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THE FIGHT AGAINST THE SMUGGLING OF MIGRANTS IN THE MEDITERRANEAN

THE ITALIAN EXPERIENCE

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STRENGTHENING TRANSATLANTIC COOPERATION



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Cover photo: Would-be immigrants arrive on a boat in the port of Italy's southern island of Lampedusa late on July 31, 2008.
Photo credit: Mauro Seminara/AFP/Getty Images

THE FIGHT AGAINST THE SMUGGLING OF MIGRANTS IN THE MEDITERRANEAN: THE ITALIAN EXPERIENCE

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EXECUTIVE SUMMARY

In recent years, Libya has become the main transit route toward the Italian coasts for illegal migrants, African and Asian nationals, trying to enter Europe by sea. Over time, Italy has established a set of rules aimed at developing international cooperation with countries of origin and transit that have made the prevention and suppression of illegal migration by sea more effective. Italian legislation concerning law enforcement operations complies with international rules and provides national authorities with a broad range of initiatives, in terms of both rescue of human beings and combating smuggling of migrants. Since preventing and countering the smuggling of migrants must be conducted in conformity with the obligation to protect human rights, the principle of “non-refoulement”² has to be guaranteed during operations, as do the rights of refugees and other categories of foreign nationals. The cooperation Italy is promoting with Libya and other states affected by illegal smuggling of migrants at sea is effective and should be supported. It aims not only at ensuring prevention and suppression of criminal phenomena and guaranteeing foreign nationals’ fundamental rights, but also at building the capacity of the states involved according to European models.

² Non-refoulement is a principle of International law that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened.

1 INTRODUCTION

Thousands of illegal migrants try to enter Europe via the Mediterranean Sea every year.³ Libya is not the country of origin for these migrant flows, but in recent years it has become the main transit route toward the Italian coast for African and Asian nationals. Migrants also set out from Tunisia and Algeria and, to a lesser extent, from the Eastern Mediterranean area. In the 1990s, many illegal migrants departed from the Albanian coast on small boats, but the phenomenon decreased over time and finally ceased. This paper outlines the main problems stemming from the migratory flows by sea and focuses, in particular, on rescue measures, return of illegal foreign nationals, and on the correct processing of political asylum applications or other forms of international protection. Special consideration will be given to the legal framework and the practices adopted by Italy, as well as international and European commitments.

³ See Europol's file on *Illegal Immigration Into the European Union*, March 2008, www.europol.europa.eu; see also annual reports of Frontex, the European agency coordinating operational cooperation at the external borders of the European Union member states, <http://www.frontex.europa.eu>. See further Stefano Becucci, *Criminalità multietnica. I mercati illegali in Italia*, Rome, Bari, 2006.

2 MEDITERRANEAN ROUTES

From 2004 to 2007, Italian authorities registered an average of about 20,000 immigrants who either landed illegally or were detected or rescued along sea routes each year.⁴ In 2008, there was a considerable increase in illegal migratory flows by sea with the arrival of 34,540 immigrants on the Sicilian coasts alone, followed by a dramatic decrease in the first half of 2009 with only 6,588 persons landing in Sicily.⁵ Before that, the highest peaks were reached during the Balkan crisis.⁶ All studies on this phenomenon agree on the fact that migratory flows to Italy by sea are objectively less important than other forms of illegal entry. However, due to the shape of the country, the shipwrecks, and traffickers' exploitation of migrants, illegal immigration by sea draws most of the attention of public opinion and institutions.⁷

⁴ The survey was conducted by Paola Monzini, *Il traffico di migranti per mare verso l'Italia. Sviluppi recenti (2004-2008)*, CeSPI, Working Paper 2008, p. 3.

⁵ See the data provided by the Minister of the Interior Roberto Maroni, on May 25, 2009, www.camera.it.

⁶ In 1998, 38,159 persons landed illegally in Italy compared to 49,999 in 1999. 26,817 immigrants were registered in 2000; 20,143 in 2001; 23,719 in 2002; 14,331 in 2003; 13,635 in 2004; 22,939 in 2005; 22,016 in 2006; and 20,455 in 2007.

⁷ Actually, most of the illegal landing operations surveyed have to be considered as immigrant rescue activities due to unsuitable boats used for navigation. In 2005, the President of the Italian Republic awarded law enforcement bodies a gold medal for merit for their rescue activities carried out at sea in aid of boats bound for Lampedusa. They had saved more than 32,000 lives in the prior three-year period.

Currently, the main sea routes toward Italy followed by smugglers of migrants are:

- from Libya to the Sicilian coasts, in particular to the island of Lampedusa, for nationals coming from the countries of Northern Africa, sub-Saharan Africa, and the Indian sub-continent;
- from Tunisia to Sicily, especially for nationals of Northern African countries;
- from Algeria to Sardinia for Algerian nationals;
- from Turkey, Lebanon, and Syria to the southern coasts of Apulia and Calabria for nationals from Middle Eastern countries, Afghanistan, and Iraq;
- from Greece and, to a certain extent, Albania, and Turkey by means of sea liners to the main Italian Adriatic ports for Afghans and Iraqis.

As already mentioned, since 2003, the routes toward Apulia originating from the Albanian coast and involving nationals from the Balkan region and Eastern European countries, as well as a considerable number of nationals from China and other Asian countries, are no longer used. A decisive role was played by police cooperation with Albania promoted by Italy as of 1997. Thanks to the implementation of a number of bilateral protocols, an Italian national police unit was detached to and is still present in Albania, with the task of supporting local forces in preventing and

combating crime and enhancing their capacity building.⁸ Similarly, flows from Sri Lanka that reached the Sicilian coasts through the Suez Canal decreased as a result of strengthened police cooperation between Italy and Egypt starting from 2002. The Tunisian route — though still used — has registered a decrease in the last few years. As for the Algeria-Sardinia route, it was unknown until 2003. After that year, however, it increased until 2008, followed by a decrease in the first months of 2009. The route from the Eastern Mediterranean area — frequently used between 1998 and 2002 — was of less importance in the following years, only to become important again in 2007.

