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Relocation of Torture and 'State Torture'
Readmission Agreements, Externalisation of Borders and Closure of Ports in the Mediterranean Sea

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Abstract The aim of this essay is to focus on a present and important problem, i.e., the rejecting of people coming from Libya together with the closing of harbours for migrants and the criminalisation and obstruction towards the NGOs that are engaged in saving human beings in the Mediterranean Sea. The text argues how such attitudes are crimes against humanity, comparable to the infringement of prohibition of torture and of inhuman or degrading treatments. Responsibility certainly lies with who personally practise torture, but the European States governments and the European Union Institutions cannot actually disclaim liability.

Keywords Torture. Borders. Crimes against humanity. Readmission agreements. Principle of non-refoulement.

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> "Let us leave this Europe that doesn't stop talking about man, despite slaughtering him wherever he meets him, on every corner of its streets, in every corner of the world. For centuries, Europe has halted the progression of other men and has enslaved them to its designs and its glory; for centuries, in the name of a supposed 'spiritual adventure', it has suffocated almost all of mankind […]" (Fanon 1962, 240)

1 Border Control as the *Grundnorm* of Immigration Policies

For some years now, the issue of border control has been the focus of national and European immigration policies. These policies base on two fundamental axes: return and readmission. In both cases, cooperation with third countries is crucial.

If we look back over the last few years,[1] unequivocal indication in this sense is provided by an European Union Communication dated 2016, "on establishing a new Partnership Framework with third countries under the European Agenda on Migration", which reaffirms the central role of "a coherent, credible and effective policy with regard to the return", and that the proper functioning of the return and readmission system is essential in agreements with third countries, with a view to "specifically and measurably increasing the number of returns and readmissions".[2]

In 2017, the European Commission adopted two policies with evocative titles: *Communication on a more Effective Return Policy in the European Union. A Renewed Action Plan*[3] and *Recommendation on Making Returns more Effective when Implementing Directive 2008/115/EC of the European Parliament and of the Council*.[4]

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1 Previously (and in particular since 2005), several acts, mostly soft law ones, such as the *Global Approach to Migration and Mobility*, marked a change in the manner and intensity of European policies (Gjergji 2016, 70), with a growing role for cooperation with third countries, "mobility partnerships", based on the assumption that "without effective border controls, reduced illegal immigration and an effective return policy, the EU will not be able to offer better opportunities for legal migration and mobility" (European Commission, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, Brussels, 18/11/2011, 5).

2 COM(2016) 385, 07/06/2016.

3 Communication from the Commission to the European Parliament also the Council, COM(2017) 200 final, Brussels, 02/03/2017.

4 Commission Recommendation, C(2017) 1600 final, Brussels, 07/03/2017.

As for documents with a broader scope, such as the *European Agenda on Migration*, adopted by the European Commission on 13 May 2015, "border management" is one of the "four levels of action" identified, but it also interacts with the other three levels ("reducing the incentives for irregular migration", "duty to protect: a strong common asylum policy", "a new policy on legal migration").[5] Similarly, border control is recurrent in the various scenarios outlined in the *White Paper on the Future of Europe* dated 1st of March 2017.[6]

In 2018, the European Commission published a *Progress Report on the Implementation of the European Agenda on Migration*[7] and, in this case too, a significant space is devoted to border control and particularly to cooperation with third countries regarding return and readmission.

The picture is clear: to strengthen border control through cooperation with third countries, i.e., to externalise borders. Fortress Europe, first and foremost: it is of no relevance the fact that many of the countries with whom agreements have been signed are authoritarian, warring States that fail to guarantee human rights and do not protect the right to asylum.

It is a process characterised by a high level of informality, combining development cooperation with the control of migratory flows,[8] whose lines are decided in 'unofficial' contexts, such as, in relation to the involvement of African countries of origin and transit of migrants, the Khartoum Process in 2014 or the Valletta Summit in 2015.

Without disregarding the advantages that development cooperation brings *also* to the countries that govern economic aid,[9] but not forgetting that it fails to compensate for the extraction and despoiling of wealth from the countries receiving aid, we point out that it becomes a bargaining chip in order to obtain border control (see Ferri 2016).[10] (Neo)Colonialism takes on a new interpretation, with paradoxical boundaries: European countries – some of them – have not infrequently contributed, to put it mildly, to the devastation in terms of

5 European Commission, COM(2015) 240 final, Brussels, 13/05/2015.

6 European Commission, *White Paper on the Future of Europe*, COM2017(2025), 01/03/2017.

7 Communication from the Commission to the European Parliament, the European Council and the Council, COM(2018) 301 final, Brussels, 16/05/2018.

8 Cf. European Commission, COM(2016) 385, 07/06/2016.

9 Quantitative references can be found in the report by several non-governmental organisations (cf. Honest Accounts 2017).

10 For a tangible example, see the creation (at the November 2015 Euro-African Summit in Valletta) of a dedicated fund, the EU Trust Fund for Africa, managed by the European Commission, to which funds for cooperation and humanitarian aid have been diverted; see European Parliament, Resolution on the EU Trust Fund for Africa: the implications for development and humanitarian aid, 13 September 2016, P8 TA(2016)0337.

poverty and wars ravaging Africa and now expect the African countries to cope with the exodus that this has led to, exposing the victims of economic and environmental disasters and armed conflicts to further violation of their rights.

At the beginning of 2020, the European Commission announced the adoption of a *New Pact on Migration and Asylum*,[11] which does not seem to harbour discontinuity,[12] if we consider how it moves from the recognition of the "major strides […] on migration and borders since the 2015 European Agenda on Migration". It includes "the reform of the Common European Asylum Policy", with a system described as "more resilient, more humane and more effective".[13] The question, given the precedent, is obvious: more effective in guaranteeing the right to asylum or in border control?

The EU model is replicated at national level: facilitated return and readmission procedures and cooperation with third countries to externalise controls and prevent the entry of migrants.

