

## 2016 Italy - Sudan 'Memorandum of Understanding'

*" Memorandum of Understanding (MoU) between the Public Security Department of the Italian Interior Ministry and the National Police of the Sudanese Interior Ministry for the fight against criminality, management of frontiers and migration flows and about repatriation "*

### **Background**

Sudan is the host to nearly 3.2 million internally displaced persons and 800,000 refugees; due to its geographical position (bordering with Libya), it is one of the main transit routes for migrants coming from the Horn of Africa. From 1989 to 2019 Sudan was ruled by the dictator Omar al-Bashir, who has been accused of genocide and war crimes in the Darfur, South Sudan and Blue Nile conflicts, perpetrated by his armed militia known as 'Janjaweed'. The International Criminal Court has issued two arrest warrants against al-Bashir. The EU, although having sanctions in force against Sudan (i.e. an arms embargo), in the last 5 years heavily funded the regime to improve its border managements and to stop migrants from crossing to Libya. In April 2019, after months of violent protests against the regime, Omar al-Bashir was overthrown. Sudan is now led by a transitional government chaired by Amdalla Hamdok. The following section provides a short-account of the EU policies in Sudan. For an in depth-analysis over the matter, see the papers provided in the last section (External Literature).

This Memorandum of Understanding is the first disclosed agreement between Italy and Sudan in the field of migration. Through its repatriation mechanism, it completes the approach of the EU policy in the Horn of Africa (pulling-back and sending-back migrants instead of pushing them back), which enacted the 'externalization of the border control(s)' to Libya. In November 2014, the EU launched the Khartoum process aiming at combating illegal migration from the Horn of Africa region. One year later, in the midst of the so-called 'refugee crisis', European and African heads of state met in Valletta to agree on a common approach to address migration: the result of this meeting was the 'EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa' (the 'EUTF for Africa'). The EUTF combines development programs with control of irregular migration flows. Since 2015, the Horn of Africa has received € 1.4 billion in funds; as of Sudan, it has received around € 160 millions in aid from the EUTF fund. Migration management dominates EU-Sudan relations through the 'Better Migration Management' (BMM) program, providing €40 millions to strengthen the management and control of the Sudanese border with Libya. Through this fund, the EU has provided the Sudanese regime with technical assistance, training and provision of equipment (computers, cameras, thermal scanners, servers, cars) for border management. The BMM program has raised many alarm bells, as Sudan's borders are patrolled by the Rapid Support Forces (RSF), consisting of former Janjaweed militia fighters.

To recap, the Italy-Sudan MoU can be read as part of the contemporary EU policies in Africa in the field of migration. This approach is a double-sided one: it consists in (i) pulling-back migrants through the 'externalization' of the Sudanese border, and in (ii) sending-back the migrants who had successfully crossed the Mediterranean through the means of repatriation mechanisms provided for in bilateral informal arrangements.

### **Procedure**

Secret 'technical arrangement' between the Police Department of the two Parties.

### **Parties**

On the Italian side, the Public Security Department; on the Sudanese side, the Sudanese National Police.

### **Signature**

The MoU was signed in Rome, 3 August 2016, by Franco Gabrielli, the Italian Police Chief and General Director of Public Security Department, and Hashim Osman Elhuissein, the General Director of Sudanese Police Forces.

### **Legal Basis**

Directive No. A/XII/4, 3 March 2008 ('Procedure relative agli accordi internazionali ed alle intese interministeriali o tecniche'), of the Ministry of Foreign Affairs has been used as the legal basis by the Italian Security Department to conclude 'simplified readmission procedures' of individuals with non-EU countries. Supposedly, these 'technical agreements' do not amount to formal treaties and cannot be attributed neither to the Italian government nor to the Italian Republic.

### **Aims**

"**Fight against** transnational organized criminality, especially against **smuggling of migrants and irregular immigration**, smuggling of human beings, drug-smuggling and terrorism"; "**effective repatriation policy**" as a deterrent to irregular migration.

### **Contents**

The contents of the MoU can be divided in **three different parts**: the first part, named "**Police Cooperation**", concerns the cooperation measures to be enacted by the police forces of the two countries against transnational criminality, specifically against:

- (a) Organised criminal groups in the fields of human trafficking and drug smuggling.
- (b) Terrorist groups.

The cooperation measures focus on the creation of an information channel between the two Police Departments, aiming at identifying organised criminal groups, their participants, their *modus operandi*, and to proceed to arrest or implement seizure and

confiscation measures against them. In order to achieve this goal, the MoU provides for an "Assistance Request" mechanism and on the exchange of experts, courses and training activities.

The **second part** concerns the "**Collaboration in the Management of Frontiers and Migration Flows**". With the aim of improving "the capacity of managing frontiers and migration flows and of contrasting irregular migration and related crimes", the Italian party offers "to the Sudanese party, on an annual basis, support and technical assistance in terms of training and supply of means and equipment, compatibly and within the limits of its effective financial availability. In this regard, **"the Italian party can decide to ask for the financial support of the European Union"** (Article 8 (1 and 2)).

The **third** and last **part** provides for **two peculiar repatriation systems**; as we will see *infra* these mechanisms have raised multiple concerns and problems with regard to the respect of the *non-refoulement* principle.

