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Can/Will Italy be held accountable for its
'push back' policy in relation to
international refugee, human rights and
European Union law?

Pavan Marianna



ABSTRACT

This essay analyses the recent Italian 'push-back' policy in light of Italian obligations under refugee, human rights and EU law. It explores the possibility of ending the Italian policy and making the country accountable for its offences. In August 2009 the Italian and the Libyan Government signed the 'Friendship Agreement' allowing for a policy of 'push-back' of the boat people trying to reach the Italian territory. This paper supports the proposal that the non-refoulement principle has an extra-territorial scope in light of both international human rights and refugee law, sustaining therefore that Italy is violating the cornerstone of the refugees' protection regime. It reveals the real nature of the 'Friendship Agreement' and investigates the validity that Italy is complicit in torture and ill-treatment. It scrutinises the possibilities of ending the Italian policy using mechanisms available both at international and regional level, through human rights bodies and public international law tools, with the ECJ appearing to be the most efficacious in terms of enforcement. However, the lack of willingness of the European Commission will make for a dismal conclusion.

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"The Africans do not have problems of political asylum. People who live in the bush, and often in the desert, don't have political problems. They don't have oppositions or majorities or elections. These are things that only people who live in cities know. [Other Africans] don't even have an identity. And I don't mean a political identify; they don't even have a - personal identity. They come out of the bush and they say: 'In the north, there's money, there's wealth' – and so they go to Libya, and from there to Europe."

*"Please, don't take seriously this business about political asylum. The idea they are all asylum seekers makes you laugh sometimes."*¹

(Muammar Abu Minyar al-Gaddafi)

*Silvio Berlusconi, has defended his government's decision to return migrants found off its shores to Libya by declaring that his party rejected the idea of a "multi-ethnic" Italy. Berlusconi claimed the left had "opened the doors" to clandestine migrants. "So the left's idea was, and is, that of a multi-ethnic Italy," he said. "Our idea is not like that."*²

(Silvio Berlusconi)

*"We are not criminals. We are not ignorant. We are people worthy of respect. We need shelter temporarily because we want to go back to where we grew up as soon as things change for the better. I am here, invisible, struggling with my fate, a victim of injustice"*³

(Interviewed refugee in Tripoli)

¹ Hooper, John, 'Awkward photo? There may be more to come as Colonel Gaddafi visits Rome', *The Guardian*, 11 June 2009. <<http://www.guardian.co.uk/world/2009/jun/10/gaddafi-visit-italy-berlusconi>> [Accessed 22 January 2010].

² Hooper, John, 'We don't want a multi-ethnic Italy, says Silvio Berlusconi', *The Guardian*, 10 May 2009. <<http://www.guardian.co.uk/world/2009/may/10/silvio-berlusconi-italy-immigrants-libya>> [Accessed 7 March 2010].

³ Fortress Europe, 'Aggiornamento da Brak: espulsione di massa entro una settimana?', 3 July 2010. <<http://fortresseurope.blogspot.com/2010/07/aggiornamento-da-brak-espulsione-di.html>> [Accessed 8 July 2010].

Can/Will Italy be held accountable for its ‘push back’ policy in relation to international refugee, human rights and European Union law?

Introduction

Over the past decade the Mediterranean Sea has caught the attention of the European Union, particularly its coastal states. The increase in number of asylum seekers leaving the former Yugoslavia and Africa in the 1990s became the major concern of European Governments who, resultantly, decided to create visible and invisible barriers rendering it almost impossible to legally reach Europe. European states gradually built what has been named the *non-entré* regime,⁴ which deeply affected not only economic migrants but also asylum seekers.

Since these expedients did not solve the ‘push’ factors leading people to leave their countries of origin, asylum seekers did not stop departing for Europe. What changed instead, was that the routes used to reach Europe became longer and more dangerous.⁵

European States realised that relying on a black list of countries requiring a visa to enter Europe and imposing carriers sanctions, was not enough to stop people from irregularly entering Europe and decided to toughen up their countermeasures at the EU external borders.

⁴ Chimni, B.S., The geopolitics of refugee studies: A view from the South. *Journal of Refugee Studies*, 11(4), 1998, (350-374), p.351

⁵ Baldaccini, Anneliese, ‘Extraterritorial border controls in the EU: the Role of Frontex in Operation at Sea in *Extraterritorial Immigration Control*, ed. by Ryan, Bernard & Mitsilegas, Valsamis (Boston: Brill, 2010), (229-256), p.242

The new strategy consisted of proactively targeting migrants who were still far off the borders but demonstrated an intent to cross them.⁶

This paper will focus on the recent ‘push-back’ policy implemented by the Italian government throughout 2009. It will first analyse this policy in the context of international refugee and human rights law supporting the position of several scholars, the Office of the High Commissioner for Refugees (UNHCR) and UN Treaty Bodies, who state that *non-refoulement* has extraterritorial scope and therefore Italy is violating the cornerstone of the refugee protection regime. To support this, the case of *Hirsi and Others v Italy* will be analysed, in elucidation of state responsibility in international waters.

The second chapter will appraise the ever tighter relationship between Italy and Libya. It will highlight the real nature of the ‘Friendship Agreement’. Finally, in light of numerous reports, videos and interviews from 2000-present, this paper will investigate the validity of the argument that Italy is complicit in torture and ill-treatment.

The third chapter will explore the possibility of ending the Italian policy and making the country accountable for its offences. This is fundamental in light of the supportive or imitative attitude of other EU states. I will first explain what the gaps are of the UN human rights bodies in terms of enforcement and of the European Court of Human Rights in terms of state compliance to ECtHR jurisprudence. I will suggest that the best and only plausible way to stop the Italian ‘push-back’ policy would be through an infringement procedure lodged by the European Commission before the European Court of Justice (ECJ). Finally, I will assess this option in light of the EU asylum policy, concluding that due to the lack of political will

⁶ Den Heijer, Maarten, ‘Europe Beyond its Borders: Refugee and Human Rights protection in extraterritorial migration control’ in *Extraterritorial Immigration Control*, ed. by Ryan, Bernard & Mitsilegas, Valsamis (The Netherlands: Brill, 2010), (169-198) p.170

and the useful role of Libya as the guard of Europe's Southern borders, Italy will probably get away with what it did, obtaining the hushed blessing of the EU.

Chapter 1

1.1. *They are not clandestine*

According to the UNHCR - of the 75% of sea-born arrivals that managed to reach Italy in 2008 who applied for asylum, 50% were granted refugee status or temporary protection.⁷ In light of this it is hardly conceivable that none of the boats turned back to Libya by Italy between May and November 2009 had asylum seekers, as sustained by the Italian government.⁸ Indeed, by and large it is recognised as a tenet that on shipwrecks there are always persons seeking international protection.⁹ Migrant flows sailing off from the North African coasts to Italy are mixed – constituted of both economic and forced migrants. Therefore those forced migrants are protected by the Convention Relating to the Status of Refugee 1951 and its Protocol of 1967 (hereinafter Refugee Convention). According to Hathaway, State Parties to the Refugee Convention are under obligations of respecting some basic refugee rights – the *non-refoulement* principle *inter alia* - “until and unless a negative determination of the refugee’s claim to protection is rendered”.¹⁰ This assumption lies in the declaratory nature of refugee status. Indeed, a person does not become a refugee when a state says so, it is only his status of being a refugee that becomes formally recognised.¹¹ Therefore the right not to be returned belongs not only to refugees but also to asylum seekers.¹² From

⁷ UNHCR, ‘Mediterranean Sea Arrivals: UNHCR calls for access protection’, 9 January 2009. <<http://www.unhcr.org/4967386e4.html>> [Accessed 8 June 2010].

