leading through Belarus to Western European countries (Frontex 2021: 28). In its aftermath, a state of emergency was introduced in parts of Podlaskie and Lubelskie provinces, which resulted not only in changes in legislation, but also in limited knowledge of migrants’ situation in the Polish–Belarusian borderland (Perkowska, Adamczyk, Jomma 2024: 182). Since then, it can be said that the deterrence policy (Hathaway 1992; Gammeltoft-Hansen, Tan 2017) towards non-European immigrants which has been in place since 2015 has taken a major turn (Klaus 2020: 86, 302–303; Klaus, Szulecka 2022: 11; Perkowska, Gutauskas 2023: 128) and the government has introduced collective expulsion implemented through pushbacks (Górczyńska, Czarnota 2022: 8; Klaus et al. 2021: 14; Bienkowska 2023: 180). The government chose the route of issuing administrative decisions to expel foreign citizens of third countries who cross the Polish–Belarusian border, although theoretically it might have been tempted to charge them with a crime or at least a misdemeanour for crossing the Polish border in violation of the law. In contrast, the authorities took a different attitude towards those who come to the border area to pick up migrants. These individuals, regardless of their citizenship, face criminal charges for arranging for others to cross the Polish border in violation of the law. The border services’ pushback causes those crossing irregularly, whether they could be classified as refugees or not, to choose to hide in the woods and then use the services of the couriers. This clearly leads to the development of smuggling networks at the border because the goal of the migrants is to cross the border unnoticed and get to the West without coming into any contact with the Polish authorities (Grześkowiak 2023).

Under Polish law, since 2004 crossing the border of the Republic of Poland in breach of the law constitutes a misdemeanour under Article 49a of the Misdemeanours Code, punishable by a fine of up to PLN 5,000, because the legislature decided to decriminalise illegal border crossings (Perkowska 2013: 506; Klaus, Woźniakowska-Fajst 2015: 195). However, crossing the country’s border in violation

of the law with the use of deceit, violence or threats or in cooperation with other persons is already a criminal offence under Article 264(2) PCC and punishable by up to 3 years' imprisonment. Article 264(3) PCC criminalises the organisation of a border crossing by other persons in violation of the law, which is punishable by imprisonment of 6 months to 8 years.

I decided to look into the practice of criminal prosecutions in Podlasie courts (a region bordering Belarus) against people who pick up migrants from the border region. Is this truly a case of organising an illegal process? The purpose of this article is to examine the criminal files of those convicted of organising illegal border crossings. This behaviour consisted solely of picking up migrants who already were on Polish territory. Law enforcement authorities charged such persons, mainly foreigners, with aiding and abetting the organisation of an illegal border crossing. I wish to verify whether such behaviour fulfils the prerequisites of the crime specified in Article 264(3) PCC, as well as the acts of international and European law that this provision implements. Therefore, the analysis of criminal case files will be preceded by an analysis of the statutory elements of the crime in question: organising the crossing of the state border in violation of the provisions of Article 264(3) PCC.

1. Aim, scope and methods of the analysis

I have long been puzzled by what law enforcement authorities and the judiciary understand by the term "organising". What behaviours do the authorities consider to fulfil the hallmark of organising, and how does this relate to the well-established jurisprudence and the doctrine discussed above?

The study involves 47 criminal case files in the District Court of Białystok, Sokółka and Hajnówka. These three courts were chosen because their jurisdiction covers the territory of Poland near its border with Belarus. The files of criminal cases in which a person was convicted on the basis of the legal classification of Article 264(3) PCC between 2015 and 2022 were selected for analysis, which was focussed particularly on cases from 2021–2023, i.e. during the humanitarian crisis on the Polish–Belarusian border. Cases completed before this period were also analysed to verify whether the rules for qualifying the behaviour of perpetrators under Article 264(3) PCC had changed. This analysis revealed 69 perpetrators of acts under Article 264(3) PCC, citizens of the following countries: Azerbaijan, Belarus, Georgia, Germany, Iraq, Libya, Lithuania, Latvia, Moldova, Palestine, Poland, Russia, Romania, Sri Lanka, Syria, Tajikistan, Turkey and Ukraine. Another four perpetrators of the act under Article 264(2) PCC, who were citizens of Vietnam, were also reported. The largest numbers of convictions were for citizens of Ukraine (18), Syria (8), Georgia (8), Belarus (7), Iraq (5) and Germany (4).

Table 1. Legal qualification of the cases under study

Legal qualification	Number of cases
Article 264(3) PCC	6
Article 18(3) in conjunction with Article 264(3) PCC	33
Article 13(1) in conjunction with Article 18(3) and Article 264(3) PCC	5
Article 264(2) PCC	1
Article 18(3) in conjunction with 264(3) PCC and Article 223(1) in conjunction with 157(2) PCC	1
Article 18(3) in conjunction with 264(3) PCC and Article 177(2); 178b PCC	1

Source: Own elaboration.

Among the 47 cases analysed, there were 6 with charges for organising an illegal border crossing, as well as 38 cases in which perpetrators were charged with aiding and abetting the organisation of an illegal border crossing or attempted aiding and abetting (5 cases). In one case, in addition to the charge of aiding and abetting, there was also a charge of causing a fatal road accident. In another, the additional charge was an assault on a public official and causing slight bodily harm.

Another method used in the research was an in-depth interview with two Border Guard officers on duty at the Polish–Belarusian border. The interview was conducted in spring 2023, also during the Belarusian border crisis.

2. A few remarks on discretion in criminal cases

In analysing criminal case files, I also want to look at discretion in migration-related cases, specifically those which involve organising the crossing of a state border in violation of the law. Research on the power of discretion in migration-related cases in Poland is currently being undertaken by Witold Klaus and Monika Szulecka (2021a, 2021b). The authors start from the assumption that preventing unauthorised residence on Polish territory is one aspect of migration control in Poland. Based on empirical research involving court files related to this offence, they analysed the role and consequences of discretion in judicial decisions sanctioning behaviours identified as for-profit support of foreigners’ stay in Poland in breach of the law (Klaus, Szulecka 2021b: 73).

It is in the daily discretionary behaviour of police officers, lawyers, judges and others that the legal system takes shape and gets things done. The abstract and often terse statements of the legislature are given form and purpose in the choices that legal actors make about the reach and meaning of their conception of the law. Decision-making is a pervasive feature of human activity, with consequences which are sometimes trivial or banal, sometimes drastic or dramatic (Hawkins 1986: 163).

Discretion in the criminal justice system can be seen on at least three levels and is implemented by three different types of actors. The first type is the police officers, who decide which person should be stopped or arrested. The second type includes prosecutors, who decide which cases should be pursued further and eventually brought to court. The third type relates to judges, who decide not only whether to convict, but also about the severity of the punishment (Bushway, Forst 2013: 201; van der Woude, van der Leun 2017: 29–30; Klaus, Szulecka 2021b: 75).

According to Pierre Bourdieu (1990: 87–88) the regulatory measures of the law are reinterpreted and redefined by the agents responsible for implementing them. According to the actors' dispositions and interests, they can use their manoeuvrability differently, ranging from strictly implementing to exempting or even transgressing the law. However, when it comes to immigration policies, a large part of the differential management of illegality depends on the temporal aspect of the law. The practice depends on legal disposition and administrative rules, but they cannot be understood outside of the time frame in which they are implemented (Spire 2020: 94). Therefore, actors are often concerned with the making of policy, or taking decisions about how to decide particular case types. Thus, decisions are not taken individually, but as part of a pre-established policy of deciding certain types of cases in a certain way (Hawkins 1986: 1171). In general, Keith Hawkins (1992) considers the heart of the discretionary process to be policymaking, which involves deciding on the goals and meaning of the law and how these ideas are to be shaped into strategies that enable their implementation. It is policy that shapes discretion and influences decisions taken in individual cases.

The same author points out that decisions taken earlier in the process or the way information, assessments or recommendations were made by others are important to the discretion of individual actors (Hawkins 1986: 1189). The judge takes into account the satisfaction of the entire criminal justice system, which includes all those involved in the case and extends to the society (Tata 2007: 439–441). This in no way undermines the idea of judicial independence. However, the presence (or absence) of various actors and the roles they play before and during the trial leave a mark on every judicial decision. The impact on the sentencing process becomes clearer if we think of the process as a pragmatic endeavour, and the judge as a craftsman who sees his job as rather boring and repetitive (Tata 2007: 427–428) and who is part of a broader social organisation (Klaus, Szulecka 2021b: 76).

Decisions are taken by largely invisible actors: officials and lawyers whose main concerns are related to handling and managing the stream of cases seen in interactional and organisational contexts (Hawkins 1986: 1164). Throughout the process of law enforcement and justice, discretion is of paramount importance. The various actors in this process in Poland, at the time of the humanitarian crisis on the Polish–Belarusian border, are not free from the influence of the state policy in the matter. This is due to the organisation of law enforcement agencies. The law enforcement agencies are the least apolitical and report to the Minister of Internal Affairs and Administration (the same minister who issued the border

ordinance which legalised the pushbacks [Ordinance of the Minister of Internal Affairs and Administration 2020]) through the prosecutor's office, which reports to the Minister of Justice, who is also the General Prosecutor. This undoubtedly sets the course for the decisions taken by the actors, greatly reduces discretion in migration matters and makes decisions an automatic process, sometimes different to before the crisis.

3. Statutory elements of the crime under Article 264 (3) of the Polish Criminal Code

Under Polish law, according to Article 264(3) PCC,³ it is a crime to organise for others a border crossing in violation of the law; the act is punishable by imprisonment from 6 months to 8 years.

When defining the statutory elements of the offence, the legislature used the verb "to organise", which means to perform a sequence of actions aimed at making a certain event possible (The Great Dictionary n.d.) or planning and coordinating the various stages of an action (PWN Dictionary n.d.). Sticking to the linguistic meaning, the Court of Appeals in Krakow stated that organising a border crossing therefore means taking any actions that allow other people to cross the border of the Republic of Poland – typical preparatory and auxiliary activities for this act (Judgment of the Court of Appeals in Krakow II AKa 183/20). Alexander Herzog (2021: 1132) points out that organising constitutes arranging, preparing and determining the means of crossing. It is a very broad concept and includes all forms of facilitating the crossing of a state border. Janusz Wojciechowski (1997: 462) and Michał Kalitowski (2006: 801) point out that it refers to organised activity that is not one-off, but repetitive. Similarly, Dagmara Gruszecka (2014: 963–965) points out that "by organising should be understood all ways and types of facilitating the crossing of the border, its preparation or arrangement". She further states that this crime is the domain of activity of smugglers of foreigners (Banasik 2017: 11; Judgment of the Court of Appeals in Krakow II AKa 183/20). On the other hand, Aneta Michalska-Warias (2024) understands organising as taking any action intended to enable others to cross the border of the Republic of Poland (Piórkowska-Flieger 2016: 781), which was also confirmed by the Supreme Court (Supreme Court Decision of 22 November 2016, IV KK 362/16).

³ This provision has been in force since the enactment of the 1997 Criminal Code, but it was modified in 2004 and 2022, according to the legislature, in order to align the provisions of Polish criminal law with the requirements of the 2002 Package and the "Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention Against Transnational Organized Crime", adopted by the United Nations General Assembly on 15 November 2000 (J.o.L. of 2005 No. 18, item 162).

The problem is determining when the organisation of an illegal border crossing occurs. The doctrine points out that organising includes activities that are undertaken prior to the execution of a border crossing in violation of the law. Article 264(3) PCC criminalises activities of organisation, which boil down to the prior creation of conditions that make such a border crossing possible (Ćwiąkański 2017: 596). This is an example of criminalising behaviour that traditionally falls under the area of foregrounding the violation of a legal good. It is therefore necessary to agree with the ruling of the Court of Appeals in Lublin, which stated that

[t]he use in Article 264 of the Criminal Code of the signifier “organising the transgression” shifts responsibility to a moment much earlier than the transgression itself, or more precisely, already to the stage of preparation. Accordingly, the commission of the crime will be the perpetrator’s undertaking of actions having the conditions for illegal border crossing by at least two persons. (Judgment of the Court of Appeals in Lublin II AKa 250/08, Gruszecka 2021: 1132)

Doctrine and jurisprudence indicate that organising the crossing of the border in violation of the law will be to establish appropriate contact with people who want to illegally cross the border, putting them together in groups, arranging transportation (Kalitowski 2006: 801), making efforts to learn how the border is to be protected and the topography of the area where the border crossing is to take place, transporting people to the proximity of the border, instructing people on how they are to cross the border (Judgment of the Court of Appeals in Krakow II AKa 183/20), drawing up a map of the route, organising means of transportation, collecting a fee from candidates for illegal border crossing, harbouring persons who are to be illegally carried across the border, arranging for them to have the appropriate documents or providing them with false documents, acquiring items to facilitate the border crossing (Judgment of the Court of Appeals in Krakow II AKa 183/20), engaging persons to undertake the border crossing in a place not intended for it and bribing Border Guard personnel (Kalitowski 2006: 801). Mainly following Supreme Court Judgment WK 23/04, it is pointed out that this behaviour need not be reduced to efforts to ensure the physical crossing of the border itself, and may also consist of efforts to provide places of safekeeping for persons illegally crossing the border (Herzog 2023: 1720).

Aneta Michalska-Warias (2018: 241–242; 2024) points out that activity amounting to providing places of safekeeping or means of transport for illegal border crossers may constitute either aiding and abetting in the offences under Article 264 (2–3) PCC, a misdemeanour under Article 49a of the Code of Misdemeanours (J.o.L. of 2022, item 2151) or an offence under Article 264a(1) PCC. For an act to qualify under Article 264 (3) PCC, it is necessary to establish that the perpetrator organised the illegal border crossing itself, and not only certain elements indirectly related to it. As can be seen from the opinions of scholars and jurisprudence presented herein, facilitation is an element of organising, and organising itself consists of activities that facilitate illegal border crossing.

Similarly, Alexander Herzog (2023) points out that aiding and abetting in the commission of this crime (Article 18(3) in conjunction with Article 264(3) PCC) is applicable to those who provide a means of transport to a place of safekeeping for others after they have illegally crossed the border, if this is the result of a promise made before or during the commission of this crime, in line with a judgment of the Supreme Court (WK 23/04). From the point of view of this provision, an important element is the moment when the agreement between the helper and the perpetrator (organiser) occurs. Here, the Supreme Court opted to assume that the agreement, or basically the promise, must occur before or during the commission of the crime. At the same time, the Supreme Court did not indicate in the ruling in question whether it refers to the moment of committing the crime of organising the unlawful crossing of the border or the moment of the unlawful crossing itself. Nevertheless, assuming that it is only a matter of aiding and abetting in organising the crossing of the state border in violation of the law, the moment at which organising begins may sometimes be extremely difficult to determine, since, as indicated above, organising itself may consist of many individual acts. Such doubts, however, do not arise from the assumption that aiding and abetting can be done in the course of organising a border crossing, which from a procedural point of view is easier to determine. The question arises, however, whether the moment when the border is illegally crossed by those for whom it is organised should be taken into account. Do arrangements made between an organiser and a person providing transportation after an unlawful border crossing fulfil the prerequisites indicated by the Supreme Court? The Supreme Court's *de facto* ruling does not provide an answer to this question. Moreover, it would be necessary to determine what the organiser actually did. Regarding the situation on the Polish–Belarusian border, does an organiser who orders foreigners to be picked up from the border region only organise an illegal crossing of the Polish–Belarusian border and transport to the destination in Poland? Or do they also organise a further illegal crossing of the border of the Republic of Poland and, for example, Germany? It is important to determine the moment of promise and criminal liability of such a courier.

Jacek Postulski (2005: 98–99) criticises Supreme Court ruling WK 23/04, indicating that providing the main organiser of an illegal border crossing with a means of transport for transporting persons to a place of safekeeping after crossing the border does not constitute aiding and abetting. He points out that if organising a border crossing is also considered to include providing appropriate transportation, then the actions of a “helper” within the meaning of the Supreme Court’s judgment of 25 January 2005 falls under the criminal prohibition of Article 264(3) PCC and a perpetrator providing a vehicle for the illegal transfer of people across the border is a co-organiser. In his opinion, in such a situation we are dealing with a complementary accomplice, implemented at the end of the actions of the perpetrator who is the main organiser of the crime.

Doubts about the Supreme Court’s judgment were also raised by the Court of Appeals in Krakow (II AKa 183/20), stating that if the perpetrator’s activity comes

down to only providing places of safekeeping or means of transport for persons illegally crossing the border of the Republic of Poland, then the perpetrator's actions – depending on the specifics – constitute either aiding and abetting the offences stipulated in Articles 264(2–3) PCC, a misdemeanour under Article 49a of the Code of Misdemeanours or the offence specified in Article 264a(1) PCC. In order for an act to qualify under Article 264(3) PCC, it is necessary to establish that the perpetrator organised the illegal border crossing itself, and not only certain elements indirectly related to it.

For criminal liability due to organising an illegal border crossing, the act must be committed intentionally and with direct intent (Ćwiąkański 2017: 599; Herzog 2020: 1720; Michalska-Warias 2024). Thus, an individual's behaviour amounting to facilitating an illegal border crossing committed with intentional guilt but an alternative intent does not fulfil the statutory elements of Article 264(3) PCC.

As of 1 October 2023, section 4 of Article 264 PCC is in force, which extends the criminalisation of organising others' illegal border crossing to countries other than the Republic of Poland if an obligation to prosecute such an act results from an international agreement ratified by the Republic of Poland. According to the Explanatory Memorandum to the Law Amending the Penal Code (J.o.L. of 2022, item 2600), the amendment is

due to the necessity of full and correct implementation into the Polish legal order of the Protocol against Smuggling of Migrants [...]. The addition of section 4 in the proposed wording will result in the expansion of the scope of criminalisation to behaviours consisting in organising other persons to cross the borders of other countries against the law as well. The inability to hold perpetrators of the crime of organising the smuggling of migrants across a border other than the border of Poland criminally liable under the Criminal Code means that Poland has improperly implemented the Palermo Protocol. (Explanatory 2022: 83)

However, the scope of criminalisation is broader than that which results from the said Protocol. This is because the latter indicates as a condition for criminalisation the action of an organiser of migrant smuggling in order to obtain, directly or indirectly, a financial or other material benefit. In the provision in question, acting for financial or personal gain is not among the elements of the act, unlike in Article 264a(1) PCC, for example (Herzog 2023). Thus, the legislature has implemented the provisions too broadly and inconsistently with international law, once again potentially extending criminal liability to those who provide humanitarian aid and to family members of migrants (Perkowska 2023: 35).

Organising an illegal border crossing in both sections 3 and 4 of Article 264 PCC is punishable by imprisonment from 6 months to 8 years.⁴ On the one hand, the upper limit of this penalty is quite high, and when the legislature increased it

⁴ The threat of a sentence of up to 8 years in prison is one of the harshest in Europe. In addition to Poland, such a penalty is still prescribed in Spain and Cyprus. A harsher penalty of up to 10 years' imprisonment is only applied in Bulgaria, France, Greece and Ireland. The remaining EU Member States hand down lighter penalties (European Commission 2017: 28).

in 2004 the intention was to shape the decisions made in the process of applying the law (Krajewski 2023: 47). On the other hand, the upper limit of the penalty provides the possibility to apply other regulations from the PCC, which allow fines or the restriction of liberty to be applied instead of imprisonment. However, if a perpetrator commits an act under Article 264(3–4) PCC in order to obtain a financial benefit or if they obtained a financial benefit from the commission of the act, the court may impose a fine on the perpetrator in addition to a prison sentence. Moreover, if the perpetrator is sentenced to a term of imprisonment not exceeding 1 year, the court may conditionally suspend the execution of this sentence.

Organising an illegal border crossing may be a manifestation of the activities of an organised criminal group (Perkowska 2021). According to the current legislation, under Article 64(2) PCC, the court is required to impose a prison sentence ranging from the lower limit of the statutory threat increased by half to the upper limit of the statutory threat increased by half, i.e. currently up to 12 years.

4. Law enforcement officers' and judges' understanding of organising unauthorised entry

An analysis of the qualification of perpetrators' behaviour revealed that only eight perpetrators in five cases were charged and convicted on the basis of Article 264(3) PCC alone; in all these cases the perpetrators acted before 2021, i.e. before the crisis on the Polish–Belarusian border. Their behaviour consisted of a perpetrator driving a passenger car to transport migrants from the Lublin area to Finland, or perpetrators acting jointly and in concert to arrange for four Vietnamese nationals to illegally cross the border from Lithuania into Poland and transporting them across the border (case 1). The perpetrators' actions also consisted of commissioning two other persons to transport “illegal migrants from Latvia to Poland and then to Germany”, offering them remuneration for doing so (case 2), a Belarusian organiser transporting money to a Polish organiser for “the participation of Poles in organising the crossing of the border of the Republic of Poland against the law” (case 3) and transporting from Lithuania to Poland Vietnamese nationals who did not have documents authorising them to cross the border (case 4). Qualifying such behaviour under Article 264(3) PCC is a practice of the Polish judiciary, confirmed in studies conducted on the period 2004–2013, in which it was established that the behaviour of foreigners in organising other illegal border crossings consisted in the following examples: transporting people in a concealed vehicle, driving them across the border in a place not intended for crossing the border, driving foreigners to a hotel near the Polish–German border and having another person organise transport to Germany or simply driving foreigners across the border

in a passenger car (without concealment) or transporting foreigners in a dinghy across a river border (Perkowska 2017: 213).

The seven perpetrators were convicted on the grounds of the legal classification of Article 13(1) in conjunction with 18(3) and 264(3) PCC. Such legal qualification was adopted by the court for situations in which the perpetrators were stopped for inspection by the authorities in the border area and indicated that they were traveling to a place marked on a map to pick up foreigners, after which the authorities at the location found individuals who had crossed the Polish border in violation of the law. Due to the fact that the perpetrators did not achieve their goal of picking up the foreigners, they were charged with attempting to assist the undetermined organisers of an illegal border crossing. The indictment usually contained such a description of the charged act:

[the accused,] acting jointly and in concert with other as yet undetermined persons, attempted to provide assistance in organising the crossing of the state border illegally from the Republic of Belarus to the Republic of Poland by foreigners in this way, that he, as a driver, came to the vicinity of the area of the state border, near the place of illegal border crossing, in order to pick up and transport to an undetermined place citizens (of a third country) who had previously crossed the state border in violation of the law, but he did not achieve the intended purpose because he was detained by officers. (e.g. III K 397/22 2022; III K 583/22 2022; III K 311/22 2022)

The legal qualification of the prosecution adopted in these cases is based on the assumption that the perpetrators only attempted to carry out the act, and in fact only attempted to aid and abet and not to organise the crossing of the border in violation of the law. Thus, law enforcement authorities have assumed and the courts have confirmed that if a perpetrator comes to the vicinity of the state border (as a driver, as detailed in several cases) with the purpose of picking up those who have crossed the border, then they are not fulfilling the premise of organising an illegal border crossing. It is clear from the practice of the courts that providing a means of transport does not constitute organising a crossing of the border in violation of the law, but only assisting in its organisation. Such a position is contrary to the case law discussed above, but perhaps evidentiary issues were behind it, and what will follow later in the article.

Here we come to the construction of the legal qualification adopted in the indictments, as well as the convictions upheld against the largest number of perpetrators in the cases under analysis, Article 18(3) in conjunction with 264(3) PCC, i.e. aiding and abetting in organising the crossing of the state border in violation of the law. In the cases in question, 55 out of 72 perpetrators were charged with this crime. According to the wording of the indictments, the behaviour of the perpetrators consisted of

providing assistance to undetermined organisers of the crossing of the border from the Republic of Belarus to the Republic of Poland against the law by [*here the number is indicated*] foreigners, in such a way that he arrived in a passenger car of the make of

[here the make of the vehicle and registration number are indicated] in the border area of the Republic of Poland with the intention of picking up and transporting inland [here the number is indicated ...] citizens [here the nationality is indicated] who had illegally crossed the border of the Republic of Poland. (e.g. III K 485/22 2022; III K 576/22 2022; III K 279/22 2022; III K 500/22 2022; III K 33/22 2022; III K 72/22 2022)

The following *modus operandi* thus emerges from criminal case files. The perpetrator, usually via a text message on a mobile phone, receives the location data of people who have crossed the border. They then arrive to pick up these people near the Polish–Belarusian border, take them to their car and drive away from the Polish–Belarusian border. Subsequently, the vehicle is stopped by Border Guard or police officers, and following the discovery of persons in the vehicle who have crossed the border in an undetermined place in violation of the law, the driver is arrested and criminal proceedings are initiated against them. It is worth considering at this point the charge of aiding and abetting the organisation of a border crossing in violation of the law.

As can be seen from the wording of all the indictments containing this legal qualification, the perpetrator aids and abets “undetermined organisers of crossing the border from the Republic of Belarus to the Republic of Poland in violation of the law”. In none of the cases was there any information about at least the exclusion for separate proceedings of the case of the “organiser” whom the perpetrator was alleged to have assisted. However, from the evidence in the files, it is possible to establish the relevant circumstances in this regard, which could prove the existence of such an organiser or the lack thereof. An excerpt from the order of the District Court in Białystok (case 5) refusing to apply pretrial detention to the suspect may be quoted here:

It is not known what kind of persons the perpetrator could be referring to, whom he could induce to give certain testimonies, because it is not known what kind of persons he could be referring to. The prosecutor is only planning to establish the persons whom the perpetrator may have helped, so it is possible that there were no such persons at all. (III K 961/22 2022)

This passage of the court’s order is very significant in the context of the cases under review. And although it relates to only one of the cases, it indicates that the court itself has doubts as to whether there are in fact individuals who could be charged with organising an illegal border crossing under Article 264(3) PCC – or perhaps it does not so much doubt whether such persons actually exist, but rather it doubts whether the prosecuting authorities are even trying to establish their existence.

In 18 cases (21 perpetrators), there may indeed have been an organiser who was in contact with the perpetrator and who was commissioned, for a fee, to pick up persons who had crossed the border illegally. This fact was confirmed by the perpetrators or the foreigners themselves, who were interviewed as witnesses (which was rare in the cases under analysis). The amount of remuneration varied; if

there was such information in the case files, the most common amount given was €100 for one person, although there were also amounts of €1,000 for transporting two to four people. Due to the fact that few perpetrators admitted guilt – or even if they did, they refused to testify – it is difficult to determine in all cases whether and how they contacted the people they were supposed to pick up. The perpetrators, if they admitted guilt, indicated that through colleagues they had received the contact details of previously unknown persons, who indicated to them the location and date for picking up foreigners by sending a “pin” on a map. Rarely did the perpetrators contact the foreigners directly.

The perpetrators often used Whatsapp or Telegram. One of the perpetrators had a registered contact for the ordering party as “illegal migrants”, which clearly indicates that he knew what kind of business he would be participating in. A key piece of evidence in these cases was the “visual inspection” of the perpetrators’ cell phones, which was used to establish the transmission of the location from which the perpetrator picked up or was supposed to pick up foreigners (the place was usually located in the border zone). On the basis of the visual inspection, it was also stated that the perpetrator contacted various phone numbers. However, there was no information in the files about the content of text messages sent by and to the perpetrator. Most of the perpetrators were foreigners, so the messages were transmitted in foreign languages and no translations of the messages were provided in the files. The key evidence on which the indictment was based was a screenshot of the perpetrator’s phone with the location from which he picked-up the foreigners. In only a few of the cases reviewed were the contents of the messages from the perpetrators’ phones downloaded and translated. Significantly, none of the cases included information on law enforcement’s determination of the moment when the organiser ordered the foreigners to be picked up. Determining this moment is crucial in light of Supreme Court ruling WK 23/04, which indicates that aiding and abetting the crime of organising others to cross the border of the Republic of Poland in violation of the law may consist in providing a means of transporting persons after illegally crossing the border, provided that “this is the result of a promise made before or during the commission of this crime”. The question of when the agreement and the “promise” of the transportation service were made is completely ignored in the case files. Law enforcement agencies cling to the evidence of a screenshot with the location of foreigners, and most often build an indictment on this basis. In a small number of cases there is additional evidence, such as the testimony of foreigners (those most often were immediately returned to the border line) or the suspect’s confession and agreement to make use of plea bargaining. A confession of guilt may not constitute key evidence in the case (Grzegorzcyk, Tylman 2014: 483; Zgryzek 2021: 394).

The existence of an organiser ordering foreigners to be picked up from the border area may also be evidenced by the fact that some of those convicted were drivers providing services, such as taxis, Bolt, Uber, etc. Law enforcement authorities in such cases determined that the perpetrator received a “pin” from an

undetermined organiser showing where to pick up the foreigners. In two cases, law enforcement authorities analysed the perpetrators' mobiles in more detail and were able to determine, based on the locations of the mobile network logins, that the perpetrators (who live in central Poland) had come to the border area several times in the past few weeks, which may be evidence of repeated provision of the transportation service. Nevertheless, the perpetrator could just have been carrying out a service ordered through an app, unaware that they were participating in an organised activity. Also, they may have received the order from family members, or from the migrant foreigners themselves. This, too, has been overlooked in the cases, as was the content of the information provided.

According to an interview conducted with Border Guard officers on duty at the border with Belarus, it appears that illegal crossings at Poland's eastern border were previously mainly organised through organised crime groups (Klaus, Woźniakowska-Fajst 2015: 212–213; Laskowska 2017: 285–289; Perkowska 2021: 58). In contrast, this has taken other forms in times of crisis. At the beginning of the migration crisis in 2021, "people who came to pick up migrants who managed to successfully cross the border were most often family members who were in diasporas located in the territory of the European Union, or acquaintances" (Officer 1). These were people who had residence permits in Germany, Sweden, France, Belgium or the Netherlands and had family, friends or professional relationships with those who crossed the border from Belarus. In contrast, in the second phase of the crisis, from 2022 onwards, "couriers bringing in migrants are people with some kind of residence title in Poland", with a very high proportion of citizens of Ukraine, Georgia and Belarus. The courier "does not have any previous relationship with these people, this is done by sending internet data [...] in the form of a so-called pin, location" (Officer 2). According to Border Guard officials, the main organisers of the procedure are individuals residing in Iraq, Syria, Turkey or Canada or individuals residing in Poland. The Border Guard has identified about 30 main organisers who arrange border crossings for a fee. In this time of crisis, there were no individuals undertaking to cross the Polish border on their own. According to the officer, at this point "this is simply impossible without the help of the Belarusian state and without cooperation with Russia and their services" (Officer 1).

Various aspects of the problem of family members' involvement in migrant smuggling has been studied and discussed in the social sciences. Much of the research deals with the family finding a migrant smuggler and raising funds to pay for their service, as well as the expectation of the family's financial situation being improved through emigration (Koser 2004; 2008; 2011; Boyd 1989, Herman 2006, Triandafyllidou 2022). The theme of direct involvement in the process of migrant smuggling – family members, relatives or friends picking up migrants from the border zone – also appears in discussions on illegal migration (Herman 2006: 111–212; van den Leun, Ilies 2016: 194, 121; Liempt 2022: 309). UN documents emphasise that the framework of criminal liability for migrant smuggling defined in the Protocol Against Smuggling of Migrants deliberately assumes that

perpetrators act for financial gain, in order to exclude from its scope support provided on humanitarian grounds or on the basis of family ties (Carrera et al. 2016: 61–62; UNODC 2017: XI; Carrera et al. 2018: 108; Mitsilegas 2019: 70; Perkowska 2023: 32–33). Hence, cases involving family members who came to the border to pick up relatives during the humanitarian crisis on the Polish–Belarusian border will be analysed further.

In the course of analysing criminal case files, three cases were found in which family members came to the vicinity of the Polish–Belarusian border to pick up family members who had crossed the border without the proper documents or other authorisation. In the first case (case 6), two German citizens of Turkish nationality (AA and AB) and one Turkish citizen (AC), all living permanently in Germany, came to the border area to pick up the brother of AA. They came in three cars to a village about 5 km from the Polish–Belarusian border to pick up AD. As they testified, a total of 13 people came out of the forest; according to the findings of the Border Guard, they comprised 12 Iraqi citizens and one Turkish citizen with the same name as the perpetrator, AA. AA took his brother in his car, whilst AB and AC took the other 12 people, including three children. They were stopped by the Border Guard. The perpetrators confessed that they had picked up the migrants to take them to Germany and that they were not to receive any remuneration, but did so out of pity from seeing the families with children. The Border Guard determined from a “visual inspection” of AD’s phone that he had contacted users with phone numbers that matched those of the three perpetrators (AA, AB and AC). Significantly, there is no information in the file about the translation of possible messages from the phones of the accused perpetrators and AD. The contents of these messages were not secured. The Border Guard only drafted an official memo, which included the note that

due to the prevailing state of emergency in the area of part of the Podlaskie province and the activities related to the immediate return of illegal immigrants to the border line and the language barrier, it was not possible to carry out all procedural activities with the above-mentioned foreigners. After inspection, the phone was returned to AD and immediately returned to the state border. (III K 661/22 2022)

It therefore follows that the Border Guard was unable to read the messages on AD’s phone on the spot, and was also unable to communicate with AD due to the language barrier. The evidence in this case was the testimony of Border Patrol officers, the testimony of the suspects and the visual inspection of their mobile phones. Documentation of the visual inspection consisted only of photos of the phone screens, with no translation of the messages. The minutes of the perpetrators’ testimonies show that they admitted going to the border area and picking up AD and the other migrants. On the other hand, they did not admit to helping the organiser organise the other people’s illegal crossing of the border; their testimonies do not contain any information on this subject. The police and Border Guard focussed on obtaining a confession that the perpetrators had come

to the border area to pick up the migrants and that they planned to take them to Germany. Thus, the charge of aiding and abetting the organisation of a border crossing by other persons appears to have been erroneous. The indictment defined the charge as follows:

acting jointly and in concert, they provided assistance to as yet undetermined persons in organising the crossing of the state border illegally from the Republic of Belarus to the Republic of Poland to 12 citizens of Iraq and 1 citizen of Turkey, in such a way that they provided a means of transportation allowing them to be transported from the vicinity of the state border into the interior of the country or into the territory of the European Union that is, an offence under Article 18(3) PCC in conjunction with Article 264(3) PCC. (III K 661/22 2022).

In the second case (case 7), the situation was very similar. Two accused Iraqi citizens, AE and AF, holding a temporary residence permit in Germany, arrived at the border region to pick up AF's brother, who had come to Poland from Belarus without authorisation, along with his family: his wife and three children, aged 10, 7 and 3. According to the defendants' testimony, AF received a message from his brother that he had entered Poland, but they had lost one of their children and needed help. The charge brought against them by law enforcement officers was very similar to the first case. Neither of the perpetrators confessed to the charge against them.

In both cases the law enforcement authorities did not have any evidence that the perpetrators AA, AB, AC, AE and AF had contacted an "undetermined" organiser with whom they had arranged to provide a means of transportation to the migrants, and there is no information about this in the case file. Law enforcement authorities considered the testimony of the three perpetrators, admitting the purpose of their trip to Poland and their intention to pick up at least AD and AF's brother from the border region and take him to Germany, to be sufficient evidence in the case. Moreover, they considered the photos of AD's phone screen, showing that he had contacted AA, AB and AC, sufficient evidence. As in the case of AE and AF, the main evidence was photos of AF's phone screen, particularly a photo of a location sent on a map, indicating the family's location. The contents of the sent messages were not secured or translated into Polish. The perpetrators did not admit to contacting any third party who could have organised the migrant smuggling, and law enforcement authorities did not establish such contact. Moreover, it is not clear from the examination of the perpetrators' phones whether law enforcement established the time at which the contact with the defendants occurred. Did the contact occur before the migrants crossed the border, or was it after? The fact that the perpetrators (AA, AB and AC) arrived in three separate cars may indicate that they knew there would be more migrants to pick up, but law enforcement did not establish this. Any unremovable doubts, according to Article 5(2) of the Criminal Procedure Code, should be resolved in favour of the suspect.

The photos of the perpetrators' phone screen (without translations of their

contents) and the testimonies of the officers and the defendants themselves were again considered sufficient evidence. Evidentiary deficiencies did not prevent the court from issuing a conviction. As described above in most of the cases reviewed, the legitimacy of the charges is in doubt, especially as the evidence secured in the case itself is highly questionable. According to the views of the doctrine as well as the established case law, “for the adoption of aiding and abetting, it is necessary, confirmed by the evidence of a particular case, to convince the court that there was an individually designated person in relation to whose actions the actions specified in the disposition of the provision of Article 18(3) PCC were undertaken by the helper”. Thus, the hallmarks of aiding and abetting include identifying the direct performer, i.e. the subject of the facilitator’s actions. According to the Supreme Court, “aiding and abetting is the facilitation of the commission of a criminal act (*cum dolo directo* or *cum dolo eventuali*) to another person, i.e. a specific person, but not necessarily individualised in the given proceedings as to identity” (II KK 184/05 2005; Kardas 2012: 463; Sakowicz 2017: 467). In addition, when analysing the subjective side of aiding and abetting, it is characterised by the intention for another person to commit a criminal act, which means that, as stated by the Supreme Court, the giver of aid must want another person to commit a crime, or, foreseeing the possibility of such an act by another person, agree to it (II KK 184/05 2005). The provider of assistance must understand that by taking certain actions, they are thereby facilitating another person’s commission of a criminal act. They should also understand that they are doing so with respect to a specific, characterised in the relevant provision of the special part of the prohibited act and with respect to the individually designated person of the direct performer (Rw 317/82 1982; II KK 184/05 2005).

Thus, in order to bring a charge of aiding and abetting the crime of organising an illegal border crossing, law enforcement authorities must have evidence that there is a designated person to whom the perpetrator provided assistance (the main organiser). Moreover, it must be shown in the evidence that the perpetrator was aware that they were providing assistance to such an organiser, or at least accepted such an eventuality. No such evidence was found in the cases under review. At most, it could be assumed that the perpetrators provided assistance to a criminal act, or rather the misdemeanour of illegal border crossing.

In the third case, the facts were similar to the previous ones. An Iraqi citizen, AG, living permanently with his family in Germany, came to the vicinity of the Belarusian border because he had received a text message from his sister stating that she was in Poland with her husband and three children. The perpetrator was stopped by the Border Guard on the Białowieża-Hajnówka road. According to the indictment, the perpetrator

provided assistance in organising the crossing of the state border from the Republic of Belarus to the Republic of Poland, contrary to regulations, to five persons of Iraqi nationality, in that he provided a means of transportation allowing them to be transported from the border zone region into the interior of the country or into the

European Union, by arriving as a driver in a passenger car of the make [...] to the area of the border of the Polish state, where he picked up five foreigners of Iraqi nationality who had crossed the borders of the Republic of Belarus into the Republic of Poland against the law and then transported them inland to Poland. (VII K 137/22 2022)

AG admitted that he had come to pick up his sister and her family the day after receiving a message from her. He stated that he knew they had illegally crossed the border, and that he was aware that a carrier she had paid to deliver them to Germany was to come for his sister. AG pleaded guilty to the charge and furthermore agreed to voluntarily surrender to a sentence.

What distinguishes the approach of the prosecuting authorities in this case from the previous two is that, in constructing the charge, the prosecutors did not indicate that AG had provided assistance to an undetermined organiser. From the wording of the charge, it appears that AG assisted in organising the unlawful crossing of the state border of five people by providing a means of transportation. This raises the question of who the potential organiser could be, since the charge is for aiding and abetting the organisation of an illegal border crossing, not for aiding and abetting the border crossing itself. There is no information in the file about the existence or suspected existence of an organiser, although the defendant himself admitted that he knew his sister had used a “carrier”. When questioned as a witness, she admitted that she had used the services of a “smuggler”, who was supposed to help them reach Germany. However, the law enforcement authorities did not base the charge on the existence of an organiser. Thus, the charge of aiding and abetting organisation is questionable. Because it was not established that AG had provided assistance to the organiser, there is again no confirmation in the evidence contained in the case file that there was an individually designated person whose actions the helper assisted. Again, the law enforcement authorities had no evidence to show that AG had intended to assist any organiser nor, foreseeing the possibility of such assistance, had agreed to do so.

This case in fact does not differ from the two previous, but the text of the charge is different in terms of the existence of an organiser. More importantly, the court’s decision was different: the District Court hearing the case decided to discontinue the proceedings in the case due to the negligible social harm of the act in accordance with Article 17 (1)(3) of the Code of Criminal Procedure. This decision was upheld by the Regional Court. Admittedly, it stated that the Court found that

there is no doubt that the accused provided assistance in organising the crossing of the state border from the Republic of Belarus to the Republic of Poland, contrary to regulations, to five persons of Iraqi nationality, in that he provided a means of transportation allowing them to be transported [...] by which he fulfilled the elements of Article 18(3) in connection with Article 264(3) PCC. (VII K 137/22 2022)

However, at the same time, it stated that

the degree of social harmfulness of an act is that immutable feature of an act which allows to distinguish trivial from serious acts and to criminalise only those that actually and realistically harm specific goods of an individual or society. (VII K 137/22 2022)

The court consequently considered AG's behaviour as acting from humanitarian motives, pointing out that

he provided assistance to members of his immediate family, did not derive any material benefit from it, did not cause any harm and was guided by a reflex of the heart, normally understood as caring for loved ones who are in an extremely difficult situation. [...] Thus, juxtaposing the gravity of the provisions violated by the accused with the category of crimes against public order, it should be considered that his action to protect the life and health of persons, i.e. legal goods located high, if not at the very top of the hierarchy from the point of view of the value of legal goods subject to criminal law protection, deserves neither condemnation nor criminal penalisation. (VII K 137/22 2022)

In a similar vein, the appeals court to which the prosecution appealed pointed out that AG had not provided assistance to random foreigners nor received any remuneration, and was driven by "an internal need to help members of his closest family". At the same time, as the evidence gathered in the case shows, providing assistance to these foreigners was necessary for the health and life of the children traveling with them.⁵ But the court also stated that

it cannot be assumed that the defendant's conscious fulfilment of the elements of the subjective side of the act under Article 18(3) in connection with Article 264(3) PCC was due to the ease of deciding to commit the crime or the lack of moral brakes. On the contrary, AG's motives for acting were considered noble and selfless. The above was reasonably considered to make the social harmfulness of the act negligible. (VII K 137/22 2022)

This case was the only one among those analysed that did not result in a conviction, although the defendant's *modus operandi* did not differ in any way from that of the others, especially those who came to the border area to pick up family members. However, the judges' understanding of facilitating the organisation of unauthorised entry was similar. Also, in this case the court found that "there is no doubt that the accused assisted in the organisation of the unauthorised crossing of the state border [...] by which he exhausted the elements of Article 18(3) in connection with Article 264(3) PCC". And although this case contains a justification of the judgment – the only one that does – it unfortunately does not address the fulfilment of the elements of aiding and abetting the organisation of an illegal border crossing, but focusses primarily on the issue of the social harm of the act, which is an immutable feature of the crime. It also focusses on AG's motive, which, according to the court, was the desire to help immediate family members.