As for the international framework, or rather, in the context of the global governance that is now replacing it, the latest actions include the adoption of the *Global Compact for Safe, Orderly and Regular Migration*,[14] a non-legally binding document, aimed at "improving cooperation on international migration", "acknowledging that no State can address migration alone"[15] (Foresti 2018). Among the "interdependent guiding principles", alongside the reference to human rights, national sovereignty and sustainable development, we see the international cooperation, which "requires international, regional and bilateral cooperation and dialogue".[16] Consistently, among the goals indicated, we notice "cooperate in facilitating safe and dignified return and readmission […]", to be achieved (and it is the first point indicated) through the development and implementation of "bilateral, region-

11 European Commission, Communication, Commission Work Programme 2020. *A Union that Strives for More*, COM(2020) 37 final, 29/01/2020, 8.

12 Pending publication of this paper, the European Commission adopted the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, Brussels, 23/09/2020, COM(2020) 609 final. The Communication insists on "robust and fair management of external borders", on "streamlining procedures on asylum and return", on "an effective return policy", on "mutually beneficial partnerships with key third countries of origin and transit".

13 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, Brussels, 23/09/2020, COM(2020) 609 final.

14 A/RES/73/195. The *Global Compact* is adopted by the majority of UN Member States at an Intergovernmental Conference in Marrakesh, Morocco, on 10 December 2018, followed closely by formal endorsement by the UN General Assembly on 19 December 2018.

15 *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, §§ 7 and 8.

16 *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, § 15.

al and multilateral cooperation frameworks and agreements, including readmission agreements", specifying that it is necessary to ensure "that return and readmission of migrants to their own country is safe, dignified and in full compliance with international human rights law".[17]

2 Readmission Agreements as an Icon of Border Externalisation

The core of border control policies are readmission agreements, which are extremely unscrupulous, given that the chosen partners are often authoritarian countries or conflict-torn countries, and demonstrate an abdication of the task of protecting rights, with consequent breach of constitutional, supranational and international laws.

In the first decade of this century (from 2004 to 2014 to be precise), 17 readmission agreements were adopted between the European Union and third countries,[18] on the basis of the powers granted by Article 79, § 3 TFEU (Treaty on the Functioning of the European Union); in addition to these deals, more than three hundred agreements were entered into between EU Member States and third countries (Cassarino 2014, 132).

As far as Italy is concerned, in the Online Archive of International Treaties of the Ministry of Foreign Affairs and International Cooperation,[19] about 40 documents appear under the title 'readmission', including agreements, protocols and implementing provisions. The majority of them were stipulated in simplified form (see Marchegiani 2008, 144), with notification and communication in the Official Journal,[20] without a law of authorisation for ratification.

A complete picture of the possibilities of readmission must also take into account the clauses included in association and cooperation agreements (Vitiello 2016, 13 ff.; Borraccetti 2016, 40 ff.), along the lines of Article 13 of the so-called Cotonou Agreement, that's to say a Partnership Agreement between the members of the African, Caribbean and Pacific States, on one side, and the European Community and its member States on the other, signed on 23 June 2000 (2000/483/EC; first references in Cassarino 2016, 21 ff.).

17 *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, § 16 (no. 21) and § 37.

18 See *Return and Readmission*, `https://ec.europa.eu/home-affairs`.

19 `http://itra.esteri.it`.

20 By way of example, see the Agreement between Italy and Nigeria, Agreement on migration (readmission), Rome, 12 September 2000, notified on 24/04/2006-20/02/2007, in OJ no. 180 SO dated 04/08/2011; the Agreement between Italy and Egypt, Cooperation Agreement on readmission, with executive protocol and annexes, Rome, 9 January 2007, notified on 24/03/2008-26/03/2008, in OJ no. 242 SO of 15/10/2008.

These agreements, but also the benefits contemplated in the aforementioned agreement on readmission, make the nature of the 'money for people' exchange explicit. This exchange is often doubly advantageous for the involved European countries, because they can make business in Africa, with the surplus of a simplified and externalised control of migratory flows. Of course, there is a price to pay: the absence of rights and democracy, but are we sure that this is really a cost for global economic governance?

In recent years – from 2015 to 2016 –,[21] readmission agreements (or clauses) are being increasingly stipulated in para-institutional contexts – with interpretations that can be even paradoxical, as in the case of the "EU-Turkey Agreement" – and through hyper-simplified, i.e., soft procedures: agendas, partnerships, declarations, exchanges of notes, memoranda (Gjergji 2016; Olivito 2020).

The advantages of informality are manifold: greater simplicity in the drafting and management of the agreement, impossibility of public debate and criticism (from parliamentary bodies to political and social forces), circumvention of the control instruments set up by the legal systems (primarily jurisdictional).

The model of these agreements[22] is the *EU-Turkey Statement*, 18 March 2016 (Favilli 2016), which appears in the form of a press release on the institutional website of the European Council.[23]

In reality the form is so 'informal' as to cast doubts on the nature of international agreement (Corten 2016; den Heijer, Spijkerboer 2016; Peers 2016). In its favour, however, we can find the substantialist criterion applied within the EU with regard to sources, and the content of the agreement, which involves legal obligations (not attributable to other acts). This is a typical act of *soft law*: "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects" (Snyder 1993, 32; Algostino 2016).

The informal character of the agreement contravenes EU law, which in matters covered by the Statement requires, in compliance with Articles 77-78 TFEU, the ordinary legislative procedure, i.e., for the adoption of an international agreement, to follow the procedure laid down in Article 218 TFEU, with the participation, given the subject, of the European Parliament.

21 The 2015-16 period marks a new phase in the European Union's migration policies, not for a change in their content, but for their acceleration and de-formalisation.

