

IUVENTA CASE → The Intercept Enquiry

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The main problem in the IUVENTA affair is the lack of any formal charges having been brought against anybody. Without a principal case, the time limits attached to criminal enquiries and precautionary measures do not start to run.

Usually, a seizure, as a precautionary measure adopted to support a main procedure, requires several conditions to be met:

- 1) There has to be ‘*fumus delicti*’, i.e. the prima facie appearance that a crime has been committed (in the principal case) – the precautionary measure then helps to avoid that the crime continues or get aggravated through time;
- 2) Bad faith, culpability or *dolus* on the part of the party affected by the precautionary measure (i.e. *Jugend Rettet*) – which in this case is distinct from the potential accused (which would probably be the captain and/or crew of the IUVENTA) in the main process;
- 3) Proportionality *in concreto*; and
- 4) Jurisdiction.

Yet, none of the above prerequisites have been fulfilled in the IUVENTA case:

The *fumus delicti* would require a direct connection between the IUVENTA and the crimes of facilitation of irregular entry and/or collusion with smuggling/trafficking rings. Such connection does not exist, as the factual reconstruction by *Forensic Oceanography* clearly demonstrates.

But even if there was such a link between the IUVENTA crew and any Libyan mafias, that does not mean that *Jugend Rettet* (as owner of the vessel) knew or should have known of such a connection, in the hypothetical case. In other words, any possible wrongdoing by IUVENTA does not contaminate the good faith of *Jugend Rettet* as a separate legal subject in the parallel precautionary measure procedure and should not be penalised for it.

The adoption of such drastic a measure as the impoundment of the vessel is completely disproportionate in the circumstances. It has not only excessive economic and reputational costs to *Jugend Rettet*, but existential consequences too. The whole point of the organisation is to rescue lives at sea. If the main means through which their mission is executed is taken away, the essential purpose and main justification for its existence is eliminated. The NGO is nullified in practice; knocked out; put out of service – which may well ultimately constitute a violation of the freedoms of expression and association protected under human rights law (see for a similar finding the *Women on Waves vs. Portugal* decision of the European Court of Human Rights).

Finally, it is also disputable that Italy can claim jurisdiction in a case like this. Under international law, no country can claim any power over the high seas. Freedom of navigation reigns and vessels are subject to the exclusive jurisdiction of their flag states. Interference with communications on board the IUVENTA (via bug planting or other techniques) and

other investigative measures would have required the specific authorisation by the Dutch authorities (since the boat was flying under Dutch flag), a sufficiently concrete and clear legal basis for intervention, and judicial oversight to preserve the rights of the defence. Otherwise, any evidence collected would be illegal and unusable in any ensuing criminal proceedings (see findings of the European Court of Human Rights in the similar case of *Medvedyev v. France* in this sense).

The 2000 Palermo Protocols allow for interdiction measures to be adopted on the high seas against vessels suspected of involvement in the crimes of human trafficking and migrant smuggling, upon prior consent of the relevant flag state and provided there are sufficient grounds for suspecting that such is indeed the case.

And for the crimes of migrant smuggling and human trafficking to be 'suspectable', there are in turn several criteria to be met:

- There needs to be *mens rea* or intention to commit the crime on the part of the suspect concerned;
- A link to an organised criminal group; and
- A material or financial benefit (for smuggling) or the final purpose of exploitation (for human trafficking) in the form of forced labour, prostitution, organ removal, etc.

In the IUVENTA case it is quite clear that none of the above conditions are fulfilled. In each one of the episodes substantiating the seizure, the crew proceeded on the explicit instructions received from the MRCC Rome and following their indications at every step.

The additional crime under Italian law of facilitation of irregular entry should also be discarded. Arrival in Italian soil only occurred after having obtained the authorisation to enter territorial waters and to disembark by the relevant port authorities, which eliminates the 'irregular' or unauthorised nature of the ensuing 'entry' of the rescued migrants.

Drawing on the parallel case of the *Open Arms*, the IUVENTA proceeded according to its law of the sea obligation to render assistance to *anybody* (regardless of their immigration or other status under Italian or international law) in danger of being lost at sea (Art 98 UNCLOS). Its actions not only do not constitute a crime but were specifically required by the circumstances of distress in which migrant boats are found in the Central Mediterranean – the crime would have been to *not* rescue; actually coastal States (including Italy) are obliged to prosecute captains flouting their duties under Art 98 UNCLOS. There was no other alternative but to recover the survivors and bring them to a 'place of safety' worthy of the name – which Libya can't be by the very findings of the Italian judge in the *Open Arms* case.

For all these reasons, the current situation of strategic non-charges being pressed by the PM is untenable. The absence of a formal accusation freezes the time of the seizure and keeps the potential accused off the relevant file and any evidence collected against them. It leaves *Jugend Rettet* and the IUVENTA crew in a situation of complete defencelessness; in a sort of engineered, timeless legal limbo that effectively expels the organisation from the Mediterranean and annihilates its very *raison d'être*.