

**NEW CHALLENGES FOR PROSECUTION OF MIGRANTS TRAFFICKING:
FROM MARE NOSTRUM TO EUNAVFOR MED.
THE EXPERIENCES OF AN ITALIAN PROSECUTION OFFICE¹**

For Giovanni Salvi, Prosecutor General of Rome

Our presentation is focused on criminal prosecution of international organizations, involved in the trafficking of migrants and human beings, in the new conditions determined by EUNAVFORMED mission.

There can be no doubt that the migration phenomena are extremely complex. They are influenced by a number of pre-conditions (such as geopolitical situation; climate changes; terrorism; ethnic and religious conflicts) and conditions (mainly the “political use” of the migration flow as a tool aimed at conditioning interstate relationships). It is impossible to discuss our issue without touching on these aspects of the problem but we have to keep before us the main goal of the presentation. Any reference to the causes of the migration flows and to the political context will be strictly limited within the scope of the presentation.

Discussing migration policies is beyond the scope of the presentation. There are a number of problems related to the theme of my speech, such as the need for a comprehensive regulation of immigration, the need for a faster way of recognizing the people entitled to international protection, that means the renegotiation of the Dublin Pact, the effectiveness of the procedures for expelling people not entitled either to the protection or to humanitarian acceptance and so on. Within these problems, we must stress that refoulement is not an option. That was stated in the HREC decisions and stressed in the EU regulations, also in those relating to the EUNAVFORMED mission.

The first point to be stressed is the structural characteristic of the migration phenomena. This is a daily emergency, that will last for years: an oxymoron, but no less real.

Local or regional crises can influence, directly (as in the case of Libya) or indirectly (as in the case of Turkey) the flow, the number of migrants, their origins, the journey by land and the route by sea, the criminal organizations involved and so on. However, no local or regional consideration can stop or drastically reduce the flow as a whole: closing a door means opening others. Walls are not the answer. I'll try to give some examples to support this affirmation.

The investigations carried out in Italy, as well as in others European Countries, show that the migration flow is governed, in each of its steps, by criminal organizations: from the country of origin, through the journey by land, till the final sea crossing. There is not just one single organization but several different groups, with different references and operational modes.

There is no evidence that Mafia Type organizations, like *Cosa Nostra*, are directly involved in the trafficking. Pieces of evidence have been collected regarding various forms of interest from Terrorist organizations, territorially grounded in conflict zones (like Libya). Individuals linked with the two kind of organizations have been recently identified and arrested within the traffickers but I am not aware that there is reliable evidence pointing to the use of sea migration by terrorist fighters.

A completely different issue is the arrival in Europe, through the above mentioned route, of persons (mostly young people) that were radicalized in areas of religious conflicts. Particular attention should be devoted, as a consequence, to identifying each person arriving on European soil and to starting intelligence surveillance, when required.

Another different possibility is that the less dangerous itinerary from Turkey to the Balkans and Greece might be used by terrorist organizations.

In any case, the possibility that the routes may be used by radicalized people or by terrorist organizations reinforces the need for complete and effective identification of anyone entering on European soil.

¹ Intervento tenuto al *Consultative Forum of European Prosecutors General* della Commissione europea ed Eurojust, tenutosi all'Aia il 3 giugno 2016

These preliminary remarks were needed so as to enable us to concentrate on the specific issue of my speech, without misunderstanding.

A flow of migration, in forms completely different from the past, hit Italy in 2013-2014.

The Syrian crisis changed the trafficking routes brutally. The migrants no longer started their journey from the Libyan coasts (involved in the consequences of the Arab Spring) but from Turkey, Lebanon and Egypt.

The new route required different methodologies: not small boats any more, leaving Libya for Lampedusa, but greater vessels overloaded with migrants and towing smaller boats. The transshipping of migrants was completed on the high seas (hundreds of miles from the Italian coasts) and the smaller and unsafe boats were left to the waves.