22 The character of 'model' of the EU-Turkey 'agreement' is recognised by political summits and in communications of the European Commission (for all, see European Commission, COM(2016) 385, 07/06/2016, where, with regard to the *EU-Turkey Statement*, it is stated that "its elements can inspire cooperation with other key third countries and point to the key levers to be activated").

23 `http://www.consilium.europa.eu/it/press/press-releases/2016/03/18-eu-turkey-statement`.

By the way, an essential feature of soft agreements appears here: the substantially exclusive role of the executive bodies in their drafting. Now, being aware that international relations traditionally belong to the domain of executive bodies, the almost total ousting of the legislative system marks a step beyond; a step which is consistent with the growing concentration of power within the executive bodies, whether they act within the scope of government or in the flexible and promiscuous space of 'governance'.

As for the content of the *Statement*, it is typical of readmission agreements: to make return easier,[24] with all that this implies in terms of its impact on the right to asylum, on respect for human rights and particularly on the prohibition of torture.

Therefore, the uncompromising choice of Turkey as partner and safe State demonstrates that the democratic or non-democratic nature of the country with which the agreement is entered into – i.e., the risk of migrants and refugees suffering torture or inhuman or degrading treatment – is considered irrelevant.

The soft character of such agreements concedes irresponsibility, in the face of a content that contravenes the rules of the European Union, as can be seen from the indeed paradoxical ruling of the General Court of the European Union.

An appeal was made to the Court, under Article 263 TFEU, by two Pakistani nationals and one Afghan national, seeking asylum in Greece, who feared, by virtue of the agreement, that they would be sent back to Turkey.[25] The appeals were rejected on the grounds of incompetence. In the press release issued on 18 March 2016 announcing the agreement – the Court order States – the terms "members of the European Council" and "European Union" are used inappropriately. On 17 and 18 March 2016, two separate meetings were held in parallel: the session of the European Council and an international summit, and in the latter the Heads of State and Government, in their own right and not as members of the European Council, adopted the *Statement*, together with their Turkish counterparts.[26] Therefore,

24 "Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrants intercepted in Turkish waters"; "All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion" (*EU-Turkey Statement*, 18 March 2016).

25 *Cases NF, NG and NM/European Council* (T-192/16, T-193/16 e T-257/16).

26 General Court (First Chamber, Extended Composition) of the European Union, *NF v European Council*, Case T-192/16, Order, 28 February 2017, but the orders adopted in relation to the other two cases are of the same substance.

> independently of whether it constitutes, as maintained by the European Council, the Council and the Commission, a political statement or, on the contrary, as the applicant submits, a measure capable of producing binding legal effects, the EU-Turkey statement, as published by means of Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure.[27]

Hence the Court's lacking of jurisdiction.

No agreement, no act, therefore no breach of EU law, neither in terms of procedure nor in terms of respect for human rights and international protection law. And – it may be added – recognition of an extreme margin of manoeuvre for the governments, who take on different legal guises in parallel, moving seamlessly from the EU's role to the one of international negotiators or of members of a political summit, as befits the 'habitat' of a governance, 'free' from procedures and forms (...and from the constraints imposed by democratic parameters).

Now, even assuming that the *Statement* dated 18 March 2016 is not an act of the European Union, because of the improbable dual role of the governmental summits, there's still a remark to be pointed out. On the one hand, if it is considered to be nothing more than a mere political declaration, the rejections carried out in its name are completely illegitimate. On the other hand, if it is seen as an international agreement, albeit informally entered into, it should still – irrespective of the national law of each State – respect the *ius cogens*, i.e., the "*prohibitive rules* from which derogation is prohibited" (Carreau, Marrella 2016, 65), to which, as we will see shortly, the principle of non-refoulement belongs.

In the *Progress Report on the Implementation of the European Agenda on Migration*,[28] in 2018, therefore *after* the order of the EU Court, it is stated that "the EU-Turkey Statement remains of paramount importance" with the boasting of the results achieved,[29] and, by way of

27 General Court (First Chamber, Extended Composition) of the European Union, *NF v European Council*, Case T-192/16, Order, 28 February 2017, § 71. The plaintiffs appealed against the ruling before the Court of Justice (Section I), which rejected their appeal, declaring it manifestly inadmissible (Case C-208/17, order of 12 September 2018).

28 Communication from the Commission to the European Parliament, the European Council and the Council, COM(2018) 301 final, Brussels, 16/05/2018.

29 There is no lack of official reporting on the state of application of the Declaration either; see, for example, COM(2017) 204 final, 02/03/2017, Report from the Commission to the European Parliament, the European Council and the Council, *Fifth Report on the Progress Made in the Implementation of the EU-Turkey Statement*.

confirmation of the 'validity' of the model, it is pointed out that "while securing third countries' cooperation on readmission of own nationals remains a challenge for the EU, 2017 has seen significant progress with several new *practical arrangements* concluded" (italics added).

In the early months of 2020, this 'non-agreement' was recalled at the time of the dramatic events involving refugees on the Greek-Turkish border by both the EU Minister of Foreign Affairs and the Turkish government, who request its mutual respect (Spagnolo 2020).

The *Statement* is, in short, an elusive and ambiguous act, in a legal limbo as far as responsibilities and recourses are concerned, generating *real* violations of human rights, first and foremost of that considered by Bobbio – we can almost say, with 'excessive' optimism – as an example of "privileged rights, because they are not placed in competition with other rights" and are not limited due to the occurrence of exceptional circumstances (Bobbio 1990, 11): the prohibition of torture, in this case, as it will be seen in the following pages, in its declination as a ban on refoulement (Amnesty International 2017, 18-20).

