PUSHING BACK AGAINST PUSH-BACKS: A RIGHT OF ENTRY FOR ASYLUM SEEKERS UNLAWFULLY PREVENTED FROM REACHING ITALIAN TERRITORY

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Abstract

A decision of a civil court in Rome has reaffirmed the illegality of 'push-back' operations under both Italian and international law. In a noteworthy and innovative development, the court further held that, in light of the fact that the claimants had been wrongfully prevented from reaching Italian territory, they had a subjective right as a matter of Italian constitutional law to be admitted to Italy so as to be able to make an application for international protection. The decision has potentially far-reaching implications for future cases before the Italian courts in the field of migration, and may also pave the way for similar findings at the international level.

Keywords: push-backs at sea; migration; asylum seekers; *non refoulement*; externalization of migration controls.

Cite as: Silvia Borelli, "Pushing Back Against Push-backs: A Right of Entry for Asylum Seekers Unlawfully Prevented from Reaching Italian Territory", in *Diritti umani e diritto internazionale*, issue 1 (2020), forthcoming April 2020

1. On 28 November 2019, a judge of the first civil section of the Tribunal of Rome handed down a much-awaited judgment in respect of claims against the Italian authorities relating to the 'push-back' on the high seas of vessels carrying irregular migrants (Tribunal of Rome, First Civil Section, Judgment no. 22917/2019, published 28 November 2019). The complaint related to events occurring in the summer of 2009 and was submitted by fourteen Eritrean nationals who had been

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aboard a boat on the high seas attempting to cross from Libya to Lampedusa. Following a rescue operation carried out by an Italian Navy vessel, the claimants had been forcibly transferred onto a Libyan coastguard boat and then returned to Libya. The claimants, all of whom at the time the claim was brought were outside Italian territory, alleged that their return to Libya had been unlawful. They brought a civil action in tort under Article 2043 of the Italian Civil Code against the Italian Interior Ministry, the Ministry of Defence, the Ministry of Foreign Affairs and the Office of the Prime Minister. In addition to seeking pecuniary compensation, they sought an order compelling the authorities to allow them to enter Italian territory to submit an application for international protection. The decision, allowing the claims and finding the Ministry of Defence and Office of the Prime Minister liable, constitutes an extremely important development in a number of respects. Quite apart from the clear recognition of the domestic and international unlawfulness of the push-back operation, the judgement is of particular note for the court's conclusions and reasoning as to the consequences flowing from the illegal conduct of the Italian authorities.

2. The claimants had fled Eritrea and travelled to Libya with the intention of reaching Italy and seeking international protection there. They departed from Libya in late June 2009, on board a vessel carrying in excess of eighty migrants. On 30 June 2009, after a few days at sea, the engine of the boat failed and the vessel remained stranded in international waters, some 26 nautical miles off the coast of the island of Lampedusa; those on board were subsequently rescued by a ship of the Italian Navy, the *Orione*. The claimants, and several other witnesses, testified that, following their transfer to the *Orione*, the rescued migrants were first searched by members of the Italian military, who seized their personal belongings, and then assigned identification numbers and photographed. Despite the migrants being given assurances that the ship was heading towards Italy, where they would be able to seek international protection, the *Orione* instead headed in the direction of Libya. It was subsequently met by a Libyan coastguard vessel, on to which the migrants were transferred and then taken back to Libya, where they were detained for a number of months and ill-treated whilst in captivity. The claimants subsequently attempted to reach Europe overland, but were detained in Israel.

The incident at issue is just one of the many instances of so-called push-backs at sea to have occurred since 2009, involving the interception of migrants before they can reach Italian territory and their forced return to the country of embarkation. These operations have taken place against the background of the arrangements on

