

Working Group on Smuggling of Migrants*The Italian experience. Challenges and interpretative solutions*

I am glad to briefly give an overview on the Italian approach on tackling smuggling of Migrants by sea, in the experience of prosecutors and judges.

During the last years political instability and humanitarian crisis in Middle East and North and Sub-Saharan Africa have resulted in overwhelmingly huge and persistent migratory flows coming to the Italian coasts across the Mediterranean Sea¹.

Migrants wishing to reach Europe travel on highly unsafe and overloaded vessels, almost the totality of which without any flag or flying a flag of convenience (old fishing boats or smaller boats released by a so called “mother ship”, dinghies, dismissed cargo boats flanking a flag not connected to anyone on boards, but also big-boats) at high and concrete risk of sinking.

These vessels are led by more persons, acting under the directives of well-structured criminal groups, settled in the countries of departures.

Migrants are often exploited during all the steps of the journey from their native countries to the departure countries and finally during the travel at sea. Taken the decision to migrate and got in touch with clandestine organizations of travels to Europe, migrants are substantially deprived of their self-determination capacity and subdue to ill-treatment until they are able to pay the expensive travel costs.

During the travel by sea, migrants, made vulnerable for the reasons I said, lack any safety equipment and in some cases part of them are intensively stowed in the lower deck of the ship/boat and prevented from getting out to the upper deck for the whole travel. This can result in severe casualties such as the massive death because of suffocation, also constituting the crime of multiple murder.

So, since September - October 2013, having experienced how heinous and hateful the *modus operandi* of the smugglers can be, the Italian Navy and the Coastal Guard - since the operation Mare Nostrum on - have been carrying out all rescue operations in the Mediterranean in the High Seas or even within the Libyan territorial waters, in order to save as many lives in danger as possible and to bring them to pre-identified ports as “Places of Safety”.

At the same time any SAR operation has been conducted in parallel with the investigation of the relevant smuggling offences.

Since the first investigations, prosecutors have realised how smugglers used to intentionally stop their acts of transportation in international waters and, once there, call the SAR forces to be rescued, as a strategy to escape jurisdiction. In

¹ In 2014 there have been 170.100 arrivals in Italy, 120.239 of which only in Sicily; to the 30th September 2015 there have been about 130.442 arrivals, 77.000 of which in Sicily.

particular, professional smugglers on vessels of great worth, after transshipping the migrants into a smaller and unsafe vessel, used to change route and drive back to the coasts of North Africa. In a telephone tapping service two members of a criminal organisation sitting in Egypt in contact with its cell sitting in Sicily commented that, as far as they remained in international waters, the mother ship could not be caught and they were safe.

So, this strategy – deceitfully *completing* smuggling acts in international waters, far from the Italian territorial waters and the contiguous zone and with no apparent link to the Italian territory – gave rise to “law interpretation challenges” to the Prosecution and the Judiciary on assessing jurisdiction and exerting the related powers, which have been faced with an innovative approach, confirmed by Cass.

Italy’s criminal jurisdiction was grounded on the principle provided for by the Italian criminal code, according to which a crime is committed in Italy when the conduct is carried out, not only in whole, but even only in part within the territory of the State and even if this part is carried out only by some of the material participants in the commission of a crime, even not punishable.

In particular, this dangerous way of sailing obliges Italian and European naval units, bound by their moral and legal obligation of saving human lives in distress at sea and by the principle of non-refoulement, to take all necessary steps to save the migrants’ lives at risk and to bring them to the nearest Place of Safety, reasonably in Italy.

Therefore, the rescuers, finally bringing the migrants to Italy, carry out the final part of migrants’ transportation, allowing the organizers to achieve their goal. But such rescuers act under the threat of imminent death or shipwreck of the vessel. Smugglers and organisers, having intentionally used the rescue forces in order to obtain the illegal entry of migrants in Italy, shall be liable for the crime of smuggling, thus partially committed in the territory of the State. Those rescuers who led the migrants to the Italy (where jurisdiction can work), on the contrary are not clearly punishable themselves because of duress/necessity as a ground excluding responsibility².