⁸ As far as police cooperation in the framework of bilateral agreements on illegal immigration is concerned, see by Vincenzo Delicato, “Il contrasto al traffico di migranti negli accordi bilaterali,” in Giuseppe Palmisano, Milan, 2008, p. 167 *et seq.*

3 ACTIONS CARRIED OUT BY THE EUROPEAN UNION

In the last few years (in particular after the Seville European Council of June 2002), the European Union has developed a number of legislative and operational initiatives intended for member states and community institutions aimed at fighting illegal migration by sea. Experience acquired in the field was brought together in an ad hoc set of measures adopted by the Justice and Home Affairs (JHA) Council of November 27, 2003.⁹ This document reiterates the main rules applicable (both community and international) and offers a number of recommendations.¹⁰ The aim is to enhance cooperation with third countries by undertaking initiatives in all the areas affected by illegal migration (including on the high seas), preventing landings on European coasts, and curbing departures from the ports of origin. Frontex, the European agency for cooperation at the external borders of EU member states, has been in operation since May 1, 2005, tasked with the promotion of joint operations and pilot projects, risk analysis, professional training, and management of technical

equipment for border surveillance, cooperation in the field of repatriation of illegal foreign nationals, etc.¹¹ On March 15, 2006, regulation 562/2006 on the Schengen Code for uniform border controls was adopted.¹² As far as procedures are concerned, directive 2008/115 of the European Parliament and the European Council of December 16, 2008, establishes common rules for repatriating illegal third country nationals.¹³ Of particular strategic and political importance among the European measures aimed at reinforcing international cooperation in this field is the “European pact on immigration and asylum,” adopted by the European Council of October 15 and 16, 2008.¹⁴ For some years, immigration has been the subject of a wide range of community legislation obliging coastal state

⁹ Doc. 1544/03, FRONT 172 COMIX 731: “Programme of measures to combat illegal immigration across the maritime borders of EU member states.”

¹⁰ For legal aspects, see also the Commission study on the instruments applicable to illegal immigration by sea, document SEC (2007) 691 of May 15, 2007. At strategic level, see the Commission communication to the Council “Reinforcing Management of the European Union’s Southern Maritime Borders,” COM (2006) 733 final of November 30, 2006.

¹¹ Regulation October 26, 2004, No. 2007, *European Community Official Journal*, No. 349 of November 25, 2004.

¹² *European Community Official Journal*, L, No. 105 of April 23, 2006.

¹³ *European Union Official Journal*, L, No. 348 of December 24, 2008. The directive shall be implemented by December 24, 2010.

¹⁴ This involved the following five fundamental commitments: 1) to organize legal immigration taking account of the priorities, needs, and reception capacity of each member state and to foster integration; 2) to fight illegal immigration, in particular by ensuring readmission of illegal foreign nationals to their countries of origin or transit; 3) to strengthen the effectiveness of border controls; 4) to establish a European asylum system; and 5) to set up a partnership with illegal immigrants’ countries of origin and transit in order to facilitate synergy between migration and development.

authorities to carry out controls in the interest of all EU member states.¹⁵

¹⁵ This development, which lasted for five years after the Amsterdam Treaty entered into force on May 1, 1999, led to the progressive adoption of a number of community acts aimed at regulating the most significant aspects of migratory flow management, thus removing them from the member states' exclusive competence.

4 ITALIAN LEGISLATION AND PRACTICE ON MARITIME BORDER CONTROLS

Over time, Italy has established a set of rules that have made the prevention and suppression of illegal migration by sea more effective. These provisions are set in the framework of the general policy for the management of migratory flows and are aimed at developing international cooperation with countries of origin and transit. Italy has promoted the conclusion and implementation of international agreements to facilitate the readmission of illegal foreign nationals and has engaged in advanced forms of police cooperation to combat criminal organizations (see the Annexes, pages 23 and 24). At the same time, it has supported a strategy intended to reinforce the capacity of the countries concerned. This policy involves: 1) exchange of liaison officers; 2) granting of goods and services; 3) joint training; 4) assistance in developing policies in relations with the European Union; 5) implementation of programs to facilitate the issuing of visas; and 6) granting of privileged entry quotas for certain kinds of work.¹⁶

At the Italian domestic level, the interministerial Decree of July 14, 2003, and the technical protocols of July 6, 2004, and September 14, 2005, paved the

¹⁶ Actually, the *Consolidating Act on Immigration and Foreign Nationals' Status* (Legislative Decree No. 286 of July 25, 1988, as subsequently amended) regulates the implementing procedures of migratory policies with respect to relations with third countries and lays down the possibility of establishing privileged quotas for entry for work for those states with which international cooperation against illegal immigration is most effective.

way for a more rational distribution of tasks among the authorities responsible for controls.¹⁷ Its provisions, in line with European community obligations, are intended to apply the Consolidating Act on Immigration and Foreign Nationals' Status (Decree 286/98, as subsequently amended).¹⁸ Since prevention is developed along three main channels — 1) international cooperation with the countries of origin or transit of migratory flows; 2) coordinated checks in international waters; and 3) coordinated checks in territorial and internal waters — surveillance activity in territorial and internal waters is mainly ensured by police forces, whereas checks in international waters are carried out by military naval units. Harbor authorities are mainly responsible for activities concerning navigational security as well as search and rescue. Activity is coordinated by the Central Directorate of Immigration and Border Police of the Public Security Department.

