

---

# Memorandum of Understanding between Italy and Sudan: a legal analysis

written by

Beatrice Borletto, Eleonora Celoria, Daiana E. Neagoë, Carola Saletta, Claudio Vercellone, Jacob Wallroth

supervised by

Francesco Costamagna, Emiliano Giovine, Emanuela Roman, Andrea Spagnolo, Ulrich Stege

## Table of Contents

<b>Introduction</b>	4
<b>1. European countries' approach to the management of migration flows through bilateral agreements</b>	4
<b>2. Facts</b>	5
<b>3. Italy-Sudan Memorandum of Understanding (MoU)</b>	6
<b>3.1 The MoU is an international treaty</b>	6
<b>3.1.1 The Memorandum creates rights and obligations</b>	7
<b>3.1.2 Prohibition of Self-Sabotage</b>	8
<b>3.2 The MoU violates the Italian Constitution</b>	9
<b>3.3 Conclusion</b>	10
<b>4. Alleged Italy's Human Rights Violations</b>	10
<b>4.1 Substantial violations of the principle of non-refoulement</b>	11
<b>4.1.1 Non-refoulement under the Geneva Convention</b>	12
<b>4.1.2 Non-refoulement under the European Convention on Human Rights</b>	13
<b>4.1.3 Non-refoulement in European Union law</b>	15
<b>4.1.4 Non-refoulement in Italian law</b>	17
<b>4.1.5 Non-refoulement and implementation of the rules set out in the MoU</b>	17
<b>4.2 Prohibition of collective expulsions</b>	18
<b>4.2.1 ECtHR case law on collective expulsions</b>	19
<b>4.2.2 The right to an individualized examination</b>	20
<b>4.2.3 Relation with Article 13 of the ECHR</b>	21
<b>4.3 Violation of procedural guarantees and the right to an effective remedy</b>	22
<b>4.3.1 Right to an effective remedy under the ECHR</b>	22
<b>4.3.2 Right to an effective remedy under EU law</b>	23
<b>4.3.3 Procedural guarantees under Italian law</b>	24
<b>4.3.4 Right to information on asylum procedure</b>	25
<b>Conclusion</b>	26
<b>Bibliography</b>	28

## Riassunto del rapporto

Il 18 agosto 2016, un cittadino sudanese proveniente dal Darfur e situato in un centro della Croce Rossa di Ventimiglia è stato arrestato e sottoposto ad una procedura di identificazione forzata da parte della polizia italiana. Durante lo svolgimento di tale procedura, egli non è stato informato della possibilità di poter richiedere protezione internazionale, pur avendo affermato con forza il suo desiderio di non essere rispedito in Sudan, da dove era fuggito a causa di persecuzioni e gravi violazioni dei diritti umani. Successivamente, il 24 agosto 2016 l'uomo è stato trasportato a Torino insieme ad altri trentanove cittadini sudanesi. A partire da tale città essi sono stati forzatamente rimpatriati a Khartoum, in Sudan. Questi eventi sono stati ampiamente riportati dai media italiani. Come è stato successivamente spiegato dalle autorità italiane, i rimpatri erano stati condotti sulla base del *Memorandum d'Intesa tra Italia e Sudan*, firmato da Franco Gabrielli (il capo della polizia italiana e direttore generale del dipartimento di pubblica sicurezza) e Hashim Osman el Hussein (il direttore generale della polizia sudanese) a Roma il 3 agosto 2016.

La ragione principale di questi accordi bilaterali, informali e segreti, è assicurare che il paese partner (di solito un punto nevralgico nel percorso migratorio di moltissimi cittadini provenienti da diversi paesi dell'Africa) limiti l'attraversamento illegale delle frontiere e accetti il rimpatrio dei cittadini extracomunitari senza formalità.

Il presente report presenta un'analisi inerente l'uso ingannevole e inadeguato del *Memorandum d'intesa tra l'Italia e il Sudan*, il quale è stato implementato al fine di espellere cittadini sudanesi dal territorio italiano. La vicenda dell'agosto 2016, infatti, non rappresenta un caso isolato, bensì una tendenza degli Stati europei nella gestione dei flussi migratori, che ha tra i suoi obiettivi primari quello del rimpatrio di migranti irregolari. Simili accordi informali firmati tra l'Unione Europea (UE) - o i suoi Stati membri - e Paesi terzi hanno preso il posto dei consueti accordi bilaterali tradizionali, che avevano lo scopo di facilitare la riammissione dei cittadini di Paesi terzi.

Nel caso dell'Italia, qualsiasi misura legislativa volta a regolare la disciplina della gestione dei flussi migratori e del rimpatrio dei cittadini sudanesi avrebbe dovuto seguire la procedura prevista dagli articoli 80 e 87 della Costituzione, inerenti la ratifica di trattati internazionali. Tenuto conto, infatti, del contenuto politico e finanziario del *Memorandum*, la decisione relativa alla sua ratifica e attuazione avrebbe dovuto essere stata sottoposta ad un controllo parlamentare. Il *Memorandum* si pone anche in violazione dell'art. 10, co 3 Costituzione, che tutela gli interessi degli stranieri a che la loro condizione sia disciplinata dalla legge e non, come nel caso di specie, da accordi di polizia.

L'implementazione del *Memorandum* che ha portato all'espulsione dei cittadini sudanesi ha dato luogo ad almeno tre possibili violazioni dei diritti umani: a) violazione del principio di *non-refoulement*; b) violazione del divieto di espulsione collettiva; c) violazione del diritto a un ricorso effettivo. Per quanto riguarda la prima violazione, il *Memorandum* contiene varie disposizioni che sottolineano l'importanza del rispetto dei diritti umani e del rispetto del diritto internazionale applicabile, compreso il rispetto della Convenzione di Ginevra del 1951. Tuttavia, in nessun articolo del *Memorandum* vi è un riferimento diretto ed espresso al rispetto del principio di *non-refoulement*. Il gruppo di sudanesi rimpatriati dalla polizia italiana sulla base dell'articolo 9 del *Memorandum* può essere considerato vittima inoltre di espulsione collettiva. Questa pratica è esplicitamente vietata dall'articolo 4, Protocollo 4 della Convenzione Europea dei Diritti dell'Uomo (CEDU); in particolare, i trattati internazionali inerenti i diritti dell'uomo, la CEDU e i suoi protocolli impongono talune limitazioni alla libertà sovrana di un paese di rimuovere un cittadino straniero dal suo territorio. Infine, l'articolo 14 del Protocollo d'Intesa e le procedure che essa stabilisce rappresentano una prova indiscutibile di queste infrazioni; l'esternalizzazione dell'identificazione dei migranti è contro i diritti umani e non dovrebbe essere inclusa negli accordi

bilaterali firmati dagli Stati membri dell'UE con i paesi terzi; inoltre, gli Stati membri dovrebbero predisporre procedure che garantiscono l'esame individuale del caso, l'udienza della persona interessata, il diritto di chiedere asilo e rimedi efficaci contro le decisioni di espulsione, al fine di garantire l'osservanza del principio di *non-refoulement*. Per tali motivi, gli Stati membri dell'UE dovrebbero stare attenti nello stipulare accordi segreti e informali sulle procedure di espulsione semplificata con paesi terzi -come il Sudan - dove la sicurezza e la situazione umanitaria sono compromessi e le violazioni dei diritti umani sono diffuse.

\*\*\*

## Executive Summary

On 18 August 2016, a Sudanese citizen coming from Darfur and located at a Red Cross centre in Ventimiglia was arrested and underwent a forced identification procedure by the Italian police. Furthermore the man was not informed of the possibility to apply for international protection, even if he strongly asserted his wish not to be sent back to Sudan, from where he escaped due to the persecutions and grave violations of fundamental human rights that he underwent. Subsequently, on 24 August 2016, the man was transported to Turin together with other thirty-nine Sudanese nationals. From Turin they were forcibly repatriated to Khartoum, in Sudan, where they were punished with a ban on entering European Union (EU) countries for five years. These events have been widely reported in Italian media. As later explained by Italian authorities, they were based on the dispositions of a *Memorandum d'Intesa* signed by Franco Gabrielli (the Italian head of police and director-general of the public security department) and Hashim Osman el Hussein (the director-general of the Sudanese police force) in Rome on 3 August 2016.

The principal point of these bilateral agreements, which are informal and secretive, is to ensure that the partner country (usually a hot spot) restricts the illegal crossing of borders and accepts repatriation without formalities. The report has presented an analysis of the misleading and unsuitable use of the *Memorandum of Understanding between Italy and Sudan*, implemented in order to expel Sudanese nationals from the Italian territory. This specific case is not a solitary occurrence, but it is related to a trend of European States in managing migration flows and the repatriation of irregular migrants. Informal agreements signed between the EU (or its Member States) and Third Countries have taken the place of the traditional bilateral agreement, meant to facilitate the readmission of third-country nationals.

In the case of Italy, any legislative measure should have followed the procedure set forth by Articles 80 and 87 of the Constitution regarding the ratification of international treaties, in order for the Italian constitutional principles to be respected. Given the political and financial content of the Memorandum, the decision concerning its ratification and implementation should have been made subject to parliamentary scrutiny. A formal ratification procedure was moreover required, in the interest of the protection of foreigners, by Article 10, para 2 of the Constitution.

The implementation of the Memorandum, which led to the expulsion of the Sudanese nationals, raised three possible human rights violations: a) violation of the principle of *non-refoulement*; b) violation of the prohibition of collective expulsion; c) violation of the right to an effective remedy. Concerning the first violation, the MoU contains several provisions which stress the importance of the respect of human rights and compliance with pertinent International law, including the respect of the 1951 Geneva Convention. However, there is not a direct and expressed reference in any Article of the Memorandum to the respect of the principle of *non-refoulement*. The group of Sudanese people, who were repatriated by the Italian police on the basis of Articles 9 of the MoU, can also be considered as victims of a collective expulsion; this practice is explicitly prohibited by Article 4, Protocol 4 of the European Convention on Human Rights (ECHR). In particular, International Human Rights Law and the ECHR and its Protocols impose certain limitations on a State's sovereign freedom to remove a foreign national from its territory. Finally, Article 14 of the MoU and the procedures that it establishes, represent an unquestionable evidence of these infringements; the externalisation of identification of migrants is against human rights and shall not be included in the bilateral agreements signed by EU Member States with third countries; moreover, Member States shall lay out procedures that grant the individualised examination of the case, the hearing of the person concerned, the right to apply for asylum and effective remedies against expulsion decisions, in order to ensure the respect of the principle of *non-refoulement*. For these reasons, EU Member States must be careful in agreeing upon simplified expulsion procedures with Third Countries – such as Sudan – where the security and humanitarian situation is compromised and human rights violations are widespread.

# Introduction

The content of this report is based on the legal analysis of the Memorandum of Understanding between Italy and Sudan that was signed on 3rd August 2016, as well as on the events that took place following its implementation. Starting from the facts of the case, the report briefly describes the practice applied by European countries to use informal bilateral agreements to regulate migration flows. The aim is to highlight the human rights violations that result from such practices, as well as violations of Italian constitutional provisions and international and European Union law.

## 1. European countries' approach to the management of migration flows through bilateral agreements

Daily tragedies in the Mediterranean Sea have created a sense of political emergency that has reinforced Member States' focus on border management and return policies. The security-oriented approach to migration issues is not new at European Union (EU) level, but has gained increasing traction over the past few years. The external dimension of migration (cooperation with third countries) is becoming an increasingly important item on the EU agenda<sup>1</sup>.

In recent years, the capacity of EU Member States and the Common European Asylum System (CEAS) has been severely tested. Some countries, such as Austria, Germany, Greece, Italy, and Sweden, have been more affected than others. Fragmented responses have emerged amongst EU Member States. Some have taken measures to restrict access of refugees and migrants to their territories and to shift the responsibility to neighbouring countries. Although several States have made efforts to welcome refugees, the lack of a common EU response has led to seemingly intractable policy dilemmas. This has resulted in serious operational difficulties, exacerbating the already precarious circumstances under which refugees and migrants arrive in the EU<sup>2</sup>.

