



Spanish Jurisprudence on Illegal Immigrant Smuggling

ANALYSIS



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1. Purpose and methodology

This legal analysis provides an overview of relevant Spanish case-law on illegal immigrant smuggling, highlighting the main obstacles faced by Spanish courts in dealing with such cases and solutions emerging therefrom.

This product is based on the examination of a representative sample of 14 court cases amongst those made available by the Spanish National Member at Eurojust and others collected through legal research. These cases relate mostly to the **assertion Spanish jurisdiction on the high seas and the gathering and admissibility of evidence**. *Annex I* provides an synopsis of the examined jurisprudence.

It is important to note that this work is part of a **broader project** conducted under the auspices of the Thematic Group on Illegal Immigrant Smuggling and intended to analyse the obstacles and solutions in investigations and prosecutions stemming from the case-law of other Member States most engaged in administering justice in relation to illegal immigrant smuggling. In this respect, it is worth remarking that the analysis of relevant Italian jurisprudence on the subject has already been carried out.

The final aim and envisaged product of this project is to reach – on the basis of an integrated analysis of all the domestic legal and judicial approaches assessed - a **holistic overview of the key challenges and best practices in prosecuting this crime across the EU**.

2. Background

Given its proximity to Africa, Spain has always been a point of arrival for irregular migrants and a profitable target for organised crime groups (hereinafter, OCGs) involved in illegal immigrant smuggling. According to the Ministry of Development¹, in 2014, Tarifa's Maritime Rescue Centre coordinated 5 041 SAR operations providing relief to 14 413 irregular immigrants. In 2015, the National Maritime Rescue Centre rescued 15 566 migrants trying to reach Spain on small unfit boats², carrying out an average of 15 SAR operations per day. Relevantly, these numbers do not include irregular migrants reaching Spain by land.

The crime of illegal immigrant smuggling is of major significance in quantitative and qualitative terms in Spain. There have been numerous judgements by Spanish courts regarding this crime type in recent times. Concretely, between 2008 and 2013 (data available at the time of writing) there have been around 160 cases of illegal immigrant smuggling by sea, 279 cases of illegal immigrant smuggling by land using motor vehicles, 140 cases of illegal immigrant smuggling using counterfeited documents and 41 cases using other means.

¹ <https://www.fomento.gob.es/MFOMBPremsa/Noticias/Salvamento-Mar%C3%ADtimo-coordin%C3%B3-la-asistencia-a-14-el/5deddad9-bcc7-47ad-a8da-7515d87108fd>

² <http://www.salvamentomaritimo.es/contenido-relacionado/salvamento-maritimo-presto-auxilio-a-un-total-de-15-566-personas-durante-2015/>

3. The Legal Framework

The facilitation of illegal immigration³ is defined in Article 318*bis* of the Spanish Criminal Code which also determines the applicable sanctions. Following the reform of the Spanish Criminal Code introduced by Organic Law 1/2015, Article 318*bis* transposes **Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence** as well as the aggravating circumstances referred to in Article 1(3) of the **Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence**. Together, these two instruments are often referred to as the “Facilitators Package”, currently under review by the European Commission.

It follows a brief outline of the most relevant national and international legal provisions as relied upon by Spanish courts when examining cases of illegal immigrant smuggling.

3.1. Domestic legal framework

- **Article 318*bis* Criminal Code⁴** provides the **criminal sanctions** to be applied to the facilitation of illegal immigration. These are expressly **excluded** from the scope of the provision cases of **humanitarian assistance**. Conversely, the **intent of achieving financial gain** is **explicitly mentioned** in Article 318*bis*(1), without being a condition for the perpetration of the crime.

Article 318*bis*(2) of the same law, establishes the **criminal sanctions** applicable to cases where someone, **for financial gain, intentionally** assists a person who is not a national of a Member State **to reside** in Spain in breach of Spanish Immigration Law.

Article 318*bis*(3) determines as **aggravating circumstances** the **membership in an OCG** and the fact that the actions carried out by the defendants would have **endangered the lives** of the migrants concerned or created a **risk of serious injuries**.

Attenuating circumstances are also contemplated in **Article 318*bis*(6)** considering the gravity of the crime.

- **Article 23(1) Organic Law on the Judiciary** provides that for the lawful exercise of the Spanish jurisdiction is necessary that the action or omission that constitutes the criminal conduct takes place in Spanish territory or on board Spanish ships or aircraft without prejudice to the provisions of international treaties ratified by Spain. In addition, the jurisdiction of the Spanish State is extended over offences committed by Spanish citizens or foreigners outside Spanish territory where such offences are qualified as per Spanish law as facilitation of illegal immigration, whenever they are committed at sea and in the cases foreseen by an international treaty or normative act of an international organization to which Spain is party (Article 23(4)(d)).

³ The Spanish Criminal Code refers to the crime of facilitation of illegal immigration as a crime “against the rights of foreign citizens”. For the purpose of this briefing note, the term facilitation of illegal immigration will be used interchangeably with illegal immigrant smuggling when referring to the criminal offence regulated in Article 318*bis* of the Spanish Criminal Code.

⁴ As last amended in 2015.

In order to fully grasp the approach followed by Spanish courts in addressing cases of illegal immigrant smuggling it is important to understand the terms in which this crime type is framed under national law. Specifically, it amounts to:

- ***Delito de peligro abstracto***⁵ – As emerging from the Spanish case-law, the legal interest protected by Article 318*bis* of the Spanish Criminal Code is not only the State’s interest in controlling migratory flows and protecting its border from threats posed by OCGs but also the protection of migrants’ rights and freedoms as well as their social integration in Spain. The Supreme Court has tried to avoid considering this criminal offence as the mere criminalisation of an administrative offence (entering or remaining in Spain in breach of Spanish Immigration Law) by establishing it as a ***delito de peligro abstracto***. This means that for the criminal offence to occur it is not necessary that the “legal asset” protected has been infringed upon or that it faces an imminent risk of infringement. The conduct (i.e. facilitating irregular entry, transit or stay) is punishable in itself under criminal law as it creates a situation of vulnerability for irregular immigrants (where their fundamental rights and freedoms are at risk), thereby not being able to exercise their rights in the same terms as other individuals. This approach intends to protect migrant’s moral integrity, preventing them from being clandestinely and profitably treated as objects.
- ***Delito de consumación anticipada*** – This crime has also been considered by the Supreme Court as a ***delito de consumación anticipada*** or de ***mera actividad***, meaning that the crime occurs with the activity intending to achieve the unlawful result, regardless whether or not the result is eventually achieved. This is to say that the crime is considered as *fait accompli* with the mere initiation of the action. Any help provided, either at the outset of the migratory cycle or during it, and aiming to facilitate the illegal entry or stay in Spain, will be considered as ‘facilitation of illegal immigration’, irrespective of the outcome. When determining the jurisdiction of Spanish courts, the Supreme Court seems to be applying (solely in procedural terms) the same logic that would apply to the attempt as a mode of criminal liability.

