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THE CONSTITUTIONAL FALLOUTS OF BORDER MANAGEMENT THROUGH INFORMAL AND DEFORMALISED EXTERNAL ACTION: THE CASE OF ITALY AND THE EU

di Elisa Olivito

Abstract: *Il saggio esamina alcune questioni di diritto dell'Unione europea e di diritto costituzionale italiano concernenti la dichiarazione UE-Turchia del 2016, il Memorandum d'intesa Italia-Libia del 2017 e l'accordo di cooperazione Italia-Niger del 2017. Si vuole evidenziare come nella gestione dell'immigrazione e delle frontiere – a livello europeo e nazionale – il processo di "de-formalizzazione" e "informalizzazione" degli accordi internazionali contribuisca a riportare il diritto dell'immigrazione a un metodo intergovernativo. L'assunto secondo cui i suddetti accordi sarebbero solo atti politici e perciò insindacabili rafforza il contestabile obiettivo di rimuoverli dallo Stato di diritto e dai vincoli costituzionali.*

Abstract: *The essay examines some issues of EU law and Italian constitutional law in relation to the 2016 EU-Turkey Statement, the 2017 Italy-Libya Memorandum of Understanding and the 2017 Italy-Niger Agreement of Cooperation. The Author aims to demonstrate how in the field of migration and border management – both at the EU and national level – the process of "de-formalisation" and "informalisation" of international agreements contributes to bringing migration law back to an intergovernmental method. The assumption that the aforementioned agreements are just unquestionable political acts reinforces the dubious goal to remove them from the rule of law and from constitutional constraints.*

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1. Introduction: constitutional dilemmas about the externalisation of border management

In view of the constitutional implications of migration law, it is of particular importance to stress that not only are EU external border control and migration management entrusted to bilateral executive agreements with third countries, but these acts are sometimes removed from both prior parliamentary scrutiny and from due forms of publicity. Two cases involving Italy, and the other concerning the European Union (hereafter the EU), show how the outsourcing of border control is problematic from a constitutional standpoint, both for the contents of the agreements and for the informal and deformalised ways in which that outsourcing takes place[1]. If it is true that respecting legal forms is a matter of substance, the circumvention of parliamentary procedures related to foreign policy touches directly upon the substance of (the EU's and member states') constitutional democracy and, at the same time, places a mortgage on how we have thus far conceptualised the concepts of foreign power, legal space and territorial sovereignty.

It is indeed well-known that an on-going process to externalise the control of EU external borders has been underway for years, and that it is working in multiple directions.

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1. By the expression «informal agreements» I mean agreements that are kept secret, outside the procedure provided by law to invoke State secrecy; «deformalised agreements» means, on the other hand, agreements made according to a procedure other than that provided for by national or supranational legislation to conclude certain kinds of international agreements.

Also as a consequence of the current Common European Asylum System, EU member states with internal borders externalise that control to peripheral member states (especially, but not exclusively, Greece, Italy and Spain), which shoulder the correlated burdens and responsibilities; correspondingly, these member states, together with the EU, externalise to third countries the fulfilment and the ultimate responsibility of effective mechanisms of *refoulement* at the border or readmission in the State of origin or transit[2].

This twofold level of externalisation, which does not exhaust all forms of such a strategy[3], is the result of a double development of the policies relating to the EU area of freedom, security and justice (Title V TFEU): *i.* the prospective idea of the EU without internal border controls has been matched with the integrated system of external border management[4]; *ii.* external action in the matter of migration and asylum is depicted as a logical and consequential step of the internal free movement area, as if this were necessarily functional to its preservation. Nonetheless, the correlation between internal free movement and the need to provide the EU with external(ised) border control rests not upon an irrefutable logical connection, but rather upon the increased retreat of the EU's Fortress Europe project[5], as it is now enshrined in Article 3, paragraph 2, TEU and Article 67, paragraph 2, TFEU. As some scholars have pointed out, the link between the security deficit flowing from the opening of the EU internal frontiers and the correlated need of external compensatory measures, in order to fill that gap, is one of the stronger and symbolic myths of the EU's self-presentation[6].

With this debate in mind and taking into consideration a few case-study, my reflections are about the scope and the problematic constitutional categorisation of the international agreements through which that externalisation strategy is put in place. The 2016 European Union-Turkey Statement and two executive agreements[7] signed in 2017 by Italy with

2. For an analysis of the externalisation of migration control and its impact especially on Greece and Italy see A. Triandafyllidou, A. Dimitriadi, *Migration Management at the Outposts of the European Union*, in *Griffith Law Review*, 2013, p. 600.

3. See V. Moreno-Lax, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford, Oxford University Press, 2017, p. 39 and p. 112.

4. See, among others, V. Moreno-Lax, supra note 3, p. 27.

5. About this portrayal of the EU see, among others, S. Peers, *Building Fortress Europe: the development of EU migration law*, in *Common Market Law Review*, 1998, p. 1235.