Many European countries have been deeply reluctant to welcoming immigrants. Extremist anti-immigration parties are enjoying more consistent electoral success than in the past (for example the National Front in France, the Alternative für Deutschland in Germany, the Freedom Party of Austria, and the Sverigedemokraterna in Sweden). Even though these parties were not able to win the elections, they were successful in influencing mainstream parties and governments to adopt more restrictive immigration policies<sup>3</sup>. *“These measures constitute a legal wall to asylum just as*

---

<sup>1</sup> Yves Pascouau and Frank Mc Namara, “EU external migration policy: in the kingdom of the blind the one-eyed man is king, in European Policy Centre”, in *European Policy Center*, 6 February 2017, available at: <http://www.europeanmigrationlaw.eu/en/articles/points-of-view/eu-external-migration-policy-in-the-kingdom-of-the-blind-the-one-eyed-man-is-king> [accessed 12 July 2017].

<sup>2</sup> UNHCR, “Better Protecting Refugees in the EU and Globally”, 5 December 2016, available at: [http://www.europeanmigrationlaw.eu/documents/UNHCR-FD\\_Paper-screen%20copy.pdf](http://www.europeanmigrationlaw.eu/documents/UNHCR-FD_Paper-screen%20copy.pdf) [accessed 12 July 2017].

<sup>3</sup> UNHCR, “Better Protecting Refugees in the EU and Globally”, op. cit.

*despicable as a razor-wire fence*<sup>4</sup>, as affirmed by Judith Sunderland, associate director acting for Europe and central Asia at “Human Rights Watch”.

The European Union is facing a major crisis in managing migration and its approach appears to be incoherent and fragmented. In order to curb irregular migration European countries are pursuing a policy consisting in tightening and sealing their borders, a phenomenon also known as “Fortress Europe”<sup>5</sup>. Unfortunately, this approach has not stop the incoming fluxes of migrants. Also, the outcome of such policy is that the main burden of the refugee crisis is not on Europe, but on countries that are among the poorest in the world<sup>6</sup>. The principal point of these bilateral agreements, which are informal and secretive, is to ensure that the partner country, that are usually key countries in migration routes, restricts the illegal crossing of borders and accepts repatriation without formalities. The basis for such agreements is the ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000, concluded for a twenty-year period from 2000 to 2020. The so-called Cotonou Agreement is the most comprehensive partnership agreement between developing countries and the EU. Since 2000, it has been the framework for the EU's relations with seventy-nine countries in Africa, the Caribbean and the Pacific (ACP)<sup>7</sup>. In particular, Article 13(5(c)) of the Agreement provides that: “*each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities*”.

## 2. Facts

On 18 August 2016, a Sudanese citizen coming from Darfur and located at a Red Cross center in Ventimiglia (a town at the border between France and Italy) was arrested and underwent a forced identification procedure by the Italian police. Starting from that day, he was detained for five days in a police station and in a military structure different from a Center of Identification and Expulsion (CIE). During this period of time, the man was heard by an Italian authority with the assistance of a north African interpreter speaking Arabic language, with whom the communication was very limited given the differences in the dialects that were used. On this occasion, the man was not informed of the possibility to apply for international protection; nevertheless, he strongly asserted his wish not to be sent back to Sudan, from where he had escaped due to the persecutions and grave violations of fundamental human rights he had suffered by reason of his ethnicity. The man did not

---

<sup>4</sup> Human Rights Watch, *Austria: Drastic, Unjustified Measures against Asylum Seekers*, 27 April 2016, available at: <https://www.hrw.org/news/2016/04/27/austria-drastic-unjustified-measures-against-asylum-seekers> [accessed 12 July 2017].

<sup>5</sup> Jessica Hagen-Zanker and Richard Mallett, “Migration policy: three things to know about ‘Fortress Europe’”, in *ODI*, 20 October 2015, available at: <https://www.odi.org/comment/9995-migration-policy-three-things-know-about-fortress-europe> [accessed 12 July 2017].

<sup>6</sup> The Conversation, “Europe’s migration ‘partnerships’ with Africa need a new direction in 2017”, available at: <http://theconversation.com/europes-migration-partnerships-with-africa-need-a-new-direction-in-2017-70695> [accessed 12 July 2017].

<sup>7</sup> European Commission, “ACP - The Cotonou Agreement”, available at: [https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement\\_en](https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en) [accessed 12 July 2017].

receive any written document: neither an expulsion order to leave the Italian territory, nor a deportation order.

On 24 August 2016, the man was transported to Turin together with other thirty-nine Sudanese nationals. From Turin they were forcibly repatriated with a flight of the Egyptair company to Khartoum, in Sudan. A few Sudanese citizens managed to avoid the forced expatriation and, as a result, they could submit their application for international protection in the immediate days following these events. Once arrived in Sudan, the other Sudanese citizens were punished with a ban on entering EU countries for five years.

These events have been widely reported in the Italian media. As was later explained by Italian authorities<sup>8</sup>, they were based on the dispositions of a *Memorandum d'Intesa* signed by Franco Gabrielli (the Italian head of police and director-general of the public security department) and Hashim Osman el Hussein (the director-general of the Sudanese police force) in Rome on 18 August 2016.

### 3. Italy-Sudan Memorandum of Understanding (MoU)

This section of the report argues that the *Memorandum d'Intesa* stipulated between the police forces of Italy and Sudan and signed by their respective representatives is an international treaty in the meaning of the Vienna Convention on the Law of Treaties (VCLT)<sup>9</sup>. Thus, it is binding for the contracting parties, even though it has not followed the rules for the ratification of treaties provided for by the Italian Constitution. Consequently, the Italian government is responsible for infringing the Italian constitution, as well as for the infringements of international human rights caused by the content and the actual implementation of the Memorandum, as we will further see in Chapter 4.

#### 3.1 The MoU is an international treaty

In spite of its appellation, the procedure followed for its conclusion and the lack of representativeness of the person who signed it, the MoU has to be considered as an international binding treaty under the VCLT, as it creates rights and obligations for its parties. This follows, firstly, from the purpose expressed in the preamble of the MoU, and secondly, from the context in which the document has been concluded. Furthermore, Italy cannot rely on the fact that the MoU was concluded by an administrative officer to avoid its binding effects, as the possibility for a State to sabotage its own commitments is restricted under Article 46 VCLT<sup>10</sup> (see *infra* para. 3.2.1).

---

<sup>8</sup> ASGI, "Memorandum of understanding between the Italian public security department and the Sudanese national police. A reading guide", 3 October 2016, available at: <http://www.statewatch.org/news/2016/nov/asgi-italy-sudan-mou.pdf> [accessed 9 July 2017].

<sup>9</sup> The *Vienna Convention on the Law of Treaties* (drafted by the ILC and adopted in 1969) is a treaty regulating the formation and validity of international treaties. The Convention solely "applies to treaties concluded between States" (Article 1) and "treaty" means an international agreement concluded between States in written form and governed by international law (Article 2).

<sup>10</sup> Article 46 ("*Provisions of internal law regarding competence to conclude treaties*") has been invoked by states as a basis for a claim of invalidity. The Article states that "*a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent*". A "manifest" violation concerning "a rule of its internal law of fundamental importance" is the only exception to this rule. The article further clarifies that "*A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith*".

### 3.1.1 The Memorandum creates rights and obligations

The document in question is called “Memorandum d’Intesa”, which would seem to indicate a non-binding document. However, it should be noted that the appellation of a legal document does not influence its legal nature. Rather, as stipulated in Article 2 of the VCLT, a treaty is an “*international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designation*”. Indeed, no matter what its appellation, an international treaty is a contractual act whose content creates rights and obligations under international law<sup>11</sup>. Therefore, in order to understand the legal nature of the MoU, the content of the document needs to be scrutinized objectively.

In its rules concerning the interpretation of treaties, the Vienna Convention makes use of an objective approach. Article 31 of the Vienna Convention provides that the interpretation of a treaty should be done in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, which can be found in the preamble<sup>12</sup>.

Regarding the purpose, it follows from the preamble of the MoU that the parties recognize “*the necessity to enhance police cooperation in the fight against transnational organized criminality*” and especially “*irregular immigration*”, “*fully committed to stop the dangerous travels of migrants who seriously risk their lives*” and “*persuaded that an effective repatriation policy would have a considerable deterrent effect*”<sup>13</sup>. Hence, the purpose of the MoU strongly suggests that the document has legal effects and is intended to bind the parties. Thus, it should be considered as an international treaty having binding nature in the light of the Vienna Convention on the Law of Treaties (VCLT)<sup>14</sup>.

Regarding the context, it should be noted that during the last two decades Italy has been concluding bilateral agreements with many countries aimed at regulating migration flows between States and primarily focused on the readmission of irregular migrants, with the aim of facilitating their return to the country of origin. The denomination of such agreements, which ranges from “*Memorandum*” or “*Protocollo d’Intesa*” to “*Dichiarazione*”, and from “*Partenariato*” to “*Piano d’azione*”, corresponds to non-binding documents. The readmission agreements, which in the past used to have the form of Treaties and Conventions, are today often concluded in an atypical way. These agreements do not follow the classic procedure for the stipulation of international treaties and they are often concluded secretly<sup>15</sup>. *Memorandum d’Intesa* is the Italian translation for the Anglo-Saxon term “*Memorandum of Understanding*”. The title indicates a document through which a bilateral agreement is established. Literally, the MoU is not conceived to be a binding document but rather a statement in which the Parties express their converging interests and establish a common action line<sup>16</sup>. In the Italian system, a similar document is the so-called *Lettera d’intenti*, which is used in

---

<sup>11</sup> Article 2, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 9 July 2017].

<sup>12</sup> Benedetto Conforti, *Diritto Internazionale* (Napoli: Editoriale Scientifica, 2016), p. 17 ff.

<sup>13</sup> *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, Preamble, available at: [http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan\\_rev.pdf](http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf) [accessed 9 July 2017].

<sup>14</sup> *Vienna Convention on the Law of Treaties*, op. cit.

<sup>15</sup> Chiara Favilli, “Presentazione”, in *Diritto, immigrazione e cittadinanza XVIII*, 1-2 (2016), pp. 11-13, available at [https://www.francoangeli.it/Area\\_RivistePDF/getArticolo.ashx?idArticolo=58475](https://www.francoangeli.it/Area_RivistePDF/getArticolo.ashx?idArticolo=58475) [accessed 9 July 2017].

<sup>16</sup> Il Sole 24 Ore, “Parola chiave: Memorandum d’intesa”, available at: <http://argomenti.ilsole24ore.com/>

international trade relationships to formalize decisions and regulate negotiations, with the aim to strengthen mutual trust and enhance business safety. These documents normally contain a definition of the duties and responsibilities of Parties, objective and end of negotiations and status of negotiations<sup>17</sup>.

The choice not to follow the formal procedures for the stipulation of treaties reveals the need to avoid publicness and debates in Parliament, by which the respect of international human rights is guaranteed<sup>18</sup>. An example of how the informal procedure and denomination are used to conceal the real nature of such international agreements is offered by the EU-Turkey Statement on 18 March 2016. This document is aimed at regulating the flow of migrants towards Europe. In concluding this agreement the EU member States did not follow the rules established by Article 218 of the Treaty on the Functioning of the European Union (TFEU)<sup>19</sup> for treaties concluded with third countries; moreover, it is called Statement (which normally refers to a non-binding document) and EU Institutions assessed that it is a purely political and non-binding act. Nevertheless, for the aforementioned reasons, this document seems to produce legal effects. Indeed, on the basis of the Statement, the European Commission proposed to amend the Relocation decisions relating to Italy and Greece issued by the European Council, and the Greek parliament issued an Act which allows to return to Turkey all migrants arrived in Greece, including both irregular migrants and asylum seekers and modifies the Greek asylum procedure accordingly<sup>20</sup>. Consequently, the legal context of migration indicates that denominations like MoU are to be interpreted as denoting a legally binding instrument under the VCLT.

