

Is it a crime to help people to survive (Cap Anamur and other cases)

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Summary/Abstract:

The article of the Immigration law that punishes the conduct of facilitating illegal entry into Italian territory has been amended many times. In the beginning, it was provided with the purpose of sanctioning labor's exploitation; afterwards, it has been transformed into an example of preventative criminal law, providing for more and more severe punishments. This happened partially as a result of more severe EU provisions.

However, Italian criminal law still provides for a duty to rescue people in danger, as a reason for non-punishment. It also provides for and punishes failure of rescue as a criminal offense.

Duty of rescue at sea is provided by International conventions, as well; even more so following the *Tampa* affair.

Nevertheless, concrete reality in the Mediterranean Sea can be much more complicated. Significant cases demonstrate that rescuing shipwrecked people at sea may result in long, and economically disastrous, trials before Courts of justice: ships' crews rescuing people in danger can be charged with facilitating illegal immigration, and have a hard time proving their innocence. Significant cases, such as *Cap Anamur* affair and others, are good examples of that.

In conclusion, as long as this system is enforced, and as long as the EU agencies, such as Frontex, have the sole purpose of stopping migrants to enter EU's territory, regardless of rescue at sea, migrants and asylum seekers will continue to die in the Mediterranean Sea, just as it is happening right now.

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1. The crime of facilitating illegal entry under Italian criminal law. The EU provisions.

The conduct aimed at facilitating illegal immigration was considered a criminal offense, for the first time in Italy, by law n. 943/1986: back then, it was considered a criminal offense only insofar as its purpose was labor exploitation.

Things changed four years later, with the approval of Law no. 39/1990 (the so-called Martelli Act): the new crime of "*Favoreggiamento dell'immigrazione clandestina*" (which could be translated as "encouraging

illegal immigration”), as provided for by the new law, punished with imprisonment *"any person engaging in activities aimed at encouraging the entry of foreigners in the State's territory in violation of the provisions of this Decree"*. Thus, the penalty would be applied regardless of the offender's purpose (purpose may, however, constitute an aggravating circumstance).

Similar offenses were already sanctioned in other Countries: e.g., in Great Britain the crime of "Facilitating illegal entry" was already provided for and punished by the Immigration Act of 1971. However, Italian law used the term "encouraging", that has a wider meaning than "facilitating".

The immigration Consolidated Text of 1998 (the so-called Turco-Napolitano Act), in art. 12, provided for and punished this crime, as well. However, the C.T. imposed more severe penalties for the crime, and provided for a more severe punishment in a wider series of circumstances (e.g., the use of international means of transport, or encouraging the entry of more than one foreigner). Furthermore, the arrest *in flagrante delicto* and the confiscation of the means of transport became mandatory.

Following the entry into force of Palermo Protocol of 2000, the so-called Bossi-Fini Act of 2002 amended many articles in the C.T., including Article 12.

The newly amended article provided for and punished the crime of "procuring" illegal entry. The new term had a narrower meaning, closer to that of "facilitating" (cf. *Corte di Cassazione's* Judgment n. 20880 of May 30th 2012). Nevertheless, the law could overall be considered more severe than before.

In fact, since 2002, in addition to providing for harsher penalties, and a series of new special aggravating circumstances, art. 12 takes into consideration European borders (not just Italian borders): as such, the law punishes procured transit through the State's territory, even when Italy is not the final destination. An important amendment on the procedural level was to reduce the possibility for the defendant to make use of alternative proceedings during the trials (which has substantial effects on the extent of punishment that may be imposed in case of conviction). Moreover, the possibilities for those sentenced guilty to receive recognition of the existence of mitigating circumstances or to access alternative sentences to imprisonment, have been reduced.

Finally, this types of offense was amended again by the so-called Security Decree in 2009: now, art. 12 punishes anyone who, in violation of the C.T., *"promotes, manages, organizes, finances, or carries out the transport of foreigners"*. It also provides additional aggravating circumstances.