6. See S. Peers, *EU Justice and Home Affairs Law*, I, *EU Immigration and Asylum Law*, Oxford, Oxford University Press, 2016, p. 68; D. Bigo, *Border Regimes, Police Cooperation and Security in an Enlarged European Union*, in J. Zielonka (ed.), *Europe Unbound. Enlarging and Reshaping the Boundaries of the European Union*, New York, Routledge, 2002, p. 214.

7. An executive agreement is an international agreement concluded by the heads of government of two or more countries without prior formal approval by a legislative body, in a state in which treaties are usually ratified only with such approval. It therefore enters into force upon signature of the executive branch.

Indeed, notwithstanding the fact that the Italian Government resorts to executive agreements as well, it is important to stress what Article 80 of the Italian Constitution states: «Parliament shall authorise *by law* the ratification of such

Libya and Niger can be considered as part of an overall strategy fostered by the EU to strengthen the relationship with third countries, in order to support the fight against irregular migration and to manage migratory flows towards EU member states. But, as I propose to prove, in all three cases the way that strategy has been implemented doesn't meet basic constitutional requirements.

The aforementioned agreements have in fact to be set in a broader context of bilateral agreements with third countries, signed both by the EU and the member states to contain asylum seekers and other migrants outside Europe. Indeed the predilection for agreements with third countries can be considered as a sign of the inadequacy of EU and national regulations in managing the so called mixed migration flows[8] (*id est* flows consisting of economic migrants and people potentially deserving of international protection)[9]. It is also proof of the choice to shift the burdens of these policies onto countries of transit, in order to prevent the arrival of migrants on the EU external borders and to delegate to these countries the various responsibilities of EU member states for both asylum seekers and "voluntary" migrants.

Particularly after the adoption of the Dublin III Regulation[10], and not unlike other EU member states, Italy has signed many bilateral agreements, even implicitly relying on the concept of safe third country[11] (and that of safe country of origin or country of first

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international treaties as have *a political nature*, require arbitration or a legal settlement, entail change of borders, spending or new legislation» (italics added).

See *infra*, § 2.

8. In Italy in particular, this inadequacy has lately resulted in the criminalisation of NGOs operating at sea (see Decree-Law no. 53/2019, converted into Law no. 77/2019 and known as «decreto sicurezza *bis*») and in the tightening of the requirements for the recognition of international protection, despite the broader protection provided by Article 10, paragraph 3, of the Italian Constitution (see Decree-Law no. 113/2018, converted into Law no. 132/2018, and better known as «decreto sicurezza Salvini»).

9. The distinction between voluntary migrants and asylum seekers is often biased, because it is a tool to evade member states' responsibilities: see M. Sharpe, *Mixed Up: International Law and the Meaning(s) of "Mixed Migration"*, in *Refugee Survey Quarterly*, 2018, p. 116.

10. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member states responsible for examining an application for international protection lodged in one of the member states by a third-country national or stateless person (recast) [2013] OJ L180/31 (hereafter the «Dublin III Regulation»).

11. As to the relationship between this concept, the evolution of the Dublin System and readmission agreements see E. Kjaergaard, *The Concept of 'Safe Third Country' in Contemporary European Refugee Law*, in *International Journal of Refugee Law*, 1994, p. 649; A. Achermann and M. Gattiker, *Safe Third Countries: European Developments*, in *International Journal of Refugee Law*, 1995, p. 19.

As regards the *non-arrival practices* implemented by southern EU member states and the relevant legal questions, see M.-T. Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension - The Safe Third Country Concept Revisited*, in *International Journal of Refugee Law*, 2006, p. 571.

The fact remains that EU member states cannot assume the concept of «safe third country» as a non-rebuttable presumption: see ECJ, *N.S. and M.E.*, joined cases C-411/10 and C-493/10, judgement of 21 December 2011; ECtHR, *Ilias and Ahmed v Hungary* (Grand Chamber), Application no 47287/15, judgement of 21 November 2019.

asylum)[12]. The EU has also resorted to these tools, with the objective of encouraging the externalisation of migration and asylum policies, and of determining the pace in the juxtaposition between cooperation with third countries and the need to contain migration flows[13].

In this sense, the 2016 European Union-Turkey Statement and the 2017 Italian agreements with Libya and Niger confirm above all that the external action of the EU and the member states is marked by cooperation agreements with third countries, which are usually undertaken together with (or overlap with) agreements in the field of migration issues. It is a kind of reverse and compensatory cooperation, in the sense that third countries are called to cooperate in stopping irregular migrants and managing EU external borders[14]. The underlying idea is that, in a long-term perspective, the decreased migratory flows can stem especially from aid plans in favour of the countries of origin.

For the purposes of my research, the connection that the EU external action and the Italian legislation have built between international cooperation programs and the management of migration flows is meaningful, because it reveals the inner political nature of this area of relations with third countries and the difficulty of separating international agreements concerning migration issues from the whole set, taken together, of relations with the countries involved[15].

