

*International maritime piracy – Articles 100-107 and 110 of the United Nations Convention on the Law of the Sea of 10 December 1982 – Prosecution of maritime piracy – Italian Jurisdiction – Unconditional punishability – Articles 1135 and 1136 of the Italian Navigation Code – Italian criminal sanctions with specific reference to maritime piracy*

*Corte di Cassazione (Sez. V penale), 27 February 2015, No. 15977*

*Criminal proceedings against Abdi Abdullahi Ahmed, Gedi Aptidon Hassan, Mahamed Isse Karshi, Abdi Hassan Mahmoud, Abdillahi Ali Ahmed, Daley Mahamed Ali, Ahmaed Mahmed Ali and Hashi Abdi Hawiyke*

In the case under review, the *Corte di Cassazione* addressed the question concerning the exercise of Italian jurisdiction on crimes connected to maritime piracy in line with Articles 1135 and 1136 of the Navigation Code, as well as on related crimes committed against Italy or against Italian citizens or goods on the high seas, or in the territorial waters of other States, in areas where specified types of multilateral counter-piracy operations are taking place, i.e. “Operation Ocean Shield” and “Operation Atalanta”.

Before analyzing the factual and procedural background, it seems appropriate to briefly outline the current legal developments and fundamental challenges in place to combat maritime piracy at the international, European and, in particular, national (specifically Italian) levels. This brief introduction will hopefully foster a better understanding of the reasoning of the *Corte di Cassazione* in the case at hand.

According to general custom law (as codified by articles 100-107 and 110 of the United Nations Convention on the Law of the Sea, UNCLOS, adopted in 1982 and entered into force in 1994), “piracy” consists of any illegal acts (or any act of voluntary participation in, inciting or intentionally facilitating an act) of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship and directed: i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State (Article 101 of the United Nations Convention on the Law of the Sea, “UNCLOS”). When a ship is considered a pirate ship (Article 103 UNCLOS), it does not enjoy the freedom of navigation on the high seas and no State effectively exercise its jurisdiction and control over it. Furthermore, when pirates enter territorial seas after committing crime(s) on the high seas, or in any area beyond national jurisdiction – or when they directly attack ships in territorial waters – warships of any States or coalitions are not permitted to intervene without the consent of the involved coastal States and/or specific authorization from the UN Security Council (TREVES, “Piracy, Law of Sea, and Use of Force: Developments off the Coast of Somalia”, EJIL, 2009, p. 399 ff.; TANCREDI, “Di pirati e di Stati falliti: il Consiglio di sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia”, RDI, 2008, p. 937 ff.; CALIGIURI, “Le misure di contrasto della pirateria nel mare territorial somalo: osservazioni a margine della risoluzione 1816 (2008) del Consiglio di sicurezza”, DM, 2008, p. 1506 ff.).

In the context of serious international concern at the escalation of piracy off Somalia’s coast, the use of force in Somalia has been authorized by a series of UN Security Council Resolutions since 2008. In particular, on 16 December 2008, the unanimous adoption of United States-led Resolution 1851 (UN Doc. S/RES/1851, 16 December 2008) authorized a temporary extension of twelve months, from the adoption of the previous Resolution 1846 (UN Doc. S/RES/1846, 2 December 2008), “to undertake all necessary measures appropriate in Somalia” – where “in Somalia” must be read as the Somali region as a whole, including its territory as well as the maritime areas under its sovereignty, all sovereign rights and jurisdiction. To complement this, the UN General Assembly has also repeatedly encouraged States to cooperate to address piracy and armed robbery at sea in its resolutions on the *Oceans and the Law of the Sea*. In its Resolution 64/71, the General Assembly recognized “the crucial role of international cooperation at global, regional, sub-regional and bilateral levels in

combating, threats to maritime security, including piracy”, in accordance with international law (UN Doc. A/RES/64/71, 12 March 2010, para. 82).

Over 40 countries have been involved in military counter-piracy operations, including two main multilateral operations in full accordance with the relevant UN Security Council resolutions relating to Somalia-based piracy. Two operations deserve particular attention, namely the NATO’s Standing Naval Group, Operation Ocean Shield and the EU’s Naval Force, Operation Atalanta.

Since August 2009, Operation Ocean Shield has contributed to international efforts to counter maritime piracy, while participating in capacity building efforts with other naval forces including US-led maritime forces; EU naval forces (with Operation Atalanta in particular) and other national actors operating to combat the threat of piracy in the region. On the other hand, the EU Operation Atalanta was adopted within the European Common Security and Defence Policy (“CSDP”). In this sense, in accordance with Article 1 of the Council Joint Action 2008/851/CFSP of 10 November 2008, the EU is authorized to conduct a military operation in support of the main Security Council resolutions “in a manner consistent with action permitted with respect to piracy under Article 100 *et seq.* of the [UNCLOS]”.

Now as regards the national level, Italy has contributed warships to both NATO’s Operation Ocean Shield as well as the EU’s Operation Atalanta off the coast of Somalia. To gain a clear overview of the Italian legislation drafted to fight international maritime piracy, it must firstly be highlighted that Italy ratified the UNCLOS by means of Law No. 689 of 2 December 1994, which considers provisions aiming at tackling international maritime piracy providing for the full execution of Articles from 100 to 107 and 110 of the UNCLOS.

In line with the UNCLOS, the Navigation Code defines “piracy” as “acts of depredation damaging the national or foreign ship, or behaving violently against any person on board”. As for the criminalization of maritime piracy, the Navigation Code states that such acts must be punished with imprisonment for between ten to twenty years, when they are committed by the Master or Officer of a national or foreign ship. For all the others members of the crew, the punishment is lower, but not falling below one third of it; for non-nationals, punishment is reduced to a half (Art. 1135). In addition, the Navigation Code considers a ship on suspicion of piracy as any national or foreign ship, illegally equipped with weapons, which sails with no chance of providing proper certification. The Navigation Code states that its Master or Officer has to be punished with imprisonment from five to ten years (Art. 1136).