¹⁷ *Gazzetta Ufficiale della Repubblica Italiana* No. 220 of September 22, 2003. The protocols establish the procedures for the exchange of information between the departments concerned and the management of operational situations; see Alessandro Pansa and Vincenzo Delicato, "Le attribuzioni di competenza del Ministero dell'interno per l'ordine e la sicurezza pubblica in relazione ai flussi di immigrati clandestini via mare," in Salvatore Mellea and Alberto Pucci (ed.), *Sicurezza marittima: un impegno comune*, Taranto, 2005, p. 345 *et seq.*

¹⁸ The domestic legislation on surveillance, prevention, and the countering of illegal immigration by sea are contained in articles 11 and 12 of the Consolidating Act.

According to the above-mentioned provisions, an Italian vessel on policing duty in territorial waters or the contiguous zone that detects a ship for which there are substantial reasons to believe that it is being used for or involved in the smuggling of migrants may carry out the procedures envisaged (investigation to establish the nationality of the ship, visits, etc.). If there are elements to confirm that the ship is smuggling migrants, the ship shall be seized and transferred to one of the state's ports. These measures can also be taken outside territorial waters within the limits provided for by domestic legislation if the ship flies the national flag, or by international law or bi/multilateral agreements if the ship is flying the flag of another state or is without nationality. The system is focused mainly on rescue activities. Article 7 of the Decree of July 14, 2003, specifies that — in performing the task assigned — countering activities always have to protect human life and respect human dignity.

5 COMPLIANCE BETWEEN DOMESTIC AND INTERNATIONAL RULES

The Italian rules comply with international law. The duty to protect life at sea prevails over other activities and applies in any sea area, regardless of the activities undertaken by individuals. Among the main international provisions envisaging this principle are article 98 of the Montego Bay Convention¹⁹ and the provisions contained in the International Maritime Organization (IMO) Conventions on the Safety of Life at Sea (SOLAS) and on Maritime Search and Rescue (SAR), signed in London on November 1, 1974, and in Hamburg on April 27, 1979, respectively.²⁰ Of particular importance are the recent amendments adopted by the IMO envisaging the duty to provide rescued persons with a safe place, regardless of their nationality, status, or the circumstances in which they are found.²¹ The

guidelines adopted by resolution MSC.167 (78) of May 20, 2004, specify that non-rescue issues, including immigration and asylum, shall be dealt with after the survivors are delivered to a place of safety, which is defined as a place where survivors are no longer in danger and from which transportation arrangements can be made for their next or final destination. The same guidelines also specify the need to avoid disembarkation in territories where the lives and freedom of those alleging a well-founded fear of persecution would be threatened (paragraph 6.17). A practical guide circulated recently by UNHCR in cooperation with IMO invites the masters of ships carrying out maritime rescue of migrants to take due account of possible asylum claims by preventing — among other things — an individual from disembarking in his/her country of origin or in the country from which he/she has fled.²²

As far as national jurisdiction is concerned, the coastal state has full jurisdiction over its internal waters. The possibility of carrying out immigration checks in territorial waters or in the contiguous zone and of adopting measures envisaged by national law is regulated by the Montego Bay

¹⁹ It obliges all states to protect human life at sea and provide for assistance to any person in danger. The Montego Bay Convention has been in force in Italy since February 12, 1995 (enforced by law No. 689 of December 2, 1994, in *Gazzetta Ufficiale della Repubblica Italiana*, Suppl., No. 295 of December 19, 1994).

²⁰ Both texts and the relative status of signature and ratification can be found on the International Maritime Organization's website www.imo.org. Other international provisions for the protection of life at sea dealing in particular with the management of migrants can be found in the Palermo Protocol and the 1997 agreements with Albania described in Section 6 of this paper.

²¹ The safe place must be provided within a reasonable time. See in particular the amendments made to the SAR convention by resolution MSC.155 (78) adopted on May 20, 2004 and in force since January 1, 2006.

²² See UNHCR and IMO, *Rescue at Sea. A Guide to Principles and Practice as applied to Migrants and Refugees*, available at http://www.imo.org/includes/blastDataOnly.asp/data_id=15282/UNHCRIMOLEafletpersonsrescuedatsea.pdf.

Convention.²³ Italy has not explicitly declared a contiguous zone, however the Decree of July 14, 2003, envisages that “beyond the territorial waters a coordination zone shall be established extending up to the limit of the sea area defined internationally as a contiguous zone.”

On the high seas, the authorities of a state that is not the flag state are allowed to intercept and check a vessel for illegal immigration reasons if it is without nationality (article 110 of the Montego Bay Convention). A foreign ship can also be boarded on the high seas if the flag state agrees. The flag state’s authorization for another state to board its ships can be expressed either in an international agreement or in a less-formal act, such as an operative arrangement, or even orally. According to the provisions of the Consolidating Act on Immigration, Italian authorities have to adopt the same procedures on the high seas as in territorial waters or the contiguous zone. However, thanks to the reference to international law contained in article 12, several measures can be adopted. Mutual consultation mechanisms can be envisaged, involving coordinated rescue measures and plans for managing migrants on board. If navigational

²³ Illegal immigration is contained in article 19, paragraph 2 (g) of the convention. This is a field in which the coastal state can exercise its criminal jurisdiction for crimes committed on board ships (article 27, (a) and (b)). As far as the contiguous zone is concerned, the state jurisdiction is explicitly allowed, with a view to preventing or suppressing illegal immigration (article 33).

safety is not endangered, no rescue operation is necessary and the ship’s entry into national waters can be interdicted.²⁴ The transfer of criminal prosecution can also be authorized in an agreement. Various measures can be envisaged, depending on the level of cooperation with other states: a simple arrangement may be sufficient to implement a joint patrolling plan, whereas more effective cooperation measures, such as the sharing of criminal jurisdiction, will require a formal legal basis.

