GIURISPRUDENZA PENALE

Punishing the facilitation of irregular migration. A comparative criminal law analysis of Germany and Italy.

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1. Introduction.

International migration is generally defined as the act of entering a country other than one's usual country of residence with the intention of settling, permanently or temporarily. Migration has always been a human behaviour: since the birth of humankind it has represented a process aimed at adjusting to changes, an adaptive strategy to various forms of adversity or in pursuance of a better life.

At a time of climate heating and lengthy armed conflict, migration can be considered as a fundamental strategy aimed at supporting basic needs and livelihoods.[2]

Recently, the European Union (EU) has witnessed increasing migration from Africa, the Near East and Asia into its territory. This may explain why in recent years migration is considered worthy of attention. At a global level, media and political confrontation are constantly addressing this phenomenon. As a result, immigration policies and laws seem destined to be increasingly determined by a highly concerned public opinion.

In Europe, since the emergence of the so-called 'refugee crisis' in 2015, criminal justice tools have increasingly been used to control and manage migration, chiefly with the aim of preventing and punishing irregular migration.

This article examines a specific criminal provision which is in place in all 28 EU Member States: the crime of facilitating irregular entry. The article offers a comparative legal analysis of this offence by analyzing its implementation in Italy and Germany. Through our analysis, we aim to capture the similarities and differences between the two criminal provisions in question, and assess how, and to what extent, humanitarian assistance is criminalised in these two countries. For the present purpose, we define "humanitarian assistance", as "*the provision of services*

[1] The authors would like to thank Niamh Quille, Oxford University, for her peer review.

[2] F. Gemenne,J. Blocher "*How can migration serve adaptation to climate change? Challenges to fleshing out a policy ideal*", The Geographical Journal, 2017.

that help migrants to access their fundamental rights (including to health care, shelter, hygiene and legal assistance) and to live with dignity".[3]
To do so, we will begin by examining the broader EU legal framework.

2. The so-called EU 'Facilitators' Package'.
In 2002, the Council of the European Union adopted two instruments that supplement each other, referred to as the "Facilitators Package": the Directive 2002/90/EC Defining the Facilitation of Unauthorised Entry, Transit and Residence, and the Framework Decision 2002/946/JHA on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorised Entry, Transit and Residence.
The legal basis for the adoption of the Directive corresponds to Art. 79(2)(c) of the Treaty on the Functioning of the European Union (TFEU) on the EU policy in the area of illegal immigration and unauthorised residence, whereas the legal basis of the Framework Decision corresponds to 83(2) TFEU, concerning the harmonization of criminal laws and regulations essential to the effective implementation of a Union policy.
The purpose of the Directive is to provide a common definition of the facilitation of illegal immigration. This is included in Art. 1(1), which reads

> "*Any person who intentionally assists a third country national to enter or transit across the territory of a Member State or assists such a person, for financial gain, to reside within a Member State, must be sanctioned".*

Therefore, under EU law, the facilitation of irregular entry is criminalised irrespective of whether it is conducted for the purpose of a financial or material gain, contrary to facilitation of irregular residence, which is a criminal offence only when conducted for financial gain (Art. 1(1)(b) of the Directive).
The Directive establishes a general obligation for Member States to adopt effective and dissuasive sanctions to punish those who are responsible for the crime of facilitation of irregular migration (Art. 3). However, Art. 1(2) of the Directive provides for the possibility to exempt facilitation of unauthorised entry and transit from criminalisation, when the purpose of doing so is one of humanitarian assistance.
On the basis of the definition of the offence as set out by the Directive, the Framework Decision contains provisions that aim to set up minimum rules for penalties, liability of legal persons, jurisdiction and cooperation.
Art. 6 of the Framework Decision lays down an important clause, according to which "*the Facilitators Package applies without prejudice to the protection of the rights of refugees and asylum seekers in accordance with international law, in particular Member States' compliance with international obligations pursuant to Art. 31 (on the non-penalisation of their unlawful entry or presence) and 33 (on*

[3] Carrera S., Guild E., Aliverti A., Allsopp J., Manieri M., Levoy M., "Fit for Purpose? The Facilitation Directive and the Criminalisation of Humanitarian Assistance to Irregular Migrants", Study for the European Parliament's LIBE Committee (2016).

non-refoulement) of the 1951 Geneva Convention relating to the status of refugees".

