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# SMUGGLING OF MIGRANTS ACROSS THE MEDITERRANEAN: A EU-WIDE LEGAL CHALLENGE



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## 1. INTRODUCTION

The Central Mediterranean Route has been the main way used by smugglers of human beings to enter the EU since almost a decade. This route refers to the migratory flow coming from Northern Africa towards Italy and Malta, through the Mediterranean Sea.

The flows start from the Horn of Africa and the South-Western African countries. They merge in Tunisia and Libya, areas which are the main collectors of migrants and, by accident of geography, the perfect jumping off points for Europe's coasts.

In such a scenery, the short distance between Lampedusa Island (Italy) and the Northern Coast of Africa allows smugglers – using small boats even in bad weather conditions – to reach the Italian territorial waters, where mobsters can recover the migrants and redirect them towards Europe. In this way, a fishing boat can be overloaded with hundreds of migrants, ready to cross the European borders.

The journey on these boats is a life-and-death struggle. To maintain order on unstable vessels, passengers moving without permission are typically beaten, or even stubbed to death. Others are simply thrown overboard.

In 2009 a “*refoulement* policy” was introduced, grounded on a bilateral cooperation agreement entered into force between the Libyan and the Italian governments (“the Libyan-Italian Agreement”).<sup>1</sup> According to it, the Italian Authorities undertook to intercept the vessels on the high seas and to push the migrants back to Libya, while the Libyan Government undertook to strengthen patrolling their borders to avoid unauthorised departures.

Over the last years migrants from the Central Mediterranean increased substantially, due to the radical changes in the North African political scenarios: in early 2011, the revolutionary wave of demonstrations and protests, known as “Arabian Spring”, caused civil wars and thousands of people started to run away from their countries.

In 2012 a serious setback came from the European Court of Human Rights, which declared that “*the Italian border control operation of “push-back” on the high seas coupled with the absence of an individual, fair and effective procedure to screen asylum*

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<sup>1</sup> See the Bilateral cooperation agreement between Italy and Libya to combat clandestine immigration, signed in Tripoli on 29 December 2007, and its Additional Protocol, intended to strengthen bilateral cooperation in the fight against clandestine immigration, signed in Tripoli on 4 February 2009.



*seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulement”.*<sup>2</sup>

On the other hand, the fall of Gaddafi caused the disappearing of a legal framework in Libya. Consequently, the “push-back” agreement lost any effect, transforming the Libyan borders into a perfectly operating base for criminal gangs interested in migrant smuggling activities. It must be stressed that the more migrants are, the harder patrolling the borders is, and the greater the risk of shipwrecks, too.

On October 3<sup>rd</sup>, 2013, 366 migrants lost their lives just a few hundred meters off Lampedusa’s shores. Some days after, on October 11<sup>th</sup>, 260 migrants, mostly children and babies, drowned near the Maltese coasts.

The growing number of sea-tragedies caused a turning point in migration policies. Italian Authorities chose to give up the *refoulement* policy, which was grounded on the agreement with Libya, and increased their efforts in rescue operations. The deep change in migration policy led the Italian government to create the *Mare Nostrum* operation, aimed at increasing the border surveillance but, at the same time, at extending the rescue of migrants far over the Italian SAR (Search and Rescue) zone.

*Mare Nostrum* engaged relevant resources of the Italian Navy and Air Forces, with a squad stationed in the Sicily Channel, for surveillance and rescue purposes. The Italian Authorities ordered the deployment of helicopters, Predator B drones, ISP (Intelligence, Surveillance, Reconnaissance) equipped airplanes, frigates, and other patrolling vessels.

During its operating period, the *Mare Nostrum* operation saved thousands of lives, transferring migrants to Italian harbours. The surveillance and rescue were operated far over the Italian territorial waters, up to the international waters and sometimes also within the Libyan territorial waters, in order to avoid the drowning of migrants in areas out of any control.

Furthermore, *Mare Nostrum* also determined an unexpected change of human smuggling tactics: criminal organisations took advantage of the new operations and deliberately started to endanger migrants, counting on the possibility (close to certainty) that they would have been rescued soon by the Italian Navy very close to the Libyan coasts. As a consequence, smugglers started using very small and unseaworthy boats,

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<sup>2</sup> See *Hirsi Jamaa and Others v. Italy* [GC] - 27765/09, separate concurring opinion of Judge Pinto de Albuquerque, at p. 76. For a more in-depth discussion of the *Hirsi* case, see Paragraph 4.3 below.



deeply overloaded, that were unable to reach Europe, so lowering their costs, reducing the rates required to the migrants, and increasing their profits.

This caused the need of a different approach in the operational framework, in order to avoid the criminal organisations transferring their costs to European countries.

On November 1<sup>st</sup>, 2014, the Italian operation *Mare Nostrum* has been replaced by Triton, a Frontex-coordinated operation in Central Mediterranean. More specifically, Triton is a joint operation launched by Frontex at Italy's request, due to the high migratory pressure. As a joint operation, Triton is carried out by using resources and equipment of Schengen Member States.<sup>3</sup>

The core objective of Triton is quite different from that of *Mare Nostrum*. As a Frontex-coordinated operation, Triton only provides assistance to the Italian Authorities to ensure effective surveillance of the EU maritime borders and, under certain circumstances, to provide assistance to any person on board vessels in distress. In other words, Triton aims at reinforcing EU border checks and surveillance, and not at handling a humanitarian emergency.

This explains the huge reduction of the intervention area: while *Mare Nostrum* was spread all over the Central Mediterranean, up to the international waters, Triton resources have been deployed as far as 30 nautical miles from the coasts of Calabria, Sicily and Apulia.

