Introduzione

*Vincenzo Militello *, Alessandro Spena ***

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1. Le sfide attuali del sistema penale fra impegno di ricerca e nuovi percorsi didattici

Se un penalista, dopo essersi isolato dal mondo negli ultimi anni, decidesse di rientrare nella vita attiva approdando in un qualsiasi stato dell'Unione Europea e volesse subito informarsi sui settori di intervento che di recente più hanno messo alla prova i rispettivi sistemi penali, riceverebbe certo risposte differenziate a seconda dell'interlocutore, ma difficilmente non vedrebbe nella lista in questione i tre ambiti problematici che conducono e delimitano la raccolta di contributi di seguito presentati.

Mobilità, sicurezza e nuove frontiere tecnologiche sono settori che – per ragioni tanto obiettive quanto di rappresentazione collettiva dei fatti connessi – hanno assunto un ruolo trainante nell'evoluzione/trasformazione del diritto penale e processuale penale dei paesi occidentali e segnatamente europei. È stato questo il motivo principale che ci ha indotti – quando nel 2015 partecipammo ad una *call* dell'Unione Europea nell'ambito del programma *Jean Monnet* per progettare un modulo didattico triennale – a scegliere la triade "Mobilità, sicurezza e nuovi media" come gui-

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da per indagare e sforzarsi di comprendere tanto le specifiche esigenze poste da ciascuno di questi temi, quanto i fili che intrecciano in vario modo le relazioni reciproche.

Per fare ciò si è pensato non solo ad un *parterre* di colleghi esperti a livello internazionale per qualificare le tappe di approfondimento dell'indagine, ma anche ad una formula che li affiancasse con qualificati operatori di giustizia, in modo da arricchire la trattazione dei vari temi con la forza dell'esperienza e la varietà dei casi concreti. Fra il marzo 2016 e il maggio 2018 si sono così svolti tre corsi su ciascuno dei temi suddetti idealmente collegati all'interno di un *Modulo Jean Monnet*[1], aperto tanto a studenti degli ultimi anni del corso di laurea magistrale, quanto a dottorandi, dottori di ricerca, tirocinanti giudiziari, avvocati. La positività dell'esperienza – nel corso di 12 incontri per anno, per un totale di 48 ore annuali e 136 complessive – è stata comprovata dall'avere sempre raggiunto il numero di iscritti programmato annualmente (75) e dalla presenza nel secondo e nel terzo anno di molti dei frequentanti precedenti, che hanno così seguito l'intero percorso didattico e di approfondimento dei tre ambiti problematici.

Secondo un modello in cui impegno di ricerca e attività didattica – piuttosto che essere pensati come in reciproca opposizione – devono coniugarsi per ottimizzare i rispettivi risultati, la preparazione e la trattazione della griglia di argomenti programmati ha stimolato in molti casi i docenti ad approfondire o tematizzare profili innovativi delle questioni che erano chiamati ad illustrare, così come è stata l'occasione per alcuni giovani studiosi per mettersi alla prova nell'intervenire su alcuni aspetti via via connessi ai temi trattati dai singoli docenti. Da qui l'idea di non lasciare che il frutto di questo impegno corale restasse affidato solo alla memoria dei partecipanti diretti, per pensare piuttosto ad una più ampia diffusione di almeno alcuni dei suddetti contributi.

Ne è risultato il presente volume, che se certo non esaurisce la trattazione della varietà e complessità di profili che ciascuno dei tre ambiti problematici presenta, tuttavia può aiutare a delineare un quadro composto da una serie di tratti significativi di essi. Inoltre esso evidenzia non solo l'importanza degli sviluppi che ciascuno di essi ha segnato nei tempi più recenti nel nostro ed in alcuni altri sistemi penali, ma anche il ricorrere, nei tre pur distinti ambiti esaminati, di esigenze comuni in termini di garanzie e di rispetto di una politica criminale razionale. Al contempo, la

[1] *Jean Monnet Module 2015-18 – Project Number: 565689–EPP–1–2015–IT–EPPJMO – Grant Decision Nr. 2015-2231/001 – 001 of the Education, Audiovisional and Culture Executive Agency*.

pubblicazione dei principali risultati raggiunti nel *Modulo Jean Monnet* rappresenta una tappa intermedia per un ulteriore progetto su tematiche in parte connesse, che stiamo conducendo dal 2017 sul tema dei traffici illeciti nel Mediterraneo [2], e dalla sinergia fra questi percorsi di ricerca ci aspettiamo un ritorno di ulteriori spunti di riflessione e approfondimento per la migliore prosecuzione del lavoro in corso.

2. Struttura e lineamenti del libro

2.1. *La mobilità della persona straniera migrante*

Le tre sezioni di questo libro rispecchiano la tripartizione tematica su cui si è articolato il *Modulo Jean Monnet*. Entrambi si sviluppano secondo una logica di scansione progressiva, in cui ciascun passaggio ha sia una rilevanza propria, che lo rende meritevole di autonomo approfondimento, sia un rapporto di implicazione con gli altri, che ne giustifica la trattazione in un contesto unitario. Tra i temi della mobilità, della sicurezza e del progresso tecnologico si possono, per vero, individuare diverse linee di connessione. Quella che emerge in questo libro è, più o meno, la seguente. Punto di partenza ne è la mobilità – qui intesa essenzialmente come mobilità della *persona straniera migrante* – e le diverse questioni che essa solleva. Se l'immobilità è ordine – nel senso di vita consolidata, pacificata – la mobilità ne rappresenta la rottura: essa scuote un ordine, rimescola posizioni, crea incontri ma per ciò stesso anche scontri; dunque inquieta, spiazza, solleva questioni. Di tali questioni, per la rilevanza cruciale che ormai, a livello italiano ed europeo, è attribuita al tema della mobilità della persona straniera, viene inevitabilmente investito anche il diritto penale, il quale la prende in considerazione essenzialmente da due prospettive diverse. Innanzitutto, dal punto di vista dell'interesse dello stato (e dell'Europa) ad una regolazione dei flussi migratori (su cui si veda, per tutti, Corte cost. n. 250/2010), e dunque al controllo dei propri confini come premessa (meglio, come una delle premesse) al controllo del territorio e al mantenimento dell'ordine pubblico. In secondo luogo, dal punto di vista – opposto a (o comunque, non perfettamente coincidente con) il precedente – degli interessi del soggetto che si sposta o viene spostato (chiamiamolo, per semplicità, il migrante): per quanto un certo tipo di discorso politico, oggi vincente, tenda ad ometterlo, messa in gioco in ogni spostamento è innanzitutto la posizione del migrante, il quale – oltre

