N. R.G. 2024/348

ORDINARY COURT OF CROTONE

First CIVIL

In the interlocutory proceedings No. **348/2024** brought by:

[redacted], represented by [redacted], lawyers, with an address for service in [redacted], lawyer

SOS HUMANITY GGMBH (C.F. 11111111111), represented by Mr [redacted], lawyers, with an address for service in [redacted] at the office of [redacted], lawyer

RECURRENCE

v.

CAPITANERIA DI PORTO-GUARDIA COSTIERA DI CROTONE (C.F. 00000000000) with the patronage of the lawyer and the lawyer electively domiciled at the lawyer's office.

MINISTRY OF INFRASTRUCTURES AND TRANSPORT (C.F. 97532760580) with the patronage of the lawyer [redacted] and of the lawyer, with an address for service in [redacted], at the address of the lawyer [redacted]

MINISTRY OF THE INTERIOR AND QUESTURA OF CROTONE (C.F. 97149560589) with the under the patronage of the lawyer [redacted] and of the lawyer electively domiciled at [redacted] at the lawyer [redacted]

MINISTRY OF THE ECONOMY AND FINANCE, GUARDIA DI FINANZA, NAVAL OPERATIONAL SECTION OF CROTONE (C.F. 80415740580) with the patronage of the lawyer [redacted] and of the lawyer, with an [redacted]

RESISTANT

Judge [redacted],
Rescinding the reservation made at the hearing of 17 April 2024 ,
pronounced the following

ORDER

By interlocutory appeal at the same time as the opposition lodged under Art.

6 and 7 of Legislative Decree 150/2011 [redacted] and Sos Humanity GGMBH (hereinafter 'Humanity 1') brought an action under Art.

5 Legislative Decree No. 150/2011, against the Crotone Harbour

Office-Coast Guard, the Ministry of Infrastructure and Transport, the Ministry of the Interior and the Ministry of the Economy and Finance

Finance in order to obtain, also *inaudita altera parte,* the suspension of the administrative detention order issued in respect of the vessel Humanity 1.

They pleaded, under the profile of *fumus boni iuris*, the unlawfulness of the sanctioning measure for lack of legitimacy of the Italian State to issue the aforementioned measure as well as for lack of motivation and distortion of the facts.

They emphasised in particular the fulfilment of the duty to rescue, recognised by international and national sources, implemented by the commander of today's applicant and the non-existence of any danger to the safety of the persons involved in the rescue operations by the same humanitarian vessel, contrary to what is stated in the contestation report in the file.

They also held that the requirement of *periculum in mora was met* to justify the precautionary petition formulated, on account of the pecuniary and non-pecuniary damage resulting from the detention of the vessel in the port of Crotone.

The [redacted]) appeared before the Court, contesting the *adversary's claim that the* Italian State has jurisdiction to issue the sanction in *question;* it also pointed out the failure to comply with the order to expel the Libyan patrol boat involved in the migrants' rescue operations, in breach of Article 1(2)(a) of Law Decree 1/2023. He also pointed out the lack of *periculum in mora for the* issuance of the requested precautionary measure.

The case was remanded for decision on 17 April 2024.

The interlocutory appeal is well-founded.

From the standpoint of *fumus boni iuris,* the administrative offence found to justify the detention imposed on the vessel Humanity 1 must be considered as non-existent.

As can be deduced from the contestation report on file, the NGO in question allegedly hindered the rescue operations carried out by the Libyan Coast Guard, failing to comply with the order given by it not to undertake rescue activities and, at the same time, causing danger to the safety of the persons involved.

Now, the assessment of these charges must necessarily start from an examination of the duty to assist recognised by international sources and the specific modalities in which it must be carried out, in order to be able to then proceed to a correct legal framework of the facts underlying the offences found.