This way, the Italian Judiciary caught the inner spirit of one of the optional criteria of jurisdiction under article 15, para. 2 c) – (i) of the UN Convention (when the offence is committed outside the territory of [*the State: ex. Italy*] with a view to commit a serious crime within the territory of [*the State: ex. Italy*])). But, dealing

² Italian Supreme Court in the criminal case against H. A., 11 March 201 “*the request for rescue at sea, made necessary on the grounds of the state of the vessel or the conditions at sea, is a foreseen and deliberately employed instrument used in order to reach the predetermined objective of disembarking on the Italian coast. Every State has the obligation to rescue persons in distress on the high seas, an obligation imposed by international conventions (the November 1, 1974 London Convention, ratified by Law n. 313 of 1980; the April 27, 1979 Hamburg Convention, ratified by law n. 147 of April 3, 1989; Montego Bay Convention). The disembarkation of migrants, a seeming consequence of the state of necessity which made rescue operations necessary, is simply the last phase of a activity planned since the beginning, resulting in the achievement of the criminal network’s objective and the fulfillment of a duty towards the migrants.*”

with substantive criminal law, bound by a principle of strict legality, domestic legislations could positively establish such an extension of jurisdiction on these cases.

Recently, still relying on such interpretative approach, jurisdiction has been affirmed also with regard to crimes committed concurrently with smuggling (multiple murder, shipwreck) on the ground of a close connection among crimes as already affirmed by the jurisprudence with reference to piracy and related offences.

In parallel, we also establish “enforcement jurisdiction” powers, intended as the legal powers to board, inspect, seize vessels and arrest suspect people, again as regards such actions observed in the High Seas, directly based on article 110 of the United Nation Convention on the Law of the Sea (right of visit) and article 8, para. 7 of the Protocol against Smuggling of migrants together with the Italian Immigration Act.

In particular, the Montego Bay Convention (UNCLOS) affirms the freedom of navigation in the High Seas (article 87) and exclusive and effective jurisdiction of every State over ships flying its flag (articles 91-92).

But when a vessel is without flag or in similar situations, **right of visit** of vessels is granted by article 110 of UNCLOS³. Which steps and measures can be taken following a visit of a vessel confirming the suspicion of its involvement in criminal acts? It depends on the situation considered by article 110. For example, powers of seizure and arrest are expressly permitted in case of piracy (article 105).

For smuggling of migrants we can rely on article 8, paragraph 7 of the UN Protocol against Smuggling of migrants, saying: “*A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law*”.

The wording of the disposition in this case is bounding and mandatory. It doesn't contain a mere option left to the domestic legislator.

Thus, it was affirmed the Italian law-enforcement and judicial authorities' legitimacy to search and seize the vessel (even “Mother vessels”) and to arrest the crew members within the high seas according to this set of rules, holding that these “appropriate measures” can consist in the seizure of the smugglers' boat and the arrest of the crew members (also in connection with article 12, para. 9-bis and 9-quarter of the Italian Immigration Act).

This innovative jurisprudence was later confirmed by the Italian Supreme Court⁴.

³Article 110, paragraph 1, lett. d), e 4.

⁴ Court of Cassation, First Section, judgments delivered on 28.2.2014 no. 14510 v Haji Hassan, on 11.3.2014 no. 18354 v. Hamada and on 23.5.2014 no. 36053 v. Al Bahlawan and others.

To implement such a set of rules with reference to cargo boats from Turkey apparently connected to a State (for example declaring Moldavian nationality to the departure Port Authority), we relied on articles 91 e 92 of the Montego Bay Convention (the so called “flag principle”)⁵, according to which “There must exist a genuine link between the State and the ship”, and therefore we ruled that, having regards to a series of circumstances (such as the nationality of the crew members, all Syrians, the repeat change of the ship name while sailing, the

The Supreme Court, in the case H.H. against order n. 1642/2013, Tribunal of Freedom of Catania dated October 10, 2013, so stated on 23 May 2014:

“The judges of the Court of review correctly recognized the legitimacy of the boarding of and intervention on the ship without a flag, with reference to the Montego Bay Convention, ratified by Italy on January 13, 1995, entered into force on February 12, 1995. Article 110 of the above mentioned Convention, as reminded in the document appealed against, provides that a military ship which encounters, on the high seas, a foreign ship other than a ship entitled to complete immunity, is not justified in boarding it unless the ship is engaged in piracy, in the slave trade or is without nationality.