With regards to the applicable international legal framework, the 2000 UN Protocol Against the Smuggling of Migrants by Land, Sea and Air also regulates the facilitation of the irregular entry of migrants. The Protocol establishes an obligation to criminalise the smuggling of migrants, defined as "*the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident*".

This definition differs from the one included in the Facilitators Package, mainly because the Protocol defines the smuggling of migrants as the facilitation of unauthorised entry or transit for a financial or other material benefit, while the Facilitators Package applies the financial gain element only to the facilitation of unauthorised residence.

In this respect, a study commissioned by the European Parliament noted:

> "*It seems that the intention of the drafters of the UN Protocol, who insisted on a material or other financial benefit requirement, was at least partly to avoid criminalising family members, civil society organisations and individuals acting out of solidarity with refugees, asylum seekers and irregular migrants"*.[4]

This suggests the offence under EU law is therefore broader and permits Member States to criminalise acts of different kind. In other words, the EU Facilitators Package does not itself distinguish between criminal facilitation and humanitarian assistance. The question then arises, how do individual Member States legislate for these offences, and how have they developed through domestic case law?

3. The Italian criminal provision and its case law application.

Italian criminal law punishes irregular entry. Art. 10 bis of the Law n. 286/1998, introduced in 2009[5] states that "A*ny third-country national who enters or stays in the territory of the State in violation of the law is punished with a fine from 5.000 to 10.000 Euros"*. In 2014 the Parliament put forward a proposal to abolish this offence,[6] but the Government refused to do so.

With regards to the specific context of the migration fluxes in the Central Mediterranean, it is worth noting that in 2016 the Supreme Court *sit en banc* held that those migrants who were rescued in international waters could not be punished for the crime of irregular entry, holding that they were regularly transported to the national territory pursuant to "*public safety reasons*".[7]

Facilitating irregular migration constitutes a crime, too. According to Art. 12 of the Law n. 286/1998, "W*hoever promotes, directs, organises, finances or transports*

[4] European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update" (2018).

[5] This offence was introduced by Art. 1(16)(a) of the Law n.94/2009.

[6] Law n. 67/2014.

[7] Cass. S.U. n. 40517/2016, more recently n. 20189/2018

foreigners to the territory of the State, or carries out other conduct directed to illegally obtaining their entry into the territory of the State is subject to imprisonment from one to five years and a fine of 15.000 euro for each third-country national helped".

The Italian Supreme Court has consistently held that the crime in question does not require that the assisted migrant actually enters the territory of the State, but it punishes any conduct that can contribute to his/her *potential* irregular entry.[8] The offence is thus structured as a "*Vorverlagerung*" crime under German Law, or "*reato a consumazione anticipata*" in Italian Criminal Law.

The provision aims to protect public order and the control of migration flows.[9] It is thus important to emphasise that this criminal provision does not intend to safeguard migrants' fundamental rights, which are only protected indirectly.[10] The offence requires individual direct intent for *mens rea*.[11]

In line with the EU Facilitators Package, the Italian Law n. 286/2002 and n. 241/2004 increased the penalties and broadened the ambit of the criminal provision. The Italian Supreme Court noted that these amendments emphasised the scope of security and the protection of public order in the law, partially reversing the former spirit of solidarity endowed in the Act.[12]

It is crucial to note that Art. 12 does not require that financial gain or profit arises for it to be a punishable offence. Pursuant to Art. 12 par. 3 ter let. b), profit simply constitutes an aggravating circumstance for the offence: in such a case, the length of detention is raised and a fine of € 25.000 for each third-country national assisted.

Art. 12 par. 3 provides additional aggravating circumstances, including when (*i.*) the conduct concerns the illegal entry or permanence in the territory of the State of five or more persons; (*ii.*) the person who has been carried has been exposed to danger to his or her life or safety in order to obtain illegal entry or stay; (*iii.*) the person carried has been subjected to inhumane or degrading treatment in order to bring about his or her illegal entry or stay; (*iv.*) the offence is committed by three or more persons in collaboration, or by using international transport services, or by forging documents; (*v.*) where the offenders carried weapons.

Imprisonment is also increased when the offence concerns the exploitation of a minor or recruiting persons for prostitution or sexual or labour exploitation (Art. 12 par. 3 ter).

Furthermore, on 14 June 2019, the Italian Government enacted the Law n. 53/2019, that imposes an administrative sanction of €10.000 to €50.000 to the captain and the owner of the ship who breaches the prohibition on entering, transiting or staying in Italian territorial waters (Art. 2).