Italian legal provisions provide national authorities with a dual set of possibilities: on the one hand, international cooperation and a broader range of initiatives, in terms of both rescue and combating human smuggling; on the other hand, a strictly unilateral approach envisaging the exercise of domestic jurisdiction, taking a ship to a national port, seizing it, prosecuting smugglers, and adopting measures for foreign nationals on board.

²⁴ Therefore, in addition to the illegal migrants on board, there may also be individuals under international protection (this subject will be dealt with in more detail in Sections 8 and 9 of this paper).

6 THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS

The first cooperation agreement to monitor illegal migration flows by sea was concluded between Italy and Albania through an exchange of letters between their respective ministers of foreign affairs on March 25, 1997, and the related operative protocol of April 2, 1997.²⁵ A number of bilateral police cooperation agreements already contained rules for this kind of activity, and cooperation of this kind is expected to increase.²⁶ The Protocol against the smuggling of migrants supplementing the United Nations Convention on transnational organized crime, signed in Palermo on December 12, 2000, considers these forms of cooperation particularly effective.²⁷ The text mentions a series of measures that allow for the boarding of ships suspected of

transporting illegal migrants and authorize the adoption of coercive measures against the ship, as well as persons and cargo on board (on the basis of mutual arrangements). This mechanism calls for the consent of state parties and unilateral measures can be adopted only for ships without nationality or the like, in compliance with international law and applicable domestic provisions (article 8, paragraph 7). State parties are obliged to appoint a national authority responsible for assistance, confirming that a ship is registered and authorizing the adoption of measures requested by another state. Article 9 obliges the state adopting one of the above mentioned measures to guarantee the safety of the ship, persons, and cargo, without jeopardizing the commercial and legal interests of the flag state or damaging the environment. If the grounds on which the coercive measures were carried out are proven fallacious or non-existent, compensation is envisaged.

²⁵ The texts are published in the essay by Fabio Caffio, "Immigrazione clandestina via mare," *Rivista marittima*, supplement, 2003, pp. 12 and 57 *et seq.*

²⁶ Agreements, in addition to those with Libya listed in section 7, include: 1) the cooperation agreement with Cyprus on the fight against organized crime and other forms of crime, signed in Nicosia on June 28, 2002 and in force since July 27, 2006; 2) the agreement with Malta for aero-maritime surveillance in the Mediterranean, signed in Rome on December 20, 2002 and in force since July 31, 2003; 3) the agreement with Poland for the fight against crime, signed in Warsaw on June 4, 2007, and in force since June 25, 2009.

²⁷ The protocol has been in force in Italy since September 1, 2006 (Law No. 146 of March 16, 2006, *Gazzetta Ufficiale della Repubblica Italiana*, Suppl., No. 85 of April 11, 2006, No. 91/L); see Vincenzo Delicato, "Il protocollo sul traffico di migranti," in Elisabetta Rosi (ed.), *Criminalità organizzata transnazionale e sistema penale italiano*, Milan, 2007, p. 395 *et seq.*

7 AGREEMENTS WITH LIBYA

Cooperation between Italy and Libya in the fight against illegal immigration was inaugurated with a bilateral agreement promoting cooperation against terrorism, organized crime, drug trafficking, and illegal immigration, signed in Rome on December 13, 2000. On December 29, 2007, two further protocols dealing with the fight against illegal immigration were signed. Aimed at regulating joint patrolling, they set out that Italy will assign a number of patrol boats to Libya. Several clauses of the protocols were supplemented by a further text signed on February 4, 2009. Finally, article 19 of the bilateral Treaty of Friendship, Partnership and Cooperation, signed in Benghazi on August 30, 2008, reiterating the will to implement the provisions of the 2000 agreement and the 2007 protocols, fosters the implementation of a system to monitor Libyan land borders with the support of European institutions. These agreements involve various mutual obligations:

- The commitment of both countries to cooperate against organized crime and illicit trafficking in all possible forms, both at the investigative and the analytical level;
- Italian support to Libya to strengthen its administrative capacity to monitor its borders through the transfer of goods and professional training for police staff;

- Joint patrolling of stretches of the sea and the setting up of a multi-agency operative headquarters in Libya;
- Strengthening of relations between Libya and the European Union and implementation of regional projects.

The above-mentioned legal framework has made it possible, as of 2003, to implement a number of initiatives whereby Italy has transferred goods and services (most recently, on May 14, 2009, Italy provided Libyan authorities with three motorboats and guaranteed that another three vessels would be supplied within a few weeks²⁸), provide professional training for Libyan police officers, give assistance in returning illegal migrants to their countries of origin, set up structures for policing needs in Libya, and support a rapprochement between Libya and the European Union.²⁹ Libya's commitment in the field of migration represented the basis for the Italian government's pursuit in the European Union of lifting the embargo against Libya and starting

²⁸ See Minister Roberto Maroni's report of May 25, 2009 quoted, in footnote 4, page 3.

