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The "Push-back Policy" Struck Down Without Appeal? The European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*

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Abstract

The judgment delivered on 23 February 2012 by the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy* is not only an international condemnation of the "push-back policy" enacted by Italy towards foreign nationals *refoulés* towards Libya, but also a warning to conform to the principles it contains, should similar cases arise again of migrants or asylum seekers intercepted at sea by the Italian authorities. What will the Italian government's conduct be after the judgment? Perhaps it will lead to less equivocal bilateral relations between Italy and Libya.

Keywords: *European Court of Human Rights / Migration / Refoulement / International Law / Human Rights / Italy / Bilateral Relations / Libya / Bilateral Treaties*

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The "Push-back Policy" Struck Down Without Appeal? The European Court of Human Rights in *Hirsi Jamaa and Others v. Italy*

by Bruno Nascimbene*

The judgment of 23 February 2012[1] is not only a clear condemnation of the "push-back policy" enacted by Italy towards foreign nationals who have been *refoulés* towards Libya. It is also a warning to Italy to comply with the principles embodied in the ruling, which was pronounced by the Grand Chamber and is therefore final, should migrants or asylum seekers be intercepted again at sea by the Italian authorities.

The violation of fundamental rights obliges the Italian government to ensure that the authorities of the country to which the foreigners have been turned back (in the instant case, Libya), will treat them in conformity with the European Convention on Human Rights (ECHR) - particularly Art. 3 - and will not repatriate them to their countries of origin (in the instant case, Eritrea and Somalia), and to take all possible measures to prevent similar situations from occurring in the future. The individual measures, including the payment of compensation in the amount of 15,000 Euros for each of the applicants, are not enough: under Article 46 of the ECHR, in fact, the State must adopt measures of a general character, including legislative action.

These are the facts, briefly. Italy was carrying out its own strategy to curb irregular migration flows by sea, principally centered on bilateral cooperation with the migrants' countries of origin and transit. In May 2009 the Italian naval authorities intercepted over 800 individuals who were attempting to reach Italy on board vessels from the Libyan coast. These individuals were turned over to Libya, as a consequence of the entry into force of the Treaty of Partnership, Friendship and Cooperation between Italy and Libya signed on 30 August 2008 in Benghazi (and the Additional Protocol on cooperation in the fight against clandestine immigration signed in Tripoli on 4 February 2009, which partially amended the agreement of 29 December 2007[2]). There were many and fierce criticisms and censures of Italy's actions, based on the violation of the fundamental rights of the migrants who were being returned to places where they might be victims of

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[1] Judgment of the Grand Chamber of the European Court of Human Rights on the case of *Hirsi Jamaa and Others v. Italy* (Application No. 27765/09), 23 February 2011, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=901565&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

[2] On the fight against clandestine immigration. On the same date an additional protocol was stipulated on the operative and technical measures to execute the agreement. On the treaty see Natalino Ronzitti, *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, Roma, Istituto affari internazionali, May 2009 (Documenti Iai ; 0909), http://www.iai.it/pdf/DocIAI/IAI0909.pdf. On the most recent interpretation of the agreements, following the revolutionary change of regime in Libya, by the same author, see: "Il futuro dei trattati tra Italia e Libia", in *AffarInternazionali*, 2 February 2012, http://www.affarinternazionali.it/articolo.asp?ID=1961.

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inhuman or degrading treatment, with the added risk of being repatriated to countries from which they had to flee. These criticisms emerge also from the findings of the European Court, thanks to the decision of the Court to allow third-party interventions by several NGO, as well as by the United Nations High Commissioner for Refugees. Significant rebukes and condemnations were issued by the then Commissioner for Justice and Internal Affairs of the European Union, Jacques Barrot, and by organizations of the Council of Europe such as the European Commissioner for Human Rights and the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

The application that sparked the controversy was made by eleven Eritrean nationals and thirteen Somali nationals who belonged to a group of about two hundred people who had left Libya in May 2009. They were on board three vessels which had been intercepted by ships belonging to the "Guardia di Finanza" (the Italian financial police) and the Italian Coast Guard, thirty-five nautical miles south of Lampedusa. The search and rescue area, in truth, was the responsibility of the government of Malta but, after discussion with the Italian government, it refused to intervene. The occupants were transferred to the Italian military ships and turned over to Tripoli. The applicants argued that, during the trip, the Italian authorities failed to provide information regarding their true destination, did not take measures to identify them, and confiscated all their personal effects, including documents attesting to their identity. Upon arrival in the port of Tripoli, the migrants were turned over to the Libyan authorities, against their wills. These circumstances were entirely corroborated in the course of the judgment.

The violations which the applicants reproached Italy were many: the breach of Article 3 of the ECHR (prohibition of inhuman or degrading treatment); of Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens); of Article 13 of the ECHR, on its own and in conjunction with Article 3 and with Article 4 of Protocol No. 4, as no adequate remedy was allowed for the migrants' claims to be properly examined.