### 3.1.2 Prohibition of Self-Sabotage

Article 46 of the Vienna Convention sets a limit for the self-sabotage of a State's commitment in cases in which the consent has been expressed in violation of a provision of its internal law regarding competence to conclude treaties. The general rule is that a State cannot invoke the invalidity of its consent because of the violation of domestic legal rules, except for the cases in which the violation is manifest or concerns a rule of fundamental importance. Such a violation is to be considered as manifest if it would be objectively evident to any State, considering normal practice and good faith. As a result, if a State's representative is competent under international law to express the consent of the State to conclude a treaty, his or her action in this sense binds the State to international obligations<sup>21</sup>. International case law concerning claims of invalidity of treaties shows to what extent Article 46 can be used for the sake of stability and predictability of the obligations assumed by treaties. A relevant example is given by the Eastern Greenland Case decided by the Permanent Court of International Justice in 1933: here an oral agreement entered into by the Norwegian Foreign Minister and Denmark was considered legally binding even though the conclusion procedure was in breach of the Norwegian Constitution<sup>22</sup>.

---

parolechiave/memorandum-d-intesa.html [accessed 9 July 2017].

<sup>17</sup> Andrea Lisi, "Le lettere di intenti", in *Diritto e Diritti*, 11 September 2000, available at: <http://www.diritto.it/materiali/civile/lisi.html> [accessed 9 July 2017].

<sup>18</sup> Favilli, *Presentazione*, op. cit., p. 13.

<sup>19</sup> The Treaty on the Functioning of the European Union (2007) sets out the scope of EU's authority to legislate and the principles of EU law. Alongside the Treaty on European Union (TEU), it is one of the two EU primary sources.

<sup>20</sup> Enzo Cannizzaro, *Diritto Internazionale* (Torino: Giappichelli Editore, 2016), p. 150 ff.; see also: Marteen Den Heijer and Thomas Spijkerboer, "Is the EU-Turkey refugee and migration deal a treaty?", in *EU Law Analysis. Expert Insight into EU law developments*, 7 April 2016, available at: <http://eulawanalysis.blogspot.it/2016/04/is-eu-turkey-refugee-and-migration-deal.html> [accessed 9 July 2017].

<sup>21</sup> Conforti, op. cit., pp. 20-21.

<sup>22</sup> See also: Institute for International Law and Justice, "Note on the Invalidity of Treaties under Art. 46", available at <http://www.iilj.org/wp-content/uploads/2016/08/Note-on-Invalidity-of-Treaties-under-Art.-46.pdf> [accessed 9 July 2017].

Similarly, the MoU has to be considered as legally binding even though it has been concluded by an State organ not entitled by Italian law to represent the State. According to the Vienna Convention, international treaties are legitimately concluded by State representatives, who “*produce the appropriate full powers*”<sup>23</sup>.

In Italy, the State representatives who have the “appropriate” power to bind the State are the organs of the executive power<sup>24</sup>. However, the MoU has not been concluded by a State representative but by the head of the Police, who is dependent from the Minister of Interiors but has merely administrative power.

International police cooperation in the area of migration is widespread: the Italian police has entered two hundred sixty-seven Police Agreements<sup>25</sup>, 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. These agreements are merely administrative acts and are not published, as it happens for international treaties. Even though the MoU formally belongs to this category, its content and actual implementation go beyond the normal forms of police cooperation<sup>26</sup>. Under these circumstances, it cannot be considered objectively evident to any State, acting in accordance with normal practice and good faith, that the Head of the Police does not have the competence to bind Italy by means of an international agreement. Indeed, the Chief of the Police is an organ which can be possibly delegated by the Government to represent Italy in the stipulation of an international treaty. However, in case the agreements are signed without a mandate of the Government, such a practice is to be considered unorthodox and eventually illegitimate. Moreover, the Chief of Police is normally competent for concluding agreements regarding the operational aspects of the cooperation in transnational crimes between two countries, which normally does not affect the content of the status of third country nationals (regulated by law).

### 3.2 The MoU violates the Italian Constitution

Since the MoU is an international treaty, the fact that Italy omitted to follow the Constitutional provisions concerning the ratification of treaties makes it constitutionally illegitimate.

The Italian Constitution provides two different rules concerning ratification. According to Article 87, international treaties need to be ratified by the President of the Republic, except for cases in which the authorization of the Parliament is needed. In addition to this general rule, Article 80 provides that, in specific cases, the Parliament needs to promulgate an Act to authorize the ratification made by the President of the Republic. Among others, this rule is applied to international treaties that are considered as “political”. The logic is to let the Parliament have control over the Government foreign policy in such cases<sup>27</sup>.

In spite of what is established by the Italian Constitution, it must be noted that the practice shows a different trend: since the Republic was born, the Italian Government has been tending to stipulate international agreements following a simplified procedure, where no ratification is needed and the signature by the Government’s representative binds the State. This means that, even though it is not expressly authorized to do so by the Constitution, the Government negotiates and stipulates treaties,

---

2017].

<sup>23</sup> Article 7, *Vienna Convention*, op. cit.

<sup>24</sup> Conforti, op. cit., p. 17 ff.

<sup>25</sup> Favilli, *Presentazione*, op. cit., p. 15.

<sup>26</sup> Id.; Marco Borraccetti, “L’Italia e i rimpatri: breve ricognizione degli accordi di riammissione”, in *Diritto, immigrazione e cittadinanza* XVIII, 1-2 (2016), pp. 50-51.

<sup>27</sup> Article 80, Italian Constitution, 1 January 1948, available at: [https://www.senato.it/1025?sezione=127&articolo\\_numero\\_articolo=80](https://www.senato.it/1025?sezione=127&articolo_numero_articolo=80) [accessed to 10 July 2017].

which are binding for Italy, in a complete autonomy and without the supervision of other organs of the State. The justification for the legitimacy of this practice is under discussion. A part of the doctrine talks about the formation of a internal customary rule that would integrate Article 87 Const and cover also those cases for which the special procedure under Article 80 is needed. In fact, the Italian Government has acted without the permission of the Parliament in several cases since the Republic was born: relevant examples are the London Memorandum of 1954 and the Osimo Treaty of 1975<sup>28</sup>. According to a part of the doctrine, the legitimacy of this type of agreements is related to a broader concept of “ratification”, including not only the types of international treaties mentioned by Article 80 Const., but more generally all acts through which the Italian State manifests its commitment to international obligations<sup>29</sup>. Nevertheless, this practice cannot be considered as legitimate for the international agreements related to the readmission of foreigners. In fact, Article 10, para. 2, Const. sets out a principle with the aim of protecting the position of foreigners: it states that the juridical situation of the foreigner must be regulated through the adoption of Parliament Acts (*riserva di legge*), which shall comply with international law and international treaties. This rule implies the absolute ban of stipulation of secret agreements. It is interesting to note that, in this case, the conformity obligation refers not only to law but also to treaties, as contracts which are binding Italy as a contracting party<sup>30</sup>.

### 3.3 Conclusion

In the light of what has been analysed in this section, it can be concluded that the Italian Government has entered into an international binding treaty which is suspected to breach many human rights.

This could happen since Italy, by circumventing the rules established by the Italian Constitution for the ratification of international treaties, avoided the democratic control of the content of the Memorandum.

## 4. Alleged Italy's Human Rights Violations

This section aims to assess the compatibility of the rules contained in Chapter II of the Memorandum with the protection of human rights of the individuals concerned. The analysis will be focused on both the formal rules provided for in the text of the Memorandum and on their implementation. In particular, with reference to the implementation of the Memorandum which took place on 24 August 2016 and led to the expulsion of a group of forty Sudanese nationals, three human rights violations have been assessed: a) violation of the principle of *non-refoulement*; b) violation of the prohibition of collective expulsion; c) violation of the right to an effective remedy.

It is impossible to understand the reasons for these violations without understanding the difficult situation of Sudan nowadays. Under the dictatorship of Sudanese President Omar Al-Bashir, Sudan

---

<sup>28</sup> Edoardo C. Raffiotta, "Potere estero del Governo e accordi internazionali in forma semplificata: una ricerca sulla prassi", in *Forum di quaderni costituzionali*, 5 November 2009, Available at [http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti\\_forum/paper/0149\\_raffiotta.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0149_raffiotta.pdf) [accessed 9 July 2017]; Cannizzaro, op. cit.

<sup>29</sup> Augusto Barbera, "Gli accordi internazionali: tra Governo, Parlamento e corpo elettorale", in *Quaderni costituzionali*, 4, n. 3 (1984), p. 448.

<sup>30</sup> ASGI, "Memorandum of understanding between the Italian public security department and the Sudanese national police. A reading guide", 3 October 2016, available at: <http://www.statewatch.org/news/2016/nov/asgi-italy-sudan-mou.pdf> [accessed 9 July 2017]; see also Favilli, *Presentazione*, op. cit., p. 14.

was transformed into one of the most dangerous places on earth, governed by violence and impunity. These general conditions affect all its citizens, but especially those coming from the province of Darfur. This province has been affected and involved for years in an armed conflict (likewise the States of South Kurdofan and the Blue Nile) that continues to cause mass displacement and civilian victims: all parties engaged in the conflict have perpetrated violations of human rights, and government forces have destroyed civil facilities such as schools and hospitals situated in the conflict zone. The access of humanitarian agencies to civil society has been obstructed.

#### 4.1 Substantial violations of the principle of *non-refoulement*

The MoU contains several provisions that stress the importance of the respect of human rights and compliance with pertinent international law<sup>31</sup>, including the respect of the 1951 Geneva Convention<sup>32</sup>. However, there is no direct and expressed reference in any Article of the Memorandum to the respect of the principle of *non-refoulement*.

Considering that the Memorandum sets out questionable procedures and rules for the return and repatriation of irregular migrants (which are far from being as human rights deferential as those set under international and European law), the mentioning of a *non-refoulement* principle should have been indispensable.

Moving to the content of the Memorandum, Article 9 establishes an identification procedure for Sudanese migrants with the purpose of executing repatriation measures in cooperation with the Sudanese authorities. The competent Sudanese authorities shall proceed “*without delay to interview people who have to be repatriated, in order to ascertain their nationality*”<sup>33</sup> and “*without carrying out further investigations on their identities*”<sup>34</sup>. The satisfactory accomplishment of these operations allows Italian authorities to organize and repatriate “suspected” Sudanese nationals back to Sudan.

Another repatriation procedure is set under Article 14 of the Memorandum, in cases considered by Italian and Sudanese authorities “*of necessity and urgency*”. Following this provision, migrants can be directly transported to Sudan for identification assessment by the competent Sudanese authorities, and eventually can be returned back to Italy when it is ascertained that they are not Sudanese nationals.

Firstly, these procedures constitute an infringement of the safeguards provided by Article 33 of the Geneva Convention and by Article 3 of the European Convention on Human Rights (ECHR). Both mechanisms lack an effective identification mechanism that can properly assess the risk of *refoulement* in repatriating Sudanese migrants. The abovementioned identification and repatriation procedures are not in compliance with international obligations and human rights law.

Secondly, the procedures set out in Articles 9 and 14 do not comply with the safeguards and guarantees provided under European Law (provisions and obligations that are binding for Italy). In

---

<sup>31</sup> See e.g. Preamble, Article 1, Article 3.2, Article 9.1, Article 14.1, *Memorandum d'Intesa*, op. cit.

<sup>32</sup> The 1951 Refugee Convention (Geneva Convention) is a legal document ratified by 145 State parties that defines the term “refugee”; it outlines the rights of the displaced and the legal obligations of States to protect them.

<sup>33</sup> Article 9.2, *Memorandum d'Intesa*, op. cit.

<sup>34</sup> Id.

particular, the MoU procedures are in breach of the specific rules set out in the Procedure Directive<sup>35</sup>, the Qualification Directive<sup>36</sup> and the Return Directive<sup>37</sup>.

