THE MEDITERRANEAN SEA BETWEEN LEGEND AND CRIME: THE TRICKY QUESTION OF JURISDICTION FOR MEDITERRANEAN STATES

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Abstract

How have Mediterranean States been combating unlawful activities carried out on the high seas? Can international rules on enforcement and adjudicative jurisdiction help coastal States to meet this challenge? This contribution attempts to answer these questions with reference to the jurisprudence of the supreme courts of Italy and Spain. The analysis identifies a common attempt by both courts to expand the jurisdiction of domestic tribunals in cases of smuggling of migrants and trafficking of drugs by adopting expansive interpretations of domestic and international law rules.

Keywords: Mediterranean Sea; drug trafficking; smuggling of migrants; jurisdiction.

1. INTRODUCTION

"A sea of legends and harsh realities":[1] the Mediterranean Sea is a place that captures the imagination, but also a place where a complex and intense web of lawful and unlawful activities occur. Since the 1970s, the European States that are surrounded by its waters have shown a keen interest in securing their territories from threats coming from the sea, such as terrorism; the unlawful trafficking of arms (especially arms of mass destruction) and drugs; the unlawful discharge of hazardous waste; the trafficking in human beings; as well as the unlawful transport of migrants to facilitate their irregular entry into their territories.

For a very long time transnational organized criminal groups have been able to escape the jurisdiction of States they target with their criminal enterprises by taking advantage of the freedom to sail the high seas, as well as the many uncertainties of the international customary and conventional rules governing enforcement and adjudicative jurisdiction over vessels that are stateless or sailing under another State's flag.

Starting from this last observation, this contribution will analyze the actions of two States bordering the Mediterranean Sea, Italy and Spain, to counter the activities carried out by organized criminal groups, especially the unlawful trans-

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[1] This is the incipit of PAPANICOLOPULU, "The Mediterranean Sea", in ROTHWELL et al. (eds.), *The Oxford Handbook of the Law of the Sea*, Oxford, 2015, p. 604 ff.

port of migrants to facilitate their entry into Europe, as well as drug trafficking. Its aim is to verify whether international and domestic law provide for appropriate means of combating these criminal phenomena or whether the shortcomings of these regimes force domestic judges to turn to "legal gymnastics".[2] The analysis will be limited to the findings of the supreme courts of both States because the jurisprudence of the lower courts is often contradictory; whereas, the former have developed a more coherent case law that allows some trends to be identified and assessed.

2. A Brief Look at the Main Relevant International Law Provisions on Jurisdiction and Their Pitfalls

To place the jurisprudence of the Italian and Spanish supreme courts in context, it is necessary to briefly survey the main international law provisions concerning the rights and obligations of States to establish the jurisdiction of domestic courts over offences committed on the high seas. As the following paragraphs will illustrate, these rules are far from clear.

2.1. Customary international law

Customary international law provides for the exclusive enforcement jurisdiction of the flag State over any offence committed on board a ship flying a flag on the high seas. This power is one side of a coin, the other being the principle of freedom of navigation of the high seas. Indeed, while the need to extend the nationality of a State to a ship was originally developed to protect merchant ships from pirate attacks on the high seas, the necessity that freedom of navigation be exercised in an orderly fashion also led States to share the responsibility to regulate and control the activities of ships, each one assuming this role as regard vessels having their nationality.[3]

Although the doctrine is subject to strident criticism,[4] flag States continue to have the monopoly on enforcement measures against vessels sailing under their flag on the high seas. It is codified in Article 92 UNCLOS as well as Article 17(3) and (4) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Drug Convention) and, lastly, in Article 8(2) of the Protocol against the Smuggling of Migrants by Land, Sea and Air

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[2] Annoni, "L'esercizio dell'azione penale nei confronti dei trafficanti di migranti: le responsabilità dell'Italia… e quelle degli altri", SIDIBlog, 16 May 2015, available at: <http://www.sidiblog.org/2015/05/06/lesercizio-dellazione-penale-nei-confronti-dei-trafficanti-di-migranti-le-responsabilita-dellitalia-e-quelle-degli-altri/>.

[3] König, "Flag of Ships", Max Planck Encyclopaedia of Public International Law, 2009, available at: <https://opil.ouplaw.com/>, para. 1

[4] In this way Treves, "High Seas", Max Planck Encyclopaedia of Public International Law, 2009, available at: <https://opil.ouplaw.com/>, para. 25.

Supplementing the United Nations Convention against Transnational Organized Crime (respectively, the Smuggling Protocol and UNTOC).[5] However, no customary international law rule confers exclusive adjudicative jurisdiction over crimes committed on board a ship on the high seas to the courts of the flag State. Indeed, under current international law the flag State jurisdiction concurs with that of other States.[6] Customary international law confers a right to States other than the flag State which they can avail themselves of by establishing the jurisdiction of their national courts in their domestic law, as States do for offences committed on board ships flying their flags.

Since customary international law recognizes the freedom of each State to prosecute acts occurring on board ships flying a foreign flag on the high seas, the logical consequence should be that the same power should be recognized for acts that occur on board stateless vessels. At the time this contribution is published no study exists on State practice concerning the exercise of adjudicative jurisdiction for acts committed on board stateless ships on the high seas. Scholars have mainly investigated State practice on the exercise of enforcement powers, concluding either that customary international law allows any State to adopt enforcement measures against a stateless vessel since nobody may protect it,[7] or that at least a

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[5] See *infra* Sections 2.3 and 2.4.

[6] *S.S. "Lotus" (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Reports, Series A, No. 10, p. 2 ff., pp. 19, 23 and 25. In international law literature, see Conforti, "In tema di giurisdizione penale per fatti commessi in acque internazionali", SIDIBlog, 2012, available at: <http://www.sidi-isil.org/wp-content/uploads/2012/10/Conforti1.pdf>; Magi, "Criminal Conduct on the High Seas: Is a General Rule on Jurisdiction to Prosecute Still Missing?", RDI, 2015, p. 79 ff.; Honniball, "The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?", The International Journal of Marine and Coastal Law, 2016, p. 499 ff.; Guilfoyle, "Article 92", in Proelss (ed.), *United Nations Convention on the Law of the Seas. A Commentary*, Munich, 2017, p. 700 ff. The opposite view was held by the International Tribunal on the Law of the Sea (ITLOS) in the case concerning the *M/V "Norstar" (Panama v. Italy)*, Judgment of 10 April 2019, ITLOS Reports 2018-2019, p. 10 ff. The Tribunal observed that the principle of exclusive jurisdiction of the flag State on the high seas "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas": para. 225. Seven judges disagreed: see the Joint Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Treves annexed to the Judgment, para. 19: "nothing in the text of the Convention, in its *travaux préparatoires*, in other international treaties, in customary international law, or in the practice of States suggests that Article 87 and its corollary Article 92 altogether excludes the right of non-flag States to exercise their prescriptive jurisdiction with respect to activities on the high seas". The ITLOS's opinion was upheld by the Arbitral Tribunal constituted under Annex VII to the 1982 UNCLOS to solve the dispute concerning the *The "Enrica Lexie" Incident* (*The Italian Republic v. The Republic of India*), PCA Case No. 2015-28, Award of 21 May 2020, para. 527.

