

The role of Italy and the European Union in handling the immigration by sea: profiles of international law.

This work arises from the recent events which are occurring in the Mediterranean sea, where thousands of irregular migrants risk their life every day in order to flee their countries. The problem is particularly evident in Italy, a country geographically very exposed to the phenomenon, where more than a hundred thousand of illegal migrants have arrived to its coasts just in the first six months of the 2014. Although this huge problem does not concern only Italy and its government, till now the European Union did not provide for a concrete help, so that the main operation that in this historical moment is trying to contain this critical situation is a solely Italian operation, called “Mare nostrum”, which is costing a lot to the Italian population.

Anyway, the matter of the illegal immigration by sea is not an Italian or an European problem, but an International one. It is not a coincidence that the most important protection for the migrants of all countries was recognized by an international tool like the Geneva Convention of the 1951, which guarantees to the people who tries to enter a country, also in illegal ways, to seek refuge, avoiding that this person could be rejected towards countries where he/she could be persecuted. Unfortunately, this kind of protection, as amended in 1967, cannot be considered the last word on the matter: giving a possibility to be accepted in a foreign country solely to that people who is able to prove a well-founded fear of being persecuted for reason of race, religion, nationality, or membership of a particular social group or opinion (art. 1, par. A(2)), it prevents the other migrants who are equally persecuted but who are not members of a particular racial, religious, national or political group, from receiving an effective guardianship by the international regulations.

The topic of the irregular immigration by sea, as it can be easily inferred, is closely linked with the Law of the sea, and first of all with the dispositions of the Convention of Montego Bay drawn up in 1982. The reason is easy to imagine. The international migrants use to leave their countries by unsafe boats, going through particular zones of water, called high sea, where only the international rules and conventions are in force. In these waters the States do not have a proper jurisdiction, and the migrants cannot be forced to come back in their country. The situation changes when the subjects cross a frontier, because in this case the national norms could knock against the rights of the migrants (and their vessels) guaranteed by the international law. For example, the most important right which a coastal State has to respect is the innocent passage one (art. 17 UNCLOS), that guarantees to the ships of a foreign country to go through the territorial waters of the coastal State without being blocked or hindered.

However, the boats have some obligations too. They have to make a fast and continuous passage, without stopping or bringing prejudice to the peace and the security of the coastal State. They can actually stop their passage only for emergency reasons, and one of these exceptions is represented by the duty to render assistance to the vessels in distress found at sea (art. 98 UNCLOS). This kind of obligation had become consuetudinary already in 1974, and concern all the people who are in danger of life at sea. Unfortunately, the duty at issue proved a very difficult one to follow and respect. Although several tools have been adopted to enforce the collaboration between States in these topics, it results very difficult for a master of a ship to render assistance to people found in distress without causing a serious prejudice to him/herself. These statements are confirmed by several cases occurred in recent times.

The conventions SAR and SOLAS, as amended in 2006, have got the aim to create a cooperation between the States in order to better fulfil the duties to render assistance at sea. For this reason the conventions take the trouble to precisely define the notion of “place of safety”,

the place where the subjects in distress have to be led for considering the assistance fully completed. Unfortunately this definition, just like the responsibility of the States in this order of things, was not so efficacious. Events such as the case *Pinar*, a ship which rescued 154 migrants in the SAR zone of Malta and which was kept for three weeks in international waters without receiving an entrance permission, or the similar case *Cap Anamur*, effectively demonstrate how difficult a real application of these conventional obligations could result.

However, although the obligation of render assistance at sea is one of the most fundamental right that a migrant could enjoy in order to preserve his/her life during the trip to another country, it is not the only one. Another very important right with a similar aim does exist: to preserve the immigrants' life, avoiding that this people could be expelled or returned towards the frontiers of territories where his/her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This consuetudinary international right is called *non refoulement* principle, and represents the basis of the international refugees' protection system.

It is sanctioned by the celebrated art. 33 of the Geneva Convention, the article which concretely applies the definition given by the art. 1, par. A(2), guaranteeing to every person who fall within the category of refugee according with the previously given definition, to seek asylum in the State in which he/she asks it. Indeed, although this article of the convention gives a substantial protection to this category of people, anyway it remains a sovereign prerogative of the State to grant this kind of protection to the person who eventually makes this request. For this reason, principally in the European contest, the institutions have tried to make the granting criterions more harmonic, but without reaching the expected results. Every State in fact keeps having different regulations and asylum procedures, sharpening the problem of the harmonic

approach to the matter. Some specific examples may help to concretely apply what we have said till this moment.