#### 4.1.1 *Non-refoulement* under the Geneva Convention

The term "*refoulement*" derives from the word "*refouler*", that literally means "driving back", "repelling" or "conducting". Prohibitions of *refoulement* preclude the expulsion of a person to a country where she or he would be exposed to a specifically defined risk. *Refoulement* prohibitions define the outer limits of international refugee protection, and thus are the primary yardstick for testing the boundaries of asylum policy<sup>38</sup>.

*Non-refoulement* has developed into a norm of customary international law and, as such, is binding to all States<sup>39</sup>. The 1951 Refugee Convention remains the foundation of international refugee law, and its refugee definition is the principal basis for establishing a person's refugee status. The principle of *non-refoulement* is formulated at Article 33 of the Convention. It reads as follows: "*No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*".

The personal scope of Article 33 (1) includes persons recognised as refugees within the meaning of Article 1(A)(2) of the Convention, but also protection seekers whose status has not yet been determined. It is widely accepted that the status of refugee has a declaratory nature, and that recognition as a refugee has no constitutive effect. A person is a refugee from the moment in which she/he satisfies the criteria of Article 1(A), which occurs when crossing the border of a country of persecution into the jurisdiction of another State<sup>40</sup>.

---

<sup>35</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en> [accessed 9 July 2017].

<sup>36</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN> [accessed 9 July 2017].

<sup>37</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN> [accessed 9 July 2017].

<sup>38</sup> Stephen Coutts, *European Readmission Policy: Third Country Interests and Refugee Rights*. Revised by Nils Coleman (Leiden: Martinus Nijhoff Publishers, 2009), p. 231.

<sup>39</sup> Inter-American Court of Human Rights, *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrant*, OC-18/03, 17 September 2003, para. 217 ff, available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf) [accessed 9 July 2017]; UNHCR, "The European Court of Human Rights", in *Manual on the Case Law of the European Regional Court*, UNHCR, 169-255, June 2015. Available at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/alddfiles/UNHCR%20case%20law%20558803c44.pdf> [accessed 9 July 2017]; *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and UNHCR (Intervener)*, 25 March 2013, available at: [http://www.refworld.org/cases,HK\\_CFA,515010a52.html](http://www.refworld.org/cases,HK_CFA,515010a52.html) [accessed 9 July 2017].

<sup>40</sup> Coutts, op. cit., p. 236.

This means that formal recognition of refugee status is not a precondition for protection against *refoulement* to apply. A protection seeker is covered by the terms of Article 33(1) as if he/she was a refugee until a determination of his status would discredit this claim, enjoying what may be considered “presumptive” or “*prima facie*” refugee status<sup>41</sup>.

Even though Article 33 of Geneva Convention is not explicitly mentioned in the Memorandum, it can be held that Sudanese citizens cannot be subjected to the identification procedure provided for by Article 9 or Article 14 MoU when they have applied for asylum or have been recognised as refugees. Moreover, given the fact that in order to assess the asylum claim the migrants shall be given the opportunity to file an asylum claim, the application of the Memorandum can be considered contrary to the principle of *non-refoulement* when it occurs before the migrants had the opportunity to apply for asylum.

#### 4.1.2 *Non-refoulement* under the European Convention on Human Rights

The principle of *non-refoulement* as expressed in the Geneva Convention is not part of an autonomous provision in the European Convention on Human Rights (ECHR)<sup>42</sup>; however, the ECHR contains various forms of protection in relation to the expulsion and other forms of removal, including protection against *refoulement*<sup>43</sup>. The protection derives from the general obligation to “*secure to everyone within their jurisdiction the rights and freedoms*” guaranteed by the Convention, interpreted in the sense that the protection must be practical and effective<sup>44</sup>.

One of the rights mentioned in Article 1 is the right not to be “*subjected to torture or to inhuman or degrading treatment or punishment*”, provided for in Article 3 of the Convention. This article is one of the most important of those laid down in the Convention; indeed, the Court affirmed many times that it: “[...] *enshrines one of the fundamental values of democratic societies*”<sup>45</sup>. A further confirmation is represented by its inclusion in Article 15, which lists those provisions of the Convention that are non-derogable and that must be enforced even in time of war or other public emergency threatening the life of a nation<sup>46</sup>.

The relevance of this Article in the current case is represented by its function inside the ECHR in protecting aliens who may be subjected to *refoulement*. This function arose inside the ECtHR case-law over the time, initially in relation to extradition cases and afterwards in situations concerning irregular migrants and asylum seekers. The first step in the Court jurisprudence is represented by *Soering v. UK*, where the Court expanded the applicability of Article 3 not only to cases of ill-treatment inside the Contracting State's territory but also to cases where a State extradite a person towards another country where he or she can be subjected to ill-treatment<sup>47</sup>.

---

<sup>41</sup> Id.

<sup>42</sup> The European Convention on Human Rights (formally, the “Convention for the Protection of Human Rights and Fundamental Freedoms”) is an international treaty drafted in 1950 that protects human rights and fundamental freedoms in Europe.

<sup>43</sup> UNHCR, “The European Court of Human Rights”, op. cit., p. 188.

<sup>44</sup> ECtHR, *Saadi v. Italy*, Application no. 37201/06, 28 February 2008, para. 127; ECtHR. *Chahal v. The United Kingdom*, 70/1995/576/662, 15 November 1996, para. 79.

<sup>45</sup> For instance, see ECtHR, *Soering v. The United Kingdom*, Application no. 14038/88, 7 July 1989, para. 127.

<sup>46</sup> UNHCR, “Fact Sheet on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms”, in *UNHCR Manual on Refugee Protection and the ECHR*, 31 March 2003, p. 5, available at: <http://www.unhcr.org/3ead2d262.pdf> [accessed 9 July 2017].

<sup>47</sup> *Soering v. the United Kingdom*, op.cit., para. 91.

Two years later the Court applied the same principle in *Cruz Varas and Others v. Sweden* and in *Vilvarajah and Others v. the United Kingdom*. It was ruled that the expulsion of an asylum seeker might give rise to a violation under Article 3 ECHR<sup>48</sup>.

The same principle was reaffirmed in *Saadi v. Italy*, where the Court wrote that: "[...] *Contracting States have the right to control the entry, residence and removal of aliens [...] However, expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country*"<sup>49</sup>. Moreover, the Court stated for the first time the absolute and unconditional character of the content of Article 3. The kind of protection offered by such Article to asylum seekers and refugees is considered wider than the protection accorded by the Geneva Convention, due to its more flexible criteria<sup>50</sup>.

According to the procedures set out in Articles 9 and 14 of the MoU, Italian authorities shall respect Article 3 of the Convention when expelling Sudanese citizens. The duty of *non-refoulement*, being of an absolute nature and not subject to any exceptions<sup>51</sup>, applies regardless of national security considerations, or other strong public interests, economic pressures or heightened influxes of migrants<sup>52</sup>. The challenges posed by migration flows cannot be used as a justification for expelling migrants in disregard of the principle of *non-refoulement*, not even by the States that form the external border of the Union<sup>53</sup>.

The ECtHR has further specified that the principle of *non-refoulement* applies where the expulsion or return would create a "real and personal risk" for the non-national. The assessment of the individual risk faced by the person concerned implies his or her identification. Hence, the externalization of the identification provided for in Article 14 of the MoU is not compatible with the principles expressed by the ECtHR case law. In addition to the individual situation of the person concerned, the "general situation of the receiving country" should also be taken into account<sup>54</sup>. The Court has even pointed out that in some "extreme" cases it can be considered that "*a general situation of violence in a country of destination [is] of a sufficient level of intensity to entail that any removal to it would breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence*"<sup>55</sup>. To this regard, it is important to point out that Italy has signed an agreement with a State (as briefly recalled in the introduction to section 4) where conflicts are still present and the political crisis is yet to be solved. Consequently, the expulsion of Sudanese citizens conducted on the basis of the Memorandum shall

---

<sup>48</sup> ECtHR, *Cruz Varas and Others v. Sweden*, Application no. 15576/89, 20 March 1991, paras. 69-70; ECtHR, *Vilvarajah and Others v. The United Kingdom*, Applications Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 26 September 1991, para. 103. See also, ECtHR, *Chahal v. the United Kingdom*, op. cit., para. 79; ECtHR, *Ahmed v. Austria*, Application no. 25964/94, 17 December 1996, para. 39.

<sup>49</sup> *Saadi v. Italy*, op. cit., para. 74.

<sup>50</sup> UNHCR, *Fact Sheet*, op. cit., p. 7.

<sup>51</sup> Yannis Ktistakis, *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter – A Handbook for legal practitioner*, Paris: Council of Europe, 2013, p. 81, available at: <https://rm.coe.int/168007ff59> [accessed 9 July 2017].

<sup>52</sup> *Saadi v. Italy*, op. cit., para. 138.

<sup>53</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012, para. 223.

<sup>54</sup> *Saadi v. Italy*, op. cit., para. 150; *Hirsi Jamaa and Others v. Italy*, op. cit., para. 117.

<sup>55</sup> ECtHR, *NA. v. The United Kingdom*, Application no. 25904/07, 17 July 2008, para. 115; ECtHR, *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, 28 June 2011, para. 293.

take into account whether their individual situation is affected by the country's general situation of conflict and widespread human rights violations.

The individual assessment of the risk that Sudanese citizens may face is needed even in the case of diplomatic assurance given by the destination country that the person concerned will not be subjected to ill-treatment. The Court has stated that a diplomatic assurance is unlikely to be a sufficient guarantee to allow the expulsion of the person concerned<sup>56</sup>. Besides, when in the country of origin there exists a systematic use of torture and when reliable sources reported practices, implemented or tolerated by authorities, of treatments contrary to Article 3, the diplomatic assurance will have no weight at all in the assessment of the expulsion<sup>57</sup>.

Lastly, the expulsion of migrants and asylum seekers cannot be conducted on the ground of a bilateral agreement, where there still exists a risk of *refoulement*. In *Hirsi Jamaa v. Italy* the Court was called to decide about the violation of Article 3 in the form of *refoulement* of aliens by the Italian government on the ground of bilateral agreements with a third country (Libya). As the Italian Government claimed that the push backs at sea of Somali and Eritrean migrants were conducted on the ground of bilateral agreements, the Court observed that "*Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States*"<sup>58</sup>. The Court reminded Italy that the absolute nature of the principle of *non-refoulement* under Article 3 cannot be circumvented by the presence of an agreement between the States concerned. The same principle can be applied to any expulsion implemented under the Memorandum signed with Sudan: the mere existence of the agreement does not allow Italy to expel Sudanese citizens irrespectively of their rights under Article 3 ECHR.

#### 4.1.3 *Non-refoulement* in European Union law

The principle of *non-refoulement* is contemplated also in EU primary law, more precisely in the Charter of Fundamental Rights of the European Union (CFR)<sup>59</sup> and in the Treaty on the Functioning of the European Union (TFEU), at Article 78. The relevant Articles of the Charter, which are binding for EU institution and Member States when they implement EU law (Article 51 CFR), refer both to *non-refoulement* as enshrined in the Geneva Convention (Article 18) and to the approach followed by the ECtHR (Article 19, para. 2).

The principle is recalled in many secondary law provisions. The Qualification Directive<sup>60</sup>, at Article 21 recalls that Member States shall respect the principle of *non-refoulement* "in accordance with their international obligations". In the case B and D, the Court of Justice of the European Union (CJEU) clarified that *non-refoulement* in Article 21 Directive 2011/95/EU is to be interpreted in

---

<sup>56</sup> ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, 17 January 2012; ECtHR. *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 354.

<sup>57</sup> ECtHR, *Ismoilov and Others v. Russia*, Application. no. 2947/06, 24 April 2008, para. 127; ECtHR. *Soldatenko v. Ukraine*, Application no. 2440/07, 23 October 2008, para. 73.

