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Testo della relazione, in lingua inglese, inviata dall'autore

1.Nowadays, when we talk in the West about terrorism, immediately, we are led to think of DAESH or Al Quaeda fighters.

In fact, in our minds the terrorism phenomenon is almost restricted to the Muslim terrorist actions.

The western public opinion has forgotten all the different terrorists organisations which had, during many years, disturbed our peaceful and democratic societies and even some dictatorships which existed in Europe until the middle of the 1970's.

In the dictatorships cases, the «terrorists» were even seen by many citizens as freedom fighters.

The same happened with the Palestinians. Despite the obvious contribution of religion to the multi factorial background of this conflict, Palestinian militants were never perceived as Islamic "terrorists".

Thus, the use of that word has never been consensual.

However, other reasons existed, at that time, to justify and promote terrorist actions even in democratic societies.

In North Ireland, the terrorists of both sides justified their actions with different viewpoints about the Christian religion.

In Spain, the justification for the terrorist's actions was the fight for the Basque's National independence.

In Italy, or In Portugal after the democratic revolution in 1974, the terrorist actions allegedly demanded a deepening of democracy and political conditions to promote the social revolution.

In those cases, the authorities tried to halt and fight those terrorists' actions using the law and ordinary courts, even if, in certain cases, some special and extraordinary legislation had to be adopted for this specific purpose.

However, the authorities and the people continued to believe that it was possible to use the ordinary legal system to frame, to stop and to punish the terrorism and terrorists: in some of those countries, only some procedural guarantees were, at that time, reduced temporarily in the context of the state of emergency declared by the national parliaments.

Generally speaking, those terrorists used to act only in their own countries, or in the territory of countries against which they were fighting for reasons of national politics.

Moreover many of them used to risk their own lives, although they always tried to escape and preserve their existence: they were not martyrs or suicidal.

[1] La traduzione in italiano della relazione è inserita nell'e-book *Terrorismo internazionale. Politiche della sicurezza. Diritti fondamentali*, Sezione: Strategie di contrasto al terrorismo degli organismi internazionali.

And, what's more important, they had the same culture as the Judges and policemen of their own country.

Although they could justify their actions as a consequence of the radical social changes needed, the ideas they professed to justify those revolutionary actions were based on the same cultural values and principles which ruled their societies.

Even so, many of them, after being arrested submitted to trial and serving prison sentences, never repented; others, on the contrary, changed their ideas and could even help to deter other recruits to their initial or other organisations.

However, with ISIS, the terrorism has changed completely: the terrorists are most predominately religiously motivated and by using their own lives as a weapon are seen as carrying out a blessed deed.

That change, however, is not completely recent. After the Iranian revolution in the seventies one could already identify that the reasons for terrorism in the Islamic countries had begun to change.

Since then, the spirit of the terrorist activities has not only been motivated by nationalist reasons but has also incorporated a religious justification: their fight has now come to have the Christian crusaders and their Jewish allies as the target

The goal of Muslim terrorists is no more a question of defending the nineties inherited borders of the Arabic countries and territories, but has started to be linked to the expansion of the Islamic law and the recon quest of the ancient Califat Empire: the idealized period of Islamic domination and influence.

As a consequence, they don't care about dying during their terrorist activities and in many cases they even look for their own martyrdom: their own death forms part of the terrorist action and its political and religious meaning.

All we know that is not completely new. In fact also at the end of the nineteen century some Russian Nihilists did the same.

Nevertheless, some aspects of these new terrorist characteristics continue to appear peculiar to us.

Generally speaking), these "new" terrorists were born in the West and have been radicalized in European countries, even if their parentage came from the Middle East or North Africa.

They usually have European citizenship and most of them only, after being radicalized, visited the Middle East and North African countries. Indeed, a large number of them still haven't lived or even visited there before.

They have received a European education; nevertheless that education has not been able to integrate them into European societies.

Before being captured by radical ideals, most of them had already developed marginal behaviours.

Meanwhile, others were ordinary criminals: who belonged to criminal networks and gangs.

