



INTERCEPTION AT SEA AND PUSH-BACK OF REFUGEES BETWEEN ITALY AND LIBYA

Unione Forense per la Tutela dei Diritti Umani (UFTDU) is an Italian non-governmental organisation of lawyers, founded on 2nd March 1968, with the double purpose of disseminating knowledge on the national and international human rights framework and promoting the actual and effective respect of such rights at the judicial, administrative and legislative level.

In order to achieve its goals, throughout the years UFTDU has identified four strategic areas of action: education and training, advocacy, project management and mediation. Furthermore, UFTDU is particularly engaged in the fields of: immigration and asylum, statelessness, racial discrimination, freedom of the press and freedom of expression, rights of the child and right to health.

General Statement

1. In this individual submission Unione forense per la tutela dei diritti umani (hereinafter UFTDU) will address the issue of Italy's institutionalised practice, over the last four years, to intercept at sea refugees coming from Libya and push them back. This practice violates the rights of the single individuals intercepted to seek asylum, have effective remedies and be free from torture and is perpetrated in blatant breach of Italy's *non-refoulement* obligations arising from binding international instruments.

I. Introduction

2. The issue of refugees trying to cross the Mediterranean to seek better life conditions in Italy is a dramatic phenomenon which has raised growing concerns within the international community over the last four years. Intercepting at sea and pushing back refugees coming from Libya is a violation of some of their most fundamental rights and freedoms recognised by several international treaties ratified by Italy.

3. UFTDU's mission is to promote the implementation of international human rights instruments in Italy. With regard to the question of interceptions at sea and push-back of refugees UFTDU is in possession of first hand information since its legal team – most notably Mr Anton Giulio Lana, Secretary General, and Mr Andrea Saccucci, member of the steering committee – defended before the European Court of Human Rights the 24 applicants of the *Hirsi Jamaa and others v. Italy* case which was decided in 2012. The latter were among the roughly two hundred individuals coming from Libya who were intercepted by the Italian Revenue Police (*Guardia di finanza*) and Coastguard 35 nautical miles south of Lampedusa in May 2009 and returned to Libyan authorities in Tripoli.

4. In 2010 Italy accepted recommendation n. 69 proposed by the Universal Periodic Review (UPR) Working Group concerning the Italian-Libyan agreement to prevent immigrants' ships to sail to Italy. In addition, in February 2012, Italy was condemned in the *Hirsi* case for the collective expulsion of refugees and the subsequent violation of their fundamental rights to access effective remedies and be freedom from torture. Nevertheless, interceptions at sea and push-back of refugees, justified on the ground of new bilateral agreements with Libya, are still among the practices irregularly used by Italy to control migration flux in the country. For this reason, UFTDU considers the question to be among the main issues of concern in Italy.

II. International Legal Framework

II.I. Italy's obligations with regard to the right of asylum

5. The right to seek asylum is recognised to everyone by article 14 of the Universal Declaration of Human Rights (UDHR). While this instrument was not originally intended to be binding, it is now widely accepted as being part of customary law. Therefore, the obligations it entails are binding upon signatory States such as Italy. If the asylum seeker is a child, further obligations in terms of appropriate protective measures are imposed by article 22 of the United Nations Convention on the Rights of the Child (UNCRC), of which Italy is a party. In addition, article 13(2) of the UDHR recognises the right of everyone to leave any country, including his own.

The same right is enshrined in article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) and in article 2(2) of the Fourth Protocol of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), both of which have been ratified by Italy.

II.II. Italy's obligations with regard to the right to an effective remedy

6. With regard to the right of individuals to have effective remedies when their fundamental rights are violated, Italy is bound by the obligations set forth in article 8 of the UDHR, article 2(3) of the ICCPR and article 13 of the ECHR.

II.III. Italy's obligations with regard to the right to freedom from torture

7. The right of individuals to be free from torture, cruel, inhuman or degrading treatments or punishments is one of the cornerstones of international human rights law. For this reason, it is enshrined in many international instruments. With regard to Italy, its obligations in this context arise from article 5 of the UDHR, article 7 of the ICCPR and article 3 of the ECHR.