<sup>58</sup> *Hirsi Jamaa and Others v. Italy*, op. cit., para. 129. See also ECtHR. *Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, 10 February 2005; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Application no. 61498/08, 2 March 2010, para. 128.

<sup>59</sup> The Charter of Fundamental Rights of the European Union was drafted in 2000 and enshrines specific political, social, and economic rights for European Union citizens and residents into EU law

<sup>60</sup> *Directive 2011/95/EU*, op. cit.

accordance with the Geneva Convention.<sup>61</sup> Article 9 of the Procedure Directive<sup>62</sup> specifically states that the principle of *non-refoulement* applies to asylum seekers, who have a right to stay in the country where they made the asylum application. It specifies that even in extradition cases, Member States can proceed “*only where the competent authorities are satisfied that an extradition decision will not result in direct or indirect refoulement in violation of the international and Union obligations of that Member State*”. Therefore, when a Sudanese citizen applies for asylum, Italy is bound by the primary and secondary EU law. Even in cases where a delegate from the Sudanese consulate identifies people from Sudan, their expulsion cannot be executed where they express their will to apply for asylum or are recognised refugee status or need for subsidiary protection.

Moreover, European law protects those migrants who have already received an expulsion order under the principle of *non-refoulement*. This occurs under the Return Directive (Directive 2008/115/EC)<sup>63</sup>, which provides for common rules for the return and removal of irregularly staying migrants, while respecting fundamental and human rights<sup>64</sup>. Among the fundamental rights to be respected, *non-refoulement* surely represents one of the most relevant. It is recalled by the Return Directive at Article 4 and Article 5 as a general and fundamental principle, and therefore applies to all migrants in an irregular situation. More importantly, Article 9, para. 1, lett. (a) is taken into account as a mandatory ground for postponing removals: the removal of a third-country national, staying illegally on the territory of a Member State shall be postponed “*when it would violate the principle of non-refoulement*”. Therefore removal must be postponed if there is a risk of *refoulement*, and this is an absolute ban<sup>65</sup>. This should be interpreted as implying an evaluation *ex ante* of the risk of violating the *non-refoulement* principle when enforcing the removal of an individual back to his country of origin or, more generally, to another country.

It is also worth noting that according to the Return Directive, the return of irregular migrants is possible only when the individuals are personally identified; indeed, Article 9, para. 2, lett. (b) points out that the removal may be postponed due to “technical reasons” such as the lack of identification; thus, the procedure contained in Article 14 of the MoU, which not only places the moment of identification of the individual in Sudan, but fundamentally precludes the “*ex-ante*” evaluation of the risk of *non-refoulement*, cannot be considered in line with the provisions of the Return Directive.

Finally, also the procedure set up by Article 9 of the MoU can raise doubts as concerns the respect of the Return Directive. In the case of the Sudanese repatriated on August 24<sup>th</sup>, where Italian authorities followed the Article 9 procedure, a violation of EU law has allegedly occurred, both in relation to Article 19 of the Charter and to Article 9 of the Return Directive. Indeed, since the migrants expressed their will not be deported to Sudan, Italian authorities should have postponed their removal, in order to evaluate their claims under the principle of *non-refoulement*.

---

<sup>61</sup> CJEU, *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, 9 November 2010.

<sup>62</sup> Directive 2013/32/EU, op. cit.

<sup>63</sup> Directive 2008/115/EC, op. cit.

<sup>64</sup> European Commission - Press release. *European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy*, 2 March 2017.

<sup>65</sup> European Commission. *Return Book*, 2015, p. 50, available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return\\_handbook\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf) [accessed 9 July 2017].

#### 4.1.4 *Non-refoulement* in Italian law

Article 19 of the Legislative Decree (*Decreto legislativo*) n. 286/1998<sup>66</sup> contains a general prohibition for Italian authorities to expel migrants where their expulsion might violate the principle of *non-refoulement* as provided for in the Geneva Convention. The protection against *refoulement* applies equally to push backs at the border (Article 10, D.lgs 286/98) and to the various type of expulsions (Articles 13, 15, 16, D.lgs 286/98).

The Supreme Court has specified that the prohibition of *refoulement* applies even when the person concerned has not filed an asylum application (Cass. Civ, n. 3898/2011; Cass. Civ., n. 10636/2010). The return procedure of migrants who are illegally present on the Italian territory because they crossed the border irregularly and were not immediately pushed back, is regulated by Articles 13 and 14 of the Legislative Decree. According to Article 13, para. 2, lett. (a), the expulsion of these people is carried out through a return order adopted by the administrative authority (*prefetto*) and, whenever there is a potential risk of absconding, the decision is implemented by means of a coercive removal (Article 13, para. 4).

In line with the provisions of the Return Directive, adopted in 2011, the return order has to be issued based on a case-by-case evaluation of the circumstances. The individual assessment must, among all the circumstances, take into account whether or not the expulsion of the person concerned may violate the principle of *non-refoulement*. This is also crucial in order to avoid collective expulsions. It is clear that a case-by-case evaluation of the circumstances has not been conducted as regards the deportation to Sudan of unidentified migrants, which was carried out without further investigation into their nationality. Article 9 of the Memorandum appears therefore to be in conflict with the principles expressed in the Return Directive and adopted in Italian national law at Art. 13, D.lgs 286/98.

#### 4.1.5 *Non-refoulement* and implementation of the rules set out in the MoU

Article 14 of the MoU appears to be the most controversial provision as far as the principle of *non-refoulement* is concerned, because of the externalization of the identification procedure that it regulates. Indeed, as the lack of identification results in an assessment of the case which is not at all based on the individual circumstances of the personal case, the expulsion of a third-country national who has not yet been identified may lead to a violation of the principle of *non-refoulement*. Article 9 of the MoU, by contrast, does not seem to be directly in conflict with the principle of *non-refoulement*, as the identification before the expulsion allows, in principle, an individual assessment of the case. However, in the case of the Sudanese migrants repatriated on the 24th of August, where the expulsion was implemented on the ground of Article 9, there was a potential breach of the principle of *non-refoulement* as contained in international and European law.

On that occasion, the expulsion took place on the ground of the successful identification of the Sudanese migrants made by a delegate from the Sudan consulate. The fact that many migrants expressed the desire not to go back to Sudan several times before the Italian authorities was completely ignored. During the two weeks that the migrants spent at "*Campo Roja*", an emergency camp managed by the Italian Red Cross near Ventimiglia, they did not receive proper legal information or legal counselling concerning the asylum procedure. Even the fact that some of the

---

<sup>66</sup> Also known as "Testo Unico sull'Immigrazione", the Legislative Decree n. 286/1998 contains all the rules concerning migration and foreigners' conditions in Italian legal system.

persons who were about to be expelled declared that they had fled from Darfur was never taken into consideration by Italian authorities. Thus, the Italian authorities could not be unaware of the overall critical situation in Darfur concerning the respect of human rights and the practice of inhuman and degrading treatment. For this reason, the return orders appear to have been issued without a case-by-case assessment of the individual situation of the persons concerned.

Accordingly, it was foreseeable that the Sudanese citizens should have been granted some form of protection, either under the Geneva Convention or in the form of subsidiary protection under EU law. The recognition of the refugee status to the seven Sudanese who, for reasons of public security on the plane, were stranded and remained in Italy, proves the high probability that also the people who were expelled would have been recognized a form of international protection. For this reason, all the Sudanese citizens expelled on 24 August are to be considered *prima facie* refugees.

It is possible to conclude that the expulsion of forty Sudanese refugees to Sudan constitutes a violation of the prohibition of *refoulement* under Article 33 of the Geneva Convention. From the recognition of the violation of Italy's international obligations under the Geneva Convention derives a violation of EU law (Article 18 and 19 of CFR, Article 21 of Qualification Directive, Article 5 and 9 of Return Directive) and of national law (Article 19 D.lgs 286/98).

The expulsion of forty Sudanese refugees simultaneously violated Article 3 of the ECHR, as the expulsion of the group of Sudanese could not under any consideration have been legitimate. The ECtHR clearly pointed out that the State must conduct a double assessment: of the personal situation of the migrant and of the general situation in the country of origin, in order to evaluate the actual risk of ill-treatment. This was never done. Moreover, in light of the principles stated by the ECtHR, neither the presence of a Memorandum of Understanding between Italy and Sudan, nor the high pressure on Italy caused by the current influx of migrants would justify return policies and practices such as the one implemented on 24 August 2016.

## 4.2 Prohibition of collective expulsions

The group of Sudanese people, who were repatriated by the Italian police on the basis of Article 9 of the MoU can be considered as victims of a collective expulsion. This practice is explicitly prohibited by Article 4, Protocol 4 of the European Convention of Human Rights (ECHR). International human rights law and the European Convention on Human Rights and its Protocols impose certain limitations on a State's sovereign freedom to remove a foreign national from its territory.

The well-established definition of "collective expulsion" is "*any measure of the competent authorities compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group*"<sup>67</sup>. Similarly, Article 7 of the Draft Articles on the Expulsion of Aliens, provisionally adopted by the International Law Commission (ILC), defines the term expulsion as "*the displacement of an individual under constraint beyond the territorial frontier of the expelling State to a State of destination*"<sup>68</sup>.

---

<sup>67</sup> ECtHR, *Vedran Andric v. Sweden*, Application no. 45917/99, 23 February 1999, para. 59; ECtHR, *Sultani v. France*, Application no. 45223/05, 20 September 2007.

<sup>68</sup> See Draft Article 7 (2), as stated in *UN General Assembly. Report of the International Law Commission, Fifty-ninth session (7 May-5 June and 9 July-10 August 2007)*, U.N. Doc. A/62/10 (2007), para. 199 (fn. 400), available at: [http://legal.un.org/ilc/documentation/english/reports/a\\_62\\_10.pdf](http://legal.un.org/ilc/documentation/english/reports/a_62_10.pdf) [accessed 10 July 2017]; ILC Drafting Committee, *Progress Report on the topic "Expulsion of Aliens"*, 24 July 2009, available at: <http://legal.un.org/ilc/sessions/61/pdfs/>

The prohibition set out in Article 4 of Protocol 4 to the ECHR is also recognized in other international and regional conventions<sup>69</sup>. It is noted that Article 19(1) of the Charter of Fundamental Rights of the European Union also provides that "Collective expulsions are prohibited". Notable is also Article 7(1) of the Draft Articles on Expulsion of Aliens, provisionally adopted by the Drafting Committee of the International Law Commission (ILC) in its ongoing work on the subject<sup>70</sup>. It may therefore be observed that the prohibition of collective expulsion has evolved as a principle of general international law<sup>71</sup>.

#### 4.2.1 ECtHR case law on collective expulsions

The case law of the ECtHR shows that the Court has applied Article 4 of Protocol No. 4 to persons who, for various reasons, were residing within the territory of a State<sup>72</sup>, irrespective of whether they were lawfully resident in the respondent State or not, or were intercepted on the high seas by ships flying the flag of the respondent State and returned to the originating State<sup>73</sup>.

The Court found a violation of Article 4 of Protocol No. 4 only in four cases. In two of them (*Čonka v. Belgium* and *Georgia v. Russia (I) [GC]*), "the individuals targeted for expulsion had the same origin" (Roma families from Slovakia and Georgian nationals, respectively). In the other two cases (*Hirsi Jamaa and Others v. Italy [GC]* and *Sharifi and Others v. Italy and Greece*), "the violation found involved the return of an entire group of people (migrants and asylum seekers) without adequate verification of the individual identities of the group members".

In *Čonka v. Belgium*, the Court found that the doubt about the collective nature of the expulsion procedure was reinforced by a series of factors: "*firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation ...; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served*

---

english/2009\_dc\_chairman\_expulsion\_24july2009.pdf [accessed 10 July 2017].