migration control concluded between Libya and Italy, which themselves are but one example of the ongoing trend towards the 'externalization of borders' and the outsourcing of migration control operations by European States and the EU itself to departure States on the southern shores of the Mediterranean Sea. Whilst various arrangements relating to migration control have been entered into between Italy and Libya in the past (see E. Paoletti, "Relations among Unequals? Readmission between Italy and Libya", Middle East Institute, 2010, at www.mei.edu), the most notable instrument remains the Treaty of Friendship signed in 2008 by Muammar Gaddafi and the then Italian Prime Minister Silvio Berlusconi (Treaty of Friendship, Partnership, and Cooperation between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya, Benghazi, 30 August 2008, unofficial English translation available at www.perfar.eu; for commentary, see N. Ronzitti, "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?", in *Bulletin of Italian Politics* 2009, p. 125 ss.; M. Giuffré, "State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?", in *International Journal of Refugee Law* 2013, p. 692 ss.). An essential part of the overall deal embodied in the Treaty was its reaffirmation of the already existing cooperation between the two States in matters of migration control and the reiteration of the force of pre-existing agreements, notably a 2007 Memorandum of understanding which provided for joint patrols off the Libyan coasts by mixed crews aboard patrol boats to be provided by Italy (Article 19, *Treaty of Friendship*, cit.; see also European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment of 23 February 2012 [GC], para. 19; for commentary, see S. Borelli and B. Stanford, "Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights", in *Uluslararası Hukuk ve Politika* 2014, p. 29 ss.). In February 2011, following the uprising in Libya and Italian involvement in the intervention which resulted in the overthrow of the Gaddafi government, the Treaty of Friendship was suspended (see European Court of Human Rights, *Hirsi Jamaa v. Italy*, cit., para. 21). Thereafter, on 2 February 2017, in the lead-up to the EU summit in Malta, the Italian Government and the UN-backed Government of National Accord in Tripoli signed a further undertaking aimed at 'combat[ing] illegal immigration, human trafficking and contraband' and 'reinforcing border security' (Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, Rome, 2 February 2017 (hereinafter 'the 2017 MoU'), unofficial English translation available at eumigrationlawblog.eu). The 2017 MoU, which was subsequently endorsed by the EU Council (see *Malta Declaration by the members*

of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, and "Informal meeting of EU heads of state or government, Malta, 3 February 2017", both available at www.consilium.europa.eu) reiterates and expands the commitments undertaken by Italy in previous agreements to provide financial support for migration containment activities undertaken by Libya. Notably, Italy undertook to provide additional financial and technical support so as to allow the Libyan Navy and coastguard to intercept migrant boats in Libyan territorial waters (2017 MoU, cit., Articles 1 and 4), and to provide assistance in order to improve health conditions in the Libyan-run detention facilities in Libya in which intercepted migrants were to be held pending their repatriation (ibid., Articles 2 and 4).

3. The first substantive question addressed in the judgment of the Rome court concerns the legality of the push-back operation which had led to the return of the claimants to Libya. On this issue, the judge followed the lead of the European Court of Human Rights in its 2012 judgment in *Hirsi Jamaa v. Italy* in holding that such operations violate the prohibitions of *refoulement* and collective expulsion under international law. The court set the scene for its assessment of the merits of the applicants' claim by briefly reviewing the international norms applicable to Italy relevant to the protection of individuals seeking international protection, including, first and foremost, the prohibition of *refoulement* contained in Article 33 of the 1951 Convention on the Status of Refugees, as well as the right to seek and enjoy asylum recognised in Article 14 of the Universal Declaration of Human Rights, the international prohibition of torture and other ill-treatment under Article 3 of the European Convention on Human Rights (ECHR) and the prohibition of collective expulsion in Article 4 of Protocol No. 4 to the ECHR (Judgment, cit., p. 8). Having highlighted that, in addition to – and in support of – the protections deriving from international norms, the right to seek asylum was recognised in the Italian legal system by Article 10(3) of the Constitution, the court turned to examine the scope of application of the principle of non-*refoulement*. It recalled in this regard the position of the United Nations High Commissioner for Refugees (UNHCR) that the prohibition of refoulement encompasses «any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution» (Judgment, cit., p. 8, citing UNHCR, *Note on International Protection*, 13 September 2001, UN doc. A/AC.96/951) and that such measures include «rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx» (ibid.). In that context,

the judge underlined that the due diligence obligations arising from the prohibition of *refoulement* require the authorities to ascertain that any country to which migrants are to be returned offers sufficient guarantees that they will not be subjected to proscribed treatment upon return and that, in the face of a situation of widespread and systematic violations of human rights in the destination country, there is a duty on the returning State to obtain information on the likely treatment that will be faced by returned migrants, regardless of whether any claim for asylum has been lodged (Judgment, cit., p. 9, referring to European Court of Human Rights, *Hirsi Jamaa v. Italy*, cit.).