[7] Shaw, *International Law*, 5th ed., Cambridge, 2003, p. 547; Evans, "Law of the Sea", in Evans (ed.), *International law*, 2nd ed., Oxford, 2006, p. 636 ff. On the customary nature of the right of any State to intervene against a stateless vessel on the high seas, see Antonucci, Fantinato and Caiazza, *The Evolution of Enforcement Powers on the High Seas through the Air-naval Operations of the Guardia di Finanza against the Smugglers of Migrants in the Mediterranean Sea*, in Cataldi (ed.), *A Mediterranean Perspective on Migrants' Flows in*

jurisdictional nexus should exist in order for a State to extend its law and enforce it against a flagless vessel.[8]

2.2. *UNCLOS*

UNCLOS does not contain *a general rule* determining which State is entitled to institute criminal proceedings against individuals who have committed an offence on board (or from) a ship on the high seas. In fact, despite some ambiguities, Article 92 UNCLOS is confined to establishing the exclusive enforcement jurisdiction of the flag State's courts.

In the case of flagless vessels on the high seas Article 110(1) UNCLOS distinguishes two cases: the first is the case where acts of interference derive from powers conferred to a State by specific treaties; the second is the residual case, namely where no treaty provides for specific enforcement powers against flagless vessels on the high seas. As for the latter case, UNCLOS only establishes the right of warships of any State to board and visit vessels suspected of having no nationality (Article 110(1)(d)). The aim of the visit is limited to verifying the ship's right to fly its flag (Article 110(2)). Therefore, the purpose should not be to ascertain whether its crew is involved in the commission of what is an offence according to the domestic law of the intervening State. Moreover, no other powers are conferred to the intervening State such as the arrest of the ship, its seizure, the arrest of its crew and nothing is said about the establishment of criminal proceedings.[9]

2.3. *Treaties establishing the obligation to criminalize specific conduct*

Treaties which provide for the obligation to criminalize certain transnational conduct[10] include provisions that lay down the States Parties' obligations or rights to confer to their domestic courts the competence to adjudicate upon such offences when committed on the high seas or, more generally, outside the national territory, as well as provisions concerning the enforcement powers the States Parties must or have the right to perform on the high seas. A common pattern of these rules is that they deal separately with the enforcement jurisdiction and the adjudicative jurisdiction.

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the European Union: Protection of Rights, Intercultural Encounters and Integration Policies, Napoli, 2016, p. 283 ff., p. 290.

[8] CHURCHILL and LOWE, *The Law of the Sea*, 3rd ed., Manchester, 1999, p. 214; GUILFOYLE, *Shipping Interdiction and the Law of the Sea*, Cambridge, 2009, p. 17.

[9] TANAKA, "Jurisdiction of States and the Law of the Sea", in ORAKHELASHVILI (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Cheltenham, 2015, p. 145 ff., excludes that UNCLOS provides for universal jurisdiction over a stateless vessel.

[10] For a general overview of the practice of Italian courts which apply the commitments of criminalization Italy has accepted, see AMOROSO, "The Duties of Criminalization under International Law in the Practice of Italian Judges: An Overview", International Criminal Law Review, 2021, p. 641 ff.

As for the provisions dealing with the adjudicative jurisdiction, it is worth noting that in the case of treaties laying down an obligation to this effect, the adoption of a domestic law recognizing the domestic courts' jurisdiction is necessary to respect the formalistic conception of the principle of legality in criminal matters, which forms part of the shared constitutional traditions of many States although, in this author's opinion, this principle should be considered as satisfied from a substantial point of view by the laws implementing those treaties. Where treaties only entitle States Parties to establish the jurisdiction of their domestic courts, the adoption of a domestic law will be indispensable to confirm the State's choice to avail of this right.

2.3.1. The 1988 Drug Convention

The 1988 Drug Convention governs the enforcement powers of the States Parties on the high seas at Article 17, while it provides their obligation or right to establish the jurisdiction of their courts at Article 4.[11]

As far as the enforcement jurisdiction is concerned, Article 17(2) provides for the right of any State to ask other Parties to assist it in suppressing the employment of stateless vessels for drug trafficking on the high seas. This provision indirectly entails the right of any State to intervene against a stateless vessel on the high seas, but it does not clarify what powers of intervention are permitted.[12]

In case of flagged vessels, Article 17(3) and (4) confirms that the flag State has the exclusive enforcement jurisdiction over them. Indeed, according to this Article, when a State other than the flag State suspects that a vessel navigating the high seas is engaged in the unlawful transport of drugs it can adopt enforcement measures against the vessel and its crew only after the flag State's authorization or if both States have previously so agreed (Article 17(9)). According to the same provision, if evidence of involvement in unlawful traffic is found, the intervening State can also be authorized by the flag State to take appropriate (enforcement) actions with respect to the vessel, persons, and cargo.

As far as the adjudicative jurisdiction, the relevant provision is Article 4.

The Commentary to the Convention adopted by the UN Secretariat[13] clarifies that States felt it appropriate to regulate the issue of prescriptive jurisdiction in a specific treaty provision, namely Article 4, "given the uncertainty and contro-

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[11] GILMORE, "Drug Trafficking by Sea: The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", Marine Policy, 1991, p. 183 ff.

[12] I.e. according to GUIFOYLE, *cit. supra* note 8, any State may seize the vessel, but may not prosecute offences committed aboard.

[13] Although the Commentary was adopted by the UN Secretariat, and not by the conference of the States Parties, it was prepared by four principal drafters, two of whom (Henri Mazaud and John F. Scott) had acted as legal consultants to the plenipotentiary conference that adopted the Convention. Moreover, the text of the Commentary was routinely submitted for comment and evaluation to a broad cross-section of government experts from all geographical regions, many of whom had participated in the drafting process of the Convention and had attended the plenipotentiary conference.

versy surrounding the issue of the limits imposed by rules of customary international law on the right of States to legislate with extraterritorial effect".[14] This declaration is a way for States not to formally take a clear stance on the content of customary international law on adjudicative jurisdiction on the high seas, as well as on the *lex specialis* nature, or the conformity to customary law, of Article 4. Instead, as will be evident from what will follow, the States Parties took a pretty clear position on the relationship between what is provided in Article 4 and customary international law, at least as regard adjudicative jurisdiction over offences committed on the high seas on board vessels flying the flag of other States.

Article 4(1)(a)(ii) states the obligation of every State Party to take the measures that are necessary to establish its jurisdiction over offences committed on board a vessel flying its flag, whenever they occur.

Article 4(1)(b) enumerates two permissive grounds for establishing adjudicative jurisdiction.

According to Article 4(1)(b)(ii), any State Party has the right to establish the jurisdiction of its domestic courts when an offence is committed on board a vessel against which that Party has been authorized by the flag State to take "appropriate actions" pursuant to Article 17(4) or (9), namely enforcement measures. It is important to observe that according to Article 4(1)(b)(ii), the State that has been authorized to board and search the foreign vessel will not need to be authorized further by the flag State to prosecute the alleged smugglers if the inspection reveals the existence of drugs on board. The consequence is that if the intervening State has already implemented the Convention by choosing to make use of the right conferred by Article 4(1)(b)(ii), its domestic tribunal may lawfully prosecute the alleged smugglers.

Moreover, as the Commentary to this provision says, while this basis for the establishment of jurisdiction is framed in permissive terms,

> there is no doubt that the assumption of prescriptive jurisdiction will in fact be necessary if effective use is to be made of the potential afforded by Article 17. This conclusion flows from the fact that there will be little point in boarding and searching a foreign vessel in international waters, which may be crewed exclusively by foreign nationals, unless a prosecution can be entertained in instances where illicit drugs are found.[15]

The second permissive ground is provided in Article 4(1)(b)(iii), which lays down the right of any State party to establish its adjudicative jurisdiction over some of the offences provided in Article 3(1) of the Convention when committed outside its territory with a view to the commission, within its territory, of another offence (the so-called "effects" principle). As the Commentary explains, the States Parties have accepted a wide concept of the "effects" principle, not limited

[14] Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. E/CN.7/590 (1988), para. 4.1.