[2] *PMI-Impact 2017-19 – The New Era of Smuggling in the Mediterranean Sea*.

a cambiare ambiente, a giungere in luoghi e tra gente sconosciuti e talora (oggi, forse, troppo frequentemente) ostili – è spesso costretto ad affidarsi a soggetti i quali sfruttano la sua condizione di irregolarità e il suo desiderio/bisogno di spostarsi.

Emblematica di questo duplice punto di vista sul tema della mobilità umana è, in particolare, l'incriminazione del cosiddetto *smuggling*: per lo più concepito come reato contro lo stato (il diritto italiano lo chiama, non a caso, "favoreggiamento dell'immigrazione clandestina"), esso tuttavia mette in questione anche gli interessi dello straniero *smuggled*, sia perché di norma avviene per finalità di profitto, con sfruttamento dunque della precaria posizione in cui quegli versa, sia perché, con significativa frequenza, esso comporta pure che la persona straniera venga sottoposta a trattamenti inumani o comunque pregiudizievoli per la sua vita e integrità fisica.

Su queste tematiche, la prima sezione del libro fornisce un ampio spaccato. Le questioni della mobilità vi sono trattate, innanzitutto, attraverso una analisi della rilevanza penale del fenomeno migratorio – sia in ottica inter- e sovranazionale (*Mitsilegas*), sia in ottica interna (italiana: *Militello*; e straniera: *Cancio Meliá*) – mettendo in luce: le ambiguità implicate nella criminalizzazione dello *smuggling*, e nella concezione dello straniero che da questa emerge (coautore o vittima? Soggetto o oggetto del fatto?) [3]; la tendenza dello stato ad estendere la propria giurisdizione oltre i confini territoriali nella repressione dello *smuggling* (*Orlando*); il trattamento penale e penale-amministrativo riservato allo straniero irregolarmente entrato o rimasto nel territorio dello stato (oltre agli altri contributi già citati, e con particolare riferimento al multiforme istituto dell'espulsione, *Siracusa*). Alla analisi di questi profili, la sezione affianca anche uno specifico approfondimento, da un punto di vista italiano (*Omodei*) e spagnolo (*Diaz Morgado*), della tratta di esseri umani, quale forma di mobilità forzata della persona (spesso, ma non necessariamente, straniera) e dunque come figura criminosa limitrofa rispetto allo *smuggling*, da cui la divide appunto, almeno in linea di principio, proprio il diverso ruolo ricoperto dal trasportato.

La prima sezione si chiude con una apertura al di là del diritto penale, verso una trattazione della mobilità da un punto di vista costituzionalistico che pone al centro il problema del difficile equilibrio, che lo stato è chiamato a trovare, tra diritti del migrante e tutela della sicurezza interna (*Cavasino*). Questa prospettiva si pone come gancio ideale rispetto alla seconda sezione, dedicata proprio al tema della sicurezza.

[3] Su ciò si vedano, soprattutto, in questo volume, i contributi di *Mitsilegas* e *Militello*.

2.2. *Sicurezza, terrorismo e le mutevoli vie della prevenzione*

Se nella prima sezione la mobilità della persona, e dello straniero in particolare, entra in gioco di per sé stessa, come oggetto di tutela o di incriminazione, nella seconda essa entra in gioco indirettamente, quale possibile preludio a questioni di sicurezza. Il tema vi viene, in particolare, affrontato, non nella sua dimensione complessiva e in tutte le sue possibili sfumature (ragioni di spazio non lo consentirebbero), ma con specifico riguardo al terrorismo e alla sua prevenzione, in armonia, del resto, con il focus specifico del secondo anno del Modulo *Jean Monnet* da cui questo lavoro, come detto, trae origine.

Mobilità e terrorismo sono legati in vari modi: i legami che emergono in questo libro discendono in particolare dal fatto che il tipo di terrorismo che in questi ultimi quindici/vent'anni ha destato il maggior interesse in Italia e in Europa, ossia il cosiddetto terrorismo internazionale di matrice islamica, costituisce esso stesso un fenomeno eminentemente mobile, che cioè si caratterizza per un elevato grado di mobilità umana e strutturale. Il riferimento alla mobilità umana non è qui inteso, ovviamente, nel senso di avvalorare l'infondato panico morale nei confronti dell'immigrato (soprattutto se proveniente dal Maghreb o dal Medioriente) come potenziale terrorista; tuttavia, se per un verso è semplicemente falso che gli attori del terrorismo internazionale siano esclusivamente soggetti stranieri, per altro verso è anche vero che il terrorismo cosiddetto *islamico* in Europa ha fin qui avuto almeno indirettamente a che fare con l'immigrazione: se non altro perché la gran parte dei soggetti attivamente coinvolti, in territorio europeo, in atti terroristici di questo genere sono immigrati, talora di prima generazione, più spesso di seconda generazione. Questo è un dato sul quale vale la pena riflettere, e sul quale nella seconda sezione si riflette, soprattutto per quanto esso lascia emergere in merito al fondamento culturale del terrorismo e al suo rapporto, oggi particolarmente sentito, col problema della radicalizzazione (*Spena* e *Crupi*).