As regards the prohibition of collective expulsion under Article 4 of Protocol No. 4 to the ECHR, the court, again referring to *Hirsi Jamaa*, highlighted that the prohibition also applies when the removal of foreign nationals within the jurisdiction of the State takes place outside its territory, including in the context of migration control operations on the high seas. In this regard, the judge noted that the basis for that conclusion given by the Grand Chamber was the need to avoid the possibility of a situation in which a State was able to remove a group of foreign nationals without considering their individual situations (Judgment, cit., p. 9). By way of synthesis of the effect of the various relevant norms, the judge concluded that, when a State intercepts migrants on the high seas, it is under an obligation to ensure that its competent authorities ascertain the situation of *each individual*, and not to send them back to a State in which there was a risk that their life or freedom would be endangered (ibid., p. 9).

Applying those principles to the claimants' case, the judge noted that, at the time of the relevant operation, several international organizations and NGOs had extensively and credibly documented widespread and systematic abuses and inhumane conditions of detention of irregular migrants in Libya. On that basis, she concluded that the Italian authorities therefore knew, or at least had been in a position to know, that Libya could not be regarded as a safe country to which migrants could be returned. In addition, there likewise had existed numerous reports documenting both the risk that Eritrean migrants returned to Libya would then be sent back to Eritrea, and the substantial risk of violation of their fundamental rights if they were so returned (ibid., pp. 9-10).

The only substantive defence on the merits put forward by the Italian authorities was that the conduct at issue was legal, insofar as it had been in accordance with Italian legislation on the control of irregular migration and the 2008 Treaty of Friendship, such that the authorities had merely given effect to an international agreement (ibid., p. 7). That argument was given short shrift; the court held that,

even assuming that, as argued by the respondent public bodies, the Treaty of Friendship had expressly provided for the return to Libya of intercepted migrants – a proposition which the court did not accept, given that the Treaty made no reference to such operations – , the Italian authorities could not invoke a bilateral agreement as a justification for disregarding international obligations for the protection of human rights. The court further noted in this regard that the Treaty of Friendship stipulated expressly that actions taken pursuant to it were to be taken in compliance with and respecting relevant international obligations (ibid., p. 10). It therefore concluded that the conduct of the Italian authorities which had resulted in the return of the applicants to Libya had been unlawful as a matter of both international and domestic law and that, as such, it gave rise to civil liability for an unlawful act pursuant to Article 2043 of the Italian Civil Code.

4. The court's synthesis of the relevant norms and its reiteration of the illegality of push back operations is valuable. The most interesting and innovative aspect of the judgment is, however, without any doubt, its treatment of the appropriate remedies for those violations and the consequences flowing from its finding of illegality. The question of compensation for the non-pecuniary harm suffered by the claimants was dealt with relatively swiftly, with the quantum of the appropriate compensation being fixed by reference to the award of the European Court of Human Rights in similar circumstances in the *Hirsi Jamaa* case (Judgment, cit., p. 12). In addition, however, having found that, as a result of the action of the Italian authorities, the applicants had been prevented from exercising their constitutional right to apply for asylum, the court held that the authorities were under a duty to allow the applicants to enter Italian territory so that they could lodge an application for international protection. Significantly, that conclusion was justified not on the basis that it constituted a remedial measure deriving from the illegality of the push-back operation, but rather as a result of the recognition of a free-standing right deriving from the (constitutional) right to seek asylum.

The applicants had asked the court to order the Italian authorities to adopt the measures necessary to allow them to enter Italian territory with a view to applying for international protection as a form of restitution in kind for the violations alleged; according to the claimants, the appropriate measure was the granting of a humanitarian visa under Article 25 of the Visa Code (Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas). The court found, however, that the claimants' request could not be qualified as a request for restitution under the general norm in Article

2058 of the Civil Code, which provides for the possibility of specific redress in favour of a claimant aimed at restoring the *status quo ante*. Whilst agreeing with the respondent authorities as to the impossibility of making an order for entry as a form of specific redress, the judge instead went on to recharacterize the claimants' request to be granted entry to Italian territory for the purpose of applying for international protection, holding that it was properly to be regarded as being «a request for a declaration as to the existence of a right to lodge a request for international protection» (Judgment, cit., p. 13).