<sup>69</sup> See Article 22 (9), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969. Available at: <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> [accessed 10 July 2017]; Article 26 (2), *Arab Charter on Human Rights*, 15 September 1994, available at: <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf> [accessed 10 July 2017]; Article 12 (5), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) [accessed 10 July 2017]; Article 25 (4), *Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms*, 26 May 1995, available at: <http://www.unhcr.org/protection/migration/4de4eef19/cis-convention-human-rights-fundamental-freedoms.html> [accessed 10 July 2017].

<sup>70</sup> Draft Article 7(1) of the *Report of the International Law Commission* provides as follows: "*The collective expulsion of aliens, including migrant workers and members of their family, is prohibited. However, a State may expel concomitantly the members of a group of aliens, provided that the expulsion measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group*".

<sup>71</sup> OHCHR, *Discussion Paper - Expulsions of aliens in international human rights law*, September 2006, available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf> [accessed 10 July 2017]; *Report of the International Law Commission*, op. cit., para. 239; UN Committee on the Elimination of Racial Discrimination, *General Recommendation 30 - Discrimination against non-citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2005), para. 26, available at: <http://www2.ohchr.org/english/bodies/cerd/docs/CERD-GC30.doc> [accessed 10 July 2017].

<sup>72</sup> Asylum seekers in *Čonka v. Belgium* and *Sultani v. France*; migrants in *Georgia v. Russia*, Application no. 38263/08, 1 April 2011, para. 170.

<sup>73</sup> *Hirsi Jamaa and Others v. Italy*, op. cit.

*on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed*"<sup>74</sup>. It is worth noticing that some of these factors - the similarities of the orders, the difficulties in contacting a lawyer, the lack of access to the asylum procedure - occurred in the case of the expulsion of the group of Sudanese nationals too.

In the case of *Hirsi Jamaa and Others v. Italy*, the Court considered the plight of twenty-four people from Somalia and Eritrea who were among more than two hundred people intercepted at sea by Italian authorities in 2009 and forced to return to Libya, their point of departure. The persons concerned were returned to Libya without the implementation of any identification procedure, and the personnel on the boat that carried them back to Libya were not at all trained to conduct individual asylum interviews; moreover, migrants were not assisted by interpreters or legal advisors. The Court ruled that a violation of Article 4, Protocol 4 has occurred in that case, as it found that, given the lack of identification and other forms of safeguards, there has not been "*sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination*"<sup>75</sup>. The ruling strengthens the respect for human rights across Europe and upholds international legal safeguards for migrants and asylum seekers.

In the light of the case law of the Court, the migrants who were returned to Sudan on the basis of Articles 9 of the Italy-Sudan agreement, fall under Article 4 of Protocol n.4 as victims of collective expulsions. They did not have the opportunity to have an individual examination of their case and notwithstanding the fact that they would be in danger if returned back to Sudan, they were forcefully returned.

#### 4.2.2 The right to an individualized examination

Under the ECHR system, the requirement of individualized examination is necessarily implicit in Article 4 of Protocol 4. As noted above, the prohibition of collective expulsion entails a right to a "*reasonable and objective examination of the particular case of each individual alien of the group*"<sup>76</sup>. The prohibition of collective expulsion does not ban the expulsion of several people at the same time, as long as "*each person concerned is given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis*"<sup>77</sup>. However, the European Court clarified that it is not decisive whether the decision formally appears to be an individual one, but whether factually an individualized examination has taken place<sup>78</sup>.

There is a distinction between the prohibitions of collective expulsion and *refoulement*. Although both rules may have simultaneous application, as they do in the present case, the prohibition of collective expulsion is distinguishable from the prohibition of *refoulement* under Article 3 of the Convention. The former is essentially a due process requirement that must be considered in its own regard. Any State considering expulsion of a group of non-nationals is required to consider, with due diligence and in good faith, the full range of individual circumstances that may militate against the expulsion of each particular individual in the group. The risk of *refoulement* is one such consideration among others.

---

<sup>74</sup> *Conka v. Belgium*, op. cit., para 63.

<sup>75</sup> *Hirsi Jamaa and Others v. Italy*, op. cit., para 185.

<sup>76</sup> *Andric v. Sweden*, op. cit., para.1; *Conka v. Belgium*, op. cit., para. 59.

<sup>77</sup> *Id.*

<sup>78</sup> *Conka v. Belgium*, op. cit., para. 56.

States may seek to rely on bilateral agreements concluded with other States not only to circumvent the prohibition of *refoulement*, but also to implement interceptions and collective expulsions. In this respect, it has to be noted that such agreements only operate *inter partes* and cannot justify the interception and expulsions of migrants without ensuring them with all the necessary guarantees provided for by law. Furthermore, such agreements have to be interpreted in line with other obligations applicable between the parties<sup>79</sup>, which could include the duty to ensure the safe and humane treatment of those intercepted under Article 9 of the Smuggling Protocol<sup>80</sup>, human rights obligations under treaty and customary law, and the prohibition of *refoulement* under general international law.

#### 4.2.3 Relation with Article 13 of the ECHR

On the basis of Article 4 of Protocol No. 4, the removal of a group of aliens may also lead to a violation of Article 13 of the Convention<sup>81</sup>. The article applies wherever a person, whose rights under the Convention are violated, does not have access to “an effective remedy before a national authority”. In some circumstances, there is a clear link between the enforcement of collective expulsions and the fact that the persons concerned were effectively prevented from applying for asylum or from having access to any other domestic procedure which met the requirements of Article 13 ECHR<sup>82</sup>.

The notion of an effective remedy under Article 13 of the Convention requires that the remedy may prevent the execution of measures that are contrary to the Convention. Consequently, it is inconsistent with Article 13 for such measures (for instance, the expulsion of a group of foreigners) to be executed before the national authorities have examined whether they are compatible with the Convention<sup>83</sup>. This means that a remedy must have a suspensive effect to meet the requirements of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4. With reference to the case under consideration, the repatriation measures should have been subject to the control of a national authority in order to evaluate their compatibility with the Convention; moreover, it should have been done before executing the measures (meaning that the remedy shall have suspensive effects).

To this regard, it should be noted that the lack of suspensive effect of a removal decision does not in itself constitute a violation of Article 13 taken together with Article 4 of Protocol No. 4, where an applicant does not allege that there is a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country<sup>84</sup>. In the case under analysis, however, it is possible to conclude that such a risk existed, therefore the lack of a suspensive effect would result in the violation of Article 13 and Article 4, Protocol 4. The absence of any domestic procedure to enable potential asylum seekers to lodge their Convention-based complaints (under Article 3 of the Convention -

---

<sup>79</sup> See Article 31 (3) (c), *Vienna Convention on the Law of Treaties*, op. cit.

<sup>80</sup> Article 9, *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime*, 15 November 2000, available at: [https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention\\_smug\\_eng.pdf](https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention_smug_eng.pdf) [accessed 10 July 2017].

<sup>81</sup> ECtHR, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights*, 30 April 2017, available at: [http://www.echr.coe.int/Documents/Guide\\_Art\\_4\\_Protocol\\_4\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf) [accessed 10 July 2017].

<sup>82</sup> *Hirsi Jamaa v. Italy*, op. cit., paras. 201-207; ECtHR, *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014, Available at: <http://www.refworld.org/cases,ECHR,544617ad4.html> [accessed 10 July 2017], paras. 240-243.

<sup>83</sup> *Conka v. Belgium*, op. cit., para. 79.

<sup>84</sup> ECtHR, *Khlaifia and Others v. Italy*, Application no. 16483/12, 15 December 2016, para. 281.

prohibition of torture and inhuman or degrading treatment - and Article 4 of Protocol No. 4) with a competent authority and to obtain a thorough and rigorous assessment of their requests before the enforcement of the removal may also lead to a violation of Article 13 of the Convention<sup>85</sup>.

### 4.3 Violation of procedural guarantees and the right to an effective remedy

The Memorandum contains provisions on procedures that serve to facilitate the cooperation between Sudan and Italy on issues related to irregular migration. Firstly, the Sudanese authorities are obliged under Article 9 to assist and support the Italian authorities in identifying irregular migrants for the purpose of repatriating them. This practice foresees that Sudanese diplomatic and consular personnel conduct interviews with migrants in order to ascertain their nationality, as well as an obligation for the Sudanese authorities to issue the necessary travel documents to make such migrants' repatriation possible.

Secondly, Article 14 stipulates a specific repatriation procedure which is applicable to situations in which the Sudanese and Italian authorities mutually recognize "necessity and urgency" to exist. If that is the case, the Memorandum allows for the transportation of migrants into the Sudanese territory for identification and repatriation by the Sudanese authorities, provided that the migrants are identified as Sudanese citizens.

The abovementioned mechanisms represent an attempt by the Italian State to sidestep its substantive obligations under Article 3 ECHR by procedural means and they constitute an infringement of the right to an effective remedy.

#### 4.3.1 Right to an effective remedy under the ECHR

Anyone who has an arguable claim for a violation under the Convention has the right to have his or her matter decided by a national authority and to obtain redress, pursuant to Article 13 ECHR<sup>86</sup>. As made clear by the ECtHR in *Jabari*, given the irreversible nature of the harm that torture might result in, the right stipulated in Article 3 requires independent and rigorous scrutiny for its remedy to be effective. Furthermore, such a remedy must allow for an automatic suspension of the deportation until the rigorous scrutiny has been carried out<sup>87</sup>.

Concerning the arguability of the claim, it is settled case law from the ECtHR that an applicant's complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under Article 3 "must imperatively be subject to close scrutiny by a "national authority"<sup>88</sup>.

Such complaints were raised by a number of migrants in the group of Sudanese citizens. Given the current situation in Sudan, the applicants' claims are arguable under Article 3 ECHR.

It follows from the wording "national authority" in Article 13 ECHR that Italy, in its capacity of a Contracting State, is responsible for performing the rigorous scrutiny prescribed by the ECtHR. In

---

<sup>85</sup> *Hirsi Jamaa v. Italy*, op. cit., paras. 201-207; ECtHR, *Sharifi and Others v. Italy and Greece*, paras. 240-243.

<sup>86</sup> ECtHR, *Klass and Others v. Germany*, Application no. 5029/71, 6 September 1978, para. 64; ECtHR, *Maaouia v. France*, Application. no. 39652/98, 5 October 2000, para 52.

<sup>87</sup> ECtHR, *Jabari v. Turkey*, Application. No. 40035/98, 11 July 2000, para. 50.

<sup>88</sup> ECtHR, *Shamayev and Others v. Georgia and Russia*, Application no. 36378/02, 12 April 2005, para. 448; *Hirsi Jamaa and Others v. Italy*, op. cit., para. 198.

*Diallo*, the Czech Republic rejected the asylum applications of the applicants as unjustified without considering their merits, simply because the applicants had arrived from a safe third country such as Portugal. The ECtHR found that the failure to subject the applicants' claims to close and rigorous scrutiny by Czech national authorities constituted a breach of the right to an effective remedy<sup>89</sup>. Similarly, the procedure set forth in Articles 9 and 14 of the Memorandum, according to which the responsibility to assess the claims of the applicants is delegated to Sudanese authorities, amounts to a lack of the scrutiny by an independent Italian authority that is required under Article 13 ECHR. The fact that Sudan, in comparison to Portugal, is by no means a safe third country further confirms the importance of the procedural guarantees.

Furthermore, as made clear by the ECtHR in *De Souza Ribeiro*, "the effectiveness of the remedy for the purposes of Article 13 requires [...] rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3"<sup>90</sup>. However, the scrutiny performed by the Sudanese authorities in accordance with the Memorandum is only aimed at determining the national identity of the migrants. As the mere confirmation of an individual's citizenship does not require Article 3 ECHR to be taken into account, the procedures prescribed in the Memorandum are not sufficient to constitute an effective remedy in the meaning of Article 13 ECHR.