⁸ See Council of Europe, *Response of the Italian Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its visit to Italy*. (Strasbourg, 28 April 2010) CPT/Inf 15, pp.9-25

⁹ Weinzierl, Ruth & Lisson, Urzula, ‘Border Management and Human Rights. A study of the EU Law and the Law of Sea’, *German Institute for Human Rights*, December 2007, p.70.
<<http://www.statewatch.org/news/2008/feb/eu-study-border-management.pdf>> [Accessed 28 June 2010] p. 70

¹⁰ Hathaway, James C., *The law of Refugees Under International Law*, (Cambridge: CUP, 2005) p.278

¹¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugee* (1979) UN doc. HCR/IP/4/Eng/Rev.1. para 28.

¹² See Goodwin-Gill, Guy S. & McAdam, Jane, *The Refugee in International Law*. 3rd edn. (New York: OUP, 2007), pp.232-233. And Lauterpacht, Sir Elihu & Bethlehem, Daniel, ‘The scope and content of the principle of non-refoulement: Opinion’ in *Refugee Protection in International Law UNHCR's Global Consultations on*

that entitlement it derives that the right to access ‘status determination procedures’ is a complementary part of *non-refoulement*. Indeed, a state, in order to ascertain that it is not either rejecting or returning a person in need of protection, is under duty to screen each individual case. Several academics sustain the view that *non-refoulement* also enshrines the right to temporary admittance to a state, at least for the time sufficient to examine the case of each asylum seeker.¹³

In light of the above it should follow that intercepting boats loaded with migrants and summarily sending them back to Libya without allowing them to access refugee status determination procedures is a clear violation of *non-refoulement*.

In reality the Italian case is much more complex since the practise of turning back boat people to Libya has been carried out on the High Seas¹⁴, *loci* which has always been claimed as *Mare Liberum*, where states have no sovereignty.¹⁵ Thus, the pivotal question is whether the *non-refoulement* principle has extraterritorial scope and therefore whether Italy is responsible for ‘push-back’ or not.

1.2. *Non-refoulement and its status*

The prohibition of *refouler* is explicitly envisaged in article 33 of the Refugee Convention and article 3 of the UN Convention Against Torture (UNCAT). It has been interpreted as deriving from the prohibition of torture and cruel, inhuman treatment and punishment of

International Protection, ed. by Feller, E., Türk, V., and Nicholson, F. (Cambridge: CUP, 2003) (78-177) pp.116-118.

¹³ See Goodwin Gill (n12) 215; Hathaway (n11) 300, EXCOM Conclusions No.81 (1997), 82iii (1997), 85 (1998), 99 (2004)

¹⁴ See: Fortress Europe, ‘Libia l’elenco dei respingimenti documentati’, 16 August 2009. <<http://fortresseurope.blogspot.com/2006/01/libia-elenco-dei-respingimenti.html>> [Accessed 30 February 2010].

¹⁵ Gammeltoft-Hansen, Thomas & E. Aalberts, Tanja, ‘Sovereignty at Sea: The law and politics of saving lives in the Mare Liberum’, *Danish Institute for International Studies Working Paper*(18), 2010, (1-30) p.13

article 7 of the International Convention on Civil and Political Rights (ICCPR)¹⁶ and article 3 of the ECHR.¹⁷

The fundamental importance of *non-refoulement* is first underlined in the Refugee Convention under article 42(1) which establishes that reservations to article 33 are not allowed.¹⁸ Furthermore the UNHCR Executive Committee (EXCOM) has repeatedly expressed the humanitarian scope of the Refugee Convention, emphasising the central role of *non-refoulement* in reaching this goal.¹⁹ In fact *non-refoulement* has been established in order to avoid two evils, firstly to prevent a person being returned to a place where he would face persecution according to refugee law, and secondly to prevent ill-treatment according to human rights law.

Over the past 60 years this principle has been interpreted and expanded by the UNHCR, several domestic and regional courts and the ECtHR *inter alia*, acquiring an ever more comprehensive meaning. For instance, the prohibition on returning a person has been interpreted as referring to *any* place where he would face either persecution or torture, not just to his country of origin.²⁰

Considering its role as supervisor of the Refugee Convention and any matter related to refugees²¹ the UNHCR claimed that this principle is part of Customary International Law considering that not only several new international Conventions have included it, but also that these do not contain the exception that article 33(2) includes.²² Under customary law it

¹⁶ See Human Rights Committee, General Comment No 31 (26 May 2004) Un doc. CCPR/C/21/Rev.1/Add.13 para 9

¹⁷ See: Soering v UK (1989) 11 ECRR 439, Chahal v UK (1996) 23 EHRR 413

¹⁸ Lauterpacht , (n 12) 101

¹⁹ See: EXCOM Conclusions No1, 1975, No52, 1988, No71, 1993, No75, 1994, No77, 1995, No85, 1998, No94, 2002, No108, 2008.

²⁰ Lauterpacht , (n 10) 122

²¹ See UNGA Res. 428(V) (14 December 1950) para8

²² UNHCR, 'The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Question Posed to the UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in

includes both a ban on returning a person to any place where he would face torture, or ill-treatment and also to persecution.²³ Moreover the EXCOM has recognised that it is achieving the rank of *jus cogens*.²⁴

In conclusion the principle of *non-refoulement* is widely acknowledged by states, scholars, courts and the UNHCR as part of both treaty and customary law, being instrumental in the route towards an efficient refugees protection system. Therefore, Italy, as a signatory to those treaties, is bound to exact their laws and obligations.

1.3. Territoriality or extraterritoriality? Interception or interdiction?

From the 6th of May to the 8th September 2009 almost 800 migrants have been intercepted on High Seas, transferred onto Italian crafts and returned to Libya. In each episode the opportunity to seek international protection has never been granted.²⁵ Furthermore they were ‘pushed-back’ to a country where they would be subjected to both torture and inhuman and degrading treatment (See Chapter 2.2).

Does a commitment to *non-refoulement* end with the territorial borders of a state, hence allowing coastal states, like Italy, to implement any kind of interception measures on High Seas in order to control or stop migrants influx? A large and growing body of literature has

Cases 2 BvR 1938/93, 2BvR 1953/93, 2 BvR 1954/93’, 31 January 1994.

<<http://www.unhcr.org/refworld/docid/437b6db64.html>> [Accessed 25 July 2010] para4 and 21

²³ See: Goodwin-Gill (n12) 351, Lauterpacht (n11) para 253, Vested-Hansen, Jens, ‘No-admission policies and the right to protection: refugees choice versus states’ exclusion?’ in *Refugee Rights and Realities: Evolving international concepts and regimes*, ed. by Nicholson, Frances & Twomey, Patrick, (Cambridge: CUP, 2000) (269-288) p.275

²⁴ EXCOM Decision No25, 1982. See also: Allain, Jean, The jus cogens Nature of non-refoulement, *International Journal of Refugee Law* 13(4), 2002, (533-558)

²⁵ See: ECRE, Memorandum to the JHA Council, 4-5 June 2009.

<http://www.ecre.org/resources/ECRE_actions/1353> [Accessed 2 July 2010]. Council of Europe, *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. (Strasbourg, 28 April 2010) CPT/Inf 14. Human Rights Watch, Pushed Back Pushed Around, 21 September 2009. <<http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0>> [Accessed 6 December 2009].

investigated this matter trying to reach a sound conclusion that *non-refoulement* has extraterritorial scope. Decisions such as the well known United States Supreme Court case *Sale v. Haitian Ctrs. Council*,²⁶ declare that article 33 of the Refugee Convention does not have extraterritorial effect. Therefore the US was not responsible for the practice of sending back sea-born Haitian migrants since it was carried out on international waters. Nevertheless this decision has been highly criticised.²⁷ The critiques were based on the reasoning that the *non-refoulement* obligation is valid anywhere a state ‘encounters’ a refugee - an analysis of the Refugee Convention confirmed that there are some explicit territorial limits in different articles, but nothing with regard to article 33.²⁸ Indeed, at present, the apparent conclusion is that when refugee or human rights are involved, a state is responsible for the conduct of its organs or of who is acting on its behalf regardless of where that occurs, as long as the state has jurisdiction over the persons affected by that conduct.²⁹ This conclusion is based on the intertwine between refugee and human rights law,³⁰ and therefore both can enjoy the dynamic teleological interpretation that has been widely used when interpreting provisions of human rights treaties.³¹ The UNHCR in fact claims that limiting the effect of *non-refoulement* to the territories of a state would be ‘inconsistent with relevant rules of international human rights law’ since the latter has a recognised extraterritorial application.³² The bodies entitled to interpret the articles of the UNCAT, ICCPR and ECHR have established that State Parties to those conventions are responsible for the acts occurring under their jurisdiction, thus also

²⁶ *Sale v Haitian Ctrs. Council* (1993) INC. 509 U.S. 155

²⁷ Blackmun, Justice, ‘The Haitian Refoulement Case: Dissenting Opinion’, *International Journal of Refugee Law*, 6(1), 1994, (71-84) p.73

²⁸ UNHCR, The Haitian Interdiction Case 1993 Brief amicus curiae, *International Journal of Refugee Law*, 6(1), 1994, (85-102) p.86

²⁹ Lauterpacht , (n 10) 110, Goodwin-Gill (n11) 248,

³⁰ See EXCOM Conclusions No71, 1993, No 95, 2003, No 103, 2005.