3.2. International legal framework⁶

- **United Nations Convention on the Law of the Sea (UNCLOS, also known as [Montego Bay Convention](#))** - While recognising the exclusive jurisdiction of the flag State, it does not make of the high sea a sort of immunity zone beyond the remit of the law and any regulatory power (Article 92). To the contrary, a ship not carrying a flag or flying a flag it is not authorised to mast is subject to the control and interference (*rectior*, jurisdiction) of any maritime State. Paragraph 2 of Article 92 determines that a “*ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality*”. Article 110 allows for the so-called ***right of visit*** allowing military ships to board and control vessels in such conditions. The same provision applies to any other duly authorized ships or aircraft

⁵ See Supreme Court rulings, STS 1087/2006 of 10 November 2006 and STS 23/2015 of 4 February 2015.

⁶ It should be noted that in addition to the references under this section, the London Convention on the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (Hamburg Convention) are further components of the relevant international legal framework regarding illegal immigrant smuggling (see *Analysis of Italian Jurisprudence on Illegal Immigrant Smuggling*). However, the legal matters addressed in the case-law analysed herein did not call for a direct analysis thereof by the competent courts.

clearly marked and identifiable as being on government service (Article 110. 5). Limitations to the right of visit, arrest and seize a vessel are provided for in Articles 97 of the Montego Bay Convention (not applicable to the cases covered in this study) and 19 of the [1958 Geneva Convention on the High Seas](#) (right to seize vessel engaged in piracy or captured by pirates).

Article 111 Montego Bay Convention allows for the so-called *hot pursuit*; that is, for national authorities to chase a ship even after it left the territorial waters and the contiguous zone. This provision would apply whenever a vessel is intercepted after leaving Spanish territorial waters.

Regarding **rescue obligations at sea**, Article 98 requires the master of a ship to render assistance to any person in danger at sea. This duty is not triggered only when the ship finds a distressed person, but also when it receives the information that there is the need for assistance. In this case, the master shall proceed with all possible speed towards the person(s) in distress. The duty to render assistance on the ship master exists insofar as he or she can abide by it without serious danger to the ship, crew or passengers.

In asserting the jurisdiction of Spanish courts over vessels intercepted on **Moroccan territorial waters**, the Supreme Court also took into consideration Article 18(2) Montego Bay Convention, which provides that a ship may pass through the territorial sea of a third State for the purpose of rendering assistance to persons, ships or aircrafts in danger or distress.

- **United Nations Convention against Transnational Organised Crime (UNTOC)** – Article 15(2)(c) recognizes the jurisdiction of the State Party when the offence is one of those established in accordance with Article 5 (1) UNTOC (that is, the participation in an OCG), when “*it is committed outside its territory with a view to the commission of a serious crime within its territory*”.⁷ Ultimately, Article 11(2) UNTOC establishes that a State Party shall endeavor to ensure that any discretionary legal powers under their domestic law relating to the prosecution of migrant smuggling are exercised to maximize the effectiveness of law enforcement measures in respect of this offence.
- **Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the UNTOC** (also known as [Palermo Protocol](#)) – Article 6 provides that each State Party shall adopt legislative and other measures in order to establish as a criminal offence the smuggling of migrants, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit (obligation that Spain has fulfilled in Article 318*bis* of the Spanish Criminal Code). Article 8(7) determines that “*A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law*”.

⁷ Article 5(1) specifically provides that “*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity: [...] (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: (a) Criminal activities of the organized criminal group; (b) Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim*”.

Note – Even though the Supreme Court maintains that Spain’s obligation in relation to Article 6 of the Palermo Protocol has been fulfilled by means of article 318bis of the Spanish Criminal Code, this argument could be challenged as the financial gain is not considered as an element of the crime but rather an aggravating circumstance foreseen in Article 318bis(1)(3). Conversely, the provision appears in line with the obligations under the “Facilitators Package”.

- **Co-operation Agreement on combatting pollution and on maritime search and rescue between the Kingdom of Spain and the Kingdom of Morocco of 6 February 1996** – This bilateral Agreement between Spain and Morocco covers SAR operations in Spanish and Moroccan territorial waters as well as cooperation and division of responsibilities and competences between both Parties. This agreement was adopted in the framework of Article 42 of the Montego Bay Convention which provides that “*subject to the provisions of this section, States bordering straits may adopt laws and regulations relating to **transit passage through straits**, in respect of all or any of the following: (a) the **safety of navigation and the regulation of maritime traffic**, as provided in article 41; (...) (d) the **loading or unloading** of any commodity, currency or **person** in contravention of the customs, fiscal, **immigration** or sanitary **laws** and regulations of States bordering straits.*”

4. Challenges in Prosecuting Illegal Immigrant Smuggling

4.1. Modus Operandi

Depending on the *modus operandi* used by migrant smugglers, the challenges faced in the investigation and prosecution of this criminal offence will vary and the legal reasoning applied to each of the scenarios may also be different. Some of the most common *modus operandi* are as follows:

1. Entering Spain in a **hidden and undercover manner through non authorised border-crossing points**. Within this general category, the following modalities are to be noted:

- a) Use of **small unseaworthy boats** without minimal security conditions;
- b) Resort to so-called **motores humanos**, whereby migrant smugglers equipped with wetsuits and flippers pull – by swimming – small boats carrying undocumented immigrants from the Moroccan baseline to the Spanish coast;
- c) Hiding irregular migrants on **heavy ships** of any kind, including fishing ships;
- d) Hiding irregular migrants on **motor vehicles** thus facilitating their entry into Spanish territory by land.