²⁹ A summary of the cooperation between Italy and Libya is contained in the European Commission's report *Technical Mission to Libya on Illegal Immigration*, November 27–December 6, 2004, Brussels, April 2005. See further Ferruccio Pastore, *Migrazioni e relazioni italo-libiche*, CeSPI, Rome, 25 giugno 2008. For the Benghazi Treaty, see initial comments by Natalino Ronzitti, *Luci ed ombre del trattato tra Italia e Libia*, www.affarinternazionali.it.

cooperation.³⁰ The JHA Council conclusions of June 3, 2005, confirmed this line by recommending short-/medium-term measures.³¹ The European Council held on December 15 and 16, 2005, recognized the difficult situation in North African countries due to the huge illegal migratory pressure to Europe and adopted a plan for a global migration approach and financial and political support for the Mediterranean states and African regions most affected by the phenomenon. On July 23, 2007, a memorandum of understanding was signed between the Commission and Libya envisaging various initiatives, including the establishment of a border surveillance system. At present, negotiations are under way to define a framework agreement between the EU and Libya, and a number of proposals to combat illegal immigration in the

Mediterranean and to develop regional cooperation are being discussed. Eventually, Libya's increased cooperation against irregular migration, particularly since 2003 onward, partially contributed to the rehabilitation of the country in the international arena and to the removal of the EU sanctions.

³⁰ The European Council's decision to lift the embargo was taken on October 11, 2004. The UN sanctions had already been suspended in 1999 and were lifted in September 2003.

³¹ Short-term measures include training programs on basic checks at external borders, on illegal immigration, and on asylum and human rights; Libya is invited to join operational initiatives at sea. Medium-term measures include: 1) enhancing the legal framework; 2) administrative coordination in order to improve the management of migratory flows; 3) strengthened border checks with a view to preventing illegal immigration; 4) establishing operative procedures to prevent the smuggling of migrants and trafficking in human beings; 5) cooperating for the return of illegal migrants to Libya, in compliance with human rights and ensuring the sustainability of returns; and 6) implementing joint operative projects between Libya and its neighboring countries.

8 THE PROTECTION OF THE RIGHTS OF ASYLUM SEEKERS AND THE “NON-REFOULEMENT” PRINCIPLE

The most controversial aspect of the Italo-Libyan framework for the fight against illegal migration relates to the treatment of foreign nationals. Libya did not sign the Geneva Convention on the status of refugees.³² Furthermore, Italy, as a party to the European Convention on Human Rights and Fundamental Freedoms, could be held responsible for infringement of the rights guaranteed by the convention committed on the territory of third states following the adoption of extradition or removal measures.³³ This principle, aimed at sanctioning the “potential” liability of the state party to the convention, can be inferred from a number of rulings of the European Court.³⁴ The principle applies in particular to the risk of capital punishment, torture, or inhuman or degrading treatment. Moreover, violation of the obligations to safeguard human rights committed by organs of the state party on foreign territory, or in places not

governed by national legislation, can also lead to a form of liability.

The European Court has expressed its view in a number of judgments concerning the activities carried out by armed forces engaged in international war or peacekeeping operations.³⁵ The European Court of Human Rights ruled on anti-drug operations on the high seas, confirming its jurisdiction in these areas.³⁶ In addition to the international, customary, and universal norms banning torture or persecutory treatment of individuals (such as article 3 of the 1984 Convention on Torture and article 7 of the 1966 Covenant on Civil and Political Rights), human rights are protected by at least two other international treaties of particular importance in cooperation with Libya. On the one hand, the obligations stemming from the Geneva Convention on Refugees, which apply to Italy but not to Libya; and, on the other, the system of guarantees set down in the European Convention on Human Rights that obliges Italy to adopt a particularly high level of protection of individual rights.

³² The Geneva Convention of July 28, 1951, and its additional protocol signed in New York on January 31, 1967, were ratified by Italy (see laws No. 722 of July 24, 1954, and No. 95 of February 14, 1970, *Gazzetta Ufficiale della Repubblica Italiana*, No. 196 of August 27, 1954, and No. 79 of March 28, 1970, respectively).

³³ The relevant texts, the status of signature and ratification, as well as the rulings of the European Court can be found on the Council of Europe website, www.coe.int.

³⁴ The ruling that expresses this concept clearly, in particular as far as extradition is concerned, is known as the “Soering” case of July 7, 1989.

³⁵ With particular reference to military activities, see the rulings “*Loizidou v. Turkey*” of December 18, 1996, and “*Bancović*” of December 12, 2001.

³⁶ See the European Court rulings in the cases “*Rigapoulos vs Spain*” of January 12, 1999, and “*Medvedyev and others v. France*” of July 10, 2008. On these cases, see Celine Trevisanut, *Lotta al traffico di sostanze stupefacenti e tutela dei diritti umani in mare: il caso Medvedyev dinanzi alla Corte Europea dei Diritti Umani*, www.sidi-isil.it.

The decisions of the European Court with respect to the European Convention tend to highlight certain rights considered of paramount importance and also applicable in the territories of third countries.³⁷ Undoubtedly, these include the clauses that — on the basis of article 15 — are not subject to derogation or possible suspension, not even in case of armed conflict or during serious public disorders.³⁸

For the purposes of this study, a number of remarks can be made.

- Both the Geneva Convention on Refugees and the European Convention on Human Rights apply in Italy with respect to the treatment of foreign nationals if they have entered national territory or are in territorial waters. Both conventions have a prevailing effect over other

international instruments or unilateral provisions relating to the removal of individuals found to be in an illegal position with respect to immigration laws. Removal measures can be adopted only if they are consistent with the rights guaranteed by these international conventions. National legislation clearly reflects this principle and article 19 of the Consolidating Act on immigration and foreign nationals' status envisages a series of limitations on the possibility of removing or expelling foreign nationals. Readmission agreements are not relevant in this connection. Readmission agreements facilitate the identification of foreign nationals and aim at simplifying return procedures. They only come into play after national measures have been adopted, that is, after assessment of whether the measure is consistent or not with the obligations to protect individual rights.

