

## ASGI/Italy

### Memorandum of understanding between the Italian public security department and the Sudanese national police. A reading guide.

The repatriation of around 40 Sudanese refugees on the past 24 August 2016 - taken from Ventimiglia, transported to the Hotspot in Taranto (Apulia) and then led, always by force, to the airport terminal in Turin - has uncovered the existence of an agreement between Italy and Sudan which has been vigorously criticised by the *Tavolo Nazionale Asilo* [a consultation group on asylum comprising Acli, Arci, Asgi, Caritas italiana, Casa dei diritti sociali, Centro Astalli, Consiglio Italiano per i Rifugiati, Comunità di S. Egidio, Federazione delle Chiese Evangeliche in Italia, Medici per i Diritti Umani, Medici Senza Frontiere, Senza Confine]. In a reply handled through an interview with [the newspaper] *Avvenire* on 29 September, the chief of police, prefect Gabrielli, explained that the Memorandum in question is merely one of 267 agreements underwritten by Italy with other countries for the purpose of perfecting police cooperation and, hence, it does not require any parliamentary oversight.

#### ***ASGI offers a first commentary on the document.***

The Italian-Sudanese memorandum of understanding [MoU hereafter] was signed by the chief of police and director-general of the public security department, prefect Gabrielli, on the Italian side, and by the director-general of the Sudanese police forces, General Hashim Osman el Hussein, on the Sudanese side, on the past 3 August in Rome, in the presence of officials from the interior ministry and the foreign affairs and international cooperation ministry.

The **subject of the MoU** is constituted by the fight against crime, the management of borders and migration flows and the delicate issue of repatriations; the agreement consists of a preamble and twenty articles divided into four chapters which respectively concern police cooperation, cooperation in border management (which, as is notorious, do not exist between the two countries, so that it is difficult to understand how the Italian police may cooperate in the control of Sudanese borders), of migration flows in the area of repatriations, data protection and, finally, formal procedures and expenses.

The **agreement's nature as a merely internal and administrative act**, which aims to dictate norms for its detailed enactment, **is already belied in its preamble** which clearly states that the Parties intend to strengthen police cooperation in the fight against organised crime, trafficking of migrants and irregular immigration, the trade in human beings, drug trafficking and terrorism. All of this occurs with full consciousness that an effective repatriation policy would have a noteworthy effect as a deterrent, contributing to prevent irregular migration and the tragedies connected to it. **It is an evidently political act**, due to the relevance of the themes the MoU deals with to security of the state, its borders and civil and peaceful coexistence **which, yet, has not been subjected to any parliamentary oversight whatsoever as would be required by art. 80 of the Italian Constitution**. Such oversight would be even more necessary if it was deemed (as is plausible, considering the similarity of the issues which are tackled) that the agreement is part of a wider cooperation scenario between Sudan (and other African countries) and the European Union in the field of immigration, the so-called "Khartoum Process" (which began in Italy in November 2014), and the establishment of the "*EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa*" (La Valletta summit in November 2015).

Two further preliminary observations deserve attention, always within the context of checks on the respect for constitutional norms by the agreement in question: on the one hand, one cannot

underestimate - due to what will be argued below regarding how the MoU affects the legal position of foreigners in Italy - **the violation of art. 10 point 2 of the Constitution**, according to which *"The legal position of foreigners is regulated by the law in accordance with international norms and treaties"*.

In fact, rigorous respect for the constitutional norm and for the legal reservation it contains automatically overwhelms the MoU we are commenting, whether it is considered an international agreement in a simplified form or, as claimed by the Italian chief of police, if it is deemed to be a mere agreement between police forces. In fact, the mentioned legal reservation imposes **maximum transparency on the norms and practices adopted in relation to the legal condition of foreigners in Italy** and it cannot be considered a mere legal frill, as it is clearly meant to prevent any conceivable abuse by the executive power affecting people's rights.

