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Combating Migrant Smuggling by Sea in Spain: Judicial Use of the Information
Obtained from the Victims, Frontex and Europol

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Abstract

31,219 irregular migrants arrived to Spain in 2022 and more than 90% of them resorted to the services provided by migrant smuggling networks. This working paper analyses the judicial use of the information gathered from the debriefed migrants who were smuggled by sea. The victims, who decide to collaborate with the competent authorities, are considered protected witnesses and their testimonies, due to the risk of not being reachable at the trial hearing, are introduced in the judicial proceedings as pre-constituted evidence. Given the exceptional nature of this type of evidence, the European Court of Human Rights, the Spanish Constitutional Court and the Spanish Supreme Court require that the evidence be complemented with objective elements. In this regard, this working paper reveals that the photographs taken by the EU's decentralized agency, Frontex, are external corroborations that reinforce the statements made by the migrants identifying the boat masters as members of a migrant smuggling network.

Keywords

Migrant smuggling; pre-constituted evidence; dinghy; irregular migrants; Frontex; Europol.

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I. Introduction

In 2022, 2,289 irregular migrants arrived to Spain by land and 1,704 vessels, with 28,930 people on board, reached the Spanish shores.¹ More than 90% of these irregular migrants resorted to smuggling services.² In this regard, the Spanish Attorney General (*Fiscalía General del Estado*) considers that the persecution and investigation of the migrant smuggling groups presents great complexity, due to the lack of cooperation between the countries from where these mafias operate, as well as the difficulties in determining the connection between the members of the criminal group based in Spain.³ However, some of the intercepted or rescued migrants provide the competent national authorities, the EU agencies and the non-governmental organisations with extremely valuable information about the routes used and the modus operandi of the criminal groups.

In the Spanish migrant smuggling investigations, the key evidence against the accused is the declaration of one or more of the irregular migrants travelling on the vessel to whom the status of protected witness is granted. Furthermore, the smuggled migrants' testimony is taken as what is known as 'pre-constituted evidence' (*prueba preconstituida*), due to the likely risk of the migrant being expelled from Spain before the court hearing. The pre-constituted evidence is an exceptional procedural measure since the concerned victim does not testify against the alleged migrant smuggler during the court hearing, but rather the examining judge orders the recording of the victim's statement and subsequently, it is watched during the trial. With the aim of reinforcing the credibility of the smuggled migrants' testimony, during the trial the court shall consider other objective and external evidences, such as photographs of the vessel in which the boatmaster can be identified or, the testimonies of the police officers involved in the investigation.

This working paper thus adopts a twofold novel approach to a topic to which very little attention has been paid: 1) the judicial use of the information obtained from the smuggled migrants and; 2) the relevance for the Spanish courts of the evidence, such as photographs or videos of the vessels used to smuggle the migrants, gathered by the EU decentralized agency Frontex. That is, the working paper focuses on studying the judicial impact of the smuggled migrants' testimonies and Frontex's evidence in order to convict the boatmasters for the crime of migrant smuggling in Spain. Although significant scholarly attention has been paid to Frontex and the reinforcement of its operational tasks, this paper goes one-step further and explores the impact of the Agency's activities in the Spanish courts when they hear migrant smuggling cases. Specifically, the article reveals that Frontex's aerial graphic material of the vessels used by the migrant smuggling networks is decisive to validate the testimony of the victims and to convict the boatmasters. The Agency's guards are also directly involved in the Spanish migrant smuggling investigations and testify as witnesses during the judicial proceedings.

Consequently, the paper, firstly, explores the offence of migrant smuggling in Spain in relation to article 59 of the Organic Law regarding the rights and freedoms of foreign nationals living in Spain and their social integration (*Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social, LOEX*).⁴ Article 59 LOEX establishes that a migrant, who is the victim or witness of the migrant smuggling crime, will not be administratively responsible for irregularly accessing Spain and will not be subject to a removal procedure as long as he/she identifies the defendants and cooperates with the authorities. Secondly, the procedural guarantees granted to the migrants caught by the requirements of article 59 LOEX are studied. In particular, the paper analyses the relevance of granting the smuggled migrants the condition of protected witnesses, as well as the conditions required by the Spanish Constitutional Court (*Tribunal Constitucional, SCC*), the Spanish Supreme Court (*Tribunal Supremo, SSC*) and the European Court of Human Rights (ECtHR) to consider as valid the testimonies taken as pre-constituted evidence. Lastly, it assesses to what extent Frontex now plays a crucial role in the Spanish judicial migrant smuggling investigations by gathering evidence, which upholds the smuggled migrants' testimonies.

II. The Migrant Smuggling Crime and the Protection of the Victims who Decide to Collaborate with the Spanish Authorities

¹ Ministerio del Interior Gobierno de España, 'Inmigración irregular 2022 - Datos acumulados del 1 enero al 31 diciembre'.

² European Commission, A renewed EU action plan against migrant smuggling (2021-2025), COM(2021) 591 final, 29.09.2021, 5.

³ Ministerio de Justicia, "Memorial Fiscalía General del Estado 2020", (Madrid 2021), 844.

⁴ Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE núm. 10 de 12 de enero de 2000.