- The system of guarantees envisaged for refugees in compliance with the Geneva Convention cannot be implemented on the high seas, nor can the asylum provisions envisaged in European Community acts. Indeed, Directive 2003/9EC on minimum standards for the reception of asylum seekers, Directive 2005/85EC on procedures, and the Dublin II regulations on the member state responsible for examining an asylum application can be implemented only when persons want to cross the border into or

³⁷ On this point see Giorgio Gaja, "Commento all'articolo 1," in Sergio Bartole, Benedetto Conforti, and Guido Raimondi (eds.), *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2001, p. 33 *et seq.*

³⁸ Paragraphs 1 and 2 of article 15 are as follows: "1. In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situations, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from article 2, except in respect of deaths resulting from lawful acts of war, or from articles 3, 4 (paragraph 1), and 7 shall be made under this provision."

are on the territory of a member state (including its territorial waters).³⁹ According to the UNHCR, the safeguard measures for refugees enshrined in the Geneva Convention and in other applicable international instruments should be applied everywhere. However, judging from the behavior of state bodies, the Geneva Convention does not seem to have been applied extensively. National regulations tend to embody a strict territorial application of asylum instruments. The convention is also binding only if the person is at the border or on national territory.⁴⁰ According to article 33, the non-refoulement principle does not mean that the coastal state has to admit foreign nationals; the

only obligation is not to send asylum seekers back to their countries of origin.⁴¹

- State bodies are undoubtedly obliged to comply with the provisions of the European Convention on Human Rights, even on the high seas. The activities carried out by Italian ships on policing duty on the high seas fall under national jurisdiction and can be compared, as far as the possible effects stemming from exercise of the rights guaranteed by the convention are concerned, with activities undertaken on national territory. Therefore, in making contact with vessels smuggling human beings, the mechanisms protecting foreign nationals aboard (including the smugglers) envisaged in the convention have to be applied. These include the provisions safeguarding life and protecting all persons from persecutory acts such as torture or inhuman or degrading penalties and treatments. If direct measures are taken against persons or vessels, for instance in the hypothesis envisaged in the Consolidating Act on immigration and the status of foreign nationals of a ship on the high seas exercising Italian jurisdiction by escorting a vessel suspected of smuggling migrants to a national port, all the measures laid down in the convention have to be observed, not only those providing for absolute measures, not

³⁹ The mentioned EC acts can be consulted in *European Union Official Journal*, L 31 of February 6, 2003, L 326 of December 13, 2005, and L 50 of February 25, 2003, respectively.

⁴⁰ The ruling of the U.S. Supreme Court in the 1993 case of Haitian displaced persons undoubtedly curbed any possible extensive interpretation of the Geneva Convention and, despite criticism, represents a particularly important practice that must be considered when analyzing the relevant international provisions. The text is contained in *International Legal Materials*, 1993, p. 1039 *et seq.* An analysis of the practices adopted in the field of political asylum by the main destination countries of immigration flows by sea is proposed by Joanne Van Selm and Betsy Cooper, *The New "Boat People"*, Migration Policy Institute, Washington DC, 2006.

⁴¹ See Natalino Ronzitti, "Coastal State Jurisdiction over Refugees and Migrants at Sea," in Ando (ed.), *Liber Amicorum Judge Siregu Oda*, The Hague, 2002, p. 1277.

only respect for life and bans on torture and inhuman or degrading treatment, but also all provisions related to persons whose liberty is restricted, and foreign nationals in general. In case of naval interdiction or rescue operations carried out in cooperation with other countries, or other situations in which national jurisdiction is not exercised, and another country is authorized to perform these functions, Italian authorities are nevertheless obliged to respect the principle of non-refoulement toward places at risk.

9 THE IMPACT OF INTERNATIONAL HUMAN RIGHTS OBLIGATIONS ON ITALIAN-LIBYAN RELATIONS

Libya's non-accession to the Geneva Convention of 1951 could justify major doubts as to its capacity to handle migration issues according to international standards. Nevertheless, Libya has ratified other instruments that expressly envisage an obligation to provide adequate protection for refugees and other categories of foreign nationals. On April 25, 1981, Libya adhered to the convention of September 10, 1969, governing refugee problems in Africa, which was adopted within the Organisation of African Unity and entered into force on June 20, 1971.⁴² This convention recognizes that the Geneva Convention is the basic and universal instrument for the protection of refugees. Furthermore, it establishes a series of procedures for the assistance of persons fleeing persecution and expressly envisages the obligation of non-refoulement to the frontiers of territories where the person's physical integrity would be threatened (article 2, paragraph 3).

⁴² The text and the status of signatures and ratifications of the convention can be found on the UNHCR website, www.unhcr.org. The organization has established an office in Libya and recently, in July 2008, signed a *Memorandum of Understanding* (MoU) in Tripoli, along with three other organizations ("International Organization for Peace, Care and Relief," "International Centre for Migration Policy Development," and the Italian "Refugee Council"), aimed at supporting Libyan authorities in the development of refugee protection systems in compliance with international and regional instruments for the protection of human rights.

Libya, along with Italy, has also adhered to various important treaties on the protection of human rights promoted by the United Nations.⁴³ Among them are the international covenants on civil and political rights and on economic, social, and cultural rights, both opened to signature in New York on December 16, 1966. These two covenants do not make reference to the principle of non-refoulement or contain rules directly applicable to political asylum, but they do establish a number of fundamental rules on the protection of human rights in favor of all those (nationals and foreigners) who are subject to the jurisdiction of the state parties. In particular, the covenant on civil and political rights contains obligations of non-discrimination (article 3), respect for the right to life (article 4), and the prohibition of torture and inhuman or degrading treatment or punishment (article 7).