The Court has found all the violations to be substantiated, affirming principles which contribute to strengthen the evolutionary trends of the Court's case-law on certain aspects of crucial importance, such as the limits of the State's powers to push-back and expel aliens who attempt to enter its territory in an irregular manner. These limits are dictated by the need to protect fundamental rights, need that is qualified as absolute, mandatory. After recalling its own jurisprudence (*Čonka v. Belgium*[3] in particular) the Court applied Article 4 of Protocol No. 4 for the first time in the circumstance of aliens who were not physically present on the territory of the State, but in the high seas, resorting to a teleological and functional interpretation of the ECHR. This is in accordance with its own jurisprudence (but also with the Vienna Convention on the Law of Treaties) and is founded on a broad meaning of jurisdiction exercised by the State under Article 1 of the ECHR. With the practice of pushing back aliens, the State exercises a public and sovereign power, so it exercises its jurisdiction on the individual, preventing him from reaching its national shores, and as a result it must be held responsible for its actions.

[3] Judgment of 5 February 2012 in the case of *Čonka v. Belgium* (Application No. 51564/99), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=801167&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

The most important points of the judgment are:

a) The assertion of Italy's responsibility, even though the operations took place in international waters. The extra-territoriality of the events was not considered to be relevant to exclude Italy's jurisdiction (ex Article 1 of the ECHR). In particular, the Court rejected the government's thesis according to which Italy should not be held responsible for the fate of the applicants on account of the allegedly "minimal" control exercised by the authorities over the parties concerned at the material time. On the contrary, the Court found that in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities (in other words, the jurisdiction), as they found themselves on board Italian vessels manned entirely with Italian personnel.

b) The applicants were exposed to the risk of being subjected to inhuman and degrading treatment in Libya and to be expelled from Libya to their respective countries of origin, Somalia and Eritrea, where the violations of fundamental personal rights are notorious (a situation which was confirmed by the third subjects who intervened in the judgment in front of the European Court).

c) The right guaranteed under Article 3 is absolute and other agreements (such as the bilateral agreements between Italy and Libya of 2007 and 2009), which pledge to respect fundamental rights, do not in themselves suffice to prove that the contracting State has acquitted, in actual fact and substance and not just *pro forma*, the respect of those individual rights[4]. The responsibility of the Italian State, which was well-aware of the general situation (in Libya, Somalia and Eritrea) was even greater in the instant case since Libya is not a contracting party of the ECHR nor, for that matter, of the Geneva Convention Relating to the Status of Refugees.

d) This has been a case of collective expulsion, in the meaning of Article 4 of Protocol No. 4. A group of individuals was rejected/expelled at the same time, without consideration for each individual case. The applicants, in particular, were not identified individually by the Italian authorities, and it was moreover established that the personnel on board the Italian navy ships had not been trained to conduct individual interviews, nor were they assisted by interpreters or legal consultants. None of the foreign nationals was asked if he or she intended to submit a request for international protection.

e) Libya as a safe third country? The question is relevant to understand the defense of the Italian government. Italy invoked the treaties on the protection of human rights to which Libya is a contracting party, as well as the provisions contained in the treaty of friendship between Italy and Libya in which the parties recall the objectives and

[4] Among the many relevant judgments, the Court recalls the judgment of 28 February 2008 in the case *Saadi v. Italy* (Application No. 3720/106) and the judgment of 21 January 2011 in the case *M.S.S. v. Belgium and Greece* (Application No. 30696/09) available in the ECHR website:
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649;
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

principles expressed in the United Nations Charter and in the Universal Declaration of Human Rights (Article 6)[5]. The Court, referring to its own case-law[6], underlined how the mere formal provision of an obligation to protect fundamental rights by another State does not allow a contracting State to evade its own responsibility under the terms of the ECHR, when sufficient elements are present to doubt the truthfulness of such assumptions. In the instant case, there were many reports from reliable sources (in particular from the UN High Commissioner for Refugees, which was intervening party, as already mentioned) that described in a detailed manner the treatment reserved to migrants in Libya, in contradiction with that country's bilateral and multilateral commitments. With the transfer of the applicants to Libya, the Italian authorities did, "in full knowledge of the facts" and of the circumstances, expose them to treatment proscribed by the Convention. The violation is all the more evident for the lack of access to any means of recourse: the foreign nationals who were turned back (*refoulés*) would have had the right, before being subjected to measures which involved irreversible consequences, to a means of recourse (ex Article 3 of the ECHR) that would have allowed for an effective and not just formal oversight of such measures.

With respect to such a guilty judgment, which cannot be appealed (as already mentioned and in spite of contrary statements by some Italian politicians), the question remains as to what the Italian government's policy will be in the future. Compliance is dutiful and desirable, as opposed to the assertion by the Interior Minister of the time that he had acted properly and would also be ready (if he were still in charge) to repeat such behavior, as if the EHCR and the European court did not exist …

The "re-activation" of the stated agreements between Italy and the new Libyan government, together with a novel appraisal or re-appraisal of matters relating to immigrants and refugees (Libya, as previously recalled, is not a contracting party to the Geneva Convention) constitute a wider issue. It is possible that the judgment pronounced in the Hirsi case will be conducive to less "ambiguous"[7] bilateral relations between Italy and Libya.

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[5] On these aspects see Natalino Ronzitti, *The Treaty on Friendship, Partnership and Cooperation between Italy and Libya …*, *cit.*
[6] In particular the judgment *M.S.S. v. Belgium and Greece*, *cit.*
[7] As Natalino Ronzitti correctly points out in "Il futuro dei trattati tra Italia e Libia" …, *cit.*

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