The normative parameter from which to start the legal reasoning is represented by the international pactual sources (the Convention for the Safety of Life at Sea, SOLAS-Safety of Life Sea, Londa, 1974, ratified by Italy with Law no. 313 of 1980; the Hamburg SAR Convention of 1979, made executive by Italy with Law no. 147 of 1989 and implemented by Presidential Decree no. 662 of 1994; the UNCLOS Convention on the Law of the Sea, stipulated in Montego Bay in 1982 and implemented by Italy with Law no. 689 of 1994) which sanction a "common law", a "right to life at sea", stipulated by the UNCLOS Convention on the Law of the Sea, signed in Montego Bay in 1982 and implemented by Italy with Law no. 689 of 1994. 662 of 1994; UNCLOS Convention of the United Nations on the Law of the Sea, stipulated in Montego Bay in 1982 and implemented by Italy by Law no. 689 of 1994) that sanction an "obligation to render assistance" which, in turn, finds its source in the customary law of the sea, a generally recognised rule of international law and therefore directly applicable in the domestic legal system by virtue of Article 10, para. 1 of the Constitution.

By virtue of this obligation, as expressly provided for in Art. 98 para. 1 of the UNCLOS Convention and SOLAS Chap. Reg. 33, each State must require the master of a ship flying its flag to render assistance to persons in distress or distress at sea, insofar as it is possible for him to do so without endangering the ship,

the crew or passengers and could reasonably be expected to do so.

Furthermore, Art. 98.2 of UNCLOS stipulates the obligation for states to establish and maintain an adequate and effective search and rescue service relating to safety at sea and, where necessary, to develop cooperation in this area through regional agreements with neighbouring states, laying the groundwork for the implementation of multilateral agreements.

From the point of view of the specific explicative modalities with which this duty to rescue must be implemented, as reiterated also by our Supreme Court, in accordance with the Guidelines on the treatment of persons rescued at sea (Res. MSC.167-78 of 2004) the same "*cannot be considered fulfilled with only the rescue of the shipwrecked persons on board the vessel and their stay on it, but also includes the disembarkation of the same at a 'place of safety', i.e. in a place where the rescue operations are considered concluded, the safety of the survivors and their lives are no longer threatened, the basic human needs (such as food, accommodation and medical care) can be met and the transport of the survivors to the near or final destination can be organised*" (C. 6626/2020).

Point 3.1.9 of the above-mentioned SAR Convention provides that: "*The Parties shall ensure the necessary co-ordination and co-operation so that the masters of ships providing assistance by embarking persons in distress at sea are relieved of their obligations and deviate as little as possible from their intended course, without further jeopardising the safety of human life at sea. The Party responsible for the search and rescue area in which assistance is rendered shall take responsibility, in the first instance, for ensuring that the abovementioned coordination and cooperation take place so that the survivors to whom assistance is rendered are disembarked from the ship which picked them up and brought to a place of safety, taking into account the particular situation and the guidelines developed by the Organization*

(International Maritime). In such cases, the Parties concerned shall take the necessary steps to ensure that the landing in question takes place as soon as reasonably possible'.

According to the Guidelines on the Treatment of Persons Rescued at Sea (Res. MSC.167-78 of 2004) "*Although a ship rendering assistance may temporarily constitute a place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made*". (para. 6.13).

Therefore, a ship at sea cannot be qualified as a 'safe place', due to the obvious lack of such a prerequisite, which, in addition to being at the mercy of adverse weather events, does not allow the fundamental rights of the persons rescued to be respected. Nor can the duty to rescue be considered fulfilled by rescuing the shipwrecked persons on the ship and keeping them on it, since those persons are entitled to apply for international protection under the 1951 Geneva Convention, which certainly cannot be done on the ship.

As further confirmation of this interpretation, it is useful to recall Resolution No 1821 of 21 June 2011 of the Council of Europe (The interception and rescue at sea of asylum seekers, refugees and migrants in an irregular situation), according to which "*the notion of a 'safe place' cannot be limited to the physical protection of persons alone but necessarily includes respect for their fundamental rights*" (point 5.2.), which, although not a direct source of law, constitutes an indispensable interpretative criterion of the concept of 'safe place' in international law.

the meaning of the term 'safe' (referring to the place of disembarkation) is therefore also connoted by other requirements, linked to the need not to violate people's fundamental rights, enshrined in international human rights standards (Convention for the Protection of Human Rights and Fundamental Freedoms - 1951 Geneva Convention relating to the Status of Refugees
- European Convention on Human Rights), preventing

landings' take place in 'unsafe' places, which would result in open violations of the principle of non-refoulement, the prohibition of 'collective expulsions' and, more generally, prejudicial to the 'international protection' rights granted to refugees (in fact and/or in law) and asylum seekers.