Libya has adhered to the convention against torture of December 10, 1984. Article 3, paragraph 1 expressly envisages the prohibition to "expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." In addition, Libya is party to the convention against genocide of December 9, 1948, the convention on the elimination of all forms of discrimination against women of December 18, 1979, and the

⁴³ The relevant texts can be found, along with the status of signatures and ratifications, on www.un.org.

convention on the rights of the child of November 20, 1989.

Italy and Libya are parties to the Protocols against the smuggling of migrants and the trafficking of persons supplementing the United Nations Convention against Transnational Organized Crime, opened to signature in Palermo on December 12, 2000. The Protocol against the smuggling of migrants sets out important rules regarding the approach state parties should have to combating illegal migration and clearly gives primacy to respect for human rights over repressive measures. It aims at reinforcing the instruments to combat criminal organizations engaged in such trafficking, while protecting the fundamental rights of migrants.⁴⁴ Furthermore, it obliges governments to carry out political campaigns on migration issues, both at the national and international level, in order to combat the root causes of the phenomena and discourage illegal migration.⁴⁵ The cornerstone of this system of international cooperation binding

⁴⁴ The preamble stresses the need to develop “a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at national, regional and international levels”; Article 2 specifies that the aim of the protocol “... is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.”

⁴⁵ See articles 15 and 16, regarding prevention, protection, and assistance measures.

Italy and Libya is the implementation of a security policy — in compliance with the protocol’s provisions — that establishes a reference framework not only for migration management at the national level, but also for interventions to be carried out at the regional level and in third countries affected by flows of illegal migrants. Similarly, in addition to envisaging the obligation to prevent and combat the phenomena, the Protocol against the trafficking of persons requires state parties to adopt a number of measures to protect victims and guarantee their rights.

Finally, article 6 of the Treaty on Friendship, Partnership and Cooperation between Italy and Libya, signed on August 30, 2008, commits the parties to cooperate in compliance with the principles set forth by the United Nations and, in particular, in the Universal Declaration of Human Rights. This direct reference constitutes a further guarantee of human rights, since all applicable provisions from the declaration are incorporated into the treaty, in particular article 14, which sets out that everyone has the right to seek and enjoy asylum from persecution in other countries.⁴⁶

In conclusion, Libya is bound by a number of international instruments in its relations with Italy and other states, which should be taken into account when assessing its capacity to manage migratory flows and protect the human rights of migrants.

⁴⁶ Regarding this point, see Natalino Ronzitti, *op. cit.*, 2002.

These instruments involve the following commitments for Libya in the field of migration:

- To guarantee protection to refugees and other categories of foreign nationals who could be subject to persecution, torture, inhuman or degrading treatment in third countries, and to ensure the principle of non-refoulement;
- To base decisions regarding migration issues on the fundamental principles set forth by the United Nations, by giving primacy to respect for human rights over repressive measures to combat illegal phenomena;
- To prevent and combat all forms of abuse or discrimination against foreign nationals who are present on its territory; and
- To combat the smuggling of migrants and the trafficking in persons at both the domestic and international level, using the models set down in the Palermo Protocols.

This formal reference framework is useful, yet not exhaustive for making a broader assessment. It can be asserted, however, that the approach followed by Italy and the European Union in developing international cooperation with Libya on migration issues is in keeping with relevant international instruments. On a substantial level, Libya must continue to follow the path undertaken in recent years to adjust its administrative systems to more adequate levels of protection of the human rights of foreign

nationals. At the same time, Italy and the European Union need to monitor the correct implementation of international instruments and guarantee the necessary assistance in order to achieve the desired operational solutions, as well as a level of convergence with Western systems.

Brief mention should also be made of the possible effects of article 10, paragraph 3 of the Italian Constitution on Italian authorities operating on the high seas. According to scholars, this provision could guarantee a subjective right of asylum to all foreign nationals who, in their country of origin, are denied exercise of the democratic freedoms guaranteed in Italy.⁴⁷ According to this reading, supported by a number of judgments, the scope of the aforementioned article of the Italian Constitution would be wider than the Geneva Convention on Refugees. However, the line taken by recent case law is not uniform; some rulings tend to be more restrictive.⁴⁸ The introduction of specific legislation could help clarify the scope of this rule by giving Italian authorities clear procedures to apply on the high seas. This is of paramount importance when, in the course of joint operations

⁴⁷ See, for instance, Bruno Nascimbene and Chiara Favilli, "Rifugiati," in Sabino Cassese (ed.), *Dizionario di diritto pubblico*, Milan, 2006, p. 5309 *et seq.*

⁴⁸ Corte di Cassazione, November 25, 2005, No. 25028; September 1, 2006, No. 18941; September 25, 2006, No. 18549, in *Diritto Immigrazione Cittadinanza*, 2006, p. 93 *et seq.*, p. 112 *et seq.*, and p. 115 *et seq.*, respectively.

with other countries, persons claim that they could be subject in their country of origin to persecution or treatment not consistent with the constitutional rights guaranteed by Italy.

10 CONCLUSIONS AND POLICY RECOMMENDATIONS

The most important aspects related to migration flows via the sea include navigation law, criminal jurisdiction procedures, rescue measures, migration rules, and management of political asylum applications or other forms of protection, at both national and international level. The coastal state may act within its sea areas by exercising its jurisdiction in case of suspected smuggling of migrants. However, interventions on the high seas have to take account of international agreements or have the consent of the flag state of the ship concerned. In international waters, the general rules legitimating the checking of a state's vessel or a vessel without nationality apply. The Palermo Protocol against the smuggling of migrants promotes the development of international cooperation in this field, and sets out criteria for the correct planning of operations.

