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Seminar: *Europe's crisis: What future for immigration and asylum law and policy?*

New experiences in investigating and prosecuting the migrants' smuggling: from the national dimension to a European approach.

During the last years Italy has been facing overwhelmingly huge and persistent migratory flows coming from Middle East and Africa through the Mediterranean Sea: in 2014 there have been 170.100 arrivals; in 2015 they were 153.842, in the current year up to May 47.810, most of them migrants come from Africa, more or less the same number as last year in May (Unhcr); on the contrary number of migrants arriving in Greece dropped 90 % in April (Frontex). Most of these flows have a daily impact on the Sicilian coasts.

Therefore Italian judges and prosecutors, starting from my office, working together with law enforcements bodies (I have to mention the Military Navy above all) have been confronted with investigations and trials dealing with Smuggling of Migrants by sea, facing new legal challenges. That's because:

a) the most relevant part of smuggling by sea takes place in an area (the High Seas) where there is no **criminal jurisdiction** and no State, even Italy, had recognised its jurisdiction before;

b) the relevant crimes are **transnational** in nature and refer to **organised criminal groups**;

c) **Extra-EU States** are mainly involved.

Actually, the migrants routes' both from Africa and Asia to Europe are controlled by **comprehensive criminal networks** having their "mastermind" centres in non-EU countries, such as Somalia, Eritrea, Nigeria, Libya, Syria, Egypt, etc..

They are able to take substantial control over each and every migratory flow, from the migrants' native countries to the places of destination. They thus

establish a sort of "governance" of migration flows by their own criminal 'rules' with accomplishes in the State administration, military and paramilitary bodies.

Each criminal group is very well hierarchically structured as an enterprise. It has got many 'workers' at its disposal: mediators with the task of putting the migrants in touch with the criminal network able to organise the travel from his native country to Europe, and making them pay, drivers to bring and transport the migrants from one country to another, guards with weapons to watch the migrants kept in enclosures waiting to leave; members of professional crews, experts in illegal money transfer systems (for instance, the so called Hawala). They also have flats, houses and farms where to place people waiting to leave. Their top level bosses invest their money in many countries and sometimes keep electronic records about the migrants' names and payments.

Taken the decision to migrate, migrants are substantially deprived of their self-determination. They pay very high costs to afford each segment of the travel, they have to cross the desert, they may be kidnapped and exploited for work or other reasons, everything under the control of one or more criminal groups.

They are transported on highly unsafe and overloaded boats, almost the totality of which without any flag and at high and concrete risk of sinking (old fishing boats or smaller boats released by a so called "mother ship", inflatable boats, dinghies, dismissed cargo boats).

These vessels are led by more persons, acting under the directives of the aforementioned criminal groups, settled in the countries of departures. Such professional crew members do it to earn money as a job.

During the travel by sea migrants, made vulnerable for the said reasons, lack any safety equipment and some of them, those coming from Sub-Saharan countries, are more severely mistreated during this time just for racism.

For instance, when travelling on big wooden boats from Libya, they can be intensively stowed in the lower deck and prevented from getting out to the upper deck for the whole travel. This can result in severe casualties, such as the massive death because of suffocation, constituting the crime of multiple murder.

In 2013 e 2014 the main route was from Egypt to Italy, a strategic meeting point for both the Middle East and Africa migration routes.

Therefore, since the summer of 2013, having experienced how heinous and hateful the *modus operandi* of the smugglers from Egypt was and knowing that each journey was monitored and assisted by accomplishes in Sicily, the first **investigations on the *overall route and the criminal networks behind*** begun.

At the same time since October 2013 the Italian Navy and the Coastal Guard – especially through the operation called "Mare Nostrum"– have been carrying out all rescue interventions in the Mediterranean Sea in the High Seas, in order

to save as many lives in danger as possible and to bring them to pre-identified ports as "Places of Safety".