Ma, come si accennava, la mobilità del terrorismo internazionale emerge anche nelle sue caratteristiche strutturali: organizzazioni come al-Qaeda e l'ISIS hanno entrambe un radicamento extra-europeo che conferisce agli atti di terrorismo ad esse imputabili ma compiuti in Europa una dimensione inevitabilmente non stanziale né autoctona (come è invece, ad es., nel terrorismo nazionalista, e come era anche nel terrorismo politico degli anni '70), ma, per così dire, dinamica, fondata su connessioni organizzative, comunicative o anche soltanto simboliche tra chi opera in territorio europeo e i padri spirituali ultimi dell'atto, che invece si trovano altrove. Inoltre, il rapporto fra operativi, cellule e vertici dell'organizza-

zione è esso stesso caratterizzato da una estrema mobilità, o se si vuole fluidità, e mancanza di una rigida strutturazione: basti pensare al fenomeno dei cosiddetti lupi solitari e alla difficoltà di ricondurre questi attori entro l'idea di una vera e propria affiliazione a quelle stesse organizzazioni che nondimeno ne ispirano l'azione e che poi, a cose fatte, se ne appropriano rivendicandola come parte del proprio disegno.

Questa estrema, e variegata, mobilità del terrorismo internazionale lo rende un fenomeno assai sfuggente, il che è tra le ragioni che ne complicano il contrasto e soprattutto la prevenzione. La seconda sezione è tutta concentrata su queste difficoltà e sulle strategie adottate dagli stati e dalle istituzioni inter- e sovranazionali per superarle: in particolare, sulla diffusività delle strategie di sorveglianza (*Bachmaier*), anche attraverso strumenti di ritenzione massiva di dati personali, alla luce dell'importanza assunta dalle nuove tecnologie nella comunicazione delle informazioni e dunque nella mobilità dei dati, tematica il cui rilievo verrà approfondita nella terza sezione sotto svariati altri profili (*Galli*); sul recente imporsi a più livelli di strategie di prevenzione culturale e non preventiva, generalmente accomunate sotto l'unitario cappello della de-radicalizzazione (*Spena*, *Crupi*); e infine sulla sempre crescente rilevanza attribuita, a livello interno, europeo e internazionale, al bisogno di prevenire il terrorismo prosciugandone le fonti di finanziamento (*Palmisano*, *Vitale*). Si tratta di forme di prevenzione tutte piuttosto difformi rispetto al classico modello della prevenzione penale attraverso la criminalizzazione dell'atto terroristico: forme tutte caratterizzate da una spiccata anticipazione dell'intervento preventivo e tutte perciò problematiche, se pur per ragioni diverse, dal punto di vista del rispetto dovuto ai diritti fondamentali della persona.

2.3. *Progresso tecnologico e trasformazioni del sistema penale e processuale penale*

Prendendo spunto, tra l'altro, proprio dalla mobilità del fenomeno terroristico e dal bisogno, sempre più sentito, di porvi rimedio anche deviando dalle forme classiche dell'intervento penale, la terza sezione approfondisce, infine, l'uso di nuove tecnologie informatiche e le sue conseguenze sul sistema penale nel suo complesso. Come *trait d'union* con quella precedente dedicata alle articolate strategie di contrasto al terrorismo, quest'ultima parte del volume si apre con un approfondimento sulle questioni tanto sostanziali quanto processuali poste dalla nuova Procura Europea, da ultimo istituita dopo un prolungato dibattito. Di essa infatti già la Commissione UE programma una estensione ai reati di terrorismo,

benché rimangono ancora aperti non pochi interrogativi sui profili di responsabilità di questo nuovo organo, che inizia a dar corpo al da tempo vagheggiato – o, a seconda dei punti di vista, contrastato – sistema di giustizia penale dell'Unione Europea (*Vervaele*).

Seguono altri contributi dedicati a diversi profili dall'impatto delle tecnologie informatiche sul sistema di giustizia penale, che prestano particolare attenzione, in primo luogo, ai molteplici aspetti problematici connessi all'uso del cosiddetto captatore informatico, che ha mostrato nella prassi la tendenza a tradursi in forme probatorie rispetto alle quali il confine fra atipicità ed illiceità è particolarmente sottile (con considerazioni di respiro generale *Di Chiara*, e quindi per aspetti più specifici anche *Maggio* e *Parlato*); in secondo luogo, alle profonde novità collegate alla cosiddetta prova elettronica conservata oltreconfine, detenuta cioè da prestatori di servizi che si trovino in uno stato diverso da quello nel quale si procede (questione fatta recentemente oggetto di una proposta di Regolamento e di una proposta di Direttiva della Commissione UE, alla cui analisi è dedicato il contributo di *Mangiaracina*). Infine, a chiusura di un percorso in cui le varie dimensioni del sistema penale si distinguono ma non dimenticano le loro interrelazioni, il volume segnala come il ricorso ad indagini ad alto contenuto tecnologico, oltre che questioni relative alla tenuta del sistema di garanzie proprie del processo penale, solleciti anche una ulteriore e più generale riflessione in merito al rispetto dovuto a diritti fondamentali della persona, in particolare in relazione alla emersione di due nuovi beni penalmente rilevanti, quali la "riservatezza informatica" e la "sicurezza informatica" (*Flor*).

3. Ringraziamenti

Un ringraziamento particolare, oltre che a tutti gli Autori dei contributi che seguono, anche alle istituzioni che hanno sostenuto lo svolgimento dell'intero *Modulo Jean Monnet* e gli eventi di presentazione e diffusione dei relativi risultati: il Dipartimento di Giurisprudenza dell'Università di Palermo; la Corte di Appello di Palermo e il relativo ufficio per la formazione decentrata della Scuola Superiore della Magistratura; il Consiglio dell'Ordine degli Avvocati di Palermo; oltre alla Città di Palermo e all'Ambasciata tedesca in Italia.