The way migrants are smuggled by sea endangers their life and safety. Illegal migration, on the other hand, represents a threat to Italian and European economic and administrative structures. The Italian legislation concerning law enforcement operations complies with international rules. Thus, it calls for rescue operations and is based primarily on the development of international cooperation. Naval interdiction measures on the high seas, which are legitimated by international law, are applicable in Italy in the framework of bi- and multilateral cooperation. Unilateral action, instead, is aimed at exercising domestic jurisdiction and involves measures provided for on national territory. Italy's approach to enhancing police cooperation with

other Mediterranean states — particularly Libya in the last few years — is the best path to follow since it safeguards the legitimate interests of national as well as European systems of immigration management. At the same time, wide-ranging cooperation based not only on suppression, and extending the system of international guarantees provided to foreign nationals, is leading to a coherent and standardized approach to managing migration. It is fundamental to complement this effort with increased cooperation involving the countries of departure of the immigrants, namely Chad, Niger, and Sudan. In recent years, Libya has signed agreements with these neighboring countries.

Since preventing and countering the smuggling of migrants must be conducted in conformity with the obligation to protect human rights, the principle of non-refoulement has to be guaranteed during operations, as do the rights of refugees and other categories of foreign nationals. Domestic legislation on these issues would be desirable in that Italian authorities would have clear procedures to follow in case of possible requests for protection on the high seas. The cooperation Italy is promoting with Libya and other states affected by illegal smuggling of migrants at sea is effective and should be supported, with the aim not only of ensuring prevention and suppression of criminal phenomena and guaranteeing foreign nationals' fundamental rights, but also of fostering the capacity building in the states involved according to European models. In this

framework, an increasingly high level of human rights protection should be sought. Cooperation with Libya could be strengthened through more effective measures in this field, for example, by giving external bodies access to Libyan migration centers, and monitoring the conditions of migrants and the measures adopted there. Joint screening of the asylum applications of persons returned to Libya by Italy during joint operations at sea would be particularly useful for both countries, and would implement the obligations stemming from article 6 of the bilateral treaty of August 30, 2008. Yet, the illegal migration phenomenon cannot be faced on a bilateral basis alone; a concrete commitment from European Union institutions and member states is essential.

ANNEXES

COUNTRIES	AGREEMENTS
Albania	Agreement on drug trafficking and organized crime and additional protocol, Tirana, August 24, 1991; protocols on advice and assistance for the reorganization of the Albanian police forces signed on September 17, 1997, June 11, 1998, November 10, 1998, January 10 and July 5, 2000, February 13, 2001, and November 12, 2002 (Establishing and prolonging the Italian multi-agency mission); readmission agreement and implementing protocol, Tirana, November 18, 1997, in force since August 1, 1998; agreement against crime, Tirana, June 19, 2007, in force since December 19, 2008.
Algeria	Agreement against terrorism, organized crime, illicit trafficking in narcotic and psychotropic substances, and illegal immigration, Algiers, November 22, 1999, in force since January 28, 2008; agreement on movement of persons, Rome, February 24, 2000, in force since October 18, 2006; protocol for the implementation of the agreement on the movement of persons, Rome, October 9, 2000, in force since October 18, 2006.
Bosnia	Agreement against organized crime and drug trafficking, Sarajevo, January 28, 2002, in force since October 26, 2007; agreement on readmission and implementing protocol, Sarajevo, May 12, 2004, in force since April 1, 2007.
Croatia	Agreement against drug trafficking and organized crime, Rome, May 28, 1993, in force since May 4, 1994; readmission agreement, Rome, June 27, 1997, in force since June 1, 1998; arrangement implementing the readmission agreement, Zagreb, June 8, 1998, in force since June 1, 1998.
Egypt	Agreement on police cooperation, Cairo, June 18, 2000, in force since January 18, 2005; readmission agreement with implementing protocol, Rome, January 9, 2007, in force since April 25, 2008.
Libya	Agreement against terrorism, organized crime, illicit drug trafficking, and illegal immigration, Rome, December 13, 2000, in force since December 22, 2002; protocol on illegal migration and additional technical-operative protocol, Tripoli, December 29, 2007; protocol supplementing the protocol signed on December 29, 2007, Tripoli, February 4, 2009; the treaty of friendship, partnership, and cooperation signed in Benghazi on August 30, 2008, in force since March 2, 2009.

Morocco	Agreement against terrorism, organized crime, and drug trafficking, Rabat, January 16, 1987; additional protocol to the agreement of January 16, 1987, Rome, December 16, 1996; the readmission agreement of July 27, 1998, and the additional protocol of June 18, 1999, are not yet in force.
Serbia	Readmission agreement and implementing protocol, Belgrade, January 28, 2003, both in force since April 1, 2005; the agreement against organized crime, illicit drug trafficking, and international terrorism signed in Rome on December 28, 2008, is not yet in force.
Republic of Montenegro	Memorandum of Understanding against crime and illicit trafficking in persons and goods, Bari, December 9, 1999; the agreement against organized crime signed in Rome on July 25, 2007, is not in force yet.
Tunisia	Exchange of notes concerning entry and stay of Italian and Tunisian nationals, Rome, August 6, 1998, in force since September 23, 1999; agreement against organized crime, Tunis, December 13, 2003, in force since December 21, 2005.
Turkey	Agreement against organized crime, terrorism, the trafficking of drugs and human beings, Rome, September 22, 2008, in force since February 9, 2001.

Note: These are the police cooperation agreements concluded by Italy and in force with Southern and Eastern Mediterranean non-EU countries most affected by migrant smuggling. The agreements, absent information on their coming into force, are deemed applicable upon the date of signature.

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