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[8] Cass. S.U. n. 40982/2018, Cass. N. 28819/2014.

[9] Cass. n. 48402/2017 and Cass. n. 50561/2015.

[10] Cass. n. 50561/2015 *"…the protection of the migrant is not the specific and direct object of the criminal protection, with reference to the ratio of the incrimination, but rather constitutes the object of a relevant but reflected protection".*

[11] Cass. n. 26414/2012.

[12] Cass. n. 3162/2003.

We will now look at the exemption regime and its interpretation by Italian courts.
Italian criminal law provides a specific exemption for the facilitation of entry or transit based on humanitarian grounds. Art. 12 par. 2 reads: *"Without prejudice to the provisions of Article 54 of the Criminal Code, the activities of rescue and humanitarian assistance provided in Italy towards foreigners in need, however present in the territory of the State, do not constitute a crime"*.
It has been argued[13] that the scope of the application of Art. 12 par. 2 cannot be extended by analogy to extraterritorial waters, where migrants and asylum seekers are frequently rescued, but this interpretation is disputed.
In the criminal proceedings brought against the NGO Sea Watch and Practiva Open Arms, the Public Prosecutor[14] held: "*It is the humanitarian obligation of all coastal states to allow ships in distress to seek shelter in their waters and to grant asylum, or at the very least, to issue a temporary protection measure to persons on board who are asylum seekers. States should contribute to facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities*".
The Italian exemption clause is rather vague, as it does not define genuine humanitarian assistance. Its territorial limitation also precludes any wider application. In the context of search and rescue operations in the sea and the facilitation of irregular migration, two additional general exemptions included in the criminal code come into play: Art. 51 and 54 of the Italian Criminal Code.
Under Art. 51, "*The exercise of a right or the performance of a duty imposed by a legal provision or a legitimate order of the public authority shall not be subject punishment*". This rule is considered an expression of the Aristotle's law of non-contradiction.
Art. 51 is frequently invoked to apply the law of the sea and the duty to rescue migrants while they are irregularly entering Italian territory. There are many sources of this obligation, including the Code of Navigation (Art. 489, 490, and 1158), the 1979 Search and Rescue Convention, Art. 98 of the United Nations Convention on the Law of the Sea,[15] and the EU Regulation n. 656/2014 Establishing Rules for the Surveillance of the External Sea Borders.
In this respect, it is worth noting that in 2010, the Court of Agrigento acquitted[16] three members of the German charity organization "Cap Anamur", who had been accused of facilitating irregular immigration when 37 African migrants were rescued in international waters, 46 miles from the Libyan coast.
The Court found that the defendants' decision not to render the migrants to the Libyan or Maltese authorities was in keeping with the concept of a place of safety. In this respect, reference was made to art. 6(11) of the Maritime Safety Committee Resolution n. 167, that defines it as "*a place where the survivors' safety of life is*

[13] S. Bernardi, "(Possible) Criminal Profiles of Search and Rescue Activities at Sea", in Diritto Penale Comparato, 1/2018.
[14] Public Prosecutor of Palermo, proc. n. 9039/2018, request to drop the charges, 13 June 2018.
[15] Ratified by Italy with the Law n. 689/1994.
[16] Sentenza del Tribunale di Agrigento del 7 ottobre 2009, n. 954.