Investigations revealed how smugglers used to intentionally stop their acts of transportation in international waters and, once there, call the SAR forces to be rescued, as a **strategy to escape jurisdiction**: professional smugglers on vessels of great worth, after transhipping the migrants into a smaller and unsafe vessel, used to change route and drive back to the coasts of North Africa. In a telephone tapping service two members of a criminal organisation sitting in Egypt in contact with its cell sitting in Sicily commented that, as far as they remained in international waters, the mother ship could not be caught and they were safe.

The strategy of deceitfully *completing* smuggling acts in international waters, far from the Italian territorial waters and the contiguous zone and with no apparent link to the Italian territory, led us to affirm Italy's criminal jurisdiction on innovative grounds: the principle provided for by the criminal code, according to which a crime is committed in Italy when the conduct is carried out, not only in whole, but even only in part within the territory of the State and even if this part is carried out only by some of the material participants in the commission of a crime, even if these participants are not punishable for a ground of exclusion, combined with the principle of duress.

The relevant reasoning can be summarised in the following four points:

1. all naval units are bound by a moral and legal obligation of saving human lives in distress at sea, provoked by this dangerous way of sailing, and bound by the principle of *non-refoulement*, to take all necessary steps to save the migrants' lives at risk and to bring them to the nearest Place of Safety, reasonably in Italy.
2. such rescuers, finally bringing the migrants to Italy, carry out the final part of migrants' transportation and allow the smugglers to achieve their goal.
3. such rescuers are excused participants in the crime of smuggling, because they act under the threat of imminent death or shipwreck of the vessel, are not clearly punishable themselves because of duress/necessity as a ground excluding responsibility.
4. on the contrary, the smugglers and the organisers of such journeys, having intentionally abused of the rescue forces in order to obtain the illegal entry of migrants in Italy, shall be liable for the crime of smuggling, considered partially committed in the territory of the State thanks to the disembarkation and the "link" of the rescuers[1].

[1] Italian Supreme Court in the criminal case against H. A., 11 March 2014: *"the request for rescue at sea, made necessary on the grounds of the state of the vessel or the conditions at sea, is a foreseen and deliberately employed instrument used in order to reach the predetermined objective of disembarking on the Italian coast. Every State has the obligation to rescue persons in distress on the high seas, an obligation imposed by international conventions (the November 1, 1974 London Convention, ratified by Law n. 313 of 1980; the April 27, 1979 Hamburg Convention, ratified by law n. 147 of April 3, 1989;*

Relying on such interpretative approach, Italy's jurisdiction was also affirmed with regard to **crimes arisen from the same conduct of migrants' smuggling** (participation into a transnational criminal group aimed at committing such crimes, shipwreck, multiple murder[2], involuntary manslaughter) on the ground of a close connection among crimes as already affirmed by the jurisprudence with reference to piracy and related offences.

Judicial decisions also assessed the legitimacy of the relevant **enforcement powers**, to board, inspect, seize the vessels used to smuggle migrants and arrest suspect smugglers on board, as regards such actions observed in the High Seas, based on article 110 of the United Nation Convention on the Law of the Sea (right of visit) and article 8, para. 7 of the Protocol against Smuggling of migrants together with the Italian Immigration Act.

We combined the right of visit of vessels without nationality, granted by article 110 of UNCLOS[3], and article 8, paragraph 7 of the UN Protocol against Smuggling of migrants, saying: "*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*"[4].

We held that these "appropriate measures" can consist in the seizure of the smugglers' boats and the arrest of the crew members (also in connection with article 12, para. 9-bis and 9-quarter of the Italian Immigration Act).

This innovative jurisprudence was later confirmed by the Italian Supreme Court[5].

Montego Bay Convention). The disembarkation of migrants, a seeming consequence of the state of necessity which made rescue operations necessary, is simply the last phase of a activity planned since the beginning, resulting in the achievement of the criminal network's objective and the fulfilment of a duty towards the migrants.