This paper centres on analysing the conduct of the boatmasters who intentionally facilitate the irregular access of migrants into Spain. Article 318bis Spanish Criminal Code (*Código Penal, CP*) provides that ‘whoever intentionally helps another person who is not a citizen of a Member State of the European Union to enter into Spanish territory or to transit through said territory in a manner that violates the laws on the entry and transit of aliens, shall be punished with a fine of three to twelve months or a prison sentence of three months to one year’.⁵ However, the migrant accessing, transiting and staying irregularly in Spain is not a criminal offense and is only subject to an administrative sanction. If article 318bis CP offence is committed within a criminal organisation, or if the life of the individuals subject to the criminal offence is endangered, the prison sentence raises from three months to one year, to four to eight years. According to the SSC, the life of migrants is at risk in every precarious journey that starts in Africa and ends in Spain since the migrant smuggling networks use overcrowded vessels that lack basic safety and navigation aids.⁶

Article 318bis CP, as currently drafted, aims to comply with the Council Directive 2002/90/EC of 28 November 2002,⁷ which distinguishes the concept of ‘facilitation of unauthorised entry, transit and residence’ from ‘human trafficking in terms of sexual exploitation and labour exploitation’, as regulated in the EU Council Framework Decision of 19 July 2002.⁸ The crime of trafficking in human beings regulated in Article 177bis CP lies beyond the scope of this paper. While the migrant smuggling offense requires a transnationality component, the trafficking in human beings crime takes place regardless of whether it is conducted exclusively in Spanish territory, from Spain to another country or, from another country to Spain. Furthermore, trafficking in human beings entails the recruitment and transportation of the victim with violence, intimidation, deception or abuse of power and with the aim of exploiting the victim for labour or sexual purposes.

The key issue surrounding the migrant smuggling crime consists in gathering the incriminating testimonies of the victims against the boatmasters. The smuggled migrants are reluctant to collaborate with the competent authorities since the criminal groups resort to methods to ensure the victims silence, who also fear being removed from Spain after irregularly accessing the country. To overcome these drawbacks, article 59 LOEX establishes that those irregular migrants who identify the smugglers and/or cooperate with the competent authorities by providing essential information might be exempted from any administrative responsibility and shall not be expelled from Spain.⁹

In a similar vein, Council Directive 2004/81/EC of 29 April 2004 regulates the residence permit to be issued to third-country nationals, who have been the subject of an action to facilitate illegal immigration and cooperate with the competent authorities. Directive 2004/81/EC points out that in order to ensure that the smuggled migrants can take an informed decision as to whether to cooperate with the competent authorities, it is crucial to inform them of the possibility of obtaining a residence permit, as well as granting them a period of reflection to recover and escape from perpetrators influence.¹⁰ Both article 59 LOEX and the Directive 2004/81/EC stress that a residence permit shall only be issued to migrants who have severed every relation with the smugglers, who show a clear intention to cooperate and whose cooperation is not fraudulent or unfounded. That is, the smuggled migrants’ cooperation must be essential and effective, allowing, for example, the identification or detention of the perpetrators and the verification of the facts surrounding the investigation.

Moreover, article 59(4) LOEX establishes the convenience of granting the smuggled migrants the condition of protected witnesses as provided for in the Spanish Organic Law 19/1994.¹¹ The Organic Law 19/1994 states that in order to avoid a victim to fear reprisals for collaborating with the competent authorities, the examining judge may adopt protective measures. The examining judge may grant the smuggled migrants the consideration of protected witnesses based on their vulnerable position and the well-founded fear that the

⁵ Ministerio de Justicia, ‘Spanish Criminal Code’ https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf.

⁶ STS 295/2016, 8 April 2016, ECLI:ES:TS:2016:1552.

⁷ Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328.

⁸ Council Framework Decision 2002/629/JHA on combating trafficking in human beings [2002] OJ L203.

⁹ See, Ana Isabel Pérez Machío, ‘El levantamiento de la medida de expulsión del artículo 89 del Código penal a la luz del supuesto de colaboración contra redes organizadas del artículo 59 de la Ley de Extranjería’, (2006) 81 *Revista del Poder Judicial* 91; Virginia Mayordomo Rodrigo, ‘La pertenencia a organización delictiva en el tráfico ilegal de personas: colaboración en su desmantelamiento como alternativa a la expulsión’, (2007) 21 *Cuaderno del Instituto Vasco de Criminología* 273.

¹⁰ Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [2004] OJ L261/19.

¹¹ Ley Orgánica 19/1994, de 23 de diciembre, de protección a testigos y peritos en causas criminales, *BOE* núm. 307 de 24 de diciembre de 1994.

migrant smuggling networks may adopt reprisal measures against their lives, property or families, either in Spain or in their countries of origin.¹² The serious nature of the crime, the clear vulnerability of the victim and the dangerous condition of the migrant smuggling groups duly justify the consideration of the victims as protected witnesses in Spain. Lastly, Law 4/2015, of 27 April, on the standing of victims of crime is also fully applicable to the smuggled migrants. In particular, article 19 states that ‘the authorities and officials responsible for investigating, prosecuting and trying offences shall (...) employ the measures necessary to protect victims and their relatives (...) particularly where they make a statement or have to testify in court, to avoid the risk of secondary or repeat victimization’.¹³

III. The Smuggled Migrants’ Testimony as Pre-Constituted Evidence

All criminal evidence shall be presented in a public hearing and in accordance with the adversarial principle. However, article 448 of the Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal, LECrim*) provides that ‘if the witness (...) declares that is impossible to attend as they will be absent from Spanish territory (...) prior to the oral trial opening, the Examining Magistrate will order the statement to be taken immediately, ensuring against the possibility of contradiction by the parties (...)’.¹⁴ Similarly, article 777 LECrim states that ‘where, due to the place of residence of a witness or victim, or for any other reason, it is reasonable to fear that evidence may not be taken at the oral trial, or may cause its stay, the Examining Magistrate will take it immediately, ensuring, in all cases, the possibility of cross-examination’.¹⁵ Under these exceptional circumstances, the examining judge will order to take the statement immediately in the presence of the accused and defence lawyer. The Court Clerk will record the answers to these questions and all those present shall sign the court recording. Pursuant to article 730 LECrim ‘evidence taken in the pre-trial proceedings may also be read or reproduced, at the request of any of the parties, which, for reasons out of their control, cannot be reproduced at the oral trial’.¹⁶

This section specifically analyses the introduction of the smuggled migrants’ testimonies as evidence obtained before trial. Taking the pre-constituted evidence is widespread in Spanish migrant smuggling cases due to the existence of reasonable grounds for the investigating judge to believe that the irregular migrants willing to testify against the boatmasters might be absent during trial. Special attention is thus paid to the conditions set by the SSC, SCC and the ECtHR in order to deem the pre-constituted evidence as valid.