[15] *Ibid.*, para. 4.27.

to the real occurrence in the territory of the coastal State of the consequences of the offence:

> The effect of the present provision is to allow States to establish jurisdiction where one of those preparatory offences was committed outside its territory but 'with a view to' the commission, within its territory, of an offence established in accordance with Article 3, paragraph 1. An example would be a conspiracy formed in one State to effect the distribution of narcotic drugs in another State. The latter State could establish jurisdiction over that conspiracy, whether or not it actually led to the distribution of drugs on its territory.[16]

In other words, the principle includes intended but not yet realized effects within the coastal State territory. *A fortiori*, it seems reasonable to conclude that, according to Article 4(1)(b)(iii), the coastal State where the drugs are to be offloaded and/or distributed is authorized to establish the jurisdiction of its courts.

Lastly, according to Article 4(3), the Convention does not exclude the exercise of criminal jurisdiction established by a Party in accordance with its domestic law. Even in this case, the Convention only confers a *right* to States other than the flag State. Therefore, in order for a State Party to exercise such a right it must implement the Convention by choosing to make use of it, namely laying down a rule to that effect in its domestic law.

The Commentary explains that the Convention encourages Parties to establish jurisdiction on grounds not included among those referred to in Article 4 but that this does not mean that States are entirely free to establish any kind of extraterritorial adjudicative jurisdiction since the limits of extraterritorial jurisdiction are governed by customary international law and must be respected.[17] However, wide saving clauses like Article 4(3) seem to confirm the opposite, i.e. that customary international law does not limit the right of States to establish adjudicative jurisdiction over offences committed on board foreign ships on the high seas. Indeed, the jurisdictional links that States may establish according to Article 4(3), and the other specific jurisdictional links that States may or must establish according to the other paragraphs of Article 4, end up covering so wide a range of jurisdictional links that it seems very difficult to see Article 4 as a *lex specialis* or an exception to an alleged general rule prohibiting States other than the flag State to exercise adjudicative jurisdiction over offences committed on the high seas.

As for stateless vessels, Article 4 is silent about the assumption of adjudicative powers over them. As the Commentary to the Convention says, "[th]e absence of specific treatment of this topic is somewhat curious, given the fact that Article 17, paragraph 2, concerns requests for assistance in suppressing the use of such vessels when engaged in illicit trafficking".[18] Nevertheless, the possibility

[16] *Ibid.*, para. 4.22.
[17] *Ibid.*, paras. 4.39-4.40.
[18] *Ibid.*, para. 4.28.

identified in the Commentary to Article 17(4) for a State that has been authorized by the flag State to adopt coercive measures to prosecute alleged perpetrators (see above), is reasonably applicable also in the case of unflagged ships. Therefore, Article 4 may at least be construed as not precluding the right of any State Party to exercise criminal jurisdiction over persons on board unflagged ships on the high seas and engaged in drug trafficking.

By way of conclusion, the Drug Convention allows States other than the flag State to establish the jurisdiction of their domestic courts in a wide variety of cases, namely: if the State has been authorized to take coercive measures; if the cargo is directed towards their coasts; and when other jurisdictional links are established by its domestic law. As already noted, this seems to confirm that Article 4 does not constitute an exception to customary international law, but rather conforms to it, and therefore also confirms its content. With regard to stateless vessels, the Convention is silent on the adjudicative jurisdiction of States Parties, but for the reasons just mentioned, its silence has at least to be interpreted as not prohibiting States from introducing rules establishing the jurisdiction of their domestic courts.

2.3.1.1. The CoE Agreement implementing Article 17 of the Drug Convention

Article 4 of the Drug Convention has been implemented by some Member States of the Council of Europe (CoE) by the conclusion and ratification of the 1995 Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (CoE Agreement).

Notwithstanding that the CoE Agreement, as well as its Explanatory Report, declare that the Agreement only implements Article 17 of the Drug Convention, there is no doubt that the former gives execution to Article 4 as well. The close link between the two provisions could only lead to that result, as the Explanatory Report itself indirectly admits, when it says that "the agreement could also be seen as implementing other articles of the Vienna Convention, such as Article 4", although it formally insists on excluding it.[19] It is also interesting to note that Article 3(2) of the Agreement obliges each Party to establish its jurisdiction over offences committed on board the vessels of all other Parties[20] and that the Explanatory Reports admits that this provision is intended to go further than Article 4(1)(b)(ii) of the Drug Convention.[21]

The CoE Agreement goes a step further than Article 4 with respect to drug trafficking discovered on board stateless vessels on the high seas. Indeed, Article

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[19] Explanatory Report to the Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 31 January 1995, para. 11.

[20] Nevertheless, it is important to remember that under Art. 3(4) the States Parties have accepted to recognize the flag State's right to exercise its preferential jurisdiction.

[21] Explanatory Report, *cit. supra* note 19, para. 26.

3(3) requires each participating State to "take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law".

As for enforcement jurisdiction, the CoE Agreement confirms that Article 17 of the Drug Convention only concerns enforcement measures. In fact, Articles 9 and 10, which enumerate the measures the flag State may authorize other interested States to adopt, only concern enforcement measures other than boarding and inspection.

Summing up, the Agreement goes some steps further than the Drug Convention. Indeed, it imposes an obligation on the Contracting States to establish the jurisdiction of their domestic courts over the offence of drug trafficking committed on the high seas (and other connected offences), whether that involves vessels flying the flag of other Contracting States or flagless vessels.

What is relevant for the analysis that will follow is that Article 3(2) and (3) is self-executing; therefore, the ratification of the Agreement and its mere incorporation into the domestic legal order of States Parties would provide a legal ground for domestic courts to prosecute drug smugglers when the jurisdictional criteria laid down by domestic criminal law refer to the existence of a treaty obligation to establish the jurisdiction of domestic tribunals. This element has to be taken into account in the development of this study since both the Italian and Spanish criminal codes contain two provisions (respectively Article 7(1)(5) and Article 23(4)(d)) which establish the jurisdiction of the domestic courts if it is so provided in international treaties they have ratified (and, according to the Spanish criminal code, even if it is so provided in the acts of international organizations of which Spain is a Member).

Surprisingly, while Italy and Spain are Member States of the Council of Europe and their coasts are popular destinations for drugs, neither State has ratified the CoE Agreement: Italy has signed it, while Spain has not even done that.

2.3.2. UNTOC and the Smuggling Protocol

International agreements which deal with the smuggling of migrants deal separately with the rights and obligations of States Parties to exercise enforcement and adjudicative jurisdiction. UNTOC deals with the adjudicative jurisdiction while the Smuggling Protocol the enforcement jurisdiction.

UNTOC provides for the obligation of every State Party to establish its jurisdiction over the offences established in accordance with Articles 5(1) – that includes smuggling migrants[22] – committed on board a ship flying its flag (Article 15(1)(b)). It also lays down the right of any State Party to establish its jurisdic-

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[22] Art. 5(1) UNTOC lays down the obligation to adopt legislative and other measures to establish as criminal offences several acts connected to the establishment, direction, support, and participation in an organized criminal group to commit a serious crime for the purpose of obtaining a financial or other material benefit. Thus, the unlawful transport of migrants to

tion over the offences established in accordance with UNTOC Article 5(1) if committed outside the State Party's territory with a view to the commission of a serious crime within its territory (Article 15(2)(c)(i)).[23] This last provision only lays down a right, therefore it is not self-executing; thus, it will not be sufficient to justify the exercise of criminal jurisdiction absent a national law establishing the State's choice to avail of it.