[2] The rescue of 15 August 2015 made by an Italian Navy Unit and a Norwegian Unit on Frontex mission, where 49 bodies "stowed" in the lower deck, dead for suffocation, were found. The seven crew members of the smuggling boat, identified by the migrants, once in Italy, were arrested for smuggling and multiple murder, crime for which jurisdiction was affirmed by interpretation on the "link" with smuggling, but such an extension would need a clearer legal ground. There have been two similar cases last summer (respectively regarding about 40-50 deaths) and one in 2014.

[3] Article 110, paragraphs 1, lett. d), and 4.

[4] The steps and measures that can be taken following a visit of a vessel confirming the suspicion of its involvement in criminal acts depend on the situation considered by article 110. For example, powers of seizure and arrest are expressly permitted in case of piracy (article 105).

[5] Italian Supreme Court, First Section, judgments delivered on 28.2.2014 no. 14510 v Haji Hassan, on 11.3.2014 no. 18354 v. Hamada and on 23.5.2014 no. 36053 v. Al Bahlawan and others.

The Supreme Court, in the case H.H. against order n. 1642/2013, Tribunal of Freedom of Catania dated October 10, 2013, so stated on 23 May 2014: "*The Catania Freedom Court correctly recognized the legitimacy of the boarding of and intervention on the ship without a flag, with reference to the Montego Bay Convention, ratified by Italy on January 13, 1995, entered into force on February 12, 1995. Article 110 of the above mentioned Convention, as reminded in the document appealed against, provides that a military ship which encounters, on the high seas, a foreign ship other than a ship entitled to complete immunity, is not justified in boarding it unless the ship is engaged in piracy, in the slave trade or is without nationality.*

To implement such a set of rules with reference to cargo boats from Turkey apparently connected to a State (e.g. declaring Moldavian nationality to the departure Port Authority), we relied on articles 91 e 92 of the Montego Bay Convention (the flag principle: "a genuine link between the State and the ship")[6], and therefore we ruled that, having regards to a series of circumstances[7], that ship was not entitled to flay such a national flag and that flag was a "flag of convenience"[8].

Following the investigations on the first cases of boarding and capture of a stateless mother vessel followed by a 'baby' vessel, the continuing telephone

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Regarding this point, it is important to remember that the Grand Chamber of the European Court, in the HIRSI versus Italy case, referenced, to consider legitimate the actions on the high seas, article 110, paragraph 1, subparagraph d) of the above mentioned Convention on the Law of the Sea, which permits the boarding of vessels that are not flying a flag, and article 110, paragraph 1, subparagraph b) which permits boarding when there is reasonable ground for suspecting that the ship is engaged in the slave trade, with the precious indication that this ground must be extended to victims of trafficking, in view of the analogy between these two forms of trade.

To this, the European Court added that the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime signed during the Palermo conference (December 12-15, 2000), ratified by Italy by Law n. 146 of August 2, 2006 and in force since September 1, 2006, in article 8, paragraphs 2 and 7, authorizes the State that has reasonable grounds to suspect that a vessel without nationality or assimilated to a vessel without nationality is engaged in the smuggling of migrants to take appropriate measures in accordance with relevant domestic and international law. The reference to domestic and international law contributes towards identifying said measures not only in the right of visit of the ship (inspection), but also in the diversion to a harbour of the coastal state, and in the institution of proceedings on the visited ship, such as the seizure of the ship and the arrest of the people found on board, once the ship has landed on the territory of the state. In fact, it was affirmed in judgment case n. 308-06 of June 3, 2008 of the Grand Chamber of the European Court that the freedom of navigation can be enjoyed only if a close connection between the ship and the State which grants its nationality to the ship is established, whereas the right is denied, when the ship is without a flag and therefore when it is not possible to attribute nationality to the ship. A ship without a flag inevitably exposes itself, even within extraterritorial waters, to controls of ships of coastal countries, for the evident relevant interest that the coastal state has in the safety and the peaceful order of life and of the activities of its territorial communities.