Inoltre, per l'aiuto redazionale nella preparazione del presente volume, un sentito ringraziamento sentiamo di rivolgere ai dottorandi *Emanuela Garbo* e *Baldo Morello* e alla studentessa *Giulia Giambona*.

Parte I

La mobilità della persona straniera migrante

The Criminalisation of Human Smuggling as Preventive Justice

Valsamis Mitsilegas *

1. Introduction [1]

Recent responses to addressing migration flows towards Europe have centered on criminalising and prosecuting human smuggling. Criminalisation and prosecution can be seen as a manifestation of a paradigm of preventive justice. Preventive justice is understood for the purposes of our analysis as the exercise of state power in order to prevent future acts which are deemed to constitute security threats. Preventive justice has the effect of extending the scope of criminal law to gradually remove the link between criminalisation and prosecution on the one hand and the commission of concrete acts on the other [2] placing criminal justice within the framework of the 'preventive state' [3] thus transforming criminal law into

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[1] An extended version of this chapter will be published as V. MITSILEGAS, *The Criminalisation of Human Smuggling between European and International Law*, in *The Limits of the Preventive Justice Paradigm*, in *New Journal of European Criminal Law*.

[2] A. ASHWORTH, L. ZENDER, *Preventive Justice*, Oxford, 2014.

[3] See inter alia P.A. ALBRECHT, *La Politique Criminelle dans l'État de Prévention*, in *Déviance et Société*, 1997, vol. 21, p. 123 ss.

'security law'[4]. Preventive justice is thus forward rather than backward looking; it aims to prevent potential threats rather than punishing past acts[5]. This preventative focus is accentuated in the case of extraterritorial immigration control, where state efforts are centered on deflecting migration flows and preventing migrants from reaching the border or the territory of the controlling state[6]. Placing the criminalisation of human smuggling within this paradigm of preventive justice, the article will focus on the different manifestations of criminalisation, and provide a critique of the normative foundations of criminalising human smuggling. The criminalisation of human smuggling has been framed in conjunction with a wide variety of categories of conduct ranging from organised crime to humanitarian assistance to irregular entry, with recent calls being made for smuggling to be treated as a crime against humanity. The analysis will cast light on the ambiguity behind the criminalisation of human smuggling and evaluate critically attempts to adopt a 'catch-all'approach towards criminalisation. The limits of this approach will be demonstrated, place within the framework of the underlying aim of the criminalisation of migrant smuggling which is the deflection of migrant flows and the prevention of entry.

2. Human Smuggling as Organised Crime

In evaluating the criminalisation of human smuggling in international law, the starting point must be the framing of human smuggling offences as organised crime offences. The primary international law framework for the criminalisation of human smuggling is the 2000 United Nations Convention on Transnational Organised Crime (the Palermo Convention)[7]. A separate Protocol addresses human smuggling, and its opening provision confirms that the Protocol supplements the Palermo Convention and must be interpreted together with it[8]. The framing of human

[4] U. SIEBER, *Der Paradigmenwechsel vom Strafrecht zum Sicherheitrecht, Max Planck Institut fur auslandisches und internationals Strafrecht*, also appeared in *Tiedemann/Sieber/Satzger/Burchard/Brodowski*, Baden-Baden, 2016, pp. 351-372.

[5] V. MITSILEGAS, *EU Criminal Law After Lisbon*, Oxford, Portland Oregon, 2016, chapter 9.

[6] B. RYAN, V. MITSILEGAS, *Extraterritorial Immigration Control: Legal Challenges*, Leiden, 2010.

[7] The United Nations Convention against Transnational Organized Crime and the Protocols thereto, 15 November 2000.

[8] Article 1(1) of the Smuggling Protocol.

smuggling within an organised crime context is further confirmed by its very definition: according to the Protocol, smuggling of migrants means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident [9]. Criminalisation of smuggling must be based on intentional conduct with the aim of obtaining a financial or other material benefit [10]. The express inclusion of the requirement to obtain such a benefit is a clear indication that the drafters of the Protocol on the one hand viewed smuggling within the framework of organised crime, and on the other that they wished to exclude from the definition and criminalisation of smuggling acts which did not have a material/financial motive such as humanitarian assistance. According to an Interpretative Note to the Protocol,

> "the reference to 'a financial or other material benefit'was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations" [11].

The above analysis helps to clarify what human smuggling is about (organised crime) and what it is not about (humanitarian or family assistance) in the eyes of the United Nations legislator [12]. A further question

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[9] Article 3(3) of the Smuggling Protocol. Emphasis added.

[10] Article 6(1) of the Smuggling Protocol.

[11] UN General Assembly, *Report of the Ad Hoc Committee on the elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, Addendum: Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc. A/55/383/Add.1, 3 November 2000, p. xxv. See UNODC, *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, New York, 2004, p. 24, according to which the intention of the drafters was to require legislatures to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-seekers (para. 32).

[12] See UNODC, *The Concept of 'Financial' or Other Material Benefit in the Smuggling of Migrants Protocol*, Vienna, 2017, p. 14, according to which the Protocol does not seek, and cannot be used as the legal basis for, the prosecution of those acting with hu-

which arises is whether criminalisation under the Protocol includes criminalisation of irregular entry. The smuggling Protocol contains two different provisions which are relevant in this context. On the one hand, Article 5 states that migrants must not become liable to criminal prosecution under the Protocol for the fact of having been the object of the smuggling offences set out therein. On the other hand, Article 6(4) of the Protocol appears to leave a degree of discretion to Member States regarding the criminalisation of non-smuggling related immigration offences, by stating that nothing in the Protocol prevents State Parties from taking measures against a person whose conduct constitutes an offence under its domestic law. The combination of the two provisions does not provide with optimal legal certainty. Gallagher and David are of the view that the Protocol takes a neutral position on whether those who migrate irregularly should be the subject of any criminal offences [13]. McClean notes that the final position reflects disagreement among States, with certain states being apprehensive regarding granting immunity to illegal migrants especially if they had committed a crime, including the smuggling of other illegal migrants [14]. On the other hand, di Martino points out that the Protocol does not apply to those immigrants who, according to international law, should not be criminally liable for the mere fact of their irregular immigration [15]. There are two arguments which militate in favour of the exclusion of criminalisation of irregular entry from the scope of the smuggling Protocol. The first argument relates to the protection of the rights of the smuggled migrants, which forms – together with combatting smuggling and promoting inter-state cooperation – the key purpose of the Protocol [16]. The second argument relates to the Protocol's explicit treatment of human smuggling as a form of organised crime. According to the Legislative Guide for the Implementation of the Protocol,

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manitarian intent or on the basis of close family ties where there is no purpose to obtain a financial or other material benefit.

