

**Kircaoglu and Sanaga, Final appeal judgment, no 32960/2010; ILDC 1635 (IT 2010); 93
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8 September 2010**

Parties:	Mehemet Kircaoglu, Mehemet Sanaga
Foreign language case name:	Corte di Cassazione (sez I penale), sentenza 8 settembre 2010, n. 32960, <i>Kircaoglu e Sanaga</i>
Date of Decision:	08 September 2010
Jurisdiction/Arbitral Institution/ Court:	Italy, Court of Cassation, First Criminal Section
Judges/Arbitrators:	Giovanni Silvestri (President); Umberto Zampetti; Aldo Cavallo; Francesco Bonito (Rapporteur); Maurizio Barbarisi
Procedural Stage:	Final appeal judgment
OUP Reference:	ILDC 1635 (IT 2010)

Subject(s): Law of the sea

Keyword(s): Contiguous zone – Flag state – High seas – Hot pursuit – Jurisdiction of states, extra-territorial – Ships / Vessels – Territorial sea

Core Issue(s)

1. Whether—on the basis of the principles of the law of the sea—Italian courts had jurisdiction to prosecute the crew of a foreign ship, suspected of smuggling migrants, who were captured by an Italian military vessel beyond the Italian territorial sea.

Facts

F1 A Turkish vessel and boat acting in team with it were captured by an Italian military ship in waters beyond the Italian territorial sea. The boat had been launched from the vessel for the transport of non European Union immigrants, in violation of Italian immigration laws. The capture of the foreign vessel took place on the night of 23–24 April 2007, in international waters, following a hot pursuit which commenced—according to the Italian authorities—when the vessel was within the Italian contiguous zone.

F2 At first instance, the Tribunal of Locri, applying Articles 33 and 111 of the United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3, entered into force 16 November 1994 ('Montego Bay Convention'), asserted jurisdiction to prosecute the crew of the captured foreign vessel, including Mr Kircaoglu and Mr Sanaga. The Tribunal sentenced Mr Kircaoglu and Mr Sanaga to eight years in prison and a fine for smuggling in violation of the Italian law on immigration.

F3 In a judgment delivered on 1 July 2009 (*Kircaoglu and Sanaga*, Appeal Judgment, 1 July 2009, unreported), the Court of Appeals upheld the decision rendered at first instance. The Court reasoned that, under Articles 33 and 111 of the Montego Bay Convention, a coastal state could exercise the control necessary to prevent violations of its laws beyond the limit of its territorial waters in its contiguous zone, which extended up to 24 nautical miles from the coast. Moreover, Italian police forces were entitled to exercise the right of hot pursuit with respect to Turkish vessels.

F4 The Court of Appeals also argued that although the Italian legislature had never indicated the outer limits of its contiguous zone, Article 11-*sexies* of the Traffic and Transport of Illegal Migrants, Law No 189, 30 July 2002 (Italy) ('Traffic and Transport of Illegal Migrants Law') referred to the contiguous zone. This law provided the possibility for vessels of the Italian police forces operating in the territorial sea or in the 'contiguous zone' to act in order to prevent or detect the violation of national rules on the smuggling of migrants. In the opinion of the Court—in the absence of an express indication of the Italian legislator—the Italian contiguous zone had to be considered as extending up to the limits set forth in the Montego Bay Convention, namely 24 nautical miles from the coast.

F5 Finally, in response to Mr Kircaoglu and Mr Sanaga's argument that the flag state of the captured vessels—ie Turkey—was not a party to the Montego Bay Convention, the Court of Appeals held that in this case the Italian police authorities were entitled to exercise the right of hot pursuit confirmed in Article 111 Montego Bay Convention and Article 23 of the Geneva Convention on the High Seas (29 April 1958) 450 UNTS 11, entered into force 30 September 1962 ('Geneva Convention on the High Seas').

F6 Mr Kircaoglu and Mr Sanaga appealed the decision of the Court of Appeals before the Court of Cassation. They claimed that the Italian courts lacked jurisdiction. Furthermore they claimed the correlative existence of exclusive jurisdiction on the part of the flag state and/or the state of the nationality of the members of vessels captured in maritime areas beyond the limits of the territorial sea. According to Mr Kircaoglu and Mr Sanaga, this conclusion was especially dictated by the absence of ratification by Turkey of the Montego Bay Convention.