Different aims and resources can also explain the different costs of the two operations: while the monthly budget of *Mare Nostrum* was of Euro 9.3 million (Euro 114 million paid for the whole operation), Triton costs are estimated at Euro 2.9 million per month.

In a rapid adaptation of strategy, as soon as Triton was in effect, the smugglers have started using much larger boats, generally redeployed for many smuggling operations. Usually, their journey starts on a big vessel, up to 75 metres long, recycled from decommissioned freighters, whose AIS (Automatic Identification System, compulsory on any large boat) has been switched off. The effect is to make the boat electronically undetectable by the search and rescue authorities, so as to gain time for the smugglers in case of escape, thus avoiding arrest.

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<sup>3</sup> For the purposes of the Triton operation, Frontex coordinates the deployment of 2 fixed wing surveillance aircrafts, 3 patrol vessels, 2 coastal patrol vessels, 2 coastal patrol boats and 1 helicopter.



When the large vessel (the so-called “Mother Ship”) is approaching the Italian borders, usually at about 100 nautical miles from the coasts, the migrants are transferred on smaller and cheaper boats, providing them with a satellite mobile-phone which can be used to call for rescue and sending coordinates.

It must be stressed that this new method implies a greater threat for the migrants’ safety in the last part of their journey, because they are left in open sea, on unseaworthy boats which are unable to reach the coast, so that smugglers can exploit the existing legal duty to aid people in danger at sea. When a distress call is transmitted, a merchant ship, being the nearest, is obliged by International Maritime Law to go and rescue, and then to disembark the migrants at the next port of call.

In a trade-off strategy between saving lives and patrolling the EU borders, the recent handover from *Mare Nostrum* to Triton has also meant a step-back in fighting smugglers: in most cases, Frontex-coordinated squads reach the migrants once the criminals have already run away.

## 2. HUMAN SMUGGLING AND TRAFFICKING

The ever-changing criminal strategies to cross international borders suggest a careful consideration upon the world of the migrants-related crimes.

In this sector, the law traditionally punishes two offences: the human smuggling and the trafficking in persons, which are also some of the fastest growing areas of the international criminal activity according to the United Nations.<sup>4</sup>

Human smuggling is the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more Countries’ laws, either clandestinely or through deception, such as the use of fraudulent documents. It must be noted that human smuggling is generally with the consent of the person being smuggled, who often pays a relevant amount of money in order to illegally cross the boundary line.

Unlike smuggling, which is – all things considered – a criminal commercial transaction between two willing parties, trafficking specifically targets the trafficked person as an object of exploitation. It must contain an element of force, fraud or coercion

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<sup>4</sup> See UNODC, “The role of organized crime in the smuggling of migrants from West Africa to the European Union” (2011), at p. 41 *et seq.*



(actual, perceived or even only implied), because the purpose from the beginning of the trafficking enterprise is to profit from the exploitation of the victim. In other words, trafficking in persons can be compared to a nowadays form of slavery.

On closer inspection, human trafficking does not require the crossing of an international border. It does not even require the transportation of victims at all. Anyway, the most common form of trafficking starts with the illegal crossing of borders, thus including a typical element of smuggling.

In a nutshell, the element which provides a precise legal distinction between the two crimes lies in the role assumed by the migrant: in human smuggling the migrant is an accomplice in the crime, while in the trafficking he/she is the victim.

Considering the new crime strategies adopted by smugglers, this traditional distinction is doomed to fail. Indeed, endangering the migrants is the way deliberately followed by smugglers to avoid their risks and costs. Moreover, putting migrants in a serious danger of death and forcing authorities to activate rescue procedures has become the main part of the planned operation aimed at the illegal entry of migrants.

Criminal tactics changed in such a manner that have deeply modified the core of smuggling itself, which is not anymore strictly related to the violation of the border security, but now directly involves people's safety. In other words, playing with migrant lives and exploiting their distress has profoundly changed the migrants' role in smuggling crime, from “accomplices” to “victims”.

### **3. LEGAL FRAMEWORK**

Tackling the smuggling of migrants is a priority for the international community, and various legal instruments have been implemented – at the international and the EU levels - for this purpose. The aim of the law is to strengthen international judicial cooperation, since only a coordinated approach to migration policies can provide suitable solutions to balance the (seemingly) opposite interests at stake: the interest to ensure an adequate protection of migrants' human rights and the interest to ensure an effective border security and to regulate migration flows.

#### **3.1. International legislation on migrant smuggling**

At the international level, the most significant legislative Act addressing the phenomenon of irregular migration is the Protocol against the Smuggling of Migrants by



Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, signed in Palermo in December 2000 (“the Palermo Protocol on Smuggling”). Smuggling of migrants is there defined as “*the procurement, in order to obtain, directly or indirectly, a financial gain 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*” (Article 3). As stated in the Preamble, the aim of the Palermo Protocol on Smuggling is to “*combat the smuggling of migrants by land, sea and air*”, not only by improving cooperation and exchange of information among States, but also by addressing the root causes of migration, especially those related to poverty and other socio-economic factors.

The Palermo Protocol provides a single framework - based on the principles of prevention, protection and prosecution - within which measuring the anti-smuggling efforts of the Countries is made possible on an on-going basis. It provides legal instruments aiming at (i) ensuring an effective border control policy, (ii) protecting migrants from trafficking and exploitation, and (iii) promoting coordination among States Parties in order to strengthen investigative powers and to ensure an effective law enforcement.<sup>5</sup>

A key policy instrument introduced by the Palermo Protocol on Smuggling is the “criminalisation” of smugglers, within the wider frame of the fight against transnational organised crime. Therefore, it is provided that the smuggling of migrants – when committed for financial gain - shall be established as a criminal offence in each State Party.<sup>6</sup> Criminalisation also covers other preparatory conducts to smuggling, such as producing or procuring fraudulent travel or identity documents committed for the purpose of enabling the smuggling, as well as attempting to commit such offences.