On the other hand, the MoU heavily affects the modes and timing of the restrictions of individuals' personal freedom in Italian territory which, in this specific case, are not determined by law at all, but rather, they are left to the arbitrary will of police authorities (moreover, foreign ones), which amounts to a **violation of individuals' personal freedom and of art. 13 point 2 and 3 of the Constitution**.

In short: it is an act which was kept secret, sealed in ministerial rooms between the two countries' chiefs of police, but which is destined to seriously affect the policies and practice of repatriation, as is shown by the notorious "case of the Sudanese in Ventimiglia" and we will try to highlight in what follows.

Whereas the MoU foresees reciprocal assistance and cooperation between police forces, training and information exchange, which certainly fall within the scope of a technical agreement between different countries' law enforcement forces, when we examine the provisions concerning immigration and returns, the situation changes.

The agreement is apparently bilateral - even insofar as immigration is concerned -: in fact, it states that the parties commit to identifying and returning *"their own citizens who are present in the other Party's territory in an irregular situation with regards to the legislation on immigration"*.

Yet, nonetheless, it is fairly easy to observe that it is unlikely that there are many Italian citizens in Sudan without a residence permit, which makes it evident that the agreement's direction is not in both senses. This is borne out by the fact that cooperation in the field of returns (art. 9) only provides that it is the Sudanese authorities which provide assistance and support to identify irregular migrants. And they must proceed without delay to *"interview the people who must be repatriated... and, on the basis of the interview's outcome, without undertaking any further checks as to their identity, they issue the laissez-passer [document] as quickly as possible, thus enabling the Italian authorities to organise the repatriation"*.

If, on the basis of a mere interview, the Sudanese police officer is convinced that a person is Sudanese, the document for the return is immediately issued. Yet, the cautious chiefs of the two police forces already imagined that they should introduce a safeguard clause which may be used in case the person who is (hastily) returned turns out not to be a Sudanese citizen, so that it is provided that *"the Italian party will take back, without delay... every person returned to Sudan with emergency documents if, following detailed checks [carried out in Khartoum, author's note], it should turn out that the person in question is not Sudanese..."*.

The sloppiness which this provision reveals (and others, as we will see) conceals **contempt for respect of people's most important rights**: in fact, if one imagines that it may not even be possible to adequately proceed to the mere identification of a person and their nationality, one cannot understand how it is possible for other inquiries to be conducted (first of all and merely as an example, those on the existence of reasons for which they should be protected, their family and social conditions) which, in any case, may impede the execution of any return.

There is an obvious omission because, according to well established constitutional case-law (sentence no. 105 of 2001), forced accompaniment to the border constitutes a limitation of personal freedom. Hence, **on the basis of an "emergency identification document" an Italian judge would be meant to validate a forced accompaniment [to the border]!**

**The Memorandum signed by the chief of police does not even take the 2008 Returns Directive into account** and the Italian norm which receives it (art. 13 point 2 of legislative decree 286/1998), where they provide that any decision on a return is adopted by the prefect following a careful "case-by-case" assessment. If one merely relies on an interview with an official from "democratic" Sudan in order to obtain an "*emergency document without delay*" to proceed to a forced return, it is impossible to deem that there may have been a specific evaluation, for each case, of the individual situation of each person.

It is evident that, **in the guise of a merely technical and non-political agreement, the intention to have a free rein to expel** presumed Sudanese citizens quickly is concealed, contravening the norms which are in force.

The need to proceed to checks as to the identity and nationality of irregular foreigners entails, according to Directive 2008/115/EC (art. 9 points 2 and 3), postponement of the removal and, according to national legislation, it is a circumstance which is suited to require detention in a CIE [identification and expulsion centre] while identification is pending. **The supranational and internal normative frameworks alike presume that a foreigner be exhaustively identified within the member state concerned before it proceeds to their expulsion.**

Envisaging summary identifications, allowing for further in-depth inquiries in Sudan, entails the externalisation of a fundamental segment of the removal procedures provided as a safeguard for foreigners, for the purpose of preventing them from being sent to a country of which they are not citizens or where inhumane or degrading treatments may be adopted towards them.

