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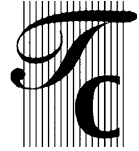
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Article

Border penalty as antagonistic politics

Theoretical Criminology

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Abstract

This article examines the socio-political implications of using criminal law to address migration issues in Italy. It delves into the polarised political debate characterised by crimmigration, on the one hand, and calls to criminalise border violence to protect migrants, on the other hand. It argues that both uses of penalty reflect and foster penal antagonism, whereby both sides of the debate seek to impose their views using punishment. Penal antagonism leads to more migrants being incarcerated and forecloses possibilities for more political changes to the prevailing anti-immigration paradigm. Drawing on Chantal Mouffe's work, the article proposes agonistic politics as an alternative approach: a political confrontation to assert one's vision about migration, but where the opponent is an adversary to engage politically rather than an enemy to be delegitimised through penalty. Moving from penal antagonism to political agonism could help decouple migration from penalty and remove a central source of harm for migrants.

Keywords

migration, crimmigration, international criminal justice, Italy, agonism

In June 2019, Carola Rackete, captain of the *Sea-Watch 3*, a charity ship with 43 rescued migrants on board, was arrested by Italian authorities. She had collided with a police boat that was blocking her from docking. Her arrest exemplified the growing antagonism towards non-governmental organisations (NGOs) that rescue migrants in the

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Mediterranean Sea and the attempts to criminalise their search and rescue (SAR) operations. Meanwhile, Italian authorities have also conducted criminal investigations to protect migrant rights. Between 2018 and 2019, three proceedings were launched against Matteo Salvini, the former Minister of the Interior, for allegedly kidnapping rescued migrants by refusing to let them disembark from coastguard vessels. Although the parliament blocked one case under Italian immunity rules and another was dropped before trial, Salvini is currently on trial for the third case involving 147 migrants who were stranded for two weeks.

Rackete's and Salvini's cases have attracted global media attention. Salvini's supporters have backed the far-right leader's actions while branding Rackete a criminal. Migrant advocates have condemned Italy's cases against SAR operations as 'criminalisation of solidarity' (Carrera et al., 2020) but have supported the proceedings against Salvini with a form of 'progressive punitivism'. This term, coined by Hadar Aviram (2020), refers to the attempt to turn 'the cannons of the punitive machine against the powerful' to advance 'social equality'. 'Criminalisation of solidarity' and 'progressive punitivism' are at the opposite ends of a spectrum of ways of using criminal law to address immigration issues, with a 'messy middle' that involves the criminalisation of migrants. Since 2013, about 3200 people have been arrested in Italy for migration-related crimes, mostly people accused of driving migrant vessels (ARCI Porco Rosso, 2024). The same Italian laws used to criminalise 'boat drivers' also reflect international obligations to combat smuggling and human trafficking. In addition, Italian courts have exercised extraterritorial jurisdiction to try cases of torture, slavery and sexual violence against migrants in Libya, complementing the International Criminal Court's (ICC) investigations of the same crimes. The defendants are all migrants who reached Italy via the Mediterranean Sea.

These cases seem to have different motivations and cover various offences, but in reality the distinction between cases that use criminal law to prevent irregular immigration and those that aim to safeguard migrant rights is blurry. Offences against the person are prosecuted alongside immigration offences, and the same judicial authorities act as enforcers of law-and-order and protectors of migrants. We could use the term 'border penalty' to describe this use of penal power in relation to borders, whether to support or deter border crossers.

This article continues the scholarly debate about the use of criminal law to deal with migration. It investigates the social and political costs of using penalty as a main tool to advance conflicting ethical-political visions on migration. It builds on the substantial academic attention that the use of penal power to deter migration, protect borders and control non-citizens has received in recent years (Aas and Bosworth, 2013; Aliverti, 2013; Bosworth, 2014; Mitsilegas, 2015; Melossi, 2015; Franko, 2020). It also contributes to the socio-legal scholarship on immigration and criminal law intermeshing: 'cimmigration' (Gatta et al., 2021; Stumpf, 2006). Moreover, it considers how 'border penalty' is not always openly repressive but at times 'benevolent' (Barker, 2017) and enmeshed with humanitarian concerns (Bosworth, 2017; Ticktin, 2011), such as ending impunity for abuses against migrants (Mann, 2021). The article situates its analysis in the context of Italy and its role in migration across the Mediterranean (Bernardi, 2018; Manacorda, 2018a; Masera, 2022; Militello and Spena, 2015).

The main argument is that in Italy ‘border penalty’ both reflects and reifies antagonistic politics. The same criminal laws are mobilised both to exclude and disenfranchise unwanted racialised migrants and to evoke moral outrage and delegitimise anti-immigration policies. This article criticises both uses of penalty and argues that, in a climate of punitive immigration policies, any attempt to use penalty to protect migrant rights may have the unintended consequence of increasing – rather than reducing – migrants’ suffering. Building upon the work of Chantal Mouffe (2013), the article presents the case for ‘agonistic’, as opposed to ‘antagonistic’, politics in dealing with migration: a recognition of the value of the political struggle between adversaries over opposing ways of dealing with complex issues of values and power. I argue that moving from antagonism to agonism could be a first step towards ending ‘border penalty’ and Europe’s securitised border regime. Although not resolute, agonism could help decouple migration from penalty and remove a central source of violence and harm for migrants.

The article has four parts. The first introduces Mouffe’s concepts of ‘agonism’ and ‘antagonism’ as tools to examine and criticise ‘border penalty’. The second part shows how Italian ‘border penalty’ both reflects and reproduces antagonistic politics, analysing examples of crimmigration and cases that frame border violence as an (international) crime. The third part discusses the consequences of a migration debate that relies on penal antagonism, which leads to the incarceration of migrants for contradictory purposes of protecting national borders and human rights. The final part concludes by making the case for agonistic migration politics and the rejection of penalty in addressing migration issues.

