

Dicembre 2021

Legal framework. Italian and Libyan responsibilities for the violation of articles 2 and 6 of the CEDAW

2. IOM's voluntary return as disguised expulsion

2.1 Legal context and content of obligations

States parties to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) have primary duty under the CEDAW: they must, both individually and collectively, prevent women and girls from being exposed to violations of their Convention rights committed by private persons and non-State actors.

Non-state actors are also represented by international organisations, including IOM, whose actions are the subject of this appeal.

Article 2(e) CEDAW explicitly provides that States Parties are to take “all appropriate measures to eliminate discrimination against women by any person, organization or enterprise” including exposure to the risk of refoulement and trafficking for the purpose of exploitation. In order to achieve this aim, State parties have an obligation to act with due diligence and, although there is no predefined content, the Committee's case law and recommendations indicate that due diligence certainly includes abstain from performing, sponsoring or condoning any practice, policy or measures that violates the Convention; while it includes adopting comprehensive action plans and implementation mechanisms for the practical realization of CEDAW's rights; investigating, prosecuting and punishing perpetrators and providing reparation to victims of violence. In the specific context of trafficking, the Committee has referred to the duty to, *inter alia*: identify, assist and protect trafficking survivors; **prevent revictimization by guaranteeing trafficked women against forcible return to their country of origin**; improve cooperation with receiving States to ensure that the truly voluntary repatriation of trafficked citizens is facilitated through standardized processes and effective communication between the authorities and officials involved.

2.2 The factual situation and its legal framework: disguised expulsion and Italy's financing of IOM

In the appeals to the Committee, the cases of two Nigerian women victims of trafficking who, after a very long period of slavery and detention in Libya, were offered by IOM the possibility of accepting assisted repatriation to their country of origin, Nigeria, was described.



What is contested in this appeal is that the repatriation that took place was not voluntary, but must be considered as an expulsion disguised as voluntary repatriation, according to the definition provided by the UN International Law Commission (ILC):

“the forcible departure of an alien from a State resulting indirectly from an action or omission attributable to the State, including where the State supports or tolerates acts committed by its nationals or other persons, intending to provoke the departure of aliens from its territory other than in accordance with the law”.

A. Detention, consent and the risk of re-trafficking

In these cases, the offer to join the voluntary repatriation programme took place while the two applicants were in detention and after many months of enslavement. Voluntary repatriation was presented as the only way out of detention and there was no assessment of the risks of persecution the two women would face if returned to Nigeria.

As is well known, foreign nationals in Libya are subjected to generalised and indefinite detention, characterised by unprecedented violence. This is all the more understandable when one considers that Libya has no asylum law, has not ratified the 1951 Geneva Convention relating to the Status of Refugees and has not formally recognised the United Nations High Commissioner for Refugees (UNHCR).

The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has highlighted the real risk that **particularly harsh detention conditions** and the use of torture or other inhuman or degrading treatment during detention may also be **used to force the will of detained persons** to accept any conditions imposed by their captors.

The existence of this risk is also widely highlighted by the UN Special Rapporteur on Human Rights in the 2018 Background Paper *Protecting the human rights of migrants in the context of Return* where the Rapporteur observed that “consent is not mere acceptance of a procedure, “but a voluntary and sufficiently informed decision”, and a fundamental feature of respecting an individual’s autonomy, self-determination and human dignity. On the contrary, “forced interventions”, which are often wrongfully justified by theories of necessity or as being in the “best interest” of the person concerned, raise issues for the autonomy and dignity of the person, and may give rise to violations of the prohibition on torture and ill-treatment.”

The situation is even more serious for Nigerian women who are victims of international organised crime networks and kidnapped in the so-called "connection houses" in Libya, places designed to materialise the power of exploiters and traffickers over women, degraded to res through habitual torture, sexual violence and deprivation, in order to cancel their will and force them into prostitution. These are places where women are also sold and traded, ending up in the hands of people who work for the Libyan authorities in detention centres.



The UN Secretary-General also denounces the lack of investigation and prosecution of cases of sexual violence perpetrated against foreign women in detention, the absence of protection, judicial and reparation mechanisms as well as the absence of minimum levels of health, psychosocial and legal support.

In this context, the two applicants were never given the opportunity to apply for protection and therefore to apply to UNHCR.

On this point, it is necessary to specify that it is well known that among the migrants who are stranded in Libya, especially Nigerian, there is a very high number of women refugees (also due to exposure to forms of trafficking for sexual exploitation) who, in case of return to Nigeria, run the serious risk of being exposed to persecution and serious violations of their fundamental rights because of their gender. Similarly, it is an established fact that migrant women present in Libya are victims of trafficking, and this is reflected in all international reports drawn up on the subject. Specifically, the Independent Anti-Slavery Commissioner Annual Report 2016-2017 (IASC Annual Report 2016/2017), recalls that according to data provided by the IOM "more than 80% of Nigerian women intercepted on the Mediterranean route are exposed to trafficking and destined for exploitation through transit countries (including Libya) and in Europe, especially in Italy".

In this context IOM considered that it could receive valid consent from the applicants and could therefore carry out a genuinely voluntary return.