Furthermore, UNTOC Article 15(6) provides that without prejudice to general international law, the Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

UNTOC has been supplemented by the Smuggling Protocol[24] that, in a way similar to the Drug Convention Article 17(2)-(4), only concerns coercive measures that States other than the flag State may adopt against a vessel suspected to be engaged in the smuggling of migrants on the high seas. Its Article 8(2) confirms the flag State's exclusive power to board and search a vessel on the high seas that is suspected to be engaged in the smuggling of migrants. Any other State that is interested in intervening must ask for the authorization of the flag State to board and search the vessel. Furthermore, if evidence is found that the vessel is involved in unlawful activity, the State may take other appropriate measures, namely enforcement measures, with respect to the vessel, persons on board, and cargo, if the flag State consents to them.

In the case of a flagless vessel suspected to be involved in unlawful activity on the high seas, Article 8(7) provides that any State may board and search it and if evidence confirms this suspicion, the intervening State has the obligation to take appropriate (enforcement) measures in accordance with relevant domestic and international law.[25] Notwithstanding some authors interpret Article 8(7) as including the intervening State's right to exercise adjudicative jurisdiction, in this author's opinion it is only UNTOC Article 15 that recognizes the States

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facilitate their entry into the territory of one State in return for money is encompassed among the offences States Parties have an obligation to criminalize.

[23] During the UNTOC negotiation (Seventh session of the Commission on Crime Prevention and Criminal Justice, 1998), a draft provision was proposed that provided for jurisdiction when the offence had "substantial effects" in the forum State. Some States opposed the "substantial effect" rule, as well as the possibility of a saving clause that might allow domestic law to establish jurisdiction. They claimed that both provisions might have been used to assert extra-territorial jurisdiction (McClean, *Transnational Organized Crime. A Commentary on the UN Convention and Its Protocols*, Oxford, 2007, p. 165 ff.). The provision concerning the "substantial effects" rule was heavily modified and transformed into the current Article 15(2)(c)(i), while the saving clause on jurisdiction according to domestic law was adopted and became Article 15(6).

[24] Gallagher and David, *The International Law of Migrant Smuggling*, Cambridge, 2014, pp. 436-437.

[25] According to Papanicolopulu, *International Law and the Protection of People at Sea*, Oxford, 2018, p. 136, this provision should be interpreted taking the object and purpose of the Protocol into account. Accorrding to this author, the right of the interving State should not be limited to the adoption of enforcement measures but should include the right to issue law and to prosecute alleged offenders; otherwise the aim of the treaty would be frustrated and smugglers could escape arrest and prosecution. See also Den Heijer, *Europe and Extraterritorial Asylum*, Oxford, 2012, p. 229, footnote 100.

Parties' obligation or right to do so. Indeed, as said at the beginning of Section 2.3, the split between provisions concerning enforcement jurisdiction and those related to adjudicative jurisdiction is a constant pattern of the treaty law establishing the obligations of States Parties to criminalize certain transnational conduct.

3. National Criminal Law Provisions on the Jurisdiction of Domestic Courts over Foreigners for Offences Committed Abroad

3.1. Italian criminal law

The Italian criminal code includes three provisions allowing Italian tribunals to exercise their jurisdiction over aliens for alleged offences committed outside Italian territory (Articles 6(2), 7(1)(5) and 10(2)). For the sake of this contribution only the first two provisions will be considered.

Article 6(1) establishes that anyone that commits an offence on Italian territory will be sentenced according to Italian law. Paragraph 2 clarifies that an offence is considered as committed on Italian territory if all or part of the offence occurs on the territory and/or whenever the consequence of the offence occurs on the territory.

Article 7(1)(5) lays down that Italian criminal law applies to any citizen or foreigner who commits in foreign territory an offence that, according to special provisions of the Italian law or international conventions, must be regulated by the Italian criminal law.

3.2. Spanish criminal law

Organic Law No. 6 on judicial power, which entered into force in 1985, provided for the jurisdiction of Spanish courts over the offence of drug trafficking when committed by foreigners outside Spanish territory (Article 23(4)(f)), and therefore also on the high seas, on ships flying the flag of other States.

The reforms introduced by Organic Law 1/2014 changed this landscape. In order to limit the scope of the principle of universal jurisdiction, Article 23(4)(d) of the Organic Law, as amended by Organic Law 1/2014,[26] now provides for the jurisdiction of the Spanish courts over the offence of drug trafficking if committed by foreigners outside the Spanish territory, whenever it is established by international treaties Spain has ratified or by acts of international organizations in which Spain is a Member. Therefore the provision is now very similar to Article 7(1)(5) of the Italian criminal code.

[26] Ley orgánica No. 6/1985 del poder judicial (1 July 1985) as modified by Ley orgánica No. 13/2007 (19 November 2007) and by Ley orgánica No. 1/2014 (13 March 2014).

Moreover, Article 23(4)(i) provides for the jurisdiction of the Spanish courts in proceedings against Spanish citizens, in the case of acts implementing the offence of unlawful drug trafficking or in the case of the establishment of a criminal group with a view to trafficking unlawful drugs into Spanish territory.

As for the offence of unlawful transport of migrants to facilitate their entrance into a foreign State, Organic Law No. 6/1985 did not originally provide for the jurisdiction of the Spanish courts over aliens that were allegedly engaged in the smuggling of migrants outside Spanish territory. Nevertheless, Article 23(4)(g) of the Organic Law provided for the Spanish courts' jurisdiction over foreigners for acts committed outside Spanish territory when international agreements laid out an obligation to establish the jurisdiction of domestic courts.

By means of Organic Law No. 13/2007 on the extraterritorial prosecution of unlawful trafficking of human beings and irregular migrants, adopted in November 2007, Organic Law No. 6/1985 was modified. In fact, the jurisdiction of the Spanish courts over the offence of smuggling of migrants – irrespective of the nationality of the offender and the place where the offence occurred – was introduced in Article 23(4)(f).

Finally, the 2014 reform of the Organic Law on judicial power has limited the scope of the principle of universal jurisdiction. Nowadays, Spanish tribunals may exercise their jurisdiction over the offence of smuggling of migrants committed on the high seas only if international agreements concluded by Spain or acts of international organizations to which Spain belongs provide for an obligation to establish the jurisdiction of the States Parties' domestic courts (Article 23(4)(d)).

4. Jurisprudence on the Adjudicative Jurisdiction of the Domestic Courts over Drug Traffickers on the High Seas

As the following paragraphs will show, the Italian and Spanish supreme courts interpreted Article 17(4) of the Drug Convention as the legal ground to justify the prosecution in their courts of drug traffickers on board foreign ships on the high seas. However, a difference exists between their case law. In a recent judgment, the Italian Court of Cassation considered Article 17(4) as *lex specialis* compared with customary international law, which in the Court's opinion entitled the flag State to exercise exclusive adjudicative jurisdiction over offenders on board ships flying its flag and, consequently, subjected the right of States other than the flag State to prosecute drug traffickers to the permission of the State of nationality of the vessel. Instead, the Spanish Supreme Court considered Article 17(4) as not precluding the right of any State to exercise adjudicative jurisdiction over alleged traffickers, while it admitted the right of the flag State to take precedence in their prosecution.

As said above, Article 17 of the Drug Convention only concerns the enforcement jurisdiction of the flag State and of those States the former authorizes to perform enforcement powers over its ships on the high seas. It is Article 4 of the Drug Convention that deals with the obligation or right of any State Party

to establish the adjudicative jurisdiction of its domestic courts, but both courts ignored this provision and construed Article 17(4) expansively.