Only in prison, when and where they served prison sentences as a consequence of those ordinary crimes, did they begin to be radicalized.

There are many reasons for that integration issues and yet some of them stay in the actual European political system and society; notwithstanding the fact that those radicalized persons have not really experienced another system.

In fact, they have lost – maybe they never even acquired them - the social values of their ancestries and they haven't embraced others: those of the European societies.

Therefore - with regard to social values, they are in «limbo».

They are trying to invent one society based on ancient values and concepts of honour, life and death, but they are really persons of our times and with modern information and awareness.

While influenced and moulded by their religious mentors, they cannot be touched by the values of the European law and they have only received a distorted view of the Islamic religion and culture: the view given by the radical Salafists/Waabists preachers.

Those preachers help to justify their previous criminal behaviour – their life - since those crimes were made against the infidels and, more than this, they even justify the practice of other new crimes in order to help finance and support the terrorist organisations.

The criminal law – at least as we can understand it nowadays – supposes a certain degree of mutual recognition about values and culture among the authorities and the criminals.

Without that mutual recognition, the criminal law loses its real meaning and social significance.

Thus, the question is: how can the western judicial system deal with terrorists who don't share and recognize the same values?

Some years ago, Günter Jakobs, the German criminal law professor, theorized about the Enemy Criminal Law.

According to that theory, these «new» terrorists cannot orientate their social behaviour by the values protected by the democratic constitutional and criminal law: the human rights and the dignity of the human being.

Consequently, the ordinary criminal law could not perform its objective: to orientate and educate the criminal to the law values.

As the criminal removed himself, voluntarily, from the values of the law, which he is no more able to recognize, he became through his own personal will a kind of «banned» man.

That's the reason why he cannot benefit from all those values and the correlative procedural rules during the investigation or in relation to the sentence: therefore in this case the prison sentence has the sole objective to prevent the social danger caused by the terrorist's existence and potential action.

The prison sentence is no more governed by principles of proportionality concerning the actual criminal behaviour or the personal guilt of the criminal, but only by the criminal fact itself and by the hazard that it represents to society.

Consequently, Jakob predicted the existence of two criminal laws: the ordinary and traditional criminal law, to be used in common crimes and the Law of the Enemy to deal with the new terrorists.

When that theory appeared, many of the jurists were shocked. However, nowadays, we need to recognize that, worse than the establishment of that doctrine; we now have in many countries a blend of these two criminal laws.

And that was exactly what Jakobs wanted to avoid.

Indeed, at the moment, many concepts of the «enemy law» have already contaminated the traditional criminal law, invading and disrupting its values and principles and even producing a new jurisprudence concerning the meaning and range of personal guarantees in procedural law.

The level of that contamination differs from country to country.

In certain cases, that affects the definition of the acts considered by law as terrorist crimes: but as we will subsequently see, is not an insignificant matter.

In other cases, the contamination has influenced furthermore the guarantees established on the procedural codes. Its doctrinal effects have immediately produced a change in the rules concerning the investigation of other criminal activities.

Basically - the extent of the changes introduced into the different criminal laws of the different countries contributes to the difficulties of judicial cooperation.

2. So, nowadays, we have anti-terrorist legislation which is not entirely oriented to the values of the traditional and democratic principles of criminal law – that is, educating convicted persons on the values of the law – but, at the same time, we are being challenged by the EU to develop judicial tools of de-radicalisation.

In a certain sense, those different strategies for judicial participation in the fight against terrorism seem contradictory; so are indeed, the correlating objectives of the criminal policies which inspire them.

The principles preconized by the «criminal law of the enemy» only intend to isolate the convicted in order to protect society; the de-radicalisation strategy aims to convince one of the values of the democracy, the rule of law and integrate one within society.

On the one hand, we favour a security strategy; on the other hand we insist on using the judicial system to achieve its specific objective – educate and draw the convicted to the values of law.

This problem – this dilemma - raises a fundamental question: how can the judicial system be used effectively to deal with this new terrorism phenomenon?

When I say «used effectively», I mean that the judicial system should be applied to the terrorist problem to accomplish its own legal objective and only in accordance with its own methodology.

