

EXTERNALISATION OF BORDERS

detention practices and denial of the right to asylum

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European externalization policies and the denial of the right to asylum: focus on ruling no. 22917/2019 of the Civil Court of Rome

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When we speak of externalization policies, we refer mainly to two kinds of practices that we have observed:

1. Firstly, the border externalization, which consists of those policies that the EU States are implementing, especially in recent years, and which consists of trying to move their border as far south as possible. These are policies that actually try to block the access of people within the territory of the Member States;
2. Secondly, there is also an externalization idea that is linked to the asylum right, and that tends to conceive mechanisms and tools to analyze the international protection applications in third countries rather than within the EU.

In the political development of the last decades, the idea of externalization of the right to asylum was the first to be imagined, by means of implementing a system that would allow the access to international protection procedure and consequent examination in the territory of third countries. Such policies which aimed to deploy asylum requests were then set aside, perhaps since it was legally difficult to conceive an analysis system of the asylum applications outside the territory of Member States that would guarantee protection to the fundamental rights of the involved persons.

Member States therefore began to focus on and develop border externalization policies, such as the restriction of people's freedom of movement, also and especially in third countries. These policies have employed and continue to employ several kinds of instruments (i.e. both direct and indirect push-backs, agreements with third countries, funding and financial support to third countries).

However, these policies of border externalization have led to a restriction of the access to the asylum procedures, which strongly affects the fundamental right of people to seek protection. In fact, by

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blocking people's access to the EU territory, their ability to apply for international protection is effectively hindered. Therefore it can be noted how the access to the asylum procedure - as an expression of a fundamental right - is closely related to the freedom of movement: in order to submit the application for protection, it is necessary for the foreign citizen to arrive on the national territory.

Therefore, blocking access to EU territory, effectively blocks access to the asylum application. The Civil Court of Rome has recently intervened in this regard with the ruling No. 22917/2019.¹ The case at stake involves a direct refoulement that concerned several Eritrean citizens, who in 2009 had been intercepted by vessels of the Italian Navy, which rescued them and took them on board, and then returned them to the Libyan Coast Guard in order to bring them back to Libya. These people were no longer able to reach Europe, but they moved to Israel to escape from Libya.

The conduct of the Italian authorities was identical to the one already sanctioned by the European Court of Human Rights (ECtHR) in the "*Hirsi Jamaa and Other v. Italy*" case.² The Civil Court of Rome has consequently sanctioned the same illegal conduct of the Italian State, which consisted in handing over those people and allow for their return to Libya.

In comparison to the ECtHR however, the Rome Court added a further conceptual step. As a matter of fact, in the "*Hirsi*" ruling the ECtHR sanctioned Italy for having brought the applicants back to Libya, a country where they risked inhuman and degrading treatment and where they were at risk of refoulement. Meanwhile, the Court of Rome deemed that the illegal conduct of the State also consisted in the fact that Italy, by bringing these foreign citizens back to Libya, prevented them from exercising a fundamental right, such as the right to asylum.

Therefore, it could be argued that the Italian externalization policy has led to a material debasement of the rejected people's asylum right.

On such ground, beside condemning Italy to pay damages (likewise the ECtHR), the Court of Rome has also stated how the asylum right of these people should be rebalanced. The Court has requested the Italian State to allow these persons to enter the Italian territory and submit a protection application. The Italian authorities will then assess whether or not these persons should be granted protection; however, these persons must be guaranteed access to the asylum right and have the opportunity to arrive on the Italian territory to submit the application.

This is the revolutionary aspect of this ruling: it has been stated that a foreign person returned illegally is the bearer of a right that must be restored, obliging the Italian State to issue a visa that allows the person to enter Europe.

This ruling entailed a realignment by the Court of Rome of an illicit conduct of the Italian State (the direct refoulement), based on one of the externalization policies implemented by Italy.

Nowadays such externalization policies have become even more refined: the Italian authorities no longer intercept people at sea and take them back to Libya. By way of example, one of the most common externalization practices is currently related to the so-called indirect push-backs or push-back by proxy: the Italian authorities do not directly intercept people and return them, but rather ask the Libyan authorities to operate the refoulement.

¹ <https://sciabacaoruka.asgi.it/en/right-to-enter-italy-for-those-who-have-been-unlawfully-pushed-back-to-libya/>

² [https://hudoc.echr.coe.int/spa#{"itemid":\["001-109231"\]};](https://hudoc.echr.coe.int/spa#{)

We have challenged also such measures before the ECtHR, which shall rule on these practices whether the indirect refoulement is an unlawful conduct of the Italian State and amount to an infringement of the asylum right of the people who suffer it.

An extensive application of the principle stated by the Court of Rome could lead us to believe that also other externalization practices put in place by the States (which, refining over time, are increasingly difficult to counter) can be deemed illegal. By way of example, it could apply to the ones linked to the funding of third countries, as well as the conditionality of the funding that is provided by EU states to African states in order to limit the freedom of movement of people on the move. The limitation of the freedom of movement aims at preventing them from reaching Europe, thus debasing, in fact, their fundamental asylum right which cannot be exercised. It could be also applied by the provision of technology or means to hinder the people's freedom of movement.

The possible scenarios are extremely diversified, like the case of people who are directly refouled at the border, as often happens in airport border crossing points. Very often, in fact, people who arrive in Italy, even if they want to request protection, are unable to access the procedure because they are illegally refouled at the border. This could be a case in which it could be hypothesized to apply the same principle stated by the Court of Rome ruling, since this is indeed a direct refoulement practice.

There are also more complex circumstances, which should be analyzed individually, and which concern people who, even if already on the national territory, were somehow prevented or restricted access to the asylum application. Such case by case analysis could, even in these situations, highlight an illegal conduct of the Italian State to which the principle established by the Court of Rome could apply.

Such proceedings are currently ongoing, so the evolution of these case law (with reference to the one submitted before the ECtHR for a case of push-back by proxy) will be established in the forthcoming months. If the Court will deem unlawful the conduct of the Italian State also in such cases, subsequent actions to rebalance the denied asylum right could be foreseen.

In conclusion, this is also the purpose of this conference: beginning together to imagine actions that can somehow counteract the externalization policies, and thus rebalance the violation of the protection right of those who suffer them.