Thinking politically with Mouffe

Mouffe (2013) proposes a theory that challenges the dominant rationalist and consensual approach to democracy (epitomised by Habermas’s and Rawls’s works) and places passions and conflicts as the driving forces of politics. In *Hegemony and Socialist Strategy* (2001), co-authored with Ernesto Laclau, she claims that the nature of the political cannot be understood without the concepts of antagonism and hegemony, which express the dimension of ‘radical negativity’ that pervades human relations. Antagonism denotes the ever-present possibility of irreconcilable conflict between social groups with incompatible interests and values. Hegemony refers to the process of articulating and creating dominant social practices that shape a certain order in society. Both concepts foreclose the possibility of a society beyond division and power.

In subsequent books, Mouffe (2000, 2013) contends that the political is concerned with forms of identification that create collective identities through a necessary demarcation of an ‘us’ versus a ‘them’. This demarcation can take different forms depending on how differences are perceived and handled. It can be either agonistic or antagonistic. Agonism is a mode of relation that accepts differences as legitimate. Each side sees the opponent as an adversary ‘with whom one shares a common allegiance to the democratic principles of “liberty and equality for all”, while disagreeing about their interpretation’ (Mouffe, 2013: 7). Antagonism is a ‘confrontation between non-negotiable moral

values or essentialist forms of identifications' (Mouffe, 2013: 7). Here differences are viewed as threats and the opponent as an enemy. Mouffe (2000) argues that democratic politics should aim to make conflict agonistic – rather than antagonistic – by creating collective forms of identification around democratic objectives and by mobilising passions towards democratic designs.

Conflict in liberal democratic societies cannot and should not be eradicated, since the specificity of pluralist democracy is precisely the recognition and the legitimation of conflict. What liberal democratic politics requires is that the others are not seen as enemies to be destroyed, but as adversaries whose ideas might be fought, even fiercely, but whose right to defend those ideas is not to be questioned. (Mouffe, 2013: 7)

Mouffe suggests that the challenge of democracy is to establish the us/them distinction in a way that respects pluralism and defuses the potential violence of human relations.

In what follows, I draw on Mouffe's work to suggest that Italian 'border penalty' – regardless of its advocates and motivations – expresses and drives antagonistic politics, which divides society into irreconcilable camps, harming not only migrants, but also the quality of democracy. I then advocate for a more agonistic confrontation about migration through institutional and extra-institutional efforts, which – even when pro-migrant views are not hegemonic – does not centre on the penalisation and disenfranchisement of either side's adversaries.

Border antagonism

Transnational migration is one of the most contentious ethical–political issues in Italy and other Global North countries (Heath et al., 2020). The border, Katja Franko (2020: 5) observes, 'is a site of a clash of moralities, with fights over conflicting notions of membership, identity, and what is right and good'. Given the power dynamics and the fundamental nature of the values at stake, this confrontation is prone to antagonism – a struggle between enemies who constantly question the legitimacy of the other side's opinions and behaviours. This does not imply that the migration debate is inevitably antagonistic. Different approaches to migration could be treated as simply different, rather than existential threats to the other side's core values or interests. However, the existing antagonism in the migration debate is exacerbated when both sides resort to penalty against their opponents. The mobilisation of penalty as a key governing tool of ethical–political issues is not unique to migration, but it is a common feature of contemporary public life (Aviram, 2020; Simon, 2007). As Ian Loader (2008) notes, this development is bound up – as an effect and cause – with the decline in agonistic politics. Criminal law is the most intolerant and punitive branch of law. A decision to criminalise is always a decision to exclude, which may lead to segregation through incarceration or stigmatisation of individuals as deviant. When both sides of the migration debate attempt to make their views hegemonic using punishment, the antagonistic nature of the confrontation is intensified. As I show in this section, one side – dominant in Global North countries – uses crimmigration, the convergence of immigration and criminal law, to oppose migration. The other side – marginalised but vocal – invokes and

enacts criminal law to support migration and punish border violence as an (international) crime.

Crimmigration

In recent decades, European states have increasingly adopted a securitarian approach to immigration (Munster, 2009). Their policy of border closure has denied safe entry to most people from the Global South and has resulted in violence and illegality when migrants try to cross militarised borders. The Mediterranean has become ‘the world’s deadliest border’ (Albahari, 2015), with over 29,000 migrants dead or missing since 2014 (IOM, 2024). Consecutive Italian governments have enforced border closure by physical means, such as pushback, expulsions and cooperation with the Libyan ‘coastguard’ to violently intercept migrant boats. In 2023, Giorgia Meloni’s far-right government agreed with Albania to build reception centres there, where people rescued at sea by Italian ships would be detained and assessed for asylum. Italy has also enforced border closure by legal means, through the increasing merger of criminal and immigration law. Crimmigration is an antagonistic approach to migration. As Juliet Stumpf (2006: 396–397) notes, both immigration law and criminal law act ‘as gatekeepers of membership in society, determining whether an individual should be included in or excluded from our society’. They create and enforce the us/them distinction, which is exacerbated when immigration law and criminal law converge. Crimmigration embodies this division in essentialist terms. Nationals are seen as rightful members who enjoy rights and privileges based on their passport, ethnicity and culture. Conversely, (some, generally racialised) non-citizens are denied entry, punished and expelled because they are deemed unworthy of inclusion in the national community (Barker and Scharff Smith, 2021). This division is also exploited for political purposes, as irregular migrants are scapegoated for various social problems and presented as enemies to be removed.