These conditions were terribly dangerous for the passengers. It must be considered that even rescuing an overloaded boat can be a danger for the passengers: the terrified people tend to move so as to be rescued as soon as possible, but these movements cause the instability of the vessel, unfit for that kind of load. A few days ago (25th of May) TV worldwide broadcast pictures of such a shipwreck, making clear with the force of the evidence how dangerous these conditions of travelling are and how professional the rescue should be. Only the immediate intervention of the Italian Navy kept the death toll low.

Endangering people became the system adopted by the traffickers in order to reduce their costs and the risks for the crew: they abandoned the migrants in un-seaworthy boats and phoned the Italian SAR Center as a tool for completing the illegal journey. Using the mother ships they could save the main vessels that could be used again with the professional crew, whom are member of the organizations.

These practices are costly in human lives. Hundreds of migrants drowned. In one case we ascertained that migrants were deliberately murdered by the hundreds when they refused to transship in unsafe boats, in the sea loch between Egypt and Crete, on 9 September 2014: the vessel was sunk by another bigger boat and only 11 people survived.

These circumstances determined a new threat for Italian Authorities.

After the terrible tragedies of Lampedusa (3 October 2013) and Malta (11 October 2013) and after the firm stand of the European Court of Human Rights against *refoulement*², Italy decided that no person should be left in danger at sea any more.

The upshot was that not only the *scafisti*, (the last link in the chain, the “expendable” crew of the boats) should be prosecuted but so also should the mobsters at the very top of the chain.

A complete discussion of the new juridical and operational approach, originating in the efforts of the Catania Prosecution Office and upheld by the Judges and the Supreme Court, can be found in the presentation delivered in the 2014 Forum, on behalf of my former office³.

Referring to the main topics could be enough here⁴.

² The Grand Chamber, Case of HirsiJamaa and Others v. Italy (*Application no. 27765/09*) Judgment Strasbourg 23 February 2012, declared that “*the Italian border control operation of “push-back” on the high seas, coupled with the absence of an individual, fair and effective procedure to screen asylum seekers, constitutes a serious breach of the prohibition of collective expulsion of aliens and consequently of the principle of non-refoulement*”. The Court concluded its statement with a moving quotation: “*The words of Justice Blackmun are so inspiring that they should not be forgotten. Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. “We should not close our ears to it.”*”

³ Giovanni Salvi, *From Refoulement to Mare Nostrum. The fight against the smuggling of migrants by sea: legal problems and practical solutions*, The Hague, 12 December 2014. Judge Simona Ragazzi delivered a thorough review of the judicial decisions in *Protecting migrants at sea and countering the smuggling of migrants. The Italian experience*. UNODC, Vienna, 18th of May 2015. A scheme of the different issue can be found in S. Ragazzi, *Regional training Workshop in the western Balkans on Smuggling of migrants. Smuggling of migrants by sea. Challenges and interpretative solutions*, Belgrad, 4-5 November 2015.

⁴ The passage from *Mare Nostrum* to *Triton* and *Mare Sicuro*, the ongoing Italian operation, as an integration to EUNAVFORMED, aimed at guaranteeing the safety of migrants, will not be here discussed as not central to the scope

The Italian Authorities affirmed national jurisdiction on the high seas, well beyond territorial waters, and the consequent enforcement powers.

That was grounded on the International Conventions: giving the definition of transnational crime (Palermo Convention) and its enforcement in the smuggling of migrants in organized form (Migrants Smuggling Protocol⁵); specifying the right to visit and to take the necessary measures regarding vessels without flag, engaged in illicit activities (Montego Bay Convention); imposing on States the obligation of rescuing people in danger (London UNCLOS Convention), inter alia.

International Provisions are not enough in grounding jurisdiction: a link should be found with national legislation. The criteria involved in the issue are provided by the criminal code (criminal association aimed at smuggling migrants in the national territory; part of the illicit conduct taking place within national borders, and so on) and by the specific legislation on smuggling (art. 416 comma 6 penal code; art. 12 legislative decree nr. 286/1998) which made it a criminal offence to help (with a purpose of profit) migrants to get to Italy.

