

STRIKING A BALANCE BETWEEN THE PERSUIT OF MIGRANTS' SMUGGLING AND THE ROLE OF CIVIL SOCIETY



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JURISDICTION IN CRIMINAL LAW

1) SUBSTANTIVE LAW

Legal ability of a State, through its judicial bodies, to deal with an offence and to apply its law according to the place where the offence was committed

2) PROCEDURAL LAW

Set of executive powers lawfully performed by a State as a consequence of affirming its jurisdiction

AFFIRMING DOMESTIC JURSDICTION FOR TRANSNATIONAL SMUGGLING

- Obligations arising from UNTOC and SOM:
 - 1) prosecuting smuggling of migrants (and linked offences: murder, shipwreck, ..) when transnational organised groups are involved ;
 - 2) Protecting smuggled migrants;
- Awareness about the smugglers as the first risk factor for migrants

Facilitation of illegal migration in the Italian law

- Facilitation of a) the illegal entry of not national into the State, b) the illegal transit into another State, c) the illegal residence or staying in the State (with the aim of undue profit);
- Conducts: to promote, organise, direct, finance or carry out the transportation of people who are not national in violation of the Immigration Act; + general clause: any conduct by which anyone “otherwise aids and abets or assist in the commission of the crime or objectively directed to the illegal entry of such people [...]”.
- List of aggravating circumstances

Coastal State's Jurisdiction in the High Seas

(Catania Review Court, October 2013 +
Supreme Court 2014)

Smuggling and related crimes are partly committed in the territory of the coastal State of disembarkation as a result of the willful conduct of the smugglers, deliberately aimed at provoking the rescue and obliging the rescuers (not punishable, because of duress) to carry out the final part of the transportation

(ref. article 6, para. 2, and 54, para 3, of the Italian Criminal Code; reference to article 15, para. 2, lett. c) sub. i) of the UN Convention on Transnational Organised Crime)

'Enforcement' jurisdiction

(powers to board, inspect, seize, arrest)

- **Article 110, para. 1, d), +4 UNCLOS : Right of visit for vessels without nationality** or assimilated (e.g. Flag of convenience) under +
- **Article 8, para. 7 Protocol on 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*".