This correlation has relevant constitutional implications first of all at the domestic level: the aforementioned agreements with Libya and Niger cannot be qualified as agreements of a purely technical nature and, in the case of Italy, this implies that their ratification has to be authorised by the Italian Parliament, according to Article 80 of the Constitution.

12. Italy had not adopted a national list of «safe countries», but Article 7-*bis* of Decree-Law no. 113/2018 (as converted into Law no. 132/2018) has recently provided that «[b]y decree of the Minister of Foreign Affairs and International Cooperation, in consultation with the Ministers of the Interior and Justice, the list of safe countries of origin is adopted [...]. The list of safe countries of origin is updated periodically and is notified to the EU Commission». A few months ago the Minister of Foreign Affairs and International Cooperation has thus signed a decree establishing a list of countries designated as «safe countries of origin» (Ministerial Decree of 4 October 2019).

The list contains 13 countries: Algeria, Morocco, Tunisia, Albania, Bosnia and Herzegovina, Kosovo, North Macedonia, Montenegro, Serbia, Ukraine, Ghana, Senegal and Cape Verde. The list of «safe countries of origin» has been presented as a «return decree» (*decreto rimpatri*). However, according to the Italian Council for Refugees, the decree *per se* has no impact on Italy's return policy.

13. The strong push by the EU towards negotiating agreements between member states and third countries as informal agreements was also made clear by the Commission's proposal for an «Action plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity» (4 July 2017, press release): «The Commission will [...] step up work to secure readmission agreements (*or equivalent informal arrangements*) with countries of origin and transit, with the support of member states» (italics added).

14. See F. Ippolito, *Compacts di partenariato con Stati di migrazione: 'i vestiti nuovi dell'imperatore'?*, in Federalismi.it, 1/2017, p. 17.

15. C. Favilli, *Quali modalità di conclusione degli accordi internazionali in materia di immigrazione?*, in *Riv. dir. intern.*, 2005, p. 159.

Otherwise, the exclusion of the Italian Parliament from the procedure of concluding those agreements results in expelling the Legislature from a large part of the political choices relating to migration.

Such considerations can also be made for the EU policy and the way in which a similar strategy of externalising border control and migration controls is conducted at this level. The reason for this is that, because of different pressures, the EU and member states consider externalisation to be the succedaneum of the EU legislation that would otherwise penalise peripheral member states, and a sign of a new device to contain migration flows.

2. Executive agreements in the domestic domain: a constitutional perspective

First of all, it is necessary to reflect on those agreements signed in a simplified form (and better known as executive agreements)[16], which in Italy are finalized at the time of their signing, without the ratification by the President of the Republic or the legislative authorisation by the Chambers[17].

The question is not addressed here either from the point of view of the correctness of this practice in terms of international law or from that of the international relevance of the constitutional provisions concerning the process of making international agreements, nor from the perspective of its constitutionality outside of the cases referred to in Article 80 of the Constitution. From a constitutional law perspective, the conclusion of executive agreements – similar to the equally deplorable practice of provisional enforcement of international acts pending the authorisation bill[18] – poses major problems when they fall into one of the categories for which Article 80 of the Constitution requires prior parliamentary authorisation for ratification. The focus is, in fact, on the parliamentary

16. The expression «executive agreement» is taken from the comparison with the US experience, even if it is not entirely overlapping with that of «agreements signed in a simplified form». Indeed, the Italian procedure for entering into such agreements also in the matters referred to in Article 80 of the Constitution is less onerous for the Executive than the US one. See R. Cortese, *Gli accordi in forma semplificata nel diritto italiano*, in *Riv. trim. dir. pubbl.*, 1977, p. 70; A. Reposo, *Gli accordi in forma semplificata nel diritto costituzionale statunitense*, Padova, La Garangola, 1983, p. 75, p. 120; L. Ferrari Bravo, *Alcune riflessioni sui rapporti fra diritto costituzionale e diritto internazionale in tema di stipulazione di trattati*, in *Il diritto internazionale al tempo della sua codificazione. Studi in onore di Roberto Ago*, I, Milano, Giuffrè, 1987, p. 282.

17. For the most striking and problematic cases of agreements in a simplified form, see, among others, A. Barbera, *Gli accordi internazionali: tra Governo, Parlamento e corpo elettorale*, in *Quaderni costituzionali*, 3/1984, p. 451; B. Conforti, *Diritto internazionale*, Napoli, Editoriale scientifica, 2014, p. 83.

18. This practice has sometimes relied on the "political" approval of the Cabinet's communication, to the Chambers or even to their committees, about the provisional implementation of the agreement. It has been an implied consent, from which the Cabinet has inferred the legal admissibility of the provisional implementation of some clauses, to the point of reaching the fully implementation of the agreement before Parliament even formally took note of it: see A. Massai, *Intervento*, in P. Fois (ed.), *Il trattato segreto. Profili storico-diplomatici e regime giuridico,* Padova, Cedam, 1990, p. 374.

control on international treaties and, in particular, on how it can be guaranteed that the Chambers make a statement on the agreements that the Government has signed in a simplified form, in the event that the Constitution prescribes a prior legislative intervention with respect to the agreement's perfection.