[13] A.T. GALLAGHER, F. DAVID, *The International Law of Migrant Smuggling*, New York, 2014, p. 47.

[14] D. MCCLEAN, *Transnational Organized Crime: A Commentary on the United Nations Convention and its Protocols*, Oxford, 2007, pp. 388-389.

[15] A. DI MARTINO *et al.*, *The Criminalzation of Irregular Immigration: Law and Practice in Italy*, Pisa, 2013, p. 83.

[16] Article 2 of the Smuggling Protocol. On the drafting history and importance of adding human rights protection expressly as a Protocol objective see MCCLEAN, *op. cit.*, p. 379. Also see A.T GALLAGHER, F. DAVID, *op. cit.*, pp. 47-48. See also the savings clause in Article 19(1) of the Smuggling Protocol according to which nothing in the *Protocol* must affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law.

> "[t]wo basic factors are essential to understanding and applying the Migrants Protocol. The first is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned (see articles 5 and 6, paragraph 4, of the Protocol). Mere illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or other material benefit), on the other hand, has been recognised as a serious form of transnational organized crime and is therefore the primary focus of the Protocol" [17].

This teleological approach, emphasising the dual primary purposes of the smuggling Protocol to counter transnational organised crime, while at the same time protecting the rights of migrants, has been influential in a major interpretation of the scope of criminalisation of human smuggling by the Canadian Supreme Court. In the case of Appulonappa [18], the Canadian Supreme Court rejected the broad criminalisation advocated by the Canadian Government by interpreting domestic law in conformity with international law, in particular with the Smuggling Protocol. The Court stressed the requirement of the Protocol to criminalise smuggling for financial or other material benefit and noted that it would depart from the balance struck in the Protocol to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid [19]. According to the Court, Canada's international commitments support the view that the purpose of domestic criminal law is to permit the robust fight against people smuggling in the context of organised crime, which excludes criminalising conduct that amounts solely to humanitarian, mutual or family aid [20]. While the security goals of domestic law are important, they do not supplant Canada's commitment to humanitarian aid and family unity [21]. In a powerful statement, Judge Beverley McLachlin noted that under the Crown's interpretation, 'a father offering a blanket to a shivering child, or friends sharing food aboard a migrant vessel,

[17] UNODC, *Legislative Guide*, *supra*, note 23, para. 28.

[18] *R. v. Appulonappa*, [2015] 3 SCR 754.

[19] Para. 44.

[20] Para. 45.

[21] Para. 57.

could be subject to prosecution' [22]. By stressing the need for the existence of the element of the financial gain for the criminal offences of human smuggling to be substantiated, the Canadian Supreme Court has placed important limits to the criminalisation of smuggling and has reminded us of the original purpose of the UN legislator in the field.

3. Human Smuggling as a Humanitarian Crime

The link between human smuggling and organised crime has not been the only route towards criminalising smuggling. With the parameters and limits in the criminalisation of human smuggling in the primary source of international law – the UN Palermo Convention and its Smuggling Protocol – being defined in the previous section, the EU approach to the criminalisation of human smuggling can be seen as a challenge to the principles underpinning the UN framework. This is the case in particular regarding the criminalisation of humanitarianism. The relevant EU legal framework is set out by a Directive defining what is called in EU law the "facilitation of unauthorised entry, transit and residence" [23] accompanied – in the light of the first pillar competence limits regarding criminalisation at the time – [24] by a third pillar Framework Decision confirming that the conduct defined as facilitation in the Directive will be treated as a criminal offence [25]. Both instruments of what is rather 'old' law by EU standards predate by far the entry into force of the Lisbon Treaty and, having being proposed not by the Commission but by a Member State (the French Government), they have been negotiated and adopted with minimal scrutiny and debate [26]. The EU Facilitation Directive goes further than the Smuggling Protocol in that it dispenses with the condition of obtaining a financial or other material benefit for the smuggling offence to

[22] Para. 57.

[23] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence [2002] OJ L328/4 (hereinafter Facilitation Directive).

[24] For an overview, see V. MITSILEGAS, *EU Criminal Law*, Oxford, Portland Oregon, 2009, ch. 2.

[25] Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence [2002] OJ L328/1 (hereinafter Facilitation Framework Decision).

[26] For a background, see V. MITSILEGAS, J. MONAR, W. REES, *The European Union and Internal Security*, Hampshire and New York, 2003, pp. 106-108.

be established[27]. The Directive calls upon Member States to adopt criminal sanctions for "any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens"[28]. The Facilitation Framework Decision contains a general obligation for Member States to criminalise such conduct[29] and imposes specific high levels of sanctions only when certain aggravating circumstances occur[30].

In spite of the lack of specificity as regards the level of criminal sanctions to be imposed by Member States, it is clear that the scope of criminalisation at EU level is very broad, as it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law (such as cases where the migrant is traveling without travel documents). It is clear that the EU approach aims at preventing entry into EU territory and targets not only the smugglers but also the smuggled. Alessandro Spena makes an insightful point in legal semiotics by drawing our attention to the terminological differences between international law, which defines smuggling as procuring irregular entry, and EU law, which focuses on assistance. Spena notes that "while assisting denotes an ancillary action, which entails that the principal action is performed by the person who is assisted, 'procuring' denotes instead a stand-alone action, with a meaning of its own"[31]. The negative

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[27] Article 1(1)(a) of the Facilitation Directive.