In Italy, crimmigration manifests in three ways: the use of criminal law for violations of immigration law; the resort to immigration procedures (e.g. expulsion) in connection with criminal convictions; and the restriction of personal liberty (e.g. arrest and detention) within the immigration system (Gatta, 2018). The aim is to deter migration by making Italy less attractive to unwanted racialised migrants and to exclude and expel those who enter Italy irregularly. This section focuses only on the first aspect of crimmigration: the use of criminal law for violations of immigration law. The first major step towards Italy’s crimmigration was the introduction of the offence of non-compliance with a removal order within the Unified Text on Immigration in 2002.¹ Originally carrying a prison term of 6 months to 1 year, this crime later escalated to 1–4 years. Thousands of trials involving undocumented migrants took place until 2011 (Masera, 2019) when the Court of Justice of the European Union (EU) ruled against prison sentences for irregular migrants.² Italy kept the criminalisation but replaced the custodial sentence with a pecuniary one. Another source of crimmigration is the offence of irregular entry and stay, introduced in 2009, which punishes the status of being an unauthorised migrant with pecuniary sanctions.³ Prison sentences of up to 4 years are reserved for cases of illegal re-entry to Italy after expulsion⁴ or after ‘deferred refusal of entry’,⁵ typically affecting migrants who arrive via the Mediterranean.

Another way that criminal law is used to exclude unwanted migrants is via the offence of aiding illegal immigration.⁶ Penalties for this offence, recently increased, range from 2 to 6 years' imprisonment and a fine for 'simple' aiding and abetting, with higher prison sentences for aggravated cases. This offence applies to anyone who has any role, even minimal, in facilitating the irregular entry of foreigners into Italy, regardless of whether they acted for profit. It criminalises migrant smuggling, but also anyone who is identified as the driver of a migrant boat and those who assist undocumented migrants. The rationale is to defend national borders, overlooking distinctions between journey organisers and active participants. Italian authorities have used this crime to prosecute and punish thousands of migrants accused of driving boats across the Mediterranean. The Minister of the Interior reports that 550 'boat drivers' were arrested in Italy in 2022–2023 alone (ARCI Porco Rosso, 2024), a figure consistent with those recorded since 2013 (ARCI Porco Rosso and Alarm Phone, 2021).

Tamar Pitch (2022) argues that migrants in Italy are subjected to a 'criminal law of the enemy' (Jakobs, 1985), whereby identity and status matter more than alleged conduct. A report by ARCI Porco Rosso and Alarm Phone (2021) entitled *From Sea to Prison* reveals that proceedings against migrants are influenced by 'a heavy political context' that undermines the normal guarantees of a fair trial. Their arrests seem to follow opaque dynamics, aiming to find a culprit at any cost rather than those who organised or facilitated the migrant journey (ARCI Porco Rosso and Alarm Phone, 2021). 'Boat drivers' face charges on weak evidence from unreliable witnesses, inadequate access to legal defence and closed court hearings. They are often denied communication with families, they are not provided with translators and, if minors, they can end up in adult prisons (ARCI Porco Rosso and Alarm Phone, 2021). During trials, encouraged by the fact that the defendants are foreign nationals without economic resources or support networks in Italy, public prosecutors adopt an extremely punitive attitude towards migrants, whom they perceive as enemies. They do not make any concessions to the defence and often demand the maximum sentences, including life imprisonment (ARCI Porco Rosso and Alarm Phone, 2021). According to data from the Italian Ministry of Justice published by BBC News (2022), in March 2022 there were 952 people in Italian prisons charged with aiding irregular immigration, of whom 562 had been convicted.

'Criminalising solidarity', or assistance to migrants' unauthorised entry or stay in Italy, is another way of using penal intervention to oppose migration. Here, the antagonist perspective of an 'us', which defines 'them' as a criminal problem, is extended from migrants to those who assist them. The offence used is aiding illegal immigration, although the norm expressly exempts those who provide 'aid and humanitarian assistance' to 'aliens in state of need'.⁷ NGOs conducting SAR operations are one of the main targets of this criminalisation (Chapman, 2021; Scieurba, 2022). They operate in the Mediterranean because EU and Italian border operations do not prioritise saving human lives at sea, on the argument that SAR efforts may encourage migration. In 2017, the then-centre-left government sought to make these NGOs sign a code of conduct that severely limited their activities, following accusations of being a pull factor for illegal immigration by media and politicians (Cusumano and Bell, 2021). Some prosecutors also launched criminal investigations to ascertain whether rescue ships colluded with smugglers. In 2018, with Salvini as the new Minister of the Interior in a coalition of the nationalist League and anti-establishment Five

Star Movement, not only NGO, but also Italian coastguard ships were prevented from disembarking migrants in Italian harbours for days and weeks. This was followed by further criminal proceedings against the crews of NGO ships, with accusations ranging from aiding illegal immigration to resisting or assaulting a warship and resisting a public official. The latter is, for instance, the case of Captain Rackete, described in the introduction. In 2023, the recently elected far-right government enacted a new decree further ‘criminalising solidarity’.⁸ Specifically, it imposes harsh penalties on SAR NGOs if they do not comply with its provisions, such as the ban on conducting multiple rescue operations on the same mission (which is linked to the government’s practice of assigning rescue ships to distant ports of disembarkation). The sanctions, formally administrative, effectively obstruct SAR operations.