It should also be noted that the procedures in the Memorandum do not produce an automatic suspensive effect of the deportations, a circumstance which in itself amounts to an infringement of Article 13 ECHR. According to the ECtHR's reasoning in *Čonka*, "the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible"<sup>91</sup>. The practices prescribed in the Memorandum involve deportation to Sudan without assessing individual claims regarding infringements of Article 3 ECHR. As the ECtHR has found such measures to produce potentially irreversible effects<sup>92</sup>, the lack of a suspensive mechanism in the Memorandum amounts to a breach of Article 13 ECHR.

Lastly, according to Article 5 ECHR, everyone has the right of liberty and security. This provision includes, inter alia, that an individual who is deprived of his or her liberty by detention is entitled to take legal action, by which the lawfulness of the detention is decided. As there was no possibility for the applicants to do so, the circumstances of this case constitutes a breach of this right, pursuant to Article 5.4 ECHR.

#### 4.3.2 Right to an effective remedy under EU law

Article 47 of the EU Charter of Fundamental Rights provides for a right to an effective remedy and to a fair trial. Its content is mainly based on Article 13 (effective remedy) and Article 6 (fair trial) of the ECHR, as interpreted by the ECtHR. The rights are recognised to be general principles of EU law that bind the Member States when they are implementing EU law. It follows that, in the application of the rules set out in the Return Directive<sup>93</sup>, the States shall assure the effectivity of the remedies against expulsion.

---

<sup>89</sup> ECtHR, *Diallo v. the Czech Republic*, Application no. 20493/07, 23 June 2011, paras. 75-81.

<sup>90</sup> ECtHR, *De Souza Ribeiro v. France*, Application no. 22689/07, 13 December 2012, para. 82.

<sup>91</sup> *Čonka v. Belgium*, op. cit., para. 79.

<sup>92</sup> *Jabari v. Turkey*, op. cit., para. 50.

<sup>93</sup> The Directive 2008/115/EC (so-called "Return Directive") establishes common standards and procedures in Member States for returning illegally staying third-country nationals.

Chapter III of the Return Directive, moreover, lists the procedural guarantees that must be granted to all migrants issued with an expulsion order: return decisions must be made in writing, they have to be motivated and to include all the necessary information about available legal remedies<sup>94</sup>. Article 13 explicitly provides for a right “*to be afforded an effective remedy to appeal against or seek review of decisions related to return*”. Article 14 of the MoU violates the effectivity of any remedy available for the migrants, as it implicates their immediate expulsion, regardless its compatibility with human rights, particularly the principle of *non-refoulement*, and the formal rules imposed by the Return Directive.

The Court of Justice of the EU focused in many immigration cases on the right to be heard. Such right, being an essential component of the rights of the defense (Article 47) can also be derived from Article 41 (2) of the Charter. This article provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him or her adversely is taken<sup>95</sup>. Even though Article 41 does not address the Member States but the EU institutions, it is nevertheless “*inherent in respect for the rights of the defense, which is a general principle of EU law*”<sup>96</sup>.

In *Mukarubega*, a case concerning an expulsion procedure, the Court made it clear that in order for the procedure to be fair and transparent as imposed by Point 6 of the Preamble to the Return Directive, Member States shall ensure that “*the person concerned is properly heard within the procedure relating to his residence application or, as the case may be, on the legality of his stay*”<sup>97</sup>. Most importantly, in *Boudjlida*, the CJEU concluded that the authorities must necessarily observe the obligations imposed by Article 5 of Directive 2008/115 (among which there is the prohibition of *refoulement*) and hear the person concerned on that subject<sup>98</sup>.

The Sudanese migrants expelled on 24 August were not given the actual opportunity to be heard on the reasons why they would not and could not be repatriated. Moreover, they did not receive a written - and motivated - return order, nor were they informed on the legal remedies against expulsion. It follows that their expulsion was conducted in violation of the procedural guarantees contained in the Return Directive and in violation of the right to an effective remedy derived from Article 47, 48 and 41, para 2 of the CFR.

### 4.3.3 Procedural guarantees under Italian law

Article 13 and 14 of D. lgs 286/98 (as amended in 2011 in order to adopt the rules set in the Return Directive) regulate the return procedure of irregular migrants. Therefore, the identification procedure, agreed in the Memorandum at Article 9, shall take place in respect of the procedural guarantees provided for by Articles 13 and 14 D.lgs 286/98. According to Article 13, a return order is issued by the administrative authority (*prefetto*) and can be implemented through a deportation order (“forced accompaniment to the border”) where there exists a risk of absconding. It was the

---

<sup>94</sup> Article 12, Directive 2008/115/EC.

<sup>95</sup> CJEU, *M.M. v. Minister for Justice, Equality and Law Reform et al.*, C-277/11, 22 November 2012, para 83; CJEU, *H.N. v. Minister for Justice, Equality and Law Reform et al.*, C-604/12, 8 May 2014, paras 49, 50; CJEU, *Mukarubega*, C-166/13, 5 November 2014, paras 45,46.

<sup>96</sup> CJEU, *Mukarubega*, C-166/13, 5 November 2014, paras 45,46.

<sup>97</sup> CJEU, *Mukarubega*, C-166/13, 5 November 2014, para 62.

<sup>98</sup> CJEU, *Boudjlida*, C-249/13, 11 December 2014, paras 34-38.

case of Sudanese refugees, who were apprehended in Ventimiglia in order to be immediately expelled to Sudan, following the procedure of Article 9 of the MoU.

Article 13 contains procedural guarantees concerning both the return order and the order of deportation at the border. The return act must indicate the reasons for expulsion, and a copy of the act shall be given to the person concerned. Moreover, the act has to be translated in a language that the person can understand (and it cannot be used, in most of the cases, a “vehicular language”<sup>99</sup>). The Sudanese migrants expelled on 24 August did not receive any copy of the return act, neither did they receive information or any formal acts in a language that they could understand.

The forced deportation order has to be validated by a judicial authority (i.e. “*Giudice di Pace*”). During the validation hearing, the person concerned has the right to be assisted by a lawyer: the presence of the defendant is “necessary” (Article 13, para. 5-bis) and his or her absence may determine the invalidity of the order. The execution of the deportation is suspended until the judge validates it, and during that period the person can be detained only in an administrative detention centre (“Centri di Identificazione ed Espulsione - CIE”, now “Centri di permanenza per il rimpatrio - CPR”). Finally, in assessing the existence of the conditions for the deportation, the judge shall verify that the expulsion is not contrary to Article 19 D. Lgs 286/98 (which prohibits *refoulement* according to the Geneva Convention). The expulsion of people identified following Article 9 of the MoU, can be considered legitimate only when all the above-mentioned guarantees are respected.

However, in the case at issue, there has been a breach of several of those guarantees. Firstly, the Sudanese people were never granted access to a lawyer and the validation hearings have allegedly taken place in a police station without the presence of the defendant. Moreover, their detention was unlawful, as it occurred in a police station rather than in an administrative detention centre: as the imprisonment of migrants in police station is not allowed or regulated by law, it constituted a breach of Article 13 of the Constitution. Finally, there is no evidence of an assessment made by the judge of the circumstances prohibiting expulsion under Article 19 D.lgs 286/98.

#### 4.3.4 Right to information on asylum procedure

Finally, among the procedural safeguards it is possible to include a right to have access to the asylum procedure. Italian authorities, however, have never granted to the group of Sudanese migrants the opportunity and means to apply for asylum. A right to access asylum procedures can be implicitly derived from the general principle of effectiveness applied to international protection. The first step in order to file an asylum application is to inform migrants of the rights they enjoy under the Geneva Convention as well as under international and European law; most importantly, they should be made aware of the rules regulating asylum procedures across Europe, including the functioning of the so-called “Dublin system”.

The ECtHR found that the lack of access to information is a major obstacle in accessing asylum procedures and can put at risk the enjoyment of the right itself (*M.S.S. v. Belgium and Greece*, para. 304; *Hirsi Jamaa and Others v. Italy*, para. 204). Besides, it stressed the importance of “*guaranteeing anyone subject to a removal measure, the consequences of which are potentially*

---

<sup>99</sup> Italian Supreme Court, section VI, 22 February 2012, n. 3678; Italian Supreme Court, section VI, 14 November 2014, n. 24341.

*irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints”<sup>100</sup>.*

Moreover, a specific information duty on asylum application is imposed on Member States by Article 8 of the Procedure Directive (2013/32/UE); it applies to migrants held in detention or present at the border crossing points. The Directive was implemented in Italy through D.lgs n.142/2015, which contains an innovative provision regarding asylum seekers: Article 2, para. 1, lett. a) D.lgs 142/2015 defines as “asylum seekers” not only those who formally filed an asylum application, but also whoever expressed the will to apply for protection. The Sudanese migrants expelled in August (and apprehend at the border between Italy and France) clearly manifested their will not to be sent back to their country of origin, since they escaped war and a general situation of human rights violations; however, they never received information on the asylum procedure.

Finally, the existence of a duty to properly inform migrants of their right to apply for asylum, as derived by the case law of the ECtHR and by Directive 2013/32/EU, was recognized by the Italian Supreme Court, that declared a border rejection order illegitimate since it was issued in violation of the duty of information on the right to asylum (Judgment n. 5926/2015). It can be derived, therefore, that any return order adopted in violation of the right to information could be illegitimate.

## Conclusion

The report has presented an analysis of the misleading and unsuitable use of the *Memorandum of Understanding between Italy and Sudan*, implemented in order to expel a group of Sudanese nationals from the Italian territory. This specific case is not a solitary occurrence, but it is related to a trend in the political approach of European States concerning the management of migration flows and the repatriation of irregular migrants. Informal agreements signed between the EU - or its Member States - and Third Countries have taken the place of the traditional bilateral agreement, meant to facilitate the readmission of third-country nationals.

The real nature of these agreements has often been hidden behind formal designation: the *Memorandum of Understanding* itself has the form of a non-binding, merely administrative act of police cooperation that States can use as a simplified instrument to cooperate on several matters. The report has claimed that such a choice of denomination aims at eluding the official channels of negotiation of international agreements, the rules on ratification contained in Constitutions and, eventually, the respect of human rights to which the European States have bound themselves.

The report pointed out that some of the contents of the *Memorandum of Understanding between Italy and Sudan* are potentially in breach of internationally recognised human rights (such as the principle of *non-refoulement*, the prohibition of collective expulsion, the right to an effective remedy) and consequently in breach of both European law and national law on that matter. Article 14 of the MoU and the procedure that it establishes represent an unquestionable evidence of these infringements. The externalisation of identification of migrants is incompatible with human rights and shall not be included in the Readmission Agreements signed by EU Member States. Moreover, for such Agreements to be compatible with the principle of *non-refoulement*, Member States shall lay out procedures that grant the individualised examination of the case, the hearing of the person concerned, the right to apply for asylum and effective remedies against expulsion decisions. States must also be careful in agreeing upon simplified expulsion procedures with Third Countries (such

---

<sup>100</sup> *Hirsi Jamaa and Others v. Italy*, op. cit., para. 205.

as Sudan) where the security and humanitarian situation is compromised and human rights violations are widespread.

Finally, a reflection is to be carried out as far as the political and institutional level for the stipulation of agreements in the field of irregular migration and repatriation is concerned. Rather than signing secret, informal agreements at the administrative national level, the debate should be brought to other levels, respectively delineating the arenas empowered for the drafting of conventions and agreements on migration management and human rights protection.

In the case of Italy, any legislative measure should have followed the procedure set forth by Articles 80 and 87 of the Constitution regarding the ratification of international treaties, in order for the Italian constitutional principles to be respected. Given the political and financial content of the Memorandum, the decision concerning its ratification and implementation should have been made subject to parliamentary scrutiny. A formal ratification procedure was moreover required, in the interest of the protection of foreigners, by Article 10, para 2 of the Constitution.

More generally, it should be noted that the competence for combating irregular migration and signing readmission agreements with Third Countries is defined as a European competence under Article 79 TFEU: therefore, agreements concerning identification procedures in the context of expulsion - where there were no previous agreements, neither bilateral nor signed by the EU - shall be discussed and adopted at the European level.

