EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

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Strategic litigation to contrast border externalization and the lack of access to the asylum right for victims of trafficking

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With reference to border externalization and in the attempt to outline the possible actions of strategic litigation against the negative consequences that it produces, it is firstly necessary to define this phenomenon, as it is currently characterized by a deep complexity.

It is therefore essential to outline and identify its characteristics in order to understand how and through which strategies this process has developed, increasingly compromising the human rights' protection system, and in particular the right to the protection and asylum of migrants fleeing their countries of origin.

For the purposes of this analysis, "border externalization" could be defined as the creation, through a wide array of instruments envisaged by the policies of the European Union and its Member States, of a mechanism conceived in order to push frontiers beyond national borders, as well as to move outside the Union's territory the control over the entry of foreign citizens, with the ultimate aim of reducing the numbers of the formers in a progressively more incisive way.

One of the first attempts to start this process within the Mediterranean migratory route from Africa was launched in 2009 with the so-called "first sea block", implemented in conjunction with the first agreement between Italy and Libya.[1] In this timeframe, for the first time the search and rescue operations became structural operations mainly aimed at exercising border police activities. At the same time, the presence of Italian national authorities in international waters became functional to the block of migrants in Libya, through the systematic refoulement of the rescued people and their return to the Libyan authorities.[2]

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[1] https://www.hrw.org/report/2009/09/21/pushed-back-pushed-around/italys-forced-return-boat-migrants-and-asylum-seekers

[2] See https://www.unhcr.org/publications/manuals/4d9486929/unhcr-protection-training-manual-european-border-entry-officials-6-treatment.html

With the ruling adopted in the well-known "Hirsi" case,[3] the European Court of Human Rights deemed such operation and the related conduct of the Italian State completely unlawful. Through this ruling, for the first time the extraterritorial application of the principle of *non-refoulement* was stated, on the same grounds subsequently taken up and developed by the Civil Court of Rome. As a matter of fact, the national Court clarified how, even if the violation of the *non-refoulement* obligation and of the asylum right occurs outside the territory of the State, the same violation shall essentially be cured by granting to the injured party the right to enter in the territory of the State, which committed the offence by preventing such access in the first place.[4]

As the Court stated, if the provisions protecting such fundamental rights are interpreted otherwise, this could progressively jeopardize the protection system by undermining its effectiveness.

Despite the groundbreaking importance of the principles established in these rulings, their application is currently hindered by the phenomenon defined as externalization, through which the direct action of the European States has been progressively reduced in favor of a more layered strategy, composed of multiple elements and therefore difficult to outline in its complexity.

Firstly, it must be pointed out that, especially in the wake of 2015 European Agenda, border externalization has shifted from being an objective of a single Member States to one of the European Union as a whole, which has implemented the mechanism in the framework of a common policy resulting in the indiscriminate block of those migrants passing through the Mediterranean route.

Such dematerialization of the borders has led to the creation of a remote-control system realized through a plurality of actions, which are jointly put in place on two fronts. On the one hand, in cooperating with third countries, especially transit countries (by way of example, Libya and Niger), to implement physical block of the migrants and integrated border control. On the other hand, in cooperating with countries of origin, by executing bilateral agreements aimed at developing a policy of deterrence to departure, supported by the increasingly massive, faster, and more effective readmissions of irregular citizens.

Such cooperation between States is implemented through: (i) the execution of international agreements, which, although in a general and indeterminate fashion, envisage the commitment framework in which third States are compelled to collaborate in order to control and prevent the transit of people towards Europe; and (ii) the subsequent financial support provided from individual Member States as well as by the European Union, which is conditioned to the purposes of the process.

In this way, the funds allocated for international cooperation have been almost totally diverted to the financing of the externalization process, by modifying the conditions of access to such funds. In fact, while previously these development funds were tied to the request for an improvement in human rights' protection standards, from 2016 on such constraint was modified, and the funds were deployed in order to require third countries to accept readmission clauses , agreements and cooperate to the transit control.