A notorious example of the ‘criminalisation of solidarity’ is the case involving Mimmo Lucano, the former mayor of the town of Riace who revitalised his community by welcoming and integrating migrants (Procacci et al., 2023). In 2021, Lucano was convicted of criminal conspiracy to assist illegal immigration, fraud, embezzlement and abuse of office, and sentenced to 13 years and 2 months in prison and a €700,000 fine (almost double the sentence requested by prosecutors). The judges ruled that Lucano had violated the public tender process by awarding waste collection contracts to two cooperatives that were created to help migrants find work. However, the judges admitted that Lucano did not make any monetary profit from it. The conviction was seen as the criminalisation of a widely praised model of integration for migrants (Pitch, 2022). On appeal, Lucano’s sentence was reduced to 1 year and 6 months in prison with most accusations overturned.⁹ Prosecution of individuals assisting migrants in transit adds to the ‘criminalisation of solidarity’ trend. For example, Andrea Costa, the leader of an organisation that helps migrants in Rome, was charged with aiding illegal immigration and faced up to 18 years in prison before being acquitted in a fast-track trial. Lorena Fornasir and Gian Andrea Franchi, who gave medicine, clothes, water and food to migrants in Trieste, were investigated for the same offence and had their house searched by the police. Their case was dismissed in 2021.

Investigations of individuals acting in solidarity with migrants are often found devoid of any evidence. The charges against Lucano almost all collapsed in the appeal trial. A report from the EU Agency for Fundamental Rights (2023: Annex) indicates that, as of June 2023, of 16 criminal cases involving SAR crew or NGO staff, 9 were dismissed and 7 were pending (with 5 at the trial stage). However, these cases received extensive media coverage and contributed to an atmosphere of stigmatisation of humanitarian assistance in Italy (Masera, 2022). By portraying SAR NGOs and migrant activists as ‘pirates’, ‘sea taxis’ and ‘friends of the smugglers’, the crimmigration discourse has established an unbridgeable divide between well-behaved citizens and ‘colluded’ others (often identified by their nationality, such as ‘German’ or ‘Spanish’) (Cusumano and Bell, 2021). The contrast between the outcomes of proceedings against racialised migrants and those against the white Europeans who assist them is also noteworthy. While migrants often face criminal convictions and prison terms, activists typically face dropped charges or acquittals. This further confirms the racial component of the us/them distinction that Italy’s crimmigration promotes.

Border violence as an (international) crime

Italy's crimmigration has faced widespread condemnation from human rights advocates and migration scholars. However, many of them also support using criminal law to protect migrant rights and address border violence through domestic and international criminal means (Mann, 2021). The resort to criminal law to vindicate migrants' suffering is also motivated by, and reinforces, antagonistic politics. Here, the us/them distinction is established through a moral vocabulary. For migrant advocates, the clash is not about fixed characteristics, such as ethnicity or nationality. Rather, it is about non-negotiable moral values they hold and see as threatened by the anti-immigration camp. Confronted with evidence of human rights violations at borders, migrant advocates aspire to use the 'moral voice' of criminal law (Duff, 2001) to express outrage at these abuses and delegitimise the anti-immigration policies that contribute to them. Ideally, they prefer that punishment be imposed by international institutions seen as enforcers of universal morality. This approach aligns with Durkheim's (1933) view of criminal law as a tool to express moral disapprobation, reinforce group solidarity and restore the violated moral order. Thus, pro-migrant politics operates within a moral-penal framework, using the language of good and evil to discriminate between 'us' (the righteous defenders of human rights) and 'them' (the evil violators), while seeking punishment to mark this distinction (cf. Mouffe, 2013). This pro-migrant penal stance includes: (a) the attempt to hold anti-immigration politicians criminally accountable for violating migrant rights; (b) the appeal to extraterritorial jurisdiction or the ICC to prosecute abuses in Libya; and (c) the application of anti-smuggling and (to a lesser extent) the anti-trafficking frameworks to protect 'vulnerable' migrants. These cases are examples of 'progressive punitivism' (Aviram, 2020) and are part of wider 'anti-impunity' trends that have made human rights a driving force of national and international penalty (Engle, 2015; Pinto, 2020).

First, migrant advocates have proposed targeting the politicians who enact policies that violate migrant rights (Parsi and Vitarelli, 2023). They have denounced the violence that European leaders inflict by militarising borders and demanded a shift in criminal proceedings from targeting the act of illegally migrating to punishing those who design and implement policies resulting in abuses against migrants (Raimondo, 2023). Itamar Mann (2021: 723) explains the logic behind this approach:

Can putting more people in prison ever be a progressive solution to anything? Perhaps not a solution. But as long as we have prisons, let them be filled with those who have committed the worst of crimes, instead of with migrants and refugees.

The criminal proceedings against Salvini exemplify this trend. As Minister of the Interior in 2018, Salvini adopted a policy of denying disembarkation to rescued migrants. In response, an Italian prosecutor initiated a criminal investigation against him, alleging that his refusal to let 177 rescued migrants disembark from a coastguard vessel constituted aggravated kidnapping. The prosecutor sought to prosecute Salvini, but the Italian Senate, which had to authorise the trial while he was in office, rejected the request. The following year, when his party had moved to the opposition, Salvini

faced two more investigations. The Senate voted in favour of the prosecution in both cases. The first case was eventually dismissed, whereas the second is ongoing (Masera, 2022).