On the contrary, the European Court of Human Rights in its judgment in *N.A.* condemned Finland for the voluntary repatriation by IOM of an Iraqi national. The Court found that the man's repatriation could not be considered "voluntary", due to the detention situation he was in and the lack of possible alternatives if he had remained in Finland, from which he would have been forcibly repatriated anyway. The judgment sets an important precedent on the issue of "voluntary" returns, stating that the returning state must nevertheless carefully consider whether doing so exposes the person to the risk of violating fundamental human rights.

B. The absence of guarantees in the Italian funds for IOM repatriation projects. The previous appeal to the Italian Administrative Court (TAR) by ASGI, Differenza Donna and Spazi Circolari

Already in 2018, IOM received funding from the Italian Ministry of Foreign Affairs and International Cooperation to implement the voluntary repatriation project from Libya to the countries of origin. These projects included Nigerian trafficked women.

In light of the risk that women deserving protection would be repatriated to countries of origin at risk of persecution, ASGI requested MAECI to provide information on the guarantees imposed on IOM so that its activities would not expose them to violations of the right to asylum.

The Italian Government replied to the requests specifying that it had not carried out any assessment of the interests involved, of the existence of mechanisms to evaluate the actual



voluntariness of the adherence to the measure and of the consequences of the action in terms of violation of the obligations deriving from international human rights law, in particular the violation of the principle of non-refoulement and the obligations to protect victims of trafficking.

Based on the information collected, it is possible to conclude that the specific and concrete conditions in which returns take place were not evaluated for the purposes of the decision to finance returns from Libya, not even when it was evident from the same results presented by the International Organization for Migration that the first nationality involved in the measure was Nigeria, a country sadly known to be the place from which the majority of women victims of trafficking come. The MAECI, in the moment in which it has deliberately decided not to carry out any preliminary investigation and not to verify either the situation in which the measure is implemented or the modalities with which it is carried out in relation to Nigerian women, has financed a measure that is very likely, if not certain, to violate the principle of non-refoulement and the risk of re-trafficking. It is evident that the Ministry, in adopting any administrative measure, should have, on the contrary, carried out such an assessment and requested and obtained information regarding the absence of violation or avoided that in practice the act adopted achieves different purposes than those for which it was issued.

For this reason, ASGI, Differenza Donna and Spazi Circolari have presented two appeals to the TAR Lazio against MAECI's funding to IOM and the proceedings are still pending.

C. The legal framework of the factual situation

Draft Article 10(1) of the mentioned ILC Draft Articles affirms that “[a]ny form of disguised expulsion” is prohibited. The ILC specifies that such prohibition stems “under international law” as, “in essence, [a] disguised expulsion infringes the human rights of the alien in question, including the procedural rights”. In turn, migrants who are so expelled are subject to the full protection of the principle of non-refoulement, the prohibition on collective expulsion and the right to an effective remedy.

This means that **CEDAW States Parties are also under an obligation to ensure that their legal and administrative apparatus permanently guarantees trafficked women against disguised expulsions**. They must also prevent non-State actors from committing disguised expulsions of trafficked women at risk of re-trafficking. This obligation extends to situations of both support and mere toleration, when “constituted [by] an action or omission attributable to the State ... intending to provoke departure of aliens”. Notably, this includes the support offered to non-State actors or private persons who materially return the migrant without offering any real alternative other than returning.

States must also respect and protect trafficked women from disguised deportations located outside their territory when these have the power to have a direct and reasonably foreseeable impact on the enjoyment by such women of their right to be free from trafficking. This interpretation of jurisdiction is based on the "special relationship of dependence" (from the ECHR



case law) that binds states to individuals regardless of where those individuals are located, when they are directly affected by decisions taken by the state authority in a manner that was reasonably foreseeable in light of the relevant obligations of that state. To conclude, in General Comment No. 36, the HRC established that States must “take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory ... but having a direct and reasonably foreseeable impact ... outside their territory” are consistent with the Covenant.

2.3 Violations of the Convention by Italy and Libya

The violations alleged against Libya and Italy in relation to repatriation to Nigeria, where women are exposed to persecution, are part of this.

A. Libya

Libya, which has territorial jurisdiction over the returned women, has breached both its duty not to return the applicants through disguised expulsions and its duty to prevent her exposure to this violation. Specifically, Libya has left the applicants with no real alternative but to return to her country of origin through IOM's VHR programme, despite the real risk of being re-trafficked and the coercion to agree to enrol in IOM's VHR programme.

B. Italy

Italy is responsible for violating the Convention by allowing its legal and administrative apparatus to fail to guarantee women against disguised deportation, either by omission or action.

In this respect, it can be said that material and financial support was offered to IOM in order for repatriation to take place and without exercising any control over the use of the funds, so much so that they were in fact used in a manner contrary to the right to asylum and the prohibition of discrimination against trafficked women. Italy has proven that it does not have any legal and administrative apparatus to ensure compliance with the duty to prevent trafficked women from being exposed to violations of CEDAW, including non-refoulement and trafficking.

On the contrary, there is evidence of support not only to IOM but also to Libya, which as seen has violated its protection obligations under CEDAW.