Further evidence that this is the real purpose of the agreement is shown by the provision in the Memorandum's art. 14 under the heading "*Repatriation procedures in cases of necessity and urgency*", when, in mutual agreement, the signatory Parties recognise the existence of cases of necessity and urgency for which "*the procedures to establish the identity of the people who must be repatriated may be undertaken in Sudanese territory*". Yet, there is not any useful indication to make it possible to understand following what criteria and when a situation may be characterised by necessity and urgency.

Through this agreement which is presented as merely technical, the Italian Police cuts itself a role involving absolute power which eludes any form of control to proceed to the identification of irregular foreigners in Sudan! Provided that requirements of necessity and urgency exist which the Police itself may determine in an entirely arbitrary manner. In line with its preferences, the Italian Police thus arrogates the power to **externalise identification procedures!** With this premise it appears somewhat derisive to state that all of this is supposed to happen "*in compliance with the respective national orders and legislations and international obligations*"... including those deriving

from Italy's membership of the European Union. Which internal or supranational norm enables the deportation to Sudan of unidentified foreigners and to delegate identification procedures to the authorities of that third country? But, even more importantly, in what material conditions will the foreigners awaiting identification be held? What way will there be to respect the guarantees provided by Directive 2008/115/EC to safeguard the respect for people's rights and dignity? The returns directive stresses the need for readmission agreements with third countries (Preamble no. 7), but this is following the adoption of a return decision which presumes identification within the EU's territory.

The Memorandum's art. 14 establishes that the signatory Parties agree on the time and modes of transfers to Sudan "as well as the guarantees for the return to the Italian territory of those who turn out not to be Sudanese citizens".

**The times and means of restriction of personal freedom are not established by law** (which the Constitution's art. 13 requires), but are agreed upon by the Italian and Sudanese police forces: to be frank, understanding of how this provision complies with Italian and supranational legislation escapes us. As for guarantees for returns, it is provided that *"the air carrier which transports the people who are repatriated will not leave Sudanese territory until the necessary checks are carried out by the Sudanese authorities, so that those people who turn out not to be Sudanese citizens may be taken back to Italy by the same air carrier. If, for reasons of contingency it proves impossible to execute this procedure, the Italian Party guarantees the return to its territory on board of the first available flight of the people who turn out not to be Sudanese citizens"*. These are **non-guarantees whose timeframes are left to the complete discretion of the administration, without any possibility of control and jurisdictional oversight, because they are outside of the national and the EU's territories.**

Through this MoU, the Italian Police does not just arrogate - in an entirely unlawful manner - the right to deport irregular foreigners to Sudan without identifying them with any certainty as being Sudanese, but it even demeans the jurisdictional control which is provided by the law and which consists in the prior validation of forced accompaniment to the border.

In fact, how will it be possible for a judge to validate the accompaniment of a person to Sudan for the sole purpose of being identified?

Accompaniment to the border using the public force is an executive mode for expulsion decrees issued by the *prefetto*, but this is not a matter of accompaniment for the purpose of expulsion, here the accompaniment is for the purpose of identification, which constitute an inescapable precondition for the expulsion, which must be adopted following a prior "case-by-case" evaluation.

The Italian-Sudanese memorandum entails the **distortion of the guarantees provided by the legal order in the field of returns, which are already weak as things stand.**

Therefore, it is an unlawful instrument of a political nature, both because it was adopted outside of parliamentary control and because it is removed from the procedures envisaged by constitutional, supranational and national sources of law.

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[http://www.asgi.it/wp-content/uploads/2016/10/Commento-memorandum-italo-sudanese\\_definitivo.pdf](http://www.asgi.it/wp-content/uploads/2016/10/Commento-memorandum-italo-sudanese_definitivo.pdf)

*The text of the Memorandum of Understanding is 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)