³¹ Brownlie, Ian, (ed.) *Principles of Public International Law*. 7th edn. (Oxford: OUP, 2008), p.636,

³² UNHCR UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol’. 26 January 2007.

<<http://www.unhcr.org/refworld/docid/45f17a1a4.html>> [Accessed 4 July 2010].

beyond their territory.³³ As Fischer-Lescano & al. argue that ‘border control measures, wherever they are carried out, have a functional territorial reference point since they are linked to the enforcement of state jurisdiction’.³⁴

Therefore it is possible to assert that despite government attempts to deny it, *non-refoulement* applies not only on territorial waters, but also on the High Seas as long as a state has jurisdiction over the fact of which is deemed responsible. One of the ways in which a state exerts extraterritorial jurisdiction is when it has *de facto* control over a person.³⁵ It has been broadly declared that since the Italian Coast Guard transferred the boat migrants on Italian vessels and gave them over to Libyan authorities they exercised *de facto* control over those persons.³⁶ Notably the episodes of interdiction at sea were all the upshot of a policy of extraterritorial border control, hence not acknowledging the Italian extraterritorial jurisdiction over the same policy would be clearly inconsistent and contradictory.

Interception measures are not new internationally, the novelty consists in the fact that - besides having been increasingly used, especially in the Mediterranean Sea – in the last decade they turned into methods of *de facto* “interdiction at sea”.³⁷ Ryan describes this practice as impeding boatpeople’s arrival at their planned destination, in this case the European coasts. This conduct perfectly mirrors the one that Italy has implemented since May 2009. It is true that monitoring state borders is a legitimate expression of state sovereignty, but it must also be born in mind that this state prerogative is limited by obligations arising from principles of international customary and treaty law. In fact the

³³ See UNCAT UN Committee Against Torture, General Comment No 2. (24 January 2008) UN doc. CAT/C/GC/2. para16, HRC (n16) para10

³⁴ Fischer-Lescano, Andreas, Lohr, Tillman & Tohidipur, Timo, ‘Border Control at Sea: Requirements Under International Human Rights and Refugee Law’, *International Journal of Refugee Law*, 21(2), 2009, (256-296), p.277

³⁵ *Ibid.*, p.275

³⁶ See Council of Europe (n 25) para29

³⁷ Bernard, Ryan, ‘Extraterritorial Immigration Control: What role for Legal Guarantees? in extraterritorial migration control in *Extraterritorial Immigration Control*, ed. by Ryan, Bernard & Mitsilegas, Valsamis (Boston: Brill, 2010), (3-38). p.31

EXCOM Conclusion No. 97 advises states that the outcomes of their interception measures should not be the denial of “access to international protection”.³⁸

Generally states cite sovereignty arguments, stressing that they have the right to crack down on illegal immigration. Whilst true, they should also not forget article 31 of the Refugee Convention. Forced migrants are a different category from economic migrants and as such enjoy the possibility of irregularly entering a country as long as they give a good explanation for that and that they immediately lodge an asylum claim. That right was granted in light of the peculiar situation in which they find themselves when escaping from a country, hence maybe not having the time or chance to obtain a visa.³⁹ Goodwin-Gill remarks that this is valid not only if they arrived directly from their country of origin, but also if they transit through a country in which their life or liberty were anyway at risk.⁴⁰ Since the sea-born migrants trying to reach Italy transit via Libya, the former should respect article 31 and not muddle the two types of migrants when implementing its immigration control policy.

At present, there is a pending case at the ECtHR, namely *Hirsi and Others v. Italy*, which regards 11 Somalis and 13 Eritreans who were victims of the first ‘push-back’ carried out by Italy in May 2009 and who are currently held in prison in Libya. The UNHCR restated the Italian breach of *non-refoulement* due to its extraterritorial scope, like it had already asserted in the Haitian case.⁴¹ Nevertheless this time the adjudicating body will be a human rights court and - looking at the jurisprudence of the Court with regard to article 3, in which it used a *practical approach* - it is very likely that the Court will recognise Italian responsibility for

³⁸ EXCOM No 97, 2003, No89, 2000

³⁹ It should be noted that in the EU list of countries of which citizens require a visa in order to legally enter the EU all African Countries are included. See: Council Regulation (EC) No 539/2001 of 15 March 2001

⁴⁰ Goodwin-Gill, Guy S., ‘Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalisation Detention and Protection’, October 2001. <<http://www.unhcr.org/refworld/pdfid/3bf9123d4.pdf>> [Accessed 10 July 2010]. para103.

⁴¹ UNHCR, ‘Hirsi and Others v Italy. Submission by the Office of the UNHCR’, March 2010. <<http://www.unhcr.org/refworld/docid/4b97778d2.html>> [Accessed 10 July 2010] para4.2

its wrongful acts.⁴² If that is the case this would be a breaking point for the protection of refugees, since an international court will have finally formally acknowledged that regardless of where it occurs, insofar as there is control over the persons, a state is responsible for the commission of international wrongful acts, be they in territorial or international waters and states will have to stop hiding behind that excuse. This is because *non-refoulement* was purposely inserted without territorial limitations so that it could protect refugee everywhere.

⁴² Human Rights Clinic, 'Italy and Others v Italy. Written Comments', *Columbia Law School*, 17 April 2010. <http://www.law.columbia.edu/null/download?&exclusive=filemgr.download&file_id=164244> [Accessed 10 July 2010].

Chapter 2

On paper

Article 10 of the Italian Constitution holds that, ‘[...] Foreigners who are, in their own Country, denied the actual exercise of those democratic freedoms guaranteed by the Italian Constitution, are entitled to the right of asylum in the Republic, under conditions provided by law [...]’.

In reality

From October 2004 to March 2005 Italy collectively expelled to Libya some 1500 sea-born migrants who arrived on the island of Lampedusa.⁴³ The European Parliament condemned this practice and drafted the Resolution on Lampedusa.⁴⁴ The UNHCR denounced that those persons did not have the possibility to lodge their asylum claims.⁴⁵ Since the migrants were in Italian territory, there was no indecision in declaring that Italy was responsible for infringing *non-refoulement*.⁴⁶

Nevertheless the Italian government, steadfast in continuing its fight against “illegal” migration, without, in its practice, discerning between economic migrants and those in need of protection, started pursuing a more subtle and ambiguous way to achieve its scope, hoping to take advantage of any loophole that might be present in international law.

2.1. 30th of August - The friendship day

⁴³ European Parliament, Parliamentary Questions (15 February 2005) E-0545/05

⁴⁴ European Parliament, Resolution on Lampedusa (14 April 2005) P6_TA(2005)0138.

⁴⁵ UNHCR, ‘Italy: UNHCR deeply concerned about Lampedusa deportations of Libyans’, 18 March 2005). <<http://www.unhcr.org/print/423ab71a4.html>> [Accessed 12 July 2010].