In the light of these legal coordinates, it is clear that a rescue operation can only be constituted in so far as it is carried out with respect for human rights and fundamental freedoms and that the authority coordinating the said operations has made known the safe place where the migrants involved can actually be completed and rescued.

Transposing the aforementioned legal coordinates to the relevant factual data, it cannot be held that the activity perpetrated by the Libyan coastguard can be qualified as a rescue activity by the very manner in which that activity was carried out.

In fact, it is an undisputed and documented circumstance that the Libyan personnel were armed and that, during these activities, they also fired shots; likewise, it is a circumstance that can be deduced from the correspondence in the file that no safe place was made known by the Libyan authorities themselves, who had intervened to coordinate the migrants' recovery operations on the spot.

Nor can the activity carried out by the Libyan coastguard be considered to be in compliance with the above-mentioned international parameters, even when it is considered to be in execution of the agreements signed between the Italian and Libyan Governments, in terms of identifying the relevant place of safety in terms of rescue operations.

Indeed, it should be recalled that the Hamburg Convention provided as a general rule that Contracting States may enter into regional agreements for the delimitation of SAR zones with neighbouring States in order to "ensure the necessary coordination and cooperation so that masters of ships providing assistance by embarking persons in distress at sea are relieved of their obligations and deviate as little as possible

from the intended route, without exempting them from these obligations further endangering the safety of human life at sea' (point 3.1.9).

On the basis of this, on 2 February 2017, with automatic three-year renewal, the Memorandum of Understanding between the Italian and Libyan Governments was signed, which provided, as a solution to the issue of migrants who irregularly reach Europe through Libya, the establishment of "temporary reception camps in Libya, under the exclusive control of the Libyan Ministry of the Interior, pending repatriation or voluntary return to the countries of origin" and the commitment of the Italian government "to provide technical and technological support to the Libyan bodies in charge of the fight against illegal immigration represented by the border and coast guard of the Ministry of Defence and by the competent bodies and departments at the Ministry of Interior".

As things stand, Libya cannot be considered a safe place within the meaning of the Hamburg Convention, as the Libyan context is characterised by gross and systematic human rights violations and Libya has never ratified the 1951 Geneva Refugee Convention.

Further proof of this is the report of the United Nations High Commissioner for Human Rights of May 2021, which on several occasions highlighted the failure to respect fundamental human rights during recovery operations carried out by the Libyan coast guard.

As the same report states, '*During the reporting period, more than 20,300 migrants were recorded as rescued/intercepted at sea by the LCG and disembarked in Libya, including more than 11,200 in 2020. The OHCHR has previously noted "a pattern of reckless and violent behaviour" by the LCG during interceptions at sea, including shooting at migrants' boats or in the*

their vicinity, colliding with or ramming migrants' boats, conducting high-speed and unsafe manoeuvres that cause large waves and the capsizing of migrants' boats, acts of physical violence such as beating and slapping migrants, and the use of threatening, discriminatory or racist language'.

All these elements are sufficient to exclude the existence of any qualification of the operations carried out by the Libyan coastguard, with armed personnel and without the identification of a safe place in accordance with the international parameters outlined above, with regard to migrants, as rescue operations, in the sense recognised by the multiple international sources.

The logical corollary of the foregoing is that no obstructive conduct can be found against the NGO involved which, in this context, was the only vessel to intervene to fulfil, in the sense recognised by international sources, its duty to rescue migrants at sea.

In the light of this, given the absence of a concurrent rescue operation carried out by the Libyan coastguard, no order of expulsion can be justified against the only vessel that carried out conduct in fulfilment of its absolute duty to rescue at sea, since there was no interference with any other authority specifically and seriously responsible for this, as can also be inferred from Article 1, paragraph 2 bis of Law Decree 1/2023.