Since a formal ratification is not envisaged in the case of executive agreements and the contracting parties agree that they come into force on the date of signing, it could be deemed that these acts are exempted from the constitutional requirement of prior parliamentary intervention, even when they relate to one of the hypotheses referred to in Article 80 of the Constitution. It has been indeed observed that, when the Government is faced with the need to sign agreements in a simplified form, it cannot refrain from concluding them, until the authorisation law is approved. For scholars favouring this thesis, in the face of an agreement that does not require a formal ratification, at least according to the rules of international law, parliamentary scrutiny in legislative form would not be constitutionally due[19].

Nevertheless, the Italian Constitution requires that the authorisation necessarily be issued by Parliament before the treaty is ratified, so that the Chambers evaluate the text of the treaty in advance[20]. From the point of view of Italian constitutional law, it is perfectly indifferent if an agreement provides for signing and ratification or is binding after signing only: if the agreement is internationally binding, there is a duty at least to inform the President of the Republic, as well as the Chambers[21], so that appropriate initiatives can be taken under Article 80 of the Constitution.

Moreover, Article 80 of the Constitution applies not only to those treaties, for which «ratification» is envisaged in the formal sense of the act following the signing, but to all international acts, in which the declaration of consent to be bound to a treaty assumes the equivalent denomination of «accession», «acceptance» or «approval». The agreements for which prior parliamentary intervention is constitutionally required have to be identified on the grounds of the subject and not by the form in which they, by the choice of the contracting States, are concluded. The term «ratification» under Article 80 of the Constitution must

19. In this sense, see W. Leisner, *La funzione governativa di politica estera e la separazione dei poteri*, in *Riv. trim. dir. Pubbl.*, 1960, p. 369; R. Monaco, *La ratifica di trattati internazionali nel quadro costituzionale*, in *Studi per il ventesimo anniversario dell'Assemblea Costituente*, IV, *Aspetti del sistema costituzionale*, Firenze, Vallecchi, 1969, p. 450.

20. Italian Constitutional Court, judgment no. 295/1984.

21. See L. Ferrari Bravo, *Intervento*, in P. Fois (ed.), *Il trattato segreto. Profili storico-diplomatici e regime giuridico*, supra note 16; p. 145; R. Monaco, *Intervento*, in A. Cassese (a cura di), *Parlamento e politica estera. Il ruolo delle commissioni affari esteri*, Padova, Cedam, 1982, p. 217.

ultimately be interpreted not in the proper meaning of international law, but in a broader, a-technical sense[22].

Nonetheless, there are scholars who argue that in this regard a constitutional custom would have been formed[23], such as to legitimise the signing of executive agreements even in the hypotheses for which the prior legislative authorisation to «ratification» is prescribed. It would therefore be possible to adapt the procedure required by Article 80 of the Constitution, which would not undermine either the possibility of concluding such agreements or the guarantee underlying the constitutional provision.

In fact, since agreements are often concluded with the sole signing of the representatives of the Government, even when they would fall within the scope of that article, Parliament's acquiescence to this practice has sometimes resulted in the adoption of *ex post* laws of «approval»[24]. Some have, therefore, argued that this could remedy the lack of a legislative authorisation before the agreement's ratification[25], as a result of the alleged development of: *i.* a constitutional custom, which modified or waived the Constitution, replacing its articles 80 and 87; *ii.* a constitutional custom supplementing these provisions, due to the laconicism and schematic character of the constitutional text; *iii.* a constitutional custom, which gives the Government only residual competence to conclude agreements in a simplified form; *iv.* a constitutional convention, under which the Government has the agreements in a simplified form[26]. Despite what is prescribed by Article 80 of the

22. See T. Perassi, *La Costituzione italiana e l'ordinamento internazionale* [1952], in *Scritti giuridici*, I, Milano, Giuffrè, 1958, p. 422; L. Ferrari Bravo, *Diritto internazionale e diritto interno nella stipulazione dei trattati*, Napoli, Morano, 1964, p. 78; A. La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale*, Milano, Giuffrè, 1961, p. 159; R. Monaco, *La ratifica di trattati internazionali nel quadro costituzionale*, supra note 19, p. 451; B. Allara, *Gli accordi in forma semplificata nella Costituzione italiana*, in *Diritto internazionale*, 1971, p. 115; A. Bernardini, *Funzione del Parlamento italiano nella conclusione di accordi internazionali*, in *La Comunità Internazionale*, 1979, p. 579.

23. The development of a constitutional custom, complementing the constitutional provisions, giving the Government the competence to conclude even agreements in a simplified form and except the subsequent legislative intervention of approval, has been also supported by the Italian Court of Cassation, SS. UU., judgement no. 867/1972, in *Riv. dir. Intern.*, 1973, p. 589.