In actual fact, Italy had pre-empted the model of the *EU-Turkey Statement*, for example in a readmission agreement entered into with Tunisia in 2011. It is a 'ghost agreement': we only know about it because, in the decision issued on 15 December 2016 by the Grand Chamber of the European Court of Human Rights (ECHR), case of *Khlaifia and Others v. Italy*, in reconstructing the legislation relating to the case, in the context of bilateral relations between Italy and Tunisia, the Court cited an agreement stipulated on 5 April 2011 by the Italian Government with Tunisia "on the control of the wave of irregular immigration from that country". The text of that agreement "had not been made public", but some extracts from the minutes of the meeting where it had been 'concluded' were attached by the Italian Government in its application for referral before the Grand Chamber.[30]

We're talking about a non-public text, whose precise content is unknown. Yet even so the effects are tangible, like those suffered by the plaintiffs in the present case: three Tunisian citizens detained in inhuman and degrading conditions first in Lampedusa, then on a ship docked at the port of Palermo, in the end sent back to Tunisia, after a cursory verification of their identity, in application of the agreement of 5 April 2011.

The agreement, in fact, according to what we know, commits Tunisia to accept the immediate return of Tunisian citizens irregularly arrived in Italy after the conclusion of the agreement, "through simplified procedures, which envisage the simple identification of the

30 European Court of Human Rights (ECHR), Grand Chamber, *Khlaifia and Others v. Italy*, Application no. 16483/12, Judgement 15 December 2016, § 37.

person concerned by the Tunisian consular authorities"[31] (quick and simplified returns), but it also establishes the "strengthening the control of its borders in order to prevent new departures of illegal immigrants, with the help of logistical means made available to it by the Italian authorities"[32] (externalisation of the borders).

As regards the indifference towards the situation in the country with whom an agreement is entered into, we can cite the *Memorandum of Understanding between the Department of Public Security of the Italian Ministry of the Interior and the National Police of the Sudanese Ministry of the Interior for the Fight Against Crime, Management of Borders and Migratory Flows and Repatriation*, signed in Rome on 3 August 2016.

To quote just one figure (and without considering the current situation), in the year the agreement was concluded, Sudan was placed in the *Democracy Index* drawn up by *The Economist* (*Intelligence Unit*), among the (permanently) authoritarian regimes, with an index of 2.37 out of 10.[33]

Lastly, it is impossible not to mention the agreement with Libya, the *Memorandum of Understanding on Cooperation in the Field of Development, in the Fight Against Illegal Immigration, Trafficking in Human Beings, Smuggling and on the Strengthening of Border Security between the State of Libya and the Italian Republic*, signed by the Government of National Reconciliation of the State of Libya and the Government of the Italian Republic on 2 February 2017; an agreement concluded without any specific formal passage, i.e., in a simplified, or rather hyper-simplified form (in breach of Article 80 of the Constitution).

The Italian Government does not consider important that the other party does not hold jurisdiction over the entire Libyan State. The Memorandum was signed for Libya by the Libyan Government of National Unity led by Al-Serraj, recognised by the United Nations, despite the fact he's controlling only part of the territory, contended by the Parliament of Tobruk and General Haftar's army, as well as being occupied by dozens of armed groups. The statement, as early as 2017, written on the Farnesina website "Viaggiare sicuri" (Travelling Safely) which mentioned a "situation of instability and political-insti-

31 ECHR, Grand Chamber, *Khlaifia and Others v. Italy*, Application no. 16483/12, Judgement 15 December 2016, § 38.

32 ECHR, Grand Chamber, *Khlaifia and Others v. Italy*, Application no. 16483/12, Judgement 15 December 2016, § 37.

33 `https://infographics.economist.com/2017/DemocracyIndex`, as well as `https://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2016` (these are numbers which, despite residual perplexities as to the truth of these reports, continue to generate doubts in relation to the authoritarian nature); see also, among the various reports on the country, Amnesty International, `https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/sudan/`.

tutional fragmentation in the country",[34] did not seem to bother the Italian Government when it signed the agreement.

The focus of the agreement is the externalisation of borders, with the launch of cooperation initiatives "in order to stem the flows of illegal migrants and deal with the consequences arising from them". In particular, "technical and technological support for Libyan organisations in charge of the fight against illegal immigration", represented by the Border Guard and Coast Guard, and the "provision of temporary refugee camps in Libya, under the exclusive control of the Libyan Ministry of the Interior, pending repatriation or voluntary return to the countries of origin [...]", were envisaged as a solution for migrants crossing Libya with plans to reach Europe by sea.

In July 2020, in the presence of a widespread civil war, with reports and judgments describing unspeakable tortures in centres for migrants,[35] the Italian Parliament, with a majority vote, refinanced the Italian mission in Libya (among other missions abroad), together with the support of the Libyan Coast Guard.

The agreement envisages a tacit renewal at its expiry date, after three years (on 2 February 2020); the draft of the renegotiation of the *Memorandum* sent by the Italian Government was published in the press on 12 February 2020: apart from the occasional mention of human rights, as it has been said, it appears "disconcerting" and "chilling" (ASGI 2020) to still read about "support to security and military institutions in order to stem the flow of irregular migrants", as well as, in the deafening silence on the tortures perpetrated, the commitment to "*improve* [...] the conditions of migrants detained in reception centres" (italics added).

3 Returns, Relocation of Controls and Closure of Ports. Violation of the Principle of Non-Refoulement and Inhuman or Degrading Treatment

Readmission agreements are likely to collide in several ways with the prohibition of torture, established in the main international catalogues on human rights (now part of the *ius cogens*) and in region-

34 http://www.viaggiaresicuri.it/paesi/dettaglio/libia.html [valid on 04/05/2017, published on 11/01/2017]; on 18 June 2020, the website states: "we repeat our invitation to Italians not to travel to Libya and, to those present, to temporarily leave the country given the very precarious security situation".

35 In addition to the sentences mentioned below, see, *ex multis*, the report of the United Nations High Commissioner for Human Rights, *Desperate and Dangerous: Report on the Human Rights Situation of Migrants and Refugees in Libya*, 20 December 2018.

al pacts[36] and constitutions, and subject of specific conventions;[37] as well as, more recently, of the 1998 Rome *Statute of the International Criminal Court*, which includes torture among crimes against humanity, if committed "as part of a widespread or systematic attack against civilian populations".