⁴⁶ It is outside the scope of this paper to argue about those episodes. The case was brought in light with the mere intent to highlight that the Italian government has a quite broad recent history of infractions of refugee and human rights law.

As of 2000 Italy started an ever stronger liaison with Libya on the field of illegal migration.⁴⁷ The relationship between the two was marked in 2007 by the Protocol of Co-operation⁴⁸ and culminated in 2008 with the Treaty of Friendship, Partnership and Cooperation (hereinafter Friendship Treaty).⁴⁹

The Friendship Treaty is a unique assortment of miscellaneous topics where a mix of claimed respect for human rights, cooperation, development, apologies for the colonialist past, economic deals and joint illegal migration control find a place. What lies behind such a broad coverage?

What is interesting is how the Italian Government presented the Treaty to its population. The emphasis lays on the regrettable colonization of Libya from 1911 to 1943, the Italian official apologies;⁵⁰ and on the help that Libya would give Italy to combat irregular migration into Italy via sea. Fewer words were spent on the fantastic economic deals for both countries resulting from that however.

Berlusconi's government has always remarked that illegal migration arriving via sea is one of the most pertinent problems in Italy. Looking at the figures over the past 15 years it is impossible not to notice that arrivals via sea are high in number – mainly due the geographical position of the country – but it must also be acknowledged that from 2004 to 2006 some 65% of the overall number of irregular migrants in Italy were overstayers who

⁴⁷ See Agreement on the fight against terrorism, organised crime, drug trafficking and illegal migration. Rome, 2000.

⁴⁸ Protocol of Co-operation between Italy and Libya. Rome, 29 December 2007.

⁴⁹ Trattato di Amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista, 30 August 2008. <<http://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/testo-accordo/testo-accordo.html>> [Accessed 5 May 2010]

⁵⁰ See: France24, Gaddafi arrives in Rome for reconciliation visit, 11 June 2009. <<http://www.france24.com/en/20090610-gaddafi-arrives-rome-reconciliation-visit>> [Accessed 1 July 2010]. Delaney, Sarah, 'Silvio Berlusconi and Colonel Gaddafi seal friendship with apology and billion-dollar deal', *The Times*. 1 September 2008. <<http://www.timesonline.co.uk/tol/news/world/africa/article4648600.ece>> [Accessed 1 July 2010].

entered Italy legally, while only 12% of them arrived via sea.⁵¹ On the contrary, the number of asylum seekers which rose sharply in 2008, was nearly entirely due to the arrivals via sea, in particular those in the direction of Lampedusa.⁵² For that reason one could assume that if the real major aim of the Government was to cut down on irregular migration without affecting asylum seekers, it should have focused on other questions, such as tackling the widespread informal market that acts as a strong 'pull factor' for economic migrants. Indeed, according to Geddes the underground economy offers elevated returns for the Italian economy. The employment of illegal migrants allows companies to save up money on social expenditures and taxes,⁵³ at the same time it consents to fill the inbuilt labour demand that generally affects OECD countries because of their ageing population.⁵⁴ Hence, arguably, lowering the number of irregular migrants would affect the Italian economy which heavily relies on migrant labour supply, especially for low-skilled jobs. Fabrizio Gatti, an Italian journalist who pretended to be an irregular migrant and worked as such in the construction industry for public infrastructures in the North of Italy, calculated that for instance a migrant who works as carpenter in a construction site for 73 hours a week is paid as if he was working 48 hours a week. This implies a saving for the employers of one third of the salary that he ought to pay to his worker, meaning that person works approximately 10 days for free.⁵⁵

Yet the Italian government had to show that it was doing something to face the problem of irregular migrants and to thus please public opinion. It therefore decided that using the

⁵¹ Fasani, Francesco, 'Undocumented Migration: Counting the Uncountable, Data and Trends Across Europe', *CReAM*, November 2008. (1-119). <http://clandestino.eliamep.gr/wp-content/uploads/2009/10/clandestino_report_italy_final_3.pdf> [15 July 2010] p.111

⁵² SPAR, *Rapporto annuale del sistema di protezione per richiedenti asilo e rifugiati. Anno 2008/2009*. (Roma, S.T.R., 2009) p. 50

⁵³ Geddes, Andrew, *The Politics of Migration and Immigration in Europe* (London: SAGE, 2003) p.152

⁵⁴ Brucker, Herbert, 'The impact of international migration on welfare and the welfare state in the integrated Europe' in *Structural Challenges for Europe*, ed. by Tumpel-Gugerell & Mooslechner (Cornwall: MPG Books Ltd, 2003), (231-275), p.262

⁵⁵ Gatti, Fabrizio, *Bilal: Viaggiare Lavorare Morire da Clandestini* (Milano: BUR, 2007) p.397

arrivals via sea, which were highly covered by the media, was a good way to show its commitment to the cause.⁵⁶ By incorrectly naming all migrants arriving by sea as illegal, the government boasted about its agreement with Libya declaring that this would stop boat migrants flows.

In light of the above it is crucial to examine the economic component of the pact, which brings into question whether the Italian government deemed as expendable asylum seeker protection in the name of economic profits.

If one halts at a superficial analysis of the Friendship Agreement, the agreement could look like an Italian promise to pay a consistent sum of money to Libya to finance development plans and repair the damages caused by the colonialism. However, deep scrutiny suggests it was an excellent economic bargain for Italy as well. It is true that Libya will obtain 5 billion dollars in 20 years⁵⁷, but what should also be taken into consideration is the broader relationship between the two states.

Italy heavily depends on Libya for the supply of gas and oil (it imports 33% and 25% respectively from Libya)⁵⁸ hence it is fundamental for the country to have it as a commercial partner.

Soon after the Friendship Treaty was signed, the Libyan Investment Authority (LIA) and the Central Bank of Libya started investing in the Italian bank *Unicredit*. It should be noted that LIA is the Sovereign Wealth Fund that handles the government's petrocurrency. Libya pledged to also increase its investments in ENI - the largest Italian gas and petrol company.

⁵⁶ This practice is called hidden agenda. A state claims to pursue a certain practice in order to reach the stated aim but in reality it is targeting something else. See Castles, Stephen, 'Why Migration policy fail', *Ethnic and Racial Studies*, 27(2), 2004, (205-227) p.214

⁵⁷ Article 8(1) Friendship Treaty

⁵⁸ Magharebia, Khadafi concludes historic trip to Italy, 12 June 2009.

<http://www.magharebia.com/cocoon/awi/print/en_GB/features/awi/features/2009/06/12/feature-02> [Accessed 16 July 2010].

The Libyan ambassador to Italy revealed that its country considers Italy as its key partner and that up to 90% of Libya's foreign investment will be directed to Italy.⁵⁹ The Italian *Finmeccanica*, of which 30% is of government's property, concluded an important contract with Libya. In the summer 2009, the company obtained a job order amounting to € 541 million.⁶⁰ In August 2010 *Finmeccanica* succeeded in attaining a € 247 million deal with Libya.⁶¹

In view of the above it might be more evident why it was convenient for the Italian government to partner with such a specific country in the fight against “illegal” migration. Surely, at present, Libya is undeniably the major transit country of migration streams departing from Africa, but as previously highlighted those flows are mainly composed of asylum seekers rather than economic migrants, therefore they cannot be categorized as “illegal”. Hence, the immigration control element of the treaty can be deemed to have been strategically inserted under the pulse of political interest and appeasement of the electorate to whom the government promised a sizeable reduction in illegal migrants.⁶²

2.2. *At what price?*

⁵⁹ Pons Giovanni (13 February 2009), *La Repubblica*. <Available from: [Accessed 14 July 2010].

⁶⁰ De Rosa, Federico, 'Finmeccanica Maxiaccordo con la Libia', *Corriere della Sera*, 29 July 2009, p.24

⁶¹ Finmeccanica, Finmeccanica wins contracts in Libya worth EUR 247million, 12 August 2010.

<http://www.finmeccanica.com/Corporate/EN/Corporate/Press_and_Media/Comunicati_stampa/args/detail/deta ils~press~Comunicati_Stampa~2010~press_dettaglio_00464.shtml/index.sdo> [Accessed 15 August 2010].