In light of the data analysis performed within ASGI Sciabaca&Oruka project, it appears clear that the European States have structured such a system in order to delegate to the third countries authorities

[3] https://www.refworld.org/publisher/ECHR.html *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012

[4] https://sciabacaoruka.asgi.it/en/right-to-enter-italy-for-those-who-have-been-unlawfully-pushed-back-to-libya/

the achievement of non-self-determined purposes. However, it is also clear that such delegation has a mostly formal nature, since it is subjected to a constant and widespread control, implemented through the massive and indispensable logistical, technical, technological, and military support provided by the EU States.

In this regard, it would sufficient to consider the Libya case, where the influence of the Italian authorities has been predominant and, through the formal creation of a Libyan SAR zone, over a few years it has managed to transform the search and rescue activities' scenario, by implementing a system in which the Libyan authorities are the ones who formally carry out every intervention and act for a systematic pull-back of anyone intercepted at sea in an attempt to reach Europe.

In this context, with reference to the strategic litigation tactics, the main question that must be answered is how to hold liable those European States which create the conditions for such flows' block, which severely limits the people's freedom to move even in transit countries, leading to their exclusion from any form of protection.

With reference to the panel's theme and in particular to the systematic violation of the protection rights of thousands of women victims of trafficking (in relation to which specific protection obligations are in place), it is worthy considering how it could be possible to oppose by the means of judicial actions those migration policies which - as confirmed by the same UN Special Rapporteur on trafficking - are in no way effective against the exploitation phenomenon, but rather contribute to make women even more vulnerable to exploitation.[5]

How can a liability be asserted against countries that deliberately ignore their protection duties vis-à-vis trafficking victims (who, as persons exposed to the risk of persecution, should be granted refugee status[6]) and, within the process of border externalization, offer them as only concrete measure an assisted voluntary return, whose voluntary nature is legally questionable?

A first attempt to respond to this need is represented by the litigation that has developed before the Italian national Court, aimed at obtaining the declaration of illegitimacy of those measures that allocate funds to the Cooperation in African Countries for the implementation of the externalization and, in particular, for the implementation of that technical support and equipment supply to the Libyan Coast Guard, without which these authorities would never be able to carry out the interception at sea of fleeing persons and bring them back to Libya. Such proceedings are currently pending before the Supreme Administrative Court.[7]

Such Administrative Court has been requested to assess the lawfulness of the allocation of these funds and, in particular, of a Decree of the Foreign Affairs Ministry of the Italian Government, pursuant to which the sum of 2.5 million euros has been deployed to support the Libyan coastal authorities, by the means (inter alia) of the restoration of four patrol boats, the purchase of spare parts for vessels and the training of the on-board personnel.

This litigation has pivotal importance since it aims to affect, as previously highlighted, the cornerstone of the instruments through which the externalization process has been put in place: the

[5] https://archive.unric.org/it/images/2018 /pr 2460 18 Messaggio Giornata Mondiale contro la tratta di essere umani.pdf

[6] https://www.unhcr.org/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html

[7] https://sciabacaoruka.asgi.it/en/asgis-case-against-italian-government-for-supporting-the-libyan-coastguard-through-misuse-of-africa-fund-money-goes-on-appeal/

disbursement of those funds financing the cooperation. The judicial authorities have been requested to assess the legitimacy of such measures in light of the evidence of macroscopic unlawful consequences of such allocation of funds. Various associations, including Amnesty International, Ecre and ICJ intervened alongside ASGI in these proceedings, as well as the Italian Organization "Differenza Donna" (relevant to the present topic).

As a matter of fact, this latter is active in Italy precisely on the issues of gender violence and protection of refugees and trafficking victims. In virtue of such intervention, the proceedings assumed an additional value for the purposes of this panel. The intervention "ad adiuvandum" of this organization has in fact allowed to draw the attention of the Court on the particular issue regarding the conditions of women and women victims of trafficking, in the context of a well-known and generalized situation of indiscriminate violence against migrants in Libya.

It was thus possible to highlight how the externalization policies, which have trapped thousands of people in Libya and deprived them of any form of protection, have also exposed women to the most brutal violence and, instead of countering their vulnerability to the exploitation phenomena, has worsen their position. The association has drawn attention to the factual need and the international obligations to assess the impact of the legislative measures and economic funding on the fundamental rights of women, girls and young girls, by asking specific questions:

(i) what is the (direct and indirect) impact of the implementation of such measures challenged before the Court on the human rights of the persons directly concerned, and specifically of women and young girls?