24. With regards to the legislative acts of *ex post* (and even implied) approval of agreements signed by the Government in the hypotheses of Article 80 of the Constitution, see the critical remarks of G. Cataldi, *In tema di rapporti tra autorizzazione alla ratifica e ordine di esecuzione del trattato*, in *Riv. dir. intern.*, 1985, p. 538; A. Bernardini, *Norme internazionali e diritto interno: formazione e adattamento*, Pescara, Libreria dell'Università, 1989, p. 219. See also M. Udina, *Gli accordi internazionali in forma semplificata e la Costituzione*, in *Riv. dir. intern.*, 1961, p. 214; V. Lippolis, *La Costituzione italiana e la formazione dei trattati internazionali*, Rimini, Maggioli, 1990, p. 227.

25. See also C. Mortati, *Istituzioni di diritto pubblico*, Padova, Cedam, 1976, II, p. 684.

26. In these terms see, respectively, *i.* M. Udina, *Gli accordi internazionali in forma semplificata e la Costituzione*, supra note 24, p. 217; *ii.* R. Monaco, *La ratifica di trattati internazionali nel quadro costituzionale*, supra note 19, p. 453; *iii.* S. Marchisio, *Sulla competenza del Governo a stipulare in forma semplificata i trattati internazionali*, in *Riv. dir. intern.*, 1975, p. 549 and F.M. Palombini, *Sui pretesi limiti costituzionali al potere del Governo di stipulare accordi in forma semplificata*, in *Riv. dir. intern.*, 3/2018, p. 878; *iv.* C. Chimenti, *Il controllo parlamentare nell'ordinamento italiano*, Milano, Giuffrè, 1974, p. 220.

Constitution, the effect of the law of «approval» would be, at the domestic level, the amnesty of the otherwise unconstitutional behaviour of the Government and, at the international level, the removal of any doubts about the conclusion of the agreement by the Italian State.

However, I agree with those scholars who maintain that the executive agreements signed in the hypotheses of Article 80 of the Constitution are inconsistent with this provision, that the gimmicks outlined in order to validate their constitutional illegitimacy should be resisted and that, finally, it should be challenged the idea that violations of Article 80 of the Constitution may result in a customary rule, suitable for repealing it or derogating from it (even in part)[27]. Confirmation of the fact that the *ex post* parliamentary intervention cannot be effective in *de facto* violating Article 80 of the Constitution is also incidentally derived from constitutional jurisprudence, where it is stated that the law containing the order of execution of a treaty stipulated in the absence of Parliament's prior authorisation cannot be considered to contain any authorisation for ratification, nor could it[28].

Furthermore, the *ex post* approval of an executive agreement would not only fail to meet the clear intent of Article 80 of the Constitution, which is to ensure the prior pronouncement of the Chambers, but above all, having the effect of putting the Parliament in front of a *fait accompli*, would lack the guarantees of the prior authorisation. Faced with the prospect of deliberating *ex post* on the agreement already in place, the Parliament would be formally free to refuse approval, but would in fact refrain to disapprove an already binding act, because it would have significant negative consequences at the international level[29].

2.1. The 2017 Memorandum of Understanding with Libya

Italy began to externalise the control of borders and migratory flows even before a common EU asylum system started to take shape after the Dublin Convention. However, recent years have seen a marked change of pace as a result of the signing, in a simplified and secret form, of agreements aimed in particular against so-called «illegal» immigration. In February 2017, then Italian President of the Council of Ministers Paolo Gentiloni and the President of the Libyan Presidential Council Fayez Mustafa Serraj signed, respectively for the Italian Government and for the Government of Reconciliation of the State of Libya, a Memorandum of Understanding on development cooperation, illegal immigration, human trafficking, fuel smuggling and reinforcement of border security (hereafter «Libya MoU»).

27. See A. Cassese, *Art. 80*, in G. Branca (ed.), *Commentario della Costituzione. La formazione delle leggi*, vol. II, (Zanichelli 1979), p. 187; S. Labriola, *La pubblicazione degli atti normativi e la circolazione delle notizie sulle relazioni internazionali della Repubblica italiana*, in *Riv. dir. intern. priv. proc.* 2/1985, p. 238; A. Massai, *Parlamento e politica estera: l'Italia*, in *Quaderni costituzionali*, 3/1984, p. 567.

28. Constitutional Court, judgement no. 295/1984.

29. A. Cassese, *Art. 80*, supra note 27, p. 188.

The language used in the Libya MoU is first and foremost significant, betraying a monolithic view of migration: migrants are qualified as «illegal» or «clandestine», evidencing the opportunistic denial of the reality of mixed migration flows. In fact, mixed flows preclude an *a priori* qualification of migrants as «illegal», as some of them may be recognised, under certain conditions, as refugees or beneficiaries of other forms of international protection.

It is also noteworthy that the word «rights» occurs only once in the Libya MoU, where Article 5 states that «[t]he Parties commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are parties». However, Libya has not signed the 1951 Geneva Convention on the Status of Refugees (hereafter the «Geneva Convention»)[30]. It currently only recognises refugee status for seven nationalities[31], under the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, to which it instead adheres (hereafter the «OAU Convention»).