⁶² See Berlusconi, Silvio, Programma Elettorale, 2008.

<www.ilpopolodellaliberta.it/speciali/PROGRAMMA2008.pdf> [Accessed 18 July 2010]. Corriere della Sera, Berlusconi Presenta il Programma: “Tasse sotto il 40%, sì al nucleare, 29 February 2008.

<http://www.corriere.it/politica/08_febbraio_29/berlusconi_programma_panorama_426891c8-e69a-11dc-84b2-0003ba99c667.shtml> [Accessed 16 July 2010].

Since September 1969, after a coup d'état, Colonel al-Gaddafi has been Libya's head of state with no other political parties at the government.⁶³

Human rights standards in Libya are minimal. In 2004 Amnesty International described the situation as such: "there continued to be widespread human rights violations".⁶⁴ A matter of concern is, the fact that Libya permits corporal punishment. Flogging, stoning, or amputation are all authorized by its domestic law.⁶⁵ Both Amnesty and Human Rights Watch (HRW) depict Libya as a state where *gross and widespread* human rights violations have been taking place followed by the impunity of the perpetrators. This could allow us to hazard a guess that if Libya was a Signatory to the Rome Statute, thus recognising the jurisdiction of the International Criminal Court, many public authorities could be accused of having committed international crimes against humanity.⁶⁶

Back in 2007 Amnesty's report divulged the information that migrants held in Libya's prisons or immigrant detention centres were beaten and at risk of communal repatriation with no access to individual scrutiny of their situation.⁶⁷ HRW drafted a comprehensive report on the dreadful way in which migrants are treated in Libya.⁶⁸

From interviews held in the Misratah centres emerges what follows:

"Some of us have been here for four years. Personally I spent three years in this camp.[...] We haven't committed any crimes, we are just looking for political asylum.[...] Nobody is

⁶³ CIA, The World Factbook, 2009. <<https://www.cia.gov/library/publications/the-world-factbook/geos/ly.html>> Available from: [Accessed 20 July 2010].

⁶⁴ Amnesty International USA, Annual Report for Libya, 2004. <<http://www.amnestyusa.org/annualreport.php?id=ar&yr=2004&c=LB>> Available from: [Accessed 18 July 2010].

⁶⁵ Amnesty International, Libya: Time to make human rights a reality, April 2004. <<http://www.amnesty.org/en/library/info/MDE19/002/2004>> Available from: [Accessed 18 July 2010] p.37

⁶⁶ See Rome Statute of the International Criminal Court, 1998, 2187 UNTS 3, art.6(a, e, f, i, k)

⁶⁷ Amnesty International USA, Annual Report for Libya, 2007. <<http://www.amnestyusa.org/annualreport.php?id=ar&yr=2007&c=LB>> Available from: [Accessed 19 July 2010]

⁶⁸ See Human Rights Watch, Stemming the flow: Abuses against migrants, asylum seekers and refugees, September 2006. <<http://www.hrw.org/reports/2006/libya0906/>> [Accessed 14 July 2010].

informing us. What's going to happen to us? I lost the hope.. I was 60 kg when I entered, now my weight is 48 kg, imagine why".⁶⁹

One might opine that NGOs are not a reliable source and tend to overly criticize governments. To this, I would answer that the contribution of NGOs have not only been greatly acknowledged by the UN but have also been fostered as a tool in order to achieve a fruitful communication between them and the governments.⁷⁰ Secondly the precarious situation of migrants rights in Libya was also overtly denounced by FRONTEX' report of 2006.⁷¹ There the detention camp in Kufra was described as "rudimentary and lacking of basic amenities". Moreover the European Commission itself, after its technical mission in 2004, portrayed some of the centres as being in appalling states.⁷²

In evaluating what has been described, there are several factors to account for. Libya is not a Signatory to the Refugee Convention, nor does it have a domestic asylum system. As a result Libyan authorities do not distinguish between economic and forced migrants, thus for the latter there is no chance of filing a protection claim. As a consequence among migrants detained by Libyan authorities on the basis that they are irregularly present in their territory, there are many de facto refugees. Libya in fact proclaimed that economic migrants barely transit through its territory.⁷³

The situation for refugees is aggravated by the limited space of action that UNHCR has there. UNHCR activity in Libya has always been very restricted since the state has never officially recognised the agency through a Memorandum of Understanding. The order issued by

⁶⁹ Fortress Europe, 'Libya: inside the immigrants detention centre of Misratah', January 2006. <<http://fortresseurope.blogspot.com/2006/01/libya-reportage-from-refugees-detention.html>> [Accessed 14 March 2010].

⁷⁰ See Vienna Declaration and Programme of Action (12 July 1993) UN doc. A/CONF.157/23. para.38

⁷¹ FRONTEX, FRONTEX-Led EU Illegal Immigration Technical Mission to Libya, 2007. <<http://www.statewatch.org/news/2007/oct/eu-libya-frontex-report.pdf>> from: [Accessed 8 July 2010]para. 5.3

⁷² European Commission, Technical Mission to Libya on Illegal Immigration Report, 2004, DGHI 7753/05 p.5

⁷³ Amnesty International, Allow UNHCR back into Libya, 10 June 2010.

<<http://www.amnesty.org.au/news/comments/23172/>>from: [Accessed 15 July 2010].

Libya's foreign minister to close down UNHCR's office in June 2010, drew the attention of the international community to the precarious stability in which the organisation was operating.⁷⁴ Indeed, if on the one hand the agency could be considered as being the only hope for asylum seekers, since through its work it was trying to bridge the gap created by the lack of a domestic asylum system;⁷⁵ on the other hand its unstable and unrecognised position has never utterly guaranteed safety for refugees, not even after the issuance of protected status certificates. To illustrate, Patrick had a official document released by the UNHCR in Tripoli in 2007, attesting that he was an asylum seeker. Notwithstanding he is locked in the centre in Sebha, in the desert of Sahara, waiting for his deportation, devoid of the right to make a call and seek for help.⁷⁶

In addition Libya has also been carrying out indiscriminate repatriation⁷⁷ and deportation of migrants from the detention centres situated in the South, to the desert. It has been made known that migrants are transported inside containers - like merchandise - and driven to the desert where they are abandoned to probable death.⁷⁸

2.3. *Complicit of torture?*

The dangerous environment that Libya represents for migrants has been further investigated in the wake of the solid friendship with Italy, which has allowed Italy to disembark, migrants intercepted at sea, on Libyan coasts.

⁷⁴Africasia, Libya orders UN refugee agency to leave the country: UNHCR, 8 June 2010. <http://www.africasia.com/services/news_africa/article.php?ID=CNG.d704e996ddc33749418fbe756b8ca19d.281> [Accessed 8 July 2010].

⁷⁵ UNHCR, 'UNHCR says ordered to close office in Libya', 8 June 2010. <<http://www.unhcr.org/4c0e79059.html>> [Accessed 12 July 2010].

⁷⁶ Fortress Europe, 'Border Sahara: the detention centres in the Libyan desert', 11 January 2009. <<http://fortresseurope.blogspot.com/2006/01/border-sahara-detention-centres-in.html>> [Accessed 4 March 2010].

⁷⁷ See Fortress Europe, 'Forced Labour and Tortures for Eritreans Deported from Libya', 18 July 2009. <<http://fortresseurope.blogspot.com/2006/01/forced-labours-and-tortures-for.html>> [Accessed 10 January 2010].

⁷⁸ Ibid.

The picture of Libya that came forward is worse than foreseeable. Migrants are locked in both common jails and specific detention centres. The description shared by all those infrastructures is extremely poor sanitary condition – usually there are no toilets in the cells and people are obliged to urinate on the floor - meagre food rations, little water, almost no possibility to shower. Overcrowded rooms without mattresses, infested by flees and lack of decent hygienic conditions lead to numerous persons contracting scabies, diarrhoea and various other infections.