Yet, today, the statement that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"[38] cedes to the policies of closing and externalising borders, which violate the ban on torture in several ways.

There is no shortage of formulas in the readmission agreements for the safeguarding of human rights, as: "fully committed in promoting and respecting human rights",[39] "the Parties undertake to interpret and apply this Memorandum in compliance with the international obligations and human rights agreements to which the two countries are party".[40] But the nature of the agreements and the parties shows that they are no more than usual expressions.

Firstly, readmission agreements, when entered into with States such as Libya, violate the prohibition of torture and inhuman or degrading treatment by infringing the principle of non-refoulement:

> 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. (Convention Relating to the Status of Refugees, 1951, Art. 33, § 1)[41]

36 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, Art. 3; *Charter of Fundamental Rights of the European Union*, 2000, Art. 4; *American Convention on Human Rights*, 1969, Art. 5 (c. 2); *African Charter on Human and Peoples' Rights*, 1981, Art. 5.

37 Within the scope of the United Nations, reference can be made to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); at continental level, we can cite the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1987) and the *Inter-American Convention to Prevent and Punish Torture* (1984).

38 Likewise, the *Universal Declaration of Human Rights* of 1948, Art. 5; similarly, the *International Covenant on Civil and Political Rights* of 1966, Art. 7.

39 *Italy-Sudan Memorandum* of 2016, preamble.

40 *Memorandum of Understanding between Italy and Libya* of 2017, Art. 5.

41 The principle of non-refoulement is enshrined in numerous international treaties (*ex multis*, *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 3), regional treaties (see for example, *Charter of Fundamental Rights of the European Union*, Art. 19) and part of the customary international law, also in the sense of *ius cogens*.

As clarified by the European Court of Human Rights, which links the principle of non-refoulement to Art. 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which prohibits torture, the rationale of the rule is to protect the life and freedom of every person, which implies that any human person (regardless of possession of, or desire to obtain, refugee status) is entitled to it.

The principle of non-refoulement "is absolute and mandatory" and undoubtedly its effectiveness cannot be limited through bilateral international agreements with third countries, such as readmission agreements (Grosso 2009, 17).

In this perspective, the Grand Chamber of the European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*,[42] condemns the policy of Italian refoulement (relating to 2009),[43] in relation to Art. 3 of the *European Convention on Human Rights*, because, with the transfer of the applicants, in the case in question to Libya, the Italian authorities exposed them "in full knowledge of the facts" to treatment in breach of the Convention,[44] given the existence of "reliable sources" who reveal how, in Libya "any person entering the country by illegal means was deemed to be clandestine and no distinction was made between irregular migrants and asylum-seekers" and "were systematically arrested and detained in conditions […] inhuman".[45]

Non-derogation and absoluteness operate not only in relation to formal data, but also with regard to effectiveness: a State is safe and does not expose people to the risk of suffering, first and foremost, torture or inhuman or degrading treatment, when it *effectively* guarantees that this does not happen; an approach – based on tangible guarantees – which is a constant in the jurisprudence of the Court of Strasbourg[46] and forms the basis of the protection of rights in the Italian Constitution (emblematically, see Art. 3, § 2).

The European Court of Human Rights, as well as the EU Court of Justice, have made it clear, for example, that there is no absolute

42 ECHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012, § 128.

43 There is also no shortage of rulings by the ECHR, such as *N.D. and N.T. v. Spain*, 13 February 2020, and *Ilias and Ahmed v. Hungary*, 21 November 2019, which show a much more 'accommodating' attitude towards State policies and – we might add – a much less secure guarantee of migrants' rights at the borders.

44 ECHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012, § 137.

45 ECHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012, parr. 128 and 125.

46 The European Court of Human Rights has long pointed out that rights are enshrined not as "theoretical or illusory but rights that are practical and effective" (ECHR, *Artico v. Italy*, ruling 13 May 1980, § 33).

presumption of security even for the Member States of the European Union.[47]

The breach of the principle of non-refoulement, and of the prohibition of torture, again with a view to effective protection, may also occur in the case of indirect repatriation. The State of (first) referral must provide sufficient assurance that it will not return migrants to countries where there is a risk that they will be subject to treatment forbidden by Art. 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:

> It is a matter for the State carrying out the return to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed to his country of origin without an assessment of the risks faced.[48]

Another profile is the one of indirect repatriation, for which Strasbourg Court, in *Hirsi Jamaa and Others v. Italy* judgment, found Italy guilty of violation of Art. 3 the Convention:

> the Court considers that, when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin.[49]

Secondly, a violation of the prohibition of torture – as a symbol of violation of human rights – may occur when third States are entrusted with checks, identification and detention. The Libyan centres for migrants are a tragic evidence to the fact that these are not only possibilities, but established realities. When agreements are entered into with non-democratic States or dictatorships, it is (almost) certain that the prohibition of torture will not be respected.

Assigning rescue at sea to the Libyan coastguard, as well as entrusting Libya with the management of migrants, now means, with no possibility to invoke the excuse of 'not knowing', to condemn peo-

47 In this sense, for ECHR jurisprudence, see, among others, Grand Chamber, *M.S.S. v. Belgium and Greece*, ruling of 21 January 2011, Application no. 30696/09; for EU jurisprudence, Court of Justice of the European Union (Grand Chamber), joined cases C-411/10, *N.S. v. Secretary of State for the Home Department*, and C-493/10, *M.E. et al. v. Refugee Applications Commissioner Minister for Justice, Equality and Law Reform*, ruling of 21 December 2011.

48 Likewise, ECHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012, § 147, which reflects consolidated jurisprudence.

49 ECHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012, § 156.

ple to a life of torture and violence: in this sense we can talk about relocated torture, or perpetration of torture through a third party.