Article 6(3)(d) of the European Convention on Human Rights (ECHR) states that everyone 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 same conditions as witnesses against him’. Regardless of whether the statement was given when the irregular migrant arrived at the external borders or, at a later stage, during the police investigation or the judicial proceedings, the person charged as a migrant smuggler shall be given the opportunity to challenge and question the witness’s incriminating testimony. The ECtHR widely acknowledges that the probative value of the testimony diminishes if it is not taken in the presence of the defendant’s lawyer during the trial.¹⁷ However, articles 6(1) and 6(3) ECHR are not infringed if there is a legitimate reason preventing the testimony being taken during the trial and that the defendant’s rights of defence are fully respected.¹⁸ In this regard, on 19 February 1991, the ECtHR in the case of *Isgrò* found that there is no violation of the Convention when the statements made by an untraceable witness are

¹² See, STSJ Andalucía 215/2021, 14 September 2021, ECLI:ES:TSJAND:2021:12412; STSJ Andalucía 55/2017, 13 November 2017, ECLI:ES:TSJAND:2017:17473; STSJ Canarias 13/2017, 15 September 2017, ECLI:ES:TSJICAN:2017:2451; STSJ Canarias 18/2019, 8 April 2019, ECLI:ES:TSJICAN:2019:857; SAP Almería 274/2020, 20 October 2020, ECLI:ES:APAL:2020:744; STSJ Andalucía 85/2021, 25 March 2021, ECLI:ES:TSJAND:2021:3288; STSJ Canarias 54/2021, 15 June 2021, ECLI:ES:TSJICAN:2021:1800; SAP Las Palmas 282/2018, 31 July 2018, ECLI:ES:APGC:2018:2143.

¹³ Law 4/2015, of 27 April, on the standing of victims of crime (Estatuto de la víctima del delito) <shorturl.at/jxZH7>. See, SAP Las Palmas 245/2020, 30 October 2020, ECLI:ES:APGC:2020:903.

¹⁴ Criminal Procedure Act 2016 (*Ley de Enjuiciamiento Penal*) <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal%20Procedure%20Act%202016.pdf>.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See, *Lucà v Italy* (2001) 3335440 and *Al-Khawaja and Tahery v UK* (2011) 26766 and 22228119. See also, Bas de Wilde, ‘A Fundamental Review of the CHR Right to Examine Witnesses in Criminal Cases’ (2013) 17(2) *The International Journal of Evidence & Proof* 157.

¹⁸ *Kostovski v The Netherlands* (1989) 1145441; *Lüdi v Switzerland* (1992) 1243347; *Unterpertinger v Austria* (1986) 912031.

taken into account. The Court considered that the concerned judge exhausted all possibilities to locate the witness and that other ratifying testimonies and observations corroborated the witness's statements.¹⁹

Two ECtHR's judgments specifically address the subject matter of this paper - the use as evidence of the smuggled migrants' statements, which are obtained during the police and judicial investigation phase, rather than at the trial stage. In *Trampevski v. The Former Yugoslav Republic of Macedonia* case,²⁰ Tome Trampevski, a taxi driver, was convicted in April 2006 for the crime of migrant smuggling. The applicant submitted a complaint to the ECtHR arguing that he was unable to confront the migrants whom he had allegedly smuggled and whose statements obtained during the judicial investigation phase were the sole basis for his conviction.

The ECtHR upheld Mr Trampevski's view and concluded that the investigating court neither tried to locate the migrants after their expulsion, nor did it provide any explanation to justify their default in appearance during the trial. The ECtHR considered that admitting the smuggled migrants statements as the decisive basis for Mr Trampevski's conviction breached articles 6(1) and 6(3)(d) ECHR since there were no sufficient counterbalancing factors to ensure that the trial was fair. That is, although it is true that 'the applicant was in a position to challenge or rebut the migrants statements by giving evidence himself or examining other witnesses', the Court considered that 'the applicant was unable to test the truthfulness and reliability of the evidence produced by the migrants by means of cross-examination despite the fact that it was the only direct evidence against him'.²¹

Similarly, in the recent *Al Alo v. Slovakia*²² case of 10 February 2022, the applicant, Jamal Al Alo, was charged with migrant smuggling. Two police officers detained Mr. Al Alo when they noticed that he was heading in a taxi with two irregular migrants towards Slovakia's border with Austria. The migrants declared at the pre-trial stage that Jamal Al Alo had agreed to introduce them irregularly into Germany. The Slovak courts considered the smuggled migrants' testimony as decisive for Mr. Al Alo's conviction, as well as justified to admit the evidence at the pre-trial stage since the migrants remained at large. The ECtHR concluded that while the competent authorities had received the postal addresses of the witnesses, they refused to take any measures to ensure that the smuggled migrants were present during the trial and consequently, denied Jamal Al Alo his right to question them.

Furthermore, the ECtHR dismissed the Slovaks government argument suggesting that Jamal Al Alo decided to waive his right to examine the witness at the pre-trial stage. The ECtHR considered that 'there has been no allegation or other indication that any individualised advice about the consequences of not exercising this right was provided to him, in particular as regards the possibility for any pre-trial statements to be used in evidence at trial if the witness became "unreachable"'.²³ The Court considers it essential to give the applicant an opportunity to question the witness during the investigation stage in order to consider the evidence of an absent witness as valid.