no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met". In this case, the court agreed with the Defendants that Italy was the proper place of safety for the migrants.
The Court also stressed that the rescued people had the right be identified and eventually to lodge an asylum application in Italy. The judge also referred to the principle of *non-refoulment* in order to exempt the defendants' conduct from criminal liability.
Also relevant to the Italian courts treatment of the facilitation of irregular migration has been Art. 54 of the Italian criminal code, which exempts from sanctions acts that have been necessary to avert the risk of a serious danger. Art. 54 also requires that the agent had not intentionally caused the dangerous situation, and the latter could not have otherwise been avoided. The response of the agent must also be to be proportional to the risk.
Furthermore, Art. 54 par. 3 punishes whoever physically coerces another to commit a crime. This provision codifies the Italian criminal doctrine of "*autore mediato*", which historically derives from the German concept of "*mittelbarer Täter*", now enshrined in § 25 first paragraph 2 alternative StGB.[17]
In the landmark decision n. 14510/2014, the Supreme Court invoked Art. 54 for the first time in the context of irregular migration.
In this case, the traffickers had abandoned migrants on board a wrecking boat in international waters near to Italy, without food or water. They were rescued by a Liberian ship and disembarked in Sicily. The Court held that the rescuers were exempt from liability under Art. 54, as they acted in response to the threat to migrants' life that had been caused by the traffickers' actions.
But the Court also found that the rescuers conduct was not unforeseen, nor was it exceptional. On the contrary, the Italian Supreme judges held that this case was demonstrative of the traffickers' criminal strategy, who had in fact intentionally abandoned the migrants in the high seas in order to escape prosecution and save their own resources, knowing that the people on board would eventually be rescued.
This reasoning led the Court to affirm that the rescuers' conduct was causally linked to the criminal plan of the traffickers. While the former was exempt under Art. 54, the latter was prosecuted before the Italian courts pursuant to Art. 6 of the criminal code, because some of the traffickers conduct (i.e. the expected and predicted rescue and the subsequent disembarking) took place in national territory.
The Supreme Court reasoning around Art. 54 is particularly interesting for the present purpose. By invoking this provision, the Court established a link between the smugglers and the humanitarian assistance, in so paving the way for potential future criminalisation of humanitarian assistance.
In this view, the Iuventa case appears to be emblematic. In August 2017, the Public Prosecutor of Trapani confiscated Iuventa, a boat belonging to the German NGO, Jugend Rettet. A criminal investigation was initiated against some of the crew members for the crime of facilitating irregular immigration.

[17] G. Fornasari, I principi del diritto penale tedesco, Padova 1993, 427 ss.

According to the prosecution, in 2017, Iuventa's crew members had contact with Libyan smugglers on three separate occasions. On one view, it follows that the migrants were "handed over" to the crew by smugglers rather than "rescued" before being transferred to other ships destined for Italy. In addition, according to the investigation, the Iuventa 'returned', rather than destroyed, three boats belonging to the smugglers.

However, an advanced spatial and media investigation by Forensic Architecture[18] provided evidence that solidly rebuts these allegations. Furthermore, it should be noted that the Prosecutor stated before the Italian Senate[19] that he had no doubt that the German NGO acted exclusively for humanitarian reasons, that no coordinated plan could be found between the Libyan smugglers and the NGOs, and that the latter received no profit for their role in the rescue operations.

Jugend Rettet appealed against the decision to confiscate its motorboat. The Supreme Court rejected the appeal with the decision n. 56138/2018.[20] The judges reasoning is, in our view, contradictory. On the one hand, the Court maintained that the smugglers should be held accountable for the crime of facilitating irregular crime under Art. 54 pursuant to the theory of the "autore mediato".[21] On the other, the Court held that the German NGO "*exceeded the scope of application of the exemption clauses under the state of necessity, pursuant to Art. 54 of the Italian Penal Code, or of the humanitarian aid, pursuant to art. 12, paragraph 2, of Legislative Decree no. 286 of 1998, and exceeded the limitation of the obligation laid down in Art. 51 of the Italian Criminal Code*".

It is argued that the Iuventa case shows that there is an increasing climate of suspicion and criminalisation of humanitarian assistance, one which has been widely reported and condemned by academics,[22] human rights organizations[23] and international institutions.[24]

The legal framework and case law show that the Italian legal system fails to sufficiently distinguish between criminal facilitation and humanitarian assistance. Art. 12 par. 2 of the law n. 286/1998 fails to provide any robust definition and is seldom accepted by the Courts. Such a wide margin of interpretation left to prosecutors to criminalise various acts without criminal intent is detrimental to the

[18] See the Report here: https://www.forensic-architecture.org/case/iuventa/.

[19] See here www.repubblica.it/cronaca/2017/05/10/news/il_pm_di_trapani_membri_delle_ong_indagati_per_favoreggiamento_dell_immigrazione_clandestina_-165076853/

[20] See here the decision, translated into English: https://www.academia.edu/39314474/_ENG_TRANSLATION_IUVENTA_CASE_Italian_Supreme_Court_judgment

[21] Supreme Court decision n. 56138/2018 par. 3.1.1.

[22] S. Carrera, J. Allsopp, & L. Vosyliūtė (2018), "Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism". International Journal of Migration and Border Studies, 4(3), pp. 236-276.

[23] EU Agency for Fundamental Rights: "Criminalisation of migrants in an irregular situation and of persons engaging with them".

[24] See the study commissioned by the EU Parliament: "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update".

protection of civil society organizations who uphold the rights of refugees and other vulnerable groups.
Having reviewed the Italian position, in the following chapter, we examine the implementation of the crime of facilitating irregular immigration in Germany.