Held

H1 The jurisdiction of Italian courts had to be asserted in respect of crimes that were exclusively committed in international waters, when they were connected to crimes committed in the territorial sea. Such connection existed when—in prosecuting these crimes—Italian authorities availed themselves of the 'right of pursuit' under Article 23 of the Geneva Convention on the High Seas. By virtue of that right, the hot pursuit of foreign vessels was allowed as long as the specific requirements set by Article 23 were satisfied, namely that the pursuit started in the territorial sea of the coastal state or in its contiguous zone and that it was continuous and uninterrupted until the ship was intercepted. (paragraph 4.1)

H2 As it was established by Article 111 of the Montego Bay Convention, national court jurisdiction existed even when the hot pursuit began and continued in the contiguous zone. (paragraph 4.1)

H3 Given that Turkey had never ratified the Montego Bay Convention, the so called 'principle of the flag' had to be taken into account as a general principle of international law. Under this principle, foreign vessels were under the sovereignty of the flag state and represented its *territoire flottant*. This principle was set forth by Article 19 of the Convention on the Territorial Sea and Contiguous Zone (29 April 1958) 516 UNTS 205, entered into force 10 September 1964 ('Convention on the Territorial Sea and Contiguous Zone') and Article 97 of the Montego Bay Convention. (paragraph 4.1)

H4 The conduct of the applicants was entirely committed in areas excluded from Italian criminal jurisdiction as outlined and defined by Article 6 of the Criminal Code, Royal Decree n 1398, 19 October 1930 (Italy) ('Italian Criminal Code'), since such conduct took place beyond the Italian territorial waters. The international law concept of 'contiguous zone', governed by Article 33 of the Montego Bay Convention, could in no way be properly invoked to justify the jurisdiction of Italian courts, because Turkey—the state of nationality of the accused and the flag state of the ship in which non European Union nationals were transported for landing illegally in Italy—had never ratified the Montego Bay Convention. (paragraph 5.1)

H5 The right of hot pursuit (Article 111 of the Convention of Montego Bay and Article 23 of the Geneva Convention on the High Seas) and the related principle of 'constructive presence' were not applicable in this case because the pursuit did not begin within the Italian territorial waters. Furthermore, there was no evidence that the applicants or the Turkish vessel and its boat—which it launched at sea for the transport of non European Union immigrants—ever crossed the Italian territorial sea or that a preparatory act of the offence was committed in Italy. (paragraph 5.1)

H6 Under Articles 6 and 7 of the Italian Criminal Code and under the 'flag state principle' (Article 19 of the Convention on the Territorial Sea and Contiguous Zone and Article 97 of the Montego Bay Convention), Italy did not have criminal jurisdiction when the offence in question was committed beyond the limit of Italian territorial waters. (paragraph 5.2)

H7 The concept of the 'contiguous zone'—in the present case—was not applicable by the Italian authorities against Turkish citizens or vessels of the same country because Turkey had never ratified the Montego Bay Convention. (paragraph 5.2)

H8 Italian authorities would only have been entitled to apply the right of hot pursuit if the pursuit had commenced within Italian territorial waters (or within its contiguous zone when this zone was legitimately recognized by all states involved in the specific situation) and—outside the territorial sea or the contiguous zone—if the pursuit was not interrupted, with the exception of the possibility of a 'constructive presence'. (paragraph 5.2)

H9 As the Court of Cassation established in its judgment in *Vamvakas*, Court of Cassation, 27 June 1992, under the principle of constructive presence, pursuit and capture on the high seas of a foreign vessel ('mother ship'), which

violated the laws of the coastal state, was lawful provided that the pursuit of this vessel started as soon as one of its smaller boats, acting in team with it, entered into the territorial waters and Italian military vessels started a pursuit of the boat. (paragraph 5.2)

H10 In conclusion—given the absence of jurisdiction on the part of Italian courts in the present case—the lower courts' decisions had to be struck down. (paragraph 6)

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Reporter(s): Andrea Caligiuri

Analysis

A1 The first interesting issue in this case was whether Italy had ever established a contiguous zone. The Court of Cassation—albeit only implicitly—seemed to accept that Italy had established a contiguous zone under Article 33 of the Montego Bay Convention.

A2 Under both the Convention on the Territorial Sea and Contiguous Zone and the Montego Bay Convention, a coastal state must choose whether to claim a contiguous zone. Italy had never adopted a national act aimed specifically at establishing a contiguous zone. Generally, the adoption of a formal national act is the means used by states to claim their contiguous zones and to define the size of the zones (see Tullio Treves, 'Codification du droit international et pratique des Etats dans le droit de la mer' (1990-IV) 223 *Recueil des cours de l'Académie de droit international* 75). In spite of this, two Italian acts (Article 11-*sexies* of the Traffic and Transport of Illegal Migrants Law and Article 6(2) of the Decree of the Ministry of the Interior, 19 June 2003 (Italy)) referred to the existence of an Italian contiguous zone as the area beyond the territorial sea where Italian military ships were allowed to fight against illegal immigration. In light of these domestic provisions, it is reasonable to assert that Italy envisaged a contiguous zone where the competent Italian authorities could exercise a limited control to prevent and punish infringement of immigration regulations within its territory or territorial sea. Italian authorities gave no indication with regard to the size of the Italian contiguous zone. In light of this silence, it seems reasonable to assume that the limit of 24 nautical miles indicated in the Montego Bay Convention could be applied.