Migrant advocates have also tried to trigger international criminal investigations, aware of the political difficulties of holding state officials accountable through domestic prosecutions. Lawyers Omer Shatz and Juan Branco submitted a communication to the ICC Prosecutor in (2019) accusing the EU and Italy of crimes against humanity for their policy to curb migration flows from Africa via the Mediterranean during 2014–2019. The allegations include murder, deportation, enslavement, enforced disappearances, torture, rape and other inhuman acts. The communication urges the investigation of European state officials (e.g. former EU representative Federica Mogherini, Emmanuel Macron and Angela Merkel) for their alleged systematic failures to fulfil their rescue duties at sea and for outsourcing border control to the Libyan ‘coastguard’. Although migrant advocates realise that it is improbable that the ICC will prosecute European leaders, they emphasise that framing border violence as an international crime may have an ‘expressivist’ value. As Ioannis Kalpouzou (2020: 577), author of another communication to the ICC about abuses on migrants in the Greek context, puts it: ‘the application of [international criminal law] can influence political judgement as to who is, and who is not, on the right side of history’.

In these cases, opponents are not defined as political adversaries but as moral enemies. Salvini and other European leaders responsible for repressive anti-immigration policies become criminals to imprison rather than adversaries to fiercely fight through political means. Consequently, politics moves from the parliament to the courtroom. The proceedings against Salvini illustrate how ending impunity for border violence risks leading to ‘political trials’, in the sense that Judith Shklar (1964: 149) defines as ‘trials in which the prosecuting party’ pursues not only law enforcement but also ‘the destruction, or at least the disgrace and disrepute, of a political opponent’. This does not mean that proceedings against Salvini and other anti-immigration politicians breach the rule of law, but that they are highly publicised penal rituals with a clear political meaning, namely to discredit high-profile politicians and their policies through penal means (Brandariz, 2023). As Oscar Camps, the founder of a SAR NGO, says: ‘Sending Matteo Salvini to trials means re-establishing ... the inviolability of international conventions governing rescue at sea [and] the ... principle that ... human rights must be respected and the law is the same for everyone’ (Ziniti, 2020).¹⁰

Another strategy that migrant advocates have pursued is the prosecution of non-state actors involved in abuses against migrants. The Libyan context has received particular attention, because migrants transiting through the country have faced systematic abuses since the 2011 revolution. Migrant advocates have framed the violence in Libyan camps as international crimes and have called for an end to impunity. In response, some European states, including Italy, have pursued prosecutions based on extraterritorial jurisdiction for crimes against migrants in Libya (Prosperi, 2023). Italian courts have convicted several migrants identified as responsible for such abuses and sentenced them to prison terms ranging from 10 years to life (Crippa, 2022). The Milan Appeal Court, for example, upheld a life sentence for a Somali citizen who was recognised by other migrants as the perpetrator of torture and murder in a Libyan camp, after his arrival in

Italy via the Mediterranean (Veglio, 2018).¹¹ Another case involved two Egyptians and a Guinean national who were rescued at sea and then identified in Italy by other migrants who claimed to have been tortured by them in Libya. In 2020, the Messina Tribunal sentenced the defendants to 20 years in prison for criminal conspiracy, kidnapping and torture (Mentasti, 2020), reduced to 12 years on appeal.¹²

Migrant advocates praise these domestic prosecutions, but they regret the absence of references to crimes against humanity, because of the lack of relevant legislation in Italy, and recognise that the defendants are not high-ranking in the command structure (Meloni and Zhang, 2021; Prospero, 2023). Therefore, they have sought to involve the ICC Prosecutor, which has been investigating the situation in Libya since 2011, after a United Nations (UN) Security Council referral. The ICC Prosecutor has repeatedly voiced serious concerns about the crimes against migrants in Libya (ICC OTP, 2022), but has not brought any charges yet. To prompt the ICC to act, several organisations have submitted communications to the Court, analysing the abuses against migrants in Libya, particularly in detention centres, and the interception of migrants at sea as crimes against humanity and war crimes (ECCHR, 2022; FIDH et al., 2021; UpRights et al., 2022). However, this insistence on penal accountability risks neglecting the complex circumstances leading some migrants to commit abuses in Libyan camps. By portraying these individuals as *hostes humani generis* (enemies of humankind), the socio-economic and political landscape that underlines the violations may be seen as diminishing the culpability of perpetrators and thus conveniently disregarded.

Finally, migrant advocates recognise the potential of anti-trafficking and anti-smuggling legislation to express outrage at migrant rights violations. They acknowledge that states fight trafficking and smuggling for border security reasons and not human rights concerns, but they still deem these criminalisation efforts necessary to repair vulnerable victims and punish mighty perpetrators – thus reproducing the us/them distinction in moral–penal terms. As Janie Chuang (2014: 641) argues: ‘when pursued in a victim-centered, rights-protective manner, criminal justice interventions unquestionably offer much-needed accountability and restitution for egregious wrongs’. Italy has implemented its international obligations on human trafficking (2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children) and migrant smuggling (2000 Protocol Against the Smuggling of Migrants by Land, Sea and Air) between 2003 and 2014.¹³ Human trafficking is a specific offence,¹⁴ whereas migrant smuggling falls under the crime of aiding illegal immigration.¹⁵ Italian authorities have focused more on prosecuting migrant smuggling than human trafficking, resulting in uneven law enforcement outcomes (US Department of State, 2023).

To try individuals for migrant smuggling and, to a lesser extent, human trafficking, Italian courts have developed a rich jurisprudence on the extraterritorial application of Italian law to acts committed abroad or in international waters (Crippa, 2022). The aim is to prevent impunity for serious human rights violations and ensure accountability for perpetrators within criminal networks (Manacorda, 2018b). This jurisdictional extension has, for example, enabled the Agrigento Court of Assizes to convict a Nigerian national for several crimes, including transnational criminal conspiracy for human trafficking and aiding illegal immigration, and sentence him to more than 24 years’ imprisonment.¹⁶ According to the prosecutors, the defendant was a prisoner in a Libyan centre

who agreed to abuse other migrants in exchange for a free trip to Italy (Patanè, 2019). Another ongoing case involves an Eritrean man accused of leading a transnational organisation for smuggling migrants from Central Africa to Europe. He was arrested in 2022 by Interpol at Addis Ababa and extradited to Italy. He will be tried in Catania, where the migrants he allegedly helped smuggle were disembarked. The arrest was achieved through a joint international cooperation team involving judicial and police authorities in several European countries, Europol, and, since 2022, the ICC (Capacci, 2023). The ICC Prosecutor stated that joining the team was a further step to bring to justice traffickers and smugglers who target ‘the most vulnerable members of society, those who have no ability to assert their core human rights’ (Khan, 2022).