Additionally inmates are also harshly beaten, tortured and women are recurrently raped. Officials usually hit them with sticks on the sole of their feet and subsequently force them to run, or they use electro shocks.⁷⁹ In September 2009 when a group of migrants tried to escape from the prison in Gandufa the guards stabbed many of them and killed 20 people. During the subsequent week they were no longer allowed to exit their cells and the guards – as reprisal - regularly went in to severely beat them.⁸⁰ It is remarkable that the vast majority of migrants present in Gandufa are Somali, Eritreans and Ethiopians, therefore they would be *de jure* refugees if Libya had an asylum system.

Examining the more recent reports containing interviews carried out with migrants reveals a new element. Not only are Sub-Saharan migrants ill-treated, they are also persecuted on a racial basis. Amid them, Christians undergo even worse treatment owing to their religion.

⁷⁹ Human Rights Watch, Full Statement of “Thomas”, a 24-year-old Eritrean, 8 June 2009. <<http://www.hrw.org/node/83699>> [Accessed 24 March 2010].

⁸⁰ For pictures of the aftermaths of the riots and a detailed account of the episode given by one of the immigrants see: Ishtar, ‘Libye: les retenus du camp de Gandufa en grève de la faim’, *Bivouac-ID*, 9 September 2009. <<http://www.bivouac-id.com/2009/09/09/lybie-les-retenus-du-camp-de-gandufa-en-greve-de-la-fin/>> [Accessed 6 July 2010].

“If they attack you and you call the police, you are the one who is arrested. Against us, they are twice racist. We are black and Christians.”⁸¹ This extract of testimony continued, revealing that the author of this quote was with a friend walking in the street when they were stopped, asked whether they were Muslim, and requested to recite a *sura* from the Koran. Despite being Eritreans they both spoke Arabic but only the interviewee knew the Koran’s part. He survived, his friend was robbed and killed. Others reported that they are called animals, cannot sit in the buses, and are constantly robbed or beaten in the street. They cannot turn to the police since police either condescend those behaviours or raid the places where migrants hide in order to send them into prisons. They are derided as “niggers” and Christians, since their lives are not considered worthy, and they are not brought to hospitals if gravely sick and caught in prison.⁸²

After the riots in Gandufa, prisoners said that Eritreans were tortured much more than the Somalis on account of their religion.⁸³ They were told that being a Christian is a terrible sin and were particularly targeted in prisons.⁸⁴

The Libyan Government can thus be regarded as responsible for the breach of the absolute prohibition of torture and ill-treatment carried out by its authorities, and their failure in preventing those events. To this could be added the persecution of migrants on the basis of their race and religion. Hence, those people should not be sent back to Libya not only because

⁸¹ Fortress Europe, ‘Escape from Tripoli. Report on the Conditions of Migrants in Transit in Libya’, 25 October 2007. <<http://www.statewatch.org/news/2007/nov/fortress-europe-libya-report.pdf>> [Accessed 3 February 2010] p.13

⁸² Peregine, Christian, ‘Immigrant prisons in Libya : ‘Go back and die in your own country, hospital is only for Libyans’, *Times of Malta*, 23 December 2009. <<http://www.timesofmalta.com/articles/view/20091223/local/go-back-and-die-in-your-own-country-hospital-is-only-for-libyans>> [Accessed 8 July 2010].

⁸³ See (n 82)

⁸⁴ Jesuit Refugee Service Malta, Do they know? Asylum Seekers Testify to Life in Libya, December 2009. <www.jrsmalta.org/Do%20They%20Know.pdf> from: [Accessed 14 March 2010] p. 13

they are at risk of torture and ill-treatment but also because they are persecuted according to the terms of the Refugees Convention.⁸⁵

Can Italy be held responsible for all the above? According to the International Law Commission, a state can be responsible for the acts of a different state if it “aided or assisted” the latter state and does that with the *knowledge* of the ‘circumstances’ of the unlawful act.⁸⁶

The Italian government clearly had the *knowledge* of the situation if one considers the year of publishing of the aforementioned reports. Moreover, in 2005 the former Director of the Italian Secret Service, went to visit the centre in Sebha, specifying that there are migrants that Italy sent back. He said that they are crammed into small rooms, and that the odours are so strong that guards wear scarves round their face.⁸⁷

With regard to *aiding or assisting*, the role played by Italy is clear. It pushed for the lift of both the arms embargo and sanctions that were imposed on Libya for years. Assistance that was highlighted in the Preamble of the Friendship Treaty. This position was purported in order to obtain an effective technical help in curbing “illegal” migration.⁸⁸ The Italian Interior Minister at that time declared that henceforth Italy would have been able to provide Libya with the means to tackle the migratory fluxes passing through its country.⁸⁹ In the European Commission report dated 2004 there is an inventory of the equipment that Italy has supplied to Libya in 2004/05 – rubber dinghies, nighttime viewers, body bags, road GPS, jeeps, buses, etc - and also a list of the charter flights funded by Italy to repatriate migrants for a total of 5688 persons. One of those flights was the one used to repatriate some Eritreans who were

⁸⁵ See Refugee Convention art33(1) where among the grounds for not returning a refugee there are race and religion.

⁸⁶ UNGA Responsibility of States for internationally wrongful acts, 28 January 2002. A/RES/56/ Art16

⁸⁷ Fusani, Claudia, Immigrati, allarme Siste ‘Centri in Libia disumani’, 3 February 2006. <<http://www.meltingpot.org/articolo6613.html>> [Accessed 12 March 2010].

⁸⁸ BBC, EU lifts weapons embargo on Libya, 11 October 2004. <<http://news.bbc.co.uk/2/hi/europe/3732514.stm>> [Accessed 13 March 2010].

⁸⁹ Fusani, Claudia, Un piano comune per bloccare gli sbarchi, 27 September 2004. <<http://www.archiviostampa.it/it/articoli/art.aspx?r=relauto&id=4347>> [Accessed 18 July 2010]

subsequently condemned to forced labour by their government.⁹⁰ According to the same report Libyan police was also trained by the Italian one. One of the migrant camps in the North Libya was financed by Italy and also the two in Kufra and Sebha which this paper has amply described.⁹¹ The current Italian Interior Minister, through an official ceremony in 2009 donated 6 motorboats – to be used with a mixed Italian-Libyan crew - that will allow Libya to efficiently patrol its coasts.⁹²

The raids of the police in the streets increased and became harsher after the Colonel promised Italy to be the guardian of its doors. Police started touring with cages on their tracks and collecting would be refugees to jail.⁹³ Gaddafi proudly stated that the number of migrants attempting to reach Europe dropped after the Friendship Agreement.⁹⁴ FRONTEX, indeed, speaks of a decrease by 83% of flows from Libya to Italy and points at the Friendship Agreement as major factor determining the plunge in departures.⁹⁵

In light of chapter 2.2 Italy was absolutely aware of the plight it was sending the migrants to from Lampedusa in 2004 and even more to what it was handing them over after the interception at sea. Italy not only asked for the help of Libya but also provided the latter with the means to stop migrants at any price.

To recapitulate, Italy is not merely violating the absolute prohibition of torture through the breach of its intrinsic *non-refoulement* proviso but it is also a complicit of Libya in the

⁹⁰ See (n 78)

⁹¹ See: Institute of Race Relation, The Mediterranean Solution, Bulletin No56, 2006.
<http://www.irr.org.uk/pdf/56%20layout_1_8.pdf> [Accessed 16 July 2010]

⁹² Schenkel, Mark, 'Outsourcing asylum seekers the Italian way', *Nrhandelsblad*, 24 July 2009.
<http://www.nrc.nl/international/article2309813.ece/Outsourcing_asylum_seekers_the_Italian_way> [Accessed 10 July 2010].

⁹³ Gatti, (n55) p.287

⁹⁴ FRONTEX, Press Pack, 2009. <http://www.ed4bg.eu/files/Frontex_Press_pack.pdf> [Accessed 2 July 2010] p.7

⁹⁵ FRONTEX, Extract From The Annual Risk Analysis 2010, March 2010.
<http://www.ed4bg.eu/files/ARA_2010_extract_24_May2010.pdf> [Accessed 2 July 2010] p. 12

commission of torture. This because Italy has been aiding and abetting Libya to catch migrants in knowledge of the treatment that the country reserves them.