[28] *Ibid.*

[29] According to Article 1(1) of the Framework Decision, each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of the Directive are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition (Article 1(3)). Article 1(6) of the Facilitation Framework Decision further states that if imperative to preserve the coherence of the national penalty system, the actions defined in paragraph 3 shall be punishable by custodial sentences with a maximum sentence of not less than six years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

[30] According to Article 1(3) of the Facilitation Framework Decision, Member States must ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances: the offence was committed as an activity of a criminal organization; and the offence was committed while endangering the lives of the persons who are the subject of the offence.

[31] A. SPENA, H*uman Smuggling and Irregular Immigration in the EU: From Complicity to Exploitation?*, in S. CARRERA, E. GUILD, *Irregular Migration, Trafficking and Smuggling of Human Beings*, Brussels, 2016, p. 37.

impact of the EU approach towards criminalisation on third country nationals wishing to apply for asylum is evident. The Directive does attempt to address this issue by granting Member States the discretion not to impose sanctions for human smuggling and instead apply their national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned [32]. However, this provision is discretionary and its value in redressing the balance set out by the broad definition and criminalisation of human smuggling under EU law is questionable. According to a recent Commission Report, only seven Member States specifically include in domestic law an exemption from punishment for facilitation for humanitarian assistance [33]. By using the threat of criminal sanctions, the EU measures on human smuggling essentially aim at deterring individuals and organisations from coming into contact and assisting any third country national wishing to enter the territory of EU Member States. As has been noted in an Issue paper published by the Council of Europe Commissioner for Human Rights, "the message which is sent is that contact with foreigners can be risky as it may result in criminal charges" [34].

The recent evaluation by the Commission of the EU criminal law framework on human smuggling provided an opportunity for law reform in order to align the EU framework more closely with the approach adopted by the UN Convention on Transnational Organised Crime and to address the human rights concerns arising from the overcriminalisation of the facilitation of unauthorised entry, transit and residence. Yet, the opportunity for law reform along these lines has been markedly and spectacularly missed: in its evaluation, the Commission has come up defending resolutely the status quo [35]. While the Commission seems to accept an organised crime framing of human smuggling, by noting that the flows of irregular migration across borders are thought to be increasingly controlled by criminal networks, [36] it declined to put forward proposals for law reform to expressly include a requirement for financial gain in the

[32] Article 1(2) of the Facilitation Directive.

[33] Commission, *Staff Working Document – REFIT Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence*, SWD (2017) 117 final, Brussels, 22 March 2017, p. 14.

[34] Council of Europe Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications* (Issue paper prepared by Elspeth Guild, 2009) available at *https://rm.coe.int/16806da917*.

[35] Commission, *supra*, note 45.

[36] *Ibid*., p. 4.

scope of the EU criminal offences on human smuggling. The Commission claimed that to date there is still limited intelligence available on the nature and extent of illicit financial flows associated to migrant smuggling, and noted that:

> "the cash intensive nature of the payment methods linked to smuggling makes it difficult to trace illicit financial flows and in turn to conduct investigations on the financial nature of the crime […] since the time of the adoption of the Facilitators Package and still today, the risks that such difficulties in tracing financial flows connected to migrant smuggling would disproportionately hamper the investigation and prosecution of this crime, affecting states'legitimate interest to control borders and regulate migration flows, have been raised as a reason to avoid including a constituent financial gain element in the offence of facilitating irregular border crossing" [37].

The Commission adds that it is difficult to disentangle the effects of the legal framework from the wider array of policy tools and enhanced operational cooperation to counter migrant smuggling, which have been triggered by the crisis' [38] and therefore that 'there is no sufficient evidence to draw firm conclusions about the need for a revision of the Facilitators package at this point in time' [39].

The Commission's reasoning for inaction is weak and lop-sided. Rather than examining critically the legality and effectiveness of the current EU substantive criminal law framework on human smuggling, it justifies choices in criminalisation on the grounds of boosting investigatory and prosecutorial interests. In this manner, substantive criminal law becomes a mere tool for prosecutorial efficiency, rather than reflecting normative or societal choices for criminalisation. By declining to adjust EU law, the Commission has missed three opportunities: to align EU law with international law on the criminalisation of human smuggling; to modernise (or 'Lisbonise') – as in the case of the "parallel" offences of human trafficking [40] the EU legal framework on human smuggling, by taking more fully into account the human rights obligations of the EU enhanced after the entry into force of the Lisbon Treaty and the constitutionalisation of the

[37] *Ibid*., p. 9.

[38] *Ibid*., p. 34.

[39] *Ibid*., p. 35.

[40] V. MITSILEGAS, N. VAVOULA, *Criminal Law: Institutional Rebalancing and Judicialization as Drivers of Policy Change*, in F. TRAUNER, A. RIPPOL SERVENT, *Policy Change in the Area of Freedom, Security and Justice – How Institutions Matter*, London-New York, 2015, p. 133.

EU Charter of Fundamental Rights [41] and, fundamentally, the Commission missed a first class opportunity for decriminalisation in the field of EU criminal law [42]. The Commission's inaction matters as it perpetuates the criminalisation of humanitarianism in EU law and sends a very strong preventative signal to anyone inclined to assist migrants. The Commission's evaluation states generally and unconvincingly that there is limited evidence that social workers, family members or citizens acting out of compassion have been prosecuted for human smuggling [43]. Yet this assertion is blatantly contradicted by recent attempts to criminalise – if not demonise – the humanitarian work of NGOs in rescuing migrants at sea. A plethora of widely documented instances of criminalisation range from the initiation of criminal investigations against NGOs in Italy for allegedly colluding with smugglers [44]. (with NGOs being called by sectors of the press as taxi services for migrants) [45] to the seizure and confiscation of NGOs' vessels [46]. Although the "pull factor" rhetoric has been rebuffed by the United Nations, [47] recent Italian initiatives (endorsed by the Commission) of "responsibilising" NGOs [48] by requiring them to co-operate

[41] On constitutionalisation, see MITSILEGAS, *EU Criminal Law After Lisbon*, cit., chapter 2.