‘Borderline’ penalty

In the antagonistic confrontation around migration, penalty serves both anti-immigration and pro-migrant agendas. Anti-immigration politicians use it to control and exclude migrants; pro-migrant actors invoke it to condemn Europe’s violent border regime. However, a closer examination of how criminal law operates in practice in the migration context reveals that many criminal cases have the dual purpose of deterring unregulated migration while protecting migrant rights. In Italy, some of the harshest prison sentences for crimes against migrants are also linked to convictions for immigration offences. Border authorities, prosecutors and judges act as guardians of both national borders and migrants’ dignity. The rationales of this penalty are ‘borderline’ because they are ambiguous and draw on both anti-immigration and pro-migrant discourses. Moreover, this penalty targets racialised migrants only. After all, penalty is not a tool in the hands of migrant advocates or individual victims but requires institutionalised authorities to enforce the law and punish perpetrators. The antagonistic confrontation also operates in a context of asymmetrical power relationships, where the anti-immigration side wields the most power over policy and practice. In a climate where anti-immigration views are hegemonic, penalty is more likely to target migrants than their abusers. Not surprisingly, after the shipwreck in 2023 that killed at least 85 people near Cutro, Italian authorities have swiftly brought to trial four migrant ‘boat drivers’ (one of them has already been sentenced to 20 years’ imprisonment), whereas investigations against institutional actors for failing to rescue migrants have struggled to progress (Parsi and Vitarelli, 2023).

The aggravated offences of aiding illegal immigration are an example of ‘borderline’ penalty.¹⁷ They punish the facilitation of illegal immigration when migrants face serious risks or harm during (or after) border crossing. The prison sentences range from 6 to 30 years. These offences have been frequently used after shipwrecks and rescues in the Mediterranean. As the Italian Constitutional Court confirmed,¹⁸ they aim to protect both public order and migrants’ personal integrity. Given the presumed link between transnational smugglers and Italian organised crime, anti-mafia agencies generally investigate these offences. These agencies have wide-ranging investigative powers, such as covert surveillance and undercover operations, and have extended their crime-control operations far beyond Italy’s borders (ARCI Porco Rosso and Alarm Phone, 2021; Minetti, 2022). Their strategy is to dismantle smuggling and trafficking networks in Libya by arresting low-level operators and offering them plea deals to implicate their

superiors (Campbell and D'Agostino, 2021). However, most cases have targeted migrants 'boat drivers' and few, if any, smuggling leaders have been convicted so far. The antagonistic perspective is particularly evident in courts: suspected 'boat drivers' are not only seen as illegal migrants, but also as human rights violators. They are held responsible for all the deaths and abuses that occurred at sea, even when they were not directly involved (ARCI Porco Rosso and Alarm Phone, 2021). An example is the case of the 'Libyan footballers', four migrants and semi-professional footballers who were accused of driving a migrant boat that shipwrecked in 2015, resulting in 49 deaths. According to organisations and journalists who followed the case, their trial was characterised by contradictions in the witness statements and inconsistencies (borderline-europe, 2021). However, in 2021, the Italian Court of Cassation upheld their sentence of 30 years' imprisonment, dismissing the doubts about the reliability of evidence as insufficient to overturn the verdict and penalty.¹⁹

Miscarriages of justice are not collateral but integral elements of the quest to end impunity for criminal networks that profit from trafficking, smuggling and slavery. Several inquests have revealed that prosecutions of crimes against migrants are built on hasty investigations and aggressive interrogations, with the primary aim of finding a culprit (ARCI Porco Rosso and Alarm Phone, 2021; Campbell and D'Agostino, 2021). For instance, after a shipwreck in 2013 that killed 368 people near Lampedusa, Italian anti-mafia prosecutors launched extensive investigations to capture the smugglers behind the tragic crossing. They focused on an Eritrean farmer and obtained his extradition from Sudan to Italy. However, ample evidence suggested that he was a victim of mistaken identity, such as DNA tests, witnesses, audio-recordings and a documentary showing that the 'real' smuggler was free in Kampala. For years, Italian authorities denied their error and tried to intimidate activists and reporters who revealed it by wire-tapping their phones. After 3 years of imprisonment, a judge acknowledged the defendant's mistaken identity but convicted him of aiding illegal immigration for helping his cousin to reach Libya (Tondo, 2019).

Italian prosecutions of migrant abuses in Libya are also controversial. These cases have only involved non-white people who arrived in Italy via the Mediterranean and were accused by other migrants of being perpetrators within Libyan camps. The defendants were low-ranking actors who frequently claimed they were forced to abuse their peers to avoid being tortured themselves. Most of them were prisoners in Libyan camps working as security guards to pay their ransom and be allowed to leave. Here, the distinction between perpetrators and victims is more blurred than what criminal trials seeking to punish the evil and vindicate the innocent can capture. As one witness in these cases stated to the judges: '[u]nfortunately, you would have to be there to understand the situation' (Campbell and D'Agostino, 2021). Furthermore, in most proceedings, the charges of conspiracy to aid illegal immigration overshadowed the charges of crimes against migrants, reflecting a priority for offences against public order over offences against the person (Crippa, 2022).