A3 A second point of interest related to the question of whether the rule set forth in Article 33 Montego Bay Convention had customary status. The Court of Cassation stated that Italy could not claim to have a 'contiguous zone' in its relations with Turkey because Turkey had not ratified the Montego Bay Convention. Thus it seems clear that—in the view of the court—a state is not entitled to establish a contiguous zone under general international law.

A4 The court's view on the latter point appears to be mistaken. The concept of 'contiguous zone' appears to be firmly recognized as a rule of general international law, although—over time—practice has shown that the claim of a contiguous zone has lost importance for those coastal states which have established an Exclusive Economic Zone. Practice of several coastal states—including those that have not ratified the Montego Bay Convention—shows the establishment of a contiguous zone beyond the territorial sea (see Hugo Caminos, 'Contiguous Zone' *Max Planck Encyclopedia of Public International Law*, para 13).

A5 A third point of interest was related to the doctrine of constructive presence. The Court of Cassation affirmed—in line with general international law—that a foreign vessel may not be pursued and captured on the high seas by a military ship because the foreign vessel in that maritime area is under the exclusive jurisdiction of the flag state. However, it also acknowledged the existence of an exception to this rule, namely the doctrine of constructive presence. This doctrine stipulates that a state may exercise jurisdiction over a foreign vessel ('mother ship') that remains seaward of coastal state waters but acts in team with one of its boats ('contact vessel') for the purpose of violating coastal state laws in waters over which the state may exercise a jurisdiction. In the court's opinion, the coastal state is entitled to exercise the right of hot pursuit of foreign vessels to punish any crimes committed in international waters if these crimes are connected with crimes consumed within the limits of the territorial sea or within the contiguous zone. This view does not seem to fully reflect the current state of international law. According to coastal state practice, the application of the doctrine of constructive presence is well founded in the case of foreign vessels engaged in illegal fishing within a maritime area under the jurisdiction of the coastal state (see Myron H Nordquist and others, 'Article 111 Right of Hot Pursuit' in *United Nations Convention on the Law of the Sea 1982: A Commentary* (1995), 247 ff, at 258). Nonetheless, the application of the doctrine is controversial in relation to the repression of violations of other laws of a coastal state, such as—for example—immigration laws.

A6 The decision was the final judgment which was not subject to appeal.

Date of Analysis: 15 March 2011

Analysis by: Andrea Caligiuri

Further Analysis

Laura Salvadego, 'Controllo marittimo dell'immigrazione clandestina e giurisdizione penale del giudice italiano' (2011) 93 *Rivista di diritto internazionale* 114

Gemma Androne, 'Immigrazione clandestina, zona contigua e Cassazione italiana: il mistero si infittisce' (2011) 5 *Diritti umani e diritto internazionale* 183

Other decisions cited in the full text of this decision:

Italian national courts

Matrino, Court of Cassation, 30 October 1969

Vamvakas, Court of Cassation, 27 June 1992

Habibi Raim and ors, Court of Cassation, no 4586, 23 June 2000

DAN and ors, Court of Cassation, no 325, 20 November 2000

Court of Cassation, no 325, 20 November 2001

M Efstathiadis, Court of Cassation, no 5583, 28 October 2003

LE, Court of Cassation, no 1180, 7 January 2008

VW, Court of Cassation, no 17026, 17 December 2008

Instruments cited in the full text of this decision:

Geneva Convention on the High Seas (29 April 1958), 450 UNTS 11, entered into force 30 September 1962, Article 23

Convention on the Territorial Sea and Contiguous Zone (29 April 1958), 516 UNTS 205, entered into force 10 September 1964, Article 19

United Nations Convention on the Law of the Sea (10 December 1982), 1833 UNTS 396, entered into force 16 November 1994, Articles 1, 33, 97, 111, 308

Previous stages in these proceedings:

Appeal Judgment; *Kircaoglu and Sanaga*, Court of Appeals of Reggio Calabria, 1 July 2009, unreported

Trial Judgment; *Kircaoglu and Sanaga*, Tribunal of Locri, 26 June 2008, unreported