⁵ They were hospitalised.

Conclusion

The issue of criminal responsibility for immigration offences became especially relevant in 2021 in the context of the humanitarian crisis on the Polish–Belarusian border. Poland began using pushbacks and collective expulsion in response to “illegal” border crossers with Belarus (Klaus et al. 2021: 14; Górczyńska, Czarnota 2022: 8; Bieńkowska 2023: 180). It responded with administrative and criminal law measures against those who tried to “help” them get into Poland or further into Western Europe. The reaction of law enforcement and the judiciary in terms of responsibility for organising border crossings in violation of the law is the subject of this research.

The research, although I am aware that it is not total or representative, allows one to cautiously draw the first conclusions about the application of Article 264(3) PCC during the humanitarian crisis on the Polish–Belarusian border. The use of the case study method on the files of criminal cases concluded with a final verdict (in courts with jurisdiction over the border area) allowed for an in-depth analysis and discussion of what behaviour and circumstances law enforcement agencies and the judiciary considered to merit criminal sanctions with regard to the provision in question, or aiding and abetting in this crime. In only one of the cases under analysis did the court decide to discontinue the proceedings due to the lack of social harm from the act. From the point of view of Poland’s policy on foreigners trying to cross the border through Belarus, it was important to analyse the discretion of the actors involved in prosecuting those involved in organising unlawful border crossings. Particularly relevant to the decision-making process, was the time span in which they were implemented (Spire 2020: 94). It was important to verify whether decisions were taken individually but within the framework of a preconceived policy for resolving certain types of cases in a certain way (Hawkins 1986: 1171) and the policy of deterrence set by the state. In the case of law enforcement agencies, which are uniformed groups tasked with executing orders or official instructions, it is even natural to adopt a specific policy for dealing with certain cases. This should not be the case with the judiciary.

The impact of the deterrence policy is evidenced by the fact that in the cases involving couriers, the legal qualification of Article 18(3) in connection with Article 264(3) PCC – i.e. aiding and abetting the organising of a border the crossing in violation of the law – was adopted, whilst the perpetrators were charged with aiding and abetting an undefined organiser. Of course, from the point of view of criminal liability, there is no requirement that the relevant organisers be identified and held criminally responsible, but in some cases there are doubts as to whether law enforcement agencies in general took steps to identify the organiser. This was especially true in one case, in which the district court refused to apply pretrial detention to the suspects, stating that “[t]he prosecutor is only planning to establish the persons whom the perpetrator may have assisted, so it is possible that there were no such persons at all”. Another important area was the evidence

on which the perpetrator was prosecuted and found guilty. None of the cases included information about law enforcement officers' determination of the timing of the organiser's order to pick up the foreigners, which is crucial in light of Supreme Court ruling WK 23/04, which states that aiding and abetting a crime under Article 264(3) PCC can consist of providing a means to transport people after they have illegally crossed the border, provided that "this is the result of a promise made before or during the commission of that crime". The question of when the agreement and the "promise" of the transportation service was made is completely ignored in the case files. In addition, when alleging aiding and abetting a crime under Article 264(3) PCC, law enforcement authorities must have evidence to prove that there is a designated person whom the perpetrator assists; in some of the cases reviewed, no such evidence was found. Moreover, the cases that resulted in convictions, in my opinion, lacked an analysis of the perpetrators' guilt. The court did not focus on whether the perpetrator fulfilled the elements of guilt, and if so, what was the direct or alternative intent. In these cases, the intent of the perpetrator was not established at all. There is a lack of evidence that would confirm the perpetrator's intent. All this gives the impression of automated law enforcement and justice (Tata 2007: 427–428).

An analysis of the criminal case files also leads to the conclusion that judges, especially in cases in which the perpetrator signed a guilty plea, do not analyse whether the perpetrator actually fulfilled the elements of the act they were charged with, whether guilt can be attributed to them or whether their rights during the criminal proceedings were violated, for example, by being obliged through an administrative decision to leave the territory of Poland – not to mention whether they were aware of the consequences of voluntarily surrendering to punishment. In such cases, the discretion of judges is greatly influenced by decisions taken earlier in the process (Hawkins 1986: 1189), especially by the prosecutors. After all, a confession is not the most important evidence in a case (Grzegorzczuk, Tyłman 2014: 483). Additionally, judges must take into account the satisfaction of the entire criminal justice system (Tata 2007: 439–441). The use of the institution of guilty plea is *de facto* only the confirmation of the sentence by the court at the session, what makes such cases invisible for the society (Aliverti 2013: 135–136).

All these doubts resound most clearly in the cases involving defendants who came to pick up their family members (siblings) in the border region. In two cases it seems that neither the law enforcement authorities nor the court took into account the fact that this was assistance given to a family member. Moreover, it had no evidence to prove that the defendant had come into contact with anyone organising an illegal crossing of the border. The court imposed the same penalties as with other perpetrators, without taking into account the motives of the perpetrators as mitigating factors, if not abolishing criminal responsibility. This confirms the automatism of the justice system in such cases. Only in one of the cases, despite the filing of a motion for voluntary surrender to punishment, did the judge decide to discontinue the proceedings due to the lack of social harm

from the act, considering the behaviour of a brother who came to pick up his sister and her family as acting from humanitarian motives.

The research results lead to the conclusion that criminal proceedings during the humanitarian crisis in cases of organising a border crossing in violation of the law or aiding and abetting this act is not free from factors influencing the discretion of law enforcement agencies and the judiciary. According to the author, the most influential factor is the state policy towards foreigners coming through Belarus.

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References

- Aliverti A. (2013). *Crimes of Mobility. Criminal Law and the Regulation of Migration*. London: Routledge.
- Aljehani A. (2015). 'The legal definition of the smuggling of migrants in light of the provisions of the migrant smuggling protocol.' *The Journal of Criminal Law* 79(2), pp. 122–137. <https://doi.org/10.1177/0022018315576734>
- Arrouche K., Fallone A., and Vosyliute L. (2021). *Between Politics and Inconvenient Evidence. Assessing the Renewed EU Action Plan against Migrant Smuggling*. Brussels: CEPS.
- Balicki J. (2022). 'Migration crisis on the Polish-Belarusian Border (2021–2022). From a humanitarian and human rights perspective.' *Studia Europejskie* 2, pp. 75–87. <https://doi.org/10.33067/SE.2.2022.5>
- Banasik K. (2010). 'Podanie wyroku do publicznej wiadomości' [Publication of the judgment]. *Państwo i Prawo* 8, pp. 83–95.
- Banasik K. (2017). 'Penalizacja bezprawnego przekroczenia granicy państwowej' [Criminalisation of unlawful crossing of the state border]. *Studia Prawnicze. Rozprawy i Materiały* 1(20), pp. 3–14.
- Bieńkowska M. (2023). 'Between humanitarianism and security – the events at the Polish-Belarusian border'. In J. S. Methi and B. Nikiforova (eds.) *Borderology*

- Spatial Perspective, Theoretical and Practical*. Routledge, pp. 177–187. https://doi.org/10.1007/978-3-031-29720-5_14
- Bourdieu P. (1990). 'Droit et passe-droit' [Prawo i uprawnienia]. *Actes de la Recherche en Sciences Sociales: L'économie de la Maison* 81–82, pp. 86–96.
- Boyd M. (1989). 'Family and personal networks in international migration: Recent developments and new agendas.' *International Migration Review* 23, pp. 638–672. <https://doi.org/10.2307/2546433>
- Bushway S.D. and Forst B. (2013). 'Studying discretion in the processes that generate criminal justice sanctions.' *Justice Quarterly* 30(2), pp. 199–222. <http://doi.org/10.1080/07418825.2012.682604>
- Carrera C., Guild E., Aliverti A., Allsopp J., Manieri M.G., Levoy M., Gutheil M., and Heetman A. (2016). *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants*. Brussels: Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs. Available online: [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU\(2016\)536490_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU(2016)536490_EN.pdf) [18.12.2023].
- Carrera C., Vosyliute L., Smialowski S., Allsopp J., and Sanchez G. (2018). *Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants: 2018 Update. Study*. Brussels: Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union. Available online: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU\(2018\)608838_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/608838/IPOL_STU(2018)608838_EN.pdf) [15.11.2023].
- Carrera S. (2021). *Walling off Responsibility? The Pushbacks at the EU's External Borders with Belarus*. Brussels: CEPS.
- Ćwiakalski Z. (2017). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In W. Wróbel and A. Zoll (eds.) *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. art. 212—277d* [Criminal Code. Special part. Volume II. Part II. Commentary to Articles 212—277d]. Warszawa: Wolters Kluwer, pp. 482–610.
- Daniluk P. (2008). 'Środek karny podania wyroku do publicznej wiadomości w kodeksie karnym' [Penal measure of making a sentence public in the Criminal Code]. In J. Jakubowska-Hara, C. Nowak, and J. Skupiński (eds.) *Reforma prawa karnego. Propozycje i komentarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej* [Criminal law reform. Proposals and commentaries. Memorial book to Professor Barbara Kunicka-Michalska]. Warszawa: Scholar, pp. 38–50.
- Durczak-Żochowska S. (2009). 'Udostępnienie treści wyroku nakazowego' [Publication of the content of the prescriptive judgment]. *Prokuratura i Prawo* 2, pp. 40–53.
- European Commission, Directorate-General for Migration and Home Affairs (2014). *Evaluation and Impact Assessment Study on a Proposal for a Revision of the EU Legal Framework Related to the Facilitation of Irregular Migration (Migrant Smuggling)*. Luxembourg: Publications Office of the European Union. Available online: <https://op.europa.eu/en/publication-detail/-/publication/70b45f3d-3426-11e7-9412-01aa75ed71a1> [28.08.2024].

- Frontex (2022). *Risk Analysis for 2022/2023*. Warsaw: Frontex. <https://doi.org/10.2819/097884>
- Gammeltoft-Hansen T. and Tan N.F. (2017). 'The end of the deterrence paradigm? Future directions for global refugee policy.' *Journal on Migration and Human Security* 5(1), pp. 28–56. <https://doi.org/10.1177/233150241700500103>
- Garcia-Espana E. (2023). 'Criminal prosecution and punishment of migrants in Spain: A border criminology perspective'. *Białystok Legal Studies* 28(1), pp. 197–212. <https://doi.org/10.15290/bsp.2023.28.01.11>
- Górczyńska M. and Czarnota K. (2022). *Gdzie Prawo nie sięga. Raport Helsińskiej Fundacji Praw Człowieka z monitoringu sytuacji na polsko-białoruskiej granicy* [The Lawless Zone – 12 months of the Polish-Belarusian border crisis]. Warszawa: Helsińska Fundacja Praw Człowieka. Available online: <https://hfhr.pl/publikacje/raport-gdzie-prawo-nie-siega-11-miesiecy-kryzysu-humanitarnego-na-polsko-bialoruskim> [12.02.2024].
- Gruszecka D. (2014). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In J. Giezek (ed.) *Kodeks karny. Część szczególna. Komentarz* [Penal Code. Special part. Commentary]. Warszawa: C.H. Beck, pp. 934–1023.
- Gruszecka D. (2021). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In J. Giezek (ed.) *Kodeks karny. Część szczególna. Komentarz* [Penal Code. Special part. Commentary]. Warszawa: C.H. Beck, pp. 1022–1142.
- Grzegorzczak T. and Tylman J. (2014). *Polskie postępowanie karne* [Polish criminal proceedings]. Warszawa: Wolters Kluwer.
- Grześkowiak M. (2022). 'The "Guardian of the treaties" is no more? The European Commission and the 2021 humanitarian crisis on Poland–Belarus border.' *Refugee Survey Quarterly* 42(1), pp. 81–102. <https://doi.org/10.1093/rsq/hdac025>
- Hathaway J.C. (1992). 'The emerging politics of non-entrée.' *Refugees* 91, pp. 40–41.
- Hawkins K. (1986). 'On legal decision-making.' *Washington and Lee Law Review* 43(4), pp. 1161–1242.
- Hawkins K. (1992). 'The use of legal discretion: Perspectives from law and social science.' In K. Hawkins (ed.) *The Uses of Discretion*. Oxford: Oxford University Press, pp. 11–46. <https://doi.org/10.1093/oso/9780198257622.003.0001>
- Herman E. (2006). 'Migration as a family business: The role of personal networks in the mobility phase of migration.' *International Migration* 44(4), pp. 191–230. <https://doi.org/10.1111/j.1468-2435.2006.00384.x>
- Herzog A. (2020). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In R. Stefański (ed.) *Kodeks karny. Komentarz* [Penal Code. Commentary]. Warszawa: C.H. Beck, pp. 1690–1722.
- Herzog A. (2023). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In R. Stefański (ed.) *Kodeks karny. Komentarz* [Penal Code. Commentary]. Warszawa: C.H. Beck, pp. 1740–1774.

- Kalitowski O.M. (2006). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In O. Górniok (ed.) *Kodeks karny. Komentarz* [Penal Code. Commentary]. Warszawa: Wolters Kluwer, pp. 796–819.
- Kardas P. (2016). 'Rozdział II. Formy popełnienia przestępstwa' [Chapter II. Forms of committing a crime]. In W. Wróbel and A. Zoll (eds.) *Kodeks karny. Część ogólna. Tom I. Cześć I. Komentarz do art. 1–52* [Criminal Code. General part. Volume I. Part I. Commentary to articles 1–52]. Warszawa: Wolters Kluwer, pp. 268–528.
- Klaus W. (2020). 'How does crimmigration unfold in Poland? Between securitisation introduced to Polish migration policy by its europeanisation and Polish xenophobia.' In R. Koulis and M.A.H. van der Woude (eds.) *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders*. New York: Fordham University Press, pp. 298–314. <https://doi.org/10.2307/j.ctvxrpzhz.16>
- Klaus W. (ed.), Czarnota K., Dąbrowska A., Fiałkowska K., Karwan-Jastrzębska J., Kosowicz A., Mandelt M., Mazur J., Mikulska-Jolles A., and Wesołowski F. (2021). *Kryzys humanitarny na pograniczu polsko-białoruskim. Raport Grupy Granica* [Humanitarian crisis in the Polish-Belarusian border region. Border Group Report]. Warszawa: Grupa Granica.
- Klaus W. and Szulecka M. (2021b). 'The judiciary power of discretion in sanctioning the facilitation of unauthorised stay in Poland.' *International Journal for Crime, Justice and Social Democracy* 10(3), pp. 72–86. <https://doi.org/10.5204/ijcsd.2042>
- Klaus W. and Szulecka M. (2022). 'Departing or being deported? Poland's approach towards humanitarian migrants.' *Journal of Refugee Studies* 36(1), pp. 1–22. <https://doi.org/10.1093/jrs/feac063>
- Klaus W. and Woźniakowska-Fajst D. (2015). 'Przestępstwo nielegalnego przekroczenia granicy w ujęciu historycznym, teoretycznym i praktycznym' [The crime of illegal border crossing in historical, theoretical and practical terms]. *Archiwum Kryminologii* 37, pp. 191–222. <https://doi.org/10.7420/AK2015F>
- Koser K. (2008). 'Why migrant smuggling pays?' *International Migration* 46(2), pp. 3–26. <https://doi.org/10.1111/j.1468-2435.2008.00442.x>
- Koser K. (2011). 'Why take the risk? Explaining migrant smuggling.' In T. Modood and J. Salt (eds.) *Global Migration, Ethnicity and Britishness*. New York: Palgrave Macmillan, pp. 65–83.
- Krajewski K. (2023). 'O wpływie ustawodawstwa karnego na politykę karną' [Impact of penal law on penal policy]. *Archiwum Kryminologii* 41(2), pp. 41–80. <https://doi.org/10.7420/AK2019N>
- Laskowska K. (2017). 'Granica państwa jako miejsce popełniania przestępstw przez zorganizowane grupy przestępcze z udziałem cudzoziemców' [State border as a place of perpetration of crimes by organized criminal groups with foreigners] In W. Klaus, K. Laskowska, and I. Rzeplińska (eds.) *Przestępczość cudzoziemców. Aspekty prawne, kryminologiczne i praktyczne* [Criminality of foreigners. Legal, criminological and practical aspects]. Warszawa: Wydawnictwo Naukowe Scholar, pp. 285–293.

- Leun J. van der and Ilies M. (2016). 'The Netherlands: Assessing the Irregular population in a restrictive setting'. In A. Triandafyllidou (ed.) *Irregular Migration in Europe Myths and Realities*. London: Routledge, pp. 187–206.
- Liempt I. van (2022). 'Humanitarian smuggling in a time of restricting and criminalizing mobility.' In M. Gallien and F. Weigand (eds.) *Routledge Handbook of Smuggling*. London: Routledge, pp. 303–312. <http://doi.org/10.4324/9781003043645-22>
- Michalska-Warias A. (2018). 'Przestępstwo ułatwiania nielegalnego pobytu na terytorium Rzeczypospolitej Polskiej (art. 264a k.k.) – wybrane problemy' [Offence of facilitating illegal residence on the territory of the Republic of Poland (Art. 264a CC) – selected issues]. *Teka Komisji Prawniczej* 11, pp. 237–249.
- Michalska-Warias A. (2024). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In M. Królikowski and R. Zawłocki (eds.) *Kodeks karny. Część szczególna. T. 2. Komentarz. Art. 222–316* [Penal Code. Special part. Vol. 2. Commentary. Articles 222–316]. Warszawa: C.H. Beck, pp. 365–543.
- Mitsilegas V. (2019). 'The normative foundations of the criminalization of human smuggling: Exploring the fault lines between European and international law.' *New Journal of European Criminal Law* 10(1), pp. 68–85. <https://doi.org/10.1177/2032284419834363>
- Perkowska M. (2013). 'Prawne i kryminologiczne aspekty dekryminalizacji przestępstwa nielegalnego przekroczenia granicy' [Legal and criminological aspects of the decriminalisation of the offence of illegal border crossing]. In S. Pikulski and M. Romańczuk-Grącka (eds.) *Granice kryminalizacji i penalizacji* [Limits to criminalisation and penalisation]. Olsztyn: Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego, pp. 505–515.
- Perkowska M. (2017) 'Polityka karna wobec cudzoziemców – sprawców przestępstw granicznych w Polsce' [Criminal policy towards foreigners – offenders of border crimes in Poland]. In W. Klaus, K. Laskowska and I. Rzeplińska (eds.) *Przestępczość cudzoziemców. Aspekty prawne, kryminologiczne i praktyczne* [Criminality of foreigners. Legal, criminological and practical aspects]. Warszawa: Wydawnictwo Naukowe Scholar, pp. 178–196.
- Perkowska M. (2017). 'Charakterystyka przestępczości granicznej cudzoziemców w Polsce na podstawie wyników badań akt spraw karnych' [Characteristics of border crime of foreigners in Poland based on the results of research of criminal case files]. In W. Klaus, K. Laskowska and I. Rzeplińska (eds.) *Przestępczość cudzoziemców. Aspekty prawne, kryminologiczne i praktyczne* [Criminality of foreigners. Legal, criminological and practical aspects]. Warszawa: Wydawnictwo Naukowe Scholar, pp. 197–239.
- Perkowska M. (2021). 'Przerzut migrantów przez polską wschodnią granicę – studium przypadku' [Migrant smuggling across the Polish eastern border – a case study]. *Studia Migracyjne – Przegląd Polonijny* 2, pp. 57–85. <https://doi.org/10.4467/25444972SMPP.21.020.13776>

- Perkowska M. (2023). 'Kryminalizacja organizowania nielegalnego przekroczenia granicy – analiza wdrożenia prawa Unii Europejskiej przez Polskę' [Criminalisation of the organisation of illegal border crossings – analysis of the implementation of European Union law by Poland]. *Europejski Przegląd Sądowy* 8, pp. 31–38.
- Perkowska M., Adamczyk A., and Jomma F. (2024). 'Poland's response to the migration crisis on the Belarusian border: A legal perspective.' In E. Kuźelewska, A. Kasińska-Metryka, K. Pałka-Suchojad, and A. Piekutowska (eds.) *Geopolitical and Humanitarian Aspects of the Belarus–EU Border Conflict. Current Debates in European Integration*. Routledge, pp. 181–199.
- Piórkowska-Flieger J. (2016). 'Rozdział XXXII. Przestępstwa przeciwko porządkowi publicznemu' [Chapter XXXII. Crimes against public order]. In J. Piórkowska-Flieger and T. Bojarski (eds.) *Kodeks karny. Komentarz* [Penal Code. Commentary]. Warszawa: Wolters Kluwer, pp. 773–795.
- Potulski J. (2005). 'Pojęcie organizowania innym osobom przekraczania granicy RP. Glosa do wyroku SN z dnia 25 stycznia 2005 r., WK 23/04' [The concept of organising other persons to cross the border of the Republic of Poland. Glosa to the judgment of the Supreme Court of 25 January 2005, WK 23/04]. *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* 4, pp. 97–102.
- Rychlik M. and Wiktorska P. (2016). 'Polityka karna wobec cudzoziemców przebywających w Polsce' [Criminal policy towards foreigners residing in Poland]. *Archiwum Kryminologii* 38, pp. 61–92. <https://doi.org/10.5281/zenodo.7824808>
- Sakowicz A. (2017). 'Rozdział II. Formy popełnienia przestępstwa' [Chapter II. Forms of committing a crime]. In M. Królikowski and R. Zawłocki (eds.) *Kodeks karny. Część ogólna. Komentarz Art. 1–116*. [Penal Code. General part. Commentary Art. 1–116]. Warszawa: C.H. Beck, pp. 393–557.
- Spire A. (2020). 'Discretionary power as a political weapon against foreigners.' *Etikk i Praksis* 14(2), pp. 89–106. <https://doi.org/10.5324/eip.v14i2.3479>
- Szulecka M. and Klaus W. (2021a). 'Who assists irregular migrants in Poland and at What cost? A court files' analysis of convictions of facilitating unauthorised stay of migrants.' *Studia Migracyjne–Przegląd Polonijny* 2(180), pp. 87–114. <https://doi.org/10.4467/25444972SMPP.21.021.13777>
- Tata C. (2007). 'Sentencing as craftwork and the binary epistemologies of the discretionary decision process.' *Social & Legal Studies* 16(3), pp. 425–447. <https://doi.org/10.1177/0964663907079767>
- Triandafyllidou A. (2022). 'Migrant smuggling.' In A. Triandafyllidou (ed.) *Routledge Handbook of Immigration and Refugee Studies*. New York: Routledge, pp. 426–433. <https://doi.org/10.4324/9781003194316-50>
- UNODC (2017). *The Concept of „Financial or Other Material Benefit” in the Smuggling of Migrants Protocol*. New York: United Nations.
- Wojciechowski J. (1997). *Kodeks karny* [Penal Code]. Warszawa: Librata.
- Woude M. van der and Leun J. van der (2017). 'Crimmigration checks in the internal border areas of the EU: Finding the discretion that matters.' *European Journal of Criminology* 14(1), pp. 27–45. <https://doi.org/10.1177/1477370816640139>

Zgryzek K. (2021). 'Rozdział VI. Dowody' [Chapter VI. Evidence]. In J. Zagrodnik (ed.) *Proces karny* [Criminal process]. Warszawa: Wolters Kluwer, pp. 345–428.

Internet sources

- Dobuszyńska I. (2024). *Aresztowano czterech kurierów przemycających ludzi* [Four human smuggling couriers arrested], Strazgraniczna.pl. Available online: <https://www.strazgraniczna.pl/pl/aktualnosci/13543,Aresztowano-czterech-kurierow-przemycajacych-ludzi.html?search=58191> [21.08.2024].
- EUROPOL (2016). *Migrant Smuggling in the EU*, Europol.europa.eu. Available online: https://www.europol.europa.eu/cms/sites/default/files/documents/migrant_smuggling__europol_report_2016_0.pdf [21.08.2024].
- Grzech K. (2024). *Granica polsko-białoruska – sytuacja wciąż napięta* [Polish-Belarusian border – situation still tense], Strazgraniczna.pl. Available online: <https://www.strazgraniczna.pl/pl/aktualnosci/13366,Granica-polsko-bialoruska-sytuacja-wciaz-napieta.html?search=58191> [21.08.2024].
- Grześkowiak M. (2023). *Jest humanitarne i skuteczne wyjście z kryzysu na polsko-białoruskiej granicy* [There is a humanitarian and effective solution to the crisis on the Polish-Belarusian border], Krytykapolityczna.pl. Available online: <https://krytykapolityczna.pl/kraj/zaprzestanie-pushbackow-pierwszy-krok-do-wyjscia-z-kryzysu/> [12.09.2024].
- Kubal A. (2021). *Why is There a Humanitarian Crisis at the Polish-Belarusian Border*, Gjia.georgetown.edu. Available online: <https://gjia.georgetown.edu/2021/11/17/why-is-there-a-humanitarian-crisis-at-the-polish-belarusian-border/> [10.01.2024].
- Na granicy polsko-białoruskiej* [On the Polish-Belarusian border] (2023), Strazgraniczna.pl. Available online: <https://www.strazgraniczna.pl/pl/aktualnosci/12188,Na-granicy-polsko-bialoruskiej.html?search=3049868206> [21.08.2024].
- PWN Dictionary of the Polish Language (n.d.), Sjp.pwn.pl. Available online: <https://sjp.pwn.pl/szukaj/organizowa%C4%87.html> [18.07.2023].
- Szczepańska E. (2023a). *21 Syryjczyków w nielegalnej podróży na Zachód* [21 Syrians on illegal journey to the West], Strazgraniczna.pl. Available online: <https://www.strazgraniczna.pl/pl/aktualnosci/11971,21-Syryjczykow-w-nielegalnej-podrozy-na-Zachod.html?search=3049868206> [21.08.2024].
- Szczepańska K. (2023b). *Zatrzymany kurier i kolejni nielegalni migranci na granicy* [Detained courier and more illegal migrants at border], Strazgraniczna.pl. Available online: <https://www.strazgraniczna.pl/pl/aktualnosci/11562,Zatrzymany-kurier-i-kolejni-nielegalni-migranci-na-granicy.html?search=3049868206> [21.08.2024].
- Szwed K. (2023). *Zatrzymano 9 kurierów w weekend, w tym dwóch po pościgu* [Detained 9 couriers over the weekend, including two after a chase], Strazgraniczna.pl. Available online: <https://www.strazgraniczna.pl/pl/aktualnosci/11911,Zatrzymano-9-kurierow-w-weekend-w-tym-dwoch-po-poscigu.html?search=3049868206> [21.08.2024].

The Great Dictionary of the Polish Language (n.d.), Wsjp.pl. Available online: <https://wsjp.pl/haslo/podglad/5752/organizowac/4045731/przyjecie> [21.08.2024].

Legal acts

Law of July 7, 2022 on Amendments to the Law – Criminal Code and Certain Other Laws. Journal of Laws of 2022, item 2600.
Law of June 6, 1997. – Criminal Code. Journal of Laws of 2022, item 1138, as amended.
Law of May 20, 1971 – Misdemeanour Code. Journal of Laws of 2022, item 2151.
Ordinance of the Minister of Internal Affairs and Administration of March 13, 2020 on temporary suspension or restriction of border traffic at specific border crossings (border ordinance) (2020).

Court decisions

Judgment of the Supreme Court of 10 May 1982, Rw 317/82 [Rw 317/82] (1982).
Judgment of the Supreme Court of 7 March 2003, WA 8/03 [WA 8/03] (2003).
Judgment of the Supreme Court of 25 January 2005, WK 23/04 [WK 23/04] (2005).
Orzecznictwo Sądu Najwyższego. Izba Karna 2, item 21.
Decision of the Supreme Court of 20 October 2005, II KK 184/05 [II KK 184/05] (2005).
Judgment of the Court of Appeal in Katowice of 28 June 2007, II AKa 190/07 [II AKa 190/07] (2007).
Judgment of the Court of Appeal in Lublin of 20 November 2008, II AKa 250/08 [II AKa 250/08] (2008). LEX no. 477864.
Judgment of the Court of Appeal in Katowice of 25 February 2015, II AKa 457/14 [II AKa 457/14] (2015).
Decision of the Supreme Court of 22 November 2016, IV KK 362/16 [IV KK 362/16] (2016). LEX no. 2183514.
Judgment of the Court of Appeal in Kraków of 29 April 2021, II AKa 183/20 [II AKa 183/20] (2021). LEX no. 3314964.
Judgment of the District Court in Białystok, III K 33/22 [III K 33/22] (2022).
Judgment of the District Court in Białystok, III K 500/22 [III K 500/22] (2022).
Judgment of the District Court in Białystok, III K 661/22 [III K 661/22] (2022).
Judgment of the District Court in Białystok, III K 72/22 [III K 72/22] (2022).
Judgment of the District Court in Białystok, III K 961/22 [III K 961/22] (2022).
Judgment of the District Court in Bielsk Podlaski VII Criminal Division in Hajnówka of 31 May 2022, VII K 137/22 [VII K 137/22] (2022).
Judgment of the District Court in Sokółka of 27 July 2022, III K 279/22 [III K 279/22] (2022).
Judgment of the District Court in Sokółka of 10 November 2022, III K 485/22 [III K 485/22] (2022).

Judgment of the District Court in Sokółka of 14 November 2022, III K 576/22 [III K 576/22] (2022).

Other documents

Commission staff working document Refit evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA) (2017). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A renewed EU action plan against migrant smuggling (2021–2025). COM(2021) 591 final (2021).

European Commission (2021). ‘A renewed EU action plan against migrant smuggling (2021–2025)’, COM(2021) 591 final, Brussels.

Explanatory Memorandum to the governmental draft bill on amendments to the Act – Penal Code and some other acts, 9th term, Sejm print no. 2024 (2022).

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Human smugglers or smuggled persons? An approach to the situation of youths accused of human smuggling in southern Spain

Przemytnicy osób czy przemycone osoby? Podejście do młodych osób oskarżonych o przemyt ludzi w południowej Hiszpanii

Abstract: The lack of safe entryways into Europe generates alternative maritime routes from Africa to the European continent. In recent years, there has been an increase in these arrivals and in the detention of individuals accused of migrant smuggling on the Central Mediterranean route to Italy and the North-west African (Atlantic) route to the Canary Islands upon their arrival by sea. Both the UNODC and various NGOs have suggested in recent reports that the punitive response to boat captains may have less to do with tackling the crime of human smuggling than it may initially appear. During fieldwork conducted as part of the JEPRAN project, a surprising number of youths accused of human smuggling were identified in a prison in Almería, Spain, having arrived via the Western Mediterranean route. This serendipitous finding allows for reflection within this article on the crime of human smuggling across different routes into Europe based on interviews with youths accused of this crime and imprisoned in the south of Spain.

Keywords: migration, asylum, sea, crime, defencelessness, law, moral

Abstrakt: Brak bezpiecznych dróg wejścia do Europy przyczynia się do powstawania alternatywnych szlaków morskich z Afryki na kontynent europejski. W ostatnich latach odnotowano wzrost liczby przypadków korzystania z tych szlaków i przypadków zatrzymań osób oskarżanych o przemyt migrantów na szlaku środkowosródziemnomorskim do Włoch i szlaku północno-zachodnioafrykańskim (atlantyckim) na Wyspy Kanaryjskie zaraz po ich przybyciu drogą morską. Zarówno UNODC, jak i różne organizacje pozarządowe zasugerowały w ostatnich raportach, że reakcja karna wobec kapitanów łodzi może mieć mniej wspólnego z walką z przestępstwem przemytu ludzi, niż mogłoby

się początkowo wydawać. Podczas badań terenowych przeprowadzonych w ramach projektu JEPRAN w więzieniu w Almerii w Hiszpanii zidentyfikowano zaskakującą liczbę młodych ludzi oskarżonych o przemyt osób, przybyłych szlakiem zachodniośródziemnomorskim. To przypadkowe odkrycie pozwoliło na podjętą w niniejszym artykule refleksję na temat przestępstwa przemytu osób różnymi szlakami do Europy w oparciu o wywiady z młodymi ludźmi oskarżonymi o to przestępstwo i osadzonymi w więzieniu na południu Hiszpanii.

Słowa kluczowe: migracja, azyl, morze, przestępstwo, bezbronność, prawo, moralność

Introduction

Entry into Spain on precarious boats departing from the African continent towards Spanish territory are carried out via two main maritime routes: towards the Spanish mainland crossing the Strait of Gibraltar, the so-called Western Mediterranean route, and the North-west African (Atlantic) route, towards the Canary Islands. The numbers representing arrivals via these routes vary considerably. In 2018, 58,569 arrivals were recorded, meaning that Spain received the highest number of irregular maritime entries in Europe. In 2021, there were 41,945 entries; then came a 25.6% decrease in 2022 (31,219 entries), followed by another increase to 57,071 entries in 2023 (UNHCR data as of 31 December of each year).

The Western Mediterranean route includes the Algeria-Alboran Sea route, which typically starts from the Algerian coast and heads for the southern Spanish coasts of Almería, Granada and Málaga. The journey can span up to 200 kilometres and poses significant risks due to the fragile and often overcrowded boats used by migrants. Severe weather conditions, including intense winds and treacherous currents, heighten the risk of shipwrecks. The Spanish Coast Guard and the European Border and Coast Guard Agency (Frontex) have actively patrolled this area in recent years.¹

Another component of the Western Mediterranean route is the Strait of Gibraltar route, connecting northern Morocco, particularly from Tangier and Tetouan, to southern Spain, including destinations like Tarifa and Algeciras. Only 14 kilometres at its narrowest point, this is the shortest route from Africa to Europe. However, the dense commercial maritime traffic and strong currents make the journey perilous. The weather conditions can change rapidly, further endangering the small boats. Spanish and Moroccan authorities, along with Frontex, maintain intensive surveillance, resulting in frequent interceptions and rescues.²

¹ In Spain, the media are starting to report on operations involving the imprisonment of the boats' drivers (Gómez 2023).

² Social entities point to the seriousness of the dangers of these routes: in 2023 the Pro Human Rights Association of Andalusia (APDHA) published a report on human rights on Spain's southern border, in which they denounce the deaths and disappearances along these routes. The full report is available at <https://www.apdha.org/frontera-sur-2023>. In May 2024 Migreurop, a European and African network of activists, published an infographic of the deaths in Ceuta (Migreurop 2024).

The Atlantic route to the Canary Islands begins from various points along the west coast of Africa, mainly Senegal, Mauritania and Morocco. This is the longest and one of the most dangerous routes, with distances exceeding 1,500 kilometres. The rudimentary and overloaded boats used for this journey face extremely treacherous Atlantic conditions, including severe storms, large waves and strong ocean currents.³

The maritime entry routes for irregular immigration, although not the most numerous, are the most conspicuous and tend to grab headlines in the media (Carvalho 2023). It is also the most dangerous, and deaths during the journey are difficult to quantify. The Spanish NGO Caminando Fronteras uses alerts from boats to track deaths and disappearances in the Western Mediterranean, following their fate and cross-checking this information with alerts from relatives or acquaintances who are looking for those who set out to sea. In 2018, 843 deaths and disappearances were recorded on routes to Spanish territory; in 2019 there were 655; in 2020 this number reached 2,170. The trend continues to grow, with a peak of 4,404 deaths in 2021, 2,390 in 2022 and 6,618 in 2023. Another route, the Central Mediterranean to the Italian coasts, accounts for more deaths and is considered the most dangerous. The International Organization for Migration (IOM), with data updated to March 2024, has registered a total of 23,046 deaths and disappearances along this route within the framework of the Missing Migrants Project, launched in 2014.

In Spain, irregular immigration is not considered a crime *per se*, but an administrative offence according to Organic Law 2/2009, on the rights and freedoms of foreigners in Spain and their social integration. The crime of human smuggling is classified under Article 318 bis of the Penal Code. This provision penalises individuals who promote, facilitate or aid in the illegal smuggling or clandestine immigration of people to or from Spain or to another European Union country. The penalties for this crime vary depending on the specific circumstances of the case. In general, the prison sentence can be from four to eight years, and it is aggravated to a minimum of eight years if participation in a criminal organisation is proven or if lives are endangered. Profit motive is also considered an aggravating factor.⁴ Additionally, fines of up to triple the value of the profits obtained from the crime can be imposed on legal persons. Given the specific characteristics of the offence, the prison sentence can be replaced by expulsion. Mitigating factors are also provided for: according to Circular 5/2011 of the Attorney General's Office, Article 318 bis 6 CP2 allows the sentence to be reduced from two to four years

³ In 2021 the Spanish Ombudsman published a monograph on migration in the Canary Islands and one of the aspects that stands out is the arrival of unaccompanied foreign minors and the need to improve the rapid identification of such migrants to ensure their access to rights. The full report is available at <https://www.defensordelpueblo.es/informe-monografico/la-migracion-canarias>.

⁴ The intention to obtain financial gain is considered an aggravating circumstance rather than an element constituting the crime. This broadens the scope of the offence compared to the definition in the Protocol Against the Smuggling of Migrants by Land, Sea and Air proposed by the United Nations and ratified by Spain: "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (United Nations 2000: 2).

when it is considered that the convicted person was seeking their own migration. In addition, if the action is committed for humanitarian reasons, the conduct is not punishable.⁵

At the European level, legislation and soft law documents collectively address the issues of migrant smuggling and unauthorised facilitation. The Facilitation Package of 2002 comprises Directive 2002/90/EC, which establishes a common definition of the offence of facilitating unauthorised entry, transit and residence, and Framework Decision 2002/946/JHA, which sets out minimum sanction rules for crimes under Directive 2002/90/EC. The New Pact on Migration and Asylum (2020) proposed by the European Commission aims to create a comprehensive framework for managing migration and asylum across the EU. It includes measures to combat smuggling networks, enhance cooperation with third countries and strengthen the European Border and Coast Guard Agency (Frontex).

Soft law documents from EU institutions provide further guidance and operational support:

- the European Commission’s EU Action Plan Against Migrant Smuggling (2021–2025);
- Frontex’s Annual Risk Analysis Reports and operational guidelines to inform policy and operational responses to smuggling;
- the Fundamental Rights Agency (FRA) provides guidance on fundamental rights, emphasising the need to protect migrants’ rights in anti-smuggling measures, and publishes reports and opinions on the human rights implications of EU migration policies.⁶

Frontex launches successive sea operations, and currently has three operations deployed in the Mediterranean. One of these is called Irini, in the Central Mediterranean, and according to its official website its aim is the “disruption of the business model of human smuggling and trafficking networks through information gathering and patrolling by planes in the Mediterranean”. One indicator of the success of these operations is the number of arrests of suspected migrant smugglers. The official website reports that 143 suspected migrant smugglers have been arrested as part of Operation Irini, which was launched in March 2020 and will continue until March 2025. At times, the so-called “fight” against human smuggling and border control gains ground in political and media discourse over other issues, such as the lack of detection and attention to especially vulnerable migrants who may potential applicants for asylum or international protection.⁷

⁵ Although irregular immigration is not a crime in Spain, it is important to mention that there are a series of semi-prison containment devices (CIEs and CATEs) for people who are intercepted crossing a border irregularly. For more on this topic, see Diego Boza and D  vika P  rez (2019) or Iker Barbero (2021).

⁶ Since 2018, in a series of reports (the latest was published in June 2023) they put the spotlight on EU Member States’ legal proceedings against civil society actors involved in search and rescue operations in the Mediterranean Sea (for more, see FRA 2023).

⁷ Studies on border police agents point to the presence of two paradoxical perspectives in the discourses and practices of Frontex: border control and humanitarian attention. These two

Expulsions and returns are another central aspect of the response of EU Member States to the arrival of migrants through unauthorised posts. Directive 2008/115/EC of the European Union sets out common standards and procedures for returning third-country nationals who are staying illegally. The Spanish legal framework on expulsions and returns is primarily governed by Organic Law 2/2009, on the rights and freedoms of foreigners in Spain and their social integration. The implementation of these provisions is further detailed in the Regulation of Organic Law 2/2009 (Royal Decree 557/2011). In addition, Spain has agreements with several countries, such as Morocco, Mauritania and Senegal, which facilitate the return of migrants. Studies such as those by José L. Rodríguez-Candela and Elisa García-España (1996) and David Moya-Malapeira (2002) delve into this issue from a legal perspective, whilst studies such as those by Cristina Fernández-Bessa and José A. Brandáriz-García (2016) and Iker Barbero (2023) highlight practical and unforeseen aspects of the application of these regulations.