[42] For a broader analysis on decriminalisation in EU criminal law see V. MITSILEGAS, *From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law*, in 5 *New Journal of European Criminal Law*, 2014, pp. 415-424.

[43] Commission, p. 21.

[44] 'Italy Targets Charity Ships Rescuing Migrants in the Mediterranean' (*The Sunday Times*, 2 July 2017) *https://www.thetimes.co.uk/article/italy-targets-charity-ships-rescuing-migrants-in-the-mediterranean-lv9pvwm5x* accessed 8 November 2017.

[45] *Madness in the Med: How Humanitarian Efforts Are Creating An Even Greater Migrant Crisis* (*The Spectator*, 22 July 2017) *https://www.spectator.co.uk/2017/07/migrants-and-madness-in-the-med/* accessed 8 November 2017.

[46] 'Italy Seizes NGO Boat and Starts Libyan Mission (EUobserver, 3 August 2017) *https://euobserver.com/migration/138677* accessed 8 November 2017.

[47] UN Security Council, *Report of the Secretary – General pursuant to Security Council Resolution 2312*, (2016), 7 September 2017, doc. S/2017/761. Its para. 5 states: «According to Eunavfor Med operation Sophia, vessels operated by international NGOs conducted search and rescue operations just outside the Libyan territorial waters limit of 12 nautical miles. Some officials in Europe opined that search and rescue operations to prevent loss of life at sea could present a dilemma, by acting as a pull factor to those crossing irregularly and facilitating the task of smugglers who only require their vessels to reach the high seas […] push and pull factors remain complex, evidence-based approach […] first priority to save lives, presence of search and rescue operations has undoubtedly prevented countless deaths».

[48] On the responsibilisation strategy see D. GARLAND, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 in *The British Journal of Criminology*, 1996, pp. 445-471.

with law enforcement authorities[49] and more recently compelling them to sign a Code of Conduct for their operations have effectively placed humanitarian assistance under constant suspicion,[50] while recent instances of violence in the form of attacks in Libya have caused further humanitarian operations to being suspended[51]. This approach enables Member States to criminalise humanitarianism and to create a criminalisation continuum from human smuggling to humanitarian assistance in order to limit opportunities for search and rescue at sea and thus routes of access to the territory of the European Union.

4. Human Smuggling as a Crime against Humanity

The constituent elements of the main offence of human smuggling, as outlined in the Palermo Convention, involve a cross-border dimension. One of the key challenges in addressing this cross-border dimension in the enforcement of criminal law has been the delimitation of jurisdiction for the prosecution of human smuggling, including the question of whether such jurisdiction can be extended extraterritorially. Extraterritorial jurisdiction for the prosecution of human smuggling would strengthen further the preventive aims of the criminalisation framework. It may come therefore as a surprise to see that in both the UN and the EU legal frameworks, jurisdiction to prosecute smuggling remains primarily territorial, and extends extraterritorially only in limited circumstances. The

[49] Interviews conducted in Italy have revealed that some of these civil society actors have been exposed to demands by Italian authorities to cooperate in the so-called fight against smuggling, in particular with respect to reporting suspected smugglers and assisting in police investigations. There have been a few reported incidents of violence against some of these same NGOs and other boats by Libyan coast guard authorities. See S. CARRERA *et al.*, *The European Border and Coast Guard: Addressing migration and asylum challenges in the Mediterranean?*, Brussels, 2016, p. 25.

[50] Commission, *Action Plan to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity*, SEC (2017) 339 final, Brussels, 4 luglio 2017. Among the measures to reduce migratory pressure and increase solidarity and the measures to ensure better coordination of SAR, the Action Plan lists the drafting of a Code of Conduct in consultation with the Commission and on the basis of a dialogue with NGOs. It is explicitly stated that the Council could endorse such Code, which raises issues as regards the EU competence in that respect. Further questions are raised concerning the responsibility for drafting the Code, its legal status, particularly whether it will be binding and whether it shall be considered as part of EU law.

[51] 'Charities' Migrants Rescue Boats Will Carry on Despite Libyan Gunfire' (*The Times*, 15 August 2017) *https://www.thetimes.co.uk/article/migrant-rescue-charities-vow-to-stay-on-patrol-off-libya-wrzvhl586* accessed 8 November 2017.

Smuggling Protocol does not contain an express provision on jurisdiction, with such a provision being reportedly abandoned during negotiations [52]. The applicable provisions on jurisdiction are therefore those contained in the main Convention on Transnational Organised Crime itself [53]. Article 15 of that Convention establishes territorial jurisdiction [54], with extraterritorial jurisdiction being established only in cases of active [55] or passive personality [56]. EU law takes a narrower approach by establishing jurisdiction only in cases of territoriality and extraterritorially in cases of active personality, with Member States being allowed to limit extraterritorial jurisdiction [57]. The Palermo Convention adopts a broader approach in the cases of offences of organised crime and money laundering: in these cases, jurisdiction is established if an offence is committed outside a State Parties'territory with a view to the commission of a serious crime within its territory [58]. This extension of territoriality addresses the extraterritorial jurisdiction question if cases of human smuggling are prosecuted as organised crime or money laundering offences and reflects the continuous and cross-border nature of these offences, which begin in the territory of the third country but whose effects continue in the territory of the state which establishes jurisdiction to prosecute [59]. These attempts to extend

[52] A.T. GALLAGHER, *op. cit.*, p. 53; D. MCCLEAN, *op. cit.*, p. 394.

[53] Article 1(2) of the Smuggling Protocol provides: "*The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein*".