Therefore, the ECtHR ruled that articles 6(1) and 6(3)(d) ECHR were breached since 'on no acceptable grounds and with no sufficient counterbalancing factors, the applicant was deprived of the possibility to examine or have examined witnesses whose evidence carried significant weight in his conviction'.²⁴ In arriving at this conclusion, the Court firstly referred to the previous case *Al-Khawaja and Tahery v. United Kingdom*.²⁵ In this case, the ECtHR detailed the grounds for accepting as valid the statements of absent witnesses during trial: 1) the court shall examine whether there are justifiable reasons to admit the witness's testimony at the pre-trial stage, bearing in mind that witnesses shall testify during the trial and that all possible efforts shall be made to get the witness to court; 2) the admission of testimonies issued prior to the trial is an exceptional measure since it poses a potential disadvantage for the accused, who should be able to test the truthfulness and reliability of the evidence; 3) the existence of sufficient counterbalancing factors, including strong procedural safeguards that permit a fair and proper assessment of the reliability of untested evidence.

The ECtHR at this point also referred to the *Schatschaschwili* case²⁶ in which examples of counterbalancing factors were explored. The ECtHR concluded that in the case of *Al Alo v. Slovakia* there were no sufficient counterbalancing factors. The Slovakian courts neither proffered that they were aware that the

¹⁹ *Isgrò v Italy* (1991) 11339.

²⁰ *Trampevski v. The Former Yugoslav Republic of Macedonia* (2012) 4570.

²¹ *Trampevski v. The Former Yugoslav Republic of Macedonia* (2012) 4570 49.

²² *Al Alo v Slovakia* (2022) 32084.

²³ *Ibid.*, 46, 66.

²⁴ *Ibid.*, 67.

²⁵ *Al-Khawaja and Tahery v UK* (2011) 26766 and 22228.

²⁶ *Schatschaschwili v Germany* (2015) 9154.

statements of the absent witness carried less weight, nor did they provide detailed reasoning as to why they considered such evidence reliable. In addition, it is convenient to record the absent witness's questioning at the investigation stage to allow the court, prosecution and defence to observe the witnesses demeanour under questioning. Lastly, in the case of *Al Alo v. Slovakia*, no additional corroborative evidence supporting the untested witness statement was examined during trial, such as testimonies of persons to whom the absent witness reported the events or further factual evidence.

The SCC and the SSC have also extensively ruled on the conditions for the validity of the statements of absent witnesses during trial. Specifically, in migrant smuggling cases the SSC considers it necessary and appropriate to take the pre-constituted evidence.²⁷ The SSC understands that while the evidence to override the presumption of innocence shall be conducted at the trial stage, under extraordinary grounds the evidence can be gathered at the pre-trial stage.²⁸ In this regard, the SCC clarified the four extraordinary grounds under which the exceptional pre-constituted evidence is considered valid: 1) material requirement - there is a legitimate cause that prevents the witness to testify during the trial; 2) subjective requirement – the intervention of the examining magistrate is necessary while the witness is testifying at the pre-trial stage; (3) objective requirement – the principle of contradiction must be ensured by allowing the accused to participate in the preliminary examination of the witness and; 4) formal requirement – the witness's declarations at the pre-trial stage shall be recorded and subsequently, played during the trial for its cross-examination.²⁹

In the migrant smuggling cases, the Spanish courts are in charge of assessing if the conditions laid down by the ECtHR, the SSC and the SCC regarding the validity of the pre-constituted evidence are fulfilled. The cases in which the pre-constituted evidence is deemed as inadmissible are twofold. On the one hand, where it is not sufficiently demonstrated that the impossibility of the witness's attendance at the trial remains, since the court has not effectively and diligently exhausted the means of ensuring his attendance and ascertaining his whereabouts.³⁰ On the other, where the only incriminating evidence against the migrant smuggler is the testimony of a protected witness identifying him as the boatmaster. The testimony shall be coherent and without any contradiction. In the absence of any additional corroborative evidence, such as the photographs or videos of the vessel and declarations by the police or other smuggled migrants, and in view of the principle *in dubio pro reo*, the accused cannot be convicted of a crime of migrant smuggling. Hence, the courts shall rule out that the smuggled migrants willing to testify are not doing so for spurious reasons and motivated by the realisation of the benefits derived from the application of Article 59 LOEX.³¹

IV. The Judicial Use of Frontex and Europol's Information in Migrant Smuggling Cases

Regarding the validity of the exceptional pre-constituted evidence, it has been studied that the ECtHR, the SSC and the SCC case law require, among other conditions, the existence of counterbalancing factors, which corroborate the testimony of the witness absent during the trial. Hence, the statements of the smuggled migrants are considered as valid pre-constituted evidence as long as they are consistent, coherent and reasonable. The smuggled migrant's testimony requires some objective corroborations that confirm the purely subjective declaration of the victim.³² Precisely, this section analyses the judicial use of the information provided by Frontex, which in some cases is the pivotal evidence that determines the acquittal or conviction of the accused of migrant smuggling in Spain.

Frontex is an EU decentralised agency, established in 2004³³ with the aim of coordinating and operationally supporting the Member States in the management of their external borders. Frontex was transformed into the European Border and Coast Guard (EBGG) following the adoption of Regulation

²⁷ STS 840/2016, 7 November 2016, ECLI:ES:TS:2016:4937; STS 167/2017, 15 March 2017, ECLI:ES:TS:2017:1045.