Chapter 3

3.1. *Weak enforcement*

After having reached the conclusion that the ‘push-back’ policy is unlawful, will Italy be held to account, thereby ending the policy of ‘push-back’?

The means that international human rights law provides are various, but are not always efficacious in terms of ensuring the respect and accountability of the countries that are bound by it.

With regard to the breach of *non-refoulement* both the HRC and CAT at the international level and the Committee for the Prevention of Torture (CPT) at the European level could intervene. Indeed the CPT after its visit to Italy condemned the Italian practice and asked Italy to discontinue it.⁹⁶ The Government besides not doing it, and denying its illegality, continued financing Libya. In fact in May 2010 it funded half of the cost for an “electronic wall” along the Southern Libyan border to prevent migratory flux from Sudan, Niger, Chad. The Italian multinational *Finmeccanica* will take charge of that.⁹⁷ Furthermore, in July Italy subsidized Libyan border patrolling for a further 2 million Euros.⁹⁸ In June another vessel loaded with Somali and Eritreans was sent back to Libya.⁹⁹ This demonstrates that the lack of enforcement due to the quasi-judicial feature of those bodies is a significant hindering factor in the obedience to their observations.

⁹⁶ Council of Europe (n8) p.26

⁹⁷Storie Migranti, Libia-UE Italia, 5 May 2010. <<http://www.storiemigranti.org/spip.php?article742>> [Accessed 25 July 2010]

⁹⁸ Fortress Europe, ‘Respinti con l’inganno. L’ultima frontiera dei pattugliamenti maltesi’, 21 July 2010. <<http://fortresseurope.blogspot.com/2010/07/respinti-con-linganno-in-libia-27.html>> [Accessed 4 August 2010].

⁹⁹ Brunetto, Claudia, ‘La Scomparsa dei Rifugiati’, *La Repubblica*, 26 June 2010. <http://palermo.repubblica.it/cronaca/2010/06/23/news/la_scomparsa_dei_rifugiati-5077915/> [Accessed 3 July 2010]

Another important instrument is the ECtHR where, according to article 33 of the ECHR, individuals can lodge a complaint against a state as long as they were under its jurisdiction when the accused illicit act occurred. In fact at the moment *Hirsi and others v Italy* is a case which is currently pending before the Court, which specifically regards the practice of interception on the high seas and forced return. (See Chapter 1.3).

Will the Court rule in favour of the complainants? It is very likely that, looking at its past jurisprudence and its reliance on international reports in order to decide whether the applicants would be at risk of torture, it will.¹⁰⁰ Will it suffice to halt Italy? Based on the Italian response to the Court's requests in the past, arguably, it is hardly plausible. Italy has three cases already of non-compliance with the Court rulings with regard to article 3. Indeed, despite the interim measure issued under Rule 39 of the Rules of Court by the Chamber, requesting the suspension of deportation of the claimant, Italy deported the applicant in the three cases.¹⁰¹

Even in the hypothesis that Italy in this case would enforce the Court decision, there will still be two drawbacks. First this will just solve the problem of the applicants, not bring to an end the widespread practise of summarily returning boatpeople; second the Court generally takes a long-time before ruling, by reason of a large backlog, meaning that in the meantime many more asylum seekers will suffer from Italy's policy. Statistics show that from 2008 to 2009 there was a rise in pending cases by 18% and that in the same period the number of cases closed declined by 40% .¹⁰²

In consideration of the above it only remains to turn to the EU and the ECJ, to investigate whether the Italian 'push-backs' can be halted.

¹⁰⁰ See *Saadi v Italy* App. No37201/06 (28 February 2008)

¹⁰¹ See *Trabelsi V Italy* App. No50163/08 (13 April 2010); *Ben Khemais v Italy* App. No246/07 (24 February 2009); *Toumi v Italy* App. No25716/09

¹⁰² ECHR, Supervision of the execution of judgements of the European Court of Human Rights, Annual Report 2009, pp.35-37

3.2. *The Commission and the ECJ*

Dealing with the issue of the lawfulness of joint border patrolling with third countries at the EU level would be fundamental, due to the standpoint of the majority of other EU Southern States. For instance, the Maltese Home Minister last year approved the Italian policy as a positive action and gave his full support to it.¹⁰³ Considering the extension of its Search and Rescue area in the Mediterranean Sea, it is not surprising that Malta sustains a policy that *de facto* blocks migrants from setting off Libyan coasts. Malta will be able to elude its obligation to rescue boats in distress and consequently allow them to disembark in a *safe place*, probably its country, if the shipwrecks loaded of migrants do not sail off.¹⁰⁴ Several disputes took place between Italy and Malta over which lines of duty it was to rescue boatpeople in distress – disagreements that caused severe delays in the rescuing operations - to avoid the consequence of having to accept the sea-born migrants.¹⁰⁵ Malta is currently foreseeing the implementation of an agreement with Libya also.¹⁰⁶

Spain, for example, has an advanced system of surveillance of its coasts that allows it to intercept boats in its territorial sea.¹⁰⁷ It also has bilateral agreements on cooperation for border control with Morocco, Senegal, Mauritania and Cape Verde.¹⁰⁸

It is therefore essential that the EU intervenes putting some boundaries on the freedom of action of the coastal states, in order to achieve real migration control and not a mechanism that practically impedes reach to Europe. It should be remembered that the scope of an

¹⁰³ See: Jesuit Refugee Service Malta, (n85)

¹⁰⁴ See obligations under: SAR, 1974 as amended. (1.3.2). Also: Resolution 167(78) May 2004 by the Maritime Safety Committee. Also: IMO FAL.3/Circ.194, 22 January 2004, para3

¹⁰⁵ See: UNHCR, UNHCR questions delays in rescue-at-sea operation off Malta, 8 June 2010. <
<http://www.unhcr.org/print/4c0e33b66.html>> [Accessed 23 July 2010]

¹⁰⁶ Garcia-Andrade, Paula, Spanish Perspective on Irregular Immigration by Sea' in *Extraterritorial Immigration Control*, ed. by Ryan, Bernard & Mitsilegas, Valsamis (Boston: Brill, 2010) (311-346)p.317

¹⁰⁷ Pugh, Michael, 'Drowning not Waving: Boat People and Humanitarianism at Sea', *Journal of Refugee Studies*, 17(1), 2004, (50-69), p.62

¹⁰⁸ Garcia-Andrade, (n107)p.319

asylum system is to “provide safety for who is in jeopardy”,¹⁰⁹ not dumping them in the desert or catching them in international waters.

The European Commission, besides being the executive body of the EU, is also the monitoring body of the implementation of EU law. This is why it was endowed, under article 258 of the Treaty on the Functioning of the EU (TFEU),¹¹⁰ with the possibility of lodging an infringement procedure before the ECJ in case a Member State (MS) does not comply with EU law. The added value of the ECJ in terms of ensuring that states abide with its rulings is the possibility of sanctioning or fining MS that do not respect its judgements.¹¹¹ Chalmers highlighted that this possibility was made easier, thanks to some procedural changes introduced by the Lisbon Treaty, hence it will probably be used more recurrently.¹¹² Following this route could be successful in stopping Italy, and be a deterrent for other states that are eagerly imitating Italian policy.

The respect for the principle of *non-refoulement* is at the base of the Common European Asylum System. It is explicitly stated in article 78(1) of the TEFU. Indeed, two fundamental Directives, namely the Asylum Procedures Directive, and the Qualification Directive, provide for the respect of that principle. The former with regard to the safe third country proviso,¹¹³ and the latter when explaining the substance of the international protection.¹¹⁴ Despite this they both have a territorial scope, therefore the Italian *refoulement* practise cannot go under either of them.