To grant protection to smuggled persons, the Palermo Protocol on Smuggling expressly excludes the migrant’s criminal liability for the fact of having being object of smuggling.<sup>7</sup> This provision gives evidence of the Palermo Protocols’ approach towards the strengthening of migrants’ protection. Indeed, even though smuggled migrants are people who willingly seek facilitation to enter or reside in the territory irregularly, the

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<sup>5</sup> See Shinkle W., “Preventing human trafficking: an evaluation of current efforts” (2007) *Institute for the Study of International Migration*, Georgetown University, Policy Brief No. 3, p.12.

<sup>6</sup> See Article 6 of the Palermo Protocol on Smuggling.

<sup>7</sup> See Article 5 of the Palermo Protocol on Smuggling, according to which “*migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol [i.e. smuggling or its preparatory conducts]*”.



harsh socio-economic conditions (e.g. poverty, famines, wars) faced by migrants in their home countries are considered prevailing on their “will” to breach immigration laws. As mentioned, they are considered “victims” rather than “accomplices”.<sup>8</sup>

In this perspective, the Palermo Protocol on Smuggling also states that smuggled migrants have to be protected against violence of individuals and criminal groups. Their rights to life and not to be subject to inhuman and degrading treatment must also be protected.<sup>9</sup> Only as a last resort, smuggled migrants may be returned to their countries of origin.<sup>10</sup>

Some provisions applicable to the smuggling of migrants may also be found in the UN Convention on the Law of the Sea, signed in Montego Bay (Jamaica) in 1982.

Smuggled migrants are often carried by sea and, during their journey, they may face life-threatening and stressful situations. The Montego Bay Convention sets out specific duties “to render assistance to any person found at sea in danger of being lost” and “to proceed with all possible speed to the rescue of persons in distress” (Article 98): it is clear that such a duty of assistance is often applied in migrants’ rescue operations.

Moreover, the Montego Bay Convention lays down rules to establish national jurisdiction over offences committed in the High Seas. Such rules are of the utmost importance to ensure prosecution of international criminal groups that carry out trafficking in human beings across different countries.<sup>11</sup>

### 3.2. EU legislation on migrant smuggling

At the EU level, smuggling of migrants is viewed within the framework of combating illegal immigration: compared to the approach taken by the Palermo Protocol on Smuggling, the EU focus shifts more to the States’ interest to protect borders, rather than to the protection of migrants’ human rights.

According to Directive 2002/90/EC (“the Facilitation Directive”) and its accompanying Framework Decision 2002/946/JHA the Member States are required to

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<sup>8</sup> For a wider analysis of the Palermo Protocols see, among others, Heinrich, K. H. “Ten Years After the Palermo Protocol: Where are Protections for Human Trafficking Victims?” (2010) *Human Rights Brief*, vol. 18, no.1, pp. 2-5. In the Italian legal literature, see Rosi E., “La tratta di esseri umani e il traffico di migranti. Strumenti internazionali” (2001) *Cassazione Penale*, p. 1986.

<sup>9</sup> See Article 16 of the Palermo Protocol on Smuggling.

<sup>10</sup> See, in particular, Article 18(5) of the Palermo Protocol on Smuggling, which provides that the return of smuggled migrants to their country of origin shall occur “with due regard for the safety and dignity of the person”.

<sup>11</sup> For a deeper analysis of the jurisdictional powers in the High Seas and the right of visit under the Montego Bay Convention, see Paragraph 4.1 below.



implement criminal legislation punishing the facilitation of unauthorised entry, transit and residence. Accordingly, any person who aids, abets or in any other manner facilitates irregular migration shall be punishable under criminal law.<sup>12</sup> Penalties shall be effective, proportionate and dissuasive criminal sanctions, and may be accompanied by other supplementary measures, such as: confiscation of the means of transport; prohibition to practice the occupational activity in which the offence was committed; deportation of the offender.<sup>13</sup>

Certain infringements committed for financial gain shall be punishable by custodial sentences with a maximum sentence of not less than eight years, if they are committed as part of activity of a criminal organisation or if the lives of the victims of the offences are endangered.<sup>14</sup>

In this legal scenery, it may be noted that EU law considers the smuggler’s “*financial gain*” as an aggravating circumstance of a smuggling offence (which, therefore, can be committed also without any intention of financial gain), while under the Palermo Protocol there is smuggling of migrants only if the migrant’s illegal entry has been procured by the smuggler “*in order to obtain ... a financial gain*”.

In any case, the Framework Decision 2002/946/JHA also grants some legal protection to smuggled migrants. In particular, any anti-smuggling provision shall be applied in compliance with the 1951 Refugee Convention and New York Protocol of 1967; *id est*, without prejudice to the principle of *non refoulement*.<sup>15</sup>

Moreover, it must be noted that the fight against smuggling of migrants may not - in any case - jeopardise the rights of migrants in need of international protection.

Specifically, the enforcement of criminal penalties against smugglers shall also consider and be in line with the provisions laid down by Directive 2011/95/EC on standards for the qualification of third-country nationals or stateless people as beneficiaries of international protection (“the Qualification Directive”).<sup>16</sup>

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<sup>12</sup> Article 1 of the Facilitation Directive expressly provides that “*each Member State shall adopt appropriate sanctions on any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens ...*”.

<sup>13</sup> See Article 1(2) of the Framework Decision 2002/946/JHA.

<sup>14</sup> See Article 1(3) of the Framework Decision 2002/946/JHA.

<sup>15</sup> See Article 6 of the Framework Decision 2002/946/JHA.