The remaining part of the court's reasoning concerning the basis of the right identified to be granted access to Italian territory was founded primarily on Article 10(3) of the Italian Constitution – albeit with frequent references to relevant international norms – and was based on an expansive reading of the scope of right to asylum contained in that provision. Having recalled that the constitutionally recognised right of asylum found expression in the Italian legal system thorough the three institutions of refugee status, subsidiary protection and – until its repeal in 2018 – humanitarian protection (see Decree-law no. 113 of 4 October 2018, converted into Law no. 132 of 1 December 2018), the judge noted the settled position of the Court of Cassation that, as a result of the 'exhaustive nature' of the norms regulating the three forms of international protection, there remained no residual margin for the direct application of Article 10(3) of the Constitution (Judgment, cit., p. 14, citing, among others, Court of Cassation, First Civil Section, Judgment no. 28969/2019 of 8 November 2019). It is at this point that the court's reasoning took an innovative turn; it observed that the norms regulating the various forms of international protection could be applied only «where they were capable of practical implementation and where the preconditions for the grant of a form of international protection under those norms are present» (Judgment, cit., pp. 14-15), and reasoned that the situation was different where the application of the existing framework was in practice not possible, including for reasons not attributable to a potential applicant and which were entirely independent of his or her actions or will. Such situations included – the court observed – those where the applicant was not within Italian territory, and therefore unable to lodge a request for international protection, which, under the relevant domestic norms, can only be submitted by an alien either at the point of entry, or once within Italian territory (ibid., p. 15, referring to Article 6, Legislative Decree no. 25/2008, "Implementation of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status", *G.U., Serie Generale* n. 40 of 16 February 2008). On that basis, relying on prior pronouncements of the Court of Cassation which had characterised the right to international protection as a directly enforceable right of the individual

('a perfect subjective right'), the existence of which did not depend upon formal recognition by the State authorities, the judge reasoned that there was a need to «expand the scope of international protection through a direct application of Article 10(3) of the Constitution with a view to protecting the position of those individuals who, as a consequence of an illegal act committed by the Italian authorities, are unable to submit an application for international protection as they are not present in the territory of the State as a result of the authorities of the State having prevented entry, following a collective push-back, in violation of constitutional principles and of the Charter of Rights of the European Union» (Judgment, cit., pp. 15-16). The court accordingly held that there existed a subjective right of the applicants under Article 10(3) of the Constitution «to enter the territory of the State in order to be able to make an application for international protection», whilst at the same time recognising that the method by which that right was to be given effect, and the eventual determination upon the merits of any such application, remained for the competent authorities (ibid., pp. 16-17).

5. The court's recognition of a right of the claimants to be allowed entry into the territory for the purpose of submitting an application for international protection, and the correlative obligation on the part of the Italian authorities to take the measures necessary to allow the claimants to enter for that purpose, is a novel and significant development. Two aspects of the ruling call for particular comment.

First, the judgment sets forth an approach which is potentially applicable under Italian law to all cases of migration control, including those which have been deliberately designed so as to take place entirely outside Italian territory. At least one passage of the judgment is framed in extremely broad terms, and the judge appeared to recognise that a right to be allowed entry to make an application for international protection may exist under Article 10(3) of the Italian Constitution whenever the applicability of the relevant norms regulating applications for international protection are not applicable «for reasons not attributable to matters within the control of the applicant and totally independent of his or her conduct or will» (Judgment, cit., p. 15). The better view, however, is probably that the *ratio* of the judgment is somewhat narrower, and is represented by the court's holding that individuals seeking asylum have a subjective right to enter where they have been physically prevented from reaching Italian territory by conduct of the Italian authorities which is illegal under domestic and/or international law (ibid., pp. 15-16). Even if this narrower understanding is the correct reading of the judgment, the civil court has nevertheless de facto introduced, albeit in relatively circumscribed

circumstances, an element of extraterritorial application of the domestic constitutional law right to asylum. That is significant, insofar as the right to asylum under Italian law has traditionally been configured as requiring the presence of the individual in question on Italian territory, with the result that, de facto, it only becomes applicable upon an individual reaching Italian territory and thus able to make a request for international protection.