2. Fraudulently entering Spain **through authorised border-crossing points**. In this respect, the Supreme Court has clarified that, illegal immigration encompasses not only undercover and clandestine immigration as well as the apparently legitimate entry, conducted with the real intention of violating Spanish Immigration Law. In this context, the following modalities are to be noted:

- a) Using **counterfeited passports**, travel and identification documents.
- b) Fraudulently **applying for entry and residence permits** whenever the real intention is to remain in Spain in breach of Spanish Immigration Law.

- c) The **harbour, shelter or reception** of irregular migrants as previously agreed with the migrant smugglers.
- d) **Marriages of interests and fraudulent family reunification**

Against this background, one of the main problems faced by prosecutions targeting OCGs involved in illegal immigrant smuggling stems from the fact that migrants are usually brought to Spain using small unfit boats, which makes it possible to prosecute only the master of the vessel or those who assist them. Generally, these people are unconnected to the OCGs as they only agreed to assist in transferring irregular migrants as a way of payment for their own transportation. In these cases, the defendants have been claiming the non-applicability of Article 318*bis* or, failing this, the application of attenuating circumstances. In this regard, the Supreme Court has repeatedly argued that, **the fact that the accused themselves were trying to reach Spain does not relieve them from criminal responsibility in relation to the crime of facilitation of illegal immigration. According to the Supreme Court⁸, this circumstance itself is not even enough cause to mitigate the punishment.** Certainly, though, this does not jeopardise the need to assess the specific circumstances of the case.

Transporting irregular migrants on small unfit boats presents a great danger to the health and life of those on board inasmuch as these boats do not meet minimal security conditions and are often overcrowded, thus turning the trip into a perilous journey across the high seas. The Supreme Court has maintained that the circumstances under which immigrants are transferred (unseaworthy boats without assuring minimum safety standards) create, *per se*, **a situation of danger** that needs to be taken into account **when considering the applicability of aggravating or attenuating circumstances.**

Unfortunately, these ventures often culminate in death. When this happens, the crimes of **facilitation of illegal immigration and involuntary manslaughter⁹** may be considered as **concurrent offences** by Spanish courts.

There have also been noted links with other criminal activities such **trafficking in human beings (THB) and drug trafficking.** There is substantial jurisprudence in Spain¹⁰ according to which the crimes of facilitation of illegal immigration and THB are considered as concurrent offences¹¹.

In general terms, migrant smugglers using **motor vehicles** to facilitate irregular entry in Spain are rarely connected with OCGs but rather act individually and occasionally. This *modus operandi* usually implies a considerable risk for the lives and health of the migrants as they are often transported in small hidden compartments with no room to breathe. Under this scenario, the Spanish courts have analysed the applicability of **aggravating circumstances** on a case-by-case basis.

With regard to the so-called ***motores humanos***, it is necessary to highlight the special risk associated thereto, taking into account the distance travelled, low temperature of the water, ocean currents and the fact that migrants, very often, do not know how to swim. This conduct

⁸See *Annex I*, Supreme Court, STS 1268/2009 of 7 December 2009 and STS 1451/2005 of 14 December 2005.

⁹ Article 142 of the Spanish Criminal Code.

¹⁰ See *Supreme Court rulings*, STS 23/2015 of 4 February 2015 and STS 17/2014 of 28 January 2014.

¹¹ "Concurrent offences" means a situation where the same offender commits several offences simultaneously or successively.

may pose challenges in proving the crime and attributing criminal responsibility, which makes the use and admissibility of **circumstantial evidence** of particular importance.¹²

4.2. Jurisdiction and coercive powers

As noted earlier, Article 23(1) of the Spanish Organic Law on the Judiciary determines that crimes committed in Spanish territory or on board Spanish ships or aircraft shall fall under Spanish jurisdiction, without prejudice to the provisions of international treaties ratified by Spain.

The general principle of territoriality set forth in Article 23(1) of the abovementioned law co-exists with other jurisdictional principles: a) principle of personality, according to which, the jurisdiction of the Spanish State is extended to crimes committed by Spanish citizens outside Spanish territory (Article 23(2)); b) principle of protection of vital interests of the Spanish State, according to which, Spanish jurisdiction is extended over criminal offences committed outside its territory whenever these offences pose a threat to fundamental interest of the Spanish State (Article 23(3)); c) Principle of universal jurisdiction (Article 23(4)).

In cases of illegal immigrant smuggling by sea, a major challenge faced by Spanish courts was the assertion of jurisdiction over vessels intercepted outside Spanish territorial waters. Indeed, navigation on the high seas is underpinned by the principle of exclusive jurisdiction of the flag State with only very narrow exceptions. This notwithstanding, the high seas do not constitute a sort of immunity zone beyond the remit of the law and any regulatory power. Two principal scenarios merit special reference.

4.2.1. Spanish jurisdiction over vessels on the high seas

The *Audiencia Provincial de Las Palmas* was often faced with the challenge of determining whether it had jurisdiction over crimes committed by migrant smugglers on the high seas given that the actual disembarkation of migrants in Spain had been facilitated by the Spanish authorities rather than the smugglers themselves. As the regional court had declared that it did not have jurisdiction over these cases, the Public Prosecutor repeatedly appealed before the Supreme Court. The latter generally upheld the Spanish jurisdiction over such cases by drawing upon the **relevant international treaties ratified by Spain**, namely Article 8(7) Palermo Protocol, Article 110 Montego Bay Convention and Article 15(2) UNTOC.

However, since a dissenting opinion was attached to case STS 1121/2008 of 3 January 2008, the criterion for asserting Spanish jurisdiction changed considerably. In the dissenting opinion, it was argued to be wrong to assert jurisdiction on the basis of the Palermo Protocol and the UNTOC. Rather, the establishment of jurisdiction should be based on the principle of territoriality and the theory of *obiciudad* (principle of ubiquity). From Judgement STS 1/2008¹³ on, the Supreme Court followed this approach meanwhile supported by a non-binding agreement adopted by the Supreme Court on 3 February 2005¹⁴. According to the **theory of obiciudad**, a crime shall be regarded as having been committed in all countries where actions aiming to achieve the unlawful result took place. Thus, the place of the commission of the crime shall not only be that where the unlawful action commenced but also the place where the result

¹² See *Annex I*, Supreme Court STS 1451/2005

¹³ See *Annex I*, Supreme Court, STS 1/2008 of 23 January 2008.