Regarding this point, it is important to remember that the Grand Chamber of the European Court, in the HIRSI versus Italy case⁴, referenced, to consider legitimate the actions on the high seas, article 110, paragraph 1, subparagraph d) of the above mentioned Convention on the Law of the Sea, which permits the boarding of vessels that are not flying a flag, and article 110, paragraph 1, subparagraph b) which permits boarding when there is reasonable ground for suspecting that the ship is engaged in the slave trade, with the precious indication that this ground must be extended to victims of trafficking, in view of the analogy between these two forms of trade.

To this, the European Court added that the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime signed during the Palermo conference (December 12-15, 2000), ratified by Italy by Law n. 146 of August 2, 2006 and in force since September 1, 2006, in article 8, paragraphs 2 and 7, authorizes the State that has reasonable grounds to suspect that a vessel without nationality or assimilated to a vessel without nationality is engaged in the smuggling of migrants to take appropriate measures in accordance with relevant domestic and international law. The reference to domestic and international law contributes towards identifying said measures not only in the right of visit of the ship (inspection), but also in the diversion to a harbour of the coastal state, and in the institution of proceedings on the visited ship, such as the seizure of the ship and the arrest of the people found on board, once the ship has landed on the territory of the state. In fact, it was affirmed in judgment case n. 308-06 of June 3, 2008 of the Grand Chamber of the European Court that the freedom of navigation can be enjoyed only if a close connection between the ship and the State which grants its nationality to the ship is established, whereas the right is denied, when the ship is without a flag and therefore when it is not possible to attribute nationality to the ship. A ship without a flag inevitably exposes itself, even within extraterritorial waters, to controls of ships of coastal countries, for the evident relevant interest that the coastal state has in the safety and the peaceful order of life and of the activities of its territorial communities.

That being said, the legitimacy of the boarding of the mother ship, its diversion to the harbour of Siracusa and the exercise of the powers to seize and arrest the crew members considered to be soundly responsible for having embarked 199 Syrian migrants onto the mother ship, having transferred them on the high seas onto another boat which continued its journey towards the landing place and was completely inadequate in relation to the conditions of the sea, must be reaffirmed.

⁵Article 91 - Nationality of ships. 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 92 - Status of ships. 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

removal of the original name, the lack of any official Moldavian records and the real course, different from the one declared to the Coastal Authority), that ship was not entitled to fly such a national flag and that flag was a “flag of convenience”⁶.

Now European Council Decision of 18 May 2015 and UN SC Resolution of 9 October 2015 expressly authorise the enforcement of such powers in operation in the Mediterranean Sea off the coasts of Libya. Such legal instruments, especially where developed in parallel to the establishment of jurisdiction for the relevant crimes, can further contribute to implement the purposes of the UN Convention and the Protocol on smuggling: preventing and combating smuggling (article 2).

To consolidate this approach, it would be useful to discuss on the contents of the “appropriate measures” clause.

Nowadays we can say with satisfaction that, even if the legal framework providing criminal and enforcement jurisdiction relies upon jurisprudence and can be better legally defined, most European countries - especially after the shipwreck of the 19 April 2015 - are jointly committed in rescue actions in the Mediterranean Sea within FRONTEX and EUNAVFOR MED Missions, and, as a parallel result, are cooperating to take the first investigative steps to support Italy’s taking of jurisdiction over the relevant criminal cases. They collect the first evidence (sat phones, notes on names and numbers of the organisers), allow the presence of Italian liaison officers on board of the rescue vessels, transmit to Italian law enforcement authorities the first operational reports on the intervention, often containing basic elements to identify smugglers and organisers. Further developing this joint commitment is a tool.

Definitively we can say that this big work of detection, prosecution and adjudication of smugglers has affected the smuggling networks. Thanks to seizure and confiscation of big ships and arrest of professional crew members, *modus operandi* patterns and even routes have changed. For instance, the “mother ships” from Egypt and dismissed cargo boats from Turkey patterns have been abandoned.