As a general rule in Italy, it is sufficient to recall the dominant *principle* that *criminal law is territorial* (Art. 4 Criminal Code). There is one exception for any other crime committed abroad for which special legal provisions or international conventions establish the applicability of the Italian criminal law (Art. 7(5) Criminal Code). That is the “unconditional punishability” for “crimes committed abroad”, including piracy.

In the framework of strengthening the fight against international maritime piracy, Italy has adopted the DL No. 209 of 30 December 2008, converted by Law No. 12 of 24 February 2009, No. 12, which contains “extension of Italian participation in international missions”. The importance of this Law, particularly its Article 5, within the context of the case under review, is twofold. Firstly, it states that crimes committed either on the high seas or in maritime areas under national jurisdiction, but covered by multilateral missions (e.g. the EU Atalanta mission), are punishable in accordance with the aforementioned Article 7 of Criminal Code. Consequently, the “unconditional punishability” for piracy is fully applicable under Italian jurisdiction (Art. 5(2) and (3) of Law No. 12 of 24 February 2009). Secondly, it specifies the extension of the Italian jurisdiction and established that for piracy-related crimes under Articles 1135 and 1136 of Navigation Code, and for those related to them in line with Article 12 of Code of Criminal Procedure, committed both in high seas or in territorial waters, the *Tribunale di Roma* is competent (Art. 5(4) of Law No. 12 of 24 February 2009). In line with further developments, the Law No. 13 of 22 February 2012, particularly its Article 4(11), extends Italian participation in the multilateral counter-piracy operations, i.e. Atalanta Operation and Operation Ocean Shield, and recalls the *lex specialis* on the extension of the Italian jurisdiction (see

*supra*, Art. 5 of Law No. 12 of 24 February 2009), i.e. the “unconditional punishability” under Italian jurisdiction, when actions are perpetrated against Italy or against Italian citizens or goods on the high seas or in the territorial waters of other States in areas where those operations are taking place.

It is against this legal framework that the case under review has to be examined. On 10 October 2011, an Italian ship was attacked on the high seas. The crew, composed of about twenty people, including six Italians, was able to barricade itself in the so-called *cittadella* – that is, the armoured part of the cockpit – and kept control of the ship, despite the attack having damaged equipment and instrumentation, and melted the electrical equipment. About twenty-four hours later, ships under the Ocean Shield Operation reached the hijacked Italian ship. In particular, after preliminary reconnaissance, British Royal Marines intervened operationally, arrested the hijackers, and freed the crew. The assailants were handed over to an Italian Navy cruiser, which was also participating in Ocean Shield Operation at the time. In the meantime, the so-called “mother ship”, from which the smaller boats operated the assault, was identified and the crew arrested.

Italian courts of first and second instances (respectively, *Corte di Assise di Roma* and *Corte di Assise di Appello di Roma*) convicted the assailants for piracy, possession of stolen property and possession of weapons of war; as well as arson causing damage to equipment, the instrumentation and ship equipment.

The *Corte di Cassazione* confirmed the first and second instances’ judgments, while at the same time referring to the conclusions of a previous judgment related to international maritime piracy (*Corte di Cassazione (Sez. II penale), Criminal proceedings against A.A.M. et al. (Montecristo case)*, 4 February 2013, No. 26825, IYIL, 2013, p. 442 ff., with a comment by BEVILACQUA). The *Corte di Cassazione* restated the facts of the case at hand, including the *modus operandi* of the kidnappers, qualifying those acts and conducts as undoubtedly crimes of piracy, in line with the national jurisprudence by applying the aforementioned articles of the Navigation Code. In particular, it took into consideration the most relevant evidence: i.e. the crew members and the security team being shot with their own weapons; people forced to take refuge in the *cittadella* (identifying the clear use of violence against people); the search for objects and people in the various rooms of the vessel; the actions taken to try to breach the *cittadella*; damage done to the onboard equipment and structures of the ship; the evidence of remote coordination and organization of the tasks; boarding the mother ship, where the leader was recognized (para. 2 of the Conclusions on points of law).

At this point, after referring to the international and European legal framework for combating piracy, and this framework’s implementation at Italian level (*ibid.*, paras. 3-9), the *Corte di Cassazione* highlighted the fact that the Italian normative system considers acts of piracy punishable under Italian law without limitation as regards the place in which it is carried out – i.e. regardless of whether it occurred in national territorial waters, or on the high seas or in foreign territorial waters – when these acts are committed against Italian ships in any of the zones where the counter piracy missions to which Italy is taking part, e.g. Operation Ocean Shield (*ibid.*, para. 10), are operating.

Therefore, the *Corte di Cassazione* confirmed that acts committed by the claimants, as it was already upheld by the lower courts (*Corte di Assise* and *Corte di Assise di Appello*), must be unequivocally defined as acts of piracy carried out on board the Italian ship, and thus on Italian territory and to the detriment of Italian ships while operating in the operation zones of Ocean Shield (*ibid.* para. 11).

Consequently the *Corte di Cassazione* confirmed the competence of *Corte d’Assise di Roma* to exercise Italian jurisdiction on piracy crimes and on those related to them, when actions are perpetrated against Italy or against Italian citizens or goods. As a final remark, it should be noted that the applicability of “unconditional punishability” by Italian courts in line with the aforementioned Italian norms for crimes committed abroad, including piracy, represents the application at the national level of criminal sanctions against pirates pursuant to international and European legal frameworks (the Italian text of the decision is available at: <<http://www.italgiure.giustizia.it>>).