THIRD PARTY INTERVENTION
BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application n. 21660/18

Between

S.S. and Others

Applicants

and

ITALY

Respondent

Written comments by the

International Human Rights Legal Clinic

Law Department – University of Turin

Pursuant to Article 36 and Rule 44 §3 of the Rules of Court

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Introduction

This memorial is submitted by the *International Human Rights Legal Clinic* (*IHRLC*)[1] of the Law Department of the University of Turin pursuant to the leave granted by the Deputy Section Registrar in accordance with Article 36 §2 of the European Convention of Human Rights and Fundamental Freedoms (ECHR) and Rule 44 §3 of the Rules of the Court[2].

This memorial is undersigned by dr. Andrea Spagnolo, coordinator and supervisor of the *IHRLC* and by Prof. Raffaele Caterina, Head of the Law Department.

Interest of the *IHRLC*

The case of *S.S. and Others v. Italy* raises critical issues of crucial importance for the *IHRLC*, since it will define the apportionment of responsibility for human rights violations committed in managing external borders of States Members of the ECHR.

Namely, what the program finds a matter of concern is the use of bilateral and multilateral treaties concluded by States to coordinate their efforts in the management of migration flows and the possibility that the implementation of those arrangements would cause human rights' violations. In particular, the *IHRLC* argues that the recourse by Italy to international treaties concluded in a simplified form limits the ability of domestic courts to secure the respect of aliens' human rights.
As regards the *S.S. and Others v. Italy* case, the *IHRLC* is of the opinion that the Memorandum of Understanding (MoU) concluded by Italy with Libya constitutes an attempt by the Italian Government of eluding Constitutional provisions and leaving no room for parliamentary control when it comes to decide on migration-related issues.

Accordingly, the *IHRLC* respectfully submits that this case provides an important opportunity for this honourable Court to clarify the limitations arising from the ECHR to the conclusion of similar agreements. The *IHRLC* also submits that such limitations should be reflected in the procedure that States follow in the conclusion of international agreements for the management of migration flows.

[1] The team of the *IHRLC* is composed of Andrea Spagnolo, Francesco Costamagna and Beatrice Porporato. Number of pages included the present one: 10.
[2] ECHR-LE14.8bP3, EDA/DS/fbi of 14 October 2019.

Therefore, the *IHRLC* wishes to assist the Court shedding light on the simplified procedure adopted by the Italian Government for the conclusion of the 2017 MoU with Libya and testing it against the Constitutional provisions on the conclusion of international treaties. Moreover, the intervention wishes to offer to the Court a fresh insight on the most recent jurisprudence of Italian domestic courts on the legitimacy of agreements concluded in simplified form. It will be shown to the Court that there is a growing trend of domestic courts towards challenging the legitimacy of agreements concluded following a simplified procedure in the context of the management of migration flows.

From push back to pull-back policy: the importance of the MoU with Libya in a broader perspective

When this Court condemned the Italian Government for the violation of the *non-refoulement* principle in the *Hirsi Jamaa and Others* case for the policy of pushing-back migrants to Libya, it stated that "Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya."[3] The message of that judgment was that the push-back policy of the Italian Government was not in compliance with the ECHR and that by no means the conclusion of a bilateral agreement could serve as a basis for justifying the same practice, hence for diluting human rights obligations in respect of migrants. That judgment contributed to clarify the boundaries of States' action in the management of migration flows: indeed, the Italian Government, at least on paper, has abandoned the practice of pushing back migrants at sea on the basis of that agreement.

However, push-backs have been substituted by pull-backs, namely: Italy agreed with the Libyan Government that the former provides the latter with all the physical and financial means to intercept migrants at sea before they reach Italian territorial waters.