There are countless reports, or stances by international bodies, that describe the dramatic condition of migrants in Libya; just about Italy, we can mention the ruling of the Milan Court of Assizes which demonstrated, in a documented and crude judgment in 2017, without a shadow of a doubt, the existence of violence and torture inside the centres housing migrants.[50]

The Court of Trapani on 3 June 2019 delivered a verdict (in the *Vos Thalassa* case) in which, after having reconstructed the basis in international law of the principle of non-refoulement and the prohibition of torture, stated: the *Italy-Libya Memorandum* is

> invalid, given that, under article 53 of the Vienna Convention on the Law of Treaties (1969) "*any treaty which, at the time of its conclusion, contravenes an imperative rule of general international law shall be null and void*".

This *Memorandum* is also incompatible with Art. 10, § 1 of the Constitution (about international customary rules), given the customary nature of non-refoulement principle. Moreover, the law authorising ratification pursuant to Art. 80 of the Constitution is missing, so at most it would be "a legally non-binding agreement".[51]

Thirdly, readmission agreements, in their anxiety to ease returns, may also lead to introduce identification, detention and deportation procedures involving inhumane or degrading treatment[52] into the countries from which people are returned: think of the *hotspots*,[53] but also Deportation Centres (known as *Centri di permanenza per il rimpatrio* – CPR, in Italy).[54] The process of dehumanisation of the migrant, and the denial of his legal subjectivity (Gjergji 2016, 106), which culminates with the policy of closure of ports and indifference towards

50 Milan Court of Assizes, I, ruling 10 October 2017 (filed on 1 December 2017), confirmed by Milan Court of Appeal, I, no. 9/2019, hearing of 20 March 2019; see also Agrigento Court of Assizes, Section II, ruling 12 June 2018 (filed on 22 June 2019).

51 Court of Trapani, Office of the Judge for Preliminary Investigations, ruling of 23 May 2019 (filed on 3 June 2019).

52 More recently, and emblematically, see EU Court of Justice, Grand Chamber, ruling of 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, on the detention of asylum seekers in the transit zones on the border with Serbia.

53 See Amnesty International 2016; more recently, see the shared note of the Association for Legal Studies for Immigration, ActionAid, ARCI, Borderline Sicilia, Indie-Watch, Medici per i Diritti Umani – MEDU, Sea-Watch. *Illegal Detention in the Messina Hotspot of Migrants Disembarked from Sea-Watch*, 10 July 2019.

54 National Authority for the rights of persons detained or deprived of their personal freedom, *Report on the Thematic Visits Carried Out in the Deportation Centres in Italy (February-March 2018)*, Rome, 6 September 2018.

those who die while attempting to reach Europe, is also expressed in the creation of a sub-law, made up of circulars, internal regulations, tender specifications.[55] Such sub-law testifies to the failure of claims for equality, of the centrality of the human being, at the basis of constitutionalism and democracy, and in its flexibility and fluidity the 'possibility' of inhuman or degrading treatment is easily insinuated.

Fourthly, torture or, *at least*, inhuman or degrading treatment can be considered in relation to the policy of the 'closure of ports', strictly related to the approach of externalisation of borders behind the readmission agreements, with the forced detention of migrants – which leads the courts to envisage abduction (Zirulia, Cancellaro 2019a)[56] – on the ships that have rescued them.

If we only consider the events of recent years, we can remember: the case of the *Aquarius* (June 2018), which sailed the Mediterranean for days without finding an harbour that would receive it; the Italian Coast Guard vessel *Diciotti*, detained in the port of Catania with 177 migrants on board (August 2018); the *Sea Watch* 3 and *Sea Eye*, both forced to remain at sea for 20 and 13 days between December 2018 and January 2019 respectively. During the summer of 2019, with the entry into force of the "Safety Decree bis" (Decree-Law no. 53 of 14 June 2019), converted into law (Law no. 77 of 8 August 2019) in the following weeks, several vessels were blocked, forbidden from entering, transiting or stopping in Italian territorial waters and also subject to the heavy penalties introduced by the decree and exacerbated by the law. In June 2019, the *Sea Watch 3* was stranded at sea again for 17 days; in July 2019, the sailing ship *Alex* belonging to the NGO Mediterranea Saving Humans was left for days without permission for disembarkation; in August 2019, the *Ocean Viking*, a vessel managed by SOS Méditerranée and Médecins sans Frontières, was forced to remain at sea for 13 days between Malta and Lampedusa, with 356 people on board, while the *Open Arms* carrying over 100 people was prevented from landing for 19 days. The *Eleonore*, belonging to the NGO Lifeline, spent 8 days waiting before breaking the ban on entering territorial waters and landing, and the *Mare Jonio* was hit by the sanctions of the decree after days at sea.

On 7 April 2020, an inter-ministerial decree[57] stated as follows:

55 For a critical reflection on the use of circulars in the field of immigration, see Gjergji 2013.

56 See the case of the Italian Coast Guard vessel, the *Diciotti*, but also the case of the *Open Arms*, where, in addition to the proceedings for abduction, the crime of omission and refusal of official acts is alleged (Public Prosecutor's Office at the Court of Agrigento, Decree of emergency preventive abduction, 20 August 2019, no. 3770/2019 R.G. criminal information (Art. 328, § 1, Italian Criminal Code).

57 Decree no. 150 of 7 April 2020, adopted by the Minister of Infrastructure and Transport, in agreement with the Minister of Foreign Affairs and International Cooperation,

> For the entire duration of the national health emergency resulting from the spread of the COVID-19 virus, Italian ports do not guarantee the necessary requirements to be classified and defined as a Place of Safety […] for rescues carried out by foreign-flagged vessels from outside the Italian SAR area.

Now, apart from the consideration that the right to health is a fundamental right of the "individual" (Art. 32 Constitution), including victims of shipwrecks who have been rescued, there is no doubt that the right to a safe haven is a necessary condition for the protection of the fundamental and acknowledged rights of every human being, such as the right to life, the prohibition of inhuman or degrading treatment (if not torture), the right to asylum.