There is also another element, which betrays the political importance of the Libya MoU and disavows its purported character of a mere implementation of agreements previously signed between the Parties. Indeed, what stands out is the indeterminacy of the obligations undertaken by the Parties, which not only fall mainly on Italy, but are such as to be translated into thoughtful commitments and demanding political assessments. Hence, it would have been necessary to have the parliamentary intervention authorise ratification. Moreover, these obligations consist of a commitment to start cooperation initiatives, to provide support and funding to development programmes in the regions affected by «illegal» migration, in addition to providing technical support to Libyan anti-immigration bodies (including the Border Guard and the Coast Guard) [Article 1]. There is also a commitment to take action in completing the land border control system in southern Libya (according to Article 19 of the 2008 Treaty of Benghazi)[32], improving and financing temporary reception centres in Libya (and training of Libyan staff within them)[33], and supporting international organisations working in Libya in the field of migration (Article 2).

In this respect, the provision of measures on Libya's southern land border control system is particularly significant. Because of its vagueness, the commitment can hardly be

30. See S. Hamood, *EU–Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?*, in *Journal of Refugee Studies*, 2008, p. 25.

31. Syrians, Iraqis, Palestinians, Somalis, Eritreans, Ethiopians of Oromo ethnicity and Sudanese from Darfur.

32. On 30 August 2008, then Italian Prime Minister Silvio Berlusconi and Colonel Muammar Qaddafi signed, in Benghazi, the Treaty on Friendship, Partnership and Cooperation between Italy and Libya (hereafter the «Treaty of Benghazi»). The Italian Parliament authorised ratification of this Treaty with Law no. 7/2009.

33. As to the question of funding, see the case initiated by the *Association for Legal Studies on Migration* (ASGI) against the Italian Government for allegedly misusing the «African Fund» to provide operational support to the Libyan authorities: www.asgi.it/wp-content/uploads/2019/07/Africa-Fund.pdf.

considered as merely the enforcement of Article 19, paragraph 2, of the 2008 Treaty of Benghazi, which planned to promote «implementation of a system of control of Libyan land borders, to be entrusted to *Italian companies with the necessary technological expertise*»[34]. Italy has therefore taken on new, burdensome and even more general obligations.

The Libya MoU has come into force at the time of signing with a validity of three years, and it has been tacitly renewed for an equivalent period because, despite the critical legal and political remarks in Italy, none of the Parties has been notified of non-renewal. However, also in light of the continuing institutional instability and uncertainty with regard to the capability of the Libyan Government of Reconciliation to maintain control of strategic borders with Chad, Niger and Sudan, these obligations postulate crucial political choices and assessments.

2.1.1. Executive agreements in the matter of migration and border management: the Italian way beyond parliamentary democracy

Since the Libya MoU is an *accordo in forma semplificata* (executive agreement), which does not provide for the deposit of ratifications, the Italian Government has not submitted to the Parliament its ratification authorisation bill as set out in Article 80 of the Constitution. Moreover, it did not publish the agreement in *Raccolta ufficiale delle leggi e dei decreti* (Italian Official Collection of Statuses) or in *Gazzetta ufficiale* (Official Journal), nor did it communicate the Libya MoU to the Presidents of the Chambers of Parliament, as provided for by Law no. 839/1984. The signing of the Libya MoU was thus reported through the media and, only later, through the publication of its text on the website of the Ministry of Foreign Affairs.

But Article 80 of the Constitution stipulates that «the Chambers should authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation». The Libya MoU was therefore designed as a mere implementation of Article 19 of the 2008 Treaty of Benghazi, the 2012 Tripoli Declaration and other agreements and memorandums signed by the Parties on the subject. The Government thus intended to confirm that practice (whose constitutional legitimacy is strongly doubted here) by which the task of assessing when an international agreement needs parliamentary authorisation, in accordance with Article 80 of the Constitution, is referred to executive power, except for the *ex post* and surrogate legislative initiative or the political control of the Chambers.

Indeed, even if the Executive has self-conferred the exclusive appreciation of the hypotheses for which the Constitution prescribes the *ex ante* parliamentary authorisation

34. Italics added.

for ratification – and it fulfils this task with wide margins of discretion and often with the complicity of a silent Parliament – another option remains. When the Government does not submit its authorisation bill before the «ratification» of the international agreement, the legislative initiative of a single member of the Parliament may replace that of the Government, in order to involve the Chambers in that appreciation and to bring out an interpretation of Article 80 of the Constitution different from that assumed by the Government[35].

This means that if an international agreement has been signed in a simplified form, but falls within the scope of Article 80 of the Constitution, the Parliament would still have the opportunity to express (and has sometimes expressed) its acquiescence to this practice through *ex post* laws of «approval» of the acts thus signed (and/or in laws containing the execution order[36], when necessary). This may in fact occur only when the agreement is already in force, on a supplementary and/or recessive course[37], and on the condition that publicity/communication of the international act has taken place.