¹⁴ See *Acuerdo del pleno no jurisdiccional de la Sala Segunda, adoptado en su reunión del día 3 de Febrero de 2005*.

was meant to have happened. Therefore, even if the action started outside Spanish territorial waters, the offence shall be regarded as committed on Spanish territory as it was in Spain that the natural consequence of the action (disembarkation of irregular migrants) was meant to occur.

Further to the jurisprudential developments afore-mentioned, a number of legislative reforms ensued with the purpose of enabling domestic courts to fully display their judicial mandate over cases of illegal immigrant smuggling. Specifically, in 2007, Article 23(4) of the Spanish Organic Law on the Judiciary underwent a legal reform by which paragraph (f) was added. Spanish jurisdiction was thus extended to offences committed by Spanish citizens or foreigners outside the Spanish territory where such offences are qualified as facilitation of illegal immigration according to Spanish criminal law. The scope of application of **universal jurisdiction** was therefore expanded so as to cover as well the crime of illegal immigrant smuggling in order to ensure the protection and promotion of fundamental human rights.

In 2014, the Spanish Organic Law on the Judiciary was further reviewed. As a result, a new section (d) was added to Article 23(4), according to which Spanish jurisdiction is extended over offences committed by Spanish citizens or foreigners outside Spanish territory where such offences are qualified as per Spanish law as piracy, terrorism, drug trafficking, trafficking in human beings, **facilitation of illegal immigration** and offences relating to maritime safety whenever they are committed at sea and in the cases foreseen by an **international treaty or normative act of an international organization to which Spain is party**. In the words of the Supreme Court's rulings¹⁵, these offenses fall under the category of those crime types that shape States' obligation to **protect the continent (the EU) from criminal attacks** carried out by sea, even when the **final target is another Member State**.

The Supreme Court¹⁶ further noted, in relation to Article 23(4), that the principle of *justicia supletoria* (**subsidiary necessity of Spanish jurisdiction**) shall also be considered when asserting jurisdiction. According to this principle, if the presumed perpetrator is not **extradited** to a country **willing and able to administer justice**, then the custodial State must refer the case to its competent authorities. This principle operates indeed due to a progressive approximation of criminal legislations in line with international treaties. By recognizing universal jurisdiction, this article implicitly incorporates the principle of *aut dedere, aut judicare*, of which limited universal jurisdiction is the corollary.

4.2.2. Spanish jurisdiction over vessels on Moroccan territorial waters

The Cooperation Agreement on combatting pollution and on maritime search and rescue between the Kingdom of Spain and the Kingdom of Morocco of 6 February 1996 covers SAR operations in Spanish and Moroccan territorial waters as well as cooperation and division of responsibilities and competences between both parties. In addition to the Agreement between Morocco and Spain, the Supreme Court referred to Article 18(2) of the Montego Bay Convention for the assertion of jurisdiction in situations where irregular immigrants were deliberately placed in a situation of danger. According to this provision, a ship may pass through the

¹⁵ See Supreme Court, STS 592/2014 of 23 July 2014.

¹⁶ See Supreme Court, STS 592/2014 of 23 July 2014 referring to STS 554/2007, STS 561/2007 and STS 582/2007.

territorial sea of a third State for the **purpose of rendering assistance to persons, ships or aircraft in danger or distress.**

Moreover, in asserting jurisdiction over vessels intercepted and rescued in **Moroccan territorial waters**, the Supreme Court¹⁷ has referred to Article 8(7) of the Palermo Protocol and the right of visit set forth in Article 110 of the Montego Bay Convention. It argued that it is reasonable to believe that the State exercising the **right of visit** shall also be the one exercising criminal jurisdiction over the vessel as this fact does not constitute an affront to any other State and would otherwise leave the crime unpunished.

This approach unveils a successful practice of bilateral cooperation in the fight against illegal immigrant smuggling.

4.3. Gathering and admissibility of evidence

With respect to the gathering of information and admissibility thereof as evidence, Spanish case-law reveals that testimonies of migrants and law enforcement agents are often crucial in prosecutions. However, a number of challenges may arise. For instance, **law enforcement authorities' testimony is not always sufficient to secure convictions.** These statements might need to be supported by other evidence. This is the case, for instance, when irregular migrants have already disembarked and smugglers are intercepted by Spanish authorities when returning to their countries of origin and or departure. **Corroborative evidence** may also be needed where the witness's credibility is questioned or where he or she delivers contradicting statements. Problems also appear in summoning victims/witness for trial and securing their presence in court, as often they are not easily located, might have returned to their countries of origin or do not attend the trial (e.g. for fear of retaliation). In this regard, Spanish courts have generally accepted the use of **circumstantial evidence¹⁸ and pre-trial evidence¹⁹ in court.**

The pre-trial testimony of the victim/witness has generally been accepted by the Supreme Court whenever it is not possible to locate the victims during the trial. In order to be admissible, the pre-trial evidence must fulfil the legal requirements set out in Spanish law²⁰. That is, (i) having been obtained during a judicial hearing, (ii) in the presence of the Public Prosecutor and of the victim's and/or his or her legal counsel. In this manner, the presumption of innocence is not infringed upon. Furthermore, the Supreme Court has, in some of its rulings, referred to Article 6(3)(d) of the European Convention on Human Rights and Fundamental Freedoms and Article 14(3) of the International Covenant on Civil and Political Rights, maintaining that **as long as the pre-trial evidence meets the legal requirements, and is subject to the rule of *audi alteram partem*, it can be legally used as evidence during the trial.** Any **non-exercise of the contradictory** rule for reasons **imputable to the accused** and his or her **legal representative** cannot be later used to challenge the **admissibility** of such evidence in court if it is not possible to ensure the presence of the witness at the oral phase of proceedings despite **reasonable measures** having been taken by the authorities to that effect.

¹⁷ See Annex I, Supreme Court, STS 606/2007 of 1 June 2007.