Repatriation system's functioning:

### **1. Ordinary system:**

Article 9 of the MoU provides that the Sudanese diplomatic or consular authorities, upon request of the Italian Police, should assist and support the Italian authorities in the identification of Sudanese irregular migrants. The identification is carried out through an interview which takes place where the migrants are hosted or kept. In the case of "a small number of migrants", the interviews can take place at the Sudanese Embassy or Consulate. After the interview, "without carrying further investigation" on the migrant identity, the Sudanese authority shall promulgate an emergency document allowing the execution of the repatriation.

### **2. Repatriation procedure in cases of necessity and urgency:**

Article 14 provides for a faster procedure in cases of "necessity and urgency", enacted in common accord between the two Police Departments. According to this Article, the identification of migrants who have to be repatriated can be executed directly in the Sudanese territory. The persons "who do not appear to be Sudanese citizens" are supposedly brought back to Italy "by the same air carrier" (para. 2 (b)).

## **Final Dispositions**

The Memorandum entered into effect from the moment of its signing (ratification is not necessary as it is not deemed to be a formal treaty) and has an unlimited standing. It can be amended with the mutual consent of the Parties, and it can be terminated by each of the Parties through notification of termination (the MoU ceases to have effect six months after such notification).

## **Cases and secondary legislation (cf. Application)**

'*W.A. and Others against Italy*' (Application no. 18787/17) case pending application in front of the European Court of Human Rights (ECtHR). This case concerns the repatriation of five Sudanese nationals arrested in Ventimiglia, then transferred to Turin and, together with other 35 Sudanese migrants, forcibly repatriated to Sudan using the dispositions of the MoU.

Legal questions:

- 1) Was the non-refoulement principle respected under Art. 3 ECHR?
- 2) Was the expulsion a collective one?
- 3) Did the applicants have effective domestic remedies at their disposal?
- 4) Have the applicants suffered discrimination on ground of their national origin under Art. 14 of the Convention?

## **Critical Issues**

In 2017, the Human Rights and Migration Law Clinic of the University of Turin conducted an in-depth legal analysis over the content of the MoU. From their report it appears that three main critical issues stem from the provisions related to the identification and expulsion of Sudanese citizens:

a) Violation of the *non-refoulement* principle:

Despite the critical socio-political state of affairs of Sudan, the MoU does not provide any express reference to the principle of *non-refoulement*. The identification and repatriation procedures provided in Article 9 and 14 do not comply with international law and human rights law obligations. Specifically, they infringe the safeguards against *refoulement* guaranteed by Article 3 of the European Convention on Human Rights, by Article 33 of the Geneva Convention, by European Law (the Return Directive, the Procedure Directive, and the Qualification Directive set out specific rules and obligations to be followed by Member States to repatriate migrants), and by Italian law (Article 19 of the Legislative Decree n. 286/1998).

b) Violation of the prohibition of collective expulsion:

The group of Sudanese citizens involved in the abovementioned '*W.A. and Others against Italy*' case have supposedly suffered a collective expulsion. They claim that their repatriation was not based on a fair, objective and proportionate examination of their individual, particular situation. The practice of collective expulsion is explicitly prohibited by Article 4 of the Protocol No. 4 of the ECHR, by Article 19 (1) of the EU

Charter of Fundamental Rights, and is deemed to be an imperative principle of international law.

c) Violation of the right to an effective remedy:

The 'necessity and urgency' identification and repatriation procedures set by Article 14 of the MoU provide for an immediate expulsion of the migrant concerned, affecting his/her right to an effective remedy and a fair trial. This practice is in breach of Article 3 and 13 of the ECHR, of Article 47 of the EU Charter of Fundamental Rights, and of the specific procedural safeguards set out in the Chapter III of the EU Return Directive.

### **External Literature**

Text of the MoU available at:

<<https://www.asgi.it/wp-content/uploads/2017/10/English-Translation-Memorandum-of-Understanding-Sudan-Italy-SL-Clinic-UniTO.pdf>>

Legal analysis of the MoU from the Human Rights and Migration Law Clinic of the University of Turin:

<<https://www.asgi.it/wp-content/uploads/2017/10/Report-Memorandum-of-Understanding-Sudan-Italy-SL-Clinic-UniTO.pdf>>

Directive No. A/XII/4, 3 March 2008 ('Procedure relative agli accordi internazionali ed alle intese interministeriali o tecniche'), available at:

<<https://www.esteri.it/mae/resource/doc/2017/07/circolaren4del3marzo2008.pdf>>

ECHR pending case '*W.A. and Others against Italy*' (Application no. 18787/17):

<<http://hudoc.echr.coe.int/eng?i=001-179588>>

Think tanks' and NGOs' analysis of the EU policies in Sudan:

'Border control from hell: how the EU's migration partnerships legitimizes Sudan's "Militia State"':

<<https://enoughproject.org/reports/border-control-hell-how-eus-migration-partnership-legitimizes-sudans-militia-state>>

'Effects of EU policies in Sudan: multilateral damages':

<<https://www.clingendael.org/pub/2018/multilateral-damage/3-effects-of-eu-policies-in-sudan/>>

'Expanding the fortress: EU's border externalization program':

<[https://www.tni.org/files/publication-downloads/expanding the fortress - 1.6 may 11.pdf](https://www.tni.org/files/publication-downloads/expanding_the_fortress_-_1.6_may_11.pdf)>

'The EU Trust Fund for Africa: trapped between aid policy and migration politics':

<<https://www.asgi.it/wp-content/uploads/2020/02/bp-eu-trust-fund-africa-migration-politics-300120-en.pdf?sessionid353CBF8035E5A776B91D76F9634159A6.pdf>>