<sup>16</sup> See Ventrella M., “Recognising Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity Between Member States” (2015) *Social Inclusion*, Volume 3, Issue 1, 78.



As mentioned above, smuggling of migrants and trafficking in human beings are interlinked - although different - phenomena. Therefore, a comprehensive overview of the EU legislation on migrant smuggling must also take into account some relevant aspect of anti-trafficking legislation.

At EU level, trafficking in human beings is dealt with by Directive 2011/36/EU, which has replaced the Council Framework Decision 2002/629/JHA. Directive 2011/36/EC defines the crime of human trafficking and it establishes a very detailed programme for the protection of victims of human trafficking.<sup>17</sup>

Directive 2011/36/EC, compared with the previous Framework Decision, grants more protection to victims of human trafficking. There are specific provisions in the Directive establishing the form of protection to which victims of human trafficking are entitled, and particular attention is given to minors. Conversely, the Framework Decision had only one provision on the protection of victims, as it prioritised the fighting against trafficking rather than the protection of victims. A similar shift from prevention to protection is still awaited in the field of anti-smuggling legislation.

It must be noted, however, that the need to reshape the EU legislation on migrant smuggling is gaining momentum. The new European agenda, in fact, considers the prevention and tackling of irregular migration as a priority for the Union. The guidelines for the period 2015-2020 given by the European Council at its meeting held in Ypres on 26/27 June 2014 (the so-called “Ypres Guidelines”), set among the key objectives for the Area of Freedom, Security and Justice “*addressing smuggling and trafficking in human beings more forcefully, with a focus on priority countries and routes*”.<sup>18</sup>

Finally, although the EU legal framework on trafficking and smuggling is not the same, it is worth noting that some common provisions apply to victims of both these crimes.

For instance, Directive 2004/81/EC entitles victims of both trafficking and smuggling to a residence permit. However, whilst granting a residence permit to victims of human

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<sup>17</sup> See, in particular, Article 1 and Articles 11-16 of Directive 2011/36/EC.

<sup>18</sup> See European Council, Conclusions of the European Council (26/27 June 2014), EUCO 79/14, in particular Guideline no. 8. For a critical analysis of the Ypres Guidelines, see Carrera S., Guild E., “The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the ‘Lisbonisation’ of Justice and Home Affairs?” (2014) *CEPS Essay*, Centre for European Policy Studies, Brussels.



trafficking is compulsory, such granting is discretionary for the victims of smuggling.<sup>19</sup> This means that Directive 2004/81/EC leaves to the hosting Member States the decision on the protection of people who have been the subject of an action to facilitate illegal immigration.

Similarly, Directive 2009/52/EC on sanctions and measures against employers of illegally staying third-country nationals (“the Employer Sanctions Directive”) also applies to both cases of trafficking and smuggling. Indeed, the possibility of obtaining work in the EU, also without the required legal status, is often a key pull factor for illegal immigration into the European territory. Therefore, action against illegal immigration and illegal stay includes measures to counter irregular work, by setting out criminal and administrative sanctions against the employer who employs irregular migrants.

### 3.3. Italian legislation on smuggling

While some anti-trafficking provisions have already been set out by the 1930 Criminal Code (namely Article 600 concerning enslavement, and Article 601 concerning the trafficking in persons),<sup>20</sup> the first provisions against the smuggling of migrants have been introduced only in 1998, by Article 12 of the Legislative Decree no. 286/1998 (“the Immigration Act”). Since then, however, Italy has repeatedly amended its legislation on smuggling and trafficking in human beings in order to ensure compliance with the relevant international and European law.<sup>21</sup>

For what concerns anti-smuggling legislation, Article 12 of the Immigration Act currently punishes two different criminal offences:

- facilitation of illegal immigration (*favoreggiamento all’immigrazione clandestina*), defined as any activity aimed at obtaining the illegal entry or stay of a third-country national in the Italian territory, which is punishable by custodial sentence between one and five years; and

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<sup>19</sup> This “twofold regime” is outlined by Article 3 of Directive 2004/81/EC, according to which “Member States *shall* apply this Directive to the third-country nationals who are, or have been victims of offences related to the trafficking in human beings”, while the same Directive “*may* apply ... to the third-country nationals who have been the subject of an action to facilitate illegal immigration”.

<sup>20</sup> In this perspective, it should be noted that the first provisions at the international level against the phenomenon of trafficking in persons date back to 1904, as they are included in the “International Agreement for the suppression of the White Slave Traffic” concluded in Paris on 18 May 1904.

<sup>21</sup> For a review of the developments of the Italian legislation on trafficking, see Musacchio V., “La nuova normativa penale contro la riduzione in schiavitù e la tratta di persone (L. 11 agosto 2003, n. 228)” (2004) *Giurisprudenza Italiana*, p. 12; and Sicurella R., “Il controllo penale dell’immigrazione irregolare: esigenze di tutela, tentazioni simboliche, imperativi garantistici. Percorsi di riflessione critica” (2012) *Rivista Italiana di Diritto e Procedura Penale*, p. 1425



- exploitation of illegal immigration (*sfruttamento dell'immigrazione clandestina*), i.e. a case of facilitation where the offence is committed as an activity of a criminal organisation, or while endangering the lives of the people subject of the offence, or carried against five or more persons, or carried out for obtaining financial gain. According to Article 12(3), exploitation of illegal immigration is punishable by custodial sentence between five and fifteen years.

It may be noted that the different legal regimes applicable to facilitation and exploitation of illegal immigration come from, and are consistent with, the relevant principles established by the Palermo Protocol on Smuggling and by Directive 2002/90/EC.<sup>22</sup>

The Immigration Act also introduces various provisions with a view of protecting smuggled migrants. A relevant protecting provision is in Article 18, which makes available a special resident permit to the victims of human trafficking, and more generally, any migrant who is found in a situation of danger.