4.1. The Italian Court of Cassation's jurisprudence

The case concerning the vessel *Fidelio*, flying the flag of Honduras, and engaged in the illegal trafficking of drugs on the high seas, was the first time the Italian Court of Cassation was confronted with a challenge by the claimants to the enforcement measures adopted by the *Guardia di Finanza* on the high seas, and to the exercise of adjudicative jurisdiction by the Italian courts against the ship's crew.[27]

By the judgment of 1 February 1993, the Court of Cassation upheld the decision of the Court of Appeal of Palermo which had ruled out the existence of a customary rule which authorized any State to exercise jurisdiction (enforcement and adjudicative) against the alleged perpetrators.[28] The Court of Cassation held that no evidence had been provided of the creation of this custom. According to the Court, this conclusion had also been confirmed by the Drug Convention, since its Article 17(3) and (4) subjected intervention against foreign ships on the high seas to the flag State's authorization.

The Court of Cassation dealt with this issue once again in its Judgment No. 13596/2019,[29] but in this case the plaintiff only challenged the decision of the Italian tribunal of Catania to confirm the precautionary measure of *custodia cautelare in carcere* against him. Therefore, the Court of Cassation's judgment only concerned the lawfulness of the enforcement measures adopted by the Italian authorities against the members of the crew.

In the case at stake, the Italian military authorities had been authorized by the Netherlands to board a ship flying the Dutch flag that Italy suspected was involved in drug trafficking. However, the Italian authorities had not limited their actions to just boarding the ship, but instead had seized the ship and steered it into an Italian port to prevent the crew's attempt to hide the cargo by sinking the vessel. Once in Italian territory, the applicants had been arrested as a precautionary measure.

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[27] *Corte di Appello Palermo*, *Criminal Proceeding againts Renevey*, 30 June 1992, RDI, 1992, p. 1081 ff. For a comment, SCOVAZZI, "La cattura della nave Fidelio", RDI, 1992, p. 1015 ff.; see also ID., "The Evolution of International Law of the Sea: New Issues, New Challenges", RCADI, Vol. 286, 2000, p. 225 ff.

[28] The judgment concerned the hot pursuit of the ship *Fidelio* by the Italian authorities, that began on the high seas and ended with the arrest of the vessel and its forced entry into the Italian harbour of Palermo where the Italian authorities ordered its seizure and the crew was arrested.

[29] *Corte di Cassazione (Sez. IV penale)*, 28 May 2019, No. 13596, in IYIL, 2019, p. 427 ff., with a comment by BEVILACQUA. The Court had to rule on the decision of the Catania Tribunal that had upheld the Ragusa Tribunal's order imposing pre-trial detention against an alleged drug trafficker. The plaintiff claimed the Italian courts lacked jurisdiction since the events had occurred on the high seas, on a ship flying the Dutch flag.

The Court of Cassation, noting that the authorization of the flag State was limited to boarding the ship, ruled that the Italian authorities did not have the power to arrest the crew on the ground of Article 17(3) and (4) of the Drug Convention.

However, in its Judgment No. 27691,[30] the Court recognized the jurisdiction of Italian tribunals over the offence of participation in unlawful drug trafficking[31] committed by foreign citizens on board a ship flying the flag of the Cook Islands. It rejected the applicants' appeal against the judgment of the Court of Appeal of Cagliari which had convicted them for the offence just mentioned. The Court held the Court of Appeal of Cagliari had rightly recognized the jurisdiction of the Italian tribunals based on Articles 7(1)(5), of the Italian criminal code and 17(4) of the Drug Convention. Indeed, according to the Court of Appeal of Cagliari, Article 17(4) also concerned the right of the flag State to permit other interested States to adopt enforcement measures limiting the personal liberty of individuals, which presupposed the adjudicative jurisdiction of the intervening State.[32]

4.2. The Spanish Supreme Court's jurisprudence

As already said above, Spanish Organic Law No. 6/1985 on judicial power originally provided for the jurisdiction of the Spanish courts over the offence of drug trafficking when committed by foreigners outside Spanish territory (Article 23(4)(f)), and therefore also on the high seas, on ships flying the flag of other States.[33]

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[30] *Corte di Cassazione (Sez. III penale)*, 21 June 2019, No. 27691, in IYIL, 2019, p. 427 ff., whit a comment by BEVILACQUA.

[31] Arts. 110 of the Italian Criminal Code and 73 and 80 of Presidential Decree 309/90 ("Consolidated text of the laws on the discipline of narcotic drugs and psychotropic substances").

[32] This judgment is also interesting because the Court held that a formal authorization by the flag State to the intervening State to allow its courts to prosecute the applicants was not required if other elements confirmed this intent. In that case, the elements were found in the satisfaction expressed by the flag State for the operation carried out by the Italian authorities, as well as the absence of declarations by the flag State expressing its willingness to exercise criminal jurisdiction over the applicants or requesting their extradition.

[33] At the time the Organic Law entered into force, Spain had concluded the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances which merely provide for the obligation of States Parties to prosecute foreigners engaged in drug trafficking if the alleged offender is found in their territories, if extradition is not acceptable according to the law of the requested Party and if the offender has not already been prosecuted and judged (respectively Arts. 36(2)(a)(iv) and 22(2)(a)(iv)). Both conventions do not regulate the exercise of enforcement and adjudicative jurisdiction on ships engaged in drug trafficking on the high seas. Consequently, when the Organic Law entered into force, no treaty Spain had ratified limited the freedom of the Parties to exercise criminal jurisdiction over drug traffickers on the high seas as it was recognized by customary international law and, therefore, the Organic Law No. 6/1985 was in conformity with international law.

After its 2014 reform, things changed sensibly. Indeed, the aim of the reform was to limit the scope of the principle of universal jurisdiction.[34] As far as the offence of drug trafficking is concerned, the result has been the recognition of the Spanish courts' jurisdiction against foreigners for acts committed outside Spanish territory only in two cases. The first is the ratification of international treaties (or the adoption of acts of international organizations in which Spain is a member) which provide for the obligation to establish the jurisdiction of the domestic courts (Article 23(4)(d)). However, under the Drug Convention, that Spain ratified, the States Parties other than the flag State do not have such an obligation; nor does this obligation exist in case of smugglers on board unflagged vessels. As just said, the Convention merely recognizes the right of States other than the flag State to establish jurisdiction in certain cases (see *supra*, Section 2.3.1).

The second ground is provided by Article 23(4)(i), which limits the jurisdiction of the Spanish courts to acts implementing the offence of drug trafficking or the establishment of a criminal group intended to traffic drugs into the Spanish territory. Since the law implementing the 2014 reform had retroactive effect, many proceedings against foreigners for the offence of drug trafficking committed on the high seas were interrupted; in fact, many Spanish courts applied Article 23(d)(i) and declared they lacked jurisdiction to hear the cases since it was not proved that Spain was the final destination of the cargo.[35]

As a matter of fact, the Spanish Supreme Court overcame these limits.

First, in its Judgment No. 593/2014 of July 2014[36] the Court clarified the relationship between letters (d) and (i) of Article 23(4). It held that they provided for separate jurisdictional criteria: letter (d) only refers to drug trafficking on the high seas while letter (i) concerns offences committed outside Spanish territory, but the high seas are excluded.

Secondly, in the same judgment the Court held that Article 17(4) had to be considered as one of the conventional provisions Article 23(4)(i) referred to. In the Court's opinion, Article 17(4) had to be interpreted as not precluding the right of a State other than the flag State to exercise criminal jurisdiction if the flag State did not prosecute the offenders.[37] Moreover, in the case of a stateless vessel, the

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[34] SEGURA-SERRANO, "Hacia una nueva reforma restrictiva del principio de jurisdiccíon universal en España", Revista Española de Derecho Internacional, 2014, p. 321 ff.