The offense provided for and punished by art. 12 is one of those that the Italian doctrine of criminal law considers crimes of "abstract danger", crimes of "mere conduct" (i.e. the crime is the action itself), and crimes with "generic criminal intent". This means that anyone who takes action to facilitate the arrival of the alien in violation of the C.T., in any way, with the mere intent to put such activity in place, is thereby punishable by law. No further event is required. Therefore, this type of offense is an example of preventative criminal law, with the sole purpose of preserving public order (a notoriously vague concept, and variously interpretable...).

It should be noted that this type of offense is provided under Council Directive 2002/90/EC, as well. The EU Court of Justice in Luxembourg confirmed, by judgment n. C-83/12 of April 10th 2012, the obligation for

Member States to impose criminal penalties on anyone who *"has intentionally assisted a third-country national to enter the territory of that Member State in breach of the applicable provisions"* .

2. Reasons for non-punishment; necessity; duty to rescue.

However, the C.T. of 1998, in the 2nd paragraph of the same Article 12, also reiterated that *"Without prejudice to the provisions of art. 54 of the Penal Code, rescue and humanitarian relief provided in Italy to foreigners in need still present in the State's territory, do not constitute a criminal offense"*

This paragraph is still unchanged.

In fact, the Italian Penal Code provides for a number of reasons for non-punishment. E.g., the fulfillment of a legal obligation, under art. 51 P.C.

These so-called "causes of justification" apply to all types of crime.

One of them is state of necessity, under art. 54 P.C. (as referred to by art. 12 of the C.T.): *"Anyone who has committed an act having been compelled to do so by the necessity of saving himself or others from the risk of an imminent personal injury, that was not voluntarily caused, nor otherwise avoidable [...]"* shall not be punished for that conduct, *"as long as the action is proportional to the danger"*.

A similar provision is incorporated into the Italian Civil Code, art. 2045.

It is similar to the concept of "necessity" provided under Common Law, and under a series of international treaties.

On the other hand, the legal systems of many Countries, both under Common law and Civil law (including Italy), provide for a duty to rescue. Moreover, failure to provide assistance is considered a crime in many States. Such is the case of the Italian Navigation Code, which, under art. 1158, provides for and punishes failure to rescue at sea.

In theory, then, under the Italian criminal system, as those of many other Countries, rescuing people at sea is not a crime: on the contrary, it is an obligation.

3. Duty to rescue under international treaties: the *Tampa* affair. Recent amendments.

This duty is also provided by a number of international conventions (signed by Italy as well): the International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention), the Hamburg Convention of 1979 on Maritime Search and Rescue Operations (SAR Convention), the United Nations Convention on the Law of the Sea, of Montego Bay, 1982 (UNCLOS), the London Convention of 1989 (so-called Salvage Convention).

SAR and SOLAS Conventions have been amended by the Maritime Safety Committee of the IMO, following the case of the Norwegian freighter *Tampa*.

The crew of *Tampa* had sailed from Perth, Australia, in August 2001. They changed course in order to assist, upon request and with the assistance of the Australian coastal authorities, an Indonesian vessel in distress, full of immigrants: they had thus rescued 433 shipwrecked people, and set a course to the nearest port: Christmas Island, in Australian territory. At this point, the Australian Department of Immigration forbade the crew to moor and to disembark the survivors.

After days of a critical situation on board, resulting in a series of deaths (the ship was equipped to accommodate only 50 people, including the crew), the survivors were put ashore in the near island country of Nauru. Afterwards, 133 of these survivors would have been granted refugee status in New Zealand. *Tampa's* crew was then awarded by the UNHCR.

The changes to the conventions, and the related guidelines, came into force on July 1st 2006: they require Member States to cooperate and take measures in order to help ship's captains to rescue people in distress at sea. They also place an obligation on state authorities, to collect the shipwrecked on boats in charge of the rescue as soon as possible, as well as to ensure an adequate "Place of Safety".