# Bibliography

## - Treaties, law and agreements

*Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrant*, OC-18/03, 17 September 2003. Available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf) [accessed 9 July 2017].

*African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Available at: [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf) [accessed 10 July 2017].

*American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969. Available at: <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm> [accessed 10 July 2017].

*Arab Charter on Human Rights*, 15 September 1994. Available at: <http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf> [accessed 10 July 2017].

*Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms*, 26 May 1995. Available at: <http://www.unhcr.org/protection/migration/4de4eef19/cis-convention-human-rights-fundamental-freedoms.html> [accessed 10 July 2017].

*Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=EN> [accessed 9 July 2017].

*Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN> [accessed 9 July 2017].

*Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en> [accessed 9 July 2017].

*Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L.

180/60 -180/95; 29.6.2013, 2013/32/EU. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en> [accessed 9 July 2017].

*Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and UNHCR (Intervener)*, 25 March 2013. Available at: [http://www.refworld.org/cases,HK\\_CFA,515010a52.html](http://www.refworld.org/cases,HK_CFA,515010a52.html) [accessed 9 July 2017].

*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, United Nations, Treaty Series, vol. 2220, p.3. Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> [accessed to 10 July 2017].

*Italian Constitution*, 1 January 1948. Available at: [https://www.senato.it/1025?sezione=127&articolo\\_numero\\_articolo=80](https://www.senato.it/1025?sezione=127&articolo_numero_articolo=80) [accessed to 10 July 2017].

*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](http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf) [accessed 9 July 2017].

*Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nation Convention Against Transnational Organised Crime*, 15 November 2000. Available at: [https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention\\_smug\\_eng.pdf](https://www.unodc.org/documents/southeastasiaandpacific/2011/04/som-indonesia/convention_smug_eng.pdf) [accessed 9 July 2017].

*Vienna Convention on the Law of Treaties*, 23 May 1969. United Nations, Treaty Series, vol. 1155, p. 331. Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf> [accessed 9 July 2017].

## **- Case-law**

(All the cases listed below can be found at the address “<https://curia.europa.eu/>”)

CJEU. *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, 9 November 2010.

ECtHR. *Ahmed v. Austria*, Application no. 25964/94, 17 December 1996.

ECtHR. *Al-Saadoon and Mufdhi v. United Kingdom*, Application no. 61498/08, 2 March 2010.

ECtHR. *Boyle and Rice v. The United Kingdom*, Application nos. 9659/82 and 9658/82, 24 March 1988.

ECtHR. *Chahal v. The United Kingdom*, Application no. 22414/93, 15 November 1996.

ECtHR. *Conka v. Belgium*, Application no. 51564/99, 5 February 2002.

ECtHR. *Cruz Varas and Others v. Sweden*, Application no. 15576/89, 20 March 1991.

ECtHR. *De Souza Ribeiro v. France*, Application no. 22689/07, 13 December 2012.

ECtHR. *Diallo v. the Czech Republic*, Application no. 20493/07, 23 June 2011.

ECtHR. *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012.

ECtHR. *Ismoilov and Others v. Russia*, Application no. 2947/06, 24 April 2008.

ECtHR. *Khlaifia and Others v. Italy*, Application no. 16483/12, 15 December 2016.

ECtHR. *Klass and Others v. Germany*, Application no. 5029/71, 6 September 1978.

ECtHR. *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000.

ECtHR. *Maaouia v. France*, Application no. 39652/98, 5 October 2000.

ECtHR. *NA. v. The United Kingdom*, Application no. 25904/07, 17 July 2008.

ECtHR. *Othman (Abu Qatada) v. The United Kingdom*, Application no. 8139/09, 17 January 2012.

ECtHR. *Prince Hans-Adam II of Liechtenstein v. Germany*, Application no. 42527/98, 10 February 2005.

ECtHR. *Saadi v. Italy*, Application no. 37201/06, 28 February 2008.

ECtHR. *Shamayev and Others v. Georgia and Russia*, Application no. 36378/02, 12 April 2005.

ECtHR. *Sharifi and Others v. Italy and Greece*, Application no. 16643/09, 21 October 2014.

ECtHR. *Soering v. The United Kingdom*, Application no. 14038/88, 7 July 1989.

ECtHR. *Soldatenko v. Ukraine*, Application no. 2440/07, 23 October 2008.

ECtHR. *Sultani v. France*, Application no. 45223/05, 20 September 2007.

ECtHR. *Vedran Andric v. Sweden*, Application no. 45917/99, 23 February 1999.

ECtHR. *Vilvarajah and Others v. The United Kingdom*, Applications nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 26 September 1991.

ICJ. *Georgia v. Russia*, Application no. 38263/08, 1 April 2011.

Italian Supreme Court, section VI, 14 November 2014, n. 24341.

Italian Supreme Court, section VI, 22 February 2012, n. 3678.

## - Books, articles and essays

ASGI. "Memorandum of understanding between the Italian public security department and the Sudanese national police. A reading guide", 3 October 2016. Available at: <http://www.statewatch.org/news/2016/nov/asgi-italy-sudan-mou.pdf> [accessed 9 July 2017].

Barbera, Augusto. "Gli accordi internazionali: tra Governo, Parlamento e corpo elettorale". In *Quaderni costituzionali*, 4, n. 3 (1984): 476-439.

Borraccetti, Marco. "L'Italia e i rimpatri: breve ricognizione degli accordi di riammissione". In *Diritto, immigrazione e cittadinanza XVIII*, 1-2 (2016): 58-33.

Cannizzaro, Enzo. *Diritto Internazionale*. Torino: Giappichelli Editore, 2016.

Conforti, Benedetto. *Diritto Internazionale*. Napoli: Editoriale Scientifica, 2016.

Coutts, Stephen. *European Readmission Policy: Third Country Interests and Refugee Rights*. Revised by Nils Coleman. Leiden: Martinus Nijhoff Publishers, 2009.

Den Heijer, Marteen, and Thomas Spijkerboer. "Is the EU-Turkey refugee and migration deal a treaty?". In *EU Law Analysis. Expert Insight into EU law developments*, 7 April 2016. Available at <http://eulawanalysis.blogspot.it/2016/04/is-eu-turkey-refugee-and-migration-deal.html> [accessed 9 July 2017].

ECtHR, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights*, 30 April 2017. Available at: [http://www.echr.coe.int/Documents/Guide\\_Art\\_4\\_Protocol\\_4\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf) [accessed 10 July 2017].

European Commission - Press release. *European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy*, 2 March 2017. Available at [http://europa.eu/rapid/press-release\\_IP-17-350\\_en.htm](http://europa.eu/rapid/press-release_IP-17-350_en.htm) [accessed 9 July 2017].

European Commission. *Return Book*, 2015. Available at [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return\\_handbook\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf) [accessed 9 July 2017].

Favilli, Chiara. "Presentazione". In *Diritto, immigrazione e cittadinanza XVIII*, 1-2 (2016): 18-11. Available at [https://www.francoangeli.it/Area\\_RivistePDF/getArticolo.ashx?idArticolo=58475](https://www.francoangeli.it/Area_RivistePDF/getArticolo.ashx?idArticolo=58475) [accessed 9 July 2017].

Hagen-Zanker, Jessica, and Richard Mallett. "Migration policy: three things to know about 'Fortress Europe'". In *ODI*, 20 October 2015. Available at: <https://www.odi.org/comment/9995-migration-policy-three-things-know-about-fortress-europe> [accessed 12 July 2017].

ILC Drafting Committee. *Progress Report on the topic "Expulsion of Aliens"*, 24 July 2009. Available at: [http://legal.un.org/ilc/sessions/61/pdfs/english/2009\\_dc\\_chairman\\_expulsion\\_24july2009.pdf](http://legal.un.org/ilc/sessions/61/pdfs/english/2009_dc_chairman_expulsion_24july2009.pdf) [accessed 10 July 2017].

Institute for International Law and Justice. "Note on the Invalidity of Treaties under Art. 46". Available at: <http://www.iilj.org/wp-content/uploads/2016/08/Note-on-Invalidity-of-Treaties-under-Art.-46.pdf> [accessed 9 July 2017].

Ktistakis, Yannis. *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter – A Handbook for legal practitioner*. Paris: Council of Europe, 2013. Available at: <https://rm.coe.int/168007ff59> [accessed 9 July 2017].

Lisi, Andrea. "Le lettere di intenti". In *Diritto e Diritti*, 11 September 2000, Available at: <http://www.diritto.it/materiali/civile/lisi.html> [accessed 9 July 2017].

OHCHR. *Discussion Paper - Expulsions of aliens in international human rights law*, September 2006. Available at: <http://www2.ohchr.org/english/issues/migration/taskforce/docs/Discussion-paper-expulsions.pdf> [accessed 10 July 2017].

Pascouau, Yves, and Frank Mc Namara. "EU external migration policy: in the kingdom of the blind the one-eyed man is king, in European Policy Centre". In *European Policy Center*, 6 February 2017. Available at: <http://www.europeanmigrationlaw.eu/en/articles/points-of-view/eu-external-migration-policy-in-the-kingdom-of-the-blind-the-one-eyed-man-is-king> [accessed 12 July 2017].

Pitruzzella, Giovanni, and Roberto Bin. *Diritto costituzionale*. Torino: Giappichelli Editore, 2008.

Raffiotta, Edoardo C. "Potere estero del Governo e accordi internazionali in forma semplificata: una ricerca sulla prassi". In *Forum di quaderni costituzionali*, 5 November 2009. Available at: [http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti\\_forum/paper/0149\\_raffiotta.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0149_raffiotta.pdf) [accessed 9 July 2017].

UN Committee on the Elimination of Racial Discrimination. *General Recommendation 30 - Discrimination against non-citizens*, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2005). Available at: <http://www2.ohchr.org/english/bodies/cerd/docs/CERD-GC30.doc> [accessed 10 July 2017].

UN General Assembly. *Report of the International Law Commission, Fifty-ninth session (7 May-5 June and 9 July-10 August 2007)*, U.N. Doc. A/62/10 (2007). Available at: [http://legal.un.org/ilc/documentation/english/reports/a\\_62\\_10.pdf](http://legal.un.org/ilc/documentation/english/reports/a_62_10.pdf) [accessed 10 July 2017].

UNHCR. *Better Protecting Refugees in the EU and Globally*, 5 December 2016. Available at: [http://www.europeanmigrationlaw.eu/documents/UNHCR-FD\\_Paper-screen%20copy.pdf](http://www.europeanmigrationlaw.eu/documents/UNHCR-FD_Paper-screen%20copy.pdf) [accessed 12 July 2017].

UNHCR. "Fact Sheet on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms". In *UNHCR Manual on Refugee Protection and the ECHR*, 31 March 2003. Available at: <http://www.unhcr.org/3ead2d262.pdf> [accessed 9 July 2017].

UNHCR. "The European Court of Human Rights". In *Manual on the Case Law of the European Regional Court*, UNHCR, 169-255, June 2015. Available at: <http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/UNHCR%20case%20law%20558803c44.pdf> [accessed 9 July 2017].

## - Other sources

European Commission. “ACP - The Cotonou Agreement”. Available at: [https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement\\_en](https://ec.europa.eu/europeaid/regions/african-caribbean-and-pacific-acp-region/cotonou-agreement_en) [accessed 12 July 2017].

Human Rights Watch. *Austria: Drastic, Unjustified Measures against Asylum Seekers*, 27 April 2016. Available at: <https://www.hrw.org/news/2016/04/27/austria-drastic-unjustified-measures-against-asylum-seekers> [accessed 12 July 2017].

Il Sole 24 Ore. “Parola chiave: Memorandum d'intesa”. Available at: <http://argomenti.ilsole24ore.com/parolechiave/memorandum-d-intesa.html> [accessed 9 July 2017].

The Conversation. “Europe’s migration ‘partnerships’ with Africa need a new direction in 2017”. Available at: <http://theconversation.com/europes-migration-partnerships-with-africa-need-a-new-direction-in-2017-70695> [accessed 12 July 2017].