Second, and quite apart from these considerations of domestic law, one may question the extent to which the holding of the Rome civil court is generalisable and potentially of wider application outside the specific Italian constitutional context. In this regard, it should be recognized at the outset that the court's holding as to the existence of a right to be allowed entry in order to present a request for international protection goes beyond the accepted limits of the right to asylum under current international law. In particular, it is relatively well-established that, leaving to one side the prohibition of *refoulement*, there exists no general substantive right as a matter of international law to be permitted entry to a State, including in order to make a claim for asylum (see, *e.g.*, European Court of Human Rights, *Hirsi Jamaa v. Italy*, cit., para. 113; R. Jennings and A. Watts (eds), *Oppenheim's International Law, vol. I: Peace, Parts 2 to 4* (9th ed., Harlow, 1992), §§ 399-402; see also G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd ed., Oxford, 2007), pp. 206-208). This does not, however, preclude the possibility of characterising an obligation of the authorities to allow entry for the purposes of submitting an application for protection as being the most appropriate remedial measure in response to systemic state action aimed at unlawfully stemming migration flows and which results in the return of individuals to countries where their fundamental rights are at risk of violation. Whilst the Rome court grounded its decision on the existence of a right of entry to present an application for international protection as a necessary component of the domestic right to asylum, and held that the same outcome could not, as a matter of the domestic law relating to remedies, be achieved through an order for restitution of the *status quo ante*, it is arguable that as a matter of international law, the situation is the converse. As a matter of general international law, the default form of reparation is restitution, so as to put the injured party in the position they would have been in but for the breach of obligation (cf. Article 35, International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts*, as annexed to General Assembly Resolution 56/83, 12 December 2001, UN doc. A/RES/56/83). It is at the least arguable that where there is a finding of violation of the prohibition of collective expulsion under Article 4 of Protocol No. 4 to the ECHR, or of the right to a remedy under Article 13 taken with Article 3 ECHR, the appropriate way in which to achieve restitution and give effect to the obligation to

give adequate consideration to the circumstances of each individual applicant (recognised, inter alia, in European Court of Human Rights, *Hirsi Jamaa v. Italy*, cit., paras 177 and 184; see also *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, Judgment of 21 October 2014, paras. 170 and 210) is to permit the individuals to make an application. If, under the relevant domestic legislation, such an application can only be made from within national territory, then this may be seen as necessarily implying a right of entry for that purpose.

It remains to be seen whether the European Court of Human Rights may in the future be prepared to indicate specific individual measures requiring the State to permit entry of migrants who were seeking international protection but who were prevented from making an application by a push-back or other measures taken by the intended destination State. In the factually very similar case of *Hirsi Jamaa*, the Court did not do so; while holding that it was appropriate to indicate the individual measures required to ensure execution of the judgment under Article 46 ECHR, the European Court found that the action required of the Italian Government was limited to «[…] tak[ing] all possible steps to [obtain] assurances from the Libyan authorities that the applicants will not be subjected to treatment incompatible with Article 3 of the Convention or arbitrarily repatriated [to their countries of origin]» (European Court of Human Rights, *Hirsi Jamaa v. Italy*, cit., para. 211). Other cases concerning violations of procedural obligations relating to protection against refoulement, however, clearly show that the Court is prepared, in appropriate cases, to indicate even relatively intrusive measures as being what is required in order to remedy the breach. Notably, in *M.S.S. v. Belgium and Greece*, the Grand Chamber concluded that Greece had breached, *inter alia*, Article 13 ECHR taken with Article 3 as a consequence of the serious flaws in its asylum system, and the consequent risk of the applicant being expelled to Afghanistan «without any serious examination of the merits of his asylum application» (European Court of Human Rights, *M.S.S. v Belgium and Greece*, Application no. 30696/09, Judgment of 21 January 2011 [GC], *dispositif*, para. 7). The Court indicated in that context that it was «incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that meets the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant» (ibid., para. 402). Although admittedly in a somewhat different factual context, given that the Court has found that the obvious remedy for a flawed asylum process is a stay of deportation to allow an applicant to have their application duly considered, it would not be too much of a stretch for the Court in the future to order a State to allow entry of an individual who has been unlawfully prevented by the State from reaching the territory and submitting their application in the first place. Notably, in *Hirsi*