The judicial system cannot be primarily oriented to promote security policies: That's not its goal.

The objective of the judicial system is to ensure and promote human rights: those of the victims of crime and those of the suspects and the convicted.

The security policies have, needless to say, their own and relevant goals: they are essentially to preserve our civil peace and to avoid terrorist attacks but they cannot overlap and rule the judicial activity subverting its objectives and working methods.

To achieve their own objectives the police and the intelligence services don't need to avoid nor, to the contrary, overlap with the judiciary.

One thing is certain: without the involvement of the judicial system, the preservation of the values which permit us to distinguish our societies from the one proposed by the terrorists is not possible.

The Americans invented one artificial solution to this problem: they don't use the extraordinary judicial measures within United States territory, but only in Guantanamo.

By doing this, they expect to preserve their own democratic values: Do the people really believe that?

And what is happening in Europe?

How are the governments dealing with the need to increase the court's capacity to deal with terrorist investigative measures developed by the police or by the Intelligence services?

In fact, an effective de-radicalisation policy requires the promotion of democratic values – human rights and human dignity.

That means actively protecting and implementing the values that have always fundamentally structured the ordinary criminal law in civilized countries.

But, how can the courts - the judges and prosecutors - do that, if, in reality, their own resources are the same as they had before the occurrence of this new criminal phenomenon?

In fact, until now, it is mainly the intelligence and police resources that have been increased by the recent European anti-terrorist policies.

Of course, we can understand that necessity: without good and efficient intelligence services and well prepared police forces it is not possible to prevent and avoid terrorist attacks.

However, without increasing the resources, the training and the organization of the judicial systems, permitting them to attentively and effectively control the investigations made by the intelligence services and police, how can we preserve the essential values of our societies?

To have an efficient de-radicalisation policy - a credible one - we therefore need to reinforce the judicial system in order to enable it to deal with terrorism.

In fact, a true de-radicalisation policy consists of an ideological fight for the democratic values; for the rule of law.

Thus, without the involvement of judiciary it is just not possible to achieve that goal.

On the other hand, we need to recognize that if we could have a well prepared and equipped judicial system able to permanently deal with police requests, it would not be necessary to maintain, during long periods, exceptional measures which, in fact, will always hurt the values of democratic societies: those very values for which we fight to protect.

I recently read an interview given by a French judge, specialized in terrorism judicial files: his name is Marc Trévidic.

He doesn't question the declaration of the emergency state in France, but he queries its length.

In synthesis, he says that the continuance of the emergency state in France can only be justified because the judicial system does not have the necessary means and organisation to permanently steer police and intelligence activities: and that only really happens because governments prefer this situation.

If the judicial system could have the right means to do that efficiently, surely the emergency state would not be needed, or, at least, it would not be necessary to prolong it for such a long time.

Perhaps at this moment, you are asking yourself what do these problems which I've been analysing have to do with judicial cooperation against terrorism: the subject that I am supposed to be talking about.

Indeed, we cannot talk about judicial cooperation against terrorism without first discussing what the rule of the judicial system is when it deals with these matters.

Judicial cooperation is related to judicial activity, with judicial acts.

Now take let us not forget: judicial cooperation is based on principles of mutual recognition relating to judicial decisions and on mutual trust among the different national judicial authorities.

In Europe, those principles have subsequently been technically developed during the last years because our societies were able to establish the rule of law, starting from different constitutional fundaments which transformed themselves into stable and democratic societies.

In fact, only within democratic societies can the rule of law be respected or, at least, be considered as a political aim to be achieved.

The respect of the rule of law is, exactly, the corner stone of judicial cooperation, especially when talking about criminal judicial cooperation.

The rule of law just requires an ordinary judicial activity, which is not the case when we talk about extraordinary political or social situations and when we talk about the different extraordinary laws against terrorism devised by the different governments.

When we deal with extraordinary laws, the imagination of the legislator cannot find common limits and is not oriented to the common standards assumed by the community of democratic countries.

The definition of an extraordinary law based on extraordinary situations can only permit different legal solutions, simply because the constitutional laws and the constitutional cultures are different.