¹⁸ *Prueba indiciaria*

¹⁹ *Prueba anticipada testifical*

²⁰ See Annex I, Supreme Court, STS 1268/2009 of 7 December 2009 and STS 1531/2005 of 7 December 2005.

Under the umbrella of **circumstantial evidence**, indicators may be admitted as evidence in court as long as they are fully accredited, objective, inter-connected and **not discredited by any other evidence or opposing indications**.²¹ In addition, the inference derived therefrom must have been properly explained in a reasonable and **logical** way. As mentioned earlier, this kind of evidence is particularly important in the cases where migrant smugglers act as ***motores humanos***. It should be further noted in this regard that the so-called *contraindicaciones* – that is, the inconsistent denial of the accused regarding the facts pending upon him or her – will not integrate the realm of circumstantial evidence for it is not the accused that must prove his or her innocence but rather the prosecutor that bears the *onus probandi* concerning the attribution of criminal responsibility. This is without prejudice to the value and or interpretation the judge may recognise to such declarations.

On the basis of all these elements, the veracity of the accusation must be objectively acceptable in order to ground the conviction of the accused without jeopardising the **presumption of innocence**.²²

Cases where irregular migrants fraudulently enter Spain through authorised border-crossing points using counterfeited passports and identification documents do not generally pose particular evidentiary problems.

In addition to statement-related issues, the good conduct of investigations will much depend on the **prompt exchange of information** between the relevant and competent authorities. For instance, boats carrying migrants are often detected by the *patrulla fiscal de la Guardia Civil* through the use of infra-red cameras. The information is then transmitted to the *Servicio Marítimo Provincial de la Guardia Civil* that will then proceed to its interception and activate the competent law enforcement and judicial authorities. In addition, it is crucial to ensure the **thorough documentation of facts and investigative measures**, especially on the sea (e.g., identification of the person manoeuvring the migrants' boat).

5. Lessons Learned

The Spanish jurisprudence on illegal immigrant smuggling provides guidance on conceivable ways forward to address challenges related to the assertion of jurisdiction on the high seas, admissibility of evidence, and circumstantial evidence. It follows a schematic illustration thereof.

²¹ *Contraindicaciones*

²² See *Annex I*, Supreme Court, STS 3858/2010 of 21 June 2010.

Chart 1

Possible avenues to address challenges re assertion jurisdiction on high seas

- Direct reliance on international law and international legal instruments (especially in respect of monist systems);
- Doctrine of ubiquity;
- Principle of subsidiary necessity of domestic jurisdiction;
- Reform of national law (to include, e.g., limited universal jurisdiction).

Chart 2

Possible guidelines on gathering of information and admissibility of evidence

- Relevance of circumstantial evidence soundly supported by objective and logical inferences;
- Principle of free appreciation of the evidence;
- Support to victims/witnesses (e.g. facilitation of residence permits);
- Resort to law-enforcement statements and declarations of migrants as mutually corroborative;
- Admissibility of pre-trial statements in court as long as the rights of the defence have been properly safeguarded.

Chart 3

Possible indicators of *Mens Rea* - Circumstantial Evidence

- Systematic character of illegal activities;
- Use of highly debilitated boats to transport migrants, entailing clear risk to their lives and safety;
- Financial gain;
- Coaching migrants (re e.g. declarations to the authorities);
- Dissimulation and cover-up (e.g. re true identity of the migrants, their nationality and destination);
- Contradicting statements upon detention and at a later stage;
- Logistical support to irregular migrants (e.g. transport, false documents);
- Awareness of false documents held/presented by migrants;
- Acting as sole 'commander' or as 'co-commander' of migrants' boat;
- Attempt to hide from authorities, even in the context of SAR operations;
- Systematic practice of causing expulsion to the country of origin in order to re-engage in the criminal conduct (recidivist behaviour).

Note: *The indicators listed above are possible indicia, alone or in conjugation, of the hypothesis they refer to. They may, of course, be indicators of other hypothesis, particularly as they are interrelated to a significant extent. By no means it is intended to suggest that such indicators may preclude the evaluation of the specific circumstances of the case in question.*

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Annex
Spanish Jurisprudence on Illegal Immigrant Smuggling

| Reference | Case description | The Court decision/ Highlights of the case |
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| <p>Supreme Court STS 1/2008¹ of 23 January 2008</p> | <p>This case regards the assertion of jurisdiction by the Spanish State on grounds of the theory of <i>obiciudad</i> and the territoriality principle in situations where irregular migrants have been intercepted outside of the Spanish territorial sea and brought to Spain by Spanish authorities. The Spanish Public Prosecutor appealed to the Supreme Court the judgment of the <i>Audiencia Provincial de Las Palmas</i> which pleaded lack of jurisdiction of Spanish courts.</p> | <p>The Public Prosecutor pleaded that:</p> <ul style="list-style-type: none"> • The crime of illegal immigrant smuggling is considered under Spanish law as a <i>delito de consumacion anticipada</i> or <i>de mera actividad</i>; that is, it is verified with the activity intending to achieve the unlawful result, regardless whether or not the result is eventually achieved. • The facilitation of illegal immigration is considered under Spanish law as a <i>delito de estructura permanente</i> which implies that the result would be achieved by means of the intervention of Spanish authorities. • Spain holds the right of visit and the exercise of coercive jurisdiction over the vessel as per Article 8 (7) Palermo Protocol. <p>The Supreme Court upheld the appeal considering that:</p> <ul style="list-style-type: none"> • The crime of illegal immigrant smuggling is verified with the actions of “encouraging, promoting or facilitating” illegal immigration regardless whether the migrants eventually reach Spanish territory or otherwise. • The place where the offence has been committed shall be regarded as that where the perpetrator carried out his “own action”. Thus, contrary to the position of the Public Prosecutor, the crime cannot be considered as a <i>fait accompli</i> when the migrants are brought into Spanish territory by a State authority, as otherwise there is a risk that the Court will incur in the so-called “<i>male captus bene detentus</i>”. Consequently, the crime shall otherwise be considered a <i>fait accompli</i> with the mere initiation of the action, preparatory acts or criminal attempt. • In order to assert the jurisdiction of the Spanish State, the Supreme Court refers to the standards of international criminal law as well as legal frameworks and judicial experience in other European countries (Germany, Poland, Finland Austria, Slovakia, Portugal, Switzerland and Italy). • The territoriality principle shall apply when pondering the jurisdiction of Spanish courts. When determining the place where the crime has been committed, |