Additionally, European Union anti-smuggling legislation has often had consequences for humanitarian rescue organisations. The NGO Proactiva Open Arms was accused in 2018 of facilitating illegal immigration after rescuing migrants in the Mediterranean. Their ship was detained in the port of Pozzallo, Italy for almost a month, and legal proceedings were initiated in both Italy and Spain. Helena Maleno, a prominent activist from Caminando Fronteras, faced prosecution in 2017 under charges of human trafficking and smuggling. These charges were based on her communications with maritime authorities to facilitate rescues at sea. Although she was ultimately acquitted, the case highlighted the risks faced by humanitarian workers. In 2019, the Spanish rescue ship *Aita Mari*, operated by SMH, was prevented from sailing to the central Mediterranean for several months due to bureaucratic obstacles and legal restrictions imposed by Spanish authorities.

Another invisible effect of this “fight” against human smuggling policies was highlighted in 2021 by the Italian organisations ARCI Porco Rosso and Alarm Phone, in collaboration with Borderline Sicilia and Borderline-Europe. In a report, they denounced the criminalisation of migrants arriving on Italian shores. The report focusses on the application of criminal law as a functional aspect of border control policy in Italy and radically criticises the criminalisation of border crossings, applied to boat drivers during crossings on the Central Mediterranean route. In the same vein, the United Nations Office on Drugs and Crime recently pointed out in a report (UNODC 2022) that a large number of individuals are being detained immediately upon arrival in Spain via the Atlantic route, accused of illicit migrant smuggling. The report questions the strategy of holding accountable individuals arriving in dinghies as boat captains and members of criminal organisations taking part in human smuggling.⁸

facets coexist and balance the self-image of the police as well as the projection of its image as a European organisation seeking social legitimacy. For further insight into these issues, see Pallister-Wilkins (2015).

⁸ Both reports also question the stated purpose of police operations that theoretically work simultaneously to rescue people in danger at sea and to combat immigrant trafficking. By focus-

Given the absence of official statistics on this matter, the JEPRAN project aimed to identify among the various types of young people in Andalusian prisons those who had previously gone through child protective services as unaccompanied foreign minors. The primary objective of the project was to highlight the challenges faced by Andalusian society in integrating former foster minors of foreign origin and the legal and social crossroads they encounter during their transition to adulthood. The project sought to identify both risk factors and protective factors for this specific group within the prison system. Four prisons in Andalusia were selected for the study (in Málaga, Algeciras, Almería and Granada), as they house the largest foreign populations. The fieldwork was conducted in two phases using both closed- and open-ended questions.

During the first phase of fieldwork, the aim was to identify different profiles of people aged 18 to 30. Particularly notable was the identification of a number of inmates who reported having come to prison directly from the sea, following their arrival on Spanish shores in dinghies. Perceiving indications that the reality described in the aforementioned reports from United Nations and Italian NGOs could also be occurring in Andalusian prisons, the JEPRAN team designed an ad hoc questionnaire to better understand the circumstances under which these detentions were taking place, from the perspective of the inmates.

This article seeks to provide an approach to the situation of individuals in prison accused of human smuggling in southern Spain who arrived via the Western Mediterranean route, based on their testimonies. Another aim is to reflect on the response to this crime, considering the context of the Central and Atlantic Mediterranean routes, where similar situations are being identified.

I start by introducing several theoretical perspectives on human smuggling and ways to address the phenomenon. Following this, I delve into the socio-historical context in which the criminalisation of boat captains in Europe emerged, providing background information on this research. Subsequently, I outline the methodology employed in and an analysis of interviews with young inmates in southern Spain. Finally, I move on to the discussion phase, engaging in a dialogue that synthesises theoretical perspectives with the research findings, ultimately leading me to draw conclusions.

1. Theoretical approaches to human smuggling: Perspectives from organised crime to a moral assessment of the offence

The academic literature on human smuggling can be organised into six distinct approaches: focussing on the organisational aspects and configurations of smuggling networks; understanding modes of border crossing and predicting flows;

sing on the boat captains, these operations may pose greater danger to the people on board. The UNODC report suggests that boat operators often abandon the helm when another vessel approaches in order to avoid identification, thereby increasing the risk of collision.

emphasising migration as an industry and from market perspectives; making historical comparisons of the phenomenon; discussing human rights aspects; and adopting a gender perspective (Baird 2013).

For the purposes of this paper, I will focus on the first and fifth approaches: smuggling networks' organisation and human rights. Whilst the other approaches are important for understanding the phenomenon of human smuggling, these two are most relevant to addressing the situation of young inmates accused of human smuggling in southern Spain.

The first approach suggests that, in the public's imagination and the media, human smuggling is strongly associated with organised crime at the international level. This approach has also been present in academic debates on human smuggling (Mallia 2010; Coen 2011; Triandafyllidou, Maroukis 2012). However, empirical evidence suggests that large international and hierarchical organisations are not typical of smuggling practices. In general, this phenomenon appears to be smaller in scale and more transient than initially expected. These findings give rise to a new perspective on human smuggling – understanding the phenomenon as a social network and a set of temporary alliances that may have hierarchical configurations and local control practices, but not as a complex, transnational criminal organisation (Neske, Doomernick 2006; Maher 2018).

The human rights approach focusses on the tensions and humanitarian costs of prosecuting the crime of human smuggling. The tensions lie between the right to leave a country, especially in situations where the individuals are seeking international protection or asylum, and the impossibility of reaching another country through safe, legal routes. This tension is linked to inflows through unauthorised routes to Europe and the phenomenon of human smuggling. In the absence of safe, legal routes, individuals seeking asylum or international protection use irregular routes, sometimes with the assistance of facilitators. The criminalisation and prosecution of these practices can be considered a barrier to accessing asylum and protection (Wahab 2015).

Also, for the purpose of organising academic scholarship on the topic, John Salt (2000) proposes three ways to approach the phenomenon of human smuggling: a) as a business or b) as a crime and c) the humanitarian responses to human smuggling. This last approach emerged later and points to a moral and ethical debate regarding the phenomenon. It adds an aspect that was neglected in previous perspectives and has gained strength over the years, beginning to appear in academic articles.

In this line, Eamon Aloyo and Eugenio Cusumano (2018) argue, from a philosophical perspective, that under certain conditions and regardless of its illegality, human smuggling would be morally permissible – as long as it is voluntary, does not harm others and is not confused with human trafficking – because it could improve the lives of people undertaking migratory journeys or others who remain in the country of origin. In the same vein, Javier Hidalgo (2016) and Julian Müller (2018) relate human smuggling to the right to asylum and assert that facilitating entry to countries where individuals are not authorised to enter would be morally

permissible when it helps protect the human rights of individuals. Eamon Aloyo and Eugenio Cusumano (2018), however, go further in the argument and point out that even if individuals are not at risk of having their human rights violated, facilitating irregular migration – even if a “reasonable” price is charged for it – would be morally permitted due to the possibility of improving people’s lives. This argument includes economic migrants as well as those eligible for international protection. The authors argue that the line separating economic migrants from asylum seekers is sometimes very thin and does not account for the complexity of the situation of people who migrate. They also emphasise these people’s right to decide, even if they decide to pay to undertake a dangerous journey.

Some studies reveal the complexity of these practices, from the perspective of the smuggled individuals, and invite us to consider other ways of looking at facilitators, beyond the logic that they are mercenary criminals. Studies suggest that sometimes individuals who use facilitators do not recognise them as criminals or see themselves as victims. On the contrary, they have bonds of trust with individuals who are key to making their journey possible (Achilli 2018; Maher 2018). Nevertheless, the various conceptualisations of human smuggling should not idealise the reality of this phenomenon. Their purpose is to provide a nuanced understanding of the diverse contexts and territories involved in facilitating the unauthorised entry of individuals. Within these contexts, power dynamics and instances of violence can manifest in numerous ways. Human smuggling operates outside regulatory frameworks, often stemming from necessity and lacking mechanisms to ensure the protection of agreements or the rights of individuals. In such environments, alliances and trust-based relationships may develop, but they can also lead to instances of abuse and exploitation, as exemplified by the situations encountered in Libyan territory, as we will elaborate on later. Philosophical discussions, as posited by Eamon Aloyo and Eugenio Cusumano (2018), revolve around the moral imperatives that facilitators are expected to uphold for their actions to be deemed morally justifiable. However, practically realising these configurations whilst ensuring all necessary safeguards presents significant challenges.

Despite the possible moral justifications and studies on the various relationships between smugglers and those smuggled, which add complexity to the issue and challenge public opinion about the crime of human smuggling, in practice these acts are legally prosecuted in European countries. Their primary objective is to protect their borders. All efforts of EU member countries in their border areas, whether maritime or sharing a border with non-EU countries, are focussed on this primary objective, even though these strategies may have to coexist with discourse on the protection of human rights, the right to asylum and humanitarian assistance (Franko, Gundhus 2015). In this complex scenario, individuals may assume a dual status that is seemingly contradictory but in line with border control policing logic: they are people who are both a risk and at risk (Aradau 2004).

Given this reality, I now focus on the fine line between being identified by authorities upon arrival as a person migrating to European shores by sea (whether

eligible for asylum or not) and being accused of facilitating the entry of unauthorised individuals into territories and via unofficial routes by operating the boat or assisting in it during the journey. This scenario was not addressed by authors reflecting on the moral evaluation of human smuggling. I address this scenario through the theoretical perspectives presented below.

2. Human smugglers or smuggled persons?

Flavia Patane et al. (2020) provides a historical overview regarding the arrival of third-country nationals on Italian shores,⁹ which helps in understanding the dynamics that lead migrants arriving by sea to be accused of human smuggling. The authors point out that human smuggling in southern Italy has undergone significant evolution from the mid-1990s to the 2010s. Initially, boat arrivals were sporadic and concentrated in the southern region of Sicily, between Pachino and Augusta in the province of Siracusa, with minimal criminal investigations and jurisprudence on the subject. However, starting in 2011, migratory pressure increased considerably, especially after the Arab Spring and the onset of the war in Syria.

The nature of smuggling also underwent significant changes during this period. Initially, the boats mainly departed from Egypt, and smugglers used a main vessel to take migrants into international waters before transferring them to smaller boats near Sicilian coasts. However, the Italian authorities managed to establish jurisdiction over smuggling activities in extraterritorial waters through innovative legal reasoning supported by the Court of Cassation in 2014. This juridic reaction led to new methods to evade detection and minimise the costs and risks associated with smuggling activities. From 2015 onwards, they shifted smuggling operations to Libya and began putting migrants directly onto small boats at the point of departure, bypassing the need for professional crews on the boats. This change marked a significant transformation in the nature of human smuggling in southern Italy, with the migrants themselves taking on active roles in smuggling operations (Patane et al. 2020).

In this context and based on interviews with key figures in Sicily, Flavia Patane et al. (2020) propose that there are different profiles of boat captains: “professional captains”, migrant smugglers operating for payment, and “occasional captains”. Their interviewees suggested that the number of professional captains is decreasing. Within the second category, the authors identified two general subcategories based on the degree of voluntariness of the behaviour. The first subcategory consists of

⁹ In Italy, the offence of human smuggling is regulated by Article 12 bis of the Consolidated Immigration Act (Legislative Decree No. 286/1998). This provision penalises facilitating the illegal entry, transit or stay of people in Italian territory. The penalties associated with this crime vary depending on whether it is committed individually or within the context of a criminal organisation. In the former case, the prison sentence can range from 3 to 8 years, whilst if a criminal organisation is involved, the sentence can be from 5 to 15 years. Additionally, fines of up to 15,000 EUR can be imposed.

those who opportunistically agree to captain or navigate a boat in exchange for a free trip to Italy. They are typically individuals who lack the financial means to pay for their journey to Europe; they would be considered “opportunistic captains”. The second subcategory of occasional captains consists of migrants who captain a boat or hold a compass or GPS device during the journey because they are coerced or forced by necessity to do so: they are referred to as “forced captains”.¹⁰ Although both groups are considered occasional captains, they differ significantly: the former willingly agree to captain in advance, whilst the latter, who pay for their passage like regular passengers, are forced to assume the role of captain under threat, either shortly before departure or once aboard.

Here it is important to explicitly state a distinction already assumed throughout this text: “boat drivers” and “human smugglers” are not equivalents. In the report (ARCI Porco Rosso and Alarm Phone 2021) on the situation in Italy, which was also based on interviews with key agents, a categorisation of different types of boat drivers is proposed, adding aspects that are absent from the study mentioned above: i) “forced drivers”, especially on the route passing Libyan ii) “drivers out of necessity”, referring to situations where the boat has problems because of an inexperienced driver and another skilled person ends up taking command to avoid further problems with the boat; iii) “paid migrant drivers”, individuals who are paid to drive the boat without any further ties to the organization, typically receiving a one-time payment due to their desire to migrate and the need for a boat operator; and iv) drivers from organisations, offering transportation as a service and with no intention of migrating – this category would include those who are intercepted returning to the point of origin, after dropping off the immigrants at the arrival point.

In this categorisation proposed by Italian NGOs, mixed cases also appear, seeking to account for the complexity of situations in which a person may find themselves driving a boat with migrants to Europe. One example is a person who, having paid for the journey and having initially refused to drive the boat, ends up acquiescing out of fear of reprisal for their refusal. The report also points out that strategies to combat human smuggling are focussed on the moment of arrival and punishing the boat captains, whilst there are no records of efforts to address the issue from other possible places, such as the points of departure.

This phenomenon of criminalising boat captains in Italy has been known for years. Since 2013, the association Borderline-Europe estimates that around 3,200 people have been arrested on charges of human smuggling upon reaching Italy’s shores.

¹⁰ These are immigrants in irregular situations who, either out of necessity or coercion, captain the boat or contribute in some other way to the smuggling of other immigrants in irregular situations. According to reports from the United Nations as early as 2016, it has been established that traffickers recruit migrants in transit, transport them to the Libyan coast and keep them in so-called “connection houses” for weeks or months before smuggling them into Europe. In these connection houses, migrants are frequently beaten, and women are sexually abused. Once the immigrants in irregular situations are scheduled for the crossing, they are taken to the beach, usually at night, and boarded onto inflatable or wooden boats. Just before departure, the group of armed Libyans overseeing the boarding selects one or two of them to act as captains and forces them to take the helm of the boat or to navigate.

Flavia Patane et al. (2020) make a point that is key to understanding the accusations against boat captains in Italy. Article 112 of the Italian Constitution establishes that public prosecutors are obliged to initiate legal proceedings whenever a crime is reported. This mandatory rule requires the initiation of criminal proceedings whenever a new rescue or landing of migrants is reported, as this constitutes a report that the crime of “human smuggling” has been committed. As a consequence of this principle of mandatory criminal action, anyone who has participated in human smuggling activities, even if their role is marginal, must also be prosecuted.

In Spain, although there is no similar legal provision that obliges prosecutors to initiate criminal actions in all reported cases, measures have been implemented to combat irregular immigration and human smuggling, such as cooperating with Frontex in border controls and maritime surveillance, operations and raids. These operations have resulted in the detention of boat captains.

Thus, in Spain, the detention of boat captains is a more recent phenomenon. It began to be detected with the increase in arrivals via the Canary Islands in 2020. In the aforementioned UNODC report (2022) on human smuggling on the Atlantic route from Africa to the Canary Islands, this phenomenon is now being documented in the Spanish context. Similar situations to those that occurred in the Italian seas are being described. Based on interviews with key agents, the report highlights that those who organise and profit from the crossings usually do not undertake the journey themselves, but recruit one of the passengers to be captain at the time of departure. This recruitment includes ad hoc agreements for discounts or free travel in exchange for the service. The chosen ones are typically men with experience in navigation or fishing, and there may be shifts to keep the boat sailing at night.

Interviews with law enforcement agents reveal that individuals with Senegalese or Moroccan nationality (coastal countries) are considered suspicious of being traffickers due to their likelihood of having boat-handling skills. Additionally, authorities identify those who steer, use the GPS device or give directions to other passengers during the journey. The fact that they receive a discount or free travel is considered by Spanish judicial authorities as a financial and material benefit, according to interviews conducted for the report (UNODC 2022).

Consistent with what occurs in the Italian context, during fieldwork for the report on the Atlantic route to the Canary Islands, no investigations beyond those related to the time of arrival were found. No cases have been identified where boat captains were considered protected witnesses in investigations aimed at locating higher-ranking members involved in the business of organising boats at the point of departure. However, Spanish prosecutors acknowledge in interviews that boat captains are often not part of an organised criminal group, and if they are, they represent the lowest rung and the most vulnerable piece of the group (UNODC 2022). Testimony from the aforementioned report draws attention to “boat drivers out of necessity”: The boat was lost for several days, and after the death of the initial captain and other individuals due to dehydration, one of those on board took command. Based on the testimony of other individuals from the boat who confirmed that he

was the captain, that person faced charges of human smuggling with aggravating circumstances and more than 20 years in prison.

Furthermore, the cited report (UNODC 2022) refers to another aspect not documented in reports and studies of the Italian context: cases of self-organisation for migration. These are instances where groups of individuals decide to pool their money in order to purchase a boat and undertake the journey independently, without an organisation or individual seeking profit from it.

These precedents motivate and contextualise the present investigation on the Spanish peninsula. This study approaches this phenomenon using the testimonies of a group of young people accused of human smuggling and held in a prison in Almería. It follows with a reflection on the topic, integrating the field findings with theoretical perspectives and the context identified in Italy and the Canary Islands.

This is a topic that continues to be gradually uncovered in Spanish territory. Recently, lawyers working on immigration issues have begun to notice the emergence of this phenomenon. When this article was being written, an analysis of court judgments was posted on the blog of the OCSPI (Observatory of the Crime control system towards Immigration) by Daniel Arencibia, a lawyer working in the Canary Islands. It focusses on judgments under Article 318 bis (Arencibia 2024). Based on a recapitulation of all publicly available judgments on *poderjudicial.es*, the lawyer points out that between 2021 and 2023, there were 459 individualised accusations filed by the Public Prosecutor's Office in 316 judgments from the Spanish provinces most affected by maritime migration.

In line with what was identified in the Italian context (Patane et al. 2020), the lawyer emphasises the fragility of the evidence on which the accusations against boat captains are based. The accusations were made by witnesses selected by the police and offered temporary residence and work permits under Article 59 LOEx7 if they denounce another traveller. Oral trials are held, in most cases without the presence of travellers other than the accused, leaving the defence with no opportunity to question any witnesses. Another noteworthy point is the high degree of conformity in these cases, reaching 98% in Murcia and 75% in the Canary Islands.

In analysing the judgments, Arencibia concludes that only in Almería are there cases of “taxi boats”, where the boat captain returns with the boat after dropping off the people on the beach. In the Italian classification proposed by Flavia Patane et al. (2020), the captains would be called “professionals”, having no intention of migrating themselves. In the other provinces, the most common cases are those where the accused is recognised as seeking their own migration.

3. Methodology

The approach of this research emerged unexpectedly during the fieldwork conducted for the JEPRAN project. The four Andalusian prisons with the most registered migrant

individuals were selected for the fieldwork: Alhaurín de la Torre (Málaga), Botafuegos (Algeciras), El Acebuche (Almería) and Albolote (Granada). To access the prisons, relevant authorisation was requested from the penitentiaries and the ethics committee of the University of Malaga (CEUMA). The young people's participation was voluntary. They were informed about the project, its voluntariness and its objectives, and they signed their informed consent before the questionnaires were administered during the month of October 2022.

The first specific objective of JEPRAN was to classify the incarcerated youths into categories more complex than just nationals and foreigners. Achieving this first objective required some methodological creativity because the data available from the penitentiaries only classify inmates by age and nationality, making it impossible to differentiate between, for example, those foreigners who migrated alone and went through the child protective services or those who did not live in Spain before entering prison. The methodological strategy used to locate and categorise the different profiles was to request a list with the names of all inmates aged 18 to 30 years old (including nationality, age and where they were located in the prison) in the selected Andalusian prisons, and to carry out the fieldwork in two stages: the first consisted of a very short questionnaire (questionnaire A, lasting 2 minutes), where all the young foreign inmates in each prison were asked basic questions regarding their trajectory: entry route into Spain, age of arrival in Spain, whether they came alone, whether they lived in Spain when they were imprisoned and if they would be interested in participating in a second phase of the research, answering a longer questionnaire about their life trajectory (questionnaire B). The sample of participants for questionnaire B was selected based on this initial classification.

During the profiling process in the Algeciras prison (Cádiz), we identified a small number of young people who claimed to have entered Spain by sea, when they were already of legal age and who did not live in Spain at the time of their arrest: they had been detained upon arrival. During the fieldwork in the next prison (Almería), this profile began to repeat itself. Prison officials in Almería also emphasised in conversations during the fieldwork that the prison was full of Algerians for the crime of human smuggling. This finding corroborated the aforementioned report, which had just been published by UNODC (in July 2022) about the Atlantic route, where a large number of recent arrivals were reported to be in prison for human smuggling by sea. A specific questionnaire (questionnaire C) was designed for this group of young people in Almería, in order to delve a little deeper into this profile.

The questionnaire consisted of 94 questions, some open-ended, divided into four blocks:

1. Migratory journey and arrival in Spain.
2. Contact with the police and entry into prison.
3. Experience with the justice system.
4. Situation in prison.

The closed-ended questions were analysed using the software programme SPSS 28, mainly to provide descriptive statistics given the small number of cases,

statistically speaking. The open-ended questions were analysed using the qualitative analysis support software ATLAS.ti. Thematic content analysis was used to identify different situations related to several topics, such as life in the country of origin and motivation to migrate, migratory journey, moment of arrival, basis of the accusation, assessment of the lawyer's work and the court hearing.

One difficulty that must be mentioned is that the fieldwork team did not speak the language of the young interviewees.¹¹ Most of the inmates matching this profile spoke only Arabic. For this reason, it was necessary to rely on other inmates as interpreters. Being particularly concerned that the presence of a translator could interfere with the interview, we allowed each inmate to choose the person who would help them.

It is important to mention that when administering the questionnaires in prison among the different profiles of young people, this specific group presented significant differences compared to the others, apart from the language issue. The fieldwork team sometimes encountered other young people who also did not speak Spanish and also needed the help of other inmates as interpreters, but the main difference was that this group was the most bewildered. During the interviews in prison, one can encounter diverse situations, requests of all kinds from inmates and a desire to speak about topics beyond what is specified in the script. This particular group, however, showed a particular bewilderment, requested help more frequently and urgently and produced the only two cases in which an interviewee mentioned contemplating suicide.

Out of the 444 young foreign inmates identified in the selected prisons, we found 53 (12%) who had been taken to prison immediately after their arrival by sea on the Spanish coast, without residing in Spain before entering prison. It is important to note that we found these numbers only among people aged 18 to 30, because that was the age range chosen for the project's objectives. We do not know the number of people over 30 years old and therefore the total number of people detained in these prisons under the same circumstances.¹²

The second specific questionnaire for this profile of young people (C) was only offered to the young inmates in the prisons of Almería and Granada. During the fieldwork in Algeciras, despite the presence of this group being identified by questionnaire A, their importance had not yet been recognised and a questionnaire specifically for them had not been designed. All of the 38 cases detected in Almería and Granada agreed to participate in the second phase of the research by responding to questionnaire C.

¹¹ That was not generally the case with the other types of interviewees, who typically had been in Spain for some time and spoke Spanish.

¹² Those who had their sentence substituted with expulsion under judicial decision, as set out in Article 57 of Organic Law 2/2009, on the rights and freedoms of foreigners in Spain and their social integration, were also excluded from the sample.

Table 1. Number of young prisoners who arrived by sea

Prison centre	N
Alhaurín de la Torre (Málaga)	0
Botafuegos (Algeciras)	15
El Acebuche (Almería)	36
Albolote (Granada)	2
Total	53

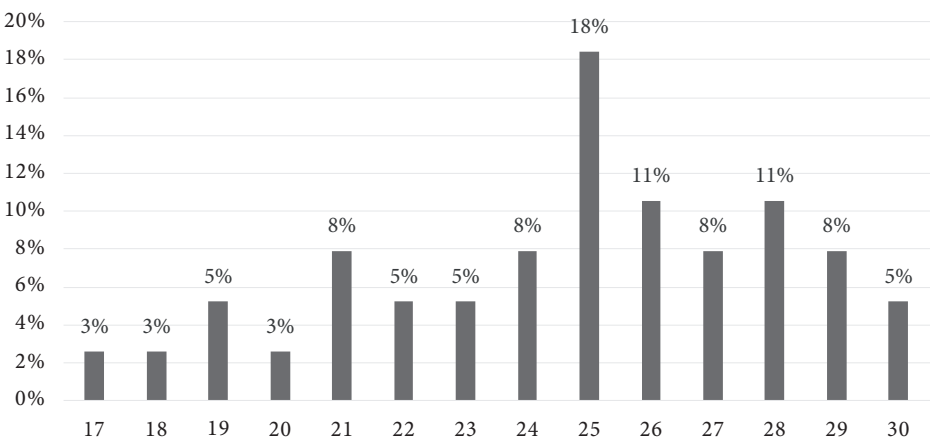
Source: Own elaboration.

4. Results

4.1. Profile of interviewees

The majority of these youths were between 25 and 28 years old (48%) and were of Algerian origin (89.5%), with the remaining being originally from Morocco (10.5%). The presence of one minor, aged 17, (see Figure 1) is noteworthy among individuals within the prison system, which is reserved for adults (+18) according to Spanish legislation. He was not the only one who claimed to have arrived as a minor. In addition to their current age, we also asked at what age they had arrived in Spain. In one more case, an individual who was already 18 at the time of the interview stated that he had arrived when he was 17 years old.

Figure 1. Age of young people in prison and accused of human smuggling



Source: Own elaboration.

Regarding life in Algeria, we identified four groups that value life in their country of origin differently and pointed to different motivations for migrating: the first and largest group referred to a difficult life in Algeria due to the hardships they face with their family. The migratory project of this first group was linked to financially assisting the family left behind in their home country in a difficult situation:

In Algeria, I was struggling to get by with my two younger brothers. I didn't have a job, so I came to seek a future. My parents don't work; they can't pay the rent. I haven't studied more because I had to work. (Respondent P6-8)

The second group pointed to the lack of opportunities, work or rights in Algeria and came to Europe in search of better living conditions:

I studied high school. I went to the Economics University for two years. I couldn't find work. In Algeria, even if you study, there are no good jobs. I wanted to come to Europe to improve my life. (Respondent P6-7)

The third group related their migration to family reunification:

[I came] to live in France with my brothers. My father is also in France. (Respondent P6-4)

And the last group, the smallest, claimed that they needed to leave in order to seek health treatment or to flee from violent situations:

[Life in Algeria was] very tough: my mother is sick and my father is in jail. My brothers depend on me. I had to leave for fear of being killed by gangsters who had a fight with my father. (Respondent P6-2)

I have a liver disease and I came to try to get treatment here. To receive better medical care because the situation in Algeria is difficult. (Respondent P6-20)

The three interviewees of Moroccan origin are in the second group: they pointed to the lack of opportunities in Morocco and the search for a better life.

4.2. Migration route and arrival time in Spain

All of them claimed to have left their country of origin and arrived directly at the Spanish coast through the Western Mediterranean route. Most of them arrived in Europe for the first time (81.6%), whilst the rest (seven cases) came for the second or third time. All had arrived in 2021 or 2022. Their previous arrivals were also by sea between the years 2015 and 2021. Three of the seven who had already come were expelled, and the rest claimed that they decided to return to their country due to various circumstances, especially family matters such as the death or illness of a parent. After these circumstances, they decided to embark on the journey to Europe again.

In the questionnaire, we inquired about the characteristics of the journey. The watercraft were mostly speedboats and inflatable boats (69%), and the number of

people on board varied from 3 to 17 people, although between 10 and 15 people were the most common responses. When asked if they knew anyone on the boat, the majority stated that they did not, although 26% claimed that they did; in these cases such individuals were usually friends, with only one case involving a family member. The majority (71%) claimed that no-one was waiting for them in Europe.

Regarding the moment of arrival, they described three situations: i) being intercepted at sea by the Civil Guard upon arrival, ii) being rescued by Salvamento Marítimo (Maritime Rescue) at sea and iii) being intercepted on the beach or shortly after leaving the beach by the Civil Guard, just after arrival. Among the cases of interception by the Civil Guard at sea, the two interviewees in the Granada prison stated that they changed boats during the journey, which led to detention because drugs were found on the second boat. In Almería, two other cases were different from the rest. The respondents claimed to have been intercepted when they were returning with the boat; these are the cases that could be identified as “taxi boats” or drivers who did not intend to migrate.

There were accounts of problems with the boat upon arrival: one young man stated that they swam to shore because they had to abandon the boat, and the Civil Guard intercepted them on the beach:

There was an accident on the boat, and it sank. We arrived swimming to the beach. When we arrived at the beach, the Civil Guard was waiting for us and took us away. (Respondent P6-28)

In another case, the boat had engine problems and a Moroccan fisherman found them and saved them:

We spent two days at sea. A Moroccan fisherman saved us. He took us to the beach, and before arriving the Civil Guard caught us. [...] The Algerians accused the Moroccan and me. Everyone on the boat says that the Moroccan saved us, but only two said that we were driving [...]. Two of those on the boat said it was me. The Algerians who were driving went free. The Moroccan who saved our lives and I stayed [were detained]. (Respondent P6-30)

In some cases, they pointed out that the Civil Guard was violent upon arrival and hit them:

The Civil Guard intercepted us and started hitting me (shows the photo on the prison ID card with bruises on his face). No-one told me anything. Other Civil Guards different from those who hit me went to court and said that I was driving [the boat]. They gave me some painkillers. I didn't report it because I didn't know anything. I wanted to, but I didn't know how to do it. (Respondent P6-1)

Five Civil Guards hit me at the port asking who was driving. In police facilities, no. There was food, but little. (Respondent P6-30)

Regarding the assistance received upon arrival, they report two situations: the first occurred in almost half of the cases, where the migrants received assistance

from the Red Cross – clothing, food and guaranteed medical attention – and later were accused and taken to police facilities.

They provided us with medical assistance, clothes and food from the Red Cross for two days [...]. They asked if we were okay and attended to us, but they didn't explain much. I only had an interpreter when they took us from the Red Cross to the police, who said I would have a trial and a lawyer – that's all. (Respondent P6-11)

In more than half of the cases, they claimed not to have received any type of attention upon arrival. They were taken directly to the police facilities, even if their clothes were wet, they were barefoot or they had health complaints. In a few cases, medical attention was offered once they were already in police custody.

No-one saw us; they took us to the port barracks for 48 hours and then took us to the judge and brought me to prison. I was taken to court barefoot, until they gave me flip-flops in prison. (Respondent P6-2)

Directly to the police detention. I hadn't changed my clothes. I slept in the cell for three days. With the same wet clothes. (Respondent P6-8)

No-one [attended to us upon arrival]; they took me from the water to the cell in police facilities, and then I was able to see a doctor. Then to the judge and to prison. (Respondent P6-12)

When asked how the opportunity to come to Spain arose, the majority referred to a friend, acquaintance or, to a lesser extent, family member who put them in contact with people who organise boats leaving their country of origin for Europe. They pointed out that it is easy to get in touch with such people:

It's very easy: you meet someone, and they tell you "We're leaving tomorrow." You pay today and you're off. (Respondent P6-16)

Another group claimed that they organised the journey themselves, pooling money to buy the boat and undertake the journey independently:

I myself started collecting money with other people, and we organised everything. We were a group of neighbours, and we set sail. It was better to die than to keep living there. The poor are worth nothing in Arab countries. (Respondent P6-14)

One individual claimed to have taken advantage of the opportunity to access a boat because he was on the beach at the time. Another said he was approached in a cafeteria and offered 1,000 EUR to drive the boat, which he accepted:

I was in a café, and some people told me we were going to Spain. They paid me a little to come. They convinced me to come. They told me they would give me 1,000 euros. I needed the money, and I accepted. Now I'm here. My family has no money. I don't even know where I am anymore. [...] We came from Algeria to here in three hours. Very fast. I dropped off the two people and went back for the money. And the Civil Guard stopped me, alone. They asked me if I was carrying immigrants, and I said yes. It was the first time, and I told the truth. (Respondent P6-8)

This is testimony from a paid boat driver who claimed to have no further relationship with those who organise the boat trips.

The relationship between not paying for the journey and driving the boat seems clear: of the five people who claimed not to have paid for the journey, four were driving the boat. They related different motivations for doing so; one claimed to have been forced:

The mafia forced me. They pointed a gun at my head and threatened to shoot me. They forced me to take the helm of the boat. (Respondent P6-27)

Another respondent claimed to have done it for money (above testimony from Respondent P6-8), whilst the other two took turns driving the boat and claimed that there was more than one captain:

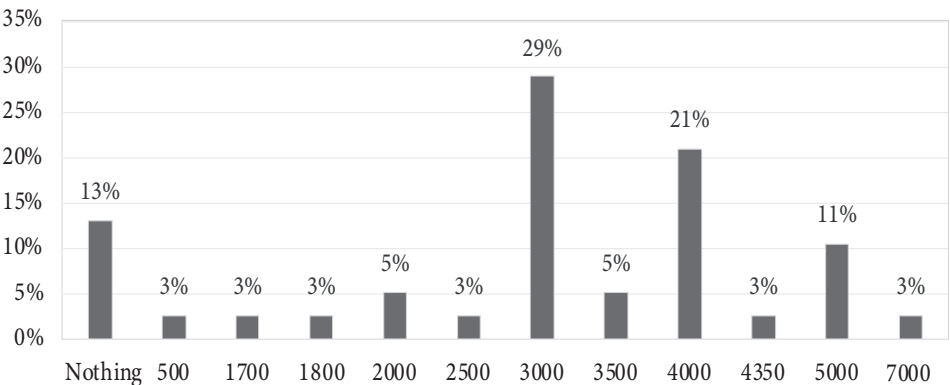
I have a video that shows I'm not the driver. It was a collective effort. All 11 of us drove; we bought the boat together. (Respondent P6-23)

The only interviewee who claimed to have participated in driving the boat and who paid for the journey indicated that he helped with the GPS because the boat had problems and the driver was inexperienced. He knew what to do and acted to avoid further problems and reach the destination:

I helped with the GPS. The person driving had trouble handling it, and I helped because I know about these things. (Respondent P6-4)

Apart from these interviewees who clearly claimed to have driven or helped drive the boat, the most common testimony was that they simply paid for the journey and did not drive the boat. The majority claimed that they had paid to come, either by contributing money for the boat or paying a third party. The amounts ranged from 500 to 7,000 EUR, although most responses were concentrated between 3,000 and 4,000 EUR.

Figure 2. Amount paid to board the boat



Source: Own elaboration.

When asked why they were accused and detained, some respondents claimed not to know why it was them and not others on the boat with them:

I don't know, I don't understand it. (Respondent P6-1)

However, the majority claimed to have been accused and detained based on the testimony of other people on the boat with them, who pointed them out as the boat driver. Some explained that this is because the police promise witnesses access to legal documents for legitimate residence in Spain if they tell the truth and accuse one or more people on board, and they agree among themselves to select one as the driver.

Because the driver says it was me, in the end the real driver gets off, and I go to prison. But I have the video that shows I didn't do it. (Respondent P6-11)

They grabbed me and another person. They use some witnesses from the boat with whom I had problems during the journey. They told the witnesses that they would give them papers if they told the truth. (Respondent P6-18)

Three people accused me of driving the boat, of being the captain. (Respondent P6-27)

Two cases from the Granada prison seem peculiar: the interviewees claimed that the arrest occurred under the same circumstances, when they changed boats during the journey and in this new boat were drugs. They claim to have been intercepted at sea, arrested and charged with drug trafficking, although they had paid for the journey to migrate.

The two who came with me are in prison here in Albolote, accused of drug trafficking. They themselves confessed to bringing drugs and already living in Spain. They came to meet me halfway. The police said they had to send me to the judge, but I told them I was innocent, and the boys told them too. The only evidence they have is that I was there. (Respondent P6-37)

They caught about four people, including me. I don't know where the others are. Two of those who came with me are here in Albolote. I don't know why they caught me. They only found drugs floating near me. (Respondent P6-38)

4.3. Detention and entry into prison

At the time of arrival, the majority (87%) claimed not to have been informed of their rights, which is consistent with the information that many did not receive first aid or attention from the Red Cross. More than half (52.6%) claimed not to have had an interpreter whilst in police custody, which would be a violation of Article 520 of the Criminal Procedure Law in Spain.

They didn't talk to me because nobody understood me. (Respondent P6-2)

On the other hand, none claimed to have been in detention for more than three days, which is in compliance with the aforementioned legal article. It was not

uncommon for them to indicate that they were accompanied by one or more fellow boat passengers in the holding cell (52.6%) or in prison with a fellow boat passenger (39.5%).

The treatment by the police during detention was generally described as “good” or “normal”, although there were references to mistreatment, insults and even physical aggression.

Only one day [in police custody]... They hit me and took my money. They didn't give me food, just a muffin. (Respondent P6-10)

This is the first time. It's very difficult, very tough. The Civil Guard treats you very badly. (Respondent P6-28)

Other respondents emphasised that they were not treated badly, but it was an especially tough experience because they were not spoken to, they could not make themselves understood and they did not know what was happening or why they were there.

Everything was very fast, and I didn't understand anything, not even why I was accused. (Respondent P6-27)

Locked up... It was tough because I didn't understand what was happening. (Respondent P6-20)

4.4. Experience with the justice system

In six cases, the respondents claimed not to have seen a judge before entering prison, although others affirmed having seen a judge and an interpreter then. However, having an interpreter does not necessarily mean they were able to understand what was happening. In general, the testimonies suggest that either they were unable to explain themselves during the hearing with the judge, they did not receive assistance from the interpreters to do so, they did not understand what was happening or they simply did not understand anything. Some mentioned feeling physically unwell, experiencing pain or being confused because they had just taken a difficult journey. In some cases, they understood that they would spend only a few days in prison and would see the judge again, but months had passed by the time of the study.

I couldn't defend myself; the translator told me to be quiet and that they would bring me back in 15 days. (Respondent P6-2)

I cannot believe that I'm here [in prison]. When I entered here, I cried. I didn't think I was going to end up in prison. I didn't understand what was happening [during the hearing with the judge]. (Respondent P6-21)

I was feeling bad and medicated, because of the trauma of coming here... I was confused, I couldn't defend myself. I came here to seek a better life. A 19-year-old boy wouldn't drive a boat with 10 people... I was just a normal guy working, in one year of work I couldn't learn to drive a boat. (Respondent P6-11)

I didn't understand anything. I didn't know who the lawyer was. It's been three months since I came here, and I haven't spoken to anyone. (Respondent P6-23)

I didn't have a lawyer. I only went to a small place at the court room, but I didn't speak to anyone. I would have liked to speak to the judge. (Respondent P6-25)

I didn't understand anything because of the language. Here in Spain everything is different, I didn't even know what a judge was like here in Spain. (Respondent P6-34)

The majority (60.5%) had a court-appointed lawyer,¹³ but three individuals (7.9%) claimed not to have had a lawyer before entering prison. Additionally, nearly half (42.1%) stated that they were unable to speak with their lawyer before the court hearing. When asked to assess their lawyer's work during this phase of the proceedings, the majority stated that they performed very poorly or poorly (65.8%). When queried about the reasons for their response, some replied that they cannot say because they did not understand what was happening. Some asserted that the lawyer did nothing to defend them, pointed out that they could not present the evidence they claim to have on their mobile phones or said that they were simply advised not to testify. Others based their assessment on their current relationship with the lawyer:

He hasn't come to talk to me, I haven't seen him again. (Respondent P6-9)

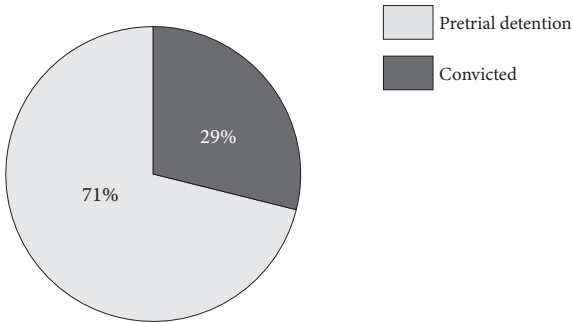
Finally, others evaluating the lawyer's work as poorly did so based on the outcome so far:

Others have already been released from prison and I haven't. (Respondent P6-8)

Those evaluating the lawyer's work positively cited reasons such as positive outcomes of reduced sentences or appeals, or fighting for them and keeping them informed about their situation.

The majority were in pretrial detention at the time of the interview.

Figure 3. Legal status



Source: Own elaboration.

¹³ Legal aid in Spain is managed through Bar Associations (Colegios de Abogados), ensuring that individuals who cannot afford legal representation receive it. In criminal matters, court-appointed lawyers (*abogados de oficio*) are assigned to detainees and defendants to provide comprehensive legal representation. For migrants arriving by boat, specialised lawyers should assist with asylum and immigration proceedings, offering legal counsel and support.

Of those in pretrial detention, the majority claimed to have been arrested and charged with human smuggling, whilst only a few, the two cases from Granada, were accused of drug trafficking.