Even if one were to disregard the qualification of the operation perpetrated by the Libyan coastguard as a rescue activity, it appears evident, by reason of the above-mentioned legal coordinates, that no expulsion order formulated can be considered legitimate either at the national or supranational level.

From the first point of view, it should be noted that the aforementioned paragraph 2 bis of Article 1 Decree Law 1/2023 only requires that the operations of

rescue are '*carried out in accordance with the instructions of the aforementioned authorities' in* charge of coordinating maritime rescue.

The unequivocal literal tenor of the rule makes it clear that the failure to comply with the provisions laid down liable to give rise to an administrative offence are only those specifically concerning not the performance or non-performance of the rescue activity but only the manner in which it is carried out.

Such an interpretation, moreover, appears to be the only one that conforms to the absolute character that characterises, at international level, the duty of rescue incumbent on all ship masters which, as mentioned above, is limited only in the circumstance that such activity is possible without endangering the ship, the crew or the passengers and that such action can reasonably be expected.

In the present case, the rescue activity had already begun by Humanity 1 and no critical profile was found or emerged as a result of that activity, so that no removal order formulated to it in defiance of the above-mentioned international and national sources can be considered legitimate.

Equally unfounded is the further charge brought against the same humanitarian vessel for having caused danger to the safety of the persons involved in the rescue operations carried out.

From the documents in the file and from the undisputed facts, several pieces of evidence have emerged which, already on a presumptive level, exclude the existence of any causal link between the danger suffered by the migrants and the conduct of the humanitarian ship.

Firstly, it is pointed out that it is an undisputed and documented circumstance that the vessel Humanity 1, prior to the intervention from which the administrative detention originated,

had already successfully completed the recovery of other migrants; just as it is an undisputed and documented circumstance that, with reference to the intervention subject to administrative sanction, the Libyan coastguard intervened when rescue operations by the NGO in question were already underway; finally, it is reiterated, only the Libyan personnel were armed and fired intimidating shots.

All these elements make it possible to exclude, with a high degree of logical probability, in accordance with the requirements of Article 2729 of the Civil Code, that the conduct of the Humanitarian Ship, in no way characterised by dangerousness in the execution of the salvage manoeuvre, in the absence of an alternative reconstruction, caused danger to the safety of the persons involved, thus making it likely that there was no causal connection with the injury complained of.

With regard to the *periculum in mora, it is* clear that, when non-pecuniary damage is involved, the aforementioned prerequisite underlying the suspension under Art.
5 Legislative Decree 150/2011 is to be assessed not in terms of irreparability but rather in terms of the insusceptibility of full and effective protection of the situation itself at the outcome of the judgment on the merits in relation to the fundamental values at stake.

In the present case, the order to detain the vessel, if the suspension order *inaudita altera parte is* not upheld, is bound to perpetuate its effects for at least another week, the time limits relating to its natural expiry having been interrupted.

This would result, as set out above, in the blocking of a vessel naturally intended for maritime rescue activities in the area at issue in the present case, with the consequent risk of jeopardising the fundamental rights of the persons involved in the routes in question.

The 'seriousness' of this expectation, moreover, is made evident by the very circumstance that, on the day in question, the same vessel had already rescued 77 migrants and that, as can be inferred from the above arguments, there are no other vessels (let alone Libyan ones) in the area in question that can be considered to be seriously responsible for carrying out the same rescue activities.

The balancing of those requirements can only tend, therefore, towards the need to protect, as a precautionary measure, that legal expectation to save lives at sea on account of an 'intolerable gap' between the possible prejudice resulting from the continued detention of the humanitarian vessel and the settlement on the merits of the case concerning the administrative detention.

The awarding of costs, since this is an interlocutory case, will follow the outcome of the trial on the merits.

p.q.m.

the Tribunal of Crotone, civil section, definitively pronouncing, provides as follows:

- confirms the suspension of the effectiveness of the administrative detention order and custody of 'Humanity 1

- expenditure on merit

- orders the continuation of the proceedings as per separate order

Please communicate.

Crotone, 19 April 2024

The Judge

[redacted]