

PROC. N. 2022/2014 R.I.M.C.

Facts

In October 2014, an overcrowded merchant vessel, in precarious conditions, showing no flag or other identifiers, was detected by the Italian Navy in international waters, off the coast of Sicily (Italy). Italian authorities exercised its 'right of visit' over the vessel, thus rescuing 323 migrants origina from several Asian and African countries. The vessel departed from Turkey in September 2014. The migrants, after irregularly entering Turkey, contacted intermediaries in Syria. Each paid between 6000 and 6500 USD for the smuggling venture. The crew of the vessel demanded the mobile phones of the migrants. The vessel then proceeded to Cyprus and Egypt. The name of the vessel was changed throughout the journey. In each location, several additional migrants embarked the vessel. Upon signs of rebellion, migrants were controlled through the threat of weapons. After departure from Egypt mobile phones were returned to migrants. The latter were advised to contact the Red Cross were any malfunction in the vessel to occur. Close to Italy, a radio emergency call was finally placed, indicating *inter alia* the absence of captain and crew, and malfunction of the engine. The crewmembers only mingled with the migrants when the vessel began being monitored by an Italian Navy helicopter. When approached by a ship of the Italian Navy, the crew argued the vessel held Moldovan flag.

The Captain of the vessel (defendant) was charged with migrant smuggling and membership in an organised criminal group dedicated to migrant smuggling.

A number of aggravating circumstances were deemed verified, namely (i) intent of obtaining a financial or other material benefit, (ii) number of migrants transported (much higher than five), (iii) number of perpetrators (more than three) and (iv) risk to life or safety of migrants, made to travel in a unseaworthy vessel, overcrowded and with no safety equipment, (iv) transnational character of the operations of the organised criminal group.

Elements of success

- International cooperation
- Holistic investigative approach
- Collection of testimonial evidence in pre-trial phase, according to contradictory principle
- Robust implementation of UNTOC & SOM Protocol
- Constructive and systemic legal interpretation

Challenges

- Migrants' protection and support
- Financial or other material benefit
- States of origin/transit 'unwillingness or inability' to cooperate

Background

The afore-mentioned merchant vessel had been used in September-October 2014 to smuggle migrants into Italy. The first smuggling venture (app. 100 migrants) occurred from Libya to Italy. Migrants were transported to the vessel from the city of Mersin by minivan and, subsequently, inflatable boats. They were threatened by smugglers to keep their eyes down. Once on board, they were hidden under a marquee.

Specifically, regarding the journey that culminated in the rescue of the 323 migrants off the coast of Sicily, the vessel departed from Istanbul (Turkey) on 18 September 2014, under the name TISS, with at least six crew men from Egypt and Syria, and directed to Beirut (Lebanon). On 30 September 2014, with the new name of UFC-5, it stopped in Northern Cyprus for several hours to then retake its journey towards Beirut (Lebanon). However, the vessel took a completely different route towards Alexandria (Egypt). It stopped there for several hours before leaving again, under the name of TISS, towards Sicily. The captain of the vessel was Syrian.

Key issues

- ❖ Jurisdiction at high sea
- ❖ Migrants as witnesses
- ❖ Right of visit and search and power of seizure and arrest under UN Convention on the Law of the Sea (UNCLOS) and the Protocol against the Smuggling of Migrants by Land, Sea and Air
- ❖ Indicators of membership of organised criminal group
- ❖ Indicia existence organised criminal group

- ❖ Evidence
- ❖ International cooperation

Investigation

The following means of evidence were resorted to: (i) records of seizure of the vessel, (ii) acts of investigation regarding the flag of such ship and verification carried out by the Navy, (iii) statements by some of the migrants, (iv) photo identification made by the latter, (v) confession of the suspect, and (vi) circumstantial evidence.

International cooperation played a crucial role. By cross-checking the information gathered by the Italian Navy with that available to the Turkish Coastal Guard it was possible to determine the doubtful movements/itinerary of the vessel. The A.I.S. (Automatic Identification System) was critical in this regard.

Upon inquest by the authorities, the crew of the vessel presented no convincing documents, despite several attempts to that effect. A number of additional indicators of suspicious activity rose the concern of authorities, i.e. the peculiar itinerary, constant changes in name, lack of cooperation with the authorities. Faced with the argument that the vessel held Moldovan flag, authorities requested Moldova authorisation to inquire, in line with Articles 7 and 8 of the Protocol against the Smuggling of Migrants by Land, Sea and Air. No response was received. Authorities then proceeded to visit and search the vessel. They ended up by seizing it and arresting the crew.

Testimony from migrants unavailable for the *incidente probatorio** was taken into account.

Reasoning

In contesting the order or precautionary detention, the Defence argued:

- Lack of jurisdiction of the Italian State as it exercised coercive powers (including the right of visit) over a Moldovan ship;
- Absence of indicia of criminality given the scarce and contradicting statements of smuggled migrants, namely given that some were unreachable at the time of the *incidente probatorio*.

Italian jurisdiction is established over acts committed on the high seas on grounds of the *autore mediato* doctrine. That is, jurisdiction will be established if the natural result of the criminal conduct occurs in Italian territory. The fact that the transport of migrants directly by the defendant was interrupted in international waters due to a Search and Rescue (SAR) operation does not dictate the contrary. Authorities act under a state of necessity (in order to prevent a greater harm, i.e. the death of migrants). They are instrumentalised by the OCG.

Right of visit to vessels on the high seas will be duly exercised whereas the inquiring State has strong grounds to believe that the targeted ship: (i) flies no flag or flies a flag of convenience, and (ii) is involved in the smuggling of migrants.

Statements produced by migrants who were not available for the *incidente probatorio* remain relevant. In respect of admissibility as evidence of such

statements (a matter to evaluate during the trial), as per the jurisprudence of the ECtHR, whereas the contradictory was not ensured, a conviction may not be based solely or essentially on such evidence. The principle of ‘sole or determinant evidence’ shall not be interpreted in absolute terms. The whole equity of the criminal procedure must be taken into account.

Verdict/Decision

Order of precautionary detention (Public Prosecutor Office Catania), deeming that, were the defendant to be released, there would be (i) risk of recidivism, (ii) risk of escape, (iii) risk of tempering with evidence.

Opinion

This case is an example of best practice in international cooperation (in line with Article 7 Protocol against the Smuggling of Migrants by Land, Sea and Air). It was the prompt exchange of information between Italian and Turkish authorities that allowed the rapid understanding of the *modus operandi* of this organised criminal law and the specific smuggling venture at stake.

Notes

* The *incidente probatorio* is a procedure under Italian law that allows the collection of testimonial evidence in the pre-trial phase. The competent Judge, Public Prosecution and Defence will be present so as to give effect to the principle of contradictory. The evidence thus gathered is ‘crystallised’ and can be submitted in trial as such. See Article 392 Italian Code Criminal Procedure.