That being said, the legitimacy of the boarding of the mother ship, its diversion to the harbour of Siracusa and the exercise of the powers to seize and arrest the crew members considered to be soundly responsible for having embarked 199 Syrian migrants onto the mother ship, having transferred them on the high seas onto another boat which continued its journey towards the landing place and was completely inadequate in relation to the conditions of the sea, must be reaffirmed.

[6] *Article 91 - Nationality of ships*. 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 92 - Status of ships. 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. 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.

[7] such as the nationality of the crew members (all Syrians), the repeat change of the ship name while sailing, the removal of the original name, the lack of any official Moldavian records and the real course, different from the one declared to the Coastal Authority.

[8] The relevant judgments issued by the Detention Revise Court in Catania on the 11th of November 2014 can be read here: http://www.magistraturademocratica.it/mdem/articolo.php?id=2339&a=on

surveillance service permitted to identify some leading members of criminal groups organising travels from Egypt to Italy and the Catania prosecuting, having a warrant of arrest, asked for their surrender/extradition, still in vain.

Very good results have been achieved in terms of convictions for participation into a criminal network and smuggling, seizure and confiscation of big ships, identification and international warrants of arrest of some of the networks' leaders.

The same approach was used to prosecute the 24 Egyptian members of the crew of two joint vessels responsible of the transportation of 478 migrants discovered on 19-20 October 2015, acting according to **a partly new pattern**[9].

Since 2015 new investigations have been focusing on parallel criminal transnational networks engaged in **traffic of human beings** from Nigeria to Italy through Libya, with members on both sides on the Mediterranean sea. The main victims are all young women who are recruited being deceived on their future working opportunity in Europe and subdue to a tribal rite similar to *Woo doo*; then, after being smuggled, once in Italy, are to be exploited for prostitution.

By the time, routes continuously mutate and adapt to the repressive action. More and more vessels depart from **Libya**, by a more dangerous *modus operandi*: as Libya is closer to the Italian coasts than Egypt, a) inflatable boats and small wooden boats, even more unsafe, replace fishing boats from Egypt; b) there are no professional crews, but some migrants (especially from Mali, Gambia and Senegal, deemed to be good fisher), able and willing to sail, who accept the smugglers' proposal to steer the ship in change of travelling without paying any cost. This way the smugglers minimize the prosecution risks: they don't need to deploy any man from their networks and prosecuting such occasional skippers has got no sense, as they are not part in the criminal networks responsible for the smuggling.

Inflatable boats, as they are structured 'made to sink', should be stopped and rescued as soon as possible.

Following the worldwide immense shock provoked by the shipwreck of 18 April 2015, where about 700 people died, the European Council launched the military operation **Eunavfor Med** by the Decision of 18 May 2015, and the Frontex

[9] There are two vessels sailing together: a big fishing boat (unit 1) with all the migrants on board, supported and followed by a second speeder boat (unit 2) with the crew on board. The crew on unit 2, made of 17 men, calls the rescue, remaining 'in the shadow' during the rescue action, in order to come back on the scene after the rescue is over, in order to take back the big boat used for the transportation, left in the high seas by the rescuers, and drive back to Egypt. In the meanwhile, the migrants tell about it to the police and the day after, during their travel back to Egypt, under the authorisation of the prosecutor, the two vessels, one linked to the other, are intercepted by the Military Navy; being without flag, they are boarded, inspected, seized and all the crew apprehended. The Catania Revise Court (decision made on 17.12.2015) confirmed the charges for both smuggling of migrants and participation to a joint transnational criminal group aimed at such crimes

mandate in the Central Mediterranean route (operation **Triton**) extended its range to reach (from the previous 30) 138 miles South of the Sicilian coasts.