²⁸ STS 101/2003, 27 January 2003, ECLI:ES:TS:2003:412; STS 840/2016, 7 November 2016, ECLI:ES:TS:2016:4937; STS 396/2019, 24 July 2019; ECLI:ES:TS:2019:2572.

²⁹ STC (Pleno) 53/2013, 28 February; ECLI:ES:TC:2013:53, FJ 3. See, STS 637/2021, 15 July 2021, ECLI:ES:TS:2021:2953.

³⁰ SAP Melilla 16/2017, 18 May 2017, ECLI:ES:APML:2017:69.

³¹ See, SAP Las Palmas 31/2015, 8 June 2015, ECLI:ES:APGC:2015:674; SAP Murcia 80/2021, 31 March 2021, ECLI:ES:APMU:2021:715; STS 8/2022, 12 January 2022, ECLI:ES:TS:2022:11. SAP Las Palmas 39/2021, 11 February 2021, ECLI:ES:APGC:2021:113. SAP Almería 56/2015, 19 February 2015, ECLI:ES:APAL:2015:94; SAP Almería 444/2019, 19 December 2019, ECLI:ES:APAL:2019:1352.

³² SAP Las Palmas 114/2008, 19 September 2008, ECLI:ES:APGC:2008:2871.

³³ Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349.

2016/1624³⁴ and Regulation 2019/1896.³⁵ Regulations 2016/1624 and 2019/1896 aim to develop EU integrated management of the external borders by addressing both the existing deficiencies at the national level and responding effectively to exceptional and sudden migratory flows.³⁶ To achieve these ambitious objectives, Regulations 2016/1624 and 2019/1896 indicate that the EBCG shall have the following operational tasks vis-à-vis the Member States: 1) monitor the effective management of the external borders; 2) provide reinforced technical and operational assistance to Member States through joint operations and rapid border interventions and; 3) ensure the practical implementation of EU border management measures in situations requiring urgent action at the external borders.

1. Frontex's Aerial Graphic Material: Identifying Migrant Smugglers' Vessels

Articles 14 and 18 Regulation 2019/1896 regulate the photographic material that Frontex provides to the Spanish authorities. Article 14(1) states that 'the Agency shall establish and maintain a communication network in order to provide communication and analytical tools and allow for the exchange of sensitive non-classified and classified information in a secure manner and in near real time with, and among, the national coordination centres'. Article 18 refers to the Agency's European Border Surveillance System (Eurosur) as an integrated framework for the exchange of information and for operational cooperation in the 'detection, prevention and combating of illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants'.³⁷ The objective of Eurosur is to reduce the number of undetected irregular entries and to combat cross-border crime by using new technologies, swiftly exchanging information and identifying small vessels heading to the coasts of the Member States.

In this regard, the Agency is acquiring and renting new technologies such as drones, due to their efficiency in patrolling the extensive maritime borders and detecting vessels used for migrant smuggling purposes. The unmanned aircrafts take pictures and videos of the vessels, as well as data relating to their course, position, behaviour, speed and, number of persons and activities on board.³⁸ Since the transformation of Frontex into the EBCG in 2016, the intention is to provide the Agency with its own technical and human resources with the aim of filling the operational gaps and the disparity of equipment made available by the Member States. Specifically, in the 2021-2027 Multiannual Financial Framework, 2.2 billion euros was allocated for the Agency to purchase or lease its own equipment.³⁹

The 1941/2013 Almería Provincial Court's (*Audiencia Provincial de Almería*) ruling constitutes the first Spanish judicial reference to the photographic material collected by Frontex in a migrant smuggling case.⁴⁰ This judgement concerns the detection, on 28 May 2012, by the Spanish Maritime Rescue Service of a dinghy with 23 migrants on board intending to access Spain irregularly along the Almería coast. Three persons commanded the dinghy, which lacked any security measures. The defendants were sentenced to six years and

³⁴ Regulation (EU) 2016/1624 of the European Parliament and of the Council on the European Border and Coast Guard [2016] OJ L251.

³⁵ Regulation (EU) 2019/1896 of the European Parliament and of the Council on the European Border and Coast Guard [2019] OJ L295.

³⁶ See, Sergio Carrera and Leonhard Den Hertog, 'A European Border and Coast Guard: What's in a name?' (2016) CEPS paper in liberty and security in Europe; Arne Niemann and Johanna Speyer, 'A neofunctionalist perspective on the "European refugee crisis": The case of the European Border and Coast Guard' (2018) 56(1) *JCMS* 23; Philippe De Bruycker, 'The European border and coast guard: a new model built on an old logic' (2016) 2 *European Papers* 559; David Fernandez-Rojo, 'Regulation 2019/1896 on the European Border and Coast Guard (Frontex): The Supranational Administration of the External Borders?' in Markus Kotzur et. al., *The External Dimension of EU Migration and Asylum Policies* (Nomos 2020).

³⁷ See, Rocco Bellanova and Denis Duez, 'The Making (Sense) of EUROSUR: How to Control the Sea Borders?' in Raphael Bossong and Helena Carrapico (eds.), *EU Borders and Shifting Internal Security* (Springer International Publishing 2016) 23; Luisa Marin (2011), 'Is Europe turning into a "Technological Fortress"? Innovation and technology for the management of EU's external borders: Reflections on FRONTEX and EUROSUR' in Michiel Heldeweg and Evisa Kica (eds.), *Regulating Technological Innovation* (Palgrave Macmillan 2011) 131.