Provoking the rescue

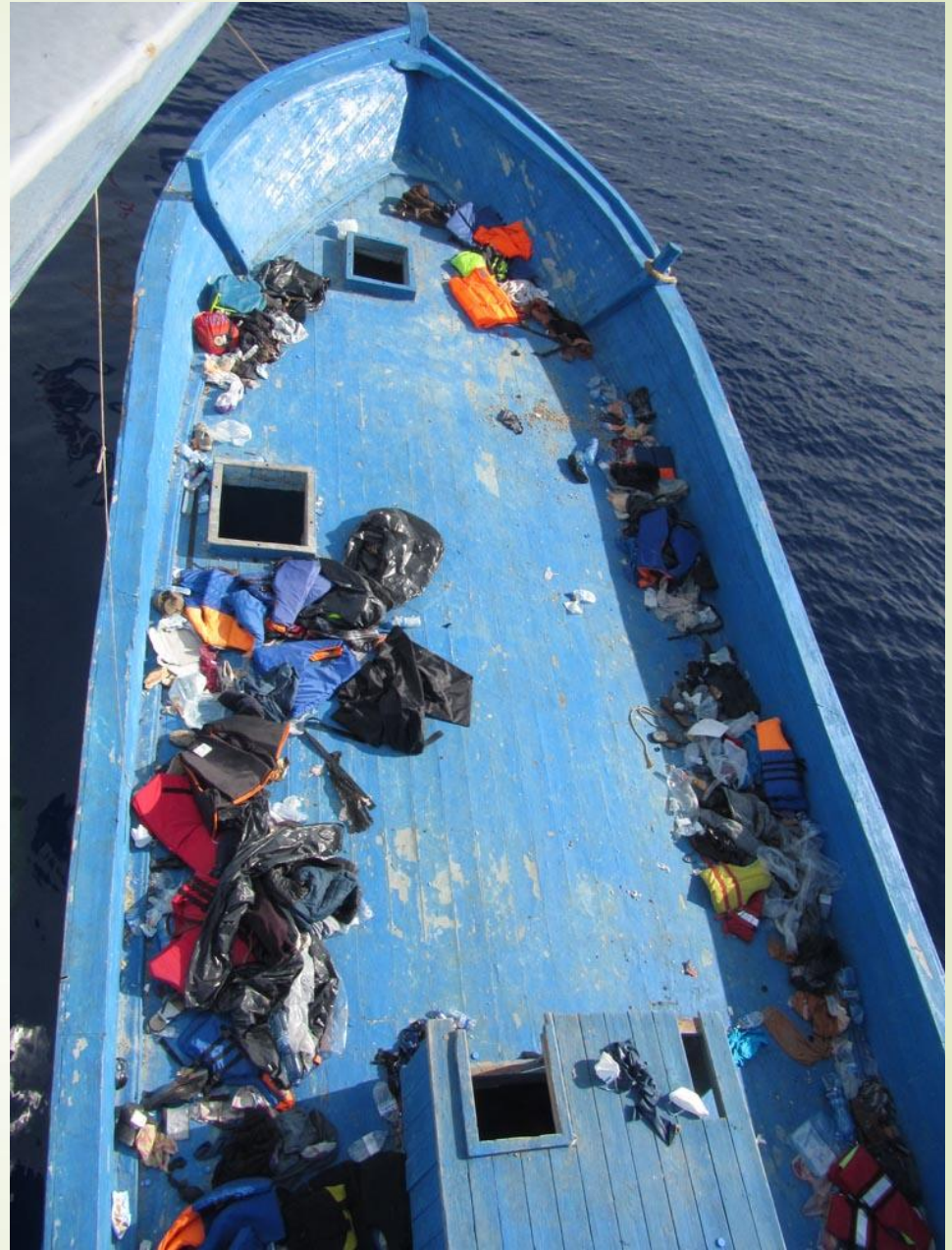


Fishing boat (from Libya)

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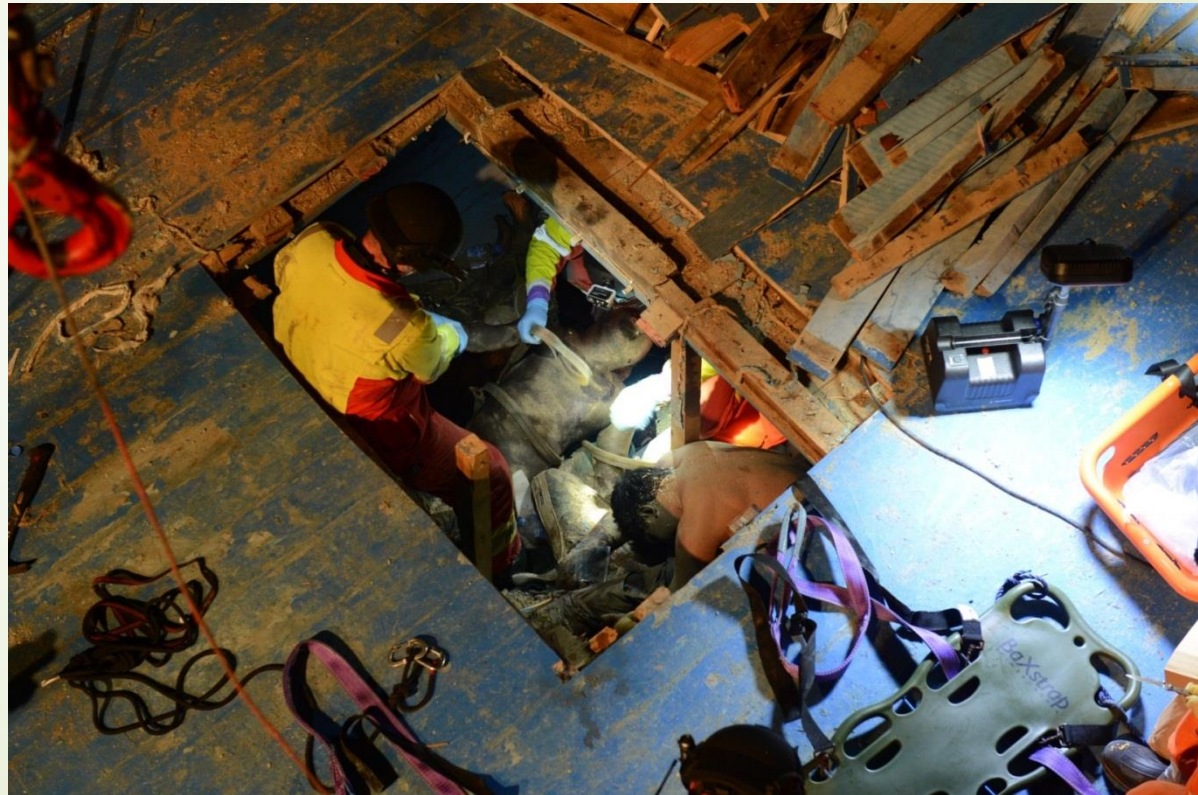
Inspecting the vessel



