Analysis

Italy guilty of *refoulements* in 2009 handover of Eritrean shipwreck survivors to Libya

Yasha Maccanico

January 2020

An Italian court has ruled that the country's Cabinet presidency and defence ministry were responsible for the refoulement *of 14 Eritrean nationals in July 2009, when a warship rescued some 80 people and took them back to Libya, ignoring requests for international protection.*

On 14 November 2019, the first section of the Rome civil court ruled on a case brought by 14 Eritrean nationals against the interior, defence and foreign affairs ministries and the Cabinet presidency, for a collective *refoulement* at sea on 1 July 2009. The court, presided over by judge Monica Velletti, handed down a sentence upholding the claims made by the 14. The Italian state has been ordered to pay €15,000 in compensation to each individual and to permit them entry into Italy to apply for international protection.[1]

This sentence upholds several basic legal principles that are being actively undermined by current EU and Italian efforts to prevent sea crossings in cooperation with the so-called Libyan coastguard. In particular, the sentence clarifies that an act undertaken in accordance with an Italian ministerial decree against irregular migration and a bilateral treaty between Italy and Libya does not allow authorities to disregard the international, EU and national legal frameworks – the latter take precedence over the former.

The normative framework that applied at the time obliged Italian authorities to accept the submission of asylum claims and prohibited *refoulements* to unsafe territories. [2] This reasoning could be extended to the so-called "code of conduct" for NGOs[3] that seeks to subordinate the law of the sea to instrumental measures aimed at obstructing rescues by civilians and to operative arrangements giving the so-called Libyan coastguard exclusive responsibility for maritime rescues in the central Mediterranean.

[1] Sentence no. 22917/2019, first civil section of the Rome Court, published on 28 November 2019, p. 17, http://statewatch.org/news/2020/jan/it-refoulement-eritrean-refugees-judgment-11-19.pdf
[2] Ibid, pp. 10-11.
[3] 'Italy's proposed code of conduct for Mediterranean NGOs "threatens life-saving operations"', *Statewatch News*¸11 July 2017, http://statewatch.org/news/2017/jul/med-ngo-code.htm

Two organisation involved in the case, *Amnesty International* (*AI*) and *ASGI* (*Associazione per gli Studi Giuridici sull'Immigrazione*), described this sentence as "historic" for its interpretation of Article 10.3 of the Italian Constitution that safeguards the right to seek asylum, and in relation to policies to externalise the EU's border control and restrictive immigration policies.[4] A wide reading of this point makes it conceivable that thousands of people were denied the opportunity to apply for asylum as a result of the EU's externalisation of border management to Libyan authorities in the Mediterranean. In fact, the statement by *AI* and *ASGI* stresses that the outcome of such practices has amounted to preventing access to protection for people taken back to Libya.

Facts of the case

After fleeing their country, the Eritrean plaintiffs embarked from the Libyan coast on 27 June 2009 to reach Italy and seek international protection. Their vessel had an engine failure on 30 June in the high sea off Lampedusa that left it at the sea's mercy until an Italian Navy ship, the *Orione*, intervened to rescue its 89 passengers. They were transferred on board, searched, had some personal effects confiscated (including photographs, money and documents), were photographed and issued an identification number. They were assured that they would be taken to Italian territory, where they could have applied for international protection.

In the early hours of 1 July, the rescued people realised that the *Orione* was heading for Libya and began complaining. They panicked when a Libyan vessel flanked the *Orione*, and many of them started shouting that they were seeking international protection and asylum, begging not to be handed over to the Libyans because they had been tortured, imprisoned and persecuted in Libya. Nonetheless, they were handed over and transferred onto the Libyan vessel, where they were cuffed with plastic handcuffs.

Hence, the plaintiffs argue that they were collectively refused entry without undergoing any formal procedures, in violation of Italian and international law. They were denied access to procedures to obtain international protection and were returned to Libya, where they were brutally and indiscriminately beaten and detained for several months in inhuman and degrading conditions.

The plaintiffs then tried to reach Europe by land, across Egypt and the Sinai Peninsula, reaching Israel in 2010, where they were arrested before being released without any guarantees. They argue that their fundamental rights are being violated, that they are experiencing inhuman and degrading treatment at the hands of the Israeli authorities and face a risk of *refoulement* to Eritrea. On 25 June 2014, the plaintiffs sent a formal notification of their plight and complaints to the accused Italian authorities, which failed to acknowledge receipt. They demanded damage payments and for action to be taken to curtail violation of their rights by allowing them to enter Italian territory and apply for protection. Their demands in this civil case are for admission into Italian territory, with all the consequences this implies, and payment of €30,000 in damages for each plaintiff for a failure to adopt necessary measures to allow entry for the purpose of requesting protection.