³⁸ Raluca Csernaton, 'Constructing the EU's high-tech borders: FRONTEX and dual-use drones for border management' (2018) 27(2) *European Security* 175; Ben Hayes, Chris Jones and Eric Toepfer, 'Eurodrones Inc.' (2014) *Statewatch and Transnational Institute*; Matthias Monroy, 'New FRONTEX agency: satellite reconnaissance and drones over the Mediterranean' (2016) <<https://digit.site36.net/2016/06/10/new-frontex-agency-satellite-reconnaissance-and-drones-over-the-mediterranean/>>; Statewatch, 'Drones for Frontex: unmanned migration control at Europe's borders' (2020) <<https://www.statewatch.org/analyses/2020/drones-for-frontex-unmanned-migration-control-at-europe-s-borders/>>.

³⁹ European Commission, 'Proposal for a Regulation of the European Border and Coast Guard', COM(2018) 631 final, 148.

⁴⁰ SAP Almería 1941/2013, 24 May 2013, ECLI: ES:APAL:2013:1941.

one day in prison for the crime of migrant smuggling in view of the clear and convincing statements of the smuggled migrants taken during the pre-trial stage as pre-constituted evidence. The victims also recognised the accused in the photographs taken by Frontex. In particular, the Spanish police officers stated that the two protected witnesses identified without doubt the three persons in the photographs as the boatmasters.

The Almería Provincial Court's ruling was appealed to the SSC. The SSC acknowledged that the police investigation officers received a video recorded by one of the aircrafts deployed by Frontex. A series of frames of the video recorded by Frontex served as supporting evidence for the testimony of the two smuggled migrants, which was incorporated into the trial as pre-constituted evidence. In this regard, the SSC pointed out that the police officers confirmed that the protected witnesses undoubtedly identified in the pictures displayed to them the boatmasters as the smugglers. Hence, the SSC concluded that the appeal lodged by the migrant smugglers was not admissible.⁴¹

In 2017, the Almería Provincial Court ruled again on a dispute relating to the key information provided by Frontex in a migrant smuggling case. On 4 September 2016, the Spanish *Guardia Civil* intercepted a dinghy with 16 migrants on board who had paid around 500 euros for the perilous journey. The boatmasters, accused of a migrant smuggling offence, argued that they only intended to reach Spain like the other migrants in the dinghy. However, one of the irregular migrants on-board the vessel identified the two accused as the boatmasters. The Almería Provincial Court unsuccessfully attempted to locate the witness who had previously testified against the smugglers in front of the investigating judge. Since the whereabouts of the smuggled migrant remained unknown, his recorded testimony, as pre-constituted evidence, was watched during the hearing. Two counterbalancing factors corroborated the smuggled migrants incriminating declaration: the testimony of the police officers in charge of the investigation and Frontex's aerial photographs. The Almería Provincial Court understood that the only objective evidence in the case, the photographs taken by Frontex's plane, ratified the protected witness testimony. The two migrant smugglers identified by the victim appeared in Frontex's pictures commanding the dinghy and wearing the very same clothes in the pictures and at the time of being arrested.⁴²

The Almería Provincial Court's ruling was appealed before the High Court of Justice of Andalusia (*Tribunal Superior de Justicia de Andalucía*). The High Court stated that the witness's testimony was the only ground for the Almería Provincial Court to find the accused guilty. While basing the conviction of the migrant smuggler only on the victim's declaration is possible, the Almería Provincial Court should have paid closer attention to the following factors that weaken his testimony. First, the irregular migrant who identified the smugglers was granted the condition of protected witness, which limits the data about his identity and makes it more difficult to assess the credibility of his statement. In addition, the smuggled migrants' incriminating testimony conflicted with the statements of the other irregular migrants on-board, who expressed that nobody was in charge of mastering the dinghy. Lastly, in accordance with article 59 LOEX, the witness obtained a residence permit for his collaboration with the competent Spanish authorities, which requires a more precautionary approach to the witness ultimate intentions.⁴³

However, the High Court of Justice of Andalusia concluded that despite the previous circumstances that weaken the smuggled migrant's testimony, it shall be deemed valid to convict the accused for a migrant smuggling offence for the single reason that Frontex's aerial photographs objectively verify the victim's statement taken as pre-constituted evidence. Hence, Frontex's graphic material shared with the competent authorities is now essential and, in some cases, decisive for the Spanish courts to convict the migrant smugglers.

2. Europol and Frontex's Direct Involvement in the Migrant Smuggling Investigations

Apart from the graphic material provided by Frontex to the national border management authorities, since the so-called 'refugee crisis' in 2015, the Agency is playing a more direct role in the Member States migrant smuggling investigations. Frontex deploys border guards to assist the Member States in patrolling the external borders, examining the documents of the migrants and taking their fingerprints. Furthermore, the Agency's experts help the national authorities during the interrogation of the intercepted and rescued migrants. Frontex's agents obtain valuable information from the irregular migrants such as the reasons for their journey, the route that they followed and the migrant smuggling networks *modus operandi*.

⁴¹ ATS 2043/2013, 31 October 2013, ECLI:ES:TS:2013:10353.

⁴² SAP Almería 267/2017, 8 June 2017, ECLI:ES:APAL:2017:1052.

⁴³ STSJ Andalucía, 20 October 2017, ECLI:ES:TSJAND:2017:16102.

Frontex's direct assistance in the national migrant smuggling investigations was best reflected in the hotspots that were created in Italy and Greece as a response to the 'refugee crisis'.⁴⁴ In the hotspots, Frontex supported the Italian and Greek authorities in disembarking, identifying and registering the arriving migrants. The Agency, supervised by the competent national border guards, also interviewed the migrants in order to determine their nationality.⁴⁵ While no hotspots have been established in Spain yet, Frontex's officials are actively involved in the Spanish migrant smuggling investigations.