Jamaa itself, one of the judges chided the Court in a concurring opinion for its caution in specifying the limited individual measures required and expressed the view that the Italian Government had «a positive obligation to provide the applicants with practical and effective access to an asylum procedure in Italy» (European Court of Human Rights, *Hirsi Jamaa v. Italy*, cit., Concurring Opinion of Judge Pinto de Albuquerque).

6. Since the events at issue in the case, the situation on the ground has already to a large extent evolved, and the efforts of European States to stem migration flows coming from the coasts of North Africa have largely moved away from direct interventions such as push-backs. Notably, in the context of supervision of execution of the judgment in *Hirsi Jamaa* before the Council of Ministers, the Italian government indicated that push-back operations had been suspended and would not be resumed (see CoE doc. DH-DD(2016)785, 25/07/2016; for the Resolution of the Council of Ministers closing examination of the execution of the judgment, adopted at the 1264th meeting of the Minister's Deputies on 14/9/2016, see CoE doc. CM/ResDH(2016)221)). Instead, Italy (and other European States) have turned to alternative methods of limiting migrant flows. The evolving practice of arrangements has gravitated towards a model by which transit countries are provided significant incentives to police their own territory and either prevent migrants from embarking on vessels bound for Europe, or engage in 'pull-back' operation by intercepting vessels departing their shores, and returning those on board. In addition, there has in recent years been at least one example of 'privatised push-back', accomplished through the Italian search and rescue authorities instructing a merchant ship to rescue migrants in distress on the high seas, and to then consign them directly to the Libyan authorities (see Forensic Architecture, "Privatised Push-back of the Nivin" (2009), available at forensic-architecture.org, and see below).

In light of the position taken by the European Court of Human Rights in relation to, on the one hand, the legality of push-backs and, on the other, the applicability of the ECHR to extraterritorial actions of Contracting States – including law enforcement operations at sea (European Court of Human Rights, *Medvedyev and Others v France*, Application No 3394/03, Judgment of 29 March 2010) and extraterritorial detention abroad (see European Court of Human Rights: *Al-Saadoon and Mufdhi v. United Kingdom*, Application no. 61498/08, Judgment of 2 March 2010; and *Al-Jedda v. United Kingdom* [GC], Application no. 27021/08, Judgment of 7 July 2010) – it was perhaps inevitable that European States would seek to put in place alternative migration control arrangements designed in such a way as to ensure

that the relevant actions are, to the greatest possible extent, undertaken with minimal direct involvement, or even solely by transit countries. Further litigation is pending before the European Court of Human Rights which will test the extent to which new arrangements of this type entered into by Italy can properly be regarded as implicating its responsibility under the ECHR. Of particular interest in this regard is an application lodged with the Court in May 2018, alleging Italy's responsibility for violations of, *inter alia*, Articles 2 and 3 ECHR and Article 4 of Protocol No. 4 as a result of a 'pull-back' operation carried out by a patrol boat, which was operated by the Libyan coastguard, but provided by the Italian Government (*S.S. and others v. Italy*, Application no. 21660/18, communicated on 26 June 2019, available at hudoc.echr.coe.int).The incident, which involved a rescue vessel belonging to the non-governmental group Sea-Watch attempting to carry out rescue operations which were interfered with by the Libyan coastguard, resulted in the deaths of at least twenty migrants and the forcible return of 47 others to Libya. Similarly, a complaint alleging Italy's breach of the International Covenant on Civil and Political Rights due to a 'privatised push-back' has recently been lodged with the Human Rights Committee (*SDG v. Italy*, Communication to the UN Human Rights Committee under the Optional Protocol to the ICCPR, 18 December 2019, available at c5e65ece-003b-4d73-aa76-854664da4e33.filesusr.com/ugd/14ee1a_e0466b7845f941098730900ede1b51cb.pdf); that case relates to a rescue operation carried out in November 2018, during which the Maritime Rescue Coordination Centre (MRCC) of Rome, having requested a private merchant vessel, the *Nivin*, to assist a migrant boat adrift in international waters, then instructed the captain to liaise with the Libyan coastguard, resulting in the disembarkation of the rescued migrants in Libyan, where they were allegedly subsequently ill-treated.