In practice, a number of recent cases shows that the reality is not quite so straightforward.

4. A significant case: The *Cap Anamur* affair

The *Cap Anamur* case is emblematic, as we can read in the judgment, published on February 15th 2010, by which the Court of Agrigento, Sicily, acquitted the defendants.

The *Cap Anamur* ship, the property of the Committee of the same name, was registered as "rescue and support vessel," and was commanded by Captain Stefan Hermann Fritz Schmidt. In the course of a mission, with destination Middle East, the captain stopped the ship to Malta for repairs to engines: he then gave order to perform a series of maneuvers at sea to verify their reliability.

During these tests, on June 20th 2004, the ship sighted an inflatable boat with 37 African people on board, asking for help. The boat was leaking air, taking on water, and you could see smoke coming from the engine. In addition, the weather conditions were very bad.

Therefore, Capt. Schmidt ordered the rescue of the 37 migrants. Once on board, most of them told him to be on the run from Sudan, a country where civil war was raging.

Later, Mr. Elias Ulrich Franck Bierdel, president of the NGO, initiated the practice to ask for permission to docking in Porto Empedocle, Sicily. This port was the closest among those who could provide the necessary logistical support to the tonnage of a ship such as *Cap Anamur*, and at the same time ensure the 37 castaways a "place of safety" as required by international conventions.

After a long series of mishaps and misunderstandings with the Italian authorities, the ship was finally able to dock, and to disembark the survivors. However, the Italian authorities arrested Captain Schmidt and Mr. Bierdel.

The Prosecutor's Office argued that the Captain and the President, together with First Officer Vladimir Dachkevitch, had associated themselves to violate the Italian immigration law, with the specific purpose of obtaining a profit (in the form of publicity for the Committee). To this end, the prosecution argued, they had falsely represented to the Italian authorities the existence of a medical emergency on board, and expressly violated their orders not to dock.

The NGO had to hire a defense team, which consisted of Neapolitan attorneys Liana Nesta (expert on immigration law), Vittorio Porzio (expert on maritime and international law) and Ivan Simeone (criminal attorney), together with German lawyer Axel Nagler (expert on criminal law and immigration law), and Sicilian attorney Giuseppe Arnone, of the Bar of Agrigento.

The defense team, during the trial, was able to demonstrate the non-existence of the allegations. No attempt had been made to mislead the Italian authorities: the misunderstandings had arisen due to communication difficulties, and uncontrolled leaks of which the defendants had no liability.

The most important aspect is that the Court has recognized the existence of the state of emergency, and acquitted the defendants, as they have fulfilled a duty, as required by art. 51 P.C. (Already cited). The Court reiterated that the Captain of the ship has the duty to rescue shipwrecked people, as well as to deliver them to a "place of safety". To be considered as such, the landing place must guarantee not only physical salvation for the survivors, but also a minimal respect for fundamental human rights. Libya and Malta could not be considered as such, according to the news from European and international institutions; for this reason, the decision to disembark the 37 survivors in Italy was the most logical one.

In view of this, according to the Court, the existence or otherwise of a denial of docking by the Italian authorities is simply irrelevant.

However, it must be said that the story leaves a bad taste in the mouth.

From the arrest to the judgment, more than 5 years have passed.

For a long time, the ship remained in port, subject to seizure, without maintenance: in addition to legal fees, to the arrest (the suspects were jailed for a few days), there has been a huge economic loss due to the wear and tear on the equipment.

The slowness of Italian justice is legendary, and the Italian State has been repeatedly condemned by the European Court of Human Rights, for violation of the right to trial within a reasonable time (Article 6 § 1 of the Convention). According to Italian law, in theory, there is the possibility of seeking compensation for unreasonably long trials: the so-called Pinto Act of 2001. In fact, Italy has also been condemned by the ECHR, even recently, because of its repeated violations of the Pinto Act (e.g. Judgment of March 31st 2009, case of Simaldone vs. Italy; Judgment Chamber of December 21st 2010, case of Gaglione and Others vs. Italy).