4. The German criminal provision and its case law application.
Entering German territory irregularly is a crime under German Law.
According to Art. 95(1) no. 3 of the Residence Act,[25] "*a prison sentence of up to one year or a fine shall be imposed on any foreigner who enters the territory of the Federal Republic contrary to Art. 14 (1) no. 1 or 2*". These latter provisions state that it is illegal to enter German territory without a passport or a visa. In case of recidivism, the punishment rises to up to 3 years imprisonment (Art. 95 (2) AufenthG). The required *mens rea* of the crime is intent (*dolus eventualis*). To *attempt* an illegal border crossing is also an offence (Art. 95 (3)).
Facilitating irregular entry is punishable under the general criminal clauses enshrined in Articles 26 (abetting) and 27 (aiding) of the German Criminal Code (GCC). According to Art. 26 GCC "*Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he/she were a principal*". Art. 27(1) GCC reads "*Any person who intentionally assists another person in the intentional commission of an unlawful act shall be convicted and sentenced as an aider*".
In case of aiding and abetting, the commission of an intentional unlawful act of another is an element of the crime. Art. 27(2) provides for a mandatory mitigation for the aider, reflecting their differing role in the commission of the offence.[26] This means that an aider of illegal immigration faces a maximum of 9 months' imprisonment instead of 1 year imprisonment (Art. 95(1) Residence Act) or 2 years and 3 months instead of 3 years' imprisonment (Art. 95(2) Residence Act).[27]
Furthermore, Art. 96 of the Residence Act sets out aggravating circumstances, namely when the aider or abettor receives or is promised a financial reward in return for their assistance, or when he/she acts repeatedly or in favour of *several*[28] foreigners. Under these aggravating circumstances, the aider and abettor is punished with up to 5 years of imprisonment, and no mitigation for aiding applies (Art. 96(1)). Even more severely dealt with is anyone who aids or abets illegal

[25] Aufenthaltsgesetz in German.
[26] This is the most significant expression of the principle of differentiation between perpetrator and aider, a special feature of German Criminal Law, see K. Lackner, K. Kühl, "Strafgesetzbuch Kommentar", 29th Edition (2018) vor § 25 Rn. 1. This principle is linked to pre-enlightenment concepts of causation, that used to weigh different conditions for an effect to occur, considering the act of the perpetrator to be "more" of a cause than that of the aider. Yet, this differentiation was sustained by Hegelian influences in the 19th century, which considered the perpetrator not "more a cause", but more culpable than the aider, see U. Moeller, "Definition und Grenzen der Vorverlagerung von Strafbarkeit" (2018), p. 212 seq. As a result, the mitigation of the punishment for the aider is a key feature of German criminal law doctrine and culture to this day.
[27] Mitigation is regulated by article 49 paragraph 1 GCC.
[28] This means at least two immigrants, see BGH NStZ 2004, 45 (11. 7. 2003 - 2 StR 31/03).

border crossing systematically *and* commercially (Art. 96(2)), which carries a prison sentence range of between six months and ten years. The same provision applies for perpetrators (*i.*) acting as a member of a gang that has joined together for the continued commission of such acts, (*ii.*) carrying a firearm or another weapon in order to use it in the offence, or (*iii.*) exposing the smuggled person to life-threatening, inhumane or degrading treatment or to the risk of serious damage to health.

It must be noted that German criminal law does not provide any explicit exemption for humanitarian assistance or any other special justifying circumstances. In case of Art. 95(1) of the Residence Act, in connection with Article 26 and 27 GCC, the facilitation of irregular immigration is punishable even where there is no financial interest involved.[29] Reports that state otherwise are misleading.[30]

Yet, it is widely accepted that any conduct is only punishable if it causes harm to a legally recognised asset which is protected by law, such as pursuant to the "Rechtsgutstheorie" or "Teoria del bene giuridico" in Italian Law.[31] If humanitarian assistance does not cause harm to a legal asset, this could be a justification for the exemption of such acts from criminal liability. Which particular legal asset is protected by law is a matter of interpretation.[32]

According to Art. 1(1) sentence 2 of the Residence Act, "*the law serves to control and limit the influx of foreigners into the Federal Republic of Germany. It enables and shapes immigration taking into account the ability to receive and integrate foreigners as well as the economic and labour market interests of the Federal Republic of Germany*". On these grounds, it has been argued by some that the legal asset protected by Art. 95 of the Residence Act is, in fact, the orderly process of immigration itself.[33]

However, Art. 1(1) sentence 3 of the Residence Act reads that "*the Act serves to fulfil the humanitarian obligations of the Federal Republic of Germany*" as well. Consequently, Art. 31 of the 1951 Geneva Convention Relating to the Status of Refugees comes into play. This provision reads that "*The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees*

[29] See for example W. Joecks, K. Miebach, "Münchener Kommentar zum Strafgesetzbuch" (2018) *Gericke*, AufenthG § 95 Rn. 58.