The conditions on board ships forced to stay at sea for days constitute inhuman or degrading treatment, for which those who order the closure of ports are responsible. Simply by way of testimony,

> conditions on board the *Diciotti* were appalling. It was impossible to stay in the sun, but there was only one canopy. There was not enough shade for everyone, and when it rained we got wet. There were only two bathrooms.[58]

Inhuman or degrading treatment consists of the conditions in which the forced stay at sea takes place (lack of space, toilets, water) and is aggravated by the personal conditions of many migrants, vulnerable people who "have suffered major traumas". As it has been witnessed, "several of them have suffered torture or sexual violence in Libya" and "the wait to disembark, spent in a confined space in the middle of the sea, only makes their condition worse".[59]

The decree that broke the deadlock affecting the *Open Arms*, which had been at sea for 19 days, on 20 August 2019, stated that "the ship was clearly overcrowded" and "in appalling conditions" ("the migrants occupied the entire deck of the ship, lying on the floor, with only two squat toilets available on board […]") and described "a state of exasperation among the people who had been on board for several days […], which led to very critical health situations (at physical and psychological level)".[60]

the Minister of the Interior and the Minister of Health.

58 Testimony of B.B., Eritrean, 29 years old, from Oxfam Italy, Borderline Sicily, *Italy-Libya agreement: human rights in checkmate in 4 moves*, 2019.

59 L. Pigozzi, doctor working with Médecins Sans Frontières, in C. Lania, *Those 356 ghosts of the Ocean Viking without a dock*, in *il manifesto*, 21 August 2019.

60 Public Prosecutor's Office at the Court of Agrigento, Decree of emergency preventive seizure, 20 August 2019, no. 3770/2019 R.G. criminal information.

Previously, again in relation to the *Open Arms*, in the appeal for the annulment of the provision of 1st August 2019 (made by the Minister of the Interior, in agreement with the Minister of Defence and the Minister of Infrastructure and Transport), forbidding the ship from entering, transiting and stopping in Italian territorial waters, the Regional Administrative Court (TAR) of Lazio had already pointed out, with regard to the danger posed by delay, that the documentation presented (medical report, psychological report, declaration of the head of the mission) envisaged a "situation of exceptional gravity and urgency", "such as to justify the granting […] of the request for monocratic precautionary protection, in order to allow the *Open Arms* to enter Italian territorial waters".[61]

The blocking of vessels gives rise to numerous statements by the institutions guarantors of rights: from ordinary judges to the National Authority for the rights of persons detained or deprived of personal freedom and to the Authority for children and adolescents; from the United Nations High Commissioner for Refugees (UNHCR) to the European Court of Human Rights (exemplary, in this sense, are the interventions concerning the blocking of the *Sea Watch 3* in January 2019, mentioned by Del Guercio 2019).

Preventing entry into territorial waters violates the prohibition of torture, at least as a prohibition of inhuman or degrading treatment, due to the conditions of the forced stay – if not outright 'detention' – on ships, and because of the violation of the duty of rescue (aimed at protecting the life, together with the conditions, both medical and psychological, of those rescued at sea). But there's also the possibility of assuming the commission of the crime of torture under Art. 613*bis* of the Italian Criminal Code (Zirulia, Cancellaro 2019b).

As pointed out by the Court of Agrigento (Office of the Judge for Preliminary Investigations)[62] – in the ordinance, filed on 2 July 2019, in the proceedings against Carola Rackete, captain of the *Sea Watch 3*, under investigation for crimes of resistance or violence against warships (Art. 1100 of the Italian Civil Code) and resistance to public officials (Art. 337 of the Italian Criminal Code), in relation to her conduct during the night of 29 June 2019 while entering the port of Lampedusa[63] – the Italian legal system, and the international incorporated rules, establish the mandatory obligation to guaran-

61 TAR Lazio, Section Prima Ter, Monocratic precautionary decree, 14 August 2019, proc. no. 10780/2019 R.G.

62 Order on the request for validation of arrest and application of the precautionary measure, 2 July 2019 (no. 3169/19 R.G.N.R.; no. 2592/19 R.G.GIP).

63 With regard to the *Sea Watch 3* incident, an application for interim measures was also submitted to the European Court of Human Rights, in relation to Articles 2 and 3 of the *European Convention on Human Rights*, but the Court rejected the application (25 June 2019).

tee rescue, as a duty which "does not end with the mere taking on board of shipwrecked people, but with their being accompanied to the [...] safe port".[64] The Court of Cassation, again in relation to the Rackete case, stated:

> A ship at sea which, in addition to being at the mercy of adverse meteorological events, does not allow the respect of the fundamental rights of those rescued, cannot be qualified as a "safe place", due to the evident absence of such condition.[65]

According to the previously mentioned ordinance of the Court of Agrigento, "the obligation to save lives at sea is a duty of all States and takes precedence over bilateral rules and agreements aimed at contrasting irregular immigration".[66] Such obligation consequently should prevail on ministerial directives on closed ports (even when 'covered' by laws),[67] by virtue of Arts 10, § 1, and 117, § 1, of the Constitution.[68]

The policy of criminalisation of solidarity (Masera 2019a; Amnesty International 2020) closes the circle of migration policies that kill and torture, punishing inconvenient witnesses of a border closure that causes a veritable genocide of the migrant people.

The appropriation and violence behind the idea of the border (Mezzadra 2018) and the hypocrisy of 'democratic States' that relocate torture become evident. The words attributed by Livy to Romulus when he killed his brother Remus, guilty of having climbed over the walls of the newly founded Rome, are tragically topical: "So, from now on, anyone who dares to climb over my walls shall die".

64 In the case in point, the Court thereby refers to Article 51 of the Italian Criminal Code, with the exclusion of punishability because the act was carried out in fulfilment of a duty imposed by a legal provision.