Another sore point is the fate of the 37 refugees. Most of the survivors rescued by the *Cap Anamur's* crew were later deported from Italy (despite some of them having legal proceedings pending for recognition of

refugee status). One of them was shipwrecked in 2006 in the Channel of Sicily, in an attempt to return to Italy.

5. Other significant cases: the Tunisian fishermen affair; the *Pinar* affair

Situation wasn't better to Tunisian fishermen, Abdelkarim Bayoudh and Abdelbasset Zenzeri, who in 2007 rescued 44 migrants, in the process of sinking off the Italian coast.

Once the survivors had been rescued, Zenzeri repeatedly asked the Italian naval units, who in the meantime had arrived in the area, to take on board the shipwrecked (it should be noted that two of the migrants would then be diagnosed serious health conditions: a child with disabilities, and a pregnant woman). To this request, the Italian units opposed a refusal (in violation of the SAR international Convention). Moreover, pursuant to a Ministerial Decree of July 14th 2003, which requires the blocking of the vessels with "clandestine aliens" on board, the Italian military ships ordered the Tunisian vessel to reverse course, and they also tried to block it physically. At this point, Zenzeri resolutely set a course to the Italian coast in order to land the survivors, successfully forcing the blockade. Once they landed, he and the other crew members were arrested on charges of aiding and abetting illegal immigration and resisting a public officer.

After two years, on November 17th 2009, the same Court where the trial for *Cap Anamur* case was pending, acquitted the fishermen of the first charge. It would take a further two years before the Court of Appeal of Palermo, with the Judgment no. 2932/2011, also absolve them from the charge of resistance. The Tunisians, the Court wrote, acted in the existence of a state of necessity: "*the action of the force exerted on the Italian warships by the accused, [...] must be deemed necessary and unavoidable.*"

Despite this victory, we must not forget that even the Tunisian fishermen have had to endure, since the arrest, the confiscation of their boat. Just as it has been for the *Cap Anamur*, no maintenance activity was done on the fishing-boat and it has therefore become unusable: for fishermen, economic damage like this can be a real disaster.

Despite 40 days spent in prison and the loss of the ship, Zenzeri has no doubts. In a 2009 interview, by *Fortress Europe's* blogger Gabriele Del Grande, Zenzeri declared that if he could go back, he would do it again quite the same way. "*It is the law of the sea ...*", he said: a customary rule, which existed long before being put in writing.

Italian director Emanuele Crialesi drew some inspiration from the story of Zenzeri and Bayoudh, to make a movie: *Terraferma*.

It went better to Baris Erdogan and Asik Tuygun, respectively owner and captain of the Turkish freighter *Pinar*: the Turkish sailors, on April 16th 2009, rescued 142 migrants in distress, who were on two boats sinking south of Lampedusa. Perhaps because of the ongoing trials, or because of media coverage of the

event, after days of diplomatic standoff between Italy and Malta, the *Pinar* was allowed to land survivors in Porto Empedocle, without criminal consequences for the crew or the ship's owner.

6. Conclusions.

It should be noted that, even today, despite the amendments to the international conventions and the openings on the case-law, Frontex, the EU agency for external border control, does not provide specific guidelines and procedures for rescue at sea (as reported, eg., by Human Rights Watch and ASGI – The Italian Association for Juridical Studies on Immigration).

Therefore, it must be concluded that saving migrants and refugees at sea, although theoretically a duty, in practice can be very problematic for the crews of the ships (to put it mildly). In fact, we cannot know how many sailors, in recent years, have refused to rescue migrants at sea, perhaps for fear of having to suffer the same consequences endured by the *Cap Anamur* Committee, or by the Tunisian fishermen. So much so that the sinking of immigrant's boats continue throughout the Mediterranean Sea, and the people dead at sea are often refugees fleeing from areas, such as Syria, where fierce conflicts are raging.