The MoU concluded in a simplified form by the Italian government with Libya represents the legal basis of this kind of cooperation.[4] It represents, in fact, a framework agreement aimed at supporting security and military institutions in order to stem the flows of illegal migrants and to face the consequences deriving from them, in line with the provisions of the Treaty of friendship,

[3] European Court of Human Rights, *Hirsi and Jamaa and Others vs. Italy*, Grand Chamber, Application no. 27765/09, Judgment of 23 February 2012, para. 129.
[4] Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, 2 February 2017, available at http://itra.esteri.it/.

partnership and cooperation signed between the two countries in 2009.[5] The MoU contains provisions which impose on the parties a generic obligation to cooperate and on the Italian Government more specific obligations to support, finance and provide technical support to the efforts of the Libyan Government to fight illegal immigration trafficking.[6]

The MoU is part of a rather new practice through which States are substituting a push-back policy towards migrants with a pull-back one, according to which European countries provide financial and logistic support and means to transit countries to halt migration flows upstream. In this regard, it appears that States have learned the lesson of the *Hirsi and Jamaa* judgment and are acting through 'legal work-around' to avoid direct implication in the management of migration flows. However, as it has been already argued, even the pull-back policies might trigger European States' – and in particular Italy's – responsibility under international law.[7]

The pull-back policy of the Italian Government seems to have been implemented also through the conclusion of a bilateral agreement with the Government of Niger signed in Rome on 26 September 2017.[8] The agreement is presented by the Government as one of the legal basis for the establishment of Operation MISIN, an Italian military mission that has been deployed in Niger in September 2018.[9] From the technical data sheet of the mission[10] it is clear that it aims at increasing the capability of the Government of Niger to counter security threats, as part of a joint European and US effort to stabilize the area and to strengthen the territorial control capabilities of the whole region (Sahel). The mission is also deployed to provide support to the control and patrolling activities at southern border of Niger, providing aerial support. According to the statements of the current Italian Government's Minister of Defense, Operation MISIN will have, among others, the clear objective of limiting the influx of migrants on the Italian coasts.[11] According to the internal law that authorized

[5] *Ibidem*, Art. 1, lett. A).
[6] *Ibidem*, Art. 1, lett. B and C).
[7] See accordingly MANCINI, "Italy's New Migration Control Policy: Stemming the Flow of Migrants from Libya Without Regard For Their Human Rights", *Italian Yearbook of International Law*, 2018, p. 259 ff., p. 277-280; PASCALE, "Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?", *Questions of International Law*, 2019, Zoom-In 56, p. 35 ff.
[8] Accordo di cooperazione in materia di difesa tra il Governo della Repubblica italiana e il Governo della Repubblica del Niger, 26 September 2017.
[9] See here: https://www.difesa.it/OperazioniMilitari/op_intern_corso/Niger_missione_bilaterale_supporto/Pagine/default.aspx.
[10] See *Autorizzazione e proroga missioni internazionali*, Schede di lettura, DOC CCL no. 3 and DOC CCL – bis no. 1, January 2018, p. 1 ff., p. 17, http://documenti.camera.it/leg17/dossier/pdf/DI0660.pdf.
[11] See a recent interview of the Italian Government's Minister of Defense, Elisabetta Trenta: "Migranti, con il bel tempo tornerà l'allarme sbarchi", *Il Messaggero*, 27 February 2019, https://www.difesa.it/Il_Ministro/Interviste/Documents/Intervista%20Ministro%20Trenta%20Messaggero.pdf.

the deployment of the mission, the legal basis of the operation is twofold: United Nations Security Council Resolution no. 2359 of 2017 and a bilateral agreement concluded between Italy and Niger.[12] This notwithstanding, it is doubtful whether the Resolution recalled in the law authorizes foreign States, explicitly or implicitly, to deploy their troops on the territory of Niger or of any other neighboring Countries. Indeed, the Resolution addresses and welcomes the efforts of five States of the region of Sahel, Niger among them, to counter security threats through the deployment of a joint military mission but does not seem to go too further.[13] As a consequence, the bilateral agreement concluded by Italy rests as the only clear and explicit legal basis for the deployment of Italian troops on the territory of Niger. However, the agreement mentioned in the law was published neither in the *Gazzetta Ufficiale*, nor in ATRIO, a part of the website of the Ministry of Foreign Affairs that hosts the publication of all international agreements concluded by Italy, both those concluded following the ordinary procedure and those concluded in a simplified form.[14]