¹⁰⁹ Gallagher, Dennis, ‘The evolution of the International Refugee System’, *International Migration Review*, 23(3), 1989, (579-598), p.584

¹¹⁰ Former article 226 EC before the Lisbon Treaty

¹¹¹ Art260 TFEU former art228 EC

¹¹² Chalmers, Damian & Monti, Giorgio, *European Union Law Updating Supplement* (New York: CUP, 2008) p.91

¹¹³ Council Directive 2005/85/EC (1 December 2005) art21

¹¹⁴ Council Directive 2004/83/EC (29 April 2004) art27(b)

The nature and implementation of the Schengen Border Code (SBC) is different. Article 3, which describes the scope of the Regulation states: “This regulation shall apply to any person crossing the internal or external borders of Member States [..]”¹¹⁵ According to Brouwers the Code covers extraterritorial controls,¹¹⁶ and the Commission’s view is that it pertains to surveillance systems carried out on High Seas.¹¹⁷ Since the SBC is a Regulation, therefore a direct form of EU law, it does not provide states with a few years to transpose into national law its provisions. By contrary, it binds MS from its entry into force – in this case 2006. Italy, therefore, through its push-back policy of 2009-2010 has been violating article 3(b) and 13 of the SBC. The former deals with the scope of the Treaty, requiring the respect for *non-refoulement*, related to asylum seekers crossing ‘internal or external borders’. The latter explains that if a state denies access to its territory, in view of the person’s unfulfilled entry requirements, this decision should not jeopardise the right to international protection. It must be recalled that it is widely recognised that treaties’ interpretation must be done in *bona fide*, and in compliance with their object and purpose.¹¹⁸

It is clear that the SBC allows for border checks and surveillance insofar as *non-refoulement* practices are avoided. Therefore the Italian-Libyan joint border patrol, which is *de facto* a *non-refoulement* practice, violates the SBC.

Italy sustained that people on the boats did not ask for asylum, and that the state’s authorities are not obliged to inform people on this option. Besides the interviews of those persons claiming the opposite, it must also be remembered that Italy is under obligations stemming from international human rights law, which has amply been recognised as imposing positive

¹¹⁵ Regulation (EC) No562/2006

¹¹⁶ Brouwer, Evelien, ‘Extraterritorial Migration Control and Human Rights: Preserving the responsibility of the EU and its Member States in *Extraterritorial Immigration Control*, ed. by Ryan, Bernard & Mitsilegas, Valsamis (Boston: Brill, 2010),(199-228), p.179

¹¹⁷ Nascimbene, Bruno, ‘Il respingimento degli immigrati e i rapporti tra Italia e Unione Europea’, *IAI* ,2009.p.5 < <http://www.iai.it/pdf/DocIAI/IAI0922.pdf>> [Accessed 7July 2010]

¹¹⁸ Vienna Convention on the Law of Treaties (1969) 1115 UNTS 331 Art31-32

obligations on states.¹¹⁹ Informing people on a boat in distress, in light of the high probability that they are escaping from a country where they are persecuted, on the possibility of applying for international protection, it is a duty born by Italy.

Clearly it is very likely that the ECJ would decide that Italy is infringing the SBC through its policy, if asked to rule on that.

To sum up it possible for the Commission to bring Italy before the ECJ, considering that Italy has violated the SCB articles 3 and 13. However, the question remains, will the Commission do it?

3.3. *Lack of willingness*

Dennis Abbott, a spokesperson from the Commission requested information upon one of the ‘push-backs’ carried out by Italy last year. Berlusconi’s reply was to threaten the blocking of the subsequent European Council if the EU spokespeople did not keep silent on any topic. According to the Prime minister, only the Commission President can hazard to comment states’ policies.¹²⁰

Apart from this attempt to show concern, the EU has since kept quiet and turned a blind eye on Italian policy in this respect. This is completely consistent with the EU’s position on asylum.

¹¹⁹ See HRC, (n16) para7-8

¹²⁰ Brunsten, Jim, ‘Berlusconi seeks to shut the Commission up’, *European Voice*, 3 September 2009. <<http://www.europeanvoice.com/article/imported/berlusconi-seeks-to-shut-commission-up/65757.aspx>> [Accessed 16 July 2010].

The Global Approach to Migration adopted by the European Council in 2005 proposed to enhance readmission agreements with more countries.¹²¹ At present the EU has readmission agreements with Morocco, Turkey, China and Russia - all countries whose HR standards are highly questionable. In July it finally managed to finalise a readmission agreement with Pakistan. Interestingly Pakistan is not a Signatory to the Refugee Convention. Consequently, can it be considered safe to send back there irregularly present migrants, in light of the elevated number of Internally Displaced Persons in Pakistan confirming humanitarian issues in the country?¹²²

Literature has amply focused on showing how much the EU concentrated on the control of its external borders after the establishment of the Schengen Area and concomitant “free movement of persons, goods and services”.¹²³ The establishment of FRONTEX – the agency for the coordination of MS on borders control - and its soaring budget of approximately € 89 million in 2009, speaks for itself.¹²⁴ €34 millions were used for operations on sea borders.

The EU has been negotiating a Framework Agreement with Libya as well. Under the National Indicative Programme for 2011-2013 appears the “support to border control and the fight against illegal immigration” as one of the major matters.¹²⁵ In June 2010 the figures requested by Libya in order to cooperate in the fight against irregular migration were amounting to € 60 million.¹²⁶ One wonders whether this is the price of human lives?

¹²¹ Gil-Bazo, Maria Teresa, ‘The Practice of Mediterranean States’, *International Journal of Refugee Law*, 18(3-4), 2006, (571-600) p.584

¹²² See: UNHCR, ‘2009: Global Trends’, 15 June 2010. <<http://www.unhcr.org/4c11f0be9.html>> [Accessed 30 July 2010]

¹²³ Treaty amending the Treaty on the EU (Amsterdam Treaty), 1997

¹²⁴ FRONTEX, Final Accounts for 2009, 2010.

<http://www.frontex.europa.eu/gfx/frontex/files/frontex_2009_final_accounts.pdf>from [Accessed 27 July 2010].p.30

¹²⁵ European Commission, Concept Note Libya Country Strategy Paper and National Indicative programme 2011-2013. <http://ec.europa.eu/world/enp/mid_term_review/final_concept_note_libya_en.pdf> [Accessed 28 July 2010] p.4

¹²⁶ Storie Migranti, (n98)

Conclusions

This essay has analysed the recent Italian ‘push-back’ policy in light of Italian obligations under refugee, human rights and EU law.

In the first chapter, the problem of defining the boundaries where a commitment to *non-refoulement* may be enforced was explored. It has been amply justified why *non-refoulement* has an extraterritorial scope and therefore, established that Italy is under a duty to respect *non-refoulement* also in High Seas, where the policy has been taking place.

The second chapter critically appraised the real nature of the relations between Libya and Italy. It has shown that mere economic interests are at the foundation of their agreements, not the cooperation-development nexus that the two countries publicly stated. Considering the substantive aid that Italy has provided Libya with, the paper assessed and demonstrated that Italy is breaching the prohibition of torture, not only because it is returning people to a country where they are at risk of torture or ill-treatment, but also because knowingly *aiding* a country in the commission of a unlawful acts – torture - makes Italy a complicit in that.

Finally, after having established that the Italian policy is unlawful in the first two chapters, the essay went on to investigate which is, at present, the best instrument to be used in order to stop the Italian wrongdoing. Chapter 3 scrutinised the possibilities both at international and regional level, through human rights bodies and public international law tools, with the ECJ appearing to be the most efficacious in terms of enforcement. However, the lack of willingness of the European Commission, made for a dismal conclusion.

Can Italy be held accountable for its push-back policy? Yes, at the moment we have the tools to do it. Will it be held accountable? No, due to the nice job that Italy is doing in stopping the asylum seekers from departing for Europe. It should be recalled that in the majority of the EU

countries, asylum seekers are the 'spongers' who are 'invading or flooding' Europe. How could the Commission dare to make Italy accountable for what is in reality a favour that it is doing to Europe overall?

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