The first one is the case of the Norwegian merchant ship *Tampa*, which came to an Indonesian smack's aid and saved 433 migrants of different nationality in distress in the international waters in front of the Christmas Island. The Australian authorities, in spite of the huge danger in which the migrants and the crew of the merchant ship were, did not give the authorization to the *Tampa's* captain to go into the harbour. Although this denial, the captain of the ship decided to come into the Australian territorial waters, where the migrants received a first medical aid. Anyway, the Australian authorities reasserted the order to immediately leave their territorial waters and, at the same way, the captain refused to restart the trip in that dangerous conditions. At the end, Australia reached a deal with New Zealand and Nauru, which offered to receive the migrants, solving the diplomatic stalemate. Briefly analysing the case, we can notice how Australia acted generally following the international norms in matter, and even taking advantage from them. Nevertheless, it violated the principle of temporary refugee affirmed by the ExCom in these terms: "asylum seekers should be admitted to the State *in which they first seek refuge* and if that State is unable to admit them on a durable basis, *it should always admit them at least on temporary basis (...)*" (italics added).

The second case concerns the rejections perpetrated by Italy on the high seas, in force of the Treaty of friendship, partnership and cooperation signed between Italy and Libya in 2007. This treaty was made principally to fight the irregular immigration and it is legally based on the article 110 UNCLOS which ratifies the Right of visit. Italy used this treaty as juridical base to intercept boats of migrants coming from Libya in international waters and to pull them back to their starting points. It did all this omitting to check the actual conditions of the migrants and to verify their potential status of international refugees. In 2009 Italy leaded nine operations of

this kind, obtaining for this reason in 2012 a conviction coming from the European Court of Justice in the famous sentence *Hirsi Jamaa* and others against Italy. Although Italy had tried to act in a no-juridical zone as the international waters, where the responsibilities of the States seem to be of lesser weight, anyway it was found guilty in reason of the article 3 of the European Convention of Human Rights, which disposes that no one can be subjected to inhuman and degrading treatments, also as a consequence of an extradition or expulsion measures. This sentence results incontrovertible for two main reasons: Italy actually used to reject the migrants towards the coasts of a country (Libya) which does not respect the human rights and the rights of the migrants, exposing the subjects to a serious danger. Moreover, the art. 3 ECHR is considered extraterritorially enforceable, so that Italy is responsible of its actions even if it acted in international waters.

Often it is forgotten that Italy is a member of the European Union, a supranational organization which is supposed to face this kind of problems in organic ways. Actually the EU went through several harmonization attempts during these years, but reaching only some kind of results. The first attempt to realize a common European approach in these subjects was the Schengen Agreement in 1985, whose aim was to abolish the controls at the internal frontiers of the contracting States in order to transfer them to the external ones. Then the Amsterdam Treaty and its article 63 came to improve the harmonization in subjects like the asylum and the refugees, but insofar as minimum harmonization standard were concerned. The competences of the States remained in fact very extended; as a result, when the Treaty of Lisbon came into force, two more articles looked after the organization of the competences: the art. 67, par. 2, and the 78, par. 1, which dispose the developing of common policies in these matters and the absolute respect of the *non-refoulement* principle.

Moreover, starting from the Council of Tampere in 1999, the EU tried to develop a Common European Asylum System, in order to make the procedures of the States to grant asylum more harmonic. Despite the good intentions we cannot say that in this moment the members of the European Union apply the same criteria obtaining more or less the same results. As an interesting report of the *Council on Refugees and Exiles* affirms, the procedures used by the States are not only very different each other, but omit some substantial aspects fundamental for the good functioning of the system. As it was not enough, these difficulties are compounded by the actual application of the Convention of Dublin, in its various versions. The Convention at issue, in spite of its modifications, underline always the same point: the competent country for the analysis of an asylum request is that first one in which the migrant submits the asylum application or where he/she illegally enters. The migrant, once he/she has obtained the asylum, cannot leave the country where he/she obtained it; therefore the consequence is that some State are much more rested than others in reason of their geographical location.

It is quite evident that these circumstances do not play in favour of a Europe united and integrated. The same goes for the integrated management of the external borders, the principal function of the European agency called Frontex. The agency was appointed by the Council Regulation 2007/2004 in order to create a collaboration between the member States to reach an effective integrated border management. Unfortunately, two main critical points rest on the good functioning of the system: an institutional one and an operational one.

The first one implies that the institutional organization of the Frontex is based on international principles, and not on supranational ones. Indeed, it is the single member States which takes the most important decisions, and not the neutral institutions of the agency. The second one concerns the operative aspects: the Frontex does not own the ships, the men and the means necessary to enforce their missions. As a result, it is completely dependent by the States which

voluntarily provide for them. Considering at the end that the whole responsibility of the Frontex operations fall on the State in which these operations are going on, we can conclude saying that the agency does not seem still ready to take on its shoulders the weight of a real solution of the critical problems which the irregular immigration is creating nowadays.