¹ See also, Supreme Court, STS 36/2008 of 31 January 2008



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| | | <p>the theory of <i>obiciudad</i> (Principle of Ubiquity) dictates that the crime shall be regarded as occurring in each of the places where actions aiming to achieve the unlawful result have been carried out or where the unlawful result took place.</p> <ul style="list-style-type: none"> In the case of criminal attempts or preparatory acts, the place of the commission of the crime shall not only be the place where the preparatory acts took place but also that where the offence was meant to have occurred. Therefore, even though the appellants initiated their actions outside Spanish territorial waters, they were aiming to transport the migrants to Spanish soil, and thereby the offence shall be regarded as committed in Spanish territory. The Spanish jurisdiction is therefore to be affirmed on grounds of the principle of territoriality and the doctrine of obiciudad. |
| <p>Supreme Court STS 1121/2008 of 3 January 2008</p> | <p>This case regards the assertion of jurisdiction of the Spanish State stemming from existing international treaties ratified by Spain in situations where irregular migrants have been intercepted outside the Spanish territorial sea and brought to Spain by Spanish authorities. The Spanish Public Prosecutor appealed to the Supreme Court the judgment of the <i>Audiencia Provincial de Las Palmas</i> which pleaded lack of jurisdiction of the Spanish criminal court. A dissenting opinion was attached to the Supreme Court judgment.</p> | <p>The Public Prosecutor pleaded that:</p> <ul style="list-style-type: none"> The jurisdiction of the Spanish court stems from existing international treaties ratified by Spain. The crime shall be regarded as committed in Spanish territory as the rescue and disembarkation of migrants carried out by Spanish authorities was simply the final stage of a situation triggered by the migrant smugglers. <p>The Supreme Court upheld the appeal considering that:</p> <ul style="list-style-type: none"> Article 8 (7) of the Palermo Protocol shall apply when a State has reasonable grounds to suspect that a flagless vessel is engaged in the smuggling of migrants being therefore able to board and search the vessel. This is in line with article 110 of the Montego Bay Convention (right of visit). If the suspicion is confirmed, the State shall take appropriate measures including those set out in Article 5 UNTOC. In addition, according to Article 11(2) UNTOC, a State Party shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of migrant smuggling are exercised to maximize the effectiveness of law enforcement measures in respect of this offence. Ultimately, in line with Article 15(2) UNTOC, a State Party may establish its jurisdiction over an offence of illegal immigrant smuggling when they are committed outside its territory but with a view to the commission within its territory. |



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| | | <ul style="list-style-type: none"> • The Supreme Court asserted the jurisdiction of the Spanish State on grounds of existing international treaties ratified by Spain, without the need to resort to the principle of territoriality. • As the crime of illegal immigrant smuggling is verified with the activity intending to achieve the unlawful result, it is comparable in procedural terms to criminal attempts. <p>Dissenting opinion:</p> <ul style="list-style-type: none"> • It is wrong to assert Spanish jurisdiction on grounds of the Palermo Protocol and the UNTOC. The jurisdiction of the Spanish state shall, conversely, be asserted on the basis of the principle of territoriality and the theory of <i>obscuidad</i>. • In order to apply the Palermo Protocol and the UNTOC, membership in an OCG is a <i>conditio sine qua non</i> and needs to be sufficiently proven. • The Palermo Protocol does not contain any territorial provision. • The right of visit (board and search the vessel) does not imply the right to exercise coercive jurisdiction over the vessel. |
| <p>Supreme Court STS 606/2007 of 1 June 2007</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, claiming lack of jurisdiction of the Spanish court and an infringement of the principle of the presumption of innocence. The Supreme Court asserted the jurisdiction of the Spanish State over a flagless fishing ship that was rescued in Moroccan territorial waters carrying 131 Hindu migrants in appalling conditions and with no authorization to enter or transit across Spain. After breaking down in Moroccan territorial waters, the ship was rescued and towed by Spanish</p> | <ul style="list-style-type: none"> • The appellant maintained that the crew had not requested assistance and argued that the ship was intercepted in Moroccan territorial waters and towed to Spain without the permission of the captain of the ship. However, the Supreme Court held that it is irrelevant who asked for assistance, as it is undeniable that the ship was indeed in distress (the engine was inoperative) triggering Spanish rescue obligations under the international law (Montego Bay Convention) and the bilateral agreement between Spain and Morocco. • In asserting the Spanish jurisdiction, the Supreme Court referred to Article 18(2) of the Montego Bay Convention, which establishes that a ship may pass through the territorial sea of a third State for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. • Spanish jurisdiction was established also in view of Article 8(7) of the Palermo Protocol applies since the ship was flagless. • The Supreme Court referred to the right of visit established in Article 110 of the Montego Bay Convention. It is reasonable to maintain that the State exercising the right of visit shall also be the one exercising criminal jurisdiction over the ship, as this fact does not constitute an affront to any other state and would |



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| | <p>maritime rescue authorities the port of Algeciras, where the <i>Guardia Civil</i> eventually found the irregular migrants.</p> | <p>otherwise leave the crime unpunished. Hence, the enforcement jurisdiction of the Spanish court was clearly upheld.</p> <ul style="list-style-type: none"> • The Co-operation Agreement on combatting pollution and on maritime search and rescue between the Kingdom of Spain and the Kingdom of Morocco of 6 February 1996 was signed in accordance with Article 42 Montego Bay Convention and allows for rescue operations. • Regarding the infringement of the principle of the presumption of innocence, the Supreme Court noted that the fact that the appellant was not formally registered as a member of the crew, does not prevent him from being accused and convicted for illegal immigrant smuggling as he was serving on board just as the “official” members of the crew were. |
| <p>Supreme Court STS 5082/2013 of 18 October 2013</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, whereby the appellants were found to have driven a boat in precarious conditions carrying several Algerian nationals towards Spain. The appellants were paid for facilitating the trip into Spain. The Supreme Court assessed the admissibility of pre-trial evidence in court proceedings.</p> | <ul style="list-style-type: none"> • Pre-trial evidence, duly documented and obtained in compliance with the principle of contradictory, is admissible in court if reasonable measures to ensure the presence of the witness in court were taken (even though ultimately with no success). The rights of the defence will not be breached if such conditions are fulfilled (e.g. witness interviewed in presence of the Prosecutor, investigative judge, and accused’s legal counsel). • If the Defence did not question the witness at the time of the pre-trial hearing for reasons imputable to itself, such lack of intervention may not be later resorted to so as to challenge the admissibility of pre-trial evidence. Indeed, the constitutional protection refers to the possibility of contradiction rather than effective contradiction. • The fact that authorities inform the victim/witness of the possibility of obtaining residence permit were they to collaborate with authorities is not a valid motive to challenge the admissibility of evidence provided by such victim/witness. • A behaviour of a recidivist offender that repeatedly illegally enters the territory of the State concerned then endeavouring to be expelled to his country of origin so as to again engage in practices of facilitation of illegal immigration (as part of a structured modus operandi) provides important indication of <i>mens rea</i>. |



