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CONTROL OF ILLEGAL IMMIGRATION AND ITALIAN-EU RELATIONS

by Bruno Nascimbene

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Controlling maritime borders and flows of illegal immigrants in the Mediterranean is an issue where sharp tensions have been evident for some months now at the national, EU and international levels. Tensions evidenced by the reactions and outcry provoked by operations involving Italian naval units which have intercepted boats carrying migrants and sent them back to their ports of departure, most notably in Libya. The migrants concerned were deemed to be illegal regardless of their possible asylum-seeker status. Such interventions have raised, and continue to raise, concerns over the fate of the persons involved, especially as regards the protection of their fundamental human rights.

This practice also gives rise to concerns over compliance with international asylum obligations and in relation to the circumstance that the migrants on board the intercepted boats may include refugees seeking international protection (asylum-seekers) and the boats are being turned back without ascertaining their individual status. Or, more specifically, whether they are persons applying or intending to apply for asylum, and thus "qualifying" under the 1951 Geneva Convention relating to the status of refugee; the European Community directives on "reception" (Directive 2003/9), "qualification and status" (2004/83) and "procedures" (2005/85); and domestic implementing provisions (Legislative Decree 140/2005, Legislative Decree 251/2007 and Legislative Decree 85/2005).

These recent episodes are an opportunity to provide clarifications that might foster a better understanding of an international relations framework in which the principal actors are Italy, Libya, Malta and the European Union.

The idea of involving migrants' countries of origin and destination in pursuing the goal of containing irregular flows has been a key feature of Italian policy for over a decade. It has given rise to a large number of police cooperation and re-admission agreements (which envisage an obligation on the states of origin, citizenship and transit to re-admit migrants). Within this strategy framework, the collaboration of many countries on the southern shore of the Mediterranean has been deemed essential. These include Libya, which has come to play an increasingly prominent political role, since cooperation with the Maghreb countries has led to departures being concentrated mainly in that country.

The 2008 Treaty between Italy and Libya

It is no coincidence, therefore, that recent years have seen closer relations with the "Great Socialist People's Libyan Arab Jamahiriya". The Treaty on Friendship, Partnership and Cooperation was signed by Italy and Libya in Benghazi on 30 August 2008 and entered into force on 19 February 2009 following the approval of the

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ratification and implementation law (no. 7 of 6 February 2009). The Treaty is intended not only to end a series of disputes dating back to colonial times but also to strengthen collaboration between the two countries in combating illegal immigration by sea. It implements the Protocol signed in Tripoli on 29 December 2007 and the additional technical-operational Protocol of the same date (another implementation Protocol, the text of which is as yet unknown, was signed on 4 February 2009).

Under the first Protocol, joint sea patrols are envisaged, with boats provided by Italy. The Parties undertake to carry out control, search and rescue operations encompassing the departure points and transit routes of boats used to transport illegal immigrants in Libyan territorial and international waters.

Art. 1 of the Treaty envisages an undertaking to fulfil obligations "deriving from the universally recognised principles and norms of international law, as well as those deriving from 'international legality'". It also refers explicitly to the objectives and principles of the United Nations Charter and the Universal Declaration of Human Rights (art. 6). Although Libya is not a contracting party to the Geneva Convention, it has ratified the African Charter on Human and Peoples' Rights (1981), art. 12 of which recognises the right to seek and obtain asylum in other countries and prohibits mass expulsions. It has also ratified the Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) , art. II of which prohibits *refoulement*.

The *non-refoulement* principle and other international obligations

The Libyan Government is in any case required to respect international obligations to protect the human rights of any and all persons, and therefore of those seeking asylum and accommodated in reception centres on its territory. Failure to observe these obligations (as reported by international associations and non-governmental organisations (NGOs) such as Amnesty International or Fortress Europe) would also affect our country. Italy has in fact concluded an international agreement based on respecting certain preconditions and is therefore legitimately entitled to call for these obligations to be observed. This is all the more true given that any failure to respect such obligations touches upon the Geneva Convention, which our country ratified as far back as 1954 (ratification and implementation Law 722 of 24 July 1954).

Art. 33 of the Geneva Convention prohibits states from expelling or returning refugees and asylum seekers to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. This principle, known as *non-refoulement*, is reiterated in a number of instruments, especially in the framework of international humanitarian law. Thus, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that no State Party shall expel, return ("refouler") or extradite a person to another State where he or she would be exposed to the risk of such treatment.

The European Convention for the Protection of Human Rights and Fundamental Freedoms also sanctions the right not to be subjected to inhuman or degrading treatment. Art. 3 of the Convention has been interpreted on several occasions as a principle prohibiting extradition, expulsion, deportation or *refoulement* to states where the individual would be exposed to the risk of such treatment. The ban also applies in cases where *refoulement* would see the individual returned to an "intermediate" state

which could in turn send him or her to yet another state where they would be exposed to inhuman or degrading treatment. As an expression of a principle of humanitarian law, the ban on *refoulement* is now also considered a principle of customary law. This means that it is binding even on those states which have not signed the conventions in which it is expressly envisaged.

As far as Italy is concerned (leaving international obligations to one side, so to speak), the protection of the fundamental rights is provided for by Article 2 of the Constitution and the right of asylum by Article 10.3. Art. 2.1 of the Consolidated text on the Condition of Foreign Nationals (Legislative Decree 286 of 25 July 1998) states that the fundamental rights of foreign nationals "present in any circumstances at the border or on national territory" must be recognised. Art. 10.4 of Law 286/1998 prohibits *refoulement* in cases of applications for political asylum, the recognition of refugee status or the adoption of temporary protection measures for humanitarian reasons. Art. 19 prohibits expulsion or *refoulement* to another state where the individual might be persecuted for various reasons or might be exposed to the risk of expulsion to another country where they would not be protected from persecution.