In this regard, Las Palmas Provincial Court (*Audiencia Provincial de Las Palmas*) heard a case concerning the arrival of a dinghy with 14 migrants on board from Morocco on 5 April 2008. Frontex agents interviewed two of the rescued migrants, who identified the dinghy's boatmasters. Frontex shared this relevant information with the Spanish police authorities in order to convict the members of the migrant smuggling network.⁴⁶ Similarly, the Almería Provincial Court was brought a case regarding the interception on 14 April 2020 of a vessel carrying 35 migrants on board, who paid 3,500 euros for the journey to Spain. During the trial, the Spanish police authorities in charge of the migrant smuggling investigation declared that Frontex informed them about a witness who wanted to testify by identifying the three boatmasters. Frontex also let the Spanish police authorities know that the other smuggled migrants were unwilling to cooperate in the investigation. The Almería Provincial Court heard Frontex's guards, who declared to have conducted several interviews with the migrants on board the vessel and only one of them was willing to collaborate in identifying the smugglers.⁴⁷

Consequently, Frontex supports Spain in matters closely linked to its national sovereignty prerogatives, such as the criminal migrant smuggling investigations. The Agency deploys its own officials in Spain and directly participates in the police and judicial proceedings by conducting interviews with the disembarked migrants, gathering information about the journey and boatmasters, as well as identifying those migrants willing to testify. In this regard, another decentralised agency that begun to play a crucial role in the national migrant smuggling investigations is the EU Agency for Law Enforcement Cooperation (Europol).

Whereas it has not yet been possible to locate any Spanish court's rulings in which Europol is explicitly mentioned, the significant activity that Europol is already conducting leads us to conclude that its assistance will soon be similar to Frontex's. Since the establishment of the Italian and Greek hotspots, Europol have also started to deploy its officials on the ground, to participate in the interrogation of the rescued migrants and to assist in the migrant smuggling investigations.⁴⁸ One of the measures introduced by Regulation 2016/794 of Europol is the development of centres of specialized expertise. Article 4(1)(1) Regulation 2016/794 states that Europol shall 'develop Union centres of specialized expertise for combating certain types of crime falling within the scope of Europol's objectives (...)'. Thus far, Europol has introduced three centres of specialized expertise: the European Cybercrime Centre (EC3), the European Migrant Smuggling Centre (EMSC) and the European Counter Terrorism Centre (ECTC). The EMSC started its activities in February 2016 and works to prevent document and identity fraud and aims to stop the facilitators from fully enjoying the profits of their criminal enterprises.⁴⁹

Of particular significance is the possibility that the EMSC may deploy specialized investigative and analytical teams in the territory of the requesting Member State that requires assistance in dismantling the smuggling networks. The Europol specialists and analysts deployed are in charge of enhancing the operational analysis and investigations of the Member States by providing a complete picture and systematic and real-time information exchange concerning migrant smuggling. Moreover, 'Guest Officers have also been deployed in different hotspots by Europol since March 2016 to perform secondary security checks and support Greek authorities'.⁵⁰ The incipient operational support of Europol on the ground aims to provide specialized forensic

⁴⁴ See, David Fernandez-Rojo, *EU Migration Agencies: The Operation and Cooperation of Frontex, Easo and Europol* (Edward Elgar Publishing 2021); Satoko Horii, 'Accountability, dependency, and EU Agencies: the hotspot approach in the refugee crisis' (2018) 37(2) *Refugee Survey Quarterly*, 204; Chiara Loschi and Peter Slominski, 'The EU hotspot approach in Italy: strengthening agency governance in the wake of the migration crisis?' (2022) *Journal of European Integration*.

⁴⁵ Frontex, 'General Annex of the Operational Plan – Joint Maritime Operations' (2016) 18-19.

⁴⁶ SAP Las Palmas 114/2008, 19 September 2008, ECLI:ES:APGC:2008:2871.

⁴⁷ SAP Almería 242/2020, 22 September 2020, ECLI:ES:APAL:2020:829.

⁴⁸ Cristina Blasi Casagran, 'El papel de Europol en la lucha contra el tráfico de migrantes y la trata de seres humanos' (2018) 59 *Revista de Derecho Comunitario Europeo* 333.

⁴⁹ Europol, 'European Migrant Smuggling Center – First Year Activity Report', 24.02.2017; Europol, 'Two Years of EMSC Activity Report Jan 2017-Jan 2018', 20.04.2018 and Europol, 'EMSC 3rd Annual Activity Report – 2018', 25.03.2019.

⁵⁰ Conclusions of the Twelfth Annual Meeting of National Experts on Joint Investigation Teams (JITs) 15 and 16 June 2016, Eurojust, The Hague, doc. 12887/16, 05.10.2016, 3.

and technical assistance to the concerned Member States. According to the Europol 2017 working program, ‘based on the assessment of MS needs, Europol’s response could include short and long-term deployments of Europol experts (...), forming a situation centre to coordinate a response to major security events and crises, creating a task force or supporting the formation of multi-national teams to intensify efforts and achieve immediate operational results in areas demanding attention’.⁵¹

There are numerous police investigations regarding the smuggling of migrants by sea, in which Europol assisted the Spanish police authorities. Europol’s intense support in the national investigations, allow us to conclude that the information gathered has an impact on the Spanish courts. In this respect, by way of example, four recent Spanish migrant smuggling investigations assisted by Europol are explored. On 29 March 2021, Europol supported the Spanish National Police in dismantling a criminal network in charge of introducing irregular migrants from Morocco through the Strait of Gibraltar. The migrants paid around 2,500 euros for the journey and three vessels were seized. Europol facilitated the exchange of information, provided operational coordination and analytical support.⁵²