Eunavfor Med is to be conducted in plural sequential phases, the second of which, we are in, includes boarding, search, seizure and diversion of vessels suspected of being used for human smuggling or trafficking in the High Seas, under the conditions set out in that Resolution or the concerned State consent. Later such powers will be allowed in the Libyan territorial waters.

In a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, it will be possible to take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.

We are still in the 2-alfa phase: international waters.

The **Resolution adopted by the UN Security Council of 9 October 2015,** under Chapter 7 of the UN Charter, expressly authorised the enforcement of such powers in operations conducted in the Mediterranean Sea "off the coasts of Libya", specifying their contents (e.g.: to inspect unflagged suspect vessels on the High Seas off the coast of Libya, to seize them after confirmation of smuggling, including disposal, to extend such powers to flagged vessels at certain conditions, to use all measures commensurate to the specific circumstances)[10].

There are positive aspects in such new joint FRONTEX and EUNAVFORMED missions. European countries are jointly committed in rescue actions in the Mediterranean Sea, and, in parallel, they are cooperating to take the first investigative steps to support Italy's jurisdiction over the relevant criminal cases. They collect the first evidence on the single journeys (sat phones, notes on names and numbers of the organisers), in some cases allow the presence of Italian liaison officers on board of the rescue vessels, transmit to Italian law enforcement authorities the first operational reports on the intervention, often containing basic elements to identify smugglers and organisers.

[10] It allows Member States acting nationally or through regional organisations engaged in the fight against migrant smuggling and human trafficking (including Frontex, expressly mentioned) to exert a range of powers: to inspect (on the high seas off the coast of Libya) any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya;

Powers to be exerted ever on flagged vessels, provided that Member States make good faith efforts to obtain the consent of the vessel's flag State prior to using the authority outlined in this paragraph (it's a sort of expedite procedure, based on "silent consent": it takes a reasonable time to wait for an answer not allowing the vessel to flee away and drive back to Libya; what about a bad faith denial of authorisation? (Point 7).

The consequential powers are: to seize vessels, after confirmation of smuggling, including disposal (for one year); to use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out activities under paragraphs 7 and 8 and in compliance with international human rights law. Finally it calls on States to investigate and prosecute and to effective implement the Protocol on Smuggling.

But is this set of legal tools adequate to face the current challenges and to contribute to dismantle the smuggling networks, as declared in the preamble and in line with the mission of the EU decision?

As far as our experience is concerned, probably not yet and not entirely, I would say.

First of all, the UN Resolution and the EUNAVFOR Med action are mainly focused only on the **Libyan route**, not considering much the Egyptian route, which has been reopened for many months now, by a slightly different *modus operandi*, but again tending to interrupt the main criminal conducts in international waters.

Despite the EU Decision often refers to "*dismantling the smuggling networks*" and recall the States' obligations under the UN Protocol on Smuggling, which is a criminal law act, such operation is basically conceived as a **military and temporary operation.**

A military approach to face a long-term criminal law issue, not well harmonised with the jurisdictional side, is disputable and in any case cannot solve the problem in a satisfactory way.

The jurisdiction and prosecution issues are left aside and unsolved[11]. For instance, such legal tools don't' specify - unlike on the vessels - which powers are allowed towards *people* responsible for smuggling on board of the inspected vessels, so that such aspects are basically left to the legal framework of the State the single asset belongs to.

In order to exert such strong enforcement powers, it would be essential to define: *a)* clear and **mutually accepted rules on EU States' jurisdiction** on migrants' smuggling discovered in the High Seas, aimed at having final effects on the territory of a EU State, because some caveat derive from a lack of jurisdiction by the concerned States; *b)* a stronger and more effective **EU cooperation on the criminal networks**, which must be the very targets (besides and beyond the single incidents), making easier for judicial authorities, having jurisdiction, to use the information gathered by EU agencies or other countries' assets employed in such scenarios.