The amnesty implied in the law of later «approval», however, would have the paradoxical effect of encouraging the Government in the degenerative practice of signing executive agreements, also in the hypotheses referred to in Article 80 of the Constitution, because this law would help discharge the responsibilities of the contracting Government and consequently place upon Parliament political responsibility for the agreement.

Moreover, the compliance of this expedient with the Italian Constitution depends on the development of parliamentary practices allowing MPs to pronounce in due course (and with the consequent political repercussions) on the executive agreements signed by the Government. This could lead to the affirmation and consolidation of constitutional

35. In these cases, there is also no question of whether the consequences of such a Parliamentary initiative in terms of the Government's political responsibility have an impact on the international responsibility of the Italian State, since the validity and effectiveness of the international acts do not depend on the proceedings followed in domestic law.

It is important, in fact, to mention Article 46 of the 1969 Vienna Convention on the Law of Treaties (hereafter the «Vienna Convention»): «1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith».

36. However, parliamentary acquiescence resulting from the order of execution of a treaty signed without prior authorisation matters in terms of international law. Under Articles 45 and 46 of the Vienna Convention, the invalidity of a treaty for violation of an internal rule can only be invoked before it has been implemented. The implementation of an invalid treaty would constitute a form of acquiescence, whether the State has started to carry out its obligations, or whether it has benefited from the corresponding rights: see A. Tanzi, *Introduzione al diritto internazionale contemporaneo*, Padova, Cedam, 2016, p. 139.

37. If the bill of authorisation for ratification were also presented by the Government, the latter's approval would absorb the parliamentary legislative initiative.

conventions similar to the UK's *Ponsonby Rule*[38] and designed for executive agreements. It would involve outlining and complying with rules under which, before the «ratification», Parliament must be able to discuss (in a timely fashion, but in-depth) the most important international treaties or executive agreements for which the request for debate comes from the opposition. These rules would also postulate a "diligent" Parliament, as it is empowered to participate in the most important foreign policy decisions.

In this regard, it is also interesting to note one of the arguments through which the judge for preliminary investigations of the Court of Trapani acquitted two individuals who in July 2018 were rescued, along with sixty five others, by the tugboat *Vos Thalassa* in the Sicilian Channel[39]. After having been arrested upon disembarkation in Italy, they were accused for aiding illegal immigration and of having led a revolt against the crew, because they wanted to prevent their return to Libya.

But focusing on the nature and legal validity of the Libya MoU and on its (in)compatibility with the 1979 international Convention on maritime search and rescue (hereafter the «SAR Convention»), the judge concluded that: *i.* according to Article 53 of the Vienna Convention, since the Libya MoU was stipulated in 2017, when the principle of *non-refoulement* had already acquired the rank of *ius cogens*, it is devoid of validity; *ii.* the Libya MoU is incompatible with Article 10, paragraph 1, of the Italian Constitution, according to which «Italian law conforms to the generally recognised principles of international law», which now include the principle of *non-refoulement*; *iii.* although the

38. The so-called *Ponsonby Rule* refers to the UK practice, introduced by then Foreign Minister Arthur Ponsonby, to file all the treaties subject to ratification in Parliament for twenty-one days. This rule, observed by all British governments since 1929 and generally recognised as a constitutional convention, was then codified by the Constitutional Reform and Governance Act of 2010 (part II, paragraphs 20-25).

It stipulates that within 21 sessions of the one following the filing of the treaty, for which it is not expected to come into force at the time of signing, both Chambers can block its ratification with a resolution. Ratification is the deposit or delivery of an instrument for ratification, accession, approval or acceptance. The deposit of the treaty must, however, be accompanied by a memorandum explaining its provisions and the reasons why the Government is calling for ratification and all the other issues that the Minister considers appropriate.

If, after that period, the Chambers have not expressed themselves negatively, the Government can complete the stipulation according to the device of assenting silence. If, on the other hand, the House of Commons is against ratification, a Minister of the Crown must submit a statement before Parliament, stating why he/she believes that the treaty should still be ratified. As a result of this communication and from it, a new 21-day period of sitting opens, by which time the House of Commons can once again express its dissent. If the vote against ratification is cast by the House of Lords, the Government has only an obligation to justify the decision to proceed in any case with the ratification of the treaty.

Although these rules do not apply to treaties covered by section 5 of the 2008 European Union (Amendment) Act and Part 1 of the 2011 European Union Act, they are also quoted in *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583.

On how the *Ponsonby Rule* has evolved over the years and the need for it to be followed by the proper response of MPs and some reforms of the parliamentary procedures see J. Barrett, *The United Kingdom and Parliamentary Scrutiny of Treaties: Recent Reforms*, in *International and Comparative Law Quarterly*, 2011, p. 225.

39. The judgment is available at: http://www.asgi.it/wp-content/uploads/2019/06/2019_tribunale_trapani_vos_thalassa.pdf [last accessed 23 March 2020].