A crucial question in those cases concerns the consequences of the relatively high degree of cooperation and support provided by Italy to the Libyan authorities, including the close collaboration between the authorities of the two countries in rescue/interception operations and the financial and logistical support provided by Italy in the running of immigration detention facilities in Libya. It remains to be seen whether this support will be held to be sufficient to trigger the responsibility of Italy under the ECHR, either directly due to attribution of the actions carried out by the Libyan authorities, or on the basis of complicity, pursuant to Article 16 of the Articles on State Responsibility (for discussion, see, *e.g.*, F. De Vittor, "Responsabilità degli Stati e dell'Unione europea nella conclusione e nell'esecuzione di 'accordi' per il controllo extraterritoriale della migrazione", in *Diritti umani e diritto internazionale* 2018, p. 5 ss.; G. Pascale "Is Italy

internationally responsible for the gross human rights violations against migrants in Libya?", in *QIL – Questions of International Law* 2019, *Zoom-in* 56, p. 35 ss., available at www.qil-qdi.org; M. Baumgärtel, "High Risk, High Reward: Taking the Question of Italy's Involvement in Libyan 'Pullback' Policies to the European Court of Human Rights", in *EJIL: Talk!*, 14 May 2018, available at www.ejiltalk.org; A. Liguori, "The Externalization of Border Controls and the Responsibility of Outsourcing States under the European Convention on Human Rights", in *Rivista di diritto internazionale* 2018, p. 1228 ss.).

7. Against the background of the increasingly inventive arrangements developed by European States to prevent and impede migrants and asylum seekers from reaching Europe, the decision of the Rome court constitutes an important precedent. Although the developments in migration control strategies outlined above have led some commentators to assert that the decision has «little relevance for the present» (G. del Turco and M. Savino, "Chi è stato illegittimamente respinto ha diritto di rientrare in Italia?", in *ADiM Blog*, January 2020, at www.adimblog.com), the judgment may equally be seen as potentially paving the way for a more robust and effective judicial response to such practices. Indeed, the reasoning of the court with regard to the 'right to be allowed entry' is framed in terms apt to apply not only to cases of direct push-backs at sea, but also to any other situation in which the Italian authorities are found to have unlawfully prevented an applicant from having his or her asylum application given proper consideration by preventing them from reaching Italian territory. The pending cases mentioned in the preceding section are likely to establish how far international human rights courts and monitoring bodies are prepared to go in finding Italy responsible for human rights violations occurring as a result of arrangements designed precisely to outsource responsibility for migration control to other States. If the Italian authorities are found to have violated their international obligations as a result of those arrangements, the question of whether a 'right to be allowed entry' exists becomes of clear relevance. That this is the case is evidenced by the recently submitted complaint in respect of the *Nivin* incident, in which the decision of the Rome court has been relied upon by the applicant in support of the request that the UN Human Rights Committee recommend «that Italy adopts measures to ensure that [the claimant] and any other individual who has suffered harm as the direct result of a privatised, or otherwise delegated, push-back, and who is in need of international protection, has access to entry in the Italian territory […]» (*SDG v. Italy*, cit., para. 106 (iii)).

The notion of a general right for individuals facing persecution to enter the territory of a foreign State in order to apply for protection is still very far from being recognised under international law, and, even in the face of the loss of life resulting from attempts by migrants to cross the Mediterranean, there appears to be little appetite on the part of the relevant States to allow applications to be lodged extraterritorially. If the right to 'seek and enjoy asylum' is to have any real meaning, however, one may posit that, whenever a State implements migration control arrangements the ultimate aim of which is unlawfully preventing individuals fleeing serious human rights abuses from reaching their borders and seeking protection, the recognition of a right of entry for the purposes of lodging an application for international protection is fully justified as a matter of legal reasoning and logic, and moreover constitutes arguably the only effective response which is available.