On point ***a)*** - particularly important to face the 'Egyptian route' or similar scenarios, Italy has proposed an amendment to the future EU Directive on Smuggling in order to **affirm jurisdiction for crimes committed outside the territory of any EU Member State**, when the crime is intended to achieve the unauthorised entry of migrants in the territory of any EU Member

[11] It is worth to mention that the UN Legislative Guide to the Smuggling Protocol, paragraph 95, says that "*Establishment of jurisdiction over smuggling at sea is a prerequisite for effective implementation of articles 7-9* [of the Protocol]" and the powers provided by article 2 of the EU Decision and the Un Resolution are the same provided by article 8 of the Protocol.

State[12]. In such cases jurisdiction should be also extended to any offence other than facilitation of unauthorized entry committed in the same context, when the same conduct violates multiple criminal dispositions or such further offence is intended to execute the offence of facilitation itself (e.g. murder, etc.).

The possibility to affirm jurisdiction on the high seas with regards to migrant smuggling has been recognised by the Report on the meeting of the Working Group on the Smuggling of Migrants held in Vienna from 18 to 20 November 2015, which in its recommendation 5, section A reads: "*States should consider establishing jurisdiction, consistent with applicable international law, over incidents of migrant smuggling on the high seas involving unflagged vessels, including incidents in which the transportation of the migrants to shore by rescuers is the result of the deliberate conduct of the smugglers aimed at provoking the rescue of the migrants, and States may wish to consider the full implementation of Art. 15 of the Convention*"

On point ***b)***, in order to strengthen the current level of cooperation, even by new legal tools, all **information gathered by intelligence or somehow other by EU agencies** and assets involved on the ground, such as Frontex and Europol, when potentially useful for prosecution purposes, should be easily transmitted to the competent prosecuting offices and be used as **evidence** on the smuggling networks.

To this regard UE assets working on the ground and/or analysing the collected intelligence information should be entitled to *directly communicate* with the Prosecuting Offices competent for the investigation.

In a future perspective Frontex teams, which have been building a solid expertise on the field, playing as UE coastal guard, could stably work also as law enforcement agents supporting the competent prosecuting offices or the judicial authorities.

Finally, we must bear in mind that the operational and legal responses are to be commensurate to continuously **new strategies and *modus operandi*** designed by the smugglers, increasingly more hateful and deceitful (such as the conduct of smugglers, sometimes in weapons, sailing on a supporting vessel, aimed at retaking back the boat used for the migrants transportation).

As far as Libya is concerned, it is essential to stop the **smuggling business in Libya itself**, preventing vessels from departing in its territorial waters. Which State has jurisdiction in such cases?

Libya firstly has got. Somebody thinks about an expansion of the International Criminal Court's mandate, but it's disputable, firstly because smuggling, even of

[12] This would be within the scope on applicable international law, in line with article 15, para. 2 c) – (i) of the UN Convention on Transnational Organised crime: "*A State Party may also establish its jurisdiction over any such offence …when the offence is committed outside the territory of* [*the State: ex. Italy*] *with a view to commit a serious crime within the territory of* [*the State: ex. Italy*]". Bound by a principle of strict legality, domestic legislations could positively establish such an extension of jurisdiction on these cases.

transnational nature, is not a crime against humanity, secondly because, if we need speed and effective investigative assets and tools, the ICC, not having direct law enforcement agents at its disposal, couldn't be a proper solution.

Finally it's essential to strengthen **judicial cooperation** with the countries of departure and transit of the migratory flows, removing the current obstacles, also through a full and effective implementation of the UN Convention on Org. Trans. Crime and the Protocol on Smuggling thereto.

In conclusion, the Italian experience has been testifying how jurisdiction (in a broader meaning, as the 'rule of criminal law' and its instruments) can work even in a complex - both from a legal and operational point of view -transnational scenario, including by the use of a military asset (such as the Navy, committed to support investigation). We must do the best to make sure that turning from the national dimension to a European approach brings an improvement and not a regression.

Europe must make the difference.

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