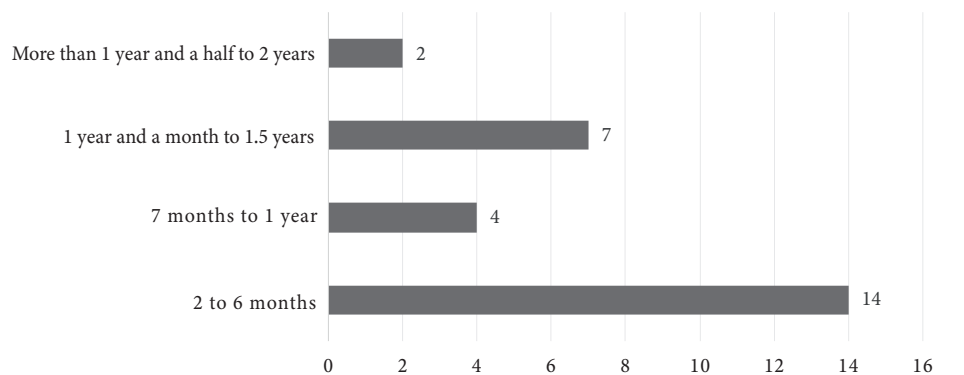
Those who were convicted (11 cases) were sentenced to between two and a half to six years. In all cases, they were convicted of human smuggling. Out of the 11 convicted individuals, only two accepted a plea bargain.

Responding to the closed questions regarding their experience in court, the interviewees claimed to have had an interpreter and a lawyer. The majority also claimed to have understood what happened in court. In comparison with the accounts of the hearings before entering prison, the trial seems to have more guarantees, or they are in better condition to understand what is happening.

4.5. Situation in prison

Among those in pretrial detention, the majority had been detained for between two and six months.

Figure 4. Time in pretrial detention



Source: Own elaboration.

We asked both pretrial detainees and convicted individuals about their contact with their families. The majority cannot communicate with their families, most frequently because they do not have money. They claimed to have only been able to phone them when entering prison. A few others said it is because they lost their phone numbers and can no longer make contact. Some are able to talk to their families, but only rarely due to lack of money. Although 47.4% claimed to have contact with their families, in most cases it is minimal.

It's been three months since I talked to them because I don't have money. (Respondent P6-1)

Twice a month, when there is money. With €5 I can talk for 8 minutes. (Respondent P6-12)

It's been four months since I talked to my family. My father has died, and I don't talk to my mother. And she doesn't know if I'm alive or dead. (Respondent P6-26)

We also asked if they worked in prison. The majority (57.9%) claimed to work in prison, but in all cases (including the convicted individuals), these were voluntary assignments (in the cafeteria or as cleaners). This indicates that they have no income in prison, which is related to their inability to pay for calls to their families.

4.6. Final comment

At the end of the questionnaire, we asked if they wished to add anything else. This was an open field where they could say whatever they like. In most cases, they asked for help in getting out or proving their innocence, or they claimed to have no lawyer, no money or anything. Among those asking for help were the two individuals who mentioned contemplating suicide. Such statements were not recorded in any of the other questionnaires from the second phase (questionnaires B and C), from any of the respondents in all four prisons visited (total number of questionnaires from the second phase: 230). This type of young person was especially affected by their entry into prison. Whilst not directly asking for help, they commented on their situation and indicated that they came seeking a better life and now find themselves in prison with nothing. A few spoke of future plans: finding a job, starting a family or going to other places in Europe.

Our country hasn't treated us well. I come here and see myself the same. If it were good there, I wouldn't have come. And look where I am. (Respondent P6-7)

I want help to show that I am innocent and that I shouldn't be here in prison. (Respondent P6-4)

[This is] the first and the last time I'll come. I want to go back to my family. Why don't they let me out? I didn't know anything. If I had known, I wouldn't have come. (Respondent P6-8)

I don't have money. I only eat what's on the tray [cannot afford to pay for other types of food]. Please help. I want to go back to my mother, and if I can't get help I'm going to commit suicide. (Respondent P6-26)

Any help you can give me, please. My parents are sick, and they have nothing to eat. I am thinking of committing suicide. Being sentenced is the same as being dead for my mother. I want to be expelled to my country and never be able to come back. It's hard to have hope when you see others being sentenced to four, five or seven years. That's a long time. (Respondent P6-30)

5. Discussion

The questionnaires completed by young detainees in southern Spain and accused of human smuggling allow us to approach this phenomenon for the first time in the specific context of the Western Mediterranean route and from their perspective. This initial approach to this group of young people resonates with the descriptions in studies and reports on the phenomenon of boat captains being detained upon arrival via the Atlantic route to the Canary Islands and the Central Mediterranean route to the Italian coasts. Identifying this group on another route to Spain allows for further reflection on the fine line between being identified as someone who migrates from their country via unauthorised maritime routes and being accused of human smuggling.

In line with studies indicating that the phenomenon of human smuggling usually does not involve large international organisations, but rather social networks (Zhang 2008; Maher 2018), the respondents reported that in Algeria they had contacts, through acquaintances or friends, to someone organising a boat to Europe. In some cases, they reported embarking on a joint project, where money was pooled to obtain a boat and travel independently, without the need for a facilitator charging for the boat. These scenarios were also observed on the Atlantic route.

Based on the responses, it cannot be affirmed whether or not the respondents are eligible for international protection; this would require a much deeper interview. The responses of the young people in prison regarding life in the country of origin and the motivation to migrate are mostly related to economic problems and the need to help their families. From a moral perspective, as proposed by Eamon Aloyo and Eugenio Cusumano (2018), individuals facilitating the arrival of such people would be engaging in morally permissible activity, even if they charge for the service, because they would be contributing to improving the living conditions not only of the person undertaking the journey but also of their family members receiving help in the country of origin. This improvement in conditions can have very important implications and may even determine between life and death when it comes to access to medication or food in more extreme situations. Thus, these authors question the stance of others, such as Javier Hidalgo (2016) and Julian Müller (2018), who consider morally permissible only the action of facilitators in cases where the human rights of the migrating individuals are in danger.

This group of authors reflecting on the limits of morality in the crime of human smuggling did not consider the possibility that the accused may be the very same individuals seeking to migrate (whether they are eligible for international protection). It can be assumed that under these circumstances the activity would be permissible from a moral standpoint, if we adopt the perspective of Eamon Aloyo and Eugenio Cusumano (2018), as it mostly involves a group of young people seeking to improve their living conditions and those of their families and who, due to various circumstances, end up detained and accused of human smuggling.

Regarding the circumstances of the accusation, Daniel Arencibia's analysis of the sentences suggests that the case in Almería would be different from the others, where "taxi boat" cases are identified and arrests occur when the boat drivers are returning to Algeria. However, these cases were not the majority of those described by the young people in the prison of Almería in October 2021. Most of the surveyed young people claimed to have been intercepted upon arrival, along with other passengers on the boat. They also claimed to have been accused by fellow passengers on the boats.

The basis of the accusation is very fragile and in many cases relies on witnesses, as also described in Italy and in the UNODC report in the Canary Islands. The motivations of the witnesses identified in the context of other routes (becoming legitimate residents) also emerge in the accounts of the young people in Almería. A peculiar situation emerged in the prison of Granada, which was not identified on other routes: some people accused of drug trafficking claimed to have paid for the journey and had to change boats along the way. These cases deserve further analysis as they are residual in this context, and it was not possible to obtain more detailed information about them.

Apart from the majority of cases described by the young people in Almería, in which the accused claimed to not be part of a criminal organisation or to have captained the boat, but to have paid for the journey, there are accounts of circumstances that led some to take the helm or assist in steering the boat. These are also in line with those described in the Italian and Canary Island contexts. Several of the previously mentioned scenarios can be identified: becoming occasional captains because a) there were problems with the boat, b) because they were forced, c) because they were offered money for it and had no intention of emigrating (taxi boat) or d) because they all took turns, as it was a joint venture and there was no leader.

One peculiar testimony worth highlighting is from a young person in the Almería prison who recounted being rescued by a fisherman when they encountered problems with the boat. That person ended up being arrested and accused of trafficking after being intercepted off the coast of Almería, along with the storyteller. Considering the accounts presented in the three routes to Europe, it seems clear that there is a range of possibilities and circumstances that can lead a person to be in charge of a boat, making it a much more complex scenario than the direct relationship between captaining the boat and being a human smuggler. This reflection leads us to consider that it is not easy to answer the question provocatively asked in the title of this text.

It is evident from the testimonies of the young people in the Almería prison regarding the moment of their arrival that investigation of the crime takes precedence over the need for first aid. There are even accounts of police violence in this context. Over half of the respondents claimed to have received no attention and to have been taken directly to police facilities, even if they were not in a condition to do so: barefoot or with wet clothes and having just arrived from a dangerous

journey. These practices described by the incarcerated youths bring to mind the discourses of policing presented in studies involving Frontex agents in Europe (Franko, Gundhus 2015; Pallister-Wilkins 2015). The coexistence of humanitarianism and control at the discursive level practically implies that at times (or at all times?), one aspect prevails over the other. It is clear that border control, crime prosecution and risk analysis weigh more heavily in the balance of police actions at the time of arrival.

An aspect that draws attention among the cases reported in Almería is the presence of minors detained at the time of arrival as boat captains. On two occasions, the interviewees claimed to have been minors at the time of arrival, yet no-one identified them as such. The issue of age determination is complex and has implications regarding unaccompanied foreign minors (Spanish Ombudsman 2012), who tend to migrate near the age of majority. We cannot assert that the two declarants who made such statements were indeed minors, but there were certainly reasons to doubt, as they were very young and undocumented individuals. Similar cases were not identified in reports and studies addressing this situation in other routes, but it is conceivable that minors may not be identified and sent to prison as adults in other parts of the Spanish and European territories.

Apart from the aspects related to the journey and the various configurations around the figure of the boat captain, the narratives of the young people in prison point to important issues of justice concerning this profile. The testimonies of the youths regarding their experience with justice indicate that as a group they are particularly uninformed and confused regarding their legal situation. Most of them were in pretrial detention and did not understand what had happened, making it clear that they lacked information, and in some cases had no contact with their lawyers.

The situation in prison is especially complicated due to the language barrier and the lack of resources and access to work in prison, resulting in a lack of contact with their families. Similar cases were detected by the ARCI Porco Rosso and Alarm Phone report (2021) in Italy. The free comments at the end of the questionnaire highlight the vulnerability of these young people, who stand out from other profiles in prison due to their confusion and lack of guidance.

Conclusions

In this paper, we aimed to delve into the issue of human smuggling and its relationship with the detention of individuals upon arrival on European territory via maritime routes and unauthorised entry points. This phenomenon has been mapped in various entry routes to Europe, specifically the Central Mediterranean route to the Italian coast and the Atlantic route to the Canary Islands. In this context, both non-governmental organisations and international bodies have noted a rise in the number of individuals detained and accused of human smuggling in

recent years. There are also indications that the migrants who have paid for their journeys, rather than members of the criminal organisations behind these trips, are being punished with prison sentences.

Against this backdrop, a significant number of young people were unexpectedly found in a prison in southern Spain (Almería) having been detained shortly after irregularly arriving via the Western Mediterranean route. The administration of a questionnaire with open-ended questions allowed us to access this reality from their perspective. The testimonies largely echoed those gathered from interviews with key actors in the Canary and Italian contexts. The various circumstances surrounding the moment they took control of the boat and the police strategies of accusation seem to be repeated in different territories.

Regarding access to justice, few guarantees are also notable in all three territories. The fieldwork conducted in the prison of Almería allows us, for the first time, to delve into the situation of these people when they are still in prison. The lack of communication with families and lawyers and the language barrier make this group especially vulnerable, as reflected in the final comments of the questionnaire, in which the young people expressed themselves more freely.

Whilst it is not possible (nor is it our goal) to determine from their accounts whether they are guilty or innocent of the crime they are accused of, it is possible to identify that they are particularly vulnerable to control and justice institutions. Many of them showed confusion and uncertainty about their situation and did not understand why they were in prison. Claims that they had not had a lawyer or seen a judge before being imprisoned point to two serious possibilities: that the minimum legal requirements for the rule of law are not being met or that those involved were unaware that they were in the presence of their lawyer or a judge, despite all legal procedures being followed. The seriousness of the situation is evident, whatever the reality may be.

An important aspect is the presence of people in prison who claim to have arrived as minors. There are indications to suggest that prison is being used as a response to the arrival of migrants in Spain, and in some cases it is unclear whether they are minors. It is unknown whether this is an invisible reality in other territories, nor how many minors have been accused of human smuggling and are serving time in a juvenile correction centre. Further research in this regard is essential.

Finally, much remains to be investigated on this issue. Regarding the Western Mediterranean route, it would be advisable to also investigate from the perspective of key actors in the criminal justice system. In both Italy and the Canary Islands, interviews with these key actors have shown that, although boat drivers have a residual role in the crime of human smuggling, they are pursued by the justice system. In some cases, mitigating factors are applied because it is recognised that they themselves seek to migrate.

With all that has been presented, it is clear that it is possible for a person who migrates by sea (a smuggled person that may even be eligible for international protection or refugee status) to end up accused of human smuggling in European

prisons. Here, the idea put forward by Claudia Aradau (2004) materialises: people at the borders can be at risk and, at the same time, be seen as a risk by the authorities guarding the border areas.

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References

- Achilli L. (2018). 'The 'good' smuggler: The ethics and morals of human smuggling among Syrians.' *The ANNALS of the American Academy of Political and Social Science* 676(1), pp. 77–96. <https://hdl.handle.net/1814/51946>
- Aloyo E. and Cusumano E. (2018). 'Morally evaluating human smuggling: The case of migration to Europe.' *Critical Review of International Social and Political Philosophy* 24(2), pp. 133–156. <https://doi.org/10.1080/13698230.2018.1525118>
- Aradau C. (2004). 'The perverse politics of four-letter words: Risk and pity in the securitisation of human trafficking.' *Millennium* 33(2), pp. 251–277. <https://doi.org/10.1177/03058298040330020101>
- Baird T. (2013). *Theoretical Approaches to Human Smuggling*. Copenhagen: DIIS Working Paper.
- Barbero I. (2021). 'Los Centros de Atención Temporal de Extranjeros como nuevo modelo de gestión migratorio: Situación actual, (des)regulación jurídica y mecanismos de control de derechos y garantías' [The temporary care centers for foreigners as a new model of migration management: Current situation, legal (dis)regulation and control mechanisms of rights and guarantees]. *Derechos y Libertades* 45, pp. 267–302. <https://doi.org/10.20318/dyl.2021.6108>
- Barbero I. (2023). 'When return orders are more than just a deportation receipt: Transit migration and socio-legal meanings of administrative documents.' *Journal of Immigrant and Refugee Studies* 21(1), pp. 164–177. <https://doi.org/10.1080/15562948.2021.2017098>

- Boza Martínez D. and Pérez Medina D. (2019). 'New migrant detention strategies in Spain: Short-term assistance centres and internment centres for foreign nationals.' *Paix et Securite Internationales* 7, pp. 261–277. https://doi.org/10.25267/Paix_secur_int.2019.i7.08
- Carvalho J. (2023). 'Comunicando la inmigración: ¿Qué nos dicen las noticias?' [Communicating immigration: What does the news tell us?]. In E. García-España and M. Contreras Román (eds.) *Inmigración y control social: Desafíos de la moderna Criminología* [Immigration and social control: Challenges of modern criminology]. Valencia: Tirant lo Blanch, pp. 183–202.
- Coen M. (ed.) (2011). *Human Trafficking, Smuggling and Illegal Immigration: International Management by Criminal Organizations*. Vol. 79. Amsterdam: IOS Press.
- Fernández-Bessa C. and Brandáriz-García J.A. (2016). 'Transformaciones de la penalidad migratoria en el contexto de la crisis económica: El giro gerencial del dispositivo de deportación' [Transformations of the migratory penalty in the context of the economic crisis: The managerial turn of the deportation device]. *Indret: Revista Para El Análisis Del Derecho* 4, pp. 1–25. <https://www.raco.cat/index.php/InDret/article/view/314500/404653>
- Franko Aas K. and Gundhus H.O.I. (2015). 'Policing humanitarian borderlands: Frontex, human rights and the precariousness of life.' *The British Journal of Criminology* 55(1), pp. 1–18. <https://doi.org/10.1093/bjc/azu086>
- Hidalgo J. (2016). 'The ethics of people smuggling.' *Journal of Global Ethics* 12(3), pp. 311–326. <https://doi.org/10.1080/17449626.2016.1245676>
- Maher S. (2018). 'Out of West Africa: Human smuggling as a social enterprise.' *Annals of the American Academy of Political and Social Science* 676(1), pp. 36–56. <https://doi.org/10.1177/0002716217743935>
- Mallia P. (2010). *Migrant Smuggling by Sea: Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework*. Leiden, Boston: Martinus Nijhoff Publishers.
- Moya-Malapeira D. (2002). 'La devolución de extranjeros en el ordenamiento jurídico español' [The return of foreigners in the Spanish legal system]. *Revista Vasca de Administración Pública* 62, pp. 189–262.
- Müller J.F. (2018). 'The ethics of commercial human smuggling.' *European Journal of Political Theory* 20(1), pp. 138–156. <https://doi.org/10.1177/1474885118754468>
- Neske M. and Doomernik J. (2006). 'Comparing notes: Perspectives on human smuggling in Austria, Germany, Italy, and the Netherlands.' *International Migration* 44(4), pp. 39–58. <https://doi.org/10.1111/j.1468-2435.2006.00379.x>
- Patane F., Bolhuis M., van Wijk J., and Kreiensiek H. (2020). 'Asylum-seekers prosecuted for human smuggling: A case study of Scafisti in Italy.' *Refugee Survey Quarterly* 39(2), pp. 123–152. <https://doi.org/10.1093/rsq/hdaa008>
- Pallister-Wilkins P. (2015). 'The humanitarian politics of European border policing: Frontex and border police in Evros.' *International Political Sociology* 9(1), pp. 53–69. <https://doi.org/10.1111/ips.12076>

- Rodríguez-Candela J.L. and García-España E. (1996). 'La devolución del extranjero' [The return of the foreigner]. *La Ley: Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía* 5, pp. 1338–1350.
- Salt J. (2000). 'Trafficking and human smuggling: A European perspective.' *International Migration* 38(3), pp. 31–56.
- Triandafyllidou A. and Maroukis T. (2012). *Migrant Smuggling: Irregular Migration from Asia and Africa to Europe*. London: Palgrave Macmillan.
- Wahab T.K. (2015). 'Helping refugees should not be illegal: Correlation between human trafficking/smuggling and asylum seekers.' *Journal of Global Legal Research* 3(1), pp. 17–25.

Internet sources

- APDHA (2023). *Derechos Humanos en la Frontera Sur 2023* [Human Rights in the Southern Border], Apdha.org. Available online: <https://www.apdha.org/frontera-sur-2023/> [08.07.2024].
- Arci Porco Rosso and Alarm Phone (2021). *From the Sea to Prison. The Criminalisation of Migration in the Report by Arci Porco Rosso and Alarm Phone*, Borderlinesicilia.it. Available online: <https://www.borderlinesicilia.it/en/news-en/from-the-sea-to-prison-the-criminalisation-of-migration-in-the-report-by-arci-porco-rosso-and-alarm-phone/> [08.07.2024].
- Arencibia D. (2024). *Testigos protegidos y teléfonos móviles* [Protected witnesses and cell phones], Dropbox.com. Available online: <https://ocspi.wordpress.com/blog-ocspi/> [08.07.2024].
- Spanish Ombudsman (2021). *Estudio sobre La migración en Canarias* [Study on migration in the Canary Islands 2021], Defensordelpueblo.es. Available online: <https://www.defensordelpueblo.es/informe-monografico/la-migracion-canarias/> [08.07.2024].
- FRA (2023). *June 2023 Update – Search and Rescue Operations in the Mediterranean and Fundamental Rights*, Fra.europa.eu. Available online: <https://fra.europa.eu/en/publication/2023/2023-update-ngo-ships-sar-activities> [08.07.2024].
- Gómez I. (2023). *Cruzada policial contra los pateristas: 642 detenidos en la última década en Almería* [Police crusade against smugglers: 642 arrested in the last decade in Almeria], Diariodealmeria.es. Available online: https://www.diariodealmeria.es/almeria/Cruzada-pateristas-detenido-Almeria-inmigracion-pateras_0_1834017082.html [08.07.2024].
- Migreurop (2024). *Muertos y desaparecidos en la indiferencia* [Dead and missing in the indifference], Migreurop.org. Available online: https://migreurop.org/article3263.html?lang_article=es&lang_nav=es [08.07.2024].
- OCSPI (n.d.). *OCSPI Blog*, Ocsapi.wordpress.com. Available online: <https://ocspi.wordpress.com/blog-ocspi/> [08.07.2024].

- Spanish Ombudsman (2012). *¿Menores o Adultos? Procedimientos para la determinación de la edad* [Minors or Adults? Age determination procedures], Defensor del pueblo.es. Available online: <https://www.defensordelpueblo.es/informe-monografico/menores-o-adultos-procedimientos-para-la-determinacion-de-la-edad-enero-2012/#> [01.08.2024].
- United Nations (2000). *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, Unodc.org. Available online: https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf [08.07.2024].
- UNODC Observatory on Smuggling of Migrants (2022). *Northwest African (Atlantic) Route: Migrant Smuggling from the Northwest African Coast to the Canary Islands (Spain)*, Unodc.org. Available online: https://www.unodc.org/res/som/docs/Observatory_StoryMap_3_NorthWestAfrica.pdf [08.07.2024].
- United Nations Support Mission in Libya and Office of the United Nations High Commissioner for Human Rights (2016). *“Detained and Dehumanised”. Report on Human Rights Abuses Against Migrants in Libya*, Ohchr.org. Available online: https://www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf [08.07.2024].



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The reform of administrative detention in Italy: A “declaration of war” to irregular migrants and asylum seekers*

**Reforma detencji administracyjnej we Włoszech.
„Wypowiedzenie wojny” migrantom o nieuregulowanym statusie
i osobom ubiegającym się o ochronę**

Abstract: Dating back to Italy’s first comprehensive immigration law in the 1990s, the practice of detaining irregular migrants has served various explicit and implicit purposes, both practical and symbolic. Two decrees passed in 2023, under the far-right government of Giorgia Meloni, were explicitly framed as responses to the increasing number of migrants arriving at the borders. The aim of these decrees was to prolong the detention of asylum seekers and irregular migrants, with the stated aim of increasing returns. However, despite these measures, available data suggests that the capacity of detention centres has not increased significantly, and the rate of returns has remained stable. Against this backdrop, this article seeks to explore the explicit and implicit functions of detention by examining recent reforms and publicly available quantitative data obtained through a request under Italy’s Freedom of Information Act. It suggests that whilst detention serves practical purposes for a minority of migrants, its symbolic role in conveying state sovereignty and strict border control is equally important.

Keywords: administrative detention, borders, asylum seekers, deterrence, symbolic policies

Abstrakt: Począwszy od pierwszego kompleksowego prawa imigracyjnego we Włoszech w latach 90. XX wieku, praktyka umieszczania w detencji migrantów o nieuregulowanym statusie służyła

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różnym jawnym i ukrytym celom, zarówno praktycznym, jak i symbolicznym. Dwa dekrety przyjęte w 2023 r., pod rządami skrajnie prawicowego rządu Giorgii Meloni, zostały wyraźnie sformułowane jako odpowiedź na rosnącą liczbę migrantów przybywających na granice kraju. Celem tych dekreto-
w było przedłużenie detencji osób ubiegających się o ochronę i migrantów o nieuregulowanym statusie, by zwiększyć liczbę powrotów. Jednak pomimo tych środków, dostępne dane sugerują, że pojemność ośrodków detencyjnych nie wzrosła znacząco, a wskaźnik powrotów pozostał stabilny. W tym kontekście niniejszy artykuł ma na celu zbadanie jawnych i ukrytych funkcji detencji poprzez analizę ostatnich reform i publicznie dostępnych danych ilościowych uzyskanych na wnioski na podstawie włoskiej ustawy o wolności informacji. Sugeruje on, że podczas gdy detencja służy praktycznym celom w odniesieniu do mniejszości migrantów, jej symboliczna rola w zapewnianiu suwerenności państwa i ścisłej kontroli granic jest równie ważna.

Słowa kluczowe: detencja administracyjna, granice, osoby ubiegające się o ochronę, odstraszenie, polityka symboliczna

Introduction

One of the hallmarks of the last decade of Italian immigration policies is the obsession with administrative detention,¹ which is often presented by the executive as a solution to manage the rising migration flows. In Italy, administrative detention of irregular migrants dates back to one of the first comprehensive laws on immigration, adopted in 1998; since then, foreigner detention centres have always been used for various purposes, both explicit and implicit as well as practical, political and symbolic (Sampson, Mitchell 2013).

As of 2017, an intensive legislative activity has reshaped the apparatus of administrative detention. At least six legislative reforms have expanded the categories of those to be detained, the length of the detention period and the spaces in which migrants can be administratively imprisoned. Two of these laws were passed in 2023, under the far-right government of Giorgia Meloni, and they were explicitly presented as a way of dealing with the increase in migrant arrivals at the external borders. The first, Law Decree n. 20/2023, converted into Law n. 50/2023, focussed mainly on the detention of asylum seekers during the asylum border procedure and seemed to anticipate the reforms proposed at the EU level – through the 2020 Pact on Migration and Asylum – aiming to reinforce the detention mechanisms at external borders (Favilli 2023). The last Law Decree (124/2023, converted into Law 162/2023) was adopted at the end of a summer in which the number of arrivals by sea had risen significantly over the previous year.² It was accompanied by the Prime Minister's press release, in which

¹ For the purpose of the article, we understand “administrative detention” as the deprivation of liberty of foreigners for immigration purposes and not for criminal purposes, whether it is applied based on existing legal provisions (*de iure* detention) or not (*de facto* detention). As is detailed in the article, immigrant detention can occur in different sites, such as longstanding pre-removal detention centres, as well as in more recent informal facilities such as the so-called “hotspots”.

² As of 15 September 2023, the number of recorded arrivals by sea was 127,207, whilst in the same months of 2022, 66,237 people had arrived (Ministry of the Interior, Daily Statistical Dashboard).

she directly addressed migrants in these terms: “If you enter Italy illegally you will be detained and repatriated” (Tiberio 2023). Moreover, she presented the extension of the detention period as a way to increase the number of returns.

Both decrees seem to evoke a scenario in which it will be legally possible to detain large groups of asylum seekers or irregular migrants for long periods of time. However, it has been several years since the Italian administrative detention system reached a capacity of more than 10,000 detainees. According to the available data (Fabini 2022; Campesi, Coresi 2023), the number of places available in detention centres increased between the late 1990s and early 2000s, but it then slowly decreased between 2010 and 2017. It is worth highlighting that whilst in the first decade of the 21st century the average number of detainees was 12,000 per year, between 2010 and 2020 the average decreased to 5,600 per year (Ferraris 2021). Moreover, since the establishment of the detention centres, the average percentage of returns from the centres has been stable at around 48% – overall, less than half of detainees are repatriated from the centres. Taking into account the relatively low capacity of the detention system in Italy in the last 15 years, Elena Valentini (2023) argues that the functioning of detention centres is ambivalent: alongside “a legal device marked by the will to make possible a massive recourse to detention”, there is also “a factual reality calibrated on a selective use of the instrument”.

Against this background, this article aims to examine the explicit and implicit functions of detention, as they emerge from both recent reforms and from the available quantitative data. We suggest that although detention serves practical purposes concerning a relatively small percentage of asylum seekers and irregular migrants, its evocative and symbolic functions are no less important as a means of conveying a political message of strong state sovereignty and harsh border control.

1. Conceptualisation and rationales of administrative detention

As the use of administrative detention has increased in Europe over the last 20 years, legal, political and sociological researchers have debated the theoretical foundations and functions of this coercive measure. Though there is no consistent, comprehensive conceptualisation of administrative detention, some scholars have identified at least three possible theoretical perspectives to address the issue (Campesi 2020a; Fernández Bessa 2021).

One of the most long-standing and influential theorisations, both within and outside the academic debate, is that of the political philosopher Giorgio Agamben. He has traced detention centres back to the concept of the camp – drawing a parallel with extermination camps – understood as a place where “the norm becomes indistinguishable from the exception”, and the exception is understood “not as a special law, but as the suspension of the legal order itself” (Agamben 2003: 13). The camp paradigm has often been used to criticise the flagrant violations of law

and fundamental rights that take place in detention centres, but more recent criminological, social and socio-legal perspectives diverge from this approach (Campesi 2020a).

For instance, scholars in the emerging field of border criminology (Aas Franko, Bosworth 2013) argue that administrative detention should rather be regarded as an expansion of the reach of the penal or carceral state (Beckett, Murakawa 2012). The inherently punitive nature of administrative detention, which becomes evident when looking at the places and conditions of detention and listening to the “lived experiences” of detained migrants (Bosworth 2018), has been placed at the forefront of reflections on the relationship between the penal state and immigration regimes. In other words, scholars in the field of border criminology have argued that the exercise of power deployed on the grounds of integrating immigration and criminal law is itself painful and punitive, even if the authorities claim that it has purposes other than punishment (García Hernández 2014). The intersection between the criminal justice and immigration systems ultimately means extending the reach of punitive power, whilst simultaneously weakening and disregarding the guarantees of criminal law.

Other scholars have moved away from the approach that sees immigration detention as a form of punishment, suggesting that it should rather be read through the lens of the “preventive turn” invested in the field of criminal law (Ashworth, Zedner 2014). Under these theoretical lenses, immigration detention should be seen “as an example of the increasing influence of the logic of preventive control that provides law enforcement agencies with expedited control tools which operate at the margins of the criminal justice system, intending to maximize their capacity to anticipate alleged threats and contain risk” (Campesi 2020a: 539). From this perspective, the asymmetry between the typical guarantees of criminal law and those granted to foreigners is not so much a problematic consequence of the expansion of the penal state, but rather a confirmation of the general trend of weakening safeguards that occurs in the turn from the penal to the preventive state (Carvalho 2017).

Such a theoretical model is in line with reflections that explain the process of securitisation by anchoring it in the qualification of the foreign person as a risk or threat to society. The notion of detention as a preventive measure is based not so much on the juxtaposition between migration and criminality, but rather on the juxtaposition between migration and dangerousness. In other words, detention is used to control dangerous and deviant behaviour, regardless of whether it may result in a crime and regardless of any claim to punishment. Ultimately, these dangerous behaviours are identified in the movement of migrants, which is perceived as a source of danger and insecurity.

Although the recent theoretical approaches we have referred to differ in their conceptualisation of the genealogy of immigration detention, they are consistent and converge on the assumption that the functions of administrative detention go beyond the legal/practical justification of preventing migrants from absconding and (ultimately) ensuring their return. Detention could be understood as a form of

punishment or as a manifestation of the “preventive state”, but in both cases scholars have argued that detention has become a tool for governments to target specific groups of migrants and to pursue both practical and symbolic functions through the selection of such groups. From a more operational perspective, scholars have argued that detention functions as a tool to “regulate human mobility” (Campesi 2024), and specifically as a “containing, bordering and excluding” device (Mountz et al. 2012). At the same time, its symbolic dimension – as a tool to reaffirm the state’s power to exclude and to reinforce its authority – shall not be disregarded, especially in a context in which immigration reforms are led by populist parties.

Legislative activity gives rise to symbolic politics when norms are not created to produce concrete effects and certain consequences for reality, but rather function to promote simplistic solutions to complex problems and to achieve a strictly political/electoral consensus (Edelman 1987). The creation of “suitable enemies” has been seen as one of the main functions of symbolic politics (Christie 1986), since such enemies can be blamed for various social problems and the sense of insecurity that results from a pluralistic and complex social context. Foreigners have been, and continue to be, one of the most suitable enemies par excellence: as early as the 1990s, Loic Wacquant argued that foreigners are “both the symbol and the target of all social anxieties” (Wacquant 1999: 219). It is possible to read the implementation of the instruments of control, identification and deportation of migrants in terms of institutionalising the fear of the foreigner: in recent years, migration policies aimed at asylum seekers have been characterised by the centrality of the immigration-security nexus (Blengino 2015: 16). From this perspective, administrative detention continues a tradition in which the “use of force” is presented as a tool to reassure the public and reduce anxiety in the face of media images and narratives of “invasion” and “siege” (Maneri 2016).

The study of detention from a sociological or criminological perspective is precisely to reveal the many functions of detention other than those expressed by the law. For example, some scholars have highlighted the instrumental function of “general” deterrence for all foreigners (Bosworth 2017), or “special” deterrence to persuade irregular migrants to leave the country voluntarily (Leerkes, Kox 2017) or that of managing public order (Leerkes, Brodeurs 2010; Campesi, Fabini 2019). Others have argued that despite the lack of effectiveness of such measures in controlling the movement of asylum seekers and returning irregular migrants, detention “remains a potent symbol of sovereign authority over territory” (Sampson, Mitchell 2013: 107). Isabella Majcher (2014) has shown that the way in which norms are framed contributes to the punitive and “disciplinary” nature of the administration, as they target migrants who are perceived as criminal and coerce them into accepting deportation. Cetta Mainwaring and Stephanie Silverman have also argued that “the divergence between stated and realised goals suggests that the detention system contributes to the spectacle of enforcement in a particularly valuable way”. They contend that if detention is primarily related to the display of sovereign power beyond its borders, such a symbolic function may also explain the

“continued expansion of detention despite mounting and compelling evidence that it is harmful and ineffective in achieving its ostensible policy goals” (Mainwaring, Silverman 2017: 23).

In the following paragraphs, we look at the proliferation of legislation in the field of administrative detention through the lens of the informal, practical and symbolic functions that this tool has displayed in Italy in recent years.

2. Methodology and data collection approach

The article investigates the impact of recent legislative changes on the administrative detention system in Italy and reflects upon the practical and symbolic functions of administrative detention. It does so by combining a legal analysis of the legislative reforms that have occurred since 2017, focussing in particular on the recent changes brought about by the far-right government led by Giorgia Meloni, with a quantitative analysis of data related to the presence and composition of the detainees in Italian administrative detention centres. The analysis focusses on the number of detainees, their country of origin, their legal status (we distinguished between irregular/illegalised migrants and asylum seekers) and the number of detainees returned to their country of origin. In order to provide a more accurate analysis of the manifold functions of the detention system in Italy, we decided to enrich the quantitative analysis by focussing on specific detention centres in Turin (northern Italy), whilst most of the centres are located in the south.

Assuming that the administrative detention system has been reinvented since the so-called refugee crisis, and taking into account that most of the crucial reforms related to migrant detention took place in 2017, 2018 and 2020, we decided to focus on qualitative data on Turin’s detention centre for the period 2018–2022. We obtained such data through a request submitted under the Freedom of Information Act (FOIA), which was formally introduced in Italy in 2016. The data were then compared with the national-level data made publicly available on the “Trattenuti” platform, developed as part of a project by ActionAid Italy and the Department of Political Science of the University of Bari.³

The Turin centre presents some peculiarities with regard to the national detention centre landscape. It is one of the oldest centres built in Italy (in 1999) and it has been functioning almost continuously (except for a short period in 2008 when it was closed for renovation). Moreover, the centre was also active during the pandemic and was identified as the facility with the highest number of detainees in 2020 and 2021 (Caja, Celoria, Mattiello 2022). According to several reports, the centre is intended to receive both migrants apprehended at the border or on the street as well as migrants who have previously been detained in prisons. In this regard, the choice of focussing on the Turin centre takes into account the literature

³ The data can be publicly accessed at the platform website (Trattenuti n.d.).

analysis according to which there is a tendency to use the instrument of administrative detention to manage migration in urban areas and as tool of “policing dangerous mobility” rather than for deportation purposes (Campesi, Fabini 2019: 65–66). The Turin centre seems particularly emblematic in this sense: located in an urban area far from the border, the facility can be considered orientated towards detention as an end in itself, as will be shown by the numbers of annual returns compared to admissions. The management of the territory through the use of detention is particularly interesting for understanding the symbolic use of migration policies, especially with regard to the selective management processes of migrants who are considered dangerous,⁴ though they are not returned.

Quantitative data on the Turin centre were collected through a FOIA request submitted by the authors on 24 April 2023 to the Turin Police Headquarters with reference to the period 2018–2022. The requested data were transmitted to the researchers on 24 May 2023. The requested data concerned the number of migrants transiting⁵ through the centre, the average length of stay, the number of asylum seekers on entry, the number of people who applied for international protection within the centre and the number of people coming from prisons, with reference to nationality and for the period under review. The local data were compared with the national data available on the “Trattenuti” platform. The latter were collected through FOIA requests addressed to the Ministry of the Interior, the Prefectures (local offices of the Ministry of the Interior) and the competent Police Headquarters. The national data on the platform are currently available for the period 2018–2021.

The comparison of the quantitative data focussed in particular on the number of persons detained in recent years, the relationship between the average number of days in the centre and the percentage of persons detained and then returned, the number of the most represented nationalities, the incoming asylum seekers and applications for asylum made within the centre and some reflections on the most represented nationalities. Although it is theoretically possible to detain women within the Italian framework, the Turin detention centre does not have a female section (the only functioning female section is in the Rome detention centre), so all figures refer to adult male detainees.⁶

The quantitative analysis described above is incorporated with a review of the relevant literature on the functions of administrative detention in Italy and with a critical examination of the policy and legislative changes that have occurred in recent years, drawing on theoretical and empirical studies on Italian detention centres.

⁴ The concept of “dangerous” migrants is based on the conceptualisation of “dangerousness” developed by Campesi and Fabini in 2020, which holds that the notion has been constructed in practice by law enforcement agencies and often refers to individuals “burdened by criminal convictions or police records which are merely a reflection of the criminalization of irregular migration and of the intense police surveillance that migrants are subjected to” (Campesi, Fabini 2020: 62).

⁵ By the term “transit”, used in the context of data received via FOIA, the authors refer to the number of people who entered the Turin centre – or Italian centres – in a given year.

⁶ According to Italian law, foreign unaccompanied minors cannot be detained, and – whilst it is not explicitly stated in the law – families with minors have never been placed in Italian detention centres.

3. Traditional and developing features of immigration detention in Italy

Italian pre-removal detention centres have changed names several times (first called “centre for temporary staying” [CPT], then “centre for identification and deportation” [CIE] and now “pre-removal staying centre” [CPR]). Their number and capacity have also changed, but they have maintained some common features over time. They usually resemble prisons or high-security facilities, are constantly monitored by the police and the army and are managed by private companies selected by the local prefecture (a representative of the Ministry of the Interior) through a tendering process. Most of them have been repeatedly reported for inadequate and unhealthy detention conditions (MSF 2004; CILD 2021). At the end of 2023, there were nine functioning CPRs, located in Milan, Rome, Gradisca d’Isonzo, Nuoro, Bari, Brindisi, Potenza, Caltanissetta and Trapani, with a total capacity of 961 detainees (CILD 2023).

Such centres have traditionally been used for detaining irregular migrants pending expulsion, and only marginally for the detention of asylum seekers (who cannot in principle be returned, as their expulsion could constitute a violation of the principle of “non-refoulement”). According to national and EU law, asylum seekers cannot be detained for the sole reason that they have applied for asylum, but they can be kept in centres to establish their identity and gather the elements on which their asylum application is based, if there is a risk of absconding or if they pose a threat to public order or security. In addition, migrants detained on the basis of a deportation order may remain in detention even if they subsequently apply for asylum, provided that the authorities can prove that the asylum application was made solely to avoid deportation.

Apart from “official” administrative detention centres (those formally recognised and regulated by the Unified Text on Immigration), migrants are also *de facto* detained in several informal facilities of a “hybrid” nature: most of these centres were built close to ports in southern regions or on islands (such as Lampedusa) and functioned as initial reception facilities of disembarked migrants and asylum seekers. However, the nature of placing foreigners in such centres has been never clarified: very often the facilities were fenced off and under police surveillance, thus implying a form of coercion against migrants that could amount to (*de facto*) detention.⁷ With the implementation of the “hotspot” approach launched by the European Commission in the 2015 European Agenda on Migration (European Commission 2015), these centres (renamed hotspots) were for the initial identification and fingerprinting of

⁷ The facilities where migrants have been placed immediately after disembarkation were never framed as formal detention centres (as CPTs, CIEs and CPRs). However, the ways migrants were kept in the centres limited not only their freedom of movement, but eventually also their personal freedom. Even though this form of informal detention had been already studied by several scholars (Campesi 2013; Ferraris, Anastasia 2013), the deprivation of liberty to which migrants were subject was only recognised for the first time by the European Court of Justice in the *Khlaifia* case in 2016.

new arrivals. Despite the absence of a legal framework authorising the detention of foreigners during the initial phase of identification – and before a return order is issued – the practice of deprivation of liberty in such centres has been widespread since 2016 (National Guarantor 2019; 2020; 2021). Suddenly, hotspots became sites of confinement, where foreigners were detained immediately upon entry in the country. Although migrants are physically on the territory of the state, this form of detention is commonly referred to in the literature as “pre-entry” or “pre-admission” detention (Guild 2005). In 2023 the European Court of Human Rights recognised that several migrants had been *de facto* restricted in the Lampedusa hotspot in 2017 and 2018, and it sanctioned Italy for their unlawful detention (13755/18 2023; 20860/18 2023; 21329/18 2023; 70583/17 2023).

Taking into account the features and the evolution of the detention system, Giuseppe Campesi (2020) has suggested that the history of administrative detention in Italy can be divided into four phases: institutionalisation and expansion (1998–2010), consolidation (2011–2012), crisis (2013–2015) and reinvention (2015–2020). During the first two phases, the main targets of administrative detention were irregular migrants, who were portrayed as “illegal” and “clandestine” and portrayed to the public opinion alternatively as dangerous “enemies” or as “parasites” trying to improve their living conditions by benefiting from the welfare and social protection of rich Western countries (Spena 2019: 303). During these years, the criminalisation of irregular migrants, based on the use and juxtaposition of criminal and administrative measures and administrative detention, was just one of the many manifestations of the reach of the penal state. In the same years, irregular migrants were also punished and incarcerated through the criminal system because of their presence in the country, which was framed as a crime; often, they were subject to a continuum of detention, first in prison and then in administrative detention centres once they had served their sentence.