[4] Respingimenti e richiesta d'asilo. Importante sentenza del Tribunale civile di Roma. Grande la soddisfazione di Amnesty International Italia e ASGI, 3.12.2019, http://www.cronachediordinariorazzismo.org/respingimenti-e-richiesta-dasilo-importante-sentenza-del-tribunale-civile-di-roma-grande-la-soddisfazione-di-amnesty-international-italia-e-asgi/

Preliminary objections advanced by the defendant administrations

The ministries and Cabinet presidency asked that the court reject the claims. They argued that 82 people were rescued in the incident (rather than 89), that the rescue was in international waters 26 nautical miles south of Lampedusa, and that none of the migrants expressed their wish to seek asylum. The defendants also argued that the handover complied with the 2008 Treaty of Friendship, Partnership and Cooperation between Italy and Libya and with Article 1.4 of an Italian ministerial decree of 14 July 2003. For these reasons, they asked the court to deem the case unfounded and inadmissible, because the plaintiffs were not legitimated to act, the statute of limitations had intervened for their damage claims, and the demands should be rejected as unfounded and not proven. The plaintiffs' precautionary request was rejected on these grounds on 23 November 2016, because it was impossible to state with certainty that the plaintiffs were involved in the rescue and because of the time that had elapsed since the events.

Three witnesses were heard by the court – two of whom attempted the crossing with the plaintiffs and a third one had met them in Israel whilst working for *Amnesty International* – and documents were submitted by both parties. The plaintiffs' identity as the people involved in the rescue was established using photographs taken on the *Orione* ship while the survivors held the identification numbers given to them, and those taken at *Amnesty International*'s office in Israel. The witness's testimonies were useful for this purpose, providing positive identification of subjects whose names did not appear in the images and confirmation of further elements described by the plaintiffs. Thus, the court agreed they had a legal right to act in these proceedings.

Another preliminary objection raised by the defendant administrations concerned expiry of the five-year term for damage payments. The plaintiffs deemed that their communication to notify Italian administrations of the situation had interrupted the statute of limitations from intervening, despite not receiving confirmation of its receipt from the addressees. The Italian authorities deemed that the period to be considered was from 30 June 2009 to 7 January 2016, whereas the recorded delivery from the plaintiffs was dated 25 June 2014, just before the expiry of five years after the events. The defendant administrations are deemed to have responded to the claim after the deadline within which they could have raised this exception and, in any case, the court deems the recorded delivery suitable to interrupt the statute of limitation from intervening. Thus, the request for damages was admitted.

Similar reconstructions, divergent interpretations

Regarding damage compensation, based on both parties' testimonies, the documents they submitted and witness accounts of incident, several points were ascertained. On 30 June 2009, the Italian Navy carried out a rescue operation of a group of around 80 people who were transferred onto an Italian vessel that headed towards Libya; data from the administration showed the rescue took place in international waters, 26 miles south of Lampedusa; on 1 July 2009 the migrants were photographed, assigned an identification number and handed over to the Libyan authorities. Witnesses confirmed the plaintiffs' account that they were told they were heading towards Italy, that they said they did not want to return to Libya because they were refugees and wished to apply for international protection, when they found out that they were being returned to Libya. It was also confirmed that the rescued people were handed over to the Libyans without having the opportunity to lodge asylum applications. The parties' reconstructions of events were similar, although their understandings differed regarding the

legality of the Italian authorities' actions, namely the rescue and subsequent handover to the Libyan authorities.

The plaintiffs argued that – aside from facing a violation of the *non-refoulement* principle and denial of access to asylum proceedings – they were consigned to an unsafe place. Collective *refoulement* with no examination of individual circumstances and the *de facto* denial of access to international protection breaches the 1951 Geneva Convention on refugee status, the European Convention on Human Rights (ECHR), the UN Convention against Torture, the International Covenant on Civil and Political Rights, the Montego Bay Convention, the Convention on the Safety of Life at Sea, the Treaty of the European Union, the Schengen Borders Code (at the time, EC Regulation 526/2006), and the Refugee Procedures Directive (2004/83/EC) laying down minimum standards for refugee status recognition transposed into Italian laws no. 25/2008 and no. 286/1998. The *Hirsi Jamaa et al vs. Italy* sentence of 23 February 2012,[5] in which the European Court of Human Rights (ECtHR) found Italy guilty in a case involving returns to Libya by the Italian Navy, served as a precedent.

The defendant administrations disagreed, arguing that the actions adopted were lawful, in accordance with Article 1.4 of a ministerial decree of 14 July 2003 on countering irregular migration and the 2008 Treaty of Friendship, Partnership and Collaboration with Libya.[6] The Italian authorities had merely executed the contents of an international agreement, within that normative framework. However, the sentence makes clear that lawfulness of the action must be assessed in the light of the entire normative framework that applied at the time.