II.IV. Italy's obligations with regard to the principle of *non-refoulement*

8. With regard to the principle of *non-refoulement*, Italy's obligations arise from the ratification of the Convention Relating to the Status of Refugees (CRSR) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). In fact, while article 1 of the CRSR lists the personal requirements upon possession of which someone is to be considered a refugee for the purpose of the Convention, article 33(1) of the latter sets forth the prohibition for States to expel or return refugees "*in every manner whatsoever*" to a country where they would risk persecution. Following the same *ratio*, article 3 of the UNCAT reiterates the *non-refoulement* obligation to those countries in which the returned, expelled or extradited would be in danger of suffering torture. Similarly, article 4 of the Fourth Protocol of the ECHR prohibits the collective expulsion of aliens.

III. National Legal Framework: Italy's domestic laws on asylum

9. Article 10(3) of the Italian Constitution recognises the right of asylum in Italy to all aliens who are denied in their countries the effective enjoyment of the fundamental rights and freedoms in it enshrined. However, the enjoyment of the right to asylum is limited by the conditions set forth by the Italian law. Notoriously, Italian laws on immigration and asylum are all but organic. In fact, immigration in general is regulated at the domestic level by law decree 286/1998 and its later amendments which establish, *inter alia*, rules on asylum and refugee status. However, while law decree 251/2007, which has implemented EC Directive 2004/83/EC¹, defines the contents and limitations of the right to asylum, law decree 25/2008, which has implemented EC Directive 2005/85/EC² and has later been amended by law decree 159/2008 and law 94/2009 – also known as the "2009 Security Package" – deals with the procedural and practical aspects of the recognition of the right to asylum.

¹ EC Directive 2004/83/EC "*On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*".

² EC Directive 2005/85/EC "*On minimum standards on procedures in Member States for granting and withdrawing refugee status*".

10. In practice, the right to asylum is recognised in Italy to the aliens satisfying the objective personal requirements to obtain refugee status set forth in article 1 of the CRSR and to those who are entitled to claim international protection according to European Law. The latter category includes all the aliens who are objectively at risk of suffering severe bodily harm upon going back to their countries of origin. Asylum claims are examined by territorial commissions which can either: recognise refugee status or international protection, reject the application or declare it unfunded. Moreover, when an alien is in the objective impossibility to return to his country due to serious humanitarian reasons which are not among those considered in article 1 of the CRSR or in the rules governing international protection, territorial commissions may reject his application but pass it on to the competent police commissioner for the recognition of humanitarian protection. The national commission for the right to asylum coordinates and supervises territorial commissions but it also has the power to revoke or cancel refugee or international protection statuses. The decisions of both national and territorial commissions can be appealed before ordinary Tribunals, the rulings of which may be the object of two further degrees of appeal.

11. In conclusion, not only Italian laws on immigration and asylum are not organic but they also lack several fundamental tools which would ensure the harmonisation of the current legal framework with international human rights standards. Examples of such tools are effective action plans for the integration of refugees and further procedural guarantees in accordance with the guidelines provided by the United Nation High Commissioner for Refugee.

IV. Supportive examples

IV.I. Bilateral agreements between Italy and Libya to reduce illegal immigration

12. Over the past four years, the Italian government has implemented a rigorous push-back policy with regard to illegal migrants intercepted off-shore trying to reach the Italian coast. Between February 2010 and October 2013 the Italian authorities have stopped at high sea several migrants' vessels coming from Libya and returned them to Tripoli without proceeding to the identification of asylum seekers. However, Libya is a country which does not recognise the right to asylum or any measure aimed at the protection of refugees. Moreover, because of Libya's bad records with regard to the treatment of detainees, pushed-back migrants are constantly at risk of suffering torture or other cruel, inhuman or degrading treatments or punishments at the hands of Libyan authorities. In some cases they also risk deportation to other countries with similarly bad records in terms of human rights standards.