Since 2011, riots and protests in detention centres have led to their closure in two major cities (Milan and Bologna), whilst at the same time campaigns promoted by civil society have denounced the serious impact of detention on the health and fundamental rights of migrants (Barbieri et al. 2013). A report adopted in 2013 by an *ad hoc* commission of the Italian Parliament highlighted the very high costs of immigration detention and its ineffectiveness as a tool for enforcing the return of irregular migrants. Gradually, the number of centres and the number of places in the facilities were significantly reduced, and a law passed in 2014 significantly reduced the maximum period of detention (from 18 to 3 months) and required migrants to be released if there was no prospect of deportation. However, the “crisis” of administrative detention now appears to be an accidental break in an ever-expanding process of proliferating detention centres and policies.

Since 2015, in fact, the government has repeatedly intervened in the design of each of the types of administrative detention we have identified: the pre-entry detention in hotspots, the pre-removal detention of irregular migrants and the detention of asylum seekers in CPRs. First, in 2015, the grounds for detaining asylum seekers in

CPRs on “security-related grounds” were expanded as a result of the implementation of EU Directive 2013/32 (OJ of 29.06.2013, L 180). Then, in 2017, two new grounds of detention in CPRs were introduced, for a) those who were taken to a hotspot for identification but refused to be fingerprinted and b) those who applied for asylum after being detained on the grounds of a return order linked to a “deferred” refusal of entry (*respingimenti differiti*). This last provision, albeit seemingly innocuous, is significant in light of the numbers of migrants issued with a “removal orders” immediately after they enter the territory by sea.⁸ Moreover, in 2017 the Ministry of the Interior Marco Minniti (linked to the centre-left Democratic Party) announced that every region would have its detention centre and presented a higher number of CPRs as a crucial tool to manage migration flows.

In 2018, the new Ministry of the Interior, Matteo Salvini (leader of the far-right Northern League party), implemented the same policy, reinforcing the idea of detention centres as a central tool in migration management. Law Decree n. 133/2018, named after Salvini for his crucial role in drafting its content, extended the maximum period of detention for irregular migrants (to 6 months) and introduced a new hypothesis of detaining asylum seekers for identification purposes. Asylum seekers could be detained for up to 30 days in “special facilities” within the hotspots and then transferred to CPRs, where their detention could continue for up to 12 months. Whilst until 2017 detention could only take place in CPRs, the 2018 reform formally made detention in hotspots part of the detention system, albeit amid numerous doubts about its constitutional legitimacy. Such a provision could potentially target all asylum seekers arriving by sea. However, migrants rescued in search and rescue (SAR) operations and who arriving autonomously by boat were not *formally* detained in hotspots. The European Court of Human Rights (ECtHR) recognised that the deprivation of their liberty occurred during identification and before they applied for asylum, and that it was not imposed by a formal decision, therefore taking place *de facto* (European Commission 2015).

Finally, in 2020, a subsequent reform of the Immigration and Asylum Law once again affected the detention system (Law Decree 130/2020, converted into Law 173/2020). On the one hand, the reform increased the number of cases in which asylum seekers could be detained, with a plethora and overlap of cases that could, on paper, legitimise the detention of a large number of dangerous individuals. In particular, asylum seekers could be detained if they have committed misdemeanours for which arrest is not mandatory, and if they have reapplied for asylum after an expulsion order has been issued. On the other hand, the legislature has for the first time established a scale of priorities to be followed when deciding on a coercive measure against irregular migrants. According to Art. 3(2) of the Law Decree, detention is applied as a matter of priority to two groups: a) those who have been

⁸ According to the data published in the Annual Reports of the National Guarantor of the Rights of Persons Deprived of Their Liberty, the percentages of returns following a “deferred” refusal of entry out of the total number of returns were 29.4% in 2017 (1,917 persons), 22.4% in 2018 (1,438) and 21.4% in 2019 (998), reaching 35.3% in 2020 (1,185) and 71% in 2021 (1,221) (National Guarantor 2018; 2019; 2020; 2021; 2022).

convicted of an offence for which the law provides mandatory detention or who are considered a “threat to public order and security”, even if no criminal proceedings have been initiated against them, and b) those who come from countries that have signed formal or informal readmission agreements with Italy. The centrality of co-operation agreements with third countries is also illustrated by the provision that, if the foreigners come from a country with which Italy has signed return agreements, their detention can be extended by a further 30 days, up to a total of 120 days.

Just a few months ahead of the reform, the Ministry of the Interior, Luciana Lamorgese, held informal negotiations with Tunisia to ensure an increase in the return of Tunisian nationals. This policy laid the foundations for a new phase in the management of the Italian detention system in the post-national lockdown period, defined as the phase of the CPR’s “revolving door” (Caja, Celoria, Mattiello 2022) and orientated towards a “managerial” approach (Brandariz García, Fernández Bessa 2016). At the same time, the new law institutionalised the priority given to the detention of “dangerous migrants”, confirming what Giuseppe Campesi and Giulia Fabini had already theorised and showing that detention is indeed used instrumentally to manage the supposed “social dangerousness” of migrants (Campesi, Fabini 2019).

Overall, the reasons and places where migrants can be detained (*de jure* or *de facto*) have proliferated during the period of “reinventing” the detention system. Moreover, the links between the three typologies have been strengthened, as asylum seekers could be legally detained first in hotspots and then in CPRs; similarly, irregular migrants were *de facto* detained in hotspots before the issuance of a return order and then transferred to CPRs to carry out the return along a “supply chain” of detention (Caprioglio, Gennari 2021).

Conversely, evidence of the harms of detention has emerged in parallel with the reforms aimed at expanding the detention system: many reports have highlighted the poor living conditions and the problematic approach to migrants’ health by the companies running detention centres (CILD 2021; Fighi, Rondi 2023). It is striking that since the adoption of a plan to expand detention capacity by building detention centres in each region, which was presented by Minniti in 2017, 15 migrants have died in detention in a CPR. The number increased between 2018 and 2022 (Naga 2023), although in many cases the causes of death remain unclear and are not properly investigated.

The analysis of the legislative reforms shows that the legislature envisaged a scenario in which almost all incoming migrants – including asylum seekers – would be detained *en masse* upon arrival at the border (Veglio 2018). Such a trend is in line with the process of stigmatising asylum seekers as a threat to European societies, who should therefore be stopped before entering the territory. To this end, asylum seekers have been represented not as victims of political persecution, wars, natural or human disasters, but rather as disguised economic migrants or “false (bogus) refugees” from whom EU countries must be protected (Maneri, Quassoli 2016). At the same time, the government is focussed on the risk that both irregular migrants and asylum seekers pose to public order and security, legitimising detention as a tool for managing such “dangerous” migrants and

“turning asylum seekers into dangerous criminals”, a trend that has been reported in Italy and elsewhere (Bathia 2015: 98; Maneri, Quassoli 2016). Finally, the 2020 law has prioritised the detention of irregular migrants from certain countries, in an attempt to “managerialise” the functioning of detention centres.

4. Detention in numbers – a quantitative analysis of migrants’ presence in the detention apparatus

Since the establishment of the administrative detention system, the numbers of migrants held in Italy’s centres has continued to rise and fall. As shown in the introduction, a gradual decrease was registered starting from 2010, reaching a minimum of 2,928 detainees in 2016. However, according to recent reports, there was an increase in the numbers between 2017 and 2019 (CILD 2021; Campesi G. and Coresi F. 2023). The situation has been more difficult to capture in recent years, due to the impact of the pandemic on the capacity of the centres and on enacting returns. This trend is accompanied by longer stays of the detainees, whilst the number of returns is tending to decrease. Looking more closely at the situation in the CPR of Turin for the period 2018–2022, we have seen that there is a decrease and then an increase in the number of returns. It is interesting to note that the decrease occurred even before the outbreak of the COVID-19 pandemic in 2020, a period in which detention centres continued to function (Caja, Esposito, Mattiello 2020). The number of detainees decreased from 1,147 in 2018 to 908 in 2019, to 816 in 2020 and to 785 in 2021 before increasing to 807 in 2022. The decrease between 2018 and 2019 can be explained by the extension of the detention period up to 6 months due to the Salvini reform.

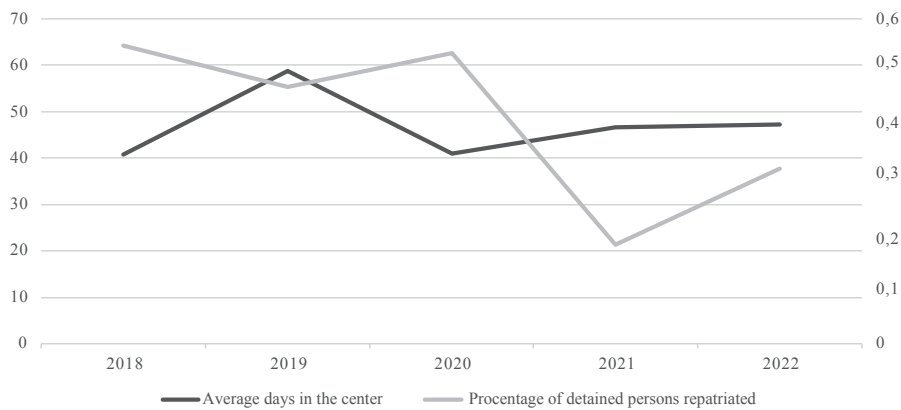
At the national level, the figures showed a partially different trend, with an initial increase from 4,069 detainees in 2018 to 6,010 in 2019, a subsequent decrease in 2020 to 4,431 detainees and an increase in 2021 to 5,216 people passing through the centres. The number of people detained in Turin out of the total population detained from 2018 to 2021 corresponds to 28.2% in 2018, 15.1% in 2019, 18.4% in 2020 and 15% in 2021. The percentage in 2018 is particularly significant, as in that year there were only seven active CPRs in Italy, whilst they were eight in 2019 and in 2020, and ten in 2021.

Whilst the average length of stays in the centres has been fluctuating in recent years,⁹ the percentage of repatriated persons over the number of admissions has generally averaged 48.3% between 2018 and 2021 (Campesi, Coresi 2023: 22). The figures concerning the Turin CPR show a trend of rising average length of stays in the centre, especially in the last three years: after an increase from 2018 to 2019

⁹ The figure for 2021 was 35.2 (Trattenuti 2023: 22).

(40.8 days in 2018 to 58.7 days in 2019), the average length of stay decreased in 2020 (41 days), only to increase again in 2021 (46.6 days) and 2022 (47.2 days). It is interesting to compare the average length of stay in the different years with the percentage of detained persons repatriated.

Figure 1. Average length of stay in the Turin CPR, in days, and percentage of detainees repatriated



Source: FOIA request submitted by the authors.

The relationship seems to be inversely proportional, i.e. when the average length was lower the repatriation rate was higher, and when the average length increased the repatriation rate decreased. Indeed, in 2018 the average length of stay was 40.8 days and 55.1% of persons were repatriated, whilst in 2019 the average length of stay increased to 58.7 days and repatriations decreased to 47.5%. In 2020, the average length of stay decreased to 41 days and repatriations increased to 53.7%, and in 2021 the average length of stay increased to 46.6 days and repatriations decreased significantly to 18.3% of all transited persons. The situation was slightly different in 2022, when a slight increase in the average stay (47.2 days) was accompanied by a more significant increase in returns (32.3%), although the percentage of total returns remains low compared to the total. As mentioned above, an analysis of data on detention within CPRs in Italy showed that the Turin centre is particularly focussed on detention rather than removals, highlighting the tendency to use detention as a way of managing urban space and migration policy (Fabini 2024), as well as a punitive purpose of the centre, detaining people for long periods without deportation. More generally, it is interesting to note that the length of stay did not affect the number of returns. The latter remained relatively low and constant over time both in the Turin centre, where the average length of stay was high, and on a national level. The number of returns was not affected by the increases in the maximum length of stay provided for by the legislative changes that have taken place over time (CILD 2023). As for the most represented nationalities, the trend in Turin's centre is similar to that at the national level (Campesi, Coresi 2023).

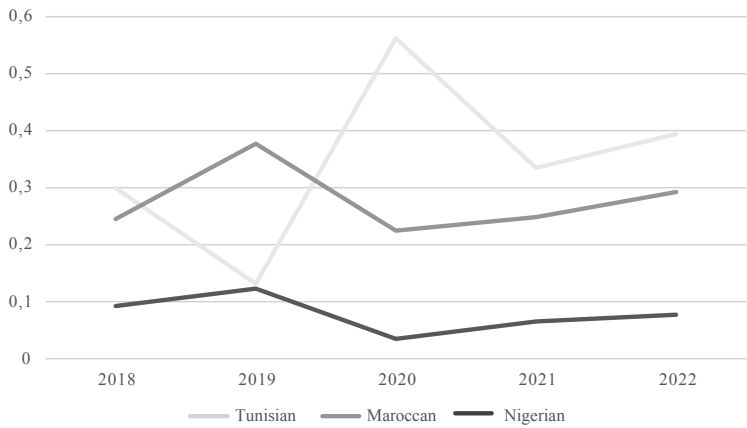
Table 1. Numbers of transits among the three most represented nationalities in the Turin CPR

Year	Tunisian	Moroccan	Nigerian
2018	343	282	106
2019	120	342	113
2020	459	184	29
2021	264	195	51
2022	318	236	63

Source: FOIA request submitted by the authors.

The detainees were mostly from Tunisia, Morocco and Nigeria.¹⁰ Tunisian citizens went from representing 29.9% of the total number of people in transit in 2018 to 13.2% in 2019 and 56.2% in 2020. In 2021, the figure fell to 33.6% of the total, before rising again to 39.4% in 2022. The figure for the presence of Moroccan nationals seems to be more constant over time: except for 2019 (37.7%), when the percentage of Moroccan transits exceeded that of Tunisian transits, it was always between 22% and 30% (24.6% in 2018, 22.5% in 2020, 24.8% in 2021 and 29.2% in 2022). People from Nigeria ranged from 3% to 13% over the period: there was an increase from 2018 to 2019 (from 9.2% to 12.4%), whilst there was a significant decrease in 2020, when Nigerian nationals accounted only for 3.5%. In 2021, the figure rose to 6.5% and in 2022 to 7.8%.

Figure 2. Percentage of the three most represented nationalities in the Turin CPR



Source: FOIA request submitted by the authors.

Other nationalities that are more strongly represented in Turin are Albanian, Algerian and Egyptian, but none exceed 5%. These are the most represented

¹⁰ The distribution of detainees by nationality may vary by centre, though (CILD 2021: 119–121). It should also be noted that data on the nationalities of people detained in all centres in Italy are only partially available (Trattenuti 2023: 23).

nationalities, likely because they are considered easier to repatriate, either coming from “safe” countries of origin (although Nigeria would not be added to the list until 2023) or from countries with which Italy has formal/informal agreements on repatriation, such as the one that Lamorgese agreed with Tunisia in 2020. In fact, Tunisian nationals are the most numerous among the Italian CPRs. Whilst in 2018 and 2019 they were about one third of those present, since 2020 this has risen to more than half (CILD 2021: 124).

This initial exploration of the data on the nationality of those detained and their subsequent repatriation thus highlights the selectivity of the processes that lead to some migrants being detained and others not. Several analyses have highlighted the selective tendency to return mainly people of Tunisian nationality (Di Luciano 2021), including through the implementation of procedures that undermine their rights, especially for the purpose of applying for asylum (ASGI 2020). The composition of the population in the centres, together with the data on returns, suggests that CPRs are used in the management of irregular migration by targeting specific sub-groups of migrants and asylum seekers of certain nationalities.

Given that most of the reforms of administrative detention in recent years focus on asylum seekers, we decided to isolate the data of detainees who applied for asylum. Two different groups of asylum seekers can be identified: those who presented an application after they were detained for the purpose of removal, pending the return proceeding (we label them “asylum seekers already in detention”), and those who applied for asylum before a return order was issued against them, but because of a risk of absconding or because they were considered dangerous they were nevertheless placed in detention (described as “incoming asylum seekers”). With regard to the Turin CPR, the data reveal a scenario in which the overall presence of asylum seekers was relatively low. This is particularly evident in the case of incoming asylum seekers (understood as those who applied for asylum before being detained): in 2018 there were 40 incoming asylum seekers, i.e. 3.5% of the total number of transits; there were 29 (3.2%) in 2019, 12 (1.5%) in 2020, 20 (2.5%) in 2021 and 15 (1.9%) in 2022. The figures at the national level were slightly different, but still limited: 115 in 2018 (2.8%), 168 in 2019 (2.8%), 100 in 2020 (2.2%) and 218 in 2021, which is also the highest percentage over the period (4.2%). The Turin Police Headquarters only provided data on the countries of origin of this group for 2018, 2021 and 2022. With regard to 2018, the most represented countries were Algeria (3), El Salvador (3) and Tunisia (3), whilst other nationalities with incoming asylum seekers did not exceed one person per country. In 2021 the countries with more than one inbound asylum seeker were Morocco (6), Nigeria (4) and Tunisia (3). In 2022, they were again Morocco (6), Nigeria (4) and Tunisia (4).

Conversely, there was an increase in asylum applications lodged by migrants already detained in the Turin CPR (who had to remain in detention centres because their application was considered fraudulent): 92 in 2018 (8% of the total transited in the CPR that year), 76 in 2019 (8.6%), 99 in 2020 (10.8%), 75 in 2021 (9.6%) and 219 in 2022 (27.1%). It is thus possible to observe a trend of increasing numbers

of applications lodged in the CPRs in recent years, whilst the overall number of asylum seekers detained after lodging an application has remained very low.

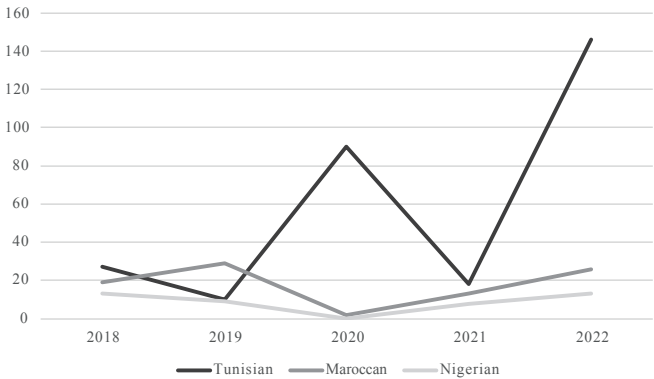
Table 2. Numbers of asylum seekers transited through the Turin centre

Year	Incoming asylum seekers	Asylum applications submitted at the CPR	Total asylum seeker
2018	40	92	132
2019	29	76	113
2020	12	99	29
2021	20	75	51
2022	15	219	63

Source: FOIA request submitted by the authors.

Although the reasons behind this increase need to be further investigated, it is possible to highlight that the majority of asylum seekers at the Turin CPR are migrants with Tunisian or Moroccan nationality – predominantly Tunisian, especially in recent years. Of the total number of asylum seekers who applied within the centre, in 2018 Tunisia accounted for 29.3%, Morocco for 20.6% and Nigeria for 14.1%. In 2019, 38.1% of asylum seekers who applied at the CPR came from Morocco, 13.1% from Tunisia and 11.8% from Nigeria. In 2020, 90.9% of asylum seekers applying at the centre came from Tunisia. In 2021, Tunisians accounted for 24%, Moroccans 17.3% and Nigerians 10.6% of applications to the CPR. In 2022, Tunisian nationals accounted for 66.7% of asylum applications lodged at the centre, whilst 11.9% of applications were submitted by Moroccan nationals and 5.9% by Nigerian nationals. The trend seems to follow the overall distribution of detainees along the years taken into account.

Figure 3. Numbers of asylum seekers of the three most prevalent nationalities who applied within the Turin CPR



Source: FOIA request submitted by the authors.

In general, however, Tunisian, Moroccan and Nigerian nationals applying for asylum in the CPR do not represent a large percentage of the total number of nationals transiting through the centre, remaining below or around 10% of the total, with some significant exceptions: in 2020, Tunisian nationals applying for asylum in transit through the CPR in Turin represented 19.7% of the total, rising to 45.9% in 2022. Nigerian nationals applying for asylum under the CPR accounted for 15.7% of the total in 2021 and 20.6% in 2022.

Finally, it is interesting to note that the most represented nationalities of migrants detained in CPRs only slightly overlapped with the number of arrivals in the study period or with the number of asylum applications. Concerning the number of arrivals, according to the data published by the Ministry of the Interior in 2018, the top five nationalities of migrants arriving by sea were Tunisia (5,181), Eritrea (3,320), Iraq (1,744), Sudan (1,619) and Pakistan (1,589); in 2019 they were Tunisia (2,654), Pakistan (1,180), Côte d'Ivoire (1,139), Algeria (1,009) and Iraq (972); in 2020 they were Tunisia (12,883), Bangladesh (4,141), Côte d'Ivoire (1,950), Algeria (1,458) and Pakistan (1,400); in 2021, Tunisia (15,671) was again the main nationality, followed by Egypt (8,352), Bangladesh (7,824), Iran (3,915) and Côte d'Ivoire (3,807); finally, in 2022, migrants arriving by sea were mainly from Egypt (20,542), Tunisia (18,148), Bangladesh (14,982), Syria (8,594) and Afghanistan (7,241).

Regarding asylum applications, data from the National Asylum Commission show that the main nationalities of applicants (from highest to lowest) were Pakistan, Nigeria, Bangladesh, Senegal and Ukraine in 2018; Nigeria, Pakistan, Bangladesh, Senegal and Gambia in 2019; Pakistan, Nigeria, Bangladesh, El Salvador and Tunisia in 2020; Pakistan, Bangladesh, Tunisia, Afghanistan and Nigeria in 2021 and Bangladesh, Pakistan, Egypt, Tunisia and Nigeria in 2022.

These figures show that the detention apparatus targets only a few nationalities of incoming migrants and asylum seekers, especially Nigerians and Tunisians. On the other hand, migrants from Morocco are likely to be detained (and eventually claim asylum) even if they are not among the most represented nationalities arriving by sea or claiming asylum. There is thus a pattern of selectivity by nationality in the process of detention, both for irregular migrants and asylum seekers. As mentioned above, especially since 2020, the year of the Lamorgese reform, the majority of detainees in CPRs – including the one in Turin – were Tunisian, which is also reflected in the number of asylum applications made from inside the centres. At the same time, it is possible to hypothesise that the high number of Tunisian nationals applying for asylum inside the centres is influenced by the difficulties these people face in submitting their applications before entering the CPR (ASGI 2020; CILD 2021).

On the other hand, the low number of detained asylum seekers reveals the high symbolic value of the reforms enacted between 2017 and 2020, which extended the possibility of detaining asylum seekers on arrival for identification purposes and if they are considered a threat to public security. Even when taking into account migrants who are considered a “danger” to public order, it appears that most of them are not asylum seekers, as shown by the relatively high numbers of detainees

which came directly from prison. With regard to the Turin CPR, they constituted 9.6% of the total number of detainees in 2018, and even 53.4% in 2019. The percentage was lower in the following three years, but still constitutes a significant part of the overall number: 18.6% in 2020, 34.4% in 2021 and 24.6% in 2022. Whilst the quantitative data regarding the CPR in Turin cannot be considered representative of a national trend, they nonetheless show that detention centres are continuously used by the immigration law enforcement apparatus as a way to manage the perceived “dangerousness” of migrants on the territory, and thus as a form to social control.

Finally, it should be stressed that there are no clear figures on the (informal) detention of migrants/asylum seekers in hotspots: it is therefore impossible to assess whether they are simply not detained at all, or whether they are detained for an initial, albeit indefinite, period upon arrival.

5. The 2023 reforms and the “war” on migrants

In March and September 2023, the government led by Giorgia Meloni, the leader of the far-right Brothers of Italy (Fratelli d’Italia) party, decided to expand the detention system once again by increasing the grounds for detention of asylum seekers and the length of detention for irregular migrants. The result has been described as “the most ambitious project of isolation and mass detention of third-country nationals in republican Italy” (Veglio 2023).

On the one hand, Law Decree 20/2023 introduced new grounds for detaining asylum seekers: a) those involved in a border procedure with the sole purpose of “ascertaining their right to enter the territory”, b) those who might abscond during the asylum procedure, if detention is the only way to obtain the elements on which the application is based and c) those who might abscond during the process of determining which state is responsible for examining the application, according to the Dublin Regulation. All the new provisions raise significant concerns in terms of the lack of clarity and the broad formulation of the risk of absconding, which may lead to wider discretion for the authorities when applying the measure.

Much of the (academic and public) debate has been centred on a provision of this Decree (Art. 7 bis Law Decree 20/2023) which set out a new type of “pre-entry” detention that can be imposed on asylum seekers in the context of a border procedure, meaning when an asylum seeker is apprehended for “absconding or attempting to abscond” or, alternatively, is found at the border and coming “from a country designated as a safe country of origin”.¹¹ The norm stipulates that “deten-

¹¹ The concept of a “safe country of origin” (SCO) has been extensively applied in the context of asylum procedures in several European Member States. The concept has been used in EU asylum law to refer to countries whose citizens should not, in theory, be granted international protection, since the countries have been regarded as safe by the EU or by its Member States. The concept can refer to “the automatic exclusion from refugee status of nationals originating from SCOs, or it can raise a presumption of safety that those nationals must rebut” (Radjenovic 2024).

tion may be ordered if the applicant has not surrendered his passport or equivalent document or has not provided an adequate financial guarantee”. This last provision was implemented by the Ministerial Decree of 14 September 2023, which set the amount to be guaranteed – by a bank guarantee or insurance policy – in order to avoid detention at €4,938. Finally, the article did not contain any reference to the need to assess the individual circumstances of the case.

Overall, in the absence of a proportionality test and the practical inapplicability of the alternatives provided for in the law, the new law on detention at the border foresees the measure automatically being applied to asylum seekers coming from a safe country. This seems to have been the initial intention of police authorities, who immediately after the ministerial decree was published in September 2023 issued a series of identical detention orders against Tunisian asylum seekers who arrived in Lampedusa and were subsequently transferred to the newly opened detention centre for asylum seekers in Pozzallo, Sicily. According to the new law, detention at the border should take place primarily in hotspots.

Unlike CPRs, whose number and location are listed by the government, these centres are not identified as detention centres; they can be reception facilities which open or close depending on the discretion of the administration. Moreover, the changes introduced by the 2023 law affect the geography of detention in hotspots, allowing these centres to be located anywhere in the country and not just at the border. The legal ambiguity regarding the definition of the centres (whose nature as reception centres or detention centres is permanently uncertain) becomes functional to the “borderisation” of the national territory. As reported by the Association for Juridical Studies on Immigration (ASGI), since the summer of 2023 several hybrid centres have been set up in Sicily (ASGI 2024). They are managed by the Italian Red Cross and could be assimilated into hotspots, but after several months it is not clear whether they will be used as first reception centres or as detention centres. In fact, the full implementation of the system of detention at the border has been significantly hindered by the decisions of the courts responsible for validating the coercive measure, and namely by the decisions of the Court of Catania of September and October 2023 (RG 4285/23 2023; RG 10459/23 2023; RG 10460/23 2023; RG 10461/23 2023).

Under Italian law, administrative detention can be applied by the police but must be confirmed by a judge within the following 48 hours. In the case of detaining asylum seekers, the competent judicial authority is determined by a specialised section of the civil court where the applicant is detained. Immediately after the entry into force of the Ministerial Decree on detention in the context of the border procedure, the Court of Catania was asked to review the measures applied to asylum seekers in the Pozzallo hotspot, and it issued several similar rulings that overturned detention orders on the grounds that they were contrary to EU law. The Court’s decision immediately put on hold the possibility of detaining asylum seekers under the new law. At the time of writing, it does not appear that asylum seekers are formally detained under the border procedure.

The decision to use border detention in September 2023 extensively coincided with a period of significantly more migrants and asylum seekers arriving from Tunisia (Tunisian nationals as well as third-country citizens exposed to deportations and abuses in Tunisia). It was at this time that the government decided to adopt the second reform of the detention system. The explicit aim of the Prime Minister was to send a clear message to those arriving in Italy by sea that they were not welcome and that they would face prolonged detention. Through Law Decree 124/2023, the legislature increased the maximum period of detention to 18 months and modified the rules for the regular review of the legitimacy of detention. Whereas until 2023 the extension of the measure had to be confirmed by a judge every 30 days, the reform requires the judicial authority to review the legality of the detention (i.e. that there are reasonable prospects of deportation) every 90 days.

The decision to extend both the detention and judicial review periods was taken despite a lack of evidence that extending the coercive measure would lead to an increase in the return rate. On the contrary, the data we have analysed shows that more time spent in detention centres is not associated with higher return rates – in fact the opposite is true. It follows that the prolongation of the detention period has other functions than the implementation of returns and that it departs from the “managerial” turn of the “revolving doors” of the CPRs inaugurated in 2020. Once again, it seems that such a provision is mainly aimed at “sending a message” of deterrence to incoming migrants, whilst at the same time it bears punitive implications and, as in the past, it will be certainly perceived by the detainees as a punishment.

Finally, Law Decree 124/2023 symbolically transformed administrative detention into an instrument of “defence” against the threat posed by the uncontrolled arrival of migrants. From this point of view, it is symbolic that the Ministry of Defence has replaced the Ministry of the Interior as the authority responsible for overseeing and building new detention centres, hybrid centres and reception centres (CPRs, hotspots and government centres). This change has practical implications, as under the military law regime construction and renovation works can be carried out outside the general rules of public tendering and urban planning. It could also mean that information and documents relating to the tender procedures could be kept secret under the rules on military property. In practice, all procedures related to the renovation or construction of detention centres will be exceptional and derogate from the normal rules. Together with this, the new provision has a significant symbolic value, since the centres dedicated to the management of migration flows are qualified as “works intended for national defence and security” (Art. 21(3), Law Decree 124/2023).

Conclusion

The article provides a quantitative analysis of the functioning of administrative detention in Italy, comparing data on detainees and returns from a specific detention centre (Turin's CPR) with publicly available data at the national level and combining the empirical analysis with an overview of recent reforms in the field, in order to explore the multifaceted functions of administrative detention in Italy. Given that the research focusses mainly on a specific spatial and urban context – and that the aim of the discussion was to link the findings of the Turin centre to a more general reflection on the evolving functions of detention – the conclusions drawn from the analysis could be considered partial and are intended to be complemented by further research that relates the complexity of each local case to national trends. In this respect, the present article could be complemented by new studies on other spatial dimensions of containment practices in Italy.

Nonetheless, looking at the frenetic legislative output of recent years, including the last two reforms promoted by the Meloni government, we can conclude that administrative detention is increasingly being presented to public opinion as an instrument of control and deterrence against migrants arriving by sea. A strong focus has been placed on asylum seekers, who must be detained before their (legal) entry into the territory, for identification purposes and in any case they are considered a threat to public order and security.

However, the data analysed herein – both with regard to the specifics of the Turin CPR and to the situation at the national level – reveal that *de jure* administrative detention in the CPR is still mainly used against irregular migrants, including those coming from prisons. It may even be the case that some migrants are detained immediately upon arrival, but the available data do not distinguish between a detention measure imposed on the basis of a “deferred” refusal of entry (issued within the first days of arrival) or on the basis of an expulsion order issued against migrants who have been living in Italy for a long time; further research would be necessary to uncover such distinctions. Nevertheless, it is clear that one of the functions of detention continues to be the management of what is framed as “dangerousness”, which is reflected in the relatively high percentage of people who have received administrative removal orders, based precisely on dangerousness, at the end of the period they spent in prisons serving for a criminal sentences.

In addition, the analysis highlights a pattern of selectivity in detention according to nationality, which has been particularly evident since 2020: most detainees (both irregular migrants and asylum seekers) come from a very small number of countries – mostly from Tunisia, even though Tunisian is only one of the main nationalities of migrants applying for asylum. The data also showed that in most cases, the asylum seekers being detained were already in the CPRs under expulsion or refolement orders. Overall, the presence of asylum seekers within the detention apparatus is relatively low compared to the total number of detainees, although there has been a gradual increase in the number of asylum applications

lodged within the centres (including the Turin centre) in 2021 and 2022; again, the increase mainly concerns Tunisian nationals. Finally, the reforms that have increased the length of detention for irregular migrants have not led to higher rates of return: on the contrary, when the length of detention increases, returns are fewer. From this perspective, the latest Meloni reform is not justified on the grounds of efficiency, but rather on the grounds of deterrence (implying a punitive attitude towards those who have not been deterred by the threat of detention).

In light of the above, we can conclude that the use of detention does not meet the objectives set by the law (returning irregular migrants or preventing the risk of asylum seekers absconding). Moreover, the data clearly show that, despite the legislative reforms that took place between 2015 and 2020, incoming asylum seekers have not yet been detained en masse. This gap between the formulation of laws and policies and their actual reality could be related to the current capacity of the detention apparatus, which was 701 places in mid-2023, according to the data published by the National Guarantor (2023).

Against this background, one might ask why the government insists on the use of detention against incoming migrants, particularly asylum seekers. We suggest that the evocative implications of the new law on detention – its narrative component – is key to understanding the recent reforms. As Cetta Mainwaring and Stephanie Silverman theorise, “the theatrics of detention contribute significantly to the spectacle of sovereign control” (Mainwaring, Silverman 2017: 11), whilst the harms of detention and everyday practices remain obscured. Detention is not spectacularised by the Italian authorities per se, but it is presented as a tool of war to contain the threat posed by migrants who dare to challenge sovereign authority across borders.

The fact that detention is not effective (both because it does not significantly increase return rates and because there is no evidence that it has any real deterrent effect) is obscured by the power of the narratives, and it is in line with the attitude of populist parties to reproduce the same discourse from the political to the policy sphere, even if it is divorced from factual and evidence-based elements. Evidence from Italy and the UK has shown that divisive and populist media and political narratives are not “redeemed” when it comes to policy development, but rather that policies incorporate the same narratives used by the media and politicians, embedded in alarmist elements (Boswell, Smell 2023). The fact that Italy is portrayed in media and political narratives as being “besieged” by migrants at its borders makes it easy to present detention as a necessary tool to respond to such an invasion.

From this perspective, the targets of the detention narrative are both the arriving migrants, who are confronted with the threat of punishment, and the national citizens, to whom detention is presented as a necessary means to contain asylum seekers arriving on Italian shores, regardless of its practical effects. Detention, in other words, serves to normalise asylum seekers as the new “appropriate enemy” in the public discourse: they represent a risk because they dared to challenge the border apparatus by claiming the right to enter the territory and seek protection. The use of detention as a “preventive” tool is reinforced in this sense by the fact

that not only migrants with criminal records are considered dangerous, but so too are all those who claim the right to enter and move freely within the territory. In this sense, whilst the police continue to use it as a selective tool to discipline irregular migrants, in public discourse the administrative detention of asylum seekers becomes part of the “border spectacle” (De Genova 2002), a tool used by the Italian government to reaffirm its sovereign power to control the borders.

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References

- Aas Franko F. and Bosworth M. (eds.) (2013). *The Borders of Punishment: Citizenship, Crime Control and Social Exclusion*. Oxford: Oxford University Press.
- Agamben G. (2003). *Stato di eccezione* [State of exception]. Torino: Bollati Boringhieri.
- ASGI (2020). *Ombre in frontiera. Politiche informali di detenzione e selezione dei cittadini stranieri* [Border shadows: Informal policies of selection and detention of foreigners]. Available online: <https://www.asgi.it/wp-content/uploads/2020/04/Ombre-in-frontiera.-Politiche-informali-di-detenzione-e-selezione-dei-cittadini-stranieri-2.pdf> [30.08.2024].
- Ashworth A. and Zedner L. (2014). *Preventive Justice*. Oxford: Oxford University Press.
- Barbieri A., Francini C., Mori N., Peca M., Tavano M.A., and Zanchetta M. (2013). *Arcipelago CIE – Indagine sui centri di identificazione e espulsione italiani* [Archipelago CIE – Investigation on Italian identification and deportations centres]. Roma: Medici per i Diritti Umani. Available online: <http://www.mediciperidirittiumani.org/pdf/ARCIPELAGOCIEsintesi.pdf> [30.08.2024].
- Bathia M. (2015) ‘Turning asylum seekers into ‘dangerous criminals’: Experiences of the criminal justice system of those seeking sanctuary.’ *International Journal for Crime, Justice and Social Democracy* 4(3), pp. 97–111. <https://doi.org/10.5204/ijcsd.v4i3.245>
- Beckett K. and Murakawa N. (2012). ‘Mapping the shadow carceral state: Toward an institutionally capacious approach to punishment.’ *Theoretical Criminology* 16(2), pp. 221–244. <https://doi.org/10.1177/1362480612442113>

- Blengino C. (2015). *Stranieri e sicurezza. Riflessioni sul volto oscuro dello stato di diritto* [Foreigners and security. Reflections on the dark face of the rule of law]. Napoli: Editoriale Scientifica.
- Boswell C. and Smell S. (2023). *Comparative Analysis of Migration Narratives in Political Debate and in Policymaking. Cross-National Report*. Barcelona: Barcelona Centre for International Affairs. <https://doi.org/10.5281/zenodo.10590198>
- Bosworth M. (2019). 'Immigration detention, punishment and the transformation of justice.' *Social & Legal Studies* 28, pp. 1–19. <https://doi.org/10.1177/0964663917747341>
- Brandariz García J.A. and Fernández Bessa C. (2016). 'Transformaciones de la penalidad migratoria en el contexto de la crisis económica: El giro gerencial del dispositivo de deportación' [Transformations of migration penalties in the context of the economic crisis: The managerial turn of the deportation system]. *InDret. Revista para el Análisis del Derecho* 4, pp. 1–25.
- Caja E., Celoria E., and Mattiello G. (2022). 'E dopo il lock down, cosa?' [And after the lockdown?]. In E. Caja, F. Esposito, and G. Mattiello (eds.) *Corpi Reclusi in Attesa di Espulsione* [Detained bodies awaiting deportation]. Torino: Seb77, pp. 123–151.
- Campesi G. (2013). *La detenzione amministrativa degli stranieri: storia, diritto, politica* [Administrative detention of foreigners: History, law and politics] Roma: Carocci Editore.
- Campesi G. (2020a). 'Genealogies of immigration detention: Migration control and the shifting boundaries between the 'penal' and the 'preventive' state.' *Social & Legal Studies* 29(4), pp. 527–548. <https://doi.org/10.1177/0964663919888275>
- Campesi G. (2020b). 'The reinvention of immigration detention in Italy in the aftermath of the "refugee crisis": A study of parliamentary records (2013–2018).' *Refugee Survey Quarterly* 39(3), pp. 381–403. <https://doi.org/10.1093/rsq/hdaa012>
- Campesi G. (2024). 'Regulating mobility through detention: Understanding the new geography of control and containment at the Southern European border.' *Theoretical Criminology* (Online First). <https://doi.org/10.1177/13624806241249665>
- Campesi G. and Coresi F. (2023). *Trattenuti. Una radiografia del Sistema detentivo per stranieri* [Detainees. A radiology of foreigners' detention system]. Roma: Università di Bari. Available online: https://trattenuti.actionaid.it/wp-content/uploads/2023/10/Rapporto-Trattenuti_10_03.pdf [30.08.2024].
- Campesi G. and Fabini G. (2019). 'Immigration detention as social defence: Policing 'dangerous mobility' in Italy.' *Theoretical Criminology* 24(1), pp. 50–70. <https://doi.org/10.1177/1362480619859350>
- Carvalho H. (2017). *The Preventive Turn in Criminal Law*. Oxford: Oxford University Press.
- Christie N. (1986). 'Suitable enemy.' In H. Bianchi and R. von Swaaningen (eds.) *Abolitionism: Toward a Non-Repressive Approach to Crime*. Amsterdam: Free University Press, pp. 42–55.
- CILD (2021). *Buchi neri. La detenzione senza reato nei Centri di Permanenza per i Rimpatri (CPR)* [Black holes: Administrative detention in CPRs]. Roma: Coalizione Italiana Libertà e Diritti Civili. Available online: https://cild.eu/wp-content/uploads/2021/10/ReportCPR_Web.pdf [30.08.2024].