[54] Article 15(1) of the Convention states: "*Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when: (a) The offence is committed in the territory of that State Party; or (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed"*.

[55] Article 15(2) of the Convention states that "*a State Party may also estab lish its jurisdiction over any such offence when: [...] 2b) [t]he offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory*".

[56] The same article provides that jurisdiction may also be established when "*[t]he offence is committed against a national of that State Party*". However, Article 15(6) of the Convention reads as follows: "*Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law*".

[57] Facilitation Framework Decision, *supra*, note 37, Article 4.

[58] *Ibid.*, Article 15(2)(c).

[59] Italian Courts have attempted to extend jurisdiction on these terms in order to establish jurisdiction for prosecution of human smuggling offences. See S. RAGAZZI, *New Experiences in Investigating and Prosecuting Human Smuggling: From the National Dimension to a European Approach*, in V. MITSILEGAS, V. MORENO-LAX, N. VAVOULA, *Securitising Asylum Flows*, Nijmegen, 2018; E. PAPASTAVRIDIS, *Eunavfor med operation So-*

jurisdiction notwithstanding, international and EU law continue to contain limited references to extraterritorial jurisdiction for smuggling offences [60]. From a systemic perspective, this does not come as a surprise. The commission of the smuggling offences does not fit easily with the model of the extension of jurisdiction on the basis of the active and the passive personality models: these models are centred primarily on the link between jurisdiction and nationality, whereas human smuggling offences are committed primarily by third country nationals and target third country nationals. In establishing jurisdiction to prosecute human smuggling offences, two further justifications in the categorisation of extraterritorial jurisdiction provided by Markus Dubber can be discussed: protection and universality [61]. The protection criterion extends jurisdiction to protect sovereignty and targets offences against the state; the universality criterion extends jurisdiction to address offending against all mankind. As Dubber eloquently puts it, universality "covers the treatment of the lordless man, the peaceless, the outlaw, the hosis humani generis, the enemy of all mankind who is outside the peace of any particular sovereign and therefore both outside his protection and outside his discipline" [62]. Establishment of extraterritorial jurisdiction under the principle of universality by treating human smuggling as a crime against humanity has been advocated by the Strategic Review of EU missions to Libya of May 2017, according to which:

> "Current arrangements regarding the legal finish of all persons apprehended or rescued by Operation Sophia are processed in accordance with Italian criminal law. However, this arrangement applies only for suspects encountered on the high seas. In the event that Operation Sophia would be authorized to operate in Libyan territorial waters, legal arrangements allowing the transfer and prosecution by competent authorities would be required. The issue is widely recognized as a major hindrance for the implementation of the mandate and discussions with Member States to date have not allowed the identification of a satisfactory solution. It [sic] this respect, the current efforts made by the operation in reaching international consensus for defining mi-

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phia and the question of jurisdiction over transnational organized crime at sea, in *Questions of International Law*, 5 August 2016, *http://www.qil-qdi.org/eunavfor-med-operation-sophia-question-jurisdiction-transnational-organized-crime-sea/* accessed 8 November 2017.

[60] United National Security Council, Resolution 2240 (2015), 9 October 2015.

[61] M. DUBBER, *Criminal Jurisdiction and Conceptions of Penality in Comparative Perspective*, in 63(2) *University of Toronto Law Journal*, 2013, pp. 247-277.

[62] *Ibid.*, p. 275.

grant smuggling and human trafficking as a crime against humanity would help in this issue as it would give more tools to the legal process – universal jurisdiction, arresting, transferring, prosecuting and sentencing" [63].

The use of both the protection and universality criteria to establish extraterritorial jurisdiction to prosecute human smuggling is problematic. The use of the protection criterion fails to identify a concrete harm imposed by smuggling and a concrete legal interest protected by the extension of jurisdiction. The protection of state sovereignty is too vague and broad as an aim to warrant the extension of criminalisation and the equation of human smuggling with offences threatening "the life of the nation" is disproportionate. Similar considerations apply to the use of the principle of universality, which is problematic in four respects: firstly, it is based upon the uncritical securitisation of the phenomenon of human smuggling, based upon discourses of smugglers as evil and posing existential threats to society [64] and treating smugglers as the enemy [65]; in this manner, secondly, human smuggling obtains a disproportionate gravitas and is equated in terms of impact and moral condemnation with crimes against humanity, trivialising thus the latter; thirdly, applying universality to human smuggling sits at odds with the essentially territorial dimension of the phenomenon, since human smuggling involves migration movements the aim of which is entry into a territory via the crossing of a border which remains defined in national or in EU terms (in the case of the EU external border), and measures against smuggling remain essentially immigration control measures; and fourthly, the use of universality in the terms used in the EU Report is problematic in that yet again it puts the cart before the horse: it legitimises the extension of jurisdiction in order to achieve investigatory and prosecutorial efficiency. It is thus investigation and prosecution that dictate the labelling of criminal offences, rather than the other way round. The current political framing of smuggling as

[63] Council of the European Union, Document 9202/17 (Restricted document of 15 May 2017) *http://www.statewatch.org/news/2017/jul/eu-eeas-strategic-review-libya-9202-17.pdf* accessed 8 November 2017, p. 36.

[64] See Commission, *Action Plan on Smuggling (Communication)*, COM (2015) 285 final, Brussels, 27 May 2015. In p. 2, the Communication mentions that "*[r]uthless criminal networks organise the journeys of large numbers of migrants desperate to reach the EU. They make substantial gains while putting migrants' lives at risk*".

[65] Smugglers are treated in the same manner as terrorists. See European Council, *Remarks by President Donald Tusk after the G20 preparation leaders' meeting in Berlin* (Statements and Remarks, 424/17, 29 June 2017) *http://www.consilium.europa.eu/en/press/press-releases/2017/06/29/tusk-remarks-berlin-preparation-g20/pdf* accessed 8 November 2017.