13. According to official reports of the Italian Ministry of Interior, this policy is justified by several bilateral agreements between Italy and Libya which provide a strengthening of the cooperation between the two countries to end illegal immigration. The first relevant agreement was signed in August 2008 by then Italian Prime Minister, Mr Silvio Berlusconi, and Libyan General Mu'ammarr Gheddafi and provided for the "*definition of initiatives, both bilateral and at domestic level, to prevent the phenomenon of the illegal immigration in the countries of origin of the immigration flows*". In April 2012 a new agreement between Italian Minister of Interior, Annamaria Cancellieri, and the Libyan counterpart, Fawzi Al-Taher Abdulali, renewed the general provisions contained in the 2008 one, but further increased Italy's commitment in terms of resources, means

and tasks. Over the last two years, there have been three official meetings between the Italian authorities and the Libyan representatives aimed at establishing a common policy to prevent the landing of illegal migrants in Italy.³ All these agreements had the common effect of institutionalising the practice of intercepting off-shore migrants' vessels coming from Libya coasts and pushing them back under Libyan jurisdiction. These agreements only prescribe for quick controls of migrants' health conditions and do not provide any identification whatsoever of their age or legal statuses.

14. Notably, these agreements between Italy and Libya raise two issues:

a) They lack transparency, both in terms of publication and contents clearness. In fact, if the 2012 agreement was published by non institutional media⁴ and with unjustified delay, to this date, the Italian authorities have not yet published any of the other three agreements. On the other hand, the 2008 and 2010 agreements include general provisions which allow a huge number of heterogeneous procedures and practices and further lack directly applicable provisions, binding on both states.

b) At no point has Italy asked Libya to ensure migrants' rights. Indeed, Libya is still not compliant to international human rights standards of migrants and asylum seekers in particular. Not only Libya has never ratified the CRSR, but many international institutions⁵ and NGOs⁶ have reported on the alarming situation of migrants pushed back by the Italian authorities and denounced the gross and systematic violation of their most fundamental rights and freedom. Italy should have not relied on mere declarations of the Libyan authorities, but rather engage actively to verify the actual respect of migrants' rights.

IV.II. The *Hirsi* case before the European Court of Human Rights

15. On February 23rd 2012, the Grand Chamber of the European Court on Human Rights delivered a groundbreaking ruling condemning Italy for the interception at sea and push-back of a vessel of illegal migrants coming from Libya. The claim was lodged by lawyers Anton Giulio Lana and Andrea Saccucci of UFTDU in November 2009. The applicants were eleven Somali citizens and thirteen Eritrean citizens intercepted by the Italian 35 naval miles south of Lampedusa in May 2009, forcefully pushed back under the custody of Libyan authorities in accordance with the above mentioned bilateral agreements.

³ In chronological order: Italian Minister of Interior, Angelino Alfano, and Libyan Minister of Foreign Affairs and Cooperation, Mohamed Emhemmed Abdelaziz, on July 4th 2013 in Rome – Italian Military Head of the Defense, Luigi Binelli Mantelli, and Libyan Head of the Defense, General Abdulsalam Jadallah Alsalhin Alobaidi, on October 1st 2013 in Tripoli - Italian Minister of Interior, Angelino Alfano, and Libyan Minister of Interior, Sadiq Abdulkarim, on February 4th 2014 in Rome

⁴ Available at <http://www.stranieriinitalia.it/images/accordolibia18giu2012.pdf>.

⁵ Press Release of the United Nations High Commissioner for Refugees of May 7th 2009 and Report of the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading treatment or Punishment of April 28th 2010.

⁶ Amnesty International's Report on its May 15th through 23rd 2009 visit to Misrata's Detention Centre; Human Rights Watch Report "*Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum seekers, Libya's mistreatment of migrants and asylum seekers*" of September 21st 2009.