The Geneva Convention sets out the *non-refoulement* principle that forbids expulsion or refusal of entry leading to the return of individuals to territories where their life or well-being are at risk. UNHCR deems this a fundamental principle that does not allow exceptions connected to the right to seek asylum (UDHR) and the absolute prohibition of torture and cruel, inhuman and degrading treatment (ECHR, art. 3). The 4th Protocol to the ECHR states: "The collective expulsion of foreigners is prohibited." Such rights are guaranteed in Italian laws including the Constitution's recognition of the right to asylum (Article 10.3), and the inclusion in EU law of principles guaranteed under international law, including the *non-refoulement* principle, as found in Article 19 of the EU Charter of Fundamental Rights.

The ECtHR's judgment in *Hirsii Jamaa* is relevant to appreciate these measures' scope and substance, viewed as the premises for which Italy was found guilty in a case that shares several features with this one. UNHCR deems this principle to apply whenever an act by a state may lead to the return of an asylum seeker or refugee towards the border of a territory where their life or freedom would be at risk and they may face persecution. It may apply to refusal of entry at the border, interception and indirect *refoulement*, whether it concerns a person seeking asylum or a substantial population's movement, and it applies when refugee status has not yet been granted, also in the high seas. The *non-refoulement* principle's intimate connection to the right to seek asylum (Article 14 UDHR) means that everyone has a

[5] European Court of Human Rights, Grand Chamber, Hirsi Jamaa and others vs. Italy (no. 27765/09), Judgement, Strasbourg, 23.2.2012, https://hudoc.echr.coe.int/eng#{"itemid":["001-109231"]}

[6] On the aftermath at the time of the Arab Spring uprisings, see "The EU's self-interested response to unrest in north Africa: the meaning of treaties and readmission agreements between Italy and north African states", Statewatch news online, Jan. 2012, http://www.statewatch.org/analyses/no-165-eu-north-africa.pdf . On the situation at the time of the treaty, see "Relaciones peligrosas: el acercamiento italo-líbico y sus efectos para los migrantes", Informe Derechos Humanos en la Frontera Sur 2008, Asociación pro Derechos Humanos de Andalucía, pp. 80-90, https://www.apdha.org/media/fronterasur2008.pdf .

right to seek and enjoy protection from persecution in other countries. This juridical situation falls within customary international law and is binding for all states. Article 3 of the ECHR forbids torture and cruel inhuman or degrading treatment and, in combination with Article 33 of the Geneva Convention, this also applies when people refused entry or turned back risk undergoing torture or other inhumane or degrading treatment.

In the *Hirsi Jamaa et al vs. Italy* case, among others, the ECtHR established that a person must not be removed if they run the risk of prohibited treatment in the destination country, a condition that the returning state must check. In situations where human rights violations are systematic, this means the returning state must find out to what treatment returnees would be subjected, and the failure to submit an asylum application does not allow states to disregard this duty. Thus, even in the absence of explicit asylum requests, states should not ignore the possibility that a return may lead people to experience cruel, inhuman or degrading treatment. The 4th Protocol to the ECHR forbids collective *refoulement* and the *Hirsi Jamaa* case established that this applies beyond national borders and, in particular, on the high seas. The sentence upheld the criterion that states cannot expel groups of foreigners without examining their individual cases.

The decision

In light of the above normative framework, if a state's authorities intercept migrants at sea their cases should be examined individually and they have a duty not to expel refugees to territories where their life or freedom would be in peril, and where they may risk persecution. The failure to submit an asylum application does not allow states to ignore the systematic violation of human rights in some countries.

In the case of Libya, this was documented in several reports issued between 2006 and 2010 by international organisations – *Human Rights Watch*, the UN Commission on Human Rights, *Amnesty International* and the US State Department. Italian authorities should have been aware that Libya has not ratified the Geneva Convention, does not have a national asylum system and could not be considered safe. There was a concrete risk of migrants being detained, subjected to violence or deported to Eritrea, a country for which several reports documented systematic violations of human rights by the government, including torture, arbitrary arrest, inhuman detention conditions, forced labour, serious restrictions on freedom of movement, expression and worship. The *Hirsi Jamaa* judgment explicitly recalled relevant reports by the UN Human Rights Commission, *Amnesty International* and *Human Rights Watch*.

The measures recalled by the defendant authorities, including the international agreement between Italy and Libya, function within this normative and factual context. Even if one were to accept that the agreement expressly provided for the return to Libya of migrants intercepted in the high seas (which it does not explicitly mention), this would not relieve Italy of its obligations under international legal instruments it has ratified. Italy cannot relinquish its responsibilities by evoking duties that may arise from bilateral agreements with Libya, which must give way to Constitutional and supranational prescriptions – Article 10 of the Constitution and Articles 18 and 19 of the EU Charter on Fundamental Rights.