Under the banners of 'anti-impunity' and 'justice for victims', widespread incarceration and stigmatisation of non-white non-Europeans are legitimised. In an already securitised border regime, the increased penalisation of migration, even if well-intended, may make the Mediterranean route even more perilous. As documented by ARCI Porco

Rosso and Alarm Phone (2021), the urge to arrest traffickers and smugglers at any cost has led to practices that jeopardise migrants' lives. For instance, more-skilled migrants refuse to be captains because they are aware of the legal risks, leaving the boats in the hands of inexperienced people. During the journey, passengers are sometimes forced to stay in the hold to evade identification, risking asphyxiation. Other times, migrants are taken to international waters with a functional boat and then transferred to unseaworthy vessels, while the smugglers return to Libya. During SAR operations, Italian authorities' priority is to identify the smugglers rather than assist migrants. In addition, criminal investigations into Libya migrant abuses seem to have resulted in greater use of underground organisations for journeys, which has shortened the time for planning and made them more hazardous (ARCI Porco Rosso and Alarm Phone, 2021).

Penal antagonism harms not only migrants, but also the quality of democracy. Pro-migrant advocates and anti-immigration politicians, despite their opposition, mirror each other when they frame migration issues as criminal problems. This diverts from meaningful political deliberation, as political issues that depend on competing principles and values choices are reduced to a question of 'crime', which is not to be debated and decided but discovered and adjudicated (cf. Invernizzi Accetti, 2021). Relying on penal logic and language to make one's position hegemonic and assert one's values also elevates domestic and international penal institutions to the primary solutions to problems, to the detriment of a properly democratic political struggle (Pitch, 2022). When a confrontation between different positions shifts from the domain of democratic politics to the domain of penalty, the other side's actions cease to be contestable political expressions and become crimes to be repressed. This way, the possibility of legitimate dissent is suppressed. But whereas Salvini's anti-immigration policies are criminalised when he is out of office, the struggles and protests of undocumented migrants are repressed all the time (Dadusc and Mudu, 2022). Moreover, if migrant advocates want to make immigration policies less punitive, demanding the criminalisation of their opponents who already hold most of the political power would not moderate them. Instead, it provokes strong and destructive political reactions – as Salvini's cases illustrate (Mann, 2021).

Border agonism

In a book that denounces Italy's securitarian drift and its impact on the marginalised, Pitch (2022: 52–53) asks: 'Is it realistic to believe that criminal justice can solve problems of exploitation, resource inequality, power (even symbolic) and various discriminations?'. She responds: 'Criminal justice may appear an easy and accessible solution. But it is neither a solution nor part of one: rather, it is a major source of the problem' (Pitch, 2022: 53). Indeed, penalty cannot solve the violence and exclusionary politics of borders. Rather, the solution should come from agonistic politics. Managing migration is a complex political issue that will shape the public debate in Europe for years. Different visions of the future inevitably clash, often in harsh tones. The conflictual nature of the debate is also rooted in asymmetrical power relations and structural dynamics, where class conflict and global resource distribution play key roles. What is crucial is not the elimination of this conflict by reducing migration to an apolitical administrative matter,

but that the confrontation adopts an agonistic form; that, as Mouffe (2013: 7) puts it, '[a]dversaries fight against each other because they want their interpretation of the principles to become hegemonic, but they do not put into question the legitimacy of their opponent's right to fight for the victory'. The antagonistic dimension is not eliminated, because the struggle between opposing projects – for or against migration – cannot be easily reconciled. It remains a conflict, but one that plays out 'under conditions regulated by a set of democratic procedures accepted by the adversaries' (Mouffe, 2013: 9), rather than through criminalisation and punishment. Practising agonistic politics is challenging, especially in the context of intertwined mechanisms of inequality, discrimination and marginalisation that motivate both border crossing and punitive government responses, fuelling antagonism. However, we could lay the groundwork for a new agonistic approach by emphasising the political, rather than the criminality, within migration, and by recognising that political disputes between conflicting social interests and value orientations do not have to turn into intransigent moral or identity clashes.

If we side with migrants, agonism urges us to address complex political questions: how can we challenge the violence that migrants endure at the border? What solutions can we offer them? How can we make migration routes safer and legal channels of entrance available? The formulation and implementation of the answers demand political vision and action. On the one hand, we need a synergy between various actors who share a vision of changing the anti-immigration paradigm that dominates many countries: migrant communities, social movements and activists, trade unions and parties, researchers and policymakers. On the other hand, we need an agonistic engagement with the state (or the EU) and its democratic institutions and processes. Through institutional and extra-institutional struggles, the pro-migrant coalition should aim to transform these institutions into vehicles for the expression of pro-migrant demands (cf. Terwiel, 2023). It should also try to draw the anti-immigration camp into agonistic politics by highlighting the contestable and inherently political nature of their views (Invernizzi Accetti, 2021). This is a difficult task, a 'war of position' in Gramsci's terms, to be waged in multiple sites (Mouffe, 2013). However, we should not overlook the many actions that are already pushing in this direction – actions that currently risk, at best, being overshadowed by more symbolic attempts to criminalise border violence or, at worst, being criminalised themselves in a spiral of penal antagonism.