(ii) to what extent are the Italian authorities and the persons acting on behalf of Libya able to fulfil their human rights obligations in the context of the implementation of such measures?

(iii) what mitigation measures, if any, are necessary?

and by demonstrating that in the financed measures, not only was the evaluation completely absent, but in concrete terms it would have to be negative for the rights to be protected.

In this sense, it is clear that this form of litigation paves the way to the possibility of questioning and assessing the legitimacy of the disbursement of funds by activating a judicial review of the purposes and consequences arising from their use.

Consequently, extremely interesting scenarios open up that make it possible to, for instance, carry out evaluations on the legitimacy of funds disbursed also in favor of International Organizations that have played a central role in the externalization.

In particular, the allocation of funds for voluntary returns from Libya can be challenged before the judicial authorities as it appears with clear evidence that this measure - also in light of the context in which it is implemented - does not present adequate guarantees in terms of voluntariness and respect of the principle of non-refoulement, and that it affects more significantly a category, such as victims of trafficking, which (by virtue of the principles of law mentioned above) should instead be guaranteed protection from refoulement and subsequent persecution.

Another particularly interesting strategic litigation area, aimed at allowing judicial evaluation of the externalization policies, is the one relating to the proceedings brought before the European Court of Human Rights and the UN Human Rights Committee, through which it has been again asked to

sanction Italy for its collaboration with Libya pursuant to the principles set out in the abovementioned "Hirsi" ruling.

In particular, the entire maritime border management system, which forces all migrants rescued by the Libyan authorities to return to Libya by the means of the "delegated refoulement" instrument, has been challenged before these international bodies[8]

The peculiarity of these proceedings lies in the fact that the human rights' protection mechanisms shall assess the subsistence of jurisdiction of the European countries (in particular, Italy) in conducts that apparently are physically carried out only by the Libyan authorities.

To this end, it has been proven that Italy plays a fundamental (if not decisive) role in the definition of the work of the Libyan authorities, carried out both directly (through a remote coordination of the Maritime Coordination Center of the Italian Coast Guard whenever it requires the intervention of the Libyan authority) and indirectly (through a dominant influence). As highlighted, such influence is defined in terms of complicity, direction and control.

The information research activities, performed through the tool of civic access (freedom of information request) and the investigations of journalists, have been decisive to this aim, since over time they have allowed to outline the complex plot through which externalization is carried out, and namely:

- the direct supply of instrumentation as well as the financing and training of the Libyan authorities, in order to make every effort to reduce flows, combat transit and block departures;
- the mutual commitments that have been formally undertaken, despite the awareness of the consequences in terms of violation of rights, and in particular of the total absence of forms of refugee protection, arbitrary indefinite detention in inhuman and degrading conditions, the generalized use of torture, all of which are accepted as risks, secondary effects of the undertaken strategy;
- the involvement of the Libyan authorities in the search and rescue of migrants on the high seas through funding, training and equipment; but also
- the collaboration and in many cases the coordination through an undeclared presence of Italian authorities on Libyan territory that, in fact, coordinate the Coast Guard in all its interventions, through Italian police and military personnel and the use of instrumentation such as drones.[9]

If such jurisdiction were to be confirmed, it would then be possible to finally hold the Italian authorities liable for having systematically exposed people to serious violations of their fundamental rights through their activities, with reference not only to the right to life and the prohibition of inhuman and degrading treatment, but of course also to the equally essential right to leave any country, in the absence of which the same asylum right would be inevitably compromised.

Always with reference to these issues, the fundamental rights' protection system appears to be at a decisive moment, where an affirmation of liability is crucial and essential, in order to avoid

[8] https://www.asgi.it/allontamento-espulsione/respingimenti-libia-ricorso-cedu/
https://www.statewatch.org/media/documents/news/2019/dec/glan-italy-libya-18-12-19.pdf
[9] https://www.avvenire.it/attualita/pagine/esclusivo-la-verita-sui-respingimenti-in-mare

jeopardizing the ultimate scope of the system and continuing to ensure the purpose for which it was created, which can be summarized in the "*right to have rights*" principle.