No. 49 bodies in the lower deck found out

Norwegian crew ship on FRONTEX mission, supporting the Italian Navy, 15 August 2015

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What happened later and why some NGOs were involved

1. anarchical post-conflict scenario of **Libya**:
smugglers **minimize costs and prosecution risks** and **feel encouraged to increase the departures**:
a) enjoying absolute impunity;
b) profiting from the unprecedented presence of NGOs rescuing units, operating close to, and sometimes within, the Libyan territorial waters. The smugglers could withdraw from the international waters, escaping jurisdiction of any coastal State.

2. Unsatisfactory role of Eunavfor Med, EU Mission launched in the middle of 2015:
It could not fully perform its mandate, never stepping forward to enter the Libyan waters, for both legal obstacles and political reasons → deterrence effect in the High Seas quite irrelevant.

UN Security Council Resolution no. 2240 of 9 October 2015

authorises for one year the enforcement of powers in operations in the Mediterranean sea “off the coasts of Libya”, such as:

- to inspect unflagged suspect vessels, to seize them after confirmation of smuggling on reasonable ground of smuggling or trafficking, including disposal;
- to extend such powers to flagged vessels after an expedite procedure to have the State’s consent;
- to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out activities



...combining such factors

- a) huge increase of the arrivals of unselected migrants (ex: 13.000 April 2017 and 23.000 in May 2017)
- b) a higher number of dead;
- c) a significant decrease of the ability to pursue smuggling networks.



Common understanding of the **unsustainability of persistent, massive and unauthorized arrivals**, because of:

- a) a negative impact on the ability to select and care about true **asylum seekers and vulnerable migrants** from the rest of irregular migrants;
- b) serious risk that migrants just come are subjected to **trafficking networks** of different nature;
- c) excessive and uncontrolled expansion of the **reception system**, giving rise to widespread misconducts in the management of public resources;
- d) feelings of **intolerance** in the receiving populations and **reject** against any kind of migrants and civil society assisting them.

16 May 2017 - Italian House of Parliament - Final Report of an Inquiry on SAR operations

- NGOs rescuing units are an unprecedented **tertium genus** between governmental and commercial ships, **unregulated** so far and dangerously acting too close to the operational area of criminal groups.
- overseeing migration is a **State's task**,
- **Recommendations:** 1) crews of voluntary units and financial backers should be registered with authorities; 2) law enforcement agents should travel aboard humanitarian vessels; 3) under international or domestic law, private organizations cannot create and manage humanitarian corridors.

The **Government** urged NGOs to follow some rules as a condition to continue to operate → **Code of Conduct**

What is duress or necessity?

(as a clause of exemption from responsibility)

- To act to defense oneself or a third person against the **current or imminent risk of physical harm** to the person, provided that such harm is **unavoidable** and who acts has **not concurred** (either willfully or by recklessness) **to provoke** the relevant risk and is/her conduct is proportionate to the degree of harm (article 54 Crim. Code).

Leading case

Types of conducts going beyond a rescue carried out under necessity:

- ❑ getting in touch with the smugglers before the SAR event, agreeing on the imminent transship of migrants from the smugglers' boat to the rescuers' ("shared transfers", confirmed by the Supreme Court) and then carrying it out;
- ❑ making the smugglers understand they can move a boat with migrants by light signs or somehow else;
- ❑ giving the boat back to the smugglers, after the transship, allowing them to reuse;
- ❑ helping the smugglers escape law enforcement interventions and investigations carried out before or after disembarkation.

The financial or other material benefit

COUNCIL DIRECTIVE 2002/90/EC of 28.11.2002 defining the facilitation of unauthorised entry, transit and residence

<<Each Member State shall adopt appropriate sanctions on:

(a) 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;

(b) any person who, **for financial gain**, intentionally assists a person who is not a national of a Member State **to reside** within the territory of a Member State in breach of the laws

of the State concerned on the residence of aliens.

2. Any Member State **may decide not to impose sanctions** with regard to the behaviour defined in paragraph 1 (a) by applying its national law and practice for cases where the **aim of the behaviour is to provide humanitarian assistance to the person concerned**>>.