Furthermore, on 3 December 2020, Europol helped the Spanish National Police by exchanging information and analytical support in order to dismantle the activities of a network that was smuggling irregular migrants from Morocco into the Canary Islands. Once the migrants reached the shores of the Canary Islands, the criminal network was responsible for providing them false documents in order to arrive to their final destinations within the EU.⁵³ In a similar investigation, Europol helped the Spanish National Police in disbanding an organised criminal group that was smuggling migrants from Morocco to the Canary Islands. It is estimated that the smugglers filled 20 boats with irregular migrants and obtained more than 35,000 euros for their illegal activity.⁵⁴

Lastly, on 19 November 2019, the Spanish National Police dismantled a criminal group specialised in smuggling migrants from Algeria and Morocco using speedboats. The operation led to 26 persons being arrested, who smuggled 850 Algerian citizens and 50 Moroccan citizens to Spain for an estimated total turnover of 1.5 million euros. Europol assisted the Spanish National Police by identifying the members of the criminal organisation, extracting information from their mobile phones and deploying a mobile field office where all operational data relating to the arrests, house searches and seizures was cross-checked.⁵⁵

V. Conclusion

In the aftermath of the Covid-19 pandemic, two new trends were detected in the criminal networks *modus operandi* when smuggling migrants into Spain. On the Mediterranean route, the departure of the boats now takes place mainly from Algeria, rather than Morocco, which is strictly controlling its borders. Well-organized criminal structures operate in this route using pleasure boats, with a capacity for no more than 12 migrants, and fishing boats that can carry around 60 persons. The smuggled migrants pay approximately 3,500 euros to reach the Spanish shores of Almería, Murcia, Alicante, Granada and the Balearic Islands.⁵⁶

On the Atlantic route, there has been a significant increase in the number of arrivals to the Canary Island. Migrants pay between 400 and 1,800 euros to the criminal networks. If the vessels depart from Morocco, the smugglers use boats with capacity for about 20 migrants, if the port of departure is Mauritania, smugglers prefer fishing boats, where no more than 60 people fit, and if the departure point is Senegal, large boats with about 80 migrants on board are used.⁵⁷

Given the incessant arrival of smuggled migrants to Spain, this paper focused on analysing the essential role of the Spanish courts in fighting this crime. Pursuant to article 59 LOEX, the irregular migrants

⁵¹ Europol, ‘Europol Programming Document 2017-2019’, 17.01.2017, 12.

⁵² Europol, ‘Smuggling network connected to four deaths at sea dismantled in Spain’, <<https://www.europol.europa.eu/media-press/newsroom/news/smuggling-network-connected-to-four-deaths-sea-dismantled-in-spain>>.

⁵³ Europol, ‘19 arrests for smuggling irregular migrants from Morocco to the Spanish Canary Islands’, <<https://www.europol.europa.eu/media-press/newsroom/news/19-arrests-for-smuggling-irregular-migrants-morocco-to-spanish-canary-islands>>.

⁵⁴ Europol, ‘28 arrested for smuggling migrants in rubber boats from Morocco to Spain’, <<https://www.europol.europa.eu/media-press/newsroom/news/28-arrested-for-smuggling-migrants-in-rubber-boats-morocco-to-spain>>.

⁵⁵ Europol, ‘Spanish police arrest 26 for smuggling migrants from Algeria and Morocco’, <<https://www.europol.europa.eu/media-press/newsroom/news/spanish-police-arrest-26-for-smuggling-migrants-algeria-and-morocco>>.

⁵⁶ Ministerio de Justicia, ‘Memoria Fiscalía General de Estado 2020’ (2021) 845.

⁵⁷ *Ibid.*, 845-847.

who decide to cooperate with the police and judicial authorities are granted the condition of protected witnesses and testify the details of their journey. The investigating judge takes this statement as pre-constituted evidence since, from the pre-trial stage until the beginning of the trial, there is a reasonable risk that the smuggled migrants might be unreachable. Notwithstanding the possibility of the smuggled migrants to be removed from Spain before the trial starts, the courts shall not assume this risk and must exhaust every possibility to locate them.

For the pre-constituted evidence to be valid, the judges shall assess to what extent the witness's testimony was clear, detailed and coherent, as well as whether the smuggled migrant can identify the organisers of the journey and the boatmasters. Due to the exceptional nature of the pre-constituted evidence, the ECtHR, the SSC and the SCC case law requires that it be complemented with objective counterbalancing factors. The statements of the police authorities in charge of the investigation, the testimony of other migrants on-board the vessel or, videos and photographs in which the migrant smugglers can be identified are grounds to corroborate the absent witness testimony. In this regard, the Frontex's aerial graphic material that is shared with the competent Spanish authorities, has become crucial in deciding on the conviction of the migrant smugglers. In addition, Frontex, and to a lesser extent Europol, are involved in the national migrant smuggling investigations by interviewing the victims and gathering all the information about the modus operandi of the criminal groups. The Spanish courts then use this evidence when hearing about migrant smuggling cases.

Consequently, as the European Commission pointed out in the renewed EU Action Plan against the Smuggling of Migrants (2021-2025), the Covid-19 pandemic and the restrictive measures adopted by the Member States did not hinder the activities of the migrant smuggling networks, but rather reinforced their activities and benefits.⁵⁸ The pandemic forced these criminal groups to change their operations and they responded with great and swift adaptability by focusing on conducting their activities on longer and riskier sea journeys to Spain. Migrant smuggling is a diverse, dynamic and highly lucrative business, which endangers the lives and fundamental rights of the migrants. The Spanish courts shall now continue to face this issue now with the assistance of external actors such as Frontex or Europol.

⁵⁸ European Commission, 'A renewed EU action plan against migrant smuggling (2021-2025)', COM(2021) 591 final, 29.09.2021, 3.