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| <p>Supreme Court STS 3858/2010 of 21 June 2010</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling and negligent homicide, whereby the appellants were found to have driven a boat in precarious conditions carrying approximately 70 irregular migrants from Sub-Saharan Africa. The appellants were paid for facilitating the trip into Spain. One migrant died during the journey. The appeal was based <i>inter alia</i> on the alleged breached of the principle of presumption of innocence. The Supreme Court relied significantly on testimonial evidence.</p> | <ul style="list-style-type: none"> • The presumption of innocence will be respected if the process of attribution of criminal responsibility is in accordance with the law, notably whereby the evidence was gathered in lawful manner and the principles of publicity and contradictory were complied with. • The evaluation of evidence as carried out by the judge must lead to an objective truth regarding the hypothesis set forth by the Public Prosecutor. This is different from aiming at an objective certainty. Rather, it is required that inferences related to the attribution of criminal responsibility follow a coherent and logical reasoning, based upon premises that are taken as unarguably correct. • Alternatives to the hypothesis of the accusation must be reasonable and logical in view of the evidence presented. Where this is not the case, the presumption of innocence remains intact. • The decision of the Court lied considerably upon testimonial evidence. |
| <p>Supreme Court STS7173/2010 of 10 December 2010</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, whereby one of the appellants was found to have organised the trip, and the other driven the boat, of several irregular migrants from Morocco into Spain. The appellants were paid for facilitating the trip into Spain. The boats further carried considerable amounts of hashish, evaluated in several hundred thousands of euros. The Supreme Court examined the admissibility of circumstantial evidence.</p> | <ul style="list-style-type: none"> • The presumption of innocence will not be breached where the decision of the judge reflects a logical and coherent reasoning developed on the basis of admissible evidence. • When the accused rebuts the evidence (especially the of co-perpetrators), objective elements should be consider that despite not having the status of evidence are of essence to ascertain the veracity and or credibility of the different versions of events. These objective elements might include the (i) effort to hide from authorities even in the context of rescue operations, (ii) level of knowledge of the life, reality, conditions of co-perpetrators, (iii) previous convictions for a similar crime. These elements shall be interpreted in line with the principles of strict logic and rigorous reasonableness. |



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| <p>Supreme Court STS 399/2009</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, whereby the appellant (Chinese citizen) fraudulently applied for the reunification of a Chinese citizen by using forged documents and claiming to be her mother.</p> | <ul style="list-style-type: none"> • The Supreme Court declared that it shall be regarded as a criminal offence any activity undertaken during the migration cycle and aiming to facilitate the unlawful result (illegal immigrant smuggling) independently of whether this activity affects the result directly or indirectly. • The facilitation of illegal immigration is considered under Spanish law as a <i>delito de mera actividad</i>. That is, it is verified with the actions of “encouraging, promoting or facilitating” illegal immigration regardless whether the migrants eventually reach Spain or otherwise. • According to the Supreme Court, a mitigating circumstance shall apply due to the fact that the criminal behaviour affected only one person and there was no evidence of membership in an OCG among other considerations. |
| <p>Supreme Court STS 4112/2006 of 21 June 2006</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling whereby the appellant was found to have facilitated the illegal entry in Spain of irregular migrants coming from Morocco. The migrants exhibited adulterated passports, provided or facilitated by the accused. The Supreme Court assessed the admissibility of circumstantial evidence.</p> | <ul style="list-style-type: none"> • The declaration of the accused before the judge according to which he did not know the irregular migrants nor that the latter travelled with false identification documents is quashed by declaration of the accused to the border authorities acknowledging (i) he knew the migrants, confirming that their nationality and identity corresponded to those stated in the false passports, (ii) the final destination of migrants was France. These behaviours amount to indicators of <i>mens rea</i> of illegal immigrant smuggling. |
| <p>Supreme Court STS 1451/2005 of 14 December 2005</p> | <p>This case regards the modus operandi known as <i>motores humanos</i>. An Algerian citizen, equipped with a wetsuit and flippers, was sighted by the Spanish <i>Guardia Civil</i> carrying an undocumented Malian immigrant while swimming from the Moroccan baseline to the Spanish coast. Once</p> | <ul style="list-style-type: none"> • According to the appellant, the Spanish court had based its judgment on mere indications rather than ‘direct evidence’. On the contrary, The Supreme Court maintained that circumstantial evidence can also be taken into account during the trial and therefore be used to rebut the presumption of innocence. In the present case, the circumstantial evidence proved that the defendant was aware of the illegality of his action considering the process and the means used to get into Spain. • The fact that the appellant himself was trying to reach Spain was unacceptable in the eyes of the Supreme Court. The appellant was equipped with flippers which would |