The obligation to provide international protection, which is broader in scope than that envisaged by the Geneva Convention (since it also includes subsidiary protection), is envisaged by EU Directives and by the transposition and implementation laws mentioned earlier.

This legislative framework could not be opened up to renewed discussion by a presumed limit on the scope of application of the *non-refoulement* principle. In response to doubts expressed as to the extra-territorial scope of the principle, the Office of the United Nations High Commissioner for Refugees (UNHCR) has taken a clear and authoritative stance (opinion of 26 January 2007). In so doing it has ruled out any suggestion that the principle can only be applied when migrants are on national territory or national waters. Such a limit, which has also been rejected (as I shall describe later) by the European Court of Human Rights and more recently by the European Commission, which espouses the Court's decisions, would in truth be a dangerous instrument in the hands of any state.

As the most recent episodes of *refoulement* by our own and the Maltese Governments confirm, it is not easy to ascertain the facts and discern where responsibilities lie. This is because boats carrying migrants can be guided or "pushed" towards international waters where the principle does not operate, thus ruling out the responsibility of any one state.

The EU dimension

Refoulement to Libya by the Italian authorities and the conduct of the Maltese authorities, who are alleged to have failed to assist the migrants (and who may also have driven them towards Italian territorial waters), have prompted the European Commission to seek clarification. The Deputy President of the Commission, Jacques Barrot, who is responsible for Justice, Freedom and Security issues, asked in a letter of 15 July 2009 what steps had been taken to ensure that returned foreign nationals received adequate protection.

The European Commission's intervention shifts attention from the international to the EU level, raising questions as to whether *refoulement* practices are compatible with obligations deriving from EU law (most notably the "Procedure Directive", which is based on art. 63 of the EC Treaty). The Commission has pointed out that while the Community laws governing this matter only apply on member states' territory – including, therefore, their territorial waters – the actions of the Italian military and coastal authorities derive from the border surveillance activities envisaged by art. 12 of the Schengen Borders Code. Under this Code, adopted through Regulation 562/2006, "the main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally".

Almost as though to pre-empt any objections from Governments, the Commission is of the view that the Code applies even if surveillance activities take place in the contiguous zone, in the exclusive economic zone or on the high seas. Community laws, and also, therefore, those concerning fundamental rights, must be observed; the fundamental principles and laws (also referred to in art. 3 of the Code) include *non-refoulement*. Border control operations to apply the Code require that this principle be observed, even if the controls are carried out on the high seas.

To back up its position, the Commission refers to the rulings of the European Court of Human Rights. Addressing the issue of responsibility for acts committed outside a country's territory, the Court has ruled that actions carried out by a state naval unit on the high seas are an example of the exercise of extra-territorial jurisdiction. As such, they could result in the state concerned being deemed responsible (see the decision of 30 June 2009 concerning the admissibility of appeal no. 61498/08, in the *Al-Saadoon and Mufdhi v United Kingdom* case, points 85-88).

As a right guaranteed by the European Convention on Human Rights (ECHR), in the event of an alleged violation perpetrated by contracting states to the Convention the *non-refoulement* obligation means that the jurisdictional control mechanism may be brought into play. This takes the form of a recourse to the European Court of Human Rights. As a fundamental guarantee that is also valid in the EU context, any violation of this principle could lead to the state being held responsible, with the possibility of an infringement proceeding under art. 226 of the EC Treaty. Any Government, such as our own or the Maltese government, carrying out an unlawful *refoulement*, could therefore find itself having to answer to a violation of Community law.

Gaps in the EU framework

News reports necessarily highlight a problem that is broader in scope than and reveals the gaps in the EU framework, given that the EU does not have sufficient means to tackle the issue. Concerns over the control and containment of illegal immigration have occupied a central position in the "European Agenda" and, it follows, in the programmes drawn up by the Commission (Tampere, The Hague and Stockholm, which is currently awaiting approval) to create a common space of freedom, security and justice. The focus on immigration via the Mediterranean has increased significantly in recent years, especially as a result of pressures originating in the countries most exposed to such flows. In late 2008 Italy, Malta, Greece and Spain set up the "Group of 4" with

the aim of keeping attention focused on this issue and pressing for a common European initiative and more solidarity amongst member-states.

On 2 September 2009 the European Commission, at the urging of the member states most affected by incoming refugee flows, proposed that a *Common Resettlement Programme* be adopted. The aim would be to provide more effective protection for refugees through increased political and practical cooperation among member states. This mechanism would apply on a voluntary basis, the aim being to encourage transfers of refugees from the third country where they submitted their first asylum appeal to another EU country where they could settle and enjoy permanent protection. The Commission has also announced a pilot scheme to boost cooperation in control and surveillance activities and information exchanges by the competent authorities of the Mediterranean member states.

Cooperation between states, thanks to Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of EU Member States (under regulation 2007/2004) is certainly a positive development, but not sufficient in itself. Recent initiatives by the Commission, now near the end of its mandate, will only bear fruit in the future and in any case are not as incisive as we might have hoped. To the question “Is the European Union doing enough in asylum matters?”, it is easy to reply in the negative. Perhaps, with the approval and entry into force of the Lisbon Treaty, which envisages (art. 67 FEU Treaty) the creation of a true “common asylum policy”, things are set to change. Perhaps.