The absence of publicity characterizes also other similar legal tools. In particular, the conclusion of agreements with third Countries that permit the readmission of individuals with simplified identification procedures, which, as seen above, builds on the European Agenda o Migration and on the Partnership Framework. Agreements of this kind are usually labelled, again, as *memoranda of understanding* and are regarded by the Italian Government as technical arrangements between Ministries or Police Departments. International police cooperation in the area of migration is widespread: the Italian Government has entered two hundred sixty-seven Police Agreements, which are normally devoted to settle technical rules of cooperation to struggle against various forms of international criminality, as for instance the smuggling of migrants.[15]

From this point of view, the case of the *Memorandum of Understanding between the Department of Public Security of the Italian Ministry of the Interior and the National Police of the Sudanese Ministry of the Interior for the fight against crime, border management and migration flows* is emblematic. The Memorandum, signed on 3rd August 2016 by the Head of the Department of Public Security of the Italian Government's Ministry of Interior, was never made public by the Government

[12] See again the technical data sheet of the mission.
[13] Security Council Resolution no. 2359/2017, UN Doc. S/RES/2359 (2017). The only paragraph which seems to confer some sort of legal coverage to external interventions is the following: "[the Security Council] encourages further support from bilateral and multilateral partners including through the provision of adequate logistical, operational and financial assistance to the FC-G5S."
[14] http://itra.esteri.it/
[15] See FAVILLI, "Presentazione", *Diritto immigrazione e cittadinanza*, 2016, p. 11 ff., p. 15.

and its text is available on the website of the Association for Juridical Studies in Immigration (ASGI).[16] The MoU gathers together some problematic features: it was concluded following a simplified procedure; it was signed by a Head of a Department of a Ministry; it was kept secret. Yet, the Memorandum contains measures aimed at establishing a framework of cooperation between the Governments of Italy and Sudan to speed up repatriation procedures. Among the measures envisaged, those that are of most concern are related to the identification of irregular Sudanese citizens, which is delegated to the Sudanese authorities, who undertake to proceed "without delay to the interviews of people from repatriate, in order to establish their nationality and, based on the results of the interview, without carrying out any further investigation into their identity, issue Sudanese emergency travel documents (passes) as soon as possible, thus allowing the competent authorities Italians to organize and carry out repatriation operations by scheduled or charter flights."[17] Article 14 of the Memorandum provides for the possibility of adopting even more simplified repatriation procedures when the Parties agree on the existence of an emergency situation. In such cases, the identification of irregular migrants is carried out in Sudanese territory, once the repatriation is accomplished.

Another example of the same practice is represented by the agreement concluded by the Italian Government with Tunisia in April 2011. Despite the fact that the agreement is still not public, the Grand Chamber of the this honorable Court, mentioned its existence in the judgment in the *Khlaifia v. Italy* case, concerning the expulsion of individuals from Italy to Tunisia.[18] According to this Court: "Tunisia undertook to accept the immediate return of Tunisians who had unlawfully reached the Italian shore after the date of the agreement. Tunisian nationals could be returned by means of simplified procedures, involving the mere identification of the person concerned by the Tunisian consular authorities."[19]

All the above demonstrates that for managing migration flows Italy is making a massive recourse to agreements that raises many problems of compatibility with the Italian Constitution.

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[16] Memorandum d'intesa tra il Dipartimento della pubblica sicurezza del Ministero dell'interno italiano e la Polizia nazionale del Ministero dell'interno sudanese per la lotta alla criminalità, gestione delle frontiere e dei flussi migratori ed in materia di rimpatrio, 3 August 2016, available at http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf.

[17] *Ibidem*, Art. 9, paras 1 and 2.

[18] European Court of Human Rights, *Khlaifia and Others v. Italy*, Grand Chamber, Application no. 16483/12, Judgment of 15 December 2016, para. 37. Notice of the agreement can be also found in a press release of the Ministry of the Interior, see "Immigrazione, siglato l'accordo tra Italia e Tunisia", available at http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/000073_2011_04_06_accordo_Italia-Tunisia.html.

[19] *Ibidem*, para. 38.

The procedure followed for the conclusion of the MoU against the background of Italian Constitutional provisions

The practice of the Italian Government to conclude international agreements following a simplified procedure represents one of the most debated and controversial issues in international and constitutional law as far as the international treaty-making power is concerned.[20]

Article 87 of the Italian Constitution provides that international treaties must be ratified by the President of the Republic[21] after an authorization from the Parliament in all cases prescribed in Article 80 of the Italian Constitution.