Furthermore, the 2008 Treaty of Friendship with Libya is not limited to allowing returns, but in Article 1 it claims compliance with international law by recalling their duties deriving from its universally recognised principles and norms. Therefore, the Italian authorities' actions contravened their obligations under Italian constitutional law and international law.

Additionally, the *Hirsi Jamaa et al* ECtHR sentence in 2012 obliged Italy to pay compensation to a group of Somali and Eritrean migrants in similar circumstances (a rescue by the Italian *Guardia di Finanza* – customs police – and Coast Guard on 6 May 2009, 35 nautical miles south of Lampedusa in Malta's SAR zone, followed by the handover of the individuals to Libyan authorities without allowing them to request international protection).

Having ascertained that this conduct contravenes juridical norms, the court sought to clarify that Italian authorities were aware or could have been aware that Libya should not be considered a place of safety due to the existence of several reports by international organisations. Thus, the authorities concerned are guilty and are objectively responsible, meaning that the damage incurred should be identified, not in terms of monetary damage, but that connected to the serious violation of people's basic rights that cannot be contravened and are protected by the Constitution, including the right to apply for international protection. Such damage must be alleged and proven by those seeking compensation. In this case, the plaintiffs have alleged experiencing harm including the suffering they underwent and risks to protected goods like health, psycho-physical well-being and personal freedom, that resulted from being returned to an unsafe country. The negative repercussions that actually affect a person harmed by a crime or breach of people's inviolable rights must be identified.

In this instance, these considerations apply to denial of access to asylum procedures intimately connected to the refusal of entry and the harm suffered as a result of forced return to Libya, where imprisonment, torture and violence occurred. Equitable damage payments are necessary, and the relevant reference is the *Hirsi Jamaa* case, in which they amounted to 15,000 euros, rather than the 30,000 euros requested by the plaintiffs in this case, whose characteristics are similar. The defence ministry and the presidency of the Cabinet should pay this compensation. The latter is responsible for the Italian state's actions in application of the Italy-Libya treaty, whereas Navy personnel physically carried out the *refoulements*. Neither the ministry for internal affairs nor the foreign affairs ministry were deemed responsible.

The plaintiffs also demanded that restrictions to their entry into Italian territory be lifted and that the defendant administrations act to make this possible, so that they may request international protection, to remove the harmful consequences of the unlawful conduct they underwent.

The administrations opposed this claim, arguing that the situation prior to the violations that have been identified could not be re-established, that the migrants were not in Italian territory but in international waters at the time of the rescue, and that boarding an Italian vessel did not automatically mean that they would have applied for or would have been granted international protection. However, witness accounts by people on board contradicted this claim because they declared that everyone expressly asked to apply for asylum or international protection when they first came into contact with Italian military personnel, as refugees from Eritrea.

The sentence rules that this claim does not require compensation, but rather, to demand verification of the right to apply for international protection. The administrations' defence does not seem to apply, because once the rescued shipwreck victims were on board the Navy ship, they were in Italian territory. A comprehensive reading of Article 10.3 of the Constitution, rulings by the United Sections of the Court of Cassation (Italy's highest appeal court) and by the Supreme Court consider the right to international protection as a perfect subject of law with constitutional and customary derivations. This means that the right to asylum in the Constitution may take the form of a right of access to submit an asylum application, when the

fact that an individual is not present in Italian territory is a result of unlawful acts by the administrations in question (a *refoulement* to Libya). This view is strengthened by evidence that, in 2019, serious and systematic human rights violations still take place in Eritrea, as certified by Human Rights Watch. The court thus also ruled that the plaintiffs may enter Italian territory to apply for protection.

Sources

Sentenza n. 22917/2019, first civil section of the Rome Court, published on 28.11.2019 (pdf)

Respingimenti e richiesta d'asilo. Importante sentenza del Tribunale civile di Roma. Grande la soddisfazione di Amnesty International Italia e ASGI, 3 December 2019

Statewatch is a non-profit-making voluntary group founded in 1991. It is comprised of lawyers, academics, journalists, researchers and community activists. Its European network of contributors is drawn from 18 countries. Statewatch encourages the publication of investigative journalism and critical research in Europe the fields of the state, justice and home affairs, civil liberties, accountability and openness.

One of Statewatch's primary purposes is to provide a service for civil society to encourage informed discussion and debate - through the provision of news, features and analyses backed up by full-text documentation so that people can access for themselves primary sources and come to their own conclusions.

Statewatch is the research and education arm of a UK registered charity and is funded by grant-making trusts and donations from individuals.

Web: www.statewatch.org | Email: office@statewatch.org | Phone: (00 44) 203 691 5227

Post: c/o MDR, 88 Fleet Street, London EC4Y 1DH

Charity number: 1154784 | Company number: 08480724
Registered office: 2-6 Cannon Street, London, EC4M 6YH