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| | <p>in Spanish soil, they were rescued and arrested by the <i>Guardia Civil</i>. The Supreme Court analyses the use and legitimacy of circumstantial evidence during the trial.</p> | <p>have allowed him to reach Spain faster than the other migrant (without flips), though both were always swimming together. In addition, the victim's testimony contradicts his statement.</p> <ul style="list-style-type: none"> • In relation to the aggravating circumstances, the argument of the defence- according to which there was not enough evidence of the “financial gain” and “danger to the life, health or physical safety”- is unfounded. The Supreme Court maintained that this <i>modus operandi</i> is especially dangerous given the distance travelled, temperature of the water, ocean currents and the fact that the migrant did not know how to swim. To prove the financial gain, the Supreme Court considered sufficient evidence the victim's testimony and a <i>Guardia Civil's report</i> describing this <i>modus operandi</i> as an activity undoubtedly economic in nature. |
| <p>Supreme Court STS 6890/2005 of 10 November 2005</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling whereby the appellant was found to have facilitated the illegal entry by land into Spain of irregular migrants coming from Morocco. The migrants exhibited adulterated passports, provided or facilitated by the accused. The Supreme Court examined the admissibility of circumstantial evidence as well as contradicting testimonies.</p> | <ul style="list-style-type: none"> • The fact that the migrants exhibited passports of relatives of the accused, the picture of which had been changed, couple with the declarations of the accused that he knew the migrants amounts to important indicia of the <i>mens rea</i> of the crime of illegal immigrant smuggling. |
| <p>Supreme Court STS 1531/ 2005 of 7 December 2005</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, whereby a migrant (with no permission to enter or transit Spain) tried to fraudulently cross</p> | <ul style="list-style-type: none"> • Not being possible to locate the victim to be present at the trial, the Supreme Court considered as valid the pre-trial evidence as it was obtained during a judicial hearing in the presence of the Public Prosecutor and of the victim and the defence lawyers. This ensures that the process complies with the legal |



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| | <p>the border using a genuine identification document belonging to the accused after having paid the agreed price.</p> <p>The Supreme Court analysed the validity of pre-trial evidence and the applicability of Article 318<i>bis</i> to the present case.</p> | <p>requirements set by Spanish law.</p> <ul style="list-style-type: none"> • The assessment of the evidence must be done in accordance with “the general experience, the rules of logic and the rules of other sciences²” without incurring in any irrational judgment. • The crime of illegal immigrant smuggling is considered under Spanish law as a <i>delito de consumacion anticipada</i>; that is, it is verified with the activity intending to achieve the unlawful result, regardless whether or not the result is eventually achieved. • Mitigating circumstances applied to the present case taking into account the “minor impact” of the criminal behaviour. |
| <p>Supreme Court STS 673/2014 of 15 October 2014</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, whereby the appellant was identified as the operator of the vessel intercepted at 1.5 miles off the coast of Morocco by the Spanish <i>Guardia Civil</i>. He argued to be just a migrant trying to reach Spain. In the present case, the Spanish police. The</p> | <ul style="list-style-type: none"> • The fact that the appellant himself was intending to reach Spain does not relieve him from his criminal responsibility in relation to the crime of illegal immigrant smuggling. He has been convicted for aiding and abetting illegal immigration and not for trying to enter Spain in an irregular manner. • The fact that the appellant was steering the vessel when intercepted by the <i>Guardia Civil</i>, is enough evidence to justify that his role was different from the actions of the other migrants. It is unsustainable the argument that he was steering the vessel only in the exact moment when the <i>Guardia Civil</i> intercepted the boat. • Given the dangerous circumstances of the trip, it is not possible to apply an attenuating circumstance. |
| <p>Supreme Court STS 1268/2009 of 7 December 2009</p> | <p>This case regards the interception of a ship aiming to transport 65 irregular migrants from Mauritania to Spain. The appellants contested their convictions on grounds of the principle of presumption of innocence and the non-applicability of an aggravating circumstance in relation to a crime of facilitation of illegal immigration.</p> | <ul style="list-style-type: none"> • The victim’s testimony could be regarded as enough evidence to rebut the presumption of innocence, subject to the following conditions: (1) lack of disbelief; (2) credibility supported by corroborative facts or evidence; (3) lack of substantial changes in the testimony during the trial. • Pre-trial evidence can be used whenever it is not possible to hear the victim/witness during the trial. According to Article 6(3) (d) of the European Convention on Human Rights and Fundamental Freedoms and Article 14(3) of the International Covenant on Civil and Political Rights, anyone charged with a criminal offence, has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the |

² “La experiencia general, normas de la Lógica o principio o reglas de otra ciencia”



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| | <p>The Supreme Court analysed the admissibility of pre-trial evidence, the legal nature of the criminal offence and the application of mitigating circumstances.</p> | <p>same conditions as witnesses against him. As long as the pre-trial evidence meets the legal requirements, it can be legally used as evidence during the trial.</p> <ul style="list-style-type: none"> • The appellant claimed that the criminal offence defined in Article 318bis (3) of the Spanish Criminal Code (facilitation of illegal immigration committed in aggravating circumstances) is a <i>delito de peligro concreto</i> and therefore a real danger would be needed for its consideration. However, the Supreme Court maintained that the circumstances under which the immigrants were transferred (unseaworthy boats without assuring minimal security conditions) created, <i>per se</i>, a situation of danger. Moreover, the Supreme Court noted that the criminal offence of illegal immigrant smuggling is a <i>delito de peligro abstracto</i> this meaning that the existence of a good chance that the risk will occur is sufficient in itself to punish the conduct. • The fact that the appellants were themselves trying to reach Spain is not enough cause to mitigate the punishment. It is however necessary to assess all the circumstances regarding the perpetrator, the facts and the inherent risks. |
| <p>Supreme Court STS 945/2007 of 14 November 2007</p> | <p>This case regards the appeal of a conviction for illegal immigrant smuggling, whereby migrants were transported by motor vehicles³ under the guise of alcohol smuggling. The Supreme Court analyses the use of surveillance techniques, wire-tapping and other forms of recording.</p> | <ul style="list-style-type: none"> • The Supreme Court maintained the admissibility of surveillance techniques, photos, wire-tapping and other forms of recording of conversations, as evidence in court, as long as they observe the legal requirements and guarantees⁴. In the present case, this evidence was supported by circumstantial evidence interpreted in accordance with the general experience and rules of logic. • Law enforcement authorities' testimony together with the content of the communications, the pictures obtained by the <i>Guardia Civil</i> and the victim's testimony were considered enough evidence to rebut the presumption of innocence. |

³ See also, Supreme Court, STS 886/2008 of 19 December 2008

⁴ See also, Supreme Court, STS 23/2015 of 4 February 2015



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