Article 80 requires the act of ratification to be authorized by a law enacted by the Parliament when the treaty in question entails a modification of the territory, a modification of national laws or financial burden; a Parliamentary authorization is also required when the treaty establishes dispute resolution mechanisms or when it *is of a political nature*.[22] The Italian Constitution is silent about the possibility to conclude treaties following a different procedure, but it is common opinion that this is possible in all the subjects that fall outside the scope of application of Article 80.

The scope of application of Article 80 still remains open to debate, in particular when it comes to assess the *political nature* of a treaty that makes it necessary for the Parliament to authorize its ratification. In fact, it is known that the Italian Government grants itself a wide margin of appreciation in determining when a treaty fall within – *rectius* outside – the scope of application of Article 80 to avoid the Parliamentary authorization.[23]

The Constitutional Court have not had many chances to clarify the boundaries of Article 80. In a relatively old judgment, it held that the said provision shall be interpreted as to allow the Parliament to scrutinize the text of a treaty in order to evaluate if an authorization law is necessary; hence proving that Article 80 suffers no exceptions.[24] Despite this judgment, many authors opine that

[20] In general, see *ex multis* MONACO, "La ratifica dei trattati nel quadro costituzionale", *Rivista di diritto internazionale*, 1968, p. 630 ff.; MARCHISIO, "Sulla competenza del Governo a stipulare in forma semplificata trattati i trattati internazionali", *Rivista di diritto internazionale*, 1975, p. 533 ff.; CASSESE, "Art. 80", in BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1979, p. 150 ff.
[21] See Art. 87, Italian Constitution.
[22] See Art. 80, Italian Constitution.
[23] See accordingly RAFFIOTA, "Potere estero del Governo e accordi internazionali in forma semplificata: una ricerca sulla prassi", *Forum di Quaderni Costituzionali*, 5 November 2009, p. 1 ff., p. 17.
[24] *Corte Costituzionale*, 19 December 1984, judgment no. 295, para. 6.

the above-mentioned practice represents the objective element of a customary constitutional rule that allow the Government to conclude agreements in a simplified form even for matters falling within the scope of Article 80.[25] The subjective element of this customary rule would lie in the attitude of the Parliament and of the President of the Republic, which never contested the practice of the Government. Furthermore, in many cases the Parliament authorized the President of the Republic to ratify ex post treaties concluded by the Government in a simplified form, thus proving some sort of acquiescence towards this practice.[26]

For the purposes of this intervention, it is useful to point out that the MoU with Libya was concluded in a simplified form, namely entered into force at the moment of the signature of the two Governments' representatives, in that case the two Heads of the Governments. The Parliament did not intervene to authorize the conclusion of the MoU, nor it ratified it *a posteriori*. Furthermore, the MoU was not ratified by the President of the Republic according to Article 87.

The *IHRLC* opines that there are no rules or customs in Constitutional law that justify such a choice of the Government as it will be argued in the next paragraph.

Arguments against the conclusion of agreements in simplified form in migration-related issues

The *IHRLC* respectfully submits that as concerns the conclusion of agreements in migration-related issues it cannot be accepted that the Italian Government follows a simplified procedure. Two arguments can be raised in this regard: 1) treaties on migration-related issues are treaties of a *political nature*, according to Article 80 of the Constitution, therefore they must be concluded following a solemn procedure; 2) agreements on migration-related issues impact on the juridical situation of aliens, a matter which is covered by a statutory reservation as per Article 10 of the Italian Constitution.

1) Treaties on migration-related issues are treaties of a political nature

As for the first argument, it is nowadays difficult to maintain that agreements concluded for managing migration flows are mere technical cooperation arrangements. Indeed, migration issues are treated in broad comprehensive agreement with third Countries. The MoU with Libya and the

[25] MARCHISIO, *cit. supra*, p. 545. PALOMBINO, *cit. supra*, p. 845-846.
[26] See again PALOMBINO, *cit. supra*, p. 847; SALERNO, *Diritto internazionale. Principi e norme*, Milan, 2017, p. 179.

agreement with Niger, for example, show that the management of migration flows is strictly intertwined with military cooperation.