[30] See e.g. the "Questionnaire for the National Report on the Implementation of the Directive on Facilitation of Unauthorised Entry and Stay" on page 134 and 139 and "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 update study" on page 11.

[31] The Rechtsgutstheorie has been questioned in recent years (see L. Greco, "Was lässt das Bundesverfassungsgericht von der Rechtsgutslehre übrig?", in Zeitschr. f. Intern. Strafrechtsdogmatik 5/2008, p. 234) but is still widely accepted as limiting criminal law like the proportionality principle, see e.g. BGH NJW 2014, 3459 (3461, Rn. 19) (Urteil v. 08.05.2014 - 3 StR 243/13).

[32] See for example A. Sinn, "Die Nötigung im System des heutigen Strafrechts" (2000), p. 53.

[33] See also W. Joecks, K. Miebach, "Münchener Kommentar zum Strafgesetzbuch" (2018), *Gericke*, AufenthG § 95 Rn. 1. On the issue of abstract legal assets like "orderly processes" see U. Moeller, "Definition und Grenzen der Vorverlagerung von Strafbarkeit" (2018), p. 139 seq.

who, coming directly from a territory where their life or freedom was threatened (…) enter or are present in their territory without authorization".

Art. 95(5) of the Residence Act explicitly refers to Article 31(1) of the Convention, stating that it shall "remain unaffected" by the criminalisation of illegal immigration. From this provision, one could infer that where the assisted individual is a refugee or asylum seeker, the assisted person ought to be exempt from the offence of facilitating irregular entry. It could be argued that the harm caused to the 'orderly process' of immigration by the illegal border-crossing would be outweighed by the urgent need of the Geneva refugee.[34] There would be no unlawful illegal entry of a Geneva refugee and therefore no aiding and abetting according to Art. 26, 27 GCC or Art. 96 AufenthG.

Yet, recent German jurisprudence has refuted this interpretation of the law. Criminal courts[35] and the Federal Constitutional Court (Bundesverfassungsgericht)[36] have ruled that the explicit reference to the Geneva Convention does not provide for an exemption from the criminal offence of Art. 95(1) no. 3, nor a justification for having committed it.[37] This case law consistently holds that the intention of the legislator was to respect the Geneva Convention only insofar as considering the refugee status to be a "*persönlicher Strafaufhebungsgrund*", a personal ground for setting aside the sentence that is exclusively recognized for the Geneva refugee, who still commits an intentional unlawful act.[38]

This legislative construction has the effect that aiding and abetting irregular immigration of Geneva refugees remains a criminal act, punishable according to Art. 95(1) no. 3 Residence Act (in connection with article 26, 27 GCC) and Art. 96 Residence Act, since the aider or abettor intentionally furthered the intentional and unlawful commission of an offence. It is only the Geneva refugee who has a personal ground for his sentence to be set aside available,[39] not the aider or abettor.

The interpretation of this exemption for Geneva refugees as merely a "personal ground to set aside the sentence" has enabled numerous convictions of aiders of such refugees to be upheld by the German Federal Supreme Court (BGH). This recently included the case of a Syrian refugee who, without financial gain, brokered and therefore unlawfully aided the entry of two other Syrian refugees who

[34] See the interpretation of A. Fischer-Lescano, J. Horst, "Das Pönalisierungsverbot aus Art. 31 I GFK" in Zeitschr. F. Ausländerr. und Ausländerp. (2011), page 89 seq.

[35] See for example LG Landshut BeckRS 2017, 136512 (25.10.2017 – 6 Qs 186/16); LG Offenburg BeckRS 2017, 117375 (14.7.2017 – 3 Qs 48/16).

[36] BVerfG NVwZ 2015, 361 (8.12.2014 – 2 BvR 450/11).

[37] An exemption (in German „Tatbestandsausschluss") would mean that the act would not be an offence even though the elements of the crime were present. A justification would mean that the commission of the offence was justified.