[35] GARCÍA-LLAVEL, PINIELLA and ACOSTA-SANCHEZ, "Maritime Interdiction on the High Seas: a Case Study of Spain and the Concept of 'Universal Jurisdiction'", Journal of Maritime Research, 2015, p. 77 ff.

[36] *Tribunal Supremo (Sala de lo Penal)*, 24 July 2014, No. 593/2014, available at: <https://vlex.es/vid/-523367494>.

[37] "Este precepto establece que el Estado español es competente para el abordaje, inspección, incautación de sustancias y detención de los tripulantes de cualquier embarcación que enarbole el pabellón de otro Estado, cualquiera que sea el lugar en que se encuentre, siempre que obtenga la autorización del Estado de abanderamiento del barco (artículo 17.3 y 4 de la Convención). Esta competencia supone, lógicamente, la del enjuiciamiento de los imputados, salvo que el Estado del pabellón reclame su competencia preferente como prevé la Convención de Ginebra sobre Alta Mar, de 29 de abril de 1958 y la Convención de Montego Bay": *ibid*.

Supreme Court held that paragraphs 3 and 4 of Article 17 presupposed the right of the intervening State to prosecute the alleged offenders.[38]

5. Jurisprudence on the Adjudicative Jurisdiction of Domestic Courts over the Smuggling of Migrants on the High Seas

The following paragraphs will point out that the Italian and Spanish supreme courts have resorted to an expansive interpretation of the territoriality principle – provided in their national criminal law – as well as of treaty provisions concerning the adoption of enforcement measures, either to expand the right of Italy and Spain to adopt enforcement measures against stateless vessels or vessels flying the flags of other States on the high seas or, mainly, to exercise adjudicative jurisdiction over the crews of such vessels for acts committed on the high seas.

5.1. The Italian Court of Cassation's jurisprudence on the adjudicative jurisdiction of the domestic courts: consolidated trends

The Court of Cassation has endorsed expansive interpretations of the provisions of the Italian criminal code concerning the jurisdiction of the Italian courts, especially Article 6 concerning the territoriality principle.

First, the Court recognized the jurisdiction of the Italian courts based on Article 6 of the Italian criminal code over offences entirely committed on the high seas but related to offences committed within Italian territorial waters when the right of hot pursuit had been exercised.

This is what happened in Judgment No. 325 of 2001.[39] The Court acknowledged the jurisdiction of Italian tribunals over offences of shipwreck and manslaughter that entirely occurred on the high seas but that were connected to the offence of smuggling of migrants (Article 12 of Legislative Decree No. 286/1998) by a vessel the Italian police authorities had discovered within Italian territorial waters, pursued, and seized. The jurisdiction was grounded on Article 6 of the

[38] "En suma, de la conjunción de lo establecido en los números 3 y 4 del artículo 17 de la Convención de Viena se deduce que un Estado (el requirente) puede ser autorizado por el Estado del pabellón (requerido) para adoptar las medidas adecuadas de investigación con respecto a una nave en dos supuestos: 1) cuando se tengan motivos razonables para sospechar que la nave está siendo utilizada para el tráfico ilícito de drogas; o 2) de conformidad con los tratados vigentes entre las Partes, o con cualquier otro acuerdo o arreglo que se haya podido concertar entre ellas. A su vez, las medidas que se pueden autorizar y adoptar, entre otras, son: abordar la nave, inspeccionarla y, si se descubren pruebas de implicación en el tráfico ilícito, adoptar medidas adecuadas con respecto a las personas y a la carga que se encuentren a bordo. Igual solución debe predicarse para el caso de naves que no enarbolen ningún pabellón": *ibid*.

[39] *Corte di Cassazione (Sez. I penale)*, 20 November 2001, No. 325, in Cassazione penale, 2002, p. 3096 ff.

Italian Criminal Code. The Court held a similar position in other judgments, especially No. 32960 of May 2010[40] and No. 48250 of September 2019.[41]

Second, since its Judgment No. 14150 of February 2014,[42] the Court has acknowledged the jurisdiction of Italian tribunals over the offence of smuggling of migrants on the high seas and has grounded it on Article 6 of the Italian criminal code, applying the so-called *autore mediato* doctrine. Pursuant to it, the smugglers' conduct is considered as inextricably linked to the activities of the Italian maritime authorities (or other private vessels under the Italian maritime authority's co-ordination) that rescue migrants in distress on the high seas and carry them to a place of safety. Although the smugglers' criminal action materially ends on the high seas, where migrants are unloaded onto unseaworthy ships and abandoned, in the Court's opinion this action still falls under the Italian courts' jurisdiction because the smugglers' conduct is deliberately planned to trigger the intervention of the Italian rescue authorities.[43]

Third, in its Judgment No. 29832 of July 2018,[44] the Court asserted the jurisdiction of the Italian courts on the ground of Article 6 of the Italian criminal code since the offence of smuggling of migrants produced its effect on Italian territory although the offence was qualified as *reato a consumazione anticipata.*[45] This is a significant change. In the past, the Court had excluded the jurisdiction of the Italian courts since the offence had been considered as completed once the offending conduct (i.e. the organization and implementation of the trip) had been carried out, while the resulting effect of the conduct, namely the actual irregular entry into the Italian territory, had been considered as irrelevant.[46]

In other cases the Court grounded the jurisdiction of the Italian courts on Article 7(1)(5) and on the provisions of international treaties, or customary international law, laying down the right of the States Parties to establish the jurisdiction of their courts, without taking the non-self-executing nature of these provisions into account.

In fact, several times the Court asserted the jurisdiction of Italian courts over the offence of *associazione per delinquere finalizzata al favoreggiamento dell'immigrazione irregolare* (Article 416 of the Italian criminal code) on the ground of Articles 7(1)(5) of the Italian criminal code and 15(2)(c)(i) of

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[40] *Corte di Cassazione (Sez. I penale)*, 5 May 2010, No. 32960.

[41] *Corte di Cassazione (Sez. V penale)*, 12 September 2019, No. 48250.

[42] *Corte di Cassazione (Sez. I penale)*, 28 February 2014, No. 14150; similarly *Corte di Cassazione (Sez. I penale)*, 11 March 2014, No. 18354. Both concerned a mother vessel that had released migrants into small unseaworthy boats on the high seas. The *autore mediato* doctrine was also applied in *Corte di Cassazione (Sez. I penale)*, 22 December 2015, No. 11165 and *Corte di Cassazione (Sez. I penale)*, 3 July 2018, No. 29832, that concerned the rescue of an unseaworthy vessel by foreign maritime authorities in international waters and its safe conveyance into Italian territorial waters.

[43] For a critical view, see MANACORDA, "Tratta e traffico di migranti: il nodo della giurisdizione tra territorialità ed extraterritorialità", Diritto penale contemporaneo, 2018, p. 39 ff.

[44] *Corte di Cassazione (Sez. I penale)*, 3 July 2018, No. 19832.

[45] For a comment, see MUSSI, "What Possibilities for Exercising Criminal Jurisdiction over Migrant Smugglers in International Waters?", IYIL, 2019, p. 459 ff.

[46] *Corte di Cassazione (Sez. I penale)*, 28 October 2003, No. 5583.