16. Italy was held responsible for violating the right of the pushed-back migrants to be free from torture or other cruel, inhuman, or degrading treatment enshrined in article 3 of the ECHR. In fact, the intercepted migrants were put in tangible danger of suffering inhuman and degrading treatments or torture in Libya. The risk was known, or at least foreseeable, to the Italian authorities at the time of the interception and under no circumstances can bilateral agreements between two countries be invoked to justify the violation of such fundamental right. Moreover, Italy further violated article 3 because it did not consider that, since Libya is not a party to the CRSR, the claimants risked to be returned to their countries of origin, Somalia and Eritrea, where the risk of being subjected to ill-treatments or torture was clear and concrete. Italy also violated the prohibition of collective expulsion prescribed by article 4 of the Fourth Protocol of the ECHR. Italian authorities failed to identify the legal status of each migrant, thus preventing denying their right to seek asylum. Finally, Italy did not provide the pushed-back migrants with effective juridical remedies this violating art 13 of the ECHR.

17. The *Hirsi* case is only one of the dramatic examples of an institutionalised practice by which migrants are intercepted and pushed back without Italian authorities taking care of identifying their individual legal statuses. Indeed, in July and August 2013 two similar episodes occurred off the coasts of Lampedusa.⁷ The migrants, mostly Eritrean, were pushed back to Libya, jailed in Tripoli's Garabuli detention centre and, supposedly, tortured and ill-treated in general.⁸

V. Concluding Remarks and Recommendations

18. After the ruling of the European Court on Human Rights, and even more so in light of the earlier commitments undertaken by the Italian authorities during the last UPR, there should have been significant changes in the immigration policies and in the procedures for the reception of illegal migrants. However, to this date, bilateral agreement with Libya have not been cancelled or amended so as to comply with international standards in terms of right to asylum and other internationally protected human rights. On the contrary, Italy's conduct shows the clear intention to strengthen its barriers and thus avoid other disembarkations of illegal migrants on the Italian shores. Moreover, Italy has committed to invest its resources to enhance Libya's capacities to deal with illegal migrants so as to avoid their entrance within Italian jurisdiction.

19. UFTDU strongly believes that Italy is still acting in severe breach of its international obligations illustrated in paragraph I and, to this end, presents to the Italian government the following recommendations:

1. To revise the agreements with Libya aimed at stopping illegal flows of migrants in the light of the European Court of Human Rights ruling in the Hirsi Jamaa et a v. Italy case and to show the clear intention to protect migrants' and refugees' rights, in compliance with customary international law and the international treaties of which Italy is a party.

⁷ Information available at: <http://habeshia.blogspot.it/2013/09/nuovi-respingimenti-in-mare-litalia.html>.

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2. *To reach more transparent and clear agreements with Libya with regard to immigration and therefore to provide for adequate and official means of publication and to refrain from adopting generic provisions..*
3. *To ensure migrants and their family members access to basic social services by promptly signing the International Convention on the Rights of All Migrants Workers and Members of their Families, as already demanded by the already accepted recommendation 75 of the 2010 UPR Working Group.*
4. *To put political pressure on Libya, partner in its struggle against illegal immigration, for the ratification of the Geneva Convention on the Status of Refugees and the de jure and de facto compliance with international standards on immigration policies and refugees' protection.*
5. *To provide for a bipartisan commission committed to monitor and control the enforcement and protection of illegal intercepted and pushed-back to Libya illegal migrants' fundamental rights and to investigate on past violations of such rights.*
6. *To take appropriate legislative measures to decriminalise all the offences directly related to the status of illegal migrant, such as the irregular entry and stay, recidivism and breach of the repatriation order, as prescribed by law 94/2009, in order to promote integration, prevent discrimination against minorities, as well as contribute to the positive image of migrants in the country.*
7. *To revise the actual laws on asylum and to take appropriate legislative measures to provide an organic legal framework with regard to the protection of refugees, in accordance with the guidelines of the United Nation High Commissioner for Refugee.*