[38] See explicitly BVerfG NVwZ 2015, 361 (8.12.2014 – 2 BvR 450/11) paragraph 23.

[39] However, a conviction of a Geneva refugee might still be possible for other crimes other than illegal entry, see LG Offenburg BeckRS 2017, 117375 (14.7.2017 – 3 Qs 48/16) and on the other hand A. Fischer-Lescano, J. Horst, "Das Pönalisierungsverbot aus Art. 31 I GFK" in Zeitschr. F. Ausländerr. und Ausländerp. (2011), page 87.

were apprehended on the Italian coastal waters and later arrived in Germany,[40] and the case of a German citizen who repeatedly aided Syrian refugees (who might have been Geneva refugees) to enter German territory for financial gain.[41]

Nonetheless, it should be noted that the crime of facilitating irregular immigration is designed as an *accessorial* offence under German law. If there is no "intentional unlawful commission of a crime", there is no aiding or abetting according to article 26, 27 GCC (or article 96 AufenthG).[42] The prosecution has to prove that the act aided or abetted *a concrete* instance of illegal immigration which was committed intentionally and unlawfully by the helped migrant.[43]

Considering the accessorial criminalisation of facilitating illegal immigration in German Criminal Law, the German Federal Supreme Court recently set aside a conviction for aiding illegal immigration (1 StR 212/18, 24.10.2018).[44] In this case, the "systematic" aider had intentionally (and commercially) organized the transport of irregular immigrants into German territory. However, some of those irregular immigrants were minors. The District Court had convicted the aider for systematic aiding illegal immigration under aggravating circumstances (Art. 96(2) German CC), sentencing him to 6 years and 9 months' imprisonment. Following the appeal, the highest criminal court ruled that the court of first instance had not established with sufficient certainty whether *the minors* had intentionally crossed the border illegally. The Federal Supreme Court held that such an intent had to be established carefully, especially given the cognitive development of children. If no intentional unlawful immigration can be established, there can be no aiding or abetting. This decision shows the effect of the accessorial liability chosen by the German legislator in practice.[45]

The present analysis shows that the German criminal law does not expressively exempt humanitarian assistance from criminal liability. One could argue that in case of aiding and abetting of a Geneva refugee, the actor had caused no harm or his act could be justified, but this interpretation has been rejected by case law. However, the aided individuals mens rea has to be established as having been

[40] BGH NStZ 2018, 286 (4.5.2017 − 3 StR 69/17), resulting in a conditional sentence of 1 year of imprisonment.

[41] BGH NStZ 2015, 402 (26.2.2015 − 4 StR 233/14).

[42] W. Joecks, K. Miebach, "Münchener Kommentar zum Strafgesetzbuch" (2018), *Gericke*, AufenthG § 96 Rn. 3; J. Bergmann, K. Dienelt, H. Winkelmann, "Ausländerrecht Kommentar" (2018), AufenthG § 96 Rn. 4.

[43] This is the case at least where aiding and abetting is not done systematically (Art. 95 AufenthG in connection with Art. 26/27 GCC). In case of systemic aiding and abetting (Art. 96 AufenthG) on the other hand, the German legislator found a way to ease the burden of proof on the prosecution. In a highly unusual disposition, Art. 96 paragraph 3 punishes the attempt to commit the crime of article 96 AufenthG, that is, *to attempt* to aid or abet illegal immigration "systematically". Accordingly, the aider and abettor can be punished even if no case of illegal border crossing occurs, as long as he "tried" to aid or abet illegal border-crossing. In German criminal law, this requires that in the aiders mind his act "was about to" further illegal border crossing (Art. 22 GCC).

[44] BGH NStZ 2019, 283.

[45] Critical of this approach *Mitsch* in his commentary on BGH NStZ 2019, 283 (page 285 seq.).

unlawful and intentional irregular immigration, since the liability of the aider or abettor is accessorial. The Federal Supreme Court recently held that this intent has to established particularly carefully in case of helped minors.

5. Conclusion.

Italy and Germany have chosen different legal techniques to criminalise facilitating irregular immigration. However, both can lead to the criminal liability of humanitarian assistance.

Italian Criminal Law foresees a special exemption from criminalisation for humanitarian aid, but the case law is not settled and the possibilities for interpretation and application of the law are broad. On the other hand, German Criminal Law does not exempt humanitarian aid for illegal border crossing from criminal liability. The law only grants refugee a personal ground for setting aside the sentence, but his/her aider or abettor is still punishable for their role.