When migrants are deliberately endangered to obtain the intervention of Italian rescue forces, an additional link can be found, being the ask for rescue directed to Italy. In such a way the traffickers exploit the Italian international obligation as a tool to complete the illicit journey; as a consequence the traffickers are held responsible as “mediated author” of the crime (art. 48 of the Penal Code).

An important issue was considered in the case of the shipwreck of April 2015 (that we will discuss in few moments). The Prosecution Office of Catania decided that migrants should not be questioned as defendants in a penal case⁶, from which a number of consequences derive, mainly about the procedural strength as pieces of evidence. Immigration, according to the Italian law, is not a crime but a minor offence, that can be committed only by illegal entry. No attempt to commit a minor offence can be punished. As a consequence, migrants rescued on the high seas are not liable. This interpretation of the law is very important for its consequences for the trial and allows people endangered without their consent to be heard by the Court as witnesses.

The Supreme Court upheld the decisions that the Judges of Catania delivered on such a basis⁷. Maybe this approach is not relevant in countries in which different legislation is enforced, but it appears to me important to stress even this part of the difficulty faced daily in dealing with new phenomena.

The assertion and enforcement of jurisdiction over offences committed on the high seas was at stake in the discussion within UNODC, where a working group, on the basis of the Italian experience, recommended that “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”⁸.

Similar issues have been discussed within Directorate-General Migration and Home Affairs of the European Commission, in the context of the EU Action Plan against migrant smuggling (2015-2020), on the basis of Art. 7, par. 11, of the EU Regulation No. 656/2014 of 15 May 2014 *establishing rules for the surveillance of the external sea borders*. Alternatives to the enforcement of the concerned States' jurisdiction have been considered. The main one is to involve the International Criminal Court, but smuggling migrants could hardly been considered as a crime against humanity.

of this presentation.

5 The Protocol, already signed and ratified by all EU Member States, was approved by the EU Council – Council Decision 2006/616/EC and 2006/617/EC of 24 July 2006

6 Procuratore della Repubblica di Catania - Direttiva 27 April 2015

7 Supreme Court of Cassation, 48906/2015, 15 October 2015, Bikhit.

8 Report on the meeting of the Working Group on the Smuggling of Migrants, held in Vienna from 18 to 20 November 2015.

On the other hand, the latest developments in Libya need to be considered where migrant smuggling has becoming linked with the trafficking of women, destined for prostitution, which could be held as enslavement. No conclusive assertions can be made.

The new approach has allowed the Italian authorities to reach important goals. It sided the more traditional investigations, carried out by wiretapping, witnesses examination and protection, and so on, that resulted effective when the operating modes of the traffickers do not require interventions on the high seas. Palermo investigation on the Lampedusa tragedy of 2013 is a good example of this kind of proceeding.

The traffickers have been convicted by the hundreds. In a case where the engine was deliberately sabotaged, causing the sudden sinking of the boat and the death of 17 people (on 13th May 2014), the Captain was given a life sentence⁹.

In my view, the most important goal achieved was the prosecution of three of the top mobsters of two Egyptian Criminal Organizations. One of the organizations was responsible for the deliberate sinking of the boat I mentioned before; the chief of the Organization was not charged with murder, considering the lack of specific pieces of evidence about the provenance of the order. Unfortunately the Egyptian authorities refused extradition as well as assistance in the collection of evidence about the role of the defendant (a rogatory commission was delivered with specific requests concerning phone calls with the boats).

This case points up a major shortcoming in our capacity to deal with the issue: the lack of effective international cooperation. As a matter of fact, Egypt signed and ratified the Conventions above mentioned and specifically the Palermo Convention and its Protocol against migrant trafficking.