- De Genova N. (2002). 'Migrant "illegality" and deportability in everyday life.' *Annual Review of Anthropology* 31, pp. 419–447.
- Edelman M. (1985). *The Symbolic Uses of Politics*. Illinois: University of Illinois Press.
- Fabini G. (2022). *Il confinamento della mobilità: innovazioni e continuità nella storia della detenzione amministrativa in Italia* [The confinement of mobility: Innovations and continuity in the history of administrative detention in Italy]. In E. Caja, F. Esposito, and G. Mattiello (eds.) *Corpi Reclusi in Attesa di Espulsione* [Detained bodies awaiting deportation]. Torino: Seb77, pp. 41–73.
- Favilli C. (2023). 'Presupposti, limiti e garanzie applicabili al trattenimento del richiedente protezione internazionale soggetto a procedura di frontiera: commento al decreto del Tribunale di Catania del 29 settembre 2023' [Grounds, limits and guarantees of the administrative detention of asylum seekers involved in a border procedure: a comment to the Court of Catania judgment of 29th September 2023]. *Diritto, Immigrazione e Cittadinanza* 3, pp. 1–23. Available online: <https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/note-e-commenti/fascicolo-n-3-2023-2/1295-presupposti-limiti-e-garanzie-applicabili-al-trattenimento-del-richiedente-protezione-internazionale-soggetto-a-procedura-di-frontiera/file> [30.08.2024].
- Fernández Bessa C. (2021). *Los centros de internamiento de extranjeros (CIE): Una introducción desde las Ciencias Penales* [Foreigners administrative detention centres: An introduction from criminal sciences]. Madrid: Iustel.
- Ferraris V. (2021). 'Mamadou Moussa Balde: una storia che ci interroga su che cosa sia la detenzione amministrativa' [Mamadou Moussa Balde: An episode that interrogates us on what administrative detention is]. *Il Piemonte delle Autonomie*. Available online: <https://www.piemonteaautonomie.it/mamadou-moussa-balde-una-storia-che-ci-interroga-su-cosa-sia-la-detenzione-amministrativa/?pdf=2951> [30.08.2024].
- Ferraris V. and Anastasia S. (2013). 'La detenzione amministrativa in Italia. Una analisi attraverso i dati' [Administrative detention in Italy: An analysis through data]. *Antigone* 8(1), pp. 110–116.
- García Hernández C. (2014). 'Immigration detention as punishment.' *UCLA Law Review* 61(5), pp. 1347–1414.
- Guild E. (2005). *A Typology of Different Types of Centres for Third Country Nationals in Europe*. Strasbourg: European Parliament Briefing Paper.
- Leerkes A. and Broeders D. (2010) 'A case of mixed motives? Formal and informal functions of administrative immigration detention.' *British Journal of Criminology* 50(5), pp. 830–850. <https://doi.org/10.1093/bjc/azq035>
- Leerkes A. and Kox D. (2017). 'Pressured into a preference to leave? A study on the "specific" deterrent effects and perceived legitimacy of immigration detention.' *Law & Society Review* 51(4), pp. 895–929. <https://doi.org/10.1111/lasr.12297>
- Mainwaring C. and Silverman S. (2017). 'Detention-as-spectacle.' *International Political Sociology* 11(1), pp. 21–38. <https://doi.org/10.1093/ips/olw016>
- Majcher I. (2014). 'Discipline and punish? Analysis of the purposes of immigration detention in Europe'. *AmeriQuests* 11(2). <https://doi.org/10.15695/amqst.v11i2.3964>

- Maneri M. (2016). 'Media discourse on immigration: Control practices and the language we live.' In S. Pallida (ed.) *Racial Criminalization of Migrants in the 21st Century*. Farnham: Ashgate, pp. 77–93.
- Maneri M. and Quassoli F. (2016). 'Humanity and security under siege. European discursive politics on immigration and asylum.' *DIJALOG* 1–2, pp. 69–81.
- Medici Senza Frontiere [MSF] (2004). *Rapporto sui centri di permanenza temporanea e assistenza* [Report on the centres of assistance and temporary stay]. Available online: <https://www.medicisenzafrontiere.it/wp-content/uploads/2018/06/Anatomia-di-un-fallimento.pdf> [30.08.2024].
- Mountz A., Coddington K., Catania R.T., and Loyd J.M. (2012). 'Conceptualizing detention: Mobility, containment, bordering, and exclusion.' *Progress in Human Geography* 37(4), pp. 522–541. <https://doi.org/10.1177/0309132512460903>
- Radjenovic A. (2024). 'Safe Country of Origin' Concept in EU Asylum Law. European Union: European Parliament Research Service. Available online: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762315/EPRS_BRI\(2024\)762315_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762315/EPRS_BRI(2024)762315_EN.pdf) [30.08.2024].
- Sampson R. and Mitchell G. (2013). 'Global trends in immigration detention and alternatives to detention: Practical, political and symbolic rationales.' *Journal on Migration and Human Security* 1(3), pp. 97–121. <https://doi.org/10.1177/233150241300100302>
- Spena A. (2019). 'The double-deviant identity of the mass-foreigner and the lack of authority of the crimmigrationist state.' *New Criminal Law Review* 22(3), pp. 301–317. <https://doi.org/10.1525/nclr.2019.22.3.301>
- Veglio M. (2018). 'La restrizione amministrativa della libertà personale del richiedente asilo prima, durante e dopo il processo di protezione' [The administrative restriction of the asylum seeker's personal liberty before, during and after the protection process]. *Questione Giustizia* 2, pp. 167–175.
- Veglio M. (2023). 'La bestia tentacolare. Forme, tempi e luoghi del trattenimento degli stranieri in Italia' [The tentacular beast: Shapes, times and places of foreigners' administrative detention in Italy]. *Questione Giustizia* 3, pp. 127–133.
- Wacquant L. (1999). 'Suitable enemies' foreigners and immigrants in the prisons of Europe.' *Punishment & Society* 1(2), pp. 215–222. <https://doi.org/10.1177/14624749922227784>

Internet sources

- ASGI (2024). *Mappatura dei luoghi di frontiera: monitoraggio e azioni* [Mapping border zones: Monitoring and actions], Inlimine.asgi.it. Available online: <https://inlimine.asgi.it/mappatura-dei-luoghi-di-frontiera-monitoraggio-e-azioni/> [30.08.2024].
- Caja E., Esposito F., and Mattiello G. (2020) *No One Is Looking at Us Anymore*, Blogs. law.ox.ac.uk. Available online: <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/11/no-one-looking-us> [28.08.2024].

- Caprioglio C. and Gennari L. (2021). *Dopo lo sbarco: La filiera del trattenimento dentro e oltre la pandemia* [After disembarkation: The detention chain in and beyond the pandemic], Blogs.law.ox.ac.uk. Available online: <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/06/dopo-lo-sbarco-la> [30.08.2024].
- Di Luciano C. (2021). *Molti rimpatri, poche garanzie: un'analisi dei dati sui rimpatri dei cittadini tunisini* [Many deportations, few guarantees: a data analysis of the returns of Tunisian national], Inlimine.asgi.it. Available online: <https://inlimine.asgi.it/molti-rimpatri-poche-garanzie-unanalisi-dei-dati-sui-rimpatri-dei-cittadini-tunisini-degli-ultimi-mesi/> [30.08.2024].
- Fabini G. (2024). *I numeri della detenzione amministrativa in Italia* [The numbers of administrative detention in Italy], Adimblog.com. Available online: <https://www.adimblog.com/2024/04/05/10683/> [30.08.2024].
- Figoni L. and Rondi L. (2023). *Rinchiusi e sedati: l'abuso quotidiano di psicofarmaci nei Cpr italiani* [Locked up and sedated: The daily abuse of psychiatric medication in Italian detention centres], Altraeconomia.it. Available online: <https://altreconomia.it/rinchiusi-e-sedati-labuso-quotidiano-di-psicofarmaci-nei-cpr-italiani/> [30.08.2024].
- Tiberio L. (2023). *Migranti: Il governo Meloni parla di invasion, ma è crisi umanitaria* [Migrants: Meloni's government talks about invasion, but it is a humanitarian crisis], Valigiablu.it. Available online: <https://www.valigiablu.it/migranti-governo-lampedusa-crisi-umanitaria/> [28.08.2024].
- Trattenuti (n.d.), Trattenuti.actionaid.it. Available online: <https://trattenuti.actionaid.it/> [28.08.2024].
- Valentini E. (2023). *Il trattenimento in Italia, tra passato, presente e futuro: verso un ricorso massiccio alla detenzione amministrativa?* [Administrative detention in Italy between past, present and future: Towards a massive use of detention?], Adimblog.com. Available online: <https://www.adimblog.com/2023/11/02/il-trattenimento-in-italia-tra-passato-presente-e-futuro-verso-un-ricorso-massiccio-alla-detenzione-amministrativa/> [30.08.2024].

Other documents

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). Official Journal of the European Union of 29.06.2013, L 180, pp. 60–95.
- European Commission (2015). Communication: A European Agenda on Migration, COM(2015) 240.
- Garante Nazionale dei diritti delle persone detenute o private della libertà personale [National Guarantor for the rights of people deprived of their liberty] (2023). *Relazione al Parlamento 2023* [Report to the Parliament 2023]. Available online: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/document-s/24447d8bb0b3093d479d7da93ebcda98.pdf> [14.10.2024].

- Garante Nazionale dei diritti delle persone detenute o private della libertà personale [National Guarantor for the rights of people deprived of their liberty] (2022). *Relazione al Parlamento 2022* [Report to the Parliament 2022]. Available online: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/s/8d31d77e25e800f9c0eb31448e8f03d8.pdf> [14.10.2024].
- Garante Nazionale dei diritti delle persone detenute o private della libertà personale [National Guarantor for the rights of people deprived of their liberty] (2021). *Relazione al Parlamento 2021* [Report to the Parliament 2021]. Available online: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/d4cc5b2d5560fb4455d53edb573dd76a.pdf> [14.10.2024].
- Garante Nazionale dei diritti delle persone detenute o private della libertà personale [National Guarantor for the rights of people deprived of their liberty] (2020). *Relazione al Parlamento 2020* [Report to the Parliament 2020]. Available online: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/a5fa1a499fdaf9e241f537006675c158.pdf> [14.10.2024].
- Garante Nazionale dei diritti delle persone detenute o private della libertà personale [National Guarantor for the rights of people deprived of their liberty] (2019). *Relazione al Parlamento 2019* [Report to the Parliament 2019]. Available online: <https://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/b356a1eef850a31f18553126887a274c.pdf> [14.10.2024].
- Garante Nazionale dei diritti delle persone detenute o private della libertà personale [National Guarantor for the rights of people deprived of their liberty] (2018). *Relazione al Parlamento 2018* [Report to the Parliament 2018]. Available online: <http://www.garantenazionaleprivatiliberta.it/gnpl/resources/cms/documents/29e40afb6be5b608916cad716836dfe.pdf> [14.10.2024].

Court decisions

- Judgment of the Civil Court of Catania, Specialised Section on Asylum and Immigration of 29 September 2023 (2023). RG 10459/23.
- Judgment of the Civil Court of Catania, Specialised Section on Asylum and Immigration of 29 September 2023 (2023). RG 10460/23.
- Judgment of the Civil Court of Catania, Specialised Section on Asylum and Immigration of 29 September 2023 (2023). RG 10461/23.
- Judgment of the Civil Court of Catania, Specialised Section on Asylum and Immigration of 8 October 2023 (2023). RG 4285/23.
- Judgment of the European Court of Human Rights of 30 March 2023 (2023). *J.A. and Others v. Italy*, no. 21329/18.
- Judgment of the European Court of Human Rights of 31 August 2023 (2023). *A.M. v. Italy*, no. 70583/17.
- Judgment of the European Court of Human Rights of 19 October 2023 (2023). *A.B. v. Italy*, no. 13755/18.

Judgment of the European Court of Human Rights of 19 October 2023 (2023). *A.S. v. Italy*, no. 20860/18.

Legal acts

Law Decree 19 September 2023, n. 124/2023, converted into Law 13 November 2023, n. 162/2023 (G.U. 16/11/2023, n. 268) [Law Decree 124/2023, converted into Law 162/2023].

Law Decree 20 October 2020, n. 130, converted into Law 18 December 2020, n. 173 (G.U. 19/12/2020, n. 314) [Law Decree 130/2020, converted into Law 173/2020].

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Struggles over the borders of international protection: A socio-legal analysis of climate-induced migration in Italy

Walka o granice ochrony międzynarodowej. Analiza społeczno-prawna migracji klimatycznych we Włoszech

Abstract: The paper explores the multifaceted nature of borders, drawing on Sandro Mezzadra and Brett Neilson's (2013) concept of a border as both a demarcation line between States and an instrument for governing global space. Borders, including legal ones, are simultaneously sites of control and resistance, as articulated by Bell Hooks (1991). The paper delves into border struggles within the international protection system, especially concerning environmentally driven migration. Climate change disrupts established migration control policies and protection frameworks, challenging legal spaces to reconcile human rights protection with migration control. By analysing documents related to residence permits issued for environmentally induced migration, this study aims to uncover the nuances of these border struggles through semantic analysis. In addition, this research situates itself within Sousa Santos' theoretical framework, "human rights theories" (2015). It examines how Italian jurisprudence responds to climate-induced migration, particularly focussing on the interpretation of humanitarian protection for those displaced by environmental factors. Despite judicial recognition of climate migration, legislative changes in 2018 eliminated humanitarian permits, limiting avenues for protection. The study advocates for reimagining legal frameworks to address emerging challenges, highlighting the pivotal role of human rights in shaping migration governance and advocating for a comprehensive approach that prioritises social justice.

Keywords: climate migration, international protection, human rights, courts, border struggles

Abstrakt: Przedmiotem artykułu jest badanie wieloaspektowej natury granic w oparciu o koncepcję granic Sandro Mezzadry i Bretta Neilsona (2013) jako zarówno linii demarkacyjnej między państwami, jak i instrumentu zarządzania globalną przestrzenią. Granice, w tym granice prawne, są jednocześnie

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miejscami kontroli i oporu, jak określiła to Bell Hooks (1991). Artykuł poświęcony jest zmaganiom granicznym w ramach systemu ochrony międzynarodowej, zwłaszcza w odniesieniu do migracji klimatycznych. Zmiany klimatu zakłócają ustalone polityki kontroli migracji i ramy ochrony, stając wyzwanie dla przestrzeni prawnych służących pogodzeniu ochrony praw człowieka z kontrolą migracji. Niniejsze badanie ma na celu odkrycie niuansów zmagania granicznych przy wykorzystaniu analizy semantycznej dokumentów związanych z zezwoleniami na pobyt wydanymi w związku z migracją spowodowaną środowiskiem. Ponadto badanie to sytuje się w obrębie rozważań teoretycznych Sousy Santosa (2015) odnośnie do „teorii praw człowieka”. Badanie dotyczy sposobu, w jaki włoskie orzecznictwo reaguje na migrację spowodowaną klimatem, a w szczególności koncentruje się na interpretacji ochrony humanitarnej osób przesiedlonych z powodu czynników środowiskowych. Pomimo sądowego uznania migracji klimatycznej, zmiany legislacyjne w 2018 r. wyeliminowały zezwolenia humanitarne, co ograniczyło możliwości ochrony. W badaniu opowiedziano się za zmianą ram prawnych w celu sprostania pojawiającym się wyzwaniom, a także podkreślono kluczową rolę praw człowieka w kształtowaniu zarządzania migracją i wskazano argumenty za kompleksowym podejściem do migracji.

Słowa kluczowe: migracja klimatyczna, ochrona międzynarodowa, prawa człowieka, sądy, zmagania graniczne

1. Environmental and climate-related migration and new vulnerabilities

It is estimated that approximately three billion people currently live in contexts that are highly vulnerable to climate change¹ (IPCC 2023: 4). The rise in extreme climate events – such as droughts, floods, heatwaves and changes in precipitation patterns – exposes millions of people daily to severe risks, including food and water insecurity and other life-threatening challenges. According to the IPCC (2023), human mortality resulting from floods, droughts and storms is 15 times higher in communities residing in highly vulnerable regions compared to those with lower vulnerability. This heightened vulnerability to the impacts of climate change is determined not only by the greater geographic exposure of certain territories, but also by social, political, demographic and economic factors.

In the context of global warming, whilst the *risk* is widely distributed spatially and temporally, it is the *vulnerability* that defines the asymmetry of risk (Longo, Lorubbio 2023). In this sense, vulnerability reflects the initial conditions with which a community experiences a specific climatic event and prompts us to reflect on the systemic conditions that determine that vulnerability (Davis 2002). Globally, the primary economic damage resulting from climate change has been observed in sectors particularly exposed to climate conditions, such as agriculture, forestry,

¹ According to Article 1(2) of the United Nations Framework Convention on Climate Change, climate change means a change of climate which is attributed directly or indirectly to human activity, that alters the composition of the global atmosphere and which is observed over comparable time periods in addition to natural climate variability.

fishing, energy and tourism. The higher temperatures affect crop yields and change ecosystems, which is compounded by the consequences of the increased risk of extreme and sudden precipitation and other meteorological events. Negative effects are also anticipated on marine ecosystems and their productivity due to rising water temperatures, acidifying oceans and the reduced available oxygen because of their combined effects. Consequently, the most vulnerable communities are small-scale agricultural producers, who rely on income from agricultural and fishing activities, and low-income families facing difficulties responding to the loss of livelihoods. Increasingly, due to the impacts of climate change, communities and families experience a loss of livelihoods – from the destruction of homes to loss of income, and from the destruction of transportation systems to unavailable food and water resources (IPCC 2023).

Extreme climatic and meteorological phenomena are increasingly driving displacement in Africa, Asia, North America and Central and South America, with small island states in the Caribbean and the southern Pacific being disproportionately affected (IPCC 2023). As stated by the authors of the Groundswell Report, “[m]obility is emerging as the human face of climate change” (Clement et al. 2018: 1). Water scarcity, declining crops, the destruction of homes and the consequences of rising sea levels are and will be significant factors in migration (Clement et al. 2021). According to the Internal Displacement Monitoring Centre (IDMC), in 2022 the numbers of internally displaced persons due to environmental disasters were 41% higher than the ten-year annual average (IDMC 2023). In 2023, out of 60.9 million recorded internal displacements in 151 countries (the highest number ever recorded), more than 32 million were people displaced by environmental causes, such as floods (19 million), storms (9 million) and droughts (2 million) (IDMC 2023).

The data provided by the IDMC has some methodological limitations that do not allow for a thorough understanding of the number of people involved in migration due to environmental or climate-related causes. IDMC estimates are specifically calculated for movements related to sudden meteorological disasters and are limited to national contexts; thus, they exclude movements resulting from slow-onset events and international migrations.

Since 1988, when estimates of climate migrants first reached 10 million, interest in estimating and predicting this type of human mobility has remained consistently high and debated (Ionesco, Mokhnacheva, Gemenne 2017). However, this interest clashes with the difficulty of synthesising such a complex phenomenon as climate migration into a single number. As the authors of “The Atlas of Environmental Migration” explain:

[t]he truth is that even if it can be supposed that the environment is one of the principal factors of migration throughout the world, a precise figure is impossible to establish. That would, first, suppose that a strict definition for these migrants exists; and, second, that the environment could be isolated as a distinctive factor for

migration – something that is not always the case. The average number of people displaced yearly due to natural disasters is 25.4 million, or one every second. In addition to this figure, the figure relating to the number of people displaced by more insidious environmental degradation would also be needed, degradation that includes sea level rise or deforestation, but this figure is not known. Finally, the number of environmental migrants is all the more difficult to estimate as it combines both voluntary and forced migrants, and both short and long-term displacement. (Ionesco, Mokhnacheva, Gemenne 2017: 12)

Climate and environmental migration constitute a multifactorial phenomenon that does not align well with the categories traditionally used to describe human mobility. Therefore, it requires a shift in perspective. The convergence of environmental and climate issues with economic, demographic, technological, political and social factors challenge many of the rigid categories we use to classify migration. Concepts such as “refugee” or “migrant,” movements of a political or economic nature, coercion and voluntariness are just a few of the dichotomies through which we label migrations. Those driven by environmental or climate reasons not only make it clear that these rigid distinctions are inaccurate for describing the complex mechanisms behind human mobility, but – more importantly – they reveal the power dynamics underlying these dichotomies and the governance techniques for organising and controlling migration.

In fact, the act of labelling does not merely produce a description, but is rather the result of the cultural, economic, social, political, religious and legal contexts that led to its definition (Foucault 1981). The power to produce discourse and labelling is, as explained by Michel Foucault, “an asset that consequently, from the moment of its existence (and not only in its ‘practical applications’), poses the question of power; an asset that is, by nature, the object of a struggle, a political struggle” (Foucault 1969: 120). In other words, defining climate migration not only serves the need to describe the phenomenon, but also involves the non-discursive realm (Foucault 1969), within which conditions for migration governance are determined. Falling into categories such as “migrant”, “refugee”, “minor” or “trafficking victim” will shape the migration experience, regulating the stages of the journey and defining its outcomes.

There is still no shared definition regarding climate and environmental migration, let alone a legal framework or form of protection. Conversely, this type of human mobility challenges some of the foundational elements of migration categorisation, foremost among them the dichotomy between economic and political migration. For this reason, within the legal realm, such as in formalising applications for international protection, the normative system contends with unrecognised forms of vulnerability.

The aim of the paper is to analyse how the legal system, specifically within the Italian context, addresses situations where the demand for protection is based on an environmental or climatic element. To achieve this, immigration legislation, including Italian immigration law and the international protection system, is examined

through the theoretical insights provided by the conception of borders proposed by Sandro Mezzadra and Brett Neilson (2013). Subsequently, some Italian judgments are analysed, seeming to confirm the possibility, as indicated by Boaventura de Sousa Santos (2015), that the law can serve as an emancipatory tool, under specific conditions. Finally, it is highlighted how the legislative changes of 2018 represented a halt to the innovative path opened by jurisprudential work.

2. The borders of international protection

The analysis of immigration policies in Italy, through the lens of border studies, provides critical insight into the complexity of governing human mobility. As explained by Sandro Mezzadra and Brett Neilson (2013), the concept of border no longer solely refers to the geographical lines of separation between nation-states, but encompasses power dispositifs that regulate human movements and sociopolitical dynamics. Immigration law represents a new border that emerges within this analytical framework. It constitutes a normative boundary, comprised of laws, regulations and administrative procedures that organise and regulate migrants' access and stay. From this point of view, the act of crossing is no longer confined to the passage between the territorial borders of two states. It also applies to all subsequent phases after entry into a national territory, which – like the crossing of national borders – can also lead to practices of expulsion. Sandro Mezzadra and Brett Neilson (2013) describe these dynamics as processes of border proliferation, of which legal boundaries represent an essential element. Indeed, the Italian immigration regulatory system does not provide for a subjective right to entry and stay for non-European foreign nationals. Entry and stay are always conditional on the purpose of the stay and the meeting of specific requirements. This system entails predefined legal categories, without which it is not possible to remain on the territory. The legal identities thus defined reduce the complexities of migrants' lives and subjectivity, confining them to predetermined categories they must adhere to so as to ensure regular entry and stay. As Latinos proclaimed in 2006 demonstrations across the United States, “We did not cross the border; the border crossed us”, summarising the effect of migration policies and border utilisation on the production and control of subjectivities (Mezzadra, Neilson 2013).

However, this legal boundary is not static; rather, it is subject to negotiations and reinterpretations in response to changing conditions and pressures exerted upon it. Sandro Mezzadra and Brett Neilson (2013) refer to these conflicting processes as “border struggles”, struggles for subjectivity whose end is not only the practice of crossing, but the changes they can bring about within the system. Borders can transform from instruments of exclusion into anti-hegemonic spaces (Hooks 2018), where claims and demands arise and whose outcome, in certain circumstances, can give rise to new political and normative horizons.

In recent years, Italian legislators have progressively restricted the regular modes of entry and stay, working towards a gradual, increasingly stringent fragmentation of categories with the aim of strengthening the processes of controlling, selecting and containing migrant subjectivities. It is argued that the international protection system is configured as a means of constructing subjectivities useful for governing migration rather than protecting people's rights. Sousa Santos (2015) defines this use of law and human rights as "configurative law". Being labelled a "migrant" or "refugee" informs how individuals are treated since these two categories represent distinct groups governed by separate legal frameworks (Closas Casasampera 2021). The power to label creates the need for those destined to become migrants or refugees to conform to these pre-defined categories as if they were real, pre-existing forms of subjectivity (Foucault 1969; 1981). A distinction as rigid as this leaves no room for ambiguity or ambivalence and presupposes the various forms of mobility, dictating how they should unfold and manifest. We are confronted with a system that shapes reality according to the imperatives of control and dominance. The ways these categories are experienced, asserted and resisted exemplify instances of "border struggles" and may bring forth new normative horizons (Mezzadra, Neilson 2013).

Climate migration emerges as a factor that challenges immigration borders and advocates for new forms of normativity and protection. Rising global temperatures, environmental changes and natural disasters are exerting increasing pressure on traditional borders and migration policies. Climate migrations challenge conventional categories of "migrant" and "refugee", questioning the existing legal distinctions between economic and political migrants. From a sociological standpoint, climate migrations represent an emerging form of human mobility that calls for critical reflection on existing border policies. These movements cannot be easily controlled or regulated by traditional immigration laws, as they often result from factors that exceed traditional requirements for ensuring forms of protection (such as persecution or conflicts), which introduces the theme of poverty and economic conditions into the realm of vulnerability.

The debate over introducing legal recognition for migration driven by environmental and climatic causes takes place in this dimension. Since 1985, when Essam El-Hinnawi coined the term "environmental refugee",² the discussion has evolved around the contrast between using "refugee" as opposed to "migrant". Indeed, within the realm of refuge/asylum as defined by the Refugee Convention of 1951, mobility is always forced, whereas in the case of "migrations" the reasons underlying mobility can be voluntary, including economic reasons. Economic reasons undergo a significant process of criminalisation and exclusion, according to European and Italian legislation, and cannot lead to forms of protection. In this context, climate migration precisely constitutes an excess, especially when it clearly

² "[P]eople who have been forced to leave their traditional habitat, temporarily or permanently, because of a marked environmental disruption (natural and/or triggered by people) that jeopardized their existence and/or seriously affected the quality of their life" (El-Hinnawi 1985: 4).

reveals that material conditions, including poverty, can represent a compelling factor and a form of protection. Given the moral, political and legal implications, the insistence on using the term “climate refugee” primarily aims to emphasise the environment’s role in forcing migration and to draw attention to States’ human rights protection obligations.

However, despite the decisive role of the element of compulsion in recognising a form of international protection, other authors emphasise how the incorporation of climate migration within the conceptual framework to which the term “refugee” refers directs the debate towards an arbitrary, problematic separation of elements characterising this type of human mobility (McGregor 1993; Richmond 1994). As highlighted in the description of migrations driven by environmental or climatic causes, the connection between migration and the environment is built upon the intertwining of environmental, social, economic, political and technological factors. A proper definition of the phenomenon can only organise the voluntariness–compulsion dichotomy along a continuum rather than a stark opposition (Richmond 1994). For reasons of discourse economy, other proposed terms for defining migrations driven by environmental or climatic causes will not be presented here.³ However, it is crucial to observe that the “forced” element is central to the definitional debate since it aligns with the characteristics of the legal framework. Climate migrations in fact intersect with existing legal categories. This comparison is complicated by the multifactorial dynamics accompanying this type of human mobility – which are always entangled in economic, social and political dynamics – and it aligns poorly with the architecture of European migration governance, leading to a deadlock both in terms of definition and legal recognition.

As explained by Chiara Scissa:

[s]till, the international community is far from reaching consensus on the definition to apply to this category of migrants and the protection status to which they should be entitled. Between the end of 20th century and the beginning of the 21st century, five proposals to define and assist environmental displaced people gained particular attention. These were: 1) extending the 1951 Convention Relating to the Status of Refugee; 2) adding a protocol on climate refugee to the United Nations Framework Convention on Climate Change (UNFCCC); 3) adopting a new legal framework; 4) promoting the Guiding Principles on Internal Displacement; and 5) using temporary protection mechanisms. However, none of them succeeded in convincing heads of state to process them further. (Scissa 2021: 42)

This political and legal limbo clashes with the social demand for protection voiced by communities increasingly vulnerable to climate change, sparking conflicts on the margin of legal spaces. Indeed, whilst immigration law and the international protection system function as tools for controlling subjectivities and bodies, the invocation of rights similarly represents the means through which securing the

³ For a deeper exploration of the evolving discourse on climate-induced environmental migration, please refer to Michela Trinchese (2024).

right to a dignified life is ensured, even in the context of climate change. Resorting to the language of rights and invoking the role of the courts comes to the “more modest, and realistic, acknowledgment that fundamental rights emerge as the only legal instrument challengeable against powers that truly do not embody any democratic logic” (Rodotà 2012: 58, translated by the author).

The legal space increasingly confronts numerous social demands, constituting itself as a conflict zone. Faced with injustices (Pisanò 2022), social demands become a collective creative process for new rights. Human rights principles defined in conventions and declarations need continuous recontextualisation and adaptation within the regulations (Bobbio 1990). They represent a synthesis of the past and an aspiration for the future, but for these documents to fulfil their purpose and remain effective in their intentions, their content must be continuously refined, articulated, specified and updated (Bobbio 1990). Within this evolutionary process of law, showing an emancipatory impulse, where law becomes a space and instrument for protection rather than dominion, a jurisprudential trend has developed. It contributes to recognising forms of protection for climate-related migrants through a dynamic and innovative interpretation of national and supranational law.

As Stefano Rodotà (2012) explains, the relationship between social dynamics and legal responses has evolved over time. In a context where politics seems increasingly unable to address social justice concerns, courts appear to assume the sole space where rights find legitimacy. In a scenario where politics is increasingly deaf to social justice demands, prioritising the interests of a few over the needs of many, fundamental rights emerge as the only legal instrument able to challenge economic powers and social inequalities (Rodotà 2012) – particularly when they appeal to foundational principles of freedom, dignity, solidarity and equality. The appeal to fundamental rights is decisive because it refers to a domain that looks at society and its evolution and the ways in which economic, technological and, in our case, climatic developments affect people’s dignity in new ways.

As explained by Sousa Santos (2015), the appeal to human rights functions when integrated within broader political mobilisations. A strong rights politics, according to him, is one that does not rely solely on law and rights. In his analysis of emancipatory law, Sousa Santos (2015) defines these processes of emancipation that find space within legal systems as “reconfigurative law”. Legal action refers to the pressure placed on legislation to implement rights or to undergo transformation.

My hypothesis is that climate migrations, namely the life stories of individuals who have migrated due to environmental or climatic issues, when they are heard in courtrooms, can constitute processes of reconfigurative law by advancing new questions of protection that judges may uphold in cases where they base their decisions on the invocation of foundational principles of human rights.

However, as Sousa Santos himself explains, protests of indignation argue

that the conditions for *legal* mobilization either do not exist or are deteriorating to such an extent that political mobilization must take unequivocal precedence over legal mobilization. According to the protestors, the impossibility of legal

mobilization is the result of the rise of authoritarianism that has led to top-down extra-institutionalism or deinstitutionalization, disguised by the invisible split between the law of the 1% and the law of the 99%. As a result, social transformation through legal and judicial activism cannot be achieved under the current conditions of global capitalism. (Sousa Santos 2015: 139)

As will be seen in the next section, this gap between the emancipatory power of law and its stalling by political power is clearly visible in the recent development of Italian immigration law. In fact, whilst the legislation in force before the 2018 amendments provided room for an interpretative space of the law in reconfigurative terms, the abolition of humanitarian protection and the introduction of the residence permit for disasters represented a setback to these processes.

Selected Italian judgments in which judges have recognised a form of protection for climate migrations are presented below, demonstrating the hypothesis that, in certain circumstances, the law can be emancipatory. It will then be briefly explained how the legislative changes of 2018 may represent a reversal of course.

3. An innovative jurisprudential trend

The judgments discussed below are part of a doctoral thesis that encompasses a much larger sample. As mentioned above, the aim is to demonstrate through which reasoning and hermeneutical developments Italian courts have recognised a form of protection for climate and environmental migrants. Specifically, the original sample consists of 16 judgments that exhibited two main elements: the close link between the migration project and the environmental climatic event, as narrated by the same plaintiff during the hearing, and reflections on the climate and environmental issue within the courts' reasoning. The judgments presented in this section have been selected because they are particularly interesting from an analytical perspective, but they are not exhaustive since the research process is still ongoing. Moreover, the analytical context is represented by the Italian legislative system, which integrates European directives and regulations concerning immigration law and international protection into its national framework. Specifically, the international protection system in Italy falls within the scope of common European policies and includes refugee status and subsidiary protection status. According to the Refugee Convention of 1951, a "refugee" is a foreign citizen who, due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political opinion, is outside the country of nationality and cannot or, owing to such fear, does not want to avail themselves of the protection of that country (Art. 1-A, n. 2, para. 1). Subsidiary protection status is instead granted to a citizen who does not meet the criteria to be recognised as a refugee, but for whom there are substantial grounds for believing

that if they were to return to their country of origin, they would face a real risk of suffering serious harm (Art. 2, d. lgs. 251/2007). Until 2018, alongside the residence permits provided by the international protection system, Italy also offered the humanitarian residence permit (and other minor types of permits). Article 5(6) of the T.U.⁴ stated that it was possible to issue a residence permit even when the foreigner did not meet the conditions provided by law, in cases where “serious reasons”, particularly of a “humanitarian nature” or resulting from constitutional or international obligations of the Italian State, were present. This structure of the humanitarian residence permit did not define specific instances of “humanitarian reasons”, instead being presented as an open formula through which to recognise unprecedented rights violations, new vulnerabilities and different protection needs, diverging from the rigid model prescribed for international protection. In 2018, the then Minister of the Interior, Matteo Salvini, introduced significant legislative changes to immigration regulations. Among these was the repeal of the humanitarian residence permit, which was partly replaced by the residence permit for disasters. The latter are granted to foreigners already present in Italy who cannot return to their home country and stay in safety due to a severe calamity.

As anticipated above, the aim is to demonstrate how law, in certain circumstances, can constitute emancipatory law. In the case under consideration, this process is observed in the ways in which some Italian judges have interpreted humanitarian protection extensively, surpassing traditional implementation, legitimising vulnerabilities thus far ignored and going as far as recognising forms of protection for climate migrants. On the contrary, in line with the thinking of the indignation movements, this process came to a halt following the legislative changes introduced in 2018.⁵

The first judgment to be presented concerns an order issued by the Bologna Tribunal in November 2014 (7334/2014). The plaintiff, a Pakistani citizen from the Punjab region, left Pakistan in 2013 due to a flood that destroyed his home and caused the death of his family members. Faced with a lack of assistance from the Pakistani government, he decided to travel to Europe. The Court of Bologna, in its judgements, stated that the events that led the applicant to leave his country are in the private and economic sphere, outside the scope of the Geneva Convention and subsidiary protection. Despite this, based on the legislation then in force, the judge opted for a thorough analysis of humanitarian protection’s potential, interpreting it as a “safeguard clause” allowing residence permits for situations not covered by specific provisions but presenting circumstances worthy of protection. These circumstances could include the need for protection due to conditions leaving one particularly vulnerable, such as health, age, famine, natural disasters or other

⁴ “T.U.” refers to the Consolidated Text of provisions concerning the regulation of immigration and rules on the condition of foreigners (Legislative Decree 286/1998).

⁵ It is essential to clarify that the judgments discussed in the paragraph, despite being dated post-2018, pertain to protection applications lodged prior to the amendments’ enactment. Thus, the applicable legislation is that which was in effect when the application was submitted.

similar circumstances. Considering the plaintiff's extremely grave and delicate situation, the Bologna Tribunal partially granted the appeal, ordering a residence permit to be issued for humanitarian reasons.

A more detailed treatment of similar themes emerges in the judgment of the L'Aquila Tribunal dated February 2018 (1522/2017). The plaintiff, a Bangladeshi citizen who lost his land due to a flood, incurred heavy debt whilst trying to support his large family. In this instance as well, the judge engaged in an in-depth analysis of the humanitarian residence permit, defining it as a "safeguard clause of the system" aimed at providing protection even in circumstances not contemplated in specific provisions. The legislation did not provide an exhaustive list of "serious reasons", leaving room for broad interpretation. Subjective situations, such as the need for protection due to an individual's particular vulnerability – including health or age-related reasons, famine, natural or environmental disasters or similar circumstances – could fall under this provision. The judge argues that the extreme poverty of the plaintiff and his family, which motivated the migration, does not satisfy international protection requirements but could apply under humanitarian protection.

On 12 November 2020, the Supreme Court of Cassation issued a pivotal judgment reinforcing the legal direction initiated by the Bologna and L'Aquila Tribunals. Through Judgment No. 5022/2021, the Supreme Court further explored the connection between human rights protection and environmental disasters, with specific attention on climate change. Building on previous jurisprudence, the Court strengthened the possibility of recognising humanitarian protection in cases involving environmental degradation. The occasion arises from an appeal to the Supreme Court against the Ancona Tribunal's decision to deny subsidiary protection or, alternatively, humanitarian protection. The plaintiff contested the Tribunal's failure to consider the environmental disaster in Niger, where oil spills heavily contaminated numerous areas, leading to disease, food insecurity and conflicts. Despite the judge acknowledging these circumstances, they were not deemed sufficient for subsidiary or humanitarian protection.

In the case analysis the Court referred to the UN Committee's considerations (Human Rights Committee 2020) on environmental disasters in the October 2019 observation of the Teitiota case. Mr Teitiota, a citizen of the Republic of Kiribati, approached the UN Committee after New Zealand refused to recognise refugee status. Teitiota claimed that returning to his home country would have exposed him to life-threatening risks due to the damage to arable land caused by rising sea levels. Additionally, frequent floods destroyed homes and crops, causing gradual coastal erosion and saline infiltration that contaminated freshwater wells and rendered the soil poor and infertile. Teitiota emphasised the severe repercussions this situation had on his family, living in a traditional way and relying on fishing and agriculture for their livelihood. Due to the scarcity and quality of drinking water, his three children faced serious health issues. Teitiota concluded that all these factors constituted an obstacle to enjoying his right to life.

In addressing Mr Teitiota's case, the UN Committee stated that

[t]he Committee further recalls that the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 of the Covenant even if such threats and situations do not result in the loss of life. Furthermore, the Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. (Ioane Teitiota v. New Zealand 2020)

The Committee highlighted that the principle of non-refoulement extends to all situations of danger, including environmental degradation and climate change, as these situations can threaten the effective enjoyment of human rights in the same way as other circumstances. Continuing this argument, the Supreme Court reaffirmed the principle that the right to life includes the right to a dignified existence and the freedom from any act or omission that may cause unnatural or premature death. Therefore, for the recognition of humanitarian protection, the danger to life can arise from socio-environmental conditions caused by human action, where the context poses a serious threat to the individual's and their family's survival. This compromise occurs in situations where the socio-environmental context is so degraded that it exposes the individual to the risk of nullifying their fundamental rights to life, freedom and self-determination, or reducing them below the threshold of their essential and inalienable core – a level below which the necessary conditions for a dignified life are absent, and the individual's fundamental right to life is not guaranteed. Consequently, the trial judge is tasked with verifying the actual assurance of this minimum limit, not only in situations related to armed conflict but also those concerning conditions of social, environmental or climatic degradation and those characterised by unsustainable exploitation of natural resources.

According to the Marche Tribunal, despite acknowledging a strongly compromised environmental context in the Niger region, failed to specifically examine the violation of the plaintiff's right to life concerning the environmental disaster. Therefore, the Supreme Court decided to accept the plaintiff's appeal.

In all three judgments, the issuance of the residence permit followed two significant channels: on the one hand, the judges' recognition of a previously unprecedented situation of vulnerability within the legal system, such as that following a severe natural disaster, and on the other hand, the judges' ability to utilise a legal instrument, such as humanitarian protection, capable of accommodating unforeseen yet equally deserving protection situations. By invoking the principles of dignity and vulnerability, which also encompass the material conditions of individuals threatened by the natural disaster, the judges could work towards an extensive and thus emancipatory implementation of the norm.

As mentioned earlier, Legislative Decree No. 113 of 4 October 2018 modified the national protection system, abolishing the residence permit for humanitarian

reasons and introducing new types of residence permits. Article 20 *bis*, introduced in Legislative Decree 113/2018, stipulated that:

1. When the country to which the foreigner should return is in a situation of *contingent and exceptional calamity* that does not allow return and staying in safe conditions, the police chief issues a residence permit for disasters. 2. The residence permit issued under this article has a duration of six months and is renewable for an additional six months if the conditions of exceptional calamity referred to in paragraph 1 persist; the permit is valid only within the national territory and allows for employment but cannot be converted into a work permit. (Legislative Decree 113/2018)

The substantial difference to the residence permits for humanitarian reasons appears to lie in the limitation of specified circumstances. The residence permit for disasters, whilst introducing the environment as a reason for issuing a form of national protection, makes the protection system even more rigid. It is evident that in 2018, the legislator intended to compartmentalise forms of protection to minimise possibilities included in the “humanitarian reasons” formula. This modification leaves uncovered the right to access adequate food, housing and clothing (as sanctioned by Article 11 of the International Covenant on Economic, Social and Cultural Rights) and, in general, all the various situations that are not determinable *a priori* but are nonetheless deserving of protection (ASGI 2018).

With the abolition of humanitarian protection, one of the three pillars of the protection system designed to preserve fundamental rights in situations not contemplated by the international system has been eliminated. This change, from my perspective, fits into the previously analysed process aimed at strengthening the boundaries around the “political migrant”, widening the gap between the “refugee” and the “economic migrant” through increasingly strict, suspicious scrutiny of life stories. Humanitarian protection represented an obstacle to this process, as it constituted a space for recognising ambivalent vulnerabilities, closely tied to material and economic conditions, as seen in the migrations driven by environmental causes. In fact, for this type of human mobility, the cause of migration is often linked to the loss of livelihood due to climate or environmental events. The conditions of destitution in which individuals may find themselves (as described in the cases presented in the judgments) become the justification for their exclusion from the protection system, even though these circumstances constitute the most significant obstacle to the effective enjoyment of human rights.

The path inaugurated by the 2015 judgment, aimed at recognising vulnerabilities related to the environment and ensuring protection, now confronts a governmental approach to migration focussed on control and the criminalisation of people in motion. In this context, climate migrations emphasise that human rights violations are not a static list, but emerge in ever-new forms. Therefore, a legal protective instrument must consider the ever-evolving changes and innovations, coupled with the evolving needs of a society characterised by uncertainty, risk and fluidity, which underscore the necessity for a regulatory framework capable of adapting swiftly to

unforeseeable shifts (Bobbio 1990). The first step in this process is the decriminalisation of poverty. Continuing to relegate economic migration to the space of illegality, where “economic” refers to migration caused by extreme poverty, means accepting and facilitating an economic system based on exploitation and a State system built on racism. The appeal to fundamental rights, as tools of advocacy, self-determination and emancipation, is more important than ever to address these challenges without leaving anyone behind.