Finally, indirect protection to migrants is granted by Article 12(2), which excludes criminal liability when a person facilitates the illegal entry of migrants who are found in a state of need, or in any other manner acts in execution of a duty of rescue or humanitarian assistance.

#### 4. CONTROVERSIAL ISSUES IN TACKLING MIGRANT SMUGGLING

Having given the above picture of the existing legal framework, for the purposes of this elaboration it is essential to discuss (and in some ways to anticipate) the main problems that the implementation of such framework may realistically raise for the judges of EU countries; the possible implications on judicial co-operation as covered by EU law as well as general international law; some ethical and deontological implications related to the role of the judge in protecting fundamental rights.

The smuggling of migrants, in fact, already raises, and will likely more and more raise, several legal problems that have to be dealt with in order to effectively tackle this heinous criminal phenomenon; but the implications on the practical work of EU judges are – if possible – even more delicate.

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<sup>22</sup> See Mangiaracina A., “Brevi note in tema di favoreggiamento dell'immigrazione clandestina” (2005) *Giurisprudenza di Merito*, p. 1163



#### 4.1 Jurisdictional powers in the High Seas and right of visit

The starting point is the assumption that vessels transporting migrants have no flag or a fake flag (without a genuine link to the State indicated). As a consequence, the main criterion on attribution of jurisdiction on the high seas, the nationality of the ship, or its flag, cannot be considered in this discussion.

In the European legal framework, Regulation n. 656/2014<sup>23</sup> redirects to the national and international legal sources as regarding jurisdiction for what concerns no-flag vessels (Art. 7, par. 11).

As already shown, the two main international legal sources are the Montego Bay Convention and the Palermo Protocols.

The first recognises the principle that the jurisdiction on the vessel at sea belongs to the national flag (Articles 91-92)<sup>24</sup>. At the same time it does not ascertain that the high seas are a sort of immunity zone, or a no-man’s land, beyond the remit of the law and beyond any regulatory power. Indeed, a ship not bearing any nationality, or flying a flag that it is not authorised to mast, is subject to the control and interference (i.e. *jurisdiction*<sup>25</sup>) of any maritime State<sup>26</sup>. This is an established principle of international law, that Montego Bay Convention further ratifies: as a matter of fact, Article 110 (*Right of Visit*) allows the military ships to board and control vessels without flag or when there is suspicion of fraudulent flag<sup>27</sup>.

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<sup>23</sup> The mentioned Regulation was issued after the ECHR (Grand Chamber, 5 September 2012, Case C355/10, *European Parliament, v. Council of the European Union and European Commission*) voided the previous Decision 2010/252/EU, governing the same area of the law, for reasons not related with the topic of this paper.

<sup>24</sup> This clarified that, in the high seas, the link between a ship and a state takes place via the nationality requirement denoted by the “flag” of the vessel (Art.91). “*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*”(Art. 92 Conv. Montego Bay).

<sup>25</sup> As unanimously considered, the term “jurisdiction” should be understood here in the broad sense used in the Anglo-Saxon legal terminology, including the terms *executive jurisdiction* or *enforcement jurisdiction*, or the power of Government bodies to exercise coercive measures against a ship and the people who you are on board (chasing, collision, stopped, hijacking, arrest of persons).

<sup>26</sup> Case *Naim Molvan*, in *British International Law Cases*, vol. I, 1964, p. 674; also “*Magda Maria And Customary Law at Sea, a case note*” in *Netherlands Yearbook of International Law*, 1982, p. 143-149. These arguments are developed in the Order of 11 November 2014, Tribunal of Catania, concerning a seized vessel with an allegedly fake flag of Moldova.

<sup>27</sup> 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.

It was affirmed in judgment case n. 308-06 of June 3, 2008 of the Grand Chamber of the European Court of Human Rights that the freedom of navigation can be enjoyed only if a close connection between the ship



It is also important to stress that the Law of the Sea allows the National Authorities to pursue a ship, when leaving the territorial waters or the contiguous zone (i.e. *hot pursuit*<sup>28</sup>), or waiting for smaller boats, out of the territorial waters (i.e. *constructive presence*). In some cases, the so-called “Mother-Vessel/Ship” - after having crossed the Mediterranean and downloaded the migrants on a smaller boat (which it had dragged all along the journey) far from the Italian territorial waters - tries to return to the North African coast. In these cases, if the Mother Ship can be tracked in a hot pursuit or considered to be directly connected with boats penetrated into the borders, the Italian jurisdiction is, in our opinion, out of discussion.

It should be added that the Palermo Protocols not only give a definition of “transnational” crime that suits both cases of Article 416(6) of the Criminal Code and Article 12 of the Immigration Act, but also provide that: “*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*” (Art. 8, par. 7, Protocol on Migrants).

In conclusion, where vessel is without a flag or in similar situations, right of visit is granted by the High Seas Conventions; smuggling of migrants, considered as a transnational crime, grounds the seizure of the ship and the arrest of the crew, in accordance with the Palermo Protocols<sup>29</sup>. It is evident that such a solution may give judges the possibility to decide cases in a way consistent with protection of migrants.

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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 by ships of coastal countries, for the manifestly relevant legal interest that the coastal state has in the safety and the peaceful order of life and of the activities of its territorial communities.

<sup>28</sup> Art. 111 UNCLOS, “*Right of hot pursuit - 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. ...*”

In the cases here discussed this provision could not be applied, the vessels having never entered the Italian territorial waters, remaining well far away from the coasts.