This failure has appeared also in more recent developments, when the Italian Navy were supported by military ships of European countries. If in the *Mare Nostrum* Operation the first seizure of a Mother Ship was carried out in a joint operation by the Romanian and Italian Navy, in the current phase we have to complain that cooperation during operations on the high seas has become difficult.

The trafficking organizations reacted to the Italian authorities' capacity on the high seas by changing their operational strategies. At the beginning the change appeared to be limited to the departure harbors and the routes; then a main shift was effected by the use of large merchant ships, bought at very low cost in Turkey with fake flags, carrying many more migrants that a large fishing boat was able to. The ships were abandoned by the crew off the European coasts (mainly Italian and Greek).

There were relatively few cases of these new operating modes. The abandonment of these new systems could be due to different causes, from the need for an initial investment (that was traceable by the investigators) to modifications in the Turkish approach and the opening of a different corridor.

As a matter of fact, the shift in itself is a good example of how the features and the modes of trafficking are responsive to the reactions of the enforcement agencies.

The situation described above changed dramatically in 2016. At the beginning, the ongoing Syrian Crisis, which concentrated in Turkey a large number of people seeking international protection, allowed a safer way to reach Europe through the Balkan Route and the Greek Islands (closer to the departure places than Lampedusa from Libya); then political decisions, not to be discussed here, closed the new corridor.

At the same time, the hastening of the Libyan Crisis proved fertile ground for the criminal organizations. A large part of the Libyan coasts went out of control of any recognized authorities and was taken over by militias; some of which were related to the Terrorist Organizations linked with the Islamic State or Daesh.

Libya once again became the starting point for the journey by sea of a large number of people coming mainly from the central belt of Africa, after a terrible odyssey in the desert, oppressed by

⁹ The defendant appellate the verdict; the trail is pending in the Catania Appeals Court.

the traffickers and the militias. Any kind of craft, barely able to stay afloat (old fishing boats; low cost raft, built for carrying merchandise along rivers; etc ...), were loaded with as many persons as could be fitted in with the use of force. In our investigations we collected evidence of people beaten to death to force them to leave the barracks and board the overcharged vessels.

These ways of operating endangered the migrants from the very beginning of the sea journey. A number of boats capsized or sank a few miles from the coast, within Libyan territorial waters or just outside.

The Italian tugs and the SAR specialized ships, engaged in the rescue operations, were threatened with firearms by the traffickers, with the aim of recovering the boats for further use. The military ships, which are not allowed to enter the territorial waters, were unable to offer protection because of the risk of endangering passengers.

In one case a crewman from a Libyan military vessel was arrested (then released), when the ship boarded a tug engaged in rescuing migrants.

This new, very confusing phase, ended dramatically on 18th April 2015, when an old fishing boat capsized and sank while a merchant ship was trying to rescue the passengers. Only 28 people survived. It is impossible to ascertain how many passengers were on the boat. From the statements of the survivors and the robot pictures of the wreck taken during the investigations, we believe that they were more than 700 people, compressed in every part of the vessel: on the deck, in the galley but also loaded in the hold, without any chance of escape.

The number of deaths is given by default: in a very similar case, which occurred in 2015, the Italian Navy intercepted a fishing boat of the same dimensions and shape: 887 persons were rescued.

The impact of the tragedy was immense.

What has been considered the worst peacetime disaster in the Mediterranean determined a shift in the European approach to migration by sea. Libyan stability was already at stake. So, in the following days, after a declaration of “strong commitment to act in order to prevent human tragedies resulting from the smuggling of people across the Mediterranean” from the EU Council (20 April 2015), a military operation in the Southern Central Mediterranean was launched by the Council (18 May 2015).

The operation, labeled EUNAVFORMED, was aimed at fighting the traffickers, by undertaking systematic efforts to identify, capture and destroy vessels before they are used by traffickers.