In particular, the MoU with Libya implemented the so-called Valletta Action Plan, through which European and African States agreed on political solutions for the management of migration flows.[27] The political dimension of the Valletta Action Plan was stressed by the European Council, which explicitly regarded cooperation with Libya as a tool to reach a political settlement of the migration crisis.[28]

It should not be forgotten that the MoU with Libya also builds on the Commission's European Agenda on Migration[29], which focuses on four pillars: the reduction of incentives for irregular migration; the management of external border; the revision of the European common asylum system and of the rules governing regular migration in the EU. The first two pillars of the European Agenda on Migration are of particular relevance for the present analysis. In fact, the Commission, among the key actions to reduce incentives for irregular migration regarded as crucial the "partnership with countries of origin and transit"[30]. Moreover, in order to reach the goal of a better management of external borders the European Agenda on Migration focused on the development of higher standard of efficiency in order to "make it easier for Europe to support third countries developing their own solutions to better manage their borders."[31]

Against this background, it can be affirmed that agreements such as the MoU with Libya involve matters that inevitably regard the long-term foreign policy of the State thus representing a clear and manifest example of treaties of a *political nature*.[32]

2) Agreements on migration-related issues impact on the juridical situation of aliens, a matter which is covered by a statutory reservation as per Article 10 of the Italian Constitution.

[27] Valletta Summit, 11-12 November 2015, *Action Plan*, available at https://www.consilium.europa.eu/media/21839/action_plan_en.pdf.
[28] European Council, *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route*, 3 February 2017, available at https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/, paras 5 and 6.
[29] Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, 13 May 2015.
[30] See European Agenda on Migration, *cit. supra*, p. 8.
[31] *Ibidem*, p. 11.
[32] For the view that treaties that impact on the foreign policy must be concluded following the ordinary procedure see CASSESE, *cit. supra*, p. 162.

The MoU with Libya and the other international agreements in migration-related issues impact on the juridical situations of aliens. In this regard, Article 10 of the Italian Constitution reads as follows: "The legal status of foreigners is regulated by law in conformity with international provisions and treaties."

The case that this honorable Court will decide in *S.S. and Others* clearly shows that the MoU with Libya at least had and still has an impact on human rights of foreigners and also on the determination of their legal status. In fact, pull-back operations, just as push-back ones, might constitute a case of collective expulsions of aliens as per Article 4, Protocol 4, of the ECHR. As this Court affirmed in *Hirsi Jamaa and Others v. Italy*: "the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority."[33]

It is clear, therefore, that the implementation of the MoU with Libya interferes with the right of foreigners to see their status considered by Italian Authorities. Such an infringement of their rights is based on an agreement – the MoU with Libya – which was concluded in a simplified form.

This demonstrates that the conclusion and the implementation of the MoU with Libya violates Article 10 of the Italian Constitution and the statutory reservation on the treatment of aliens included therein.

A growing practice in favor of the preceding arguments

Recently, a domestic court in Italy acknowledged that the MoU with Libya is not compatible with the Italian Constitution. The judge for preliminary investigation (G.I.P.) of Trapani, in its judgment of 23 May 2019, acquitted a group of migrants that were charged with threatening the crew of the vessel Vos Thalassa, which was transferring them to the Libyan Coastguard.

The G.I.P. affirmed that the migrants were acting in self-defense (art. 52 Italian Penal Code) and raised the argument that the defendants reacted to an unjust act – the transfer to the Libyan Coastguard and the subsequent return to Libya – which would have exposed them to human rights violations.

[33] European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, *cit. supra*, para. 177.

For the purposes of this intervention it is worth noting that the G.I.P. concluded that the unjust act was not justified by reliance on the MoU with Libya as it (the MoU) violates Article 80 of the Constitution because of the lack of parliamentary authorization.

Conclusion

For all the above stated reasons, the *IHRLC* believes that the *S.S. and Others v. Italy* case represents a unique opportunity for this honorable Court to clarify the boundaries of States' massive recourse to agreements such as the MoU that Italy signed with Libya.

In particular, the *IHRLC* respectfully invites your Excellencies to take into account the compatibility of the MoU as a legal basis for the management of migration flows under Articles 2, 3, 4 of the ECHR and under Article 4 Protocol 4 of the ECHR, all of them read in conjunction with Article 13 of the ECHR.