65 Supreme Court of Cassation, III Criminal Section, Judg. no. 112, 16 January 2020 (deposited on 20 February 2020).

66 Public Prosecutor's Office at the Court of Agrigento, Decree of emergency preventive seizure, 20 August 2019, no. 3770/2019 R.G. criminal information.

67 Law no. 77 of 8 August 2019.

68 "By virtue of the superordinate nature of conventional and legislative sources [...], no suitability to impose the obligations incumbent on the captain of *Sea Watch 3* [...] could be covered by ministerial directives on 'closed ports' [...]" (Court of Agrigento, Office of the Judge for Preliminary Investigations, Ordinance on the request for validation of arrest and application of the precautionary measure, 2 July 2019 no. 3169/19 R.G.N.R.; no. 2592/19 R.G.GIP).

4 Conclusions. State Torture?

Returning people to Libya, or preventing them from crossing the borders of Niger (Spagnolo 2018) or Sudan, as well as criminalising and obstructing NGOs operating in the Mediterranean, closing harbours or delegating rescue at sea to the Libyan authorities, violates the prohibition of torture and inhuman or degrading treatment and constitutes a crime against humanity.

This is certainly perpetrated by those who practise torture themselves, as well as by the States that just tolerate it, but the governments of the European States and the EU institutions are definitely not exempt from responsibility. As a matter of fact, in making certain political choices, they cannot avoid envisaging the subsequent scenarios, as stated by the European Court of Human Rights in relation to the Libyan situation: "The Italian authorities knew or should have known".[69]

As declared by the National Authority for the Rights of Persons Detained or Deprived of Personal Freedom, in the person of Mauro Palma, about the blocking at sea of the *Mare Jonio* (August 2019), Italy may be accused – with consequent profiles of responsibility at international level – of the violation of the *European Convention on Human Rights* and the 1951 *Geneva Convention on the Status of Refugees*.[70]

In addition to this,

> the immigration and asylum policies and practices of the EU and its Member States constitute a total denial of the fundamental rights of people and migrants, and are veritable crimes against humanity: even though they may not be personally ascribable to individual perpetrators according to commonly agreed criminal law definitions they must be recognised as 'system crimes'. (Permanent Peoples' Tribunal)[71]

In this perspective, a complaint to the International Criminal Court was recently presented – in June 2019 – accusing the European Union and the Member States of crimes against humanity for policies that have made the Mediterranean route the most lethal migration route in the world and for orchestrating forced transfers to detention camps in Libya, similar to concentration camps, where atrocious crimes are committed (Pasquero 2020).

69 ECHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Judgment 23 February 2012.

70 Appeal of the National Authority for the situation of *Mare Jonio*, 30 August 2019, press release (http://www.garantenazionaleprivatiliberta.it).

71 Permanent Peoples' Tribunal, Sessions on the violation of human rights of migrants and refugee people (2017-2019), *Final Document*, European Parliament, Brussels, 9 April 2019.

Those who externalise borders, relocate and subcontract torture and inhuman or degrading treatment are co-responsible, as well as those who take measures to close ports, in condemning shipwrecked people to inhuman or degrading treatment. Whoever, following the Italian policies, signs or renews the 2017 *Memorandum of Understanding with Libya* (Minister Minniti, Gentiloni government; Conte-bis government), whoever closes harbours and criminalises sea rescues (Minister Salvini, Conte government; Conte-bis government), whoever continues to vote for the refinancing of the Libyan Coast Guard (the majority of the members of parliament of the 18th legislature), becomes complicit, to take just the most shocking case, in the crimes committed in the centres for migrants in Libya, not to mention the responsibility for the deaths at sea.

And there is more: what is happening questions the democratic nature itself of States that adopt policies and enter into agreements, which actually (but the rights exist insofar as they are effective) contemplate torture or directly cause inhuman or degrading treatment.

'State torture' is by no means new – Genoa 2001 *docet*. It can – *must* – be stopped and punished in courtrooms, but strong social mobilisation is also needed, with disobedience if necessary, in the name of rights, in order to spread acts of testimony, such as those of the brave captains of NGO ships and of the migrants on the *Vos Thalassa*, who rose up against the order issued by the Italian authorities to the ship's captain to bring them back to Libya (Masera 2019b; Ruggiero 2020).

Torture, relocated or otherwise, towards the migrants is a sign of an authoritarian involution of the State consistency with the dogmas of a global governance marked by the hegemony of a model and a social class. This situation reveals a class conflict which is catastrophic for those who, even with their mere existence, show the inequalities and violence of the neoliberal system.

At the same time, the migrants, as well as people living on the fringes of society, but also those who express dissent, constitute a convenient enemy against whom to channel social anger, creating a fictitious community of intent between people at the top and the ones at the bottom of the pyramid (the atomised masses), in order to prevent inequality from exploding upwards.[72] An enemy is created and a further effect is the inhibition of a conscience – class-conscience (to use a term which not surprisingly is ostracised) – ca-

72 Emblematic in this sense are the various 'security decrees', such as, to mention the most recent, the so-called Minniti package (Decree-Law no. 13 of 2017, converted into Law no. 46 of 2017, and Decree-Law no. 14 of 2017, converted into Law no. 48 of 2017) and the Salvini's decrees (Decree-Law no. 113 of 2018, converted into Law no. 113 of 2018. 132 of 2018, Decree-Law no. 53 of 2019, converted into Law no. 77 of 2018, and Decree-Law no. 53 of 2019, converted into Law no. 77 of 2019).

pable of uniting those who, in different places, suffer the effects of neoliberalism.

Operations of dehumanisation occur. We're seeing the return of Francisco De Vitoria's *hebetes* (*Relectio de Indis*, 1539):[73] migrants considered as not fully human beings, against whom torture and inhuman or degrading treatment acquire a different weight, tragically revealing the ambiguities that accompany the proclamation of universal rights and their submission to economic interests.

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