I would like to underline that in the preamble (of)/to the 2015/778 Council Decision, references were made to the international sources and obligations that grounded the above -mentioned approach of the Italian Judiciary to the national jurisdiction on the High Seas¹⁰: UNCLOS¹¹, Palermo UN Convention and its Additional Protocol¹², SOLAS¹³, SAR¹⁴. What completely changed the point of view was the shifting to a military approach, caused by the instability of Libya, causing in turn the need to confront the traffickers in the very proximity of the coast and even inside Libyan territorial waters and territory: “Measures may also be taken in the territorial or internal waters, territory or airspace of a State against vessels suspected of involvement in human smuggling or

10 “The UNCLOS, SOLAS and SAR Conventions include the obligation to assist persons in distress at sea and to deliver survivors to a place of safety, and to that end the vessels assigned to EUNAVFOR MED will be ready and equipped to perform the related duties under the coordination of the competent Rescue Coordination Centre. (7) On the high seas, in accordance with relevant domestic and international law, States may interdict vessels suspected of smuggling migrants, where there is flag State authorisation to board and search the vessel or where the vessel is without nationality, and may take appropriate measures against the vessels, persons and cargo”.

11 The 1982 United Nations Convention on the Law of the Sea (UNCLOS)

12 the 2000 Protocols against the Smuggling of Migrants by Land, Sea and Air (the Protocol against the Smuggling of Migrants) and to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

13 the 1974 International Convention for the Safety of Life at Sea

14 the 1979 International Convention on Maritime Search and Rescue (SAR),

trafficking, with the consent of that State or pursuant to a UN Security Council Resolution, or both”.

The main target of the mission is to “identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers” (art 1).

EUNAVFORMED is to be conducted in sequential phases:

(a) in a first phase, support the detection and monitoring of migration networks through information gathering and patrolling on the high seas in accordance with international law;

(b) in a second phase, (i) conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking; (ii) in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, conduct boarding, search, seizure and diversion, on the high seas or in the territorial and internal waters of that State, of vessels suspected of being used for human smuggling or trafficking, under the conditions set out in that Resolution or consent.

We are now in the second phase. The UN Security Council not having delivered any Resolution on the issue and no authorizations coming from Libya, the second phase is limited to non-territorial waters (Phase 2 – alfa, started on 7th October).

The third phase presupposes a UN Resolution or consent by the coastal State concerned; as said, these conditions are not in force. So it is not at the moment 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”.

EUNAVFORMED has modified drastically the judicial approach to the problem. First of all, the operations are conducted by military ships of different countries, with different judicial and institutional systems and backgrounds. So, as an example, the presence on board of Italian police staff is no longer permitted, which in the past made the difference in collecting evidence from the very beginning in a form that can be used in court.

More deeply, EUNAVFORMED is a military operation, carried out well inside Libyan territory, even if from the outside.

The operation could be considered a preemptive one; that is pretty good: the criminal approach, as a matter of fact, is important but not enough. Preemption means shifting in the direction of intelligence as well. Pieces of information gathered by intelligence are often not useful in court. So, reaching a balance between prosecution and preemption might not be easy.

The juridical tools worked out in 2014/2015 (Jurisdiction on the high seas; enforcement of jurisdiction; “mediated authorship” and so on) are no longer useful in the Libyan situation, as faced by EUNAVFORMED.

An effort to enhance our capacity, linking preemption and prosecution is our current target. That could enable us to hit the Organizations based in the Libyan territories, at the beginning only by gathering pieces of evidence (and of intelligence), then using them wherever and whenever possible.

Good results were obtained in the past following the path of the traffickers and their assets (Glauco Operation by the Prosecution Office of Palermo is an example, as well as the investigations carried out by the Catania Office against Somali and Eritrean organizations). This approach could be enhanced in the new conditions by a more effective international cooperation and by the use of intelligence sources.

Prosecuting the last link (the *scafista*, as defined above) is no longer a deterrent. Our most recent intelligence suggests that often they are migrants press-ganged as part of the payment or obliged to take the helm. They have no value at all for the Organization.