Concluding reflections

In conclusion, this research underscores the pivotal role of law in addressing the challenges posed by climate-induced migrations and environmental displacement. Through an examination of Italian judicial decisions, the study demonstrates how, in specific circumstances, the legal system can serve as an emancipatory tool for individuals facing severe socio-environmental vulnerabilities.

The focus on Italian jurisprudence concerning humanitarian protection and its expansive interpretation in cases of climate-related migration highlights the potential for legal mechanisms to accommodate unforeseen protection needs. However, this trend was disrupted by significant legislative changes in 2018, which restricted the scope of protection available to vulnerable individuals, particularly those affected by environmental disasters.

Despite these challenges, the study emphasises the growing importance of law in the context of climate migrations and the urgent need to reformulate legal frameworks to address emerging challenges. It underscores the fundamental role of human rights as a tool for advocacy and self-determination, highlighting the political, social and moral implications of migration governance.

Considering the complexities of climate migration and the challenges posed by environmental changes, the study advocates for a holistic approach that recognises the centrality of human rights and promotes solidarity and social inclusion. It calls for sustained efforts to address the intricate intersection of climate change, migration and legal frameworks, emphasising the imperative of safeguarding the rights and dignity of vulnerable populations in the face of environmental upheaval.

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References

- Bobbio N. (1990). *L'età dei diritti* [The age of rights]. Torino: Giulio Einaudi Editore.
- Clement V., Rigaud K.K., Sherbinin A. de, Jones B., Adamo S., Schewe J., Sadiq N., and Shabahat E. (2021). *Groundswell Part 2: Acting on Internal Climate Migration*. Washington: The World Bank.
- Davis M. (2002). *Olocausti tardovittoriani. El Nino, le carestie e la costruzione del Terzo Mondo* [Late victorian Holocausts: El Niño, famines, and the making of the third world]. G. Carlotti (transl.). Milano: Feltrinelli.
- Foucault M. (1969). *The Archaeology of Knowledge* [Originally published in France under the title *L'Archeologie du Savoir* by Editions Gallimard]. R. Swyer (transl.). New York: Pantheon Books.
- Foucault M. (1981). 'The order of discourse.' In R. Young (ed.) *Untying the Text: A Post-Structuralist Reader*. Boston, London and Henley: Routledge & Kegan Paul, pp. 51–78.
- Giacomelli E., Magnani E., Musaro P., and Walker S. (2023). *Crisi climatica, mobilità e giustizia sociale. Voci e storie dal Senegal* [Climate crisis, mobility, and social justice: Voices and stories from Senegal]. Bologna: DeriveApprodi.
- Hinnawi E.E. and UNEP. (1985). *Environmental Refugee*. Nairobi: UNEP.
- Hooks B. and Nadotti M. (eds.) (2018). *Elogio del margine. Scrivere al buio* [In praise of the margin: Writing in the dark]. M. Nadotti (transl.). Napoli: Tamu edizioni.
- IPCC (2023). 'Summary for policymakers.' In H. Lee and J. Romero (eds.) *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: IPCC, pp. 1–34. <https://doi.org/10.59327/IPCC/AR6-9789291691647.001>
- Ionesco D., Mokhnacheva D., and Gemenne F. (2017). *The Atlas of Environmental Migration*. New York: Routledge.
- Kumari Rigaud K., Sherbinin A. de, Jones B., Bergmann J., Clement V., Ober K., Schewe J., Adamo S., McCusker B., Heuser S., and Midgley A. (2018). *Groundswell: Preparing for Internal Climate Migration*. Washington: The World Bank.
- Longo M. and Lorubbio V. (2023). 'Vulnerabilità, rischio e diritti umani tra riflessione sociologica e diritto internazionale' [Vulnerability, risk, and human rights: Between sociological reflection and international law]. *Rivista Trimestrale di Scienza dell'Amministrazione* 3, pp. 1–29. <https://doi.org/10.32049/RTSA.2021.3.09>
- McGregor J. (1993). 'Refugee and the environment.' In R. Black and V. Robinson (eds.) *Geography of Refugee: Patterns and Processes of Change*. London: Bellhaven, pp. 157–171.

- Mezzadra S. and Neilson B. (2013). *Borde Ras Method or, the Multiplication of the Labor*. Durham and London: Duke University Press.
- Pisanò A. (2022). *Il diritto al clima. Il ruolo dei diritti nei contenziosi climatici europei* [The right to climate: The role of rights in european climate litigation]. Napoli: Edizioni Scientifiche Italiane.
- Richmond A.H. (1994). *Global Apartheid: Refugees, Racism, and the New World Order*. Toronto, New York: Oxford University Press.
- Rodotà S. (2012). *Il diritto di avere diritti* [The right to have rights]. Bari-Roma: Gius. Laterza & Figli.
- Sousa Santos B. (2015). 'Towards a socio-legal theory of indignation.' In U. Baxi, C. Mccrudden, A. Paliwala (eds.) *Law's Ethical, Gloabal and Thoeoretical Context*. Cambridge: Cambridge Univerisity Press, pp. 115–142.
- Trinchese M. (2024). 'Towards a definition of climate migration.' *Partecipazione e Conflitto* 7(1), pp. 266–275. <https://doi.org/10.1285/i20356609v17i1p266>

Internet sources

- ASGI (2018). *Le modifiche in tema di permesso di soggiorno conseguenti all'abrogazione dei motivi umanitari e sull'art. 1, D.L. 113/2018 – Prime osservazioni* [Changes regarding residence permits following the abolition of humanitarian grounds and Article 1 of Decree Law 113/2018 – Initial Observations]. Available online: https://www.asgi.it/wp-content/uploads/2018/10/2018_10_25_scheda_ASGI_art_1_DL_Immigrazione_113_ok_1_.pdf [30.07.2024].
- Closas Casasampera A. (2021). 'A Foucauldian Reading of the Global Compact for Migration: How "The Migrant" is Represented and Rendered Governable.' In J.L. Diab (ed.) *Dignity in Movement: Borders, Bodies and Rights*. Bristol: E-International Relations. Available online: <https://www.e-ir.info/2021/04/26/a-foucauldian-reading-of-the-global-compact-for-migration/> [31.07.2024].
- Human Rights Committee (2020). *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016*. CCPR/C/127/D/2728/2016, Docstore.ohchr.org. Available online: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjvfi-jqiI84ZFd1DNPIS9EKG9gxBGj9kie9DBbO0eH5N3hhnsj%2FmXyyUMRG-qAMBUPEmGiVv1l5ueyf40YfsDu0dp9yZLW4jePTIgY0yjbRLV1mhxrLmEom-P8%2BgyRbPvKRQ%3D%3D> [31.07.2024].
- IDMC (2023). *GRID 2023. Internal Displacement and Food Security*. Geneva: Internal Displacement Monitoring Centre. Available online: https://api.internal-displacement.org/sites/default/files/publications/documents/IDMC_GRID_2023_Global_Report_on_Internal_Displacement_LR.pdf [31.07.2024].
- Scissa C. (2021). 'Recognition and Protection of Environmental Migrants in International Law: A Long-Lasting Swing Between Urgency and Postponement.' In J.L. Diab (ed.) *Dignity in Movement: Borders, Bodies and Rights*. Bristol: E-International Relations. Available online: <https://www.e-ir.info/2021/06/24/recognition-and-protection-of-environmental-migrants-in-international-law/> [31.07.2024].

List of judgments

Ioane Teitiota v. New Zealand (2020). Human Rights Committee. Views adopted by the Committee under Article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016.

Judgment No. 7334/2014 R.G. Bologna Court from 18 November 2014 [7334/2014] (2014).

Judgment No. 1522/2017 R.G. L'Aquila Court from 18 February 2018 [1522/2017] (2018).

Judgment No. 5022/2021 Supreme Court of Cassation from 24 February 2021 [5022/2021] (2021).

Other documents

Consolidated Text of provisions concerning the regulation of immigration and rules on the condition of foreigners. Legislative Decree 25 July 1998, No. 286 [Legislative Decree 286/1998].

Urgent Provisions on International Protection and Immigration, Public Security, as well as Measures for the Functionality of the Ministry of the Interior and the Organization and Operation of the National Agency for the Administration and Allocation of Assets Seized and Confiscated from Organized Crime. Legislative Decree No. 113 of 4 October 2018 [Legislative Decree 113/2018].



Veronika Nagy ■

Social sorting in Europe: Self-censorship in a digital asylum

Sortowanie społeczne w Europie. Autocenzura w cyfrowym azylu

Abstract: In recent decades, global mobility control and digital surveillance measures have increasingly prioritised affective aspects and perception-based policies. However, these practices encounter resistance, particularly in the everyday use of connected migrants. Through qualitative data analysis within the tradition of critical surveillance studies, this paper investigates how marginalised mobile groups – often labelled suspects of terrorism and organised crime – circumvent mobile surveillance and social sorting mechanisms within and beyond Fortress Europe. Rising tech literacy and surveillance awareness among users challenge digital policing, reshaping interactions between suspected newcomers and border control authorities. While existing studies focus on countersurveillance activities, less attention is given to strategic “silences” and social filters used to evade profiling and sorting mechanisms, protecting those who fear the risks of crossing a border. Based on notions of secure connectivity, this research employs a multi-site analysis of refugee polymedia use to examine countersurveillance strategies and digital self-censorship practices in transit countries.

Keywords: surveillance, censorship, hardware, imaginaries, migration

Abstrakt: W ostatnich dziesięcioleciach w ramach globalnej kontroli mobilności i nadzoru cyfrowego coraz częściej priorytetowo traktowane są aspekty afektywne i polityka oparta na percepcji. Praktyki te napotykają jednak na opór, zwłaszcza w codziennym korzystaniu z sieci przez migrantów. Przy użyciu jakościowej analizy danych w ramach tradycji krytycznych badań nad inwigilacją, niniejszy artykuł ma na celu zbadanie, w jaki sposób zmarginalizowane grupy mobilne – często określane jako podejrzane o terroryzm i przestępczość zorganizowaną – obchodzą mechanizmy mobilnej inwigilacji i sortowania społecznego w obrębie Twierdzy Europa i poza nią. Rosnąca wiedza technologiczna i świadomość nadzoru wśród użytkowników sieci stanowią wyzwanie dla policji cyfrowej i przekształcają interakcje między podejrzanymi przybyszami a organami kontroli granicznej. Podczas gdy istniejące badania koncentrują się na aktywnościach przeciwdziałających inwigilacji, mniej uwagi poświęca się strategicznemu „milczeniu” i filtrom

społecznym wykorzystywanym do unikania mechanizmów profilowania i sortowania, chroniącym tych, którzy obawiają się ryzyka związanego z przekraczaniem granicy. W nawiązaniu do koncepcji bezpiecznego połączenia w artykule wykorzystano wielostanowiskową analizę korzystania przez uchodźców z polimediów, aby zbadać strategię przeciwdziałania inwigilacji i praktyki autocenzury cyfrowej w krajach tranzytowych.

Słowa kluczowe: inwigilacja, cenzura, sprzęt komputerowy, zbiorowe wyobrażenia, migracja

Introduction

“This is all left from me”, he said, showing his SIM card attached to his necklace with some scratched numbers on it. The volunteer of the German language school in one of the Asylum Application centres was sitting with me, sipping tea, venting about his lost life and the endless limbo of his administrative uncertainties in a small German city. It catches my eyes when he holds this little chip between his fingers as an amulet.¹ A worthless little chip in a frame turned into a symbol of a lost life as a passport for self-identification.

The intersection of political conflicts and new border surveillance practices has significantly transformed the experiences of refugees along key migration routes, particularly the Balkan route. Syrian and Afghan refugees – fleeing conflict and seeking safety in Europe – now face not only physical borders, but also sophisticated digital surveillance systems designed to monitor and control their movements (Bigo 2008; Lyon 2010). These surveillance mechanisms, deeply embedded in the migration infrastructure, such as biometric authentication tools (Leese 2022), force refugees to adopt strategies of self-censorship that go beyond merely controlling the content of their communications online. Instead, with rising surveillance awareness, resistance strategies extend to managing the very materialities of their digital connectedness: the devices they use, the networks they connect to and the ways they interact with mobile hardware technologies unwillingly alter the credibility of connected devices as identification tools in migration control processes, such as asylum applications (Latonero, Kift 2018).

Therefore, this paper examines the materialities of surveillance awareness and self-censorship practices of Syrian and Afghan refugees along the Balkan route, with a focus on hardware selection and retrospective narratives on mobile phone security and data protection on the move. Unlike traditional notions of self-censorship, which often focus on suppressing linguistic or written content, this study explores how refugees manage the material aspects of their digital connectivity to

¹ A SIM card, or Subscriber Identity Module, is a small chip that can be inserted into a mobile device to activate it and connect it to a network. This card, as a global communication tool, contains unique information that identifies the user to the network and enables the device to receive and transmit calls, texts and data. The SIM card also stores contact information, messages and other data associated with the user's account as a dynamic archive beholding the traces of unpredicted journeys and traumas.

avoid detection (Nalbandian 2022). The central research question asks: How do refugees engage with the social imaginaries of mobile hardware technologies in shaping self-censorship practices within the context of border control surveillance?

In recent years, smartphones have become essential tools for refugees, offering crucial connectivity for navigation, communication and accessing resources (Dekker et al. 2018; Nedelcu, Soysüren 2022). However, these devices also serve as a critical point of vulnerability (Rayes, Salam 2022). Refugees are acutely aware that the materialities of their digital lives – such as the specific phone they use, the SIM card they purchase or the apps they install – can expose them to surveillance by state actors or border authorities (Gonzalez, Deckard 2022; Pallister-Wilkins 2022). This awareness shapes their self-censorship practices, not just by limiting what they say, but by determining how, when and through which devices they connect to mobile networks.

The concept of self-censorship among refugees in the context of mobile phone use is embedded in a broader, complex matrix of surveillance, state control and refugee agency (Filak 2010). This practice emerges as a response to the perceived threats associated with the technological landscape that refugees must navigate. Self-censorship, in this sense, represents a range of strategies that aim to mitigate the risks of surveillance, monitoring and potential exposure to hostile state mechanisms or third parties (Tanczer et al. 2020). These strategies encompass a diverse array of practices, from selective communication to repurposing technological tools in a manner akin to “hacking” systems of control, offering both protection and agency to refugees (Wang, Ahmed, Bee 2024). Drawing from critical surveillance studies, digital migration and border criminology, this paper reveals how refugees conceptualise the security of their mobile hardware and data, engaging in practices of self-censorship that are embedded in the situationally changing material realities of their digital existence (Učakar 2020; Minca, Collins 2021). Refugees along the Balkan route developed specific imaginaries of mobile hardware, associating particular devices or digital tools with safety, privacy or increased risk. The materialities of digital connectedness – which include choices about hardware, operating systems, encryption features and curated network access – provide a symbolic representation of the changing technological myths and beliefs that explain how refugees adjust their self-censorship practices.

It was noted in the early waves of the 2015 migration crisis that some refugees prefer iPhones over Android devices due to their perceived stronger encryption, while others use “burner phones” – temporary or disposable phones that are discarded after a short period of use – or physically disconnect from all connectable devices to minimise traceability (Campesi 2021; Ozkul 2023). These practices raised concerns about the strategic engagement of refugees with mobile technologies (Hesselberth 2018), associating them with organised crime tactics such as identifiers of trafficker networks, where the avoidance of detection is not just about limiting verbal or textual content, but about navigating the physical and technological infrastructures of connectivity. This engagement is a form of

self-censorship that operates at the level of hardware and device management, illustrating the complex ways in which refugees negotiate their digital presence in the context of surveillance (Lyon 2010; Gonzalez, Deckard 2022). Following the definition of Bar-Tal, self-censorship is defined as the act of intentionally and voluntarily suppressing information from others when formal impediments are absent. Self-censorship hinders the proper functioning of a democratic society because it inhibits free access to information, freedom of expression and the flow of information. The role of self-censorship in societies is of vital importance, as it blocks information that may illuminate various societal issues. Nevertheless, it is assumed that in some cases self-censorship is necessary (Bar-Tal 2017).

Current studies in digital anthropology and surveillance studies provide a critical lens for understanding how these material practices intersect with state-led efforts to control migration and surveillance (Milivojevic 2021; Deleuze 1992), but they predominantly focus on the power relations between authorities and mobile users, missing the sociotechnical cultural notions of tech imaginaries associated with the device itself. In order to prevent the risks of being identified while navigating border crossings, refugees must carefully manage their hardware selection: limiting the use of location-based services, disabling certain features and functions (such as microphones) or even disconnecting from telco networks altogether when crossing borders (Pfeifer 2021). These behaviours highlight a material form of self-censorship, where decisions about digital connectedness are just as critical as the content shared or withheld in online communication. Therefore, this research aims to explain the material dimensions of digital self-censorship in the context of forced migration along the Balkan route. This paper argues that refugees' interactions with mobile technologies are deeply influenced by the situational perceptions on surveillance risks and the socioeconomic threat associated with mobile connectivity. Rather than focussing on linguistic self-censorship and the fear of border authorities' semantic surveillance, this study emphasises how refugees' decisions about which hardware to use, when to connect and how to manage their digital footprint represent critical survival strategies. These material practices of self-censorship not only reveal the refugees' agency in resisting surveillance, but also reflect the complex entanglements between migration, technology and power in contemporary border control regimes (Petit 2020; Ozkul 2023).

By examining the imaginaries of mobile hardware technologies, this paper highlights how refugees use the Internet of Things, including mobile phone devices, to strategically manage their exposure to surveillance systems. This focus on the materialities of digital connectedness provides a new dimension to discussions of self-censorship and demonstrates how refugees leverage mobile hardware to maintain control over their digital lives while navigating the precarious conditions of border control and expulsion practices.

Methodology

This study forms part of the Digital Asylum project under the Gerda Henkel Foundation's Security and Society project stream, which investigates the surveillance awareness and behaviour modification of refugees in their mobile phone use. Conducted between 2018 and 2021, the research spans Hungary, Greece, Turkey, Germany and the Netherlands, retrospectively exploring how refugees navigated surveillance along the Balkan route. This methodology combines multi-sited ethnography, interviews, participant observation and virtual ethnography to understand how refugees adapted their mobile phone use and digital practices to evade surveillance.

The fieldwork began in Hungary, focussing on local NGOs and authorities, followed by visits to Lesbos and Athens in Greece, Izmir and Istanbul in Turkey and asylum centres in Germany and the Netherlands. Due to the COVID-19 lockdowns, some phases were conducted virtually, leveraging virtual ethnography to complement in-person fieldwork. The use of multi-sited ethnography (Falzon 2012) was crucial for capturing refugee experiences across multiple contexts, both physical and digital. This approach acknowledges the fluidity of refugee movements and the complex interaction between individuals and surveillance systems across various borders (Marcus 1995; Wahlberg 2022). The method is particularly well-suited to the study's focus on transnational mobility and refugees' behavioural adaptations in different border regimes (Hage 2005).

In total, 28 semi-structured interviews were conducted with a diverse range of professionals involved in border control and migration surveillance. These included migration authorities, border police, security intelligence officers, NGO representatives, local human rights activists and migrants from the selected sending countries. Additionally, interviews were held with experts from science and technology studies and surveillance studies to provide critical insights into the mechanisms of surveillance and the implications for migrant populations. The semi-structured format allowed for in-depth discussions while maintaining the flexibility to explore emerging themes related to surveillance practices, policy responses and the lived experiences of migrants. This methodological choice facilitated a nuanced understanding of the dynamics at play between state authorities and migrant communities and offered valuable context to the refugee experiences examined in this research. Though such interview data may be subject to biases based on my phrasing or the participants' willingness to disclose sensitive information – particularly when discussing surveillance practices (Hennink Kaiser, Weber 2019) – the diverse professional backgrounds of the interviewees, even those with conflicting perspectives, allowed an exploration of the different perceptions on refugees' surveillance awareness and behaviour modification. Some interviews were conducted in Turkey and Greece with interpreters, which also enabled the collection of retrospective accounts of how the refugees modified their behaviour

when using mobile phones in different countries and how they educated each other on the potential risks of being intercepted by local authorities. Following the Association of Social Anthropologists (ASA) guidelines, no written consent forms were used, but verbal consent was obtained in all cases. Ethical concerns, including anonymity and confidentiality, were prioritised to protect vulnerable populations, undocumented people or those assisting others in border crossings.

Participant observation as a form of institutional ethnography was conducted at two INGOs and three grassroots organisations in short periods (due to COVID-19 measures) providing essential services such as healthcare and language training. This method allowed for the observation of how NGO workers and refugees responded to perceived surveillance activities in real time. Observing these everyday interactions revealed how professionals contribute to refugees' self-censorship practices, particularly concerning their influence on mobile phone use (Scheel, Ustek-Spilda 2019), including switching SIM cards or not using certain wearables (Ozkul 2023; Pfeifer 2021). Participant observation was oftentimes emotionally demanding, as it is based on a complete immersion in the sensitive contexts of vulnerable groups, where full access to all aspects of refugee life may be limited due to security or ethical concerns. Therefore, this method has been complemented with virtual ethnography. This methodology also addressed the limitations of physical fieldwork during the pandemic and relied on OSINT data gathered from open and semi-open social media platforms, including Facebook and Telegram, where refugees and migrants exchange information on migration routes and border conditions. Online groups were identified by referencing refugee nationalities or migration terms, such as "Syrians in Izmir", and closed groups related to Moria or The Game (Dekker et al. 2018).

The combination of in-person and virtual methods allows for a more comprehensive understanding of how refugees navigate the complex surveillance systems they encounter during migration (Leurs, Smets 2018; Pfeifer 2021). Virtual ethnography, in particular, was invaluable in capturing real-time digital behaviours, which often reveal more about self-censorship than traditional interviews or participant observation (Gillespie, Osseiran, Cheesman 2018). This was a highly valuable method in understanding how mobile technologies shape refugee experiences (Gillespie, Osseiran, Cheesman 2018; Nedelcu, Soysüren 2022) and provided insights in the data that were structurally withheld by the platform users. However, verifying the identity of online participants remained a challenge, which also complicated the reliability of the data selected – as with language barriers – limiting the understanding of subtle nuances in chat conversations (Leurs, Smets 2018).

The selected methods, while comprehensive, have certain limitations. Multi-sited ethnography is resource-intensive, and not all sites could be revisited due to the COVID-19 pandemic. Interviews can be affected by recall bias, as participants may misremember or downplay certain behaviours in retrospect. Participant observation, while offering rich, in-situ data, may not fully capture the depth of self-censorship that occurs internally or digitally. Finally, virtual ethnography can

encounter issues of identity verification and language barriers, which may affect the reliability and depth of online interactions (Nagy 2024).

Considering the vulnerability of the research population, several issues were taken into consideration regarding their migration status and role in informal economies. No covert observation was conducted, and anonymity, confidentiality and digital data security were maintained, particularly for participants with vulnerable legal status. The sensitive nature of surveillance research required additional precautions to ensure the protection of refugees and NGO workers (Kerecsi, Nagy 2020). The research focusses on how refugees from Syria and Afghanistan retrospectively reflected on their surveillance awareness and behaviour modification regarding their mobile phone use.

Theoretical framework

This paper employs the concept of techno-authoritarian imaginaries to analyse the surveillance awareness and self-censorship practices of refugees from Syria and Afghanistan as they navigate the complexities of migration along the Balkan route. As identified by Hendrik Schopmans and İrem Ebetürk (2023), while the proliferation of artificial intelligence and surveillance technologies has been linked to the rise of digital authoritarianism, the resistance to such mechanisms remains an underexplored area within both migration studies and surveillance studies. Techno-authoritarian imaginaries refer to the collective perceptions and narratives that frame how societies understand and engage with technologies that exert control and surveillance (Cupać, Schopmans, Tuncer-Ebetürk 2024). These imaginaries are shaped by historical and political experiences, influencing how communities conceptualise the implications of surveillance technologies in their lives (Schopmans, Ebetürk 2023).

In the context of this study, refugees bring their own pre-existing imaginaries about authority, technology and resistance, informed by their experiences of conflict and migration. As a response to these perceptions, anticipatory resistance will be explored in the materiality of tech use (Kazansky 2021). This framework positions refugees not merely as passive subjects of surveillance, but as active agents engaging in anticipatory resistance. This form of resistance is characterised by pre-emptive actions taken by refugees to evade detection and control by surveillance systems. Rather than reacting solely to oppressive measures after they are implemented, refugees proactively modify their behaviour and mobile phone use, anticipating the risks associated with state surveillance and data exploitation. This anticipatory stance aligns with the notion that resistance can be an ongoing process, shaped by the recognition of systemic inequalities and the potential for future challenges (Schopmans, Ebetürk 2023). Therefore, the concept of “dataveillance imaginaries” is adopted as presented by Kiran Kappeler, Noemi Festic and Michael Latzer (2023), which highlights how individuals’ perceptions of constant surveillance can lead to self-inhibition in their online behaviour. Similar to internet users who modify their digital communication to avoid the chilling effects of dataveillance, refugees engage in self-censorship to navigate their interactions

in a digitally surveilled environment. Awareness of surveillance leads to self-inhibition, wherein refugees refrain from using certain mobile applications, avoid sharing sensitive information or alter their communication practices altogether.

Central to the examination of refugees' surveillance awareness is the imaginary surrounding mobile phone hardware as a securitised device. Research indicates that refugees often perceive their mobile phones not only as tools for communication, but also as instruments of surveillance and control (Zhang 2023). The imaginaries tied to specific electronic device brands and models, particularly those associated with enhanced security features (e.g. encryption), inform their choices and behaviours in the context of migration. For instance, a smartphone perceived as secure may foster a sense of safety and agency, leading refugees to use it more freely. Conversely, a device associated with surveillance vulnerabilities may result in cautious behaviour, where refugees self-censor their communications or avoid using certain applications altogether. This dual perception underscores the significance of mobile phones as not only functional devices, but also as symbols of power dynamics and security in the context of migration.

Regarding such contextual variability, I will explain how the imaginaries of refugees are contingent on their unique sociopolitical backgrounds and migration experiences, leading to variations in how they engage with technology and surveillance (Schopmans, Ebetürk 2023). Syrian and Afghan refugees hold different perceptions of surveillance based on their respective experiences with authoritarian regimes and conflict. These differences influence their self-censorship strategies and how they navigate their digital connectedness while in transit. This study posits that these techno-authoritarian and dataveillance imaginaries not only shape refugees' awareness and responses to surveillance, but also serve as a basis for mobilisation against oppressive technologies, such as satellite tracking of connected devices. As refugees articulate their experiences with mobile hardware and the risks associated with surveillance, they create narratives that foster solidarity and collective resistance against the impositions of state power and policing incentives. These narratives are also crucial for advocacy efforts within civil society, drawing attention to the ethical implications of surveillance technologies and leading authorities as well as humanitarian networks to call for accountability in their use. Therefore, this critical approach enriches existing debates on resistance to autocratisation, especially in ID verification processes, and highlights the need for deeper engagement with the materialities of future-making in the context of digital migration. As refugees navigate surveillance infrastructures by hardware management, they contribute to the ongoing discourse around the social and political dimensions of digital technologies in vulnerable settings. Their lived experiences of surveillance awareness not only reveal the limitations of existing frameworks, but also advocate for a more nuanced understanding of how marginalised populations adapt to and resist techno-authoritarianism.

The incorporation of techno-authoritarian, dataveillance and mobile hardware imaginaries allows this study to explore how refugees perceive the relationship

between technology and power (Haile 2021), illustrating the importance of their digital strategies and the broader societal implications of their actions. By recognising the role of these imaginaries, this research underscores the need for critical engagement with the materialities of mobile phone use (Pink, Ardèvol, Lanzeni 2020) and the ways in which refugees enact self-censorship in response to an increasingly surveilled environment.

In the discourse surrounding border control and migration, there is a critical oversight regarding the digital materialities that underpin the experiences of refugees and migrants. While much attention has been directed toward the tech solutionism that frames surveillance technologies as straightforward answers to complex migration challenges, there is a pressing need for empirical research that examines the material aspects of these technologies (Fenwick 2015): specifically, the hardware that refugees rely on during their journeys. Understanding how mobile devices function as tools for navigation, communication and self-tracking is essential to uncovering how they shape the imaginaries of safety in the context of digitised migrant economies. These devices do not merely serve as conduits for information; they actively influence refugees' perceptions of security, agency and connectivity as they navigate precarious border landscapes (Morgan 2023).

Moreover, as security technologies transition from reactive to proactive deployment, they become not just concrete objects, but fluid expressions of power that can lead to unintended consequences (Trauttmansdorff 2022). This evolution, characterised by the invisible and automated nature of surveillance algorithms, highlights the need for critical examination of how these technologies shape social and political realities (Zureik 2010). By focussing on the material dimensions of technology, this research aims to illuminate the complex interplay between hardware, surveillance and the construction of safe spaces in the lives of migrants, challenging the dominant narratives that often neglect the lived realities of those impacted by these systems. In this context, the concept of sociotechnical imaginaries becomes crucial, as it refers to the collectively held visions of desirable futures, reflecting how societies imagine and shape their relationship with technology (Milivojevic, Biles 2017; Sánchez-Querubín, Rogers 2018; Gerhold, Brandes 2021; Nedelcu, Soysüren 2022; Trauttmansdorff 2022; Kappeler, Festic, Latzer 2023).

Imaginaries and fears of portable devices: Refugee perceptions of surveillance power in hardware vs software

Refugees, navigating the complexities of social and special trajectories, often develop nuanced perceptions of the surveillance power embedded within the technologies they use. These perceptions are shaped by their lived experiences with authorities and the sociopolitical contexts of their journeys, influencing their attitudes, especially distrust towards both hardware (physical devices) and

software (applications and platforms). The concept of surveillance imaginaries – the collective understanding and anticipation of how technologies might be used to control, track or oppress them – plays a central role in shaping their behaviour. This section explores the empirical and conceptual distinctions refugees make between hardware and software, revealing a spectrum of self-censorship practices and modes of dysconnectivity.

When I crossed the Syrian–Turkish border, I held my phone tightly in my hand. It felt like a lifeline, but also a threat. I knew the border guards could track my location, see who I’ve spoken to, even read my messages. Every time I turned it on, I felt like I was exposing myself to being watched. It wasn’t just a phone anymore – it was like holding a mirror to my own fear of being monitored.

For many refugees, hardware such as smartphones, laptops and SIM cards are seen as the most visible agents of surveillance. The physical nature of these devices makes them identifiable tools that can facilitate both connection and control (e.g. IP, SIM, GNSS, UMTS or EODT). As soon as a refugee holds a smartphone, it is no longer just a communication device – it becomes a potential surveillance apparatus. This visibility leads to heightened awareness and subsequent self-censorship practices aimed at mitigating the risks of being tracked.

Before crossing, I took out my SIM card and threw it away. I didn’t want anything connected to Syria in my phone – no old contacts, no data. I was afraid they’d trace me through it, or worse, think I was linked to something dangerous. From that moment, I started being careful with every SIM card I used. I wouldn’t store numbers or even keep the same card for long. It wasn’t just about staying safe – it was about staying invisible.

Many refugees create anonymous or pseudonymous social media accounts to shield their identities while still engaging in essential online communities (Nedelcu, Soysüren 2022). These anonymous accounts allow refugees to access information, connect with support networks and engage with diaspora communities without exposing their real identities, which could be traced back to their physical locations or immigration status. Moreover, some refugees limit or entirely avoid the use of digital platforms or hide their E-CellID, particularly those that require personal information or regular updates. This restricted access, or even full disengagement from digital tools, is often seen as a strategy to reduce the digital footprint that could be exploited by surveillance actors (Sadowski 2020).

Similarly, the GPS and GSM tracking capabilities embedded in most smartphones are a primary source of fear among many refugees, as it directly translates to the possibility of real-time surveillance of their movements. Research by Shahram Khosravi (2017b) highlights how refugees develop an acute awareness of how mobile hardware can be used to monitor them, leading to behavioural adaptations such as turning off location services, removing SIM cards or even switching to simpler, non-smartphone devices that offer less tracking capability.

Every step I took felt like walking a tightrope between the migration authorities and the regime back home. I knew that if either side caught wind of my movements, I could disappear. I turned off my GPS and erased my location history, fearing that even a moment of carelessness could expose me to both sets of authorities. Sharing my whereabouts became a luxury I couldn't afford, even with those I trusted.

The tangible nature of the hardware, which can also be confiscated, compounds these fears. A refugee's mobile device is a physical object that can be taken by authorities during checkpoints or border crossings. Nicholas De Genova (2013) emphasises that the confiscation of mobile phones often exposes refugees' private information – such as contacts and sensitive communications – to authorities, creating a pervasive sense of paranoia about their hardware use. In response, many refugees deliberately avoid storing critical information on their primary devices, preferring instead to use burner phones or to employ encrypted storage systems, reflecting a tactical awareness of the risk of device seizure. As one young Syrian man explained in Istanbul:

I learnt to rely on burner phones, which I bought from street vendors in crowded markets. It felt risky, but I knew I had to protect myself from both migration authorities and the regime back home. Each time I got a new phone, I felt a mix of relief and anxiety. I couldn't save any contacts or store messages; everything had to be temporary and disposable. I kept my conversations brief and avoided anything that could trace back to me.

Managing devices to evade surveillance is an underestimated component of self-censorship. Refugees often rely on burner phones to maintain anonymity and minimise the risk of long-term tracking (Sadowski 2020). This practice aligns with the notion of “deportability”, a term coined by Nicholas De Genova (2002), which highlights the constant threat of expulsion and the precarious legal status that forces migrants to engage in practices that reduce their visibility to state systems. The type of hardware selected also reflects the imaginaries of security. Refugees increasingly prefer devices perceived to be more secure, such as those with advanced encryption or non-mainstream brands. Guoliang Zhang (2023) found that many refugees opted for smartphones like certain Android models known for stronger encryption standards over more popular brands like iPhones, which they associated with higher risks of surveillance. These choices reflect a techno-authoritarian imaginary (Aouragh, Chakravartty 2016), where refugees believe specific brands or hardware configurations are more resistant to government control, shaping their hardware preferences and behaviours. As a community worker in Hungary explained:

[R]efugees choose iPhones over cheaper alternatives, convinced that investing in a more expensive device would safeguard them from surveillance.... many utilise even multiple devices – like tablets and laptops – each serving a different purpose in their communication strategy. This belief profoundly shapes their preferences; they

are more cautious about what they share and how they communicate across these devices. For them, choosing a phone or a tablet is not just about functionality; it's about finding a sense of safety in a world where every digital footprint could lead to exposure and potential detention or expulsion.

While in 2018 there was a clear preference for specific iPhones and iPads, this has gradually changed with the awareness of encryption tools of border agencies, pushing more burner phones and multiple devices into border crossing practices. However, a discrepancy remains between those who took action against potential surveillance mechanisms and those who accepted the perceived gaze in their transition countries. Yet, vulnerable migrants should not be underestimated as they are often highly conscious of their digital footprints, routinely monitoring their devices for any signs of surveillance and adjusting their behaviours accordingly. This practice involves reviewing privacy settings, uninstalling potentially harmful apps and managing permissions to prevent unnecessary access to their personal information. Many smartphones, particularly newer Android and Samsung devices, have secure folders that require separate authentication (e.g. a PIN or biometric data) to access. The most tech-literate participants, who also used these phone attributes in their sending countries, employ these to hide sensitive documents, photos or apps from immediate detection in case their phone is searched. In this way, refugees actively shape the boundaries of their technological engagement, ensuring that their digital behaviours do not expose them to increased risks of monitoring or control (Zuboff 2019). However, these measures also make refugees more suspicious to the border authorities.

As has been illustrated, these imaginaries encompass not only the tools of surveillance themselves, but also the beliefs and behaviours that emerge in response to perceived threats. For many refugees, the assumption that they are constantly being watched by migration authorities shapes their understanding of technology and its control over their everyday safety. In transit countries, refugees often resort to unverified social measures to mitigate the risks of surveillance. Some participants emphasised the need for factory reset wipes of all data from the phone, returning it to its original state. This erases any personal information, apps, messages or media that might be used as evidence during a search. Others only said to perform this reset right before crossing borders or checkpoints where phones may be searched. These choices are informed by a collective understanding that technology is intertwined with state power and control, even when the effectiveness of these measures remains unverified. The perception that certain devices or configurations provide a buffer against surveillance becomes a critical aspect of their coping strategies. Some refugees enable full-device encryption, which ensures that the phone's data cannot be accessed without the correct passcode. This is especially helpful in case the phone is seized or stolen, as the data is unreadable without the decryption key.

One of the Syrian participants was told to have copies of his documents – IDs, passports or asylum papers – in secure folders on his Android phone, hidden from authorities during the first inspection. If a phone is searched, the authorities will

not be able to access these files without the necessary credentials. This method is also a result of the media cases of invasive search and inspection of asylum seekers' mobile phones by the Federal Office for Migration and Refugees, which has been legally challenged by GFF.

Software: The invisible mechanisms of control

In contrast, refugees perceive software – such as apps, social media platforms and messaging systems – as abstract and less visible mechanisms of surveillance. While they are aware that software can collect and transmit their data, the opacity of software surveillance often makes it harder for refugees to grasp its full extent, leading to a mixture of anxiety and resignation. This dynamic is particularly evident among refugees who must rely on communication apps like WhatsApp, Facebook and Telegram to stay connected with family and receive critical updates during their journeys. Even though they recognise the risks of data sharing on these platforms, the benefits often outweigh the perceived threats.

Mihaela Nedelcu and Ibrahim Soysüren (2022) describe this as a paradox of digital dependency: refugees are fully aware that these platforms are not secure, yet they are indispensable for communication, navigation and accessing support networks. This reliance creates a cognitive dissonance, where refugees simultaneously engage in self-censorship – such as avoiding sensitive conversations online, using coded language or frequently deleting conversations – while remaining within the dataveillance structures of these platforms. However, the situational diversity of these issues has been hardly explored in this context. According to the interviewees, in a Muslim country they feel far more confident to express their faith than in the EU; however, social and family ties in their home countries would often trigger red flags in transfer countries that are bordering the conflict. One interpreter who had fled Aleppo and was volunteering for an NGO on Lesbos in 2018 explained the affective power of these dynamics:

We were constantly trying to stay connected while being careful. I still avoid sensitive conversations, use coded language and delete messages often to protect myself. Still, I feel a strong need to rely on others online for support and information. This dependency is tricky; the same tools that help me stay in touch with family and friends also keep me paranoid.

The invisibility of software and the difficulty in understanding its data collection capabilities often lead to more passive forms of self-censorship. Refugees preferably do not modify their use of certain apps, instead developing coping mechanisms, such as switching to encrypted apps (e.g. Signal or WhatsApp) or using features that delete messages automatically after a certain time, or replace written text with voice messages. The details of these coping mechanisms were

also strongly associated with the practices of one's social network, linked to the political region of origin. Unlike hardware, however, which refugees feel they can physically control, the fear surrounding software surveillance is more pervasive and harder to mitigate, creating what Shoshana Zuboff (2019) calls a sense of digital helplessness. As noted earlier, this constantly changing imaginary of control rapidly adjust the norms of connectedness, even when multiple device use continues the common strategy grounded in the visibility of hardware surveillance. Refugees interviewed after crossing the Schengen borders testified about emotional stress and copycat strategies communicated by their travel agents or family networks. Many testified about traveling through high-surveillance areas on the Balkan route after swapping SIM cards, exchanging or flashing their phones (removing all data and resetting the device) before reaching border checkpoints to mitigate the risk of digital surveillance by authorities (Latonero, Kift 2018).

I try to use different languages in different apps, and even clean up my networks to obscure explicitly sensitive topics. Just try to protect myself while staying connected. Many of us even rely on two phones – one for public use and another for sensitive communications – or change accounts.

The physical manipulation of hardware in order to evade surveillance illustrates the immediacy of the fear associated with these devices. In contrast, during my interviews, participants frequently voiced concerns over social media platforms like Facebook, which they believed were being monitored by both state and non-state actors. Despite recognising the risks, many continued to use these platforms to stay connected with their communities and emphasised the need for critical polymedia use in different settings, i.e. public places, borderlands, private networks or institutional settings. However, they engaged in self-censorship by avoiding politically sensitive topics in their conversations or creating secondary, anonymous accounts in a more affective process (Kappeler, Festic, Latzer 2023). Refugees understand that their mobile software continuously collects data, yet the opacity of how this information is processed and used leads to a more complex form of self-censorship. They may continue using software platforms despite the risks, but engage in subtle behaviours such as coded language or temporary messaging apps, reflecting a form of adaptive disconnection rather than complete evasion. Interestingly, in regions where software censorship is stringent, such as parts of the Middle East, refugees naturally turn to VPNs or proxy servers to bypass software-based surveillance (Casas-Cortes, Cobarrubias, Pickles 2015b). This divergence in digital literacy and trusted technologies illustrates how refugees increasingly perceive hardware as more susceptible to direct interception, while software surveillance is viewed as something that can be evaded through digital tools.

