

SENTENCIA 1121/2008

Facts

The judgment decides the appeal presented by the Public Prosecutor against the decision in first instance according to which Spain would not have jurisdiction to try 18 foreign individuals (defendants) accused of having procured the illegal entry of approximately 150 migrants, by sea, into Spain. The vessel that transported the migrants flew no flag. It was intercepted and searched in international waters by Spanish authorities. The migrants were rescued thereby. The defendants were deemed to have integrated an organized criminal group dedicated to the promotion of migrant smuggling.

The Court of First Instance ruled Spain did not hold jurisdiction over the conduct and abstained from deciding the case on the merits. The defendants were immediately released.

Elements of success

- Robust implementation of UNTOC & SOM Protocol
- Constructive and systemic legal interpretation

Challenges

- Clear implementation of international obligations
- Harmonised interpretation of international law by domestic courts

Background

The Court of First Instance considered that the United Nations Convention on Transnational Organised Crime (UNTOC) and its supplementing Protocol against the Smuggling of Migrants by Land, Sea and Air could not be resorted to directly for the purpose of asserting jurisdiction. Rather, Spain had to adopt additional implementing measures to the effect.

Key issues

- ❖ Jurisdiction at high sea
- ❖ Right of visit and search under UN Convention on the Law of the Sea (UNCLOS) and the Protocol against the Smuggling of Migrants by Land, Sea and Air

Investigation

In ascertain the facts, authorities relied notably on (i) testimony of migrants and defendants, (ii) outcome of search and seizure of the vessel.

Reasoning

The Prosecution appealed against the decision of the Court of First Instance, arguing:

- International agreements ratified by Spain and the obligations deriving therefrom shall apply (here included the UNTOC and the Protocol against the Smuggling of Migrants by Land, Sea and Air).
- Under the principle of territoriality, an action shall be taken as committed also in Spain if it was finalised in

Spanish territory. Furthermore, the entry of irregular migrants in Spain was determined by the criminal plan of smugglers, who acted in such a way as to trigger the rescue operation by Spanish authorities.

The Supreme Court established Spanish jurisdiction by drawing significantly upon international obligations deriving from UNTOC and the Protocol against the Smuggling of Migrants by Land, Sea and Air.* The said Protocol (i) determines States' obligation in adopting "legislative and other measures" to criminalise the smuggling of migrants, (ii) allows States to board and search a vessel that masts no flag or flies a flag of convenience as long as there are reasonable grounds to suspect that it is engaged in the smuggling of migrants. If suspicions are confirmed, the State shall take appropriate measures, in line with national and international law. By the same token, UNTOC (i) invokes States' exercise of discretionary legal powers to ensure the effectiveness of the law and criminal prosecutions, (ii) enshrines, in its art. 15 (2) (c), the right of States to assert jurisdiction over crimes committed through an organised criminal group abroad, when the criminal conduct is intended to produce its results in the territory of the adjudicating State, (iii) determines the adoption of "legislative and other measures" to ensure the criminalisation of membership in an organised criminal group.

According to the principles of territoriality and ubiquity ("*principio de ubicuidad*") - as developed by Spanish jurisprudence - the crime is perpetrated in all places where the underlying conduct takes place as well as where the

natural result thereof occurs. In the event of interruption of the criminal conduct (as in the instant case), the place where the result or the damage should have occurred emerges as effective criteria for asserting jurisdiction.** This interpretation is in line with Article 15(2) UNTOC, which refers to the intent of perpetrating a serious crime in the territory of the (adjudicating) State. Alternatively, one should apply the principles resorted to in the evaluation of criminal attempts, and consider the offence finalised by the causally adequate conduct of the perpetrator.

Verdict/Decision

Appeal granted. Annulment of the decision of the Court of First Instance. The Supreme Court deemed Spain held jurisdiction *in casu* over acts committed on international waters. It remanded the case for review accordingly.

Opinion

The judgment illustrates the practical and constructive impact the UNTOC and Protocol against the Smuggling of Migrants by Land, Sea and Air might have in the prosecution of smuggling of migrants, especially in monist systems.

This a landmark decision whereby the Supreme Court clearly established jurisdiction over acts committed on the high seas. With its interpretation of the principle of ubiquity, the Spanish judiciary reaches a solution very similar to that adopted by Italian courts under the auspices of the *autore mediato* doctrine.

Notes

* To the decision of the Supreme Court was appended a dissenting opinion. It contained the following main arguments:

- It would be wrong to assert Spanish jurisdiction on grounds of the UNTOC and the Protocol against the Smuggling of Migrants by Land, Sea and Air. Rather, this must occur by application of the principle of territoriality and the theory of *obiciudad*.
- In order to apply the UNTOC and the Protocol against the Smuggling of Migrants by Land, Sea and Air, membership in an organised criminal group is *a conditio sine qua non* and needs to be sufficiently proven. In the current case, this seems to be neither sufficiently asserted nor detailed in the proceedings.
- The Protocol against the Smuggling of Migrants by Land, Sea and Air does not contain any provision on the attribution of jurisdiction.
- The exercise of jurisdiction (especially executive jurisdiction) cannot be derived from the right of visit (board and search the vessel).

** See also SHERLOC Case Law Database on Smuggling of Migrants, *Sentencia 1/2008*, *Sentencia 36/2008*, and *Sentencia 606/2007*. In the opposite sense, see e.g. *Resolución 2/2006*.