UN Protocol on Smuggling of Migrants

► Article 3 – Use of terms

<<Smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial 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 [...]>>

New legislation criminalising civil society activities as facilitation of irregular migration

- ▶ **Section 253 Hungarian Crim. Code** (June 2018) criminalises engaging in organising activities in order to facilitate the initiating of an asylum procedure by a person who in their native country (or in the country of their habitual residence or another country through which they had arrived) was not subjected to persecution or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a title of residence.
- EU Commission Referral to the CJUE (19 July 2018)

Commitment of no-profit actors in the migration crisis under a broader perspective: a positive balance!

...a huge variety of civil society actors more and more proactively involved in the fields of reception, integration, resettlement, anti-human trafficking and so on.....



Lessons learnt and good purposes for the future

- **Comprehensive strategy** rather than isolated measures
- a **stronger political response by the EU**, aimed at strengthening **legal, permanent and controlled pathways**, both for refugees and for economic migrants, and finally base on a **burden sharing logic**.
- **Effectiveness** in the **pursuit of transnational organised smuggling**. The migration crisis as a “test bench” for UNTOC and its Protocols: great potential and modernity of these tools, but also serious gaps in the **implementation process** in those countries where their application would have been crucial
- **Not** to address the issue through a **radical and simplified conflict between rigid and opposite principles**, but **knowledge and compromise** among needs and interests involved



Useful materials

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- 1) Giovanni SALVI, 'New Challenges for Prosecution of Migrants Trafficking from Mare Nostrum to Eunavfor Med' (Speech given on 3 June 2016) available at http://www.questionegiustizia.it/articolo/le-organizzazioni-criminali-e-il-traffico-di-migranti_07-06-2016.php
- 2) Simona RAGAZZI, New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach, 28 June 2016, in <http://www.fondazionebasso.it/2015/wp-content/uploads/2016/07/New-experiences-in-investigating-and-prosecuting-the-migrants-smuggling.pdf>, in <http://www.europeanrights.eu/index.php?funzione=S&op=5&id=1270>
- 3) Simona RAGAZZI, *L'immigrazione che cambia. Risposte della giurisdizione, sfide per il futuro prossimo*, ("Giudice Donna", n. 3/2016: <http://www.giudicedonna.it/2016/numero-tre/articoli/Ragazzi.pdf>).
- 4) Judgments issued by Catania Revis Court 11th of November 2014 at: <http://www.magistraturademocratica.it/mdem/articolo.php?id=2339&a=on>
- 5) FRONTEX, 'Risk Analysis for 2017', February 2017
- 6) Senate Commission Report 2017, in : <http://www.senato.it/service/PDF/PDFServer/BGT/1023441.pdf>.
- 7) http://questionegiustizia.it/articolo/il-sequestro-della-iuventa_ong-e-soccorso-in-mare_18-09-2017.php

- 8) National Conference on migration organised by AREA DG, 15-16 June 2018: materials and presentations in Italian (BOLAFFI, Min. ESTERI, SAVINO, etc.) in <http://www.aredg.it/evento/le-nuove-frontiere-dell-immigrazione>
- 9) Senate Commission Report 2017, in : <http://www.senato.it/service/PDF/PDFServer/BGT/1023441.pdf>.
- 10) http://questionegiustizia.it/articolo/il-sequestro-della-iuventa_ong-e-soccorso-in-mare_18-09-2017.php
- 11) National Conference on migration organised by AREA DG, 15-16 June 2018: materials and presentations in Italian (BOLAFFI, Min. ESTERI, SAVINO, etc.) in <http://www.aredg.it/evento/le-nuove-frontiere-dell-immigrazione>
- 12) OSCE, JOINT OPINION ON THE SO-CALLED “STOP SOROS” DRAFT LEGISLATIVE PACKAGE ON NGOs, in <https://www.osce.org/odihr/385932?download=true>
- 13) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195
- 14) National Conference on migration organised by AREA DG, 15-16 June 2018: materials and presentations in Italian (BOLAFFI, Min. ESTERI, SAVINO, etc.) in <http://www.aredg.it/evento/le-nuove-frontiere-dell-immigrazione>
- 15) OSCE, JOINT OPINION ON THE SO-CALLED “STOP SOROS” DRAFT LEGISLATIVE PACKAGE ON NGOs, in <https://www.osce.org/odihr/385932?download=true>
- 16) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195