Self-censorship is also strongly defined by the spaces and the places in the mobility path of migrants. Refugees seemed more concerned about hardware at physical border crossings or in highly monitored areas along the Balkan route, and less in places before or after the crossings. At borders, airports or checkpoints, the

physical inspection of phones was more clearly considered a major risk. Especially women thought that their phones could be seized by border authorities, who can access the device's content, photos, messages or apps, which may contain sensitive information about their journeys, personal contacts or even their financial situation. In countries like Turkey, Greece or Hungary, refugees have reported that the authorities search their phones at the borders. While hardware provokes immediate, material responses to mitigate surveillance risks, software elicits more nuanced, sometimes resigned behaviours that reflect both the necessity and danger of digital connectivity, even if they are aware that disconnected devices are also tools to locate them and identify their networks on the move via satellite. Yet, concerns about hardware and software deeply intersect. Crossing Schengen borders illustrates the switch in security concerns, where those who first worried about their physical devices being searched at borders shift to software concerns once they are in safer environments, focussing more on encrypted apps and semantic content of text and voice messages. Forced migrants navigate these fears based on the immediate risks posed by their geopolitical surroundings and the type of surveillance (physical or digital) they socially encounter in those settings. Understanding these imaginaries of risks provides crucial insight into how refugees navigate the digitised landscape of migration daily, illustrating the interplay between visibility, control and agency in their daily digital practices.

Self-censorship strategies as modes of dysconnectivity

The concept of dysconnectivity emerges as a vital lens through which to analyse the self-censorship strategies of refugees carrying connected devices. By choosing to limit their digital interactions by hardware selection, refugees are not merely avoiding surveillance; they are actively disconnecting from or counterfeiting the very technologies that connect them to essential services and social networks.

Dysconnectivity was considered a radical measure, and was only partially used for selective groups or app groups. Fully disconnecting from the internet was reserved for tense situations, like illegal border crossings. However, selections of online presence served multiple roles for the refugees, functioning not only as a communication tool itself, but also as a profiled self-tracker to inform family or as a form of targeted evidence collection in the complex landscape of migration.

Like this step-tracking app was ok to show my family how far I had travelled. They could see that I was still moving and doing okay. It gave them peace of mind, knowing where I was and that I was safe. The app also kept a record of everywhere I had been, so I could use it if I ever needed to prove where I was coming from.

As self-trackers, these devices allow refugees to monitor their locations, navigate unfamiliar environments and maintain contact with networks of support

in proximity that is also used as a conduit for evidence gathering about their migration trajectory. People on the move regularly repurpose these mobile features, like take photos at different border checkpoints, which are automatically geotagged with location data. These photos serve as proof in their asylum application, showing the route they took and the challenges they faced along the way. Yet, connected tools like smartphones are also repurposed in migration hotspots, and often become a commodity and form of currency within migrant networks, to be sold or used as evidence for migration authorities.

In Greece some mobile networks allow us to transfer prepaid credit from one phone to another. My brother used this feature to transfer credit in exchange for a taxi ride, but also to get some tools for his work. This is common in areas where you have no cash and people know your situation.

In many cases, refugees use their devices as deposits for financial transactions, selling or trading phones for food, shelter or other essential service, facilitated by local internet shop owners, informal interpreters or travel guides, such as local taxi drivers. In makeshift economies, credit can be traded for other items or services in informal barter exchanges. The ability to communicate is essential, and thus the value of having or being able to provide credit is high. Accordingly, the commodification of mobile technology highlights the duality of these devices: while they facilitate mobility, they also expose refugees to new forms of exploitation and data monetisation. It is well known in the case of Lesbos that free Wi-Fi offered in and around the camp often required users to register with personal information. This data was collected by service providers, leading to potential surveillance and profiling. As Amnesty International indicated, refugees faced increased scrutiny when using these networks. The data generated through the residents' mobile phone use was exploited by various actors, further complicating their relationship with these technologies. As a legal advisor of an INGO emphasised:

Some humanitarian organisations, like UNHCR, have begun partnering with tech companies to analyse data generated by refugees' mobile usage, offering insights into migration patterns and needs. While this information can improve services, it also raises ethical questions about consent and the potential for misuse. The data harvested can be exploited by various actors – governments, corporations and even malicious entities.

The biometric data collected from migrants are increasingly used to improve machine learning algorithms for private firms, allowing them to enhance facial recognition or fingerprint technology, such as those of IrisGuard. This data is valuable because it often includes individuals from diverse backgrounds, which may be underrepresented in commercial biometric databases. These datasets are also repurposed for commercial products or services unrelated to migration, e.g. smart-doorbells on Amazon. Once companies have developed better algorithms based on migrant data, they can apply these technologies to other sectors – such as banking or retail – for identity verification, which then generates profit. As the famous case

in Jordan's Zaatari refugee camp illustrated, the UN World Food Programme (WFP) implemented iris scan technology to distribute aid to Syrian refugees. While this technology ensures that aid is delivered securely, the collected data were analysed by the companies providing the biometric screening systems. These practices not only fuelled migrants' fear of engaging with digital devices, but in some cases even led to self-mutilation, such as burned fingers and blind eyes to prevent biometric identification protocols. As critical surveillance studies previously warned about such humanitarian surveillance technologies, these companies use the data to refine their software and enhance the accuracy of their algorithmic systems, which are then marketed to other industries such as fintech investing, border security tools or preventive law enforcement measures. Though many refugees would not mind becoming the guinea pig of these investors, they often cannot even provide clear informed consent, because the systems are implemented as a tool in the daily routine of service providers. However, these datafication processes and online registration methods rapidly increased migrants' surveillance awareness, fuelled by myths and misinformation regarding the technology's capabilities and the scope of monitoring by different migration authorities.

Dysconnectivity also gets its way through the selection of hardware. Many participants were advised to wrap their phones in aluminium foil, remove batteries or buy hacking software or tools sold by Amazon to cover their SIM card. With the rise of state-sponsored surveillance and third-party data collection, the choice of communication tools becomes a rhizomic, fluid often intuitive selection of media ecologies, dictated by different beliefs regarding encryption power and the level of privacy offered. For instance, Librem phones are designed specifically with privacy in mind. They run on PureOS, an open-source, Linux-based operating system, and include hardware kill switches to physically disable the camera, microphone, Wi-Fi, Bluetooth or cellular modem to avoid tracking. Similarly, Fairphone, an ethically produced phone that is compatible with LineageOS or /e/OS, was also seen as a tool with a privacy-focussed operating system that provides strong security and limited data tracking. In short, IoT tools and applications were often seen as means of dysconnectivity practices and data security measures by all stakeholders.

Mobile phone application tools of refugees are also often underestimated in their countersurveillance power. Most of the refugees use encrypted messaging apps such as Viber, Signal and WhatsApp, as these platforms offer end-to-end encryption that helps mitigate the risk of surveillance (Leurs, Smets 2018). This preference for encrypted apps reflects an understanding of digital security and an awareness of the vulnerabilities posed by less secure communication platforms, such as SMS or traditional social media applications, which are often more susceptible to interception. Though most participants used these apps interchangeably all the time, refugees in various transit countries disabled their location services on their devices, as another form of self-censorship designed to reduce traceability (Zhang 2023). A volunteer in a Greek NGO explained the practices of their beneficiaries:

On some phones, you don't even need an extra app to change your location – you can go into the settings, turn on Developer Mode and make it look like you're somewhere else. It's useful when you're trying to stay off the radar. Also, I didn't realise how many apps track your location without you knowing. It's one way to keep control over what they can see.

GPS tracking systems embedded in mobile phones can reveal the user's real-time movements, a significant concern for those attempting to evade border control detection systems. By disabling location features or opting not to use applications that require location data, refugees practice a form of “disconnection” that shields them from being monitored by authorities (Casas-Cortes, Cobarrubias, Pickles 2015b). Some NGO workers claim that most refugees intentionally avoid engaging in social media platforms where their data can be easily accessed and exploited. This choice reflects a broader dataveillance imaginary, where individuals understand the chilling effects of sharing personal information online (Kappeler, Festic, Latzer 2023). For instance, refugees use references to travel agents in the language or holiday service provisions, like referring to “travel agents”, “bookings”, or “travel guides” when they refer to smugglers in their descriptions. Selective communication represents one of the most immediate and essential strategies of self-censorship among refugees. As de Michel Certeau (1984) suggests, everyday practices often include subtle acts of resistance, and in this context, language itself becomes a tool for evasion.

Refugees often deploy coded language or euphemisms when discussing sensitive topics, such as migration plans or political affiliations, with family members or trusted contacts (Maitland, Xu 2015). By carefully selecting words or using pre-agreed terms that obscure the full meaning of their conversations, refugees reduce the likelihood of detection by surveillance systems that monitor for specific keywords or phrases. In tandem, the practice of limiting what information is shared – whether in direct conversations or via digital platforms – demonstrates a high level of awareness regarding the risks posed by modern surveillance technologies (Latonero, Kift 2018). Refugees often avoid discussing personal details, such as their migration status or their intentions to cross borders, through electronic means. This self-censorship is driven by an acute fear of exposure to state authorities or border enforcement agencies, whose increasing use of surveillance tools has rendered even private conversations vulnerable to interception (Khosravi 2007).

Which apps we use depends a lot on where we are and who we're talking to. In some places, everyone is on WhatsApp because it's encrypted and trusted, but in others, we switch to Signal or even Telegram if the border control situation changes. It's not just about privacy; it's also about who you can trust on your network.

Also, the selection of communication tools is witnessed as a culturally shaped practice of self-censorship. Refugees often utilise encrypted messaging apps, such as Signal or WhatsApp, over more popular but less secure platforms when their networks preferably use those. Though participants claim that their choice is influ-

enced by a desire for privacy and a heightened awareness of the risks associated with digital communication, their digital tech use is driven by their personal networks, which are fluid and highly influenced by the geopolitical conditions, as well as issues related to religious and class culture (Bastianutti 2024). The anticipatory nature of this self-censorship aligns with the idea that refugees are constructing imaginaries of secure futures based on their experiences of surveillance and control (Schopmans, Ebetürk 2023). Others described how they frequently engage in practices that minimise their digital footprints, such as using unregistered temporary SIM cards, using wearables or registering their devices with fake IDs or even to lost relatives. Additionally, refugees frequently switch SIM cards, disrupting the continuity of tracking mechanisms that rely on stable identifiers (Leurs, Smets 2018). This tactic prevents authorities from associating a specific phone number with an individual over time, thereby complicating efforts to track movement or communication patterns. The ability to remain untraceable in this manner is a form of technological repurposing that reflects refugees' attempts to evade the regulatory and surveillance apparatus designed to monitor their mobility (Scheel 2018).

As Sabina Lawreniuk and Laurie Parsons (2017) argue, refugees engage in a continuous negotiation of their digital and physical presences, seeking to maintain the connections necessary for survival while avoiding the risks of exposure. They emphasise that these technological practices are embedded within the broader context of power, protection and support, illustrating that refugees' engagement with technology is not merely reactive but strategic. The notion of "autonomy of migration" (Casas-Cortes, Cobarrubias, Pickles 2015b) further supports this understanding, recognising that refugees actively reshape their tools to resist the surveillance apparatus and assert their autonomy within the systems that seek to control them.

The falsification of geolocation data also enables refugees to avoid tracking when passing through border zones or other highly monitored areas. By masking their true locations, refugees can evade systems that monitor their communications, preventing governments from identifying or apprehending them.

When I came to Moria, I learnt how to fake my location on my phone. It's not that hard, and it helps a lot. By showing I was somewhere else, I could keep using the phone without them knowing exactly where I was. I tried to avoid getting flagged by the authorities, who watch everything here.

GPS spoofing apps allow users to manipulate the location data sent by their phone. By using these apps, refugees can make it appear as though they are in a different location. This is especially useful in avoiding detection in monitored zones. These apps are widely available for both Android and iOS devices, and links are shared among different app groups. These tactics also illustrate how refugees navigate the invisible borders of digital surveillance, leveraging sophisticated technologies to subvert state control. These practices not only reflect a tactical approach to evading surveillance, but also illustrate a profound sense of dysconnectivity. By

detaching from stable digital identities, refugees aim to protect themselves from the potential consequences of being identified by state authorities.

This strategy is consistent with the findings of Kiran Kappeler, Noemi Festic and Michael Latzer (2023), which highlight how dataveillance can lead to self-inhibition in legitimate digital communication, fuelling distrust. By utilising GPS tracking features, forced migrants try to navigate routes more effectively and to avoid areas known for heavy surveillance by border authorities. In this sense, mobile phones become instruments of security, enabling refugees to coordinate their movements and prevent disappearance at critical junctures along their journeys. Several INGOs working in outreach and border areas are aware of these techniques and even anticipate them by assisting those who are smuggled in life-threatening crossing points. However, many refugees stated that their choices are often not rational or based on reliable information, but rather follow trial-and-error practices, are chosen under the pressure of smugglers and copycats or are simply from the instructions of others, even via mobile chat groups.

At the border, you hear a lot of things – some say turn off your phone, others say delete certain apps or chats. Honestly, I didn't always know what was right, so I just tried different things. If someone who made it through said they wiped their phone clean, I did the same. You don't really have a plan; you just follow what others say or what worked for them, hoping it helps you avoid trouble.

Self-censorship practices of refugees regarding their mobile hardware use illustrate complex adaptive strategies rooted in their lived experiences and the influence of telecommunications companies. By engaging in innovative tactics – such as exchanging devices, reprogramming the technology, falsifying IP addresses and leveraging community knowledge – refugees navigate a complex landscape of surveillance while asserting their agency. The role of telco companies and the nature of mobile hardware further complicate this dynamic, emphasising the dual nature of technology as both a tool of empowerment and a potential instrument of control. Understanding these strategies through the lens of techno-authoritarian imaginaries provides valuable insight into the collective perceptions that frame how refugees engage with mobile technology, highlighting the enduring impact of historical and political contexts on their experiences. As one of an exFrontex officer highlighted:

We've seen refugees adopt some really sophisticated tactics to avoid detection – things like swapping devices, reprogramming their phones, encrypting visual content and using knowledge shared within their communities. It's a constant game of cat and mouse. On the one hand, these technologies empower them to stay connected and to protect smugglers, but on the other hand, they make our job more difficult. We're mainly concerned with criminals like traffickers in our interceptions, but they all seem to fear being suspected as potential terrorists. We rely on a very selective dataset, like telecom companies, but the capabilities of modern smartphones create a situation where technology can either help us enforce the law or be used to bypass it entirely.

While self-censorship may appear as a strategy of disengagement, it also serves as a form of resistance against techno-authoritarian practices. By adopting these modes of dysconnectivity, refugees assert their agency in an environment where their movements and communications are closely monitored. This anticipatory resistance challenges the narrative that refugees are passive subjects of control; instead, they are actively engaging with the technologies at their disposal, even if they are intuitively assessing the risks and benefits of their digital interactions. It has been argued that in high-risk contexts, refugees forgo digital communication altogether, choosing instead to have sensitive conversations in person, away from devices (Leurs, Smets 2018). According to previous digital migration studies, this choice of deliberate withdrawal from digital spaces is not merely a matter of convenience, but a calculated strategy to avoid the traceability associated with mobile phone use. As Zyang (2023) suggest, such forms of “dysconnectivity” reveal the nuanced ways in which refugees negotiate their visibility, selectively participating in digital ecosystems only when it is safe to do so. Still, the analysis of these self-censorship strategies underscores the need for a nuanced understanding of how marginalised populations navigate surveillance infrastructures in terms of psychological and emotional distress. The imaginaries of mobile hardware risks and the perceived role of data sharing practices as securitised devices inform their choices and behaviours, shaping their interactions with digital technologies, the society of local networks and state authorities. This recognition calls for a broader engagement with the practices of future-making, where the implications of surveillance technologies are critically examined in the context of migration (Schopmans, Ebetürk 2023).

Additionally, the shifting dynamics of deportability illustrate how migrants are forced to navigate the spaces between authorised and unauthorised status in different contexts. According to Nicholas De Genova (2002), deportability serves as a defining characteristic of migrant populations, compelling them to constantly adapt their tactics to evade detection and maintain mobility. In this sense, the political nature of migrants’ technological practices can be understood as a form of hacking, where they effectively challenge the regulatory frameworks designed to control their movements and limit their agency. By repurposing their hardware and employing digital tools, migrants not only assert their autonomy, but also compel the systems of control to adapt and evolve, thereby reshaping the very nature of migration governance (Casas-Cortes, Cobarrubias, Pickles 2015b; Scheel 2018). This highlights the need for a more nuanced understanding of the situational technopolitics of migrants that acknowledges their ambivalence and organic engagement with technology as a means of navigating and subverting the boundaries imposed upon them.

Adaptive repurposing and disconnection strategies

The most impressive finding of this study was the scale at which migrants are reprogramming their mobile hardware to enhance privacy and security. These actions reflect both technological agency and an understanding of the vulnerabilities linked to the physical aspects of their devices. While cursive sociotechnical means are often correlated with the internet literacy of digital natives, the market forces of tech tools and peer gadget cultures are deeply underestimated. Refugees manage to install custom firmware or opt for open-source operating systems like LineageOS, which are designed to offer stronger privacy protections. These operating systems provide users with more control over data flows, allowing them to minimise the risks of surveillance tied to pre-installed applications or background services that might collect personal information. This technological customisation allows mobile phone users to exert agency over their devices by removing unnecessary applications that could leak sensitive information. The choice to disable biometric authentication systems, such as facial recognition or fingerprint scanning, is also a deliberate act of self-preservation. These features can potentially expose refugees to additional scrutiny in countries where biometric data is linked to government surveillance systems (De Genova 2013). The reprogramming of hardware becomes not just a matter of enhancing functionality, but a critical act of self-defence against surveillance. As a phone shop owner in Athens explained:

Look, for a lot of the refugees who come in, messing with their phones isn't just about making them run smoother – it's about keeping safe. In some places, all that biometric stuff can get you flagged by the government, so we help them tweak the settings, turn off tracking or whatever else they need. It's not just tech fixes, it's survival. They're trying to stay off the grid and out of trouble, and this is one way they can do it.

By customising their devices in this way, refugees engage in what Maribel Casas-Cortes, Sebastian Cobarrubias, John Pickles (2015b) term the “autonomy of migration”, a concept that highlights the creative strategies migrants use to subvert and resist state control. These modifications are often shared through peer-to-peer networks in Telegram or in simple Facebook or Instagram short videos, which contribute to a collective understanding of how best to safeguard personal data on the move.

To further protect their online presence, refugees frequently employ methods to falsify their IP addresses. For example, refugees may need to access legal rights resources or diaspora communities in their home countries, where websites or forums may be censored or blocked (Nedelcu, Soysüren 2022). Using VPNs allows refugees to bypass these restrictions and communicate securely with family members or access healthcare information. Refugees who fear state monitoring use TOR to avoid being tracked by governments, surveillance firms or other malicious actors (Sadowski 2020).

The falsification of geolocation data also enables refugees to avoid tracking when passing through border zones or other highly monitored areas. By masking their true locations, migrants try to evade systems that monitor their communications, preventing governments and border authorities from identifying or apprehending them. These tactics illustrate how refugees navigate the invisible borders of digital surveillance along the Balkan route, leveraging sophisticated technologies to subvert state control. However, this informal, knowledge-based imaginary of secure device use often contains misinformation or becomes outdated as surveillance tactics evolve. Many of those who learnt in 2016 about secure apps that offer better encryption than WhatsApp or a more secure version of a popular device (ONE) that allows for safer communications (Maitland, Xu 2015) regularly educated themselves in ICT expertise.

When picking apps and devices, you gotta check out reviews from places like CNET, TechCrunch or The Verge. They talk about security stuff, privacy rules and how users feel. It helps us know what's safe to use, you know?

This form of knowledge-sharing exemplifies a dynamic understanding of technology, where refugees continually adapt their practices based on new information that builds resilience in refugees facing techno-authoritarian systems. Maribel Casas-Cortes, Sebastian Cobarrubias, John Pickles (2015a) refer to these practices as part of the broader “knowledge-based economies of migration”, where migrants and refugees capitalise on shared expertise to navigate border regimes, both physical and digital. This exchange of knowledge allows refugees to better manage their digital identities, ensuring that their technology use does not expose them to unnecessary risks. This continuous adaptation, driven by peer knowledge, underscores how refugees remain active participants in shaping their interactions with digital tools.

One of the underestimated aspects of high-tech solutions is their complementary low-tech strategies designed to enhance security and privacy. These strategies demonstrate how refugees blend traditional methods with modern technologies to avoid surveillance risks. For instance, refugees may choose to avoid storing sensitive information on digital devices, instead keeping physical copies of important documents or the other way around. This practice is also perceived as a tool to reduce the risk of interception by authorities, but it is often an unconscious practice, or some even stated that it is culturally embedded in the daily practices of those from authoritarian countries. In particularly high-risk situations, such as crossing borders or navigating hostile environments, refugees may choose to forgo digital communication altogether in favour of in-person conversations. This decision is driven by the understanding that digital interactions can generate traceable metadata and expose them to potential hacking risks, especially when using unsecured networks or devices. For instance, when discussing sensitive topics like their migration journey or legal status, refugees often opt for face-to-face meetings rather than relying on potentially compromised messaging apps. In these contexts,

personal contact becomes more exclusive, as it minimises the risk of surveillance and data breaches. This careful navigation of digital tools and personal interactions reflects a sophisticated awareness of when and how to engage with technology and when to disengage, a practice that scholars refer to as “dysconnectivity” (Zhang 2023). Digital dysconnectivity becomes a deliberate choice, where refugees actively opt out of digital systems when they perceive a heightened threat of surveillance.

Low-tech solutions also include the use of basic phones – devices with limited functionality that lack the extensive surveillance capabilities of modern smartphones. By using these simple phones, refugees minimise the risk of digital tracking, as these devices are less likely to carry spyware or offer avenues for data collection (Leurs, Smets 2018). The decision to use low-tech tools speaks to the broader theme of balancing security with connectivity. Refugees often find themselves in a precarious position, needing to remain connected for survival while also needing to minimise the surveillance risks associated with digital engagement.

Last but not least, we reflect on the role of corporate companies and how their interests shape the counter-surveillance practices of migrants from conflict countries. First and foremost, telecommunications companies and IMEI (International Mobile Equipment Identity) provider companies play a crucial role in shaping the technological landscape that refugees navigate. In many countries, mobile devices are required to be registered using their unique IMEI numbers, which are directly linked to individual users. This system enables authorities to track refugees through their devices, creating significant surveillance risks (Zhang 2023). While they provide essential services, they also contribute to the registration and tracking of mobile devices, which can exacerbate the risks faced by refugees (Elish, Boyd 2017). In response, refugees frequently adopt clever strategies to evade this form of monitoring, including purchasing second-hand phones, using burner phones or frequently changing SIM cards to avoid leaving a traceable digital footprint (De Genova 2013). The proliferation of specific networks as customers in host countries creates a unique connected environment for refugees, as the ambiguous identities associated with these providers and the physical devices – often acquired through informal channels or with false documentation – allow them to navigate technology and surveillance more effectively (Aradau, Perret 2022). The existence of a black market for phones provides refugees with the option to procure devices without personal information attached, circumventing registration requirements that could expose them to danger (Haggerty, Ericson 2006). The same is also valid for phone contracts with providers. Additionally, corporations often emphasise standardised goods and security features of data storage through branding and registration, which influences how refugees engage with technology. The material features associated with corporate branding – such as holograms and barcodes – fuel a sense of legitimacy around mobile devices, even when acquired through less formal means. This duality empowers refugees to leverage the perceived value of these devices while simultaneously engaging in self-censorship practices to protect their identities (Bennett 2010).

Conclusion

Digitised migration processes not only reflect the political and social tensions in different geopolitical contexts, but also shape contemporary power relations between data subjects, migration authorities and humanitarian service providers. This study has critically examined how refugees engage with the imaginaries of mobile hardware technologies in shaping their self-censorship practices within the context of border control surveillance. The research reveals that refugees navigate a multifaceted landscape where the perceptions and realities of technology intersect with the imperatives of survival and identity preservation. The imaginaries associated with mobile hardware and software – shaped by sociopolitical contexts and technological narratives – play a pivotal role in influencing how refugees interact with these tools and manage their digital footprints (Bennett 2016; Elish, Boyd 2017).

The findings highlight that refugees are not merely passive recipients of technology; rather, they actively engage with mobile devices as instruments of agency in a surveillance-rich environment (De Genova 2013). Mobile hardware, often perceived as a means of connectivity and empowerment, simultaneously embodies risks associated with surveillance and data collection. This duality complicates the narratives surrounding technology, wherein the promise of mobility and communication is tempered by the spectre of increased scrutiny and control. Refugees employ a range of self-censorship strategies, including using burner phones, frequently changing SIM cards and opting for in-person communication in high-risk scenarios. These practices reflect a nuanced understanding of the surveillance mechanisms at play, revealing how refugees adapt their behaviours in response to the perceived threats posed by border control authorities (Zhang 2023).

Moreover, the myths surrounding surveillance risks are often amplified by various stakeholders, including telecommunications companies and governmental agencies. While these companies facilitate access to mobile technologies, they also contribute to the surveillance apparatus through the registration and tracking of devices (Haggerty, Ericson 2000). The branding and marketing of mobile technologies often evoke imaginaries of security and connectivity, yet they simultaneously reinforce mechanisms of control that can undermine the safety of refugee populations (Graham 2010). This tension between empowerment and vulnerability illustrates the complexity of refugees' relationships with mobile technology, as they grapple with the dual-edged nature of these tracking tools.

According to the empirical findings presented herein, refugees are not merely passive victims of surveillance, but rather dynamic agents actively navigating the complexities of the technological landscape. The study reveals that the imaginaries surrounding mobile hardware and software features significantly shape the lived experiences of refugees, informing their strategies for navigating an increasingly monitored world. As the digital security landscape continues to evolve, it is imperative for policymakers, scholars and practitioners to consider these complexities in

order to support refugees in their pursuit of safety and dignity, fostering environments that respect their agency and mitigate the risks associated with surveillance technologies. This perspective illuminates the ways in which refugees negotiate their realities, leveraging technology as a means of self-preservation while simultaneously engaging in the practices of dysconnectivity to evade surveillance.

This short reflection aims to challenge the dominant narratives that seek to depict them solely as objects of control, reducing their experiences to mere statistics in the surveillance apparatus of authoritarian regimes. Such oversimplification strips refugees of their tech-savvy resilience and digital agency, masking the sophisticated strategies they employ situationally to reclaim their identities and assert their online autonomy amidst oppressive systems of surveillance (Susser, Roessler, Nissenbaum 2019). By recognising refugees as active participants, we not only explore the different imaginaries of connectedness, but also critically examine the power of self-censorship and expose those who confine connected migrants within frameworks of surveillance authoritarianism (De Genova 2013). This shift in perspective is essential for fostering a more nuanced understanding of migration and technology, highlighting the need to dismantle the stereotypes that perpetuate refugees' tech literacy, and advocating for a more inclusive discourse that acknowledges their capacity for resistance and self-determination.

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References

- Aouragh M. and Chakravartty P. (2016). 'Infrastructures of empire: Towards a critical geopolitics of media and information studies.' *Media, Culture & Society* 38(4), pp. 559–575. <https://doi.org/10.1177/0163443716643007>
- Bar-Tal D. (2017). 'Self-censorship: The conceptual framework.' In D. Bar-Tal, R. Nets, and K. Sharvit (eds.) *Self-Censorship in Contexts of Conflict: Theory and Research*. Cham: Springer, pp. 1–18. https://doi.org/10.1007/978-3-319-63378-7_1

- Bastianutti L. (2024). 'Digital practices on social media: New perspectives on the production of space and geopolitical inquiry.' In H. Gülen, C. Sungur, and A. Yeşilyurt (ed.) *At the Frontiers of Everyday Life: New Research in Cramped Spaces*. Cham: Springer Nature Switzerland, pp. 135–153.
- Bauman Z. and Lyon D. (2013). *Liquid Surveillance: A Conversation*. Cambridge: Polity Press.
- Bennett C.J. (2010). *The Privacy Advocates: Resisting the Spread of Surveillance*. Cambridge: Mit Press.
- Bigo D. (2008). 'Globalized (in)security: The field and the ban-opticon.' In D. Bigo and A. Tsoukala (eds.) *Terror, Insecurity, and Liberty*. London: Routledge, pp. 3–22.
- Bloch A. (2007). 'Methodological challenges for national and multi-sited comparative survey research.' *Journal of Refugee Studies* 20(2), pp. 230–247. <https://doi.org/10.1093/jrs/fem007>
- Campesti G. (2021). *Policing Mobility Regimes: Frontex and the Production of the European Borderscape*. New York: Routledge.
- Casas-Cortes M., Cobarrubias S., and Pickles J. (2015a). 'New directions in the study of migration: The autonomy of migration and its implications.' *Antipode* 47(4), pp. 885–895. <https://doi.org/10.1111/anti.12157>
- Casas-Cortes M., Cobarrubias S., and Pickles J. (2015b). 'Riding routes and itinerant borders: Autonomy of migration and border externalization.' *Antipode* 47(4), pp. 894–914. <https://doi.org/10.1111/anti.12157>
- Chen X., Xie J., Wang Z., Shen B., and Zhou Z. (2023). 'How we express ourselves freely: Censorship, self-censorship, and anti-censorship on a Chinese social media.' In *International Conference on Information*. Cham: Springer Nature Switzerland, pp. 93–108.
- Couldry N. and Mejiar U.A. (2019). *The Costs of Connection: How Data is colonizing Human Life and Appropriating it for Capitalism*. Stanford: Stanford University Press.
- Cupać J., Schopmans H., and Tuncer-Ebetürk İ. (2024). 'Democratization in the age of artificial intelligence: introduction to the special issue.' *Democratization* 31(5), pp. 899–921. <https://doi.org/10.1080/13510347.2024.2338852>
- De Certeau M. (1984). 'Walking in the city.' In M.M. Lock and J. Farquhar (ed.) *Beyond the Body Proper: Reading the Anthropology of Material Life*. Durham: Duke University Press, pp. 249–258.
- De Genova N. (2002). 'Migrant 'illegality' and deportability in everyday life.' *Annual Review of Anthropology* 31(1), pp. 419–447. <https://doi.org/10.1146/annurev.anthro.31.101401.090029>
- De Genova N. (2013). 'Spectacles of migrant 'illegality': The scene of exclusion, the obscene of inclusion.' *Ethnic and Racial Studies* 36(7), pp. 1180–1198. <https://doi.org/10.1080/01419870.2013.783241>
- Dekker R., Engbersen G., Klaver J., and Vonk H. (2018). 'Smart refugees: How Syrian asylum migrants use social media information in migration decision-making.' *Social Media + Society* 4(1). <https://doi.org/10.1177/2056305118764439>

- Deleuze G. (1992). 'Postscript on the societies of control.' *Cultural Theory: An Anthology*, pp. 139–142.
- Elish M.C. and Boyd D. (2017). 'Situating methods in the magic of Big Data and AI.' *Communication Monographs* 85(1), pp. 57–80. <https://doi.org/10.1080/03637751.2017.1375130>
- Falzon M. (2012). *Multi-Sited Ethnography: Theory, Praxis and Locality in Contemporary Research*. London: Routledge.
- Fenwick T. (2015). 'Sociomateriality and learning: A critical approach.' In D. Scott and E. Hargreaves (eds.) *The SAGE Handbook of Learning*, Los Angeles: SAGE, pp. 83–93.
- Filak V.F. (2010). 'Self-interest, the common good and a sense of purpose: Examining precipitating factors of the willingness to self-censor.' *College Media Review* 47(3–4), pp. 24–30.
- Gerhold L. and Brandes E. (2021). 'Sociotechnical imaginaries of a secure future.' *European Journal of Futures Research* 9(1), pp. 1–12. <https://doi.org/10.1007/s40309-021-00223-2>
- Gillespie M., Osseiran S., and Cheesman M. (2018). 'Syrian refugees and the digital passage to Europe: Smartphone infrastructures and affordances.' *Social Media + Society* 4(1). <https://doi.org/10.1177/2056305118808821>
- Gonzalez S.M. and Deckard F.M. (2024). "'We got witnesses" black women's counter-surveillance for navigating police violence and legal estrangement.' *Social Problems* 71(3), pp. 894–911. <https://doi.org/10.1093/socpro/spac043>
- Hage G. (2005). 'A not so multi-sited ethnography of a not so imagined community.' *Anthropological Theory* 5(4), pp. 463–475. <https://doi.org/10.1177/1463499605057834>
- Haggerty K.D. and Ericson R.V. (2006). *The New Politics of Surveillance and Visibility*. Toronto: University of Toronto Press.
- Haile Y.R. (2021). 'The liberalities and tyrannies of ICTs for vulnerable migrants: The status quo, gaps and directions.' *arXiv*. <https://doi.org/10.48550/arXiv.2108.09782>
- Hennink M.M., Kaiser B.N., and Weber M.B. (2019). 'What influences saturation? Estimating sample sizes in focus group research.' *Qualitative Health Research* 29(10), pp. 1483–1496.
- Hesselberth P. (2018). 'Discourses on disconnectivity and the right to disconnect.' *New Media & Society* 20(5), pp. 1994–2010. <https://doi.org/10.1177/1461444817711449>
- Kappeler K., Festic N., and Latzer M. (2023). 'Dataveillance imaginaries and their role in chilling effects online.' *International Journal of Human–Computer Studies* 179. <https://doi.org/10.1016/j.ijhcs.2023.103120>
- Kazansky B. (2021). '“It depends on your threat model”: the anticipatory dimensions of resistance to data-driven surveillance.' *Big Data & Society* 8(1). <https://doi.org/10.1177/2053951720985557>
- Kerezi K. and Nagy V. (2020). *A Critical Approach to Police Science: New Perspectives in Post-Transitional Policing Studies*. The Hague: Boom Uitgevers Den Haag.
- Khosravi S. (2007). 'The 'illegal' traveller: An auto-ethnography of borders.' *Social Anthropology/Anthropologie Sociale* 15(3), pp. 321–334. <https://doi.org/10.1111/j.0964-0282.2007.00019.x>

- Khosravi S. (2017a). *After Deportation: Ethnographic Perspectives*. New York: Palgrave Macmillan.
- Khosravi S. (2017b). 'Precarious lives: Waiting and survival in the United States and Europe.' *The Sociological Review* 65(5), pp. 858–876. <https://doi.org/10.1177/0038038517696642>
- Latonero M. and Kift P. (2018). 'On digital passages and borders: Refugees and the new infrastructure for movement and control.' *Social Media + Society* 4(1). <https://doi.org/10.1177/2056305118764432>
- Lawreniuk S. and Parsons L. (2017). 'The politics of migrant mobility: Power, protection, and support.' *Journal of Ethnic and Migration Studies* 43(3), pp. 365–383. <https://doi.org/10.1080/1369183X.2017.1349463>
- Leese M. (2022). 'Fixing state vision: Interoperability, biometrics, and identity management in the EU.' *Geopolitics* 27(1), pp. 113–133. <https://doi.org/10.1080/14650045.2020.1830764>
- Leurs K. and Smets K. (2018). 'Five questions for digital migration studies: Learning from interdisciplinary dialogue on migration, media and communication.' *Social Media + Society* 4(1). <https://doi.org/10.1177/2056305117753940>
- Lock M.M. and Farquhar J. (eds.) (2007). *Beyond the Body Proper: Reading the Anthropology of Material Life*. Durham: Duke University Press.
- Lyon D. (2010). 'Surveillance, power and everyday life.' In P. Kalantzis-Cope and K. Gherab Martín (eds.) *Emerging digital spaces in contemporary society: Properties of technology*. London: Palgrave Macmillan UK, pp. 107–120.
- Maitland C. and Xu Y. (2015). 'A social informatics analysis of refugee mobile phone use: A case study of Za'atari Syrian refugee camp.' *TPRC 43: The 43rd Research Conference on Communication, Information and Internet Policy Paper*. <https://dx.doi.org/10.2139/ssrn.2588300>
- Marcus G.E. (1995). 'Ethnography in/of the world system: The emergence of multi-sited ethnography.' *Annual Review of Anthropology* 24(1), pp. 95–117.
- Miellet S. (2021). 'From refugee to resident in the digital age: Refugees' strategies for navigating in and negotiating beyond uncertainty during reception and settlement in the Netherlands.' *Journal of Refugee Studies* 34(4), pp. 3629–3646.
- Milivojevic S. (2021). *Crime and Punishment in the Future Internet: Digital Frontier Technologies and Criminology in the Twenty-First Century*. Abingdon: Routledge.
- Milivojevic S. and Biles J. (2017). 'The paradox of border security: Migration, surveillance, and resistance.' *Critical Criminology* 25(2), pp. 197–215. <https://doi.org/10.1007/s10612-016-9354-5>
- Minca C. and Collins J. (2021). 'The Game: Or 'the making of migration' along the Balkan Route.' *Political Geography* 91(1). <https://doi.org/10.1016/j.polgeo.2021.102490>
- Morgan H. (2023). 'Living digitally like a migrant: Everyday smartphone practices and the (Re)mediation of hostile state-affects.' *Progress in Human Geography* 47(3), pp. 409–426. <https://doi.org/10.1177/03091325231174311>
- Nagy V. (2024). 'The risks of data litter in contemporary policing cultures: Interrogating data sharing between humanitarian NGOs and the Public Security

- Agencies.' In T. Østbø Kuldova, H.O.I. Gundhus, and Ch.T. Wathne (eds.) *Policing and Intelligence in the Global Big Data Era. Volume II: New Global Perspectives on the Politics and Ethics of Knowledge*. Cham: Springer Nature Switzerland, pp. 159–194.
- Nalbandian L. (2022). 'An eye for an 'I': a critical assessment of artificial intelligence tools in migration and asylum management.' *Comparative Migration Studies* 10(1). <https://doi.org/10.1186/s40878-022-00305-0>
- Nedelcu M. and Soysüren I. (2022). 'Precarious migrants, migration regimes, and digital technologies: The empowerment-control nexus.' *Journal of Ethnic and Migration Studies* 48(8), pp. 1821–1837. <https://doi.org/10.1080/1369183X.2020.1796263>
- Ozkul D. (2023). *Automating Immigration and Asylum: The Uses of New Technologies in Migration and Asylum Governance in Europe*. Oxford: University of Oxford.
- Pallister-Wilkins P. (2022). *Humanitarian Borders: Unequal Mobility and Saving Lives*. London: Verso Books.
- Petit N. (2020). *Big Tech and the Digital Economy: The Moligopoly Scenario*. Oxford: Oxford University Press.
- Pfeifer M. (2021). 'Intelligent borders? Securitizing smartphones in the European border regime.' *Culture Machine* 20, pp. 1–22.
- Pink S., Ardévol E., and Lanzeni D. (2020). 'Digital materiality.' In S. Pink, E. Ardévol, D. Lanzeni (eds.) *Digital Materialities: Design and Anthropology*. Abingdon: Routledge, pp. 1–26.
- Rayes A. and Salam S. (2022). *Internet of Things From Hype to Reality: The Road to Digitization*. Cham: Springer International Publishing.
- Sadowski J. (2020). *Too Smart: How Digital Capitalism is Extracting Data, Controlling our Lives, and Taking over the World*. Cambridge: MIT Press.
- Sánchez-Querubín N. and Rogers R. (2018). 'Connected routes: Migration studies with digital devices and platforms.' *Social Media + Society* 4(4). <https://doi.org/10.1177/2056305118808821>
- Scheel S. (2018). 'The autonomy of migration: A new framework for understanding the politics of mobility.' *Geopolitics* 23(1), pp. 110–127. <https://doi.org/10.1080/14650045.2017.1342243>
- Scheel S. and Ustek-Spilda F. (2019). 'The politics of expertise and ignorance in the field of migration management.' *Environment and Planning D: Society and Space* 37(4), pp. 663–681.
- Schopmans H. and Tuncer-Ebetürk I (2024). 'Techno-authoritarian imaginaries and the politics of resistance against facial recognition technology in the US and European Union.' *Democratization* 31(5), pp. 943–962. <https://doi.org/10.1080/13510347.2023.2258803>
- Susser D., Roessler B., and Nissenbaum H. (2019). 'Technology, autonomy, and manipulation.' *Internet Policy Review* 8(2). <https://doi.org/10.14763/2019.2.1410>
- Tanczer L.M., Deibert R.J., Bigo D., Franklin M.I., Melgaço L., Lyon D., and Milan S. (2020). 'Online surveillance, censorship, and encryption in academia.' *International Studies Perspectives* 21(1), pp. 1–36. <https://doi.org/10.1093/isp/ekz016>

- Trauttmansdorff P. (2022). 'Borders, migration, and technology in the age of security: Intervening with STS.' *Tecnoscienza-Italian Journal of Science & Technology Studies* 13(1), pp. 51–69. <https://doi.org/10.33679/tec-2022-1951>
- Učakar T. (2020). 'The rhetoric of European migration policy and its role in criminalization of migration.' *Causes and Consequences of Migrant Criminalization* 81, pp. 91–108. https://doi.org/10.1007/978-3-030-43732-9_5
- Wahlberg A. (2022). 'Assemblage ethnography: Configurations across scales, sites, and practices: post-structuralism.' In M. Hojer Bruun, A. Wahlberg, R. Douglas-Jones, C. Hasse, K. Hoeyer, D. Brogård Kristensen, and B.R. Winthereik (eds.) *The Palgrave Handbook of the Anthropology of Technology*. Singapore: Springer Nature Singapore, pp. 125–144.
- Wang Y., Ahmed S., and Bee A.W.T. (2024). 'Selective avoidance as a cognitive response: examining the political use of social media and surveillance anxiety in avoidance behaviours.' *Behaviour & Information Technology* 43(3), pp. 590–604. <https://doi.org/10.1080/0144929X.2023.2182609>
- Zhang G. (2023). 'Mobile media in China: Media practice as a research orientation.' *Mobile Media & Communication* 11(1), pp. 80–87. <https://doi.org/10.1177/20501579221134947>
- Zuboff S. (2019). *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*. New York: PublicAffairs.
- Zureik, E., Stalker, L. H., Smith, E., Lyon, D., & Chan, Y. E. (2010). *Surveillance, privacy and the globalization of personal information*. Montreal: McGill-Queen's University Press.