Lucano, the former mayor of Riace who was sentenced at first instance for his actions of solidarity towards migrants, is an example of someone who used his institutional role to change the anti-immigration paradigm. Between 2004 and 2018, he welcomed 450 migrants and refugees to his town, turning it into a celebrated model of multi-ethnic integration, and revitalised town life. Migrants, despite being excluded from institutions and citizenship, have sometimes achieved recognition as political interlocutors and driven positive change (Fernández-Bessa, 2019). For example, they have improved their working and living conditions by creating para-unions for migrant agricultural workers and by protesting against detention centres (Corrado et al., 2023). Those who rescue migrants at sea or assist them at borders are also examples of extra-institutional struggles. These activists take the law 'in their own hands' and pursue it from below, 'suo sponte and in the name of an exalted vision of ... justice' (Mégret, 2021: 368). As a SAR NGO states on its website, its action is 'civil obedience and moral disobedience': disobedience

to the anti-immigration discourse; obedience ‘to the constitutional and international laws, the declaration of human rights and the law of the sea’ (Mediterranea Saving Humans, n.d.). The actions of (pro-)migrant activists may result in criminalisation. Pitch (2022: 86) notes that these actions ‘become more *political* as they are criminalised’, because they expose institutional shortcomings and ‘injustices’ by doing ‘what public institutions are supposed to do’. But these actions can also lead to changes in the law or its interpretation. An example is the Italian Court of Cassation’s exoneration of Rackete. The Italian judges declared her arrest illegal and ruled that the obligation to provide assistance at sea includes the obligation to disembark rescuees in a port of safety, thereby illustrating how (pro-)migrant actions can contribute to transforming the law (Costello and Mann, 2020).

Pro-migrant agonism is not about suddenly erasing all borders or any anti-immigration sentiments from society, as both would entail their forms of violence and coercion. It is about working for the affirmation of a political landscape that rejects violence and harm towards migrants. This requires material changes at the global level. A preliminary step, although not conclusive, is a critical sensitivity to violence and racial injustices that ‘border penalty’ (both crimmigration and criminalisation to protect migrants) perpetuates (Tazzioli and De Genova, 2023: 5). Even if pro-migrant views do not become hegemonic, promoting the abolition of ‘border penalty’ may help reduce harm by shifting some of the discourse away from punishment and towards more political responses to border violence. In Italy, a strategy would be to challenge the prevailing crime-control paradigm of migration, which employs exceptional anti-mafia powers as border-enforcement tools. Activists should also advocate for the repeal of the punitive provisions in the Unified Text on Immigration – even those currently used to prosecute abuses against migrants – while ensuring that migrants are not controlled and stigmatised in other ways, for example through administrative measures (Crocitti and Selmini, 2017). This would terminate the criminalisation of those who facilitate border crossings, such as migrant ‘boat drivers’, activists who assist migrants in transit and SAR NGOs. It would also abrogate the offences of unauthorised entry, stay and re-entry in the Italian territory, which penalise the status of ‘illegal migrant’ rather than specific conduct.

Conclusion

In February 2023, UN experts issued a communication to the Italian government, regarding ‘alleged due process violations’ in the trial of crew members of *Iuventa*, a SAR NGO (Special Rapporteur on the Situation of Human Rights Defenders et al., 2023). The defendants are charged with aiding illegal immigration and face up to 20 years in prison if convicted.²⁰ The communication calls for the dismissal of the case and condemns the government’s new restrictions on SAR missions. This is one example among many appeals from human rights advocates against Italy’s criminalisation of migrant solidarity. However, the same advocates who denounce these penal measures also demand that Italian and international authorities end impunity for abuses against migrants.

In this article, I have argued that calls to criminalise border violence contradict calls for ending crimmigration. Attempts to prosecute violations of migrant rights strengthen the state’s penal apparatus that targets migrants and hampers humanitarian workers. They also reflect and foster penal antagonism, whereby both sides of the migration debate

seek to impose their views using punishment. Penal antagonism not only leads to more migrants being incarcerated, but also to foreclosing possibilities for more political changes to the prevailing anti-immigration paradigm. Drawing on Mouffe's work, I have suggested agonistic politics as an alternative way of addressing migration: a political confrontation, even fierce, to assert one's approach to migration, but where the opponent is an adversary to engage politically rather than an enemy to be delegitimised through penalty. Shifting from penal antagonism to political agonism is difficult without a change in the global conditions that drive people to migrate and governments to punish them. However, efforts in this direction could help de-escalate the use of 'border penalty' and eliminate a major source of violence against migrants.

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Notes

1. Legislative Decree 40/1998, art 14.5-ter.
2. CJEU, *El Dridi* (2011).
3. Legislative Decree 40/1998, art 10-bis.
4. Legislative Decree 40/1998, arts 13.13 and 13.13-bis.
5. Legislative Decree 40/1998, arts 10.2-ter and 10.2-quater.
6. Legislative Decree 40/1998, arts 12.1, 12.3 and 12.3-ter.
7. Legislative Decree 40/1998, arts 12.2.
8. Law Decree 1/2023, converted into Law 15/2003.
9. Reggio Calabria Appeal Court, *Lucano* (2023).
10. This and subsequent translations are the author's.
11. Milan Assizes Appeal Court, *Matammud* (2019).
12. Messina Assizes Appeal Court, *Condè et al.* (2021).
13. Law 228/2003 and Legislative Decree 24/2014.
14. Italian Penal Code, art 601.
15. Legislative Decree 40/1998, art 12.

16. Agrigento Assizes Tribunal, *Deji* (2019).
17. Legislative Decree 40/1998, arts 12.3, 12.3-bis, 12.3-ter, 12bis.
18. Italian Constitutional Court, Judgment No 63/2022, para 4.3.
19. Italian Court of Cassation, Tarek et al. (2021).
20. At the time of writing, in February 2024, the prosecutor asked the judge to dismiss the case. The judge's decision is expected in mid-April 2024.

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