<sup>29</sup> Specific reference to art. 110 UNCLOS and Art. 8, par. 7 of Palermo Convention has been made in the main case, the first seize and capture of a Mother-ship at high sea, operated by the Romanian Navy, in cooperation with Italian Navy and *Guardia di Finanza* (Revenue Police), dealt with by the Italian Supreme Court, 23 May 2014, case H.H. against order n. 1642/2013, Tribunal of Catania dated October 10, 2013.



## 4.2. Criteria on affirming jurisdiction

Right of visit is not enough for enforcing national jurisdiction if not sided by criteria, lawfully grounding the jurisdiction on specific crimes. This concept was clarified by the ECHR in the case of *Medvedyev and Others v. France*<sup>30</sup>, in a very different field and with reference to a case in which a flag was at stake.

In some cases dealt with by the District Prosecutor Office of Catania (Sicily), two different links with the Italian jurisdiction have been affirmed.

The first is the easier one: when it is possible to assert on the ground of the collected evidence that the criminal organisation operates partly in Italy or that it is aimed at transferring the migrants specifically to Italy, thus affecting Italian interests, the jurisdiction can be affirmed by Italian courts on the basis of the definition of transnational crime<sup>31</sup> and on the legal definition of organized crime, provided by Article 416(6) of the Criminal Code<sup>32</sup>. Here one should note that what has been said for Italy can be said for any other European State that, in a specific case, could be linked with the commission of the crime.

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<sup>30</sup> “*The Montego Bay Convention did not provide any legal basis for the action taken by the French authorities in this case. As Cambodia was not party to the Montego Bay Convention, it could not have been acting under its provisions when it sent its diplomatic note of 7 June 2002. Nor did France’s request for cooperation from the Cambodian authorities fall within the scope of that convention, as it was not based on France’s suspicion that a ship flying the French flag was engaged in drug-trafficking. Furthermore, it had not been shown that there was any constant practice on the part of the States capable of establishing the existence of a principle of customary international law generally authorizing the intervention of any State which had reasonable grounds for believing that a ship flying the flag of another State was engaged in illicit traffic in drugs. Nor could it reasonably be argued that the possibility for a warship to board a ship it had reasonable ground to suspect was without nationality applied to the present case, where the circumstances did not support that hypothesis*” (ECHR, 29 march 2010, application n. 3394/03).

<sup>31</sup> Art. 3, par. 2 UN Palermo Protocol on Transnational Crime: “*For the purpose of paragraph 1 of this article, an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State*”.

<sup>32</sup> In particular, with regard to the offence of criminal association aimed at the facilitation of illegal immigration, in the case of crimes committed abroad by a foreign citizen (i.e. that no part of Conduct has been carried out in Italy), the existing Italian jurisdiction is still valid according to Art. 7 n.5 of the Italian penal code relating to 15, paragraph 2 letter c), which refers to Article .5 paragraph 1 of the Convention of the United Nations against Transnational Organized Crime, signed in Palermo on 12-15.12.2000 and ratified by the Law no. 146 of 2006.

Indeed, given that in this case - as already mentioned - there is certainly an association which, because of its characteristics and modus operandi, can be called transnational, and therefore falls within the scope of Article 5 section 1 of the Palermo Protocol, it must thus be rooted within the competence and jurisdiction of the Italian court “*even in the case of a crime committed outside the national territory, in order to commit a serious crime within its territory*” as stated in the ‘art. 15, paragraph 2 letter c above, principle considered to be already implemented by the ratification of the Protocols.



The second occurrence, a direct consequence of the shift from *Mare Nostrum* to the Triton joint operation, is far more difficult to deal with. It is the case in which a boat - not released by a Mother-Ship - is rescued in the international waters, before approaching the Italian contiguous zone. As mentioned above, inflatable boats built to carry merchandises along rivers are now used for shipping hundreds of people; such boats are not fit to cross the Sicily Channel and their use endangers the migrants. This case is more specifically Italian, of course; but some of its implications are of interest for judicial co-operation (with Malta and some other coastal States).

In this case, if the boat with migrants requests help in the high seas all people on board, including the boat operators, are brought to shore by the Italian Navy. Apparently no part of the criminal conduct took place within the Italian borders, so the Italian jurisdiction cannot be affirmed according to the general principles<sup>33</sup>; the defendant cannot be punished on the basis of his/her presence on Italian soil, after being arrested at the high sea: the presence is not willing and the privation of liberty has already taken place<sup>34</sup>.

On the other hand, it is quite sure that the criminal organisation deliberately exposed the migrants to a dangerous situation using a boat without any safety measures and loaded much more than the vessel's capacity; from the investigation and on the basis of a recurrent methodology it can be considered that these are precise choices, in order to reduce costs and dangers for smugglers and to cause the rescue and consequently to obtain the final result, the illegal entry of migrants.

As a matter of fact, the Italian Navy is bound by the law and by the customs of the sea to undertake rescue operations and save human lives, even trespassing the borders<sup>35</sup>.

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<sup>33</sup> Article 6 of the Criminal Code provides that direct jurisdiction is exercised in all cases where at least part of the conduct takes place in the Italian territory. It is therefore possible to impose Italian jurisdiction on those who bring the boatloads of migrants at less than 12 miles from the Italian coast as well as on those individuals who have been identified as coordinators operating from Italy in order to execute the crime. In fact, according to the Italian Supreme Court, in those cases where at least one participant in the crime undertakes any criminal activity on the Italian territory, Italian jurisdiction is extended to all other participants in the crime, including therefore even those individuals operating the ships that are captured in high seas, well outside the Italian territory.

<sup>34</sup> Article 10 of the Criminal Code: in the case of a crime committed abroad (and again where no part of the criminal conduct took place physically in Italy) the jurisdiction could be based on the presence of the foreign citizen on the Italian soil, upon a request to proceed by the Italian Minister of Justice.