An effort to combine intelligence and prosecution of the top level traffickers should be made.

EUNAVFORMED has considered the importance of the issue. Cooperation within the relevant Member State authorities is provided by the Resolution, as well as collection of data concerning persons rescued to be released to the enforcement authorities.

Article 12 provides a framework for the exchange of classified information. That can ground an enhancement in cooperation, also in the prosecution field. The agreement between FRONTEX and the Commander Staff of EUNAVFORMED provides for the presence of an Italian liaison officer aboard, with the aim of ensuring cooperation with the judicial authorities but, to the best of my knowledge, this provision has not been enforced.

The Procuratore Nazionale Antimafia e Antiterrorismo delivered recently a Directive to the Antimafia Directorates¹⁵. The Prosecution Office of Catania as well delivered instructions to the Specialized Team and to the Italian authorities linked to the District Attorney Office¹⁶. These guidelines deal with a number of topics emerging from the first experiences: the ground for Italian jurisdiction (when and on which basis could now be asserted); how to collect pieces of evidence; if, when and how to enforce seizures and arrests.

One of the more important problems which arose in the field is also discussed: what is the role of the liaison officer aboard? Could he be considered a judicial officer who can execute judicial orders from Italian authorities (when jurisdiction is asserted) and take such measures directly, when allowed by the law? Or is he simply an observer?

These issues and others were thoroughly discussed in a seminar organized in Rome on 13th of May 2016 by the Italian Navy, command of the EUNAVFORMED - operation Sophia.

One of the main problems, that could not have arisen in the past, is whether and how to prosecute, in a legitimate way, suspected smugglers or traffickers who may be apprehended at sea in Libyan sovereign waters by ENFM units in subsequent phases of the operation. Among the possible solutions, invoking the International Criminal Court jurisdiction for the traffickers of human beings as the “XXI century new slaveholders” was also discussed; this met with a negative response for the moment, considering the differences between migrant smuggling and human trafficking.

It was also shown how different challenge for the SAR operations is from the past: the Italian Coast Guard provided its experience in managing the flow of migrants, when traffickers are adapting their tactics to the evolutions of the operations. Tackling the logistics behind smuggling, specifically addressed in the working groups, can be a particularly effective tool in the Libyan context.

Another issue at stake, inter alia, was how to share respective experiences in the field of information exchange. Eurojust representatives delivered a specific briefing on the matter. In my view, this is one of the major topics to be addressed, not only in the form of information sharing, but also in that of the operational use of classified pieces of information. Eurojust is an important point of reference and could be even more useful as a permanent link between law enforcement agencies, judicial authorities, intelligence.

At the moment we have to admit that the prosecution approach is no longer effective, due to the lack of international cooperation and (mainly) to the radical transformation of the trafficking itself.

A conclusive remark.

The Italian Government has started a difficult operation aimed at recovering the corpses of the passengers of the April 2015 shipwreck. This costly operation (from an economic point of view but also from an emotional one for the people involved, as I personally experienced) is not relevant for collecting evidence: immediately after the event we made use of a specialized ship of the Italian Navy. The robot governed by the ship was able to give us the needed information, (that enabled us with enough pieces of) providing us with sufficient evidence to prosecute the Captain of the fishing boat and a surviving member of the crew. They are now in court.

15 Attached the Directive, in Italian. It was signed by Filippo Spiezia, now Italian Member for Eurojust.

16 Attached the paper, informal and in Italian.

The Italian Government, with the support of the judicial authorities, decided to recover the corpses in order to give them burial and to collect information to be used in the future for identification.

So far 198 corpses have been recovered. They will be buried in Italy, in Sicily, some of them near the monument built by the Catania Community in the center of the cemetery, in which several migrants have already been buried.

This is a part of the Italian approach to the migration issue, as a warning against losing our soul, remembering that all of us have been migrants in our distant or recent lives as peoples.

The Hague, 3 June 2016