UNTOC.[47] Article 15(2)(c)(i) lays down a right, but does not impose an obligation, of States Parties to establish the jurisdiction of their courts to prosecute smugglers. Therefore, States should give effect to this provision by adopting laws that confirm their choice to exercise this right. Law No. 146 of 16 March 2006 which gives effect to UNTOC in Italian domestic law does not give effect to this right. Nonetheless, the Court has not invoked the non-self-executing nature of Article 15(2)(c)(i) for a long time.[48]

This jurisprudence is noteworthy if compared with a recent judgment of the Court of Cassation concerning the jurisdiction of the Italian courts in a case of unlawful trafficking of arms on the high seas.[49] Here, the Court acknowledged the jurisdiction of the Italian tribunals under Article 10(2) of the Italian criminal code, but excluded it on the ground of Articles 7(1)(5) of the Italian criminal code and 15(4) UNTOC. Under this last provision, the Contracting Parties may adopt measures necessary to establish their jurisdiction over the offences covered by the Convention when the alleged offender is present in their territory, and they do not extradite him or her. The Court opposed the non-self-executing nature of Article 15(4).[50]

5.1.1. Recent developments

The last trend in the Court's jurisprudence to extend jurisdiction over smugglers of migrants stems from its Judgment No. 31652 of 2021.[51]

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[47] *Corte di Cassazione (Sez. I penale)*, 27 March 2014, No. 14150; *Corte di Cassazione (Sez. I penale)*, 20 August 2014, No. 36052; *Corte di Cassazione (Sez. I penale)*, 18 May 2015, No. 20503; *Corte di Cassazione (Sez. V penale)*, 27 November 2019, No. 48250.

[48] Criticism has been expressed in criminal and international law literature in relation to the Court's failure to take the non-self-executing nature of Art. 15 into accout (Pressacco, "Immigrazione iregolare via mare e limiti della giurisdizione penale italiana", Vita e pensiero, 27 April 2021, available at: <https://jus.vitaepensiero.it/news-papers-immigrazione-irregolare-via-mare-e-limiti-della-giurisdizione-penale-italiana-5571.html>; Annoni, "Traffico di migranti via mare: l'ambito di applicazione della legge penale italiana", Rivista del diritto della navigazione, 2015, p. 420 ff).

[49] *Corte di Cassazione (Sez. I penale), Criminal proceedings against Tartoussi Youssef*, 1 July 2020, No. 19762, in IYIL, 2020, p. 488 ff., with a comment by Zugliani. The applicant was being prosecuted for the offence of unlawful international trafficking of arms, that had occurred on the high seas and in the Turkish and Libyan territorial seas. During the trip, the vessel stopped in the Genova harbour, where some members of its crew reported the unlawful trafficking to the police and the vessel's captain was arrested.

[50] For a comment, see Mandrioli, "Oltre i limiti territoriali: l'esercizio della giurisdizione penale sul traffico di armi nel Mare Mediterraneo", Il diritto marittimo, 2021, p. 354 ff.

[51] *Corte di Cassazione (Sez. I Penale), Criminal Proceedings against Jomaa Laamami Tarek and Others*, 13 August 2021, No. 31652, in this Volume, p. 481 ff., with a comment by Mandrioli. A stateless vessel had been rescued by the Italian maritime authorities. The survivors' testimonies permitted the Italian investigators to identify migrants recruited by the smugglers to maintain order on board the vessel, as well as those responsible for the deaths of many migrants on board the ship during the trip.

First, the Court asserted the jurisdiction of the Italian tribunals over the offences of *omicidio volontario* of migrants (Article 575 of the Italian criminal code) that occurred on the high seas, based on Article 7(1)(5). In the Court's opinion the legislative and conventional rules recalled by Article 7 were, on the one hand, the provision of Legislative Decree No. 286/1998 that applies the Smuggling Protocol, namely Article 12 that defines the conduct that is considered as criminal, and, on the other, Article 3(2) UNTOC that provides the definition of the transnational offence as one committed in a State but that has substantial effects in another State.[52] Later, the Court qualified this last provision as self-executing.[53] Surprisingly, neither Article 12 of the Legislative Decree nor Article 3(2) UNTOC provide for an obligation or a right to establish jurisdictional criteria, as required by Article 7.

Second, the Court accepted that the right to forcefully intervene against a stateless vessel on the high seas provided in Article 8(7) of the Smuggling Protocol also entailed a right of the Italian judicial authorities to exercise their adjudicative jurisdiction over the offence of *favoreggiamento dell'immigrazione irregolare*.[54] This was an *obiter dictum* since the applicant had appealed against the jurisdiction of the Italian courts only as for the offence of *omicidio volontario.* Thus, the Court was not called upon to tackle the jurisdiction of the Italian courts over the offence of smuggling of migrants on the high seas. Nonetheless, this *obiter* statement is relevant since it may lead to Article 8(7) being used as the legal ground to justify the Italian courts' jurisdiction in the near future.

Third, the Court has also grounded the jurisdiction of Italian courts on the customary law rule permitting any State to exercise adjudicative jurisdiction over unlawful conduct committed on the high seas on board stateless vessels and on Article 3(2) of the Italian criminal code. This latter provides that Italian law applies whenever international law so establishes. In the Court's opinion, customary international law would allow any State to act against a stateless vessel suspected

[52] *Ibid.*, see para. 2.6.2(f): "[t]he conditions to apply the Italian criminal law are provided in the general clause of Article 7 of the Italian criminal code and by the clear identification of the connecting criteria introduced by the international conventions Italy had ratified to extend the jurisdiction of its courts. It is exactly what occured with the Palermo Convention, when it specifies the connnecting criteria to esablish the application of the Italian law, *namely when an organized criminal group commits a serious offence in a State but that has substantial effects in another State, i.e. it is transnational*" (emphasis added; author's translation). Moreover, although at para. 2.6.4 of this judgment the Court quoted Art. 15(2)(c)(i) UNTOC, it had never referred to it before in the judgment. Therefore, it does not seem to represent, in the Court's opinion, the real legal foundation of the jurisdiction of the Italian courts; *contra* MANDRIOLI, "La giurisdizione penale extraterritoriale e la Convenzione di Palermo: nuove (o antiche?) riflessioni ispirate dalla Corte di Cassazione", SIDIBlog, 31 gennaio 2022, available at: <http://www.sidiblog.org/2022/01/31/la-giurisdizione-penale-extraterritoriale-e-la-convenzione-di-palermo-nuove-o-antiche-riflessioni-ispirate-dalla-corte-di-cassazione/>.

[53] *Corte di Cassazione*, *cit. supra* note 51, para. 2.6.3.

[54] *Ibid.*, paras. 2.2-2.3, where the Court held that the adjudicative jurisdiction is a direct enactment of the enforcement jurisdiction and this latter was conceived as encompassing the adjudicative jurisdiction as the most evident manifestation of the authoritative power of the State.

to be engaged in the commission of a crime on the high seas. According to the Court, the freedom to sail the high seas is the result of mutual limitation of sovereign powers (by flag States and coastal States) that usually have opposite interests. Stateless vessels and their crews do not benefit from this agreement among States; therefore, they are subject to the coercive and adjudicative jurisdiction of any State.[55] The Court did not pay any attention to the non-self-executing nature of the customary law rule.[56]

5.2. The Spanish Supreme Court's jurisprudence on the adjudicative jurisdiction of the domestic courts

As already mentioned, the Organic Law on judicial power as adopted in 1985 did not provide for the jurisdiction of Spanish courts over foreigners suspected of smuggling migrants outside Spanish territory. Nonetheless, Article 23(4)(g) provided that Spanish courts had jurisdiction over foreigners for acts committed outside Spanish territory when international agreements laid out an obligation to do so. Later, Spain ratified UNTOC, but the Convention only provides for the right, and not the obligation, of States other than the flag State to establish the jurisdiction of the domestic courts over acts committed on the high seas. Nevertheless, after Spain ratified the Smuggling Protocol, the Supreme Court interpreted its Article 8(7) expansively as including the obligation of the intervening State to prosecute smugglers on board flagless vessels for their conduct on the high seas.