<sup>35</sup> Sources of such an obligation: 1) London Convention 1 November 1974 (ratified by Italy, law 313) on the safety of life at sea; Hamburg Convention 27/4/79 – ratified by Law 3/4/89 n 147, rescue coordination; 2) UN Montego Bay Convention 10 December 1982, ratified by Law 2/12/94 n. 689, art. 98 specifically; 3) Art. 1158 Italian Navigation Code, punishing as a criminal the person who does not provide rescue at sea.



The real actor of the crime is consequently the person who caused the danger and then asked for help, possibly to be considered liable for the crime of aiding, abetting and encouraging illegal immigration, through the bound action of rescuers (i.e. “*autore mediato*”, doctrine of the so called “mediated” or “indirect” perpetrator, Article 54 of the Italian Criminal Code)<sup>36</sup>.

It should be stressed that the mediated perpetrator approach is relevant in a third case: where a Mother-ship releases her human load far away from the territorial waters and no evidence has been collected about links with a criminal organisation partly operating in Italy or aimed at transferring in Italy the migrants, the Italian jurisdiction can be asserted as well on the basis of deliberately endangering of people in the smaller boat and asking Italian authorities for help.

#### 4.3 *Refoulement* policy as a breach of human rights

The shift from the 2009 agreement with the Libyan government to *Mare Nostrum* was not only consequence of the two tragedies occurred in Lampedusa and Malta, but also caused by the *refoulement* (“*respingimento*”, pushing back) policy which integrates a breach of human rights.

The ECHR first reaffirmed the principle of *non-refoulement* in the famous *Hirsi* case<sup>37</sup>, concerning people from Eritrea and Somalia who left Libya by sea in order to reach Europe. They were intercepted by Italian coast-guards on the high seas and handed-over to the Libyan authorities on the basis of the above mentioned bilateral agreement signed between Italy and Libya to fight illegal immigration. Some of them appealed to the Court of Strasbourg by arguing that they had been victims of violations of the European Convention of Human Rights perpetrated by Italy.

The Court first had to rule on the applicability of the ECHR to the case: interception happened on the high seas and so outside the Italian territory; however, the scope of

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<sup>36</sup> The Supreme Court, in the case Prosecutor at the Court of Catania v. H. A., on March 11, 2014, deliberated the following principles: “*The jurisdiction of the Italian judge with regards to the crime referred to in Article 12 of Legislative Decree 286/1998 (section B) is determined prima facie on the basis of Article 6 of the Criminal Code, seeing that the entry and the disembarkation of the migrants, in other words, the event of the crime (also based on the UN Convention against organized crime, referenced below), took place within territorial waters and on national territory ... The Court of Catania, also in light of what has been said regarding the fact that of the rescuers’ hypothetically illegal conduct (those who determined the state of necessity must be held accountable) will have to evaluate the evidence provided in order to determine the suspect’ s position in terms of liability*” (see also Supreme Court, case Prosecutor at the Court of Catania v. R. H. H., on 10 December 2014; Tribunal of Catania, order proc. n. 1670/2014, dated 20 February 2014).

<sup>37</sup> ECHR, 23 February 2012, application n° 27765/09.



applicability of the ECHR is not purely territorial, but it relates under Article 1 of the ECHR to the notion of *jurisdiction*: in this case it was fulfilled because the people were on board Italian boats managed by Italian soldiers.

This point clarified, the Court considered that Italy, indeed, breached several provisions of the ECHR: firstly, the right not to be subject to inhumane or degrading treatment (Article 3 of the ECHR) because of the general situation of illegal migrants in Libya (in particular the risk of arrest and detention in inhumane conditions without any attention for the quality of asylum seekers), and also because of the risk of being sent back by Libya to their country of origin where they could have been tortured or put into detention in inhumane conditions or submitted to blind violence; secondly, the prohibition on collective expulsions as their cases were not individually assessed and they were sent back as a group (Art. 4, Protocol 4 to the ECHR); finally, the right to an effective remedy as they did not have the possibility of appealing the decision of return to Libya (Art. 13 of the ECHR)<sup>38</sup>.

Consequently, Member States, when fighting illegal immigration on sea operations, can only disembark people in a third Country of origin or of transit of migrants only after having given them the possibility to oppose the decision with an effective remedy. As it is extremely difficult to ensure those guarantees on a boat at sea, the only practicable solution in such a situation would be to disembark people in the EU; this raises obviously the question about in which Member State disembarkations should take place. The problem comes from the fact that international law is not clear about the place of disembarkation of rescued people<sup>39</sup>.

The European Union has tried to adopt rules completing the SAR Convention. According to a 2013 Regulation proposal (Art. 10, par. 4)<sup>40</sup>, if disembarkation cannot

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<sup>38</sup> The established case law of the ECHR expresses the same principles (see *Ben Khemais v. Italy*, 24 February 2009, application n. 246/07; *Trabelsi v. Italy*, 13 April 2010, application n. 50163/08).

<sup>39</sup> Art.1.3.2 of the Search and Rescue Convention (SAR) of 27 April 1979 states that the result of rescue must be “to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”. But where, in which port and so on the territory of which State? Specialists in maritime law consider that “It is an international obligation for States to render assistance to persons in distress at sea. However, a comparable legally binding duty to disembark these rescued persons does not exist”. A kind of deadlock is also known in international immigration law where there is a human right to leave any State, but not a corresponding right to enter another country... Amendments to the SAR Convention were adopted in 2004 to clarify the issue, but the result is that article 3.1.6.4 now states that “Each party should organize its rescue co-ordination centres (RCC) to make the necessary arrangements in cooperation with other RCCs to identify the most appropriate place(s) for disembarking persons found in distress at sea”. States could once again, unfortunately, not agree on a place of disembarkation at the international level.