We also must bear in mind that our operational and legal response shall be commensurate to new possible strategies and *modus operandi* designed by the smugglers, increasingly more hateful and deceitful (e.g. in some recent cases smugglers, sailing on a speeder vessel, other than the bigger vessel on which the smuggled migrants travel but close to it, after “assisting”, monitoring the migrants and calling the SAR intervention for them, tend to retake back the boat used for smuggling and drive back to the African coasts). These conducts shall be the very target of our joint action.

⁶ The relevant judgments issued by the Detention Review Court in Catania on 11th of November 2014 can be read in this website:

<http://www.magistraturademocratica.it/mdem/articolo.php?id=2339&a=on>

Going on investigations, some leading members of criminal groups have been identified and the judicial Authority asked for their surrender.

Here we come to the crucial point of judicial cooperation with Third Countries. Regard identification and exchange of information, Third Countries assured a quite satisfactory cooperation under article 18 of the UN Convention.

As regards extradition, criticism still remains. No cooperation is currently possible in contexts where the basic administrative structures enabling a good judicial cooperation are still missing.

In other countries of departure and transit of the migratory flows an effective and full implementation of the UN Convention and the Protocols thereto would help to overcome obstacles met so far. On current extradition requests by Italy two basic objections have been raised: the double criminalization clause and the prohibition of extradition on nationals.

To this regard the Regional training Workshop to address the Smuggling affecting the Mediterranean Sea, held in Syracuse last October and organised by UNODC and ISISC allowed judges, prosecutors and officers from many countries and international bodies to know and exchange views on the topics and the critical issues.

A mention of good practises: managing these topics with professional skills, sharing the same rules and practice of investigation, prosecution and adjudication are essential tools to avoid overlapping and gaps and to reach uniformity.

At the prosecuting Office a specialised team of deputy-prosecutors, coordinated by a senior prosecutor, is committed to address smuggling investigations and trials, share information and jointly discuss the cases, and it has become a reliable reference to police forces and legal entities working both at sea and on the ground.

Investigative protocols at local and national levels have been adopted (ex. the "Smuggling of migrants Guidelines" at the National Prosecuting Office against Organised Crime of January 2014) following round table meetings between District Prosecuting Offices, rescue forces and the law enforcement agencies. Such Guidelines have been later revised according to the changes of the smugglers *modus operandi*.

At the same time as judges, both at local and national levels (at the National School of the Judiciary), we have been discussing all together these new cases, coming - as far as possible - to shared visions on the juridical issues and interpretation challenges continuously forthcoming.

As regards evidence, as migrants tend sometimes to flee from the First Reception Centres as soon as possible, so often affecting the possibility to be cross-examined before the judge at trial, for prosecution and adjudication not to fail, a 'strategy' has been set up, consisting in a) interviewing them immediately after their arrival at the port; b) anticipating their cross examination before the pre-trial judge in a short term after their arrival (7-10 days); c) in case they have already gone away,

using their untested previous statements as evidence against the defendant in a way which is consistent with the “sole or decisive evidence” test under article 6 of the European Convention of Human Rights, as interpreted by the European Court of Human Rights.

In conclusion establishing jurisdiction over such offences perhaps has contributed to affirm the principle that the Mediterranean Sea is not a “free area at disposal”, where any smugglers network can perform any possible hateful and violent form of exploitation of the “need to migrate”, keeping impunity.

Recommendations:

- To encourage States to **extend jurisdiction** on smuggling and concurrent crimes [ex. murder, shipwreck, participation in a criminal group, and so on] to cases when the crime is committed outside the territory of a State (e.g. international waters) and the crime is intended to reach the illegal entry of migrants in the territory of that State.
- To specify the contents of the “**appropriate measures**” clause provided for by article 8, para. 7 of the Smuggling Protocol, explicitly including - among others - the seizure of the vessel or other means of transport used by the smugglers and the property on board and arrest of the suspected persons, under the supervision of the competent judicial authority.
- In this regard to provide that, when the transportation of the vessel under seizure may endanger the security of sailing and the safety of people onboard of the rescuing Unit and keeping at seizure is not necessary for investigative purposes, such vessel could be at the disposal of that State and may be immediately sunk/dismissed, upon authorization of the competent judicial authority.
- To strengthen **judicial cooperation** with the countries of departure and transit of the migratory flows, removing the current obstacles, also through a full and effective implementation of the Un Convention on Org. Trans. Crime and the Protocol on Smuggling thereto.

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