As a result, members of humanitarian organizations in both Italy and Germany can be prosecuted and face legal uncertainty, as shown in the examined case law. Neither legal systems do require a financial interest or gain for the facilitation to be criminal. In this regards, it should be recalled that in 2018 the European Parliament[46] expressed concern "*at the unintended consequences of the Facilitators Package on citizens providing humanitarian assistance to migrants and on the social cohesion of the receiving society as a whole*", and underlined that "*in line with the UN Smuggling Protocol, acts of humanitarian assistance should not be criminalised*".

While this article does not argue that this legal situation is an infringement of international human rights or humanitarian law per se, we do find it worrisome to come to the conclusion that in the law and jurisprudence of the examined domestic legal systems no clear distinction is made between facilitating illegal immigration for altruistic motives on one side and "migrant smuggling" on the other. According to Art. 1(2) 2002/90/EC, the EU Member States could change the current position by clearly exempting facilitation of unauthorised entry when it is done for humanitarian assistance.

Bibliography

BERGMANN J., DIENELT K., WINKELMANN H., "Ausländerrecht Kommentar", (2018)

BERNARDI S., *"(Possible) Criminal Profiles of Search and Rescue Activities at Sea"*, in Diritto Penale Comparato, 1/2018.

CARRERA S., GUILD E., ALIVERTI A., ALLSOPP J., MANIERI M., LEVOY M., "Fit for Purpose? The Facilitation Directive and the Criminalization of Humanitarian Assistance to Irregular Migrants", Study for the European Parliament's LIBE Committee, (2016)

[46] European Parliament resolution of 5 July 2018 on guidelines for Member States to prevent humanitarian assistance from being criminalised (2018/2769(RSP)).

CARRERA S., VOSYLIUTE L., ALLSOPP J., "Policing the mobility society: the effects of EU anti-migrant smuggling policies on humanitarianism" Int. J. Migration and Border Studies, Vol. 4, No. 3, (2018)
COMMISSIONER FOR HUMAN RIGHTS, Council of Europe, "Criminalisation of Migration in Europe: Human Rights Implications", (2010)
COMMISSIONER FOR HUMAN RIGHTS, Council of Europe, "Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean", (2019)
EUROPEAN PARLIAMENT, POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS "Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update", (2018)
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, "Criminalisation of migrants in an irregular situation and of persons engaging with them", (2014)
FORNASARI G., "I principi del diritto penale tedesco", (1993)
FISCHER-LESCANO A., HORST J., "Das Pönalisierungsverbot aus Art. 31 I GFK" in Zeitschr. F. Ausländerr. und Ausländerp, (2011)
GEMENNE F., BLOCHER J. "*How can migration serve adaptation to climate change? Challenges to fleshing out a policy ideal*", The Geographical Journal, 2017
GRECO L., "Was lässt das Bundesverfassungsgericht von der Rechtsgutslehre übrig?", in Zeitschr. f. Intern. Strafrechtsdogmatik 5/2008
HAILBRONNER K., JOCHUM G. "Questionnaire for the the National Report on the Implementation of the Directive on Facilitation of Unauthorised Entry and Stay of 28 November 2002", (2007), available at *http://odysseus-network.eu/wp-content/uploads/2015/03/2002-90-Facilitation-unauthorised-entry-Synthesis.pdf*
JOECKS W., Miebach K., "Münchener Kommentar zum Strafgesetzbuch" (2018)
LACKNER K., Kühl K., "Strafgesetzbuch Kommentar", 29th Edition (2018)
MANCINI D.: "Ancora dubbi sui limiti all'intervento umanitario di Ong nel Mediterraneo", in www.unicost.eu
MASERA L. "L'incriminazione dei soccorsi in mare: dobbiamo rassegnarci al disumano?", in Quest. Giust. 2/2018
MOELLER U., "Definition und Grenzen der Vorverlagerung von Strafbarkeit" (2018)
MORSELLI C., "Testo Unico dell'Immigrazione: Commentario di legislazione, giurisprudenza, dottrina" (2019)
PERELLI S.: "Il sequestro della nave Open Arms: è reato soccorrere migranti in pericolo di vita?"
SINN A., "Die Nötigung im System des heutigen Strafrechts" (2000)
VASSALLI PALEOLOGO F., "Gli obblighi del soccorso in mare nel diritto sovranazionale e nell'ordinamento interno", in Quest. Giust. 2/2018