<sup>40</sup> COM(2013)197.



take place in the Country from which the ship departed, “*the host Member State and the participating Member States shall as soon as possible ensure that a port or place of safety is identified taking into account relevant factors, such as distances to the closest ports or places of safety, risks and the circumstances of the case*”; if this is not possible, the rescued people shall be disembarked in the host member State.

The Commission proposal provoked an extremely strong reaction from all Mediterranean States (Cyprus, France, Greece, Malta, Italy and Spain), for a number of reasons including the fact that the EU does not have a competence to legislate in detail on search, rescue, and disembarkation; the issue of solidarity between Member States within the European Union is at stake.

It is evident, here, that a strong role in the future may be played by judges, deciding the relevant cases; and judicial ethics will impose an accurate balance of all interests involved.

## **5. PROPOSALS: JURISDICTION, ASYLUM AND... SOLIDARITY**

The smuggling of migrants across the Mediterranean raises juridical and political issues that have to be dealt with at the European level, with a role for European judiciaries.

First of all, it is crucial - in our opinion - to affirm the jurisdiction of the Member State involved in the rescue operations.

The interpretation we have tried to support of International, EU and Italian Law allows prosecution, even if the conduct is realised on the High Seas, when the actions of the criminal organisations are aimed at abetting illegal immigration to Italy or when there is evidence about involvement of Italian territory in part of the illegal conduct. The same principles may apply for other EU coastal States. Otherwise, if the rescue alarm is part of the planned operation aimed at illegal entry of migrants, such an action can be considered as belonging to the traffickers - through the person obliged to rescue (so-called “*mediated perpetrator*”) - and they can be punished according with Italian (or other) criminal law.

Since this is an interpretative guidance, as slowly emerging in Italian case law, a proposal *de lege ferenda* may consist of suggesting that Member States introduce a provision expressly granting jurisdiction when the crime of abetting illegal immigration



is committed abroad<sup>41</sup>. Once the jurisdiction is affirmed, the smugglers will be punished according to national laws, with a deterrent effect for the smuggling of migrants.

Along with this, the EU Member States (including the judiciaries) must - in our opinion - enhance the capacity to save lives at sea. For this purpose, the European Border Surveillance System (EUROSUR), established by a Regulation adopted by the EU in October 2013, will be applicable to all external borders from December 1<sup>st</sup>, 2014 on and will facilitate and improve the exchange of information among EU Member States, as well as third-countries.

Nevertheless, EU objectives must be twofold. If the first, short-term goal is to prevent death at sea, the second, longer term goal would be to limit irregular migration across the Mediterranean. With regard to this second aspect, it is important to make legal asylum channels harmonised and more accessible. The European Asylum Support Office (EASO), set up by Regulation n. 439/2010, will contribute to the development of the Common European Asylum System by facilitating, coordinating and strengthening practical cooperation among Member States on the many aspects of asylum.

It will also help Member States, in particular those under pressure, to fulfil their European and international obligations to give protection to people in need.<sup>42</sup>

As a matter of fact, the recent tragedy at Lampedusa involved, for the most part, people coming from Somalia, Eritrea and even Syria. They were not ordinary migrants, but genuine refugees. Migrants of this kind have a right to asylum, unless a safe third Country welcomes them. Nevertheless, European policies (which focus on the fight against irregular migration) force them to use the same routes of irregular migrants.

Here, of course, there is a role for judges: the number of training activities on asylum cases, offered by Schools for the Judiciary of EU member states, often in co-operation with UNHCR and EASO, is increasing.<sup>43</sup>

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<sup>41</sup> In Italy, see Article 7 of the Criminal Code, providing for the cases in which Italian jurisdiction exists even if the crime is committed outside Italian borders, should be modified in the direction mentioned.

<sup>42</sup> As regards asylum policies, another relevant legal instrument is represented by Regulation n. 604/2013 (so-called “Dublin III Regulation”). Dublin III Regulation establishes a hierarchy of criteria for identifying the Member State responsible for the examination of an asylum claim in Europe, predominantly on the basis of family links followed by responsibility assigned on the basis of the State through which the asylum seeker first entered. The main aim of the Regulation is to ensure that one Member State is responsible for the examination of an asylum application.

<sup>43</sup> In 2013-2014, four events were offered by the Italian School for the Judiciary; an e-learning platform was developed in co-operation with EASO.



But the most important actions are probably outside of the scope of law: Europe should think of opening legal channels for asylum. The best solution is probably the resettlement of those people coming from Countries of first asylum, where they have no future, or from transit Countries, where they cannot be protected (such as Libya). Nevertheless this solution is limited because, as a research project of the Migration Policy Centre<sup>44</sup> has shown, even though the number of EU resettling Member States is rising, the number of available places for resettlement is not increasing proportionally.

Further steps can be made with a proper policy, also with regard to the final issue: solidarity. The EU has already made some efforts in terms of solidarity by creating agencies (Frontex or EASO) that help Member States under pressure. However, unlike *Mare Nostrum*, these projects are primarily intended to protect, control and monitor the EU borders. Therefore, more could and should be done to implement the provision of Article 80, Lisbon Treaty, according to which “*the policies of the Union set out in this Chapter –precisely borders, immigration and asylum- and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States*”.

Solidarity, in our view, is not only a key topic in the political debate. It is much more: it is a moral duty and a legal obligation for any Member State and the European Union itself. It is therefore a binding criterion, with ethical implications, also to guide judicial interpretation of the law.

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<sup>44</sup> Visit <http://www.know-reset.eu/>.