In fact, despite the efforts of the United Nations, the Council of Europe and the European Union to harmonize the national principles and rules regarding terrorism, many differences continue to exist amongst the several national legal systems.

Let us look, for instance, at the common definition of acts constituting terrorist crimes or to the procedural judicial tools permitted in different countries to investigate and to convict the terrorists.

Of course, there are conventions, charters and international treaties regarding human rights and citizen's guarantees.

But, it is specifically in order to transcend those guarantees that governments establish extraordinary legal measures as a result of a terrorist crisis.

If the national legal systems regarding terrorism differ from country to country, more so the national jurisprudences, then the jurisprudence accorded by the Court of Strasbourg is not even able to harmonize them minimally.

Recently, I have read a relevant and exhaustive Eurojust report in which all those differences have been analysed.

However, that analysis was targeted and based only on what we can still call the ordinary legislation and common jurisprudence about terrorism.

The conclusion was clear: judicial cooperation regarding terrorism crimes is difficult as a consequence of the big differences in the legal systems concerning the definition of terrorist crimes and about legal or illegal procedural tools to deal with terrorism and the terrorist investigations.

That report also analysed the different jurisprudence of the national courts and its conclusions are identical: the juridical principles concerning the limits based on human rights relating to the investigative measures used in terrorist procedures are not interpreted identically.

However, much more complicated could be the judicial criminal cooperation if we try to focus our observation and studies on the different legal systems and jurisprudence during a declared state of emergency.

In fact, it is not hard to find the reason for those difficulties: how many countries – and I even refer to the old democracies – have already deeply developed their juridical doctrine and jurisprudence around the limits of the emergency state regarding the civil and political guarantees?

3. Regarding the specific subject of the criminal cooperation on terrorism crimes, we can say that there are two essential areas which need to be reconsidered:

- One is related to the improvement and the harmonisation of the international legislation in order to avoid the fragmentation and disparity of national laws concerning the definition of the acts considered as terrorism crimes;
- The other is connected with a more difficult matter, with regard to the different protection levels of the national constitutional guarantees: in this latter case that means the judicial value of the evidence obtained during the investigations in different countries.

With regard to the first problematic area - which also involves some constitutional problems – I think it's possible to go faster to accelerate the harmonisation of the diverse legislation.

Mainly because some European reports about cooperation on terrorism crimes have already specified this problem as the reason behind several dysfunctional ties within judicial investigations and trials.

In fact, some behaviour considered in certain countries as constituting terrorist crimes cannot, by constitutional reasons, be considered crimes in other countries.

With regard to the second problematic area – the judicial value of the evidences - I am afraid that it could pose a more difficult problem.

These difficulties lie in general - as I noted before - in the framework of the constitutional procedural guarantees, which result from the diversity of the historical context of the European countries national constitutions.

In fact, the EU is composed of countries which established their democracies in different historical periods and as a consequence in different political evolutions.

There are those which have a long tradition of democracy; there are others which only after the Second World War reinstated democratic regimes; there are even some which only in the seventies were able to defeat the fascists dictatorships which governed them for many decades, and, finally, there are those which only in the nineties adopted the democratic system existing in the EU.

Those differences have created inevitably different cultures and requirements about the civil guarantees and all of those national particularities are reflected in the national procedural criminal legislation.

Of course we know that, nowadays, if an EU country needs to obtain some kind of evidence from another EU country, the required country can be asked to obtain that evidence according to the law of the requesting country.

Usually, that happens when the requesting country has legislation more exigent about the civil and procedural guarantees than the required one and consequently it cannot produce any kind of constitutional problems: *Quod abundat non nocet*.

But, as I've also noted before, this kind of cooperation was conceived by the European legislator to work normally in the context of an ordinary functioning judicial system and in the context of the common rules of the democratic state.

When we are within the rules of the emergency state, the foreseen solutions are not so clear: even because the constitutional range of the emergency state regime might not be the same in the different countries.