In its Judgment No. 606/2007 of June 2007,[57] the Court rejected the claim of the applicants concerning the lack of jurisdiction of the Spanish court of first instance that had sentenced them for the offence of facilitation of unlawful immigration, committed on board a flagless vessel on the high seas. In the Court's opinion, Article 8(7) of the Smuggling Protocol justified their criminal prosecution.

Moreover, in Judgment No. 1121/2008 of January 2008,[58] it held that Article 8(7) of the Smuggling Protocol imposed an obligation on each State Party to

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[55] *Ibid.*, para. 2.4.

[56] Instead, the Court considered Art. 3 UNCLOS as self-executing and asserted the Italian court's jurisdiction over the offence of manslaughter on Art. 7(1)(5) and Art. 3 UNCLOS: "[t]ale evenienza si verifica proprio con riguardo alla Convenzione di Palermo là dove richiede, *così specificando i criteri di collegamento che determinano l'applicabilità della legge italiana*, che si tratti di un 'reato grave', che ha avuto effetti sostanziali in Italia, commesso da un gruppo criminale organizzato. Tali puntuali indicazioni normative internazionali non richiedono, infatti, l'adozione di uno strumento attuativo di diritto interno, essendo esse sufficientemente chiare e direttamente applicabili in presenza della clausola di cui all'art. 7 c.p." (*ibid*., para. 2.6.3, emphasis added).

[57] *Tribunal Supremo (Sala de lo penal)*, 1 June 2007, No. 606/2007. The rescue operation occurred in the Moroccan territorial Sea. The Spanish rescue authorities' operation was allowed by the Spanish-Moroccan cooperation agreement on combating pollution and on maritime and search and rescue of 1996. Moreover the Supreme Court invoked UNCLOS Art. 18(2).

[58] *Tribunal Supremo (Sala de lo penal)*, 3 January 2008, available at: <https://vlex.es/vid/ciudadanos-extranjeros-jurisdiccion-1995-37389340>.

prosecute alleged offenders when their police authorities inspected a flagless vessel and discovered it was engaged in the smuggling of migrants.[59]

The judgment concerned the appeal presented by the Public Prosecutor against the decision of the lower court (*Audiencia Provincial de las Palmas de Gran Canaria) not to recognize the Spanish criminal jurisdiction to prosecute* foreigners accused of smuggling of migrants on the high seas.

The *Audiencia Provincial* had concluded that Article 23(4)(g) of the Organic Law No. 6/1985 could not justify the jurisdiction of the Spanish courts because neither UNTOC nor the Smuggling Protocol laid down the Spanish courts' compulsory criminal jurisdiction in a case like the one that had been submitted to it. The *Audiencia Provincial rightly observed that* Article 15(2)(c)(i) of UNTOC only provides for a right for States Parties to issue laws and regulations laying down the criminal prosecution of smugglers, while Spain did not adopt implementing measures to this effect.

On the contrary, the Supreme Court held that the Spanish courts had jurisdiction. It based jurisdiction on Article 23(4)(h) of the Organic Law and on some Articles of UNTOC and its Protocol, noting in particular that the Protocol provides for the compulsory jurisdiction of the Spanish courts. The Court also referred to Article 8(7). In the Court's opinion, the appropriate measures the boarding State has an obligation to adopt if the inspection confirms that the flagless vessel is used for the smuggling of migrants are those referred to in Article 6 of the Protocol (which provides for the obligation to adopt legislative and other measures to establish the smuggling of migrants as a criminal offence) and in Article 5(1) UNTOC (which provides for the obligation to adopt legislative and other measures to criminalize those who take part in an organized criminal group to perpetrate the smuggling of migrants). It is clear that the Supreme Court considered the obligation to exercise the prescriptive jurisdiction laid down in the above articles as encompassing not only the obligation to legislate, but also to adjudicate, although it did not state this explicitly.

Furthermore, the Supreme Court held that Spanish courts had jurisdiction on the ground of an expansive interpretation of Article 23(1), which codifies the *territoriality principle* and the theory of *ubiquity* as formulated by the Supreme Court.[60] According to this interpretation, a crime takes place both in the location where the activities to achieve the unlawful result take place and in the location where the result of the unlawful action occurs. In the case at hand, the unlawful conduct had been committed outside Spanish territory and territorial waters,

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[59] The vessel, that did not fly anyone's flag, had been boarded and inspected in international waters by the Spanish authorities, the smugglers had been arrested and subjected to the Spanish criminal jurisdiction, while the immigrants had been transferred into Spanish territory.

[60] Acuerdos del pleno no jurisdiccionales la Sala segunda del Tribunal Supremo sobre el Principio de ubicuidad, 3 February 2005, available at: <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Jurisprudencia-/Acuerdos-de-Sala/Acuerdos-de-3-de-febrero-de-2005-sobre--1--Principio-de-ubicuidad---2--Clausulas-de-reserva-de-dominio-y-prohibicion-de-enajenar---3--Principio-de-minimos-psicoactivos-en-relacion-al-art--368-CP>.

but in the Court's opinion it had to be regarded as committed in Spain since its natural consequences – i.e. the disembarkation of migrants – had occurred on Spanish territory.

In its subsequent jurisprudence, the Supreme Court has enhanced this last jurisdictional criterion, and while it has considered the facilitation of unlawful entrance of migrants as a *delito de consumación anticipada*, it has repeatedly grounded it in the territoriality principle and its doctrine of ubiquity.[61]

6. A Comparison and Some Concluding Remarks

Time has come for a general comparison and some ensuing concluding observations.

The analysis developed so far shows that, faced with serious threats to national interests coming from unlawful activities of international organized groups on the Mediterranean Sea, the two Mediterranean States this contribution has taken into account have had a similar reaction as far as the exercise of adjudicative jurisdiction is concerned.

In both cases legal "gymnastics" have been used to justify the jurisdiction of the domestic courts over the offence of drug trafficking (and other connected offences) on the high seas. Indeed, both courts grounded the adjudicative jurisdiction of the domestic tribunals on Article 17 of the Drug Convention which only concerns the enforcement powers of the Contracting Parties.

The attitude of both courts has been similar in the case of smuggling of migrants. Both have attempted to assert the jurisdiction of their tribunals by forcing the text of the provisions of their criminal code, especially the territoriality principle, and that of some international law provisions, especially Article 8(7) of the Smuggling Protocol.

The tendencies this contribution has pointed out confirm that the national judges have been forced to "gymnastics" to assert the jurisdiction of their tribunals over such serious offences. This is particularly surprising. Indeed, in the case of drug trafficking, both Spain and Italy could ratify the CoE Agreement to grant their tribunals the jurisdiction to adjudicate this offence (and those connected to it) when committed on the high seas. The CoE Agreement provides for the obligation to establish the jurisdiction of domestic courts both against the vessels of other States Parties and against stateless vessels. Therefore, according to a non-formalistic reading of the legality principle in criminal matters, the law implementing the CoE Agreement would be sufficient to permit the Italian and Spanish courts to assert their jurisdiction on the basis of, respectively, Article 7(1)(5) and Article 23(4)(d) of their criminal codes.

As for the smuggling of migrants, it would be sufficient to implement Article 15(2)(c)(i) UNTOC, by adopting a domestic law to this effect. This should not

[61] *Tribunal Supremo* (*Sala de lo penal*), 23 January 2008, No. 1/2008; see also *Tribunal Supremo* (*Sala de lo penal*), 31 January 2008, No. 36/2008.

be too difficult if, as the majority and minority political parties equally state, the ultimate objective in combating the unlawful entry of migrants is to stop criminal organized groups from profiting on the back of desperate people.