Among those relevant exceptional measures introduced during the emergency sate declaration, the exceptional rule and the reduced competences of the judiciary could be surely the important one; at least if we are talking about judicial cooperation.

For instance: how can the judicial authorities of a country, where an investigation is being developed regarding a transnational terrorism network and where the phone interceptions need usually to be authorized by a judge, impose on the required country, where an emergency state has been declared and where, as a consequence, phone

interceptions are the responsibility of the intelligence services, that the required interception should have been previously authorized by a judge?

The prior example is based on an hypothesis where only one of the referred countries has adopted an emergency state declaration. But what would happen if both states have adopted emergency state declarations: states of emergencies with different ranges and with different restrictions about civil rights and about the skills of the police and the intelligence services?

Those questions lead us again to the thoughts of the French judge, Marc Trévidic.

Why is it not possible to enhance the judicial system to permit it to act against terrorist crimes in a timely and efficient manner?

As we could see from the recent terrorist attacks in Paris, the terrorist acts are organized and perpetrated not in a single country, but using international networks, which work, simultaneously across and in different countries.

That is an undeniable fact.

But, what is really relevant when we try to analyse the problems concerning the ordinary judicial cooperation is that, nowadays, we already know that this terrorist phenomenon is no longer an exceptional situation, but a situation which could become permanent; or at least lasting for a long period of time.

Consequently we need to look at it as a social and political permanent condition.

That conclusion can only lead us to think about the judiciary ordinary competences and about the way one can enhance them in order to permit the normal functioning of the democratic institutions.

In fact, only good judicial cooperation can permit efficient investigations as well as effective punishments of the terrorists.

Outside of the judicial scope, the antiterrorist fight only can rely on actions of pure force and that is exactly what plays into the interests of the terrorist strategy.

We are all learning how to deal with this new type of terrorism, but to face this challenge we jurists know that it is really important to previse the future of the judicial system.

That's our job.

Terrorist acts – invented or real – have already determined the end of some democratic regimes in Europe and after the fall of those regimes, based also on the need for exceptional legislation to combat terrorism, the democratic values were destroyed and in fact Europe entered into World War II.

Preventing the trivialization of exceptional legislation we are not facilitating terrorism crimes, we are only trying to avoid the situation that could enable terrorists to achieve their political goals: the destruction of the democratic freedoms and civil guarantees in Europe.

4. That's why we need to deepen the bases of a common understanding about terrorist crimes and related ordinary procedural rules.

We must put together common experiences and expertise in order to start drawing the lines that will shape compatible European judicial systems, based on the same values and principles. We can only achieve fruitful and effective judicial cooperation by working on a daily basis with common and predictable judicial tools.

It means that only if we work strictly bounded by commonly recognized constitutional principles will it be possible to improve judicial cooperation in matters such as terrorism.

It also means that weall need to avoid, at a national level, the temptation to randomly create exceptional and temporary rules which cannot be recognized and used during the judicial cooperation procedures.

We, certainly, encourage the Commission's efforts to issue a proposal for a Directive updating the EU Framework Decision on Combating Terrorism and implementing into EU law both the UNSCR 2178 (2014) and the additional Protocol to the Council of Europe's Convention on the Prevention of Terrorism.

We certainly appeal to the UE Member States to comply with the obligations for sharing with Eurojust information concerning prosecutions and convictions for terrorist offences, resulting from Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences.

We also need to encourage the establishment of judicial cooperation agreements with third countries, inside or outside Europe, in order to improve a common approach on the way to deal with the present terrorist phenomenon.

However, we can only challenge the underlying logic and defeat the ideologically oriented terrorism and its capacity to seduce and recruit new adherents if we are able to promote actively and to sustain, in all circumstances, the Rule of Law and the democratic values.

Unfortunately, terrorism won't be in the near future an occasional problem; thus, we'd better learn how to live with it and how to defeat it.

That's the primary reason to establish, at least at an European level a permanent set of rules enabling us to ensure Europe wide and, at the time, equivalent type of crimes, comparable punishments and identical judicial guarantees.

This quest doesn't only concern the judiciary: this quest concerns society as a whole and represents an important challenge to our present civilization.