Libya MoU can be considered an agreement for which Article 80 of the Constitution prescribes prior parliamentary authorisation for ratification, it was concluded in a simplified form, i.e. without the prior authorisation of the Italian Parliament. Therefore, it is a legally non-binding agreement, which has no legislative nature, and from whose obligations the Parties could always and freely escape[40].

2.2. The 2017 Cooperation Agreement with Niger

A few months after the signing of the Libya MoU, on 26 September 2017 a cooperation agreement was also signed between Italy and the Republic of Niger (hereafter the «Niger Agreement»). Although it provided the legal basis for the participation of Italian military personnel in the bilateral support mission in Niger – along with UN Security Council Resolution No. 2359/2017 – at first the contents of the act were not known, since the text was published neither in *Gazzetta ufficiale* nor on the website of the Ministry of Foreign Affairs. In this regard, the first question arises as to how the Chambers were able to authorise the continuation of an international mission, the legal basis of which was an international agreement unknown to them, and that could not even be known[41].

Albeit with some differences, this affair recalls what has already taken place for the Libya MoU[42] and 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 Interior (hereafter the «Sudan MoU»)[43], both for the way in which the Niger Agreement operates and for the strategy behind agreements of this type. Indeed, not only do external border control and migration management refer to bilateral agreements with third countries signed in a simplified form, but these international acts are also removed from parliamentary scrutiny and the appropriate forms of publicity.

40. In this regard, it should also be pointed out that on 23 March 2017 the Tripoli Court suspended the Libya MoU, as it had been signed by a Government without the confidence of the Tobruk Parliament.

41. Similarly, the mission in support of the Libyan Coast Guard was authorised in the 17th Legislature and has been renewed for 2019, having as a legal basis, among other things, the specific requests to Italy of the Presidential Council-Government of Libyan National Accord. Those requests were contained in President Al-Serraj's letters of 30 May and 23 July 2017, the contents of which were nevertheless kept secret.

42. Moreover, the text of the Niger Agreement consists of only six pages and is essentially a copying and pasting of agreements previously concluded by Italy. There are various inconsistencies to prove this, including the mention of «ship visits» as a form of cooperation between Italy and Niger, even if Niger is a country without access to the sea!

43. The Sudan MoU for the fight against crime, border management and migration flows, and repatriation, signed on 3 August 2016, has not been published by the Italian Government. The text of the agreement, on which three applications are now pending before the European Court of Human Rights (application no. 18911/17, *A.E. and T.B.* v *Italy*; application no. 18941/17, *A.D.* v *Italy*; application no. 18959/17, *O.A.* v *Italy*), is available at: http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf [last accessed 23 March 2020].

Since there has been no publication of the Niger Agreement, *ASGI* (Association of Legal Studies on Immigration) and *CILD* (Italian Coalition for Freedoms and Civil Rights) filed an application for civic access to the Ministry of Foreign Affairs[44], asking for a copy of both letters of 1 November 2017 and 15 January 2018 sent by the Nigerian Government to the Italian Government and of the aforementioned Niger Agreement. The Ministry of Foreign Affairs had initially denied civic access to the letters, in view of the concrete prejudice that showing of them could have caused «to the public interests underlying defence, military issues and international relations». With regard to the text of the Niger Agreement, the Ministry had instead justified the denial of access by arguing that it would be freely available, once it was published in *Gazzetta ufficiale* at the conclusion of the legislative process for authorising ratification.

As a result of this denial, the appeal to *Tar Lazio* (regional administrative Court of Lazio) stemmed from the dispute that failure to show an international agreement already in place between the Parties and two letters which – in the applicant's opinion – would also have given rise to legal obligations in international law, would have resulted in the compression of the right to access data and documents held by public administrations and for which current legislation requires publication. In fact, there is a comprehensive strategy of *de facto* secrecy of many agreements and related international commitments, which contradicts the most basic guarantees of the rule of law and that, in the confusing overlap between the (un)questionableness of the acts and the accessibility of the documents that contain them, overwhelms the democratic claims involved in the Government's exercise of foreign power.

It is in this framework that the *Tar Lazio*[45] ordered the Ministry of Foreign Affairs to present the text of the agreement within thirty days of notification, or (if earlier) from the communication of the judgement. The appeal was rejected for the part relating to civic access to letters from the Nigerian Government, it having been ruled out that they can in themselves integrate – even in the form of an exchange of notes – the notion of an international agreement subject to the legislative obligation to publish. It was instead accepted for the part relating to the applicant's right to access the text of the Niger Agreement, resulting in an order for the Ministry of Foreign Affairs to display it.

In this regard, after the *Tar Lazio* ruling, on 28 November 2018 the Italian Government at first deemed it could supersede the order to show the text of the Niger Agreement, by deliberating on the presentation of the bill of «ratification and execution» of

44. The application was filed under Articles 5 and following of Legislative Decree no. 33/2013, also known as FOIA (Freedom Of Information Act).

45. See Tar Lazio, sez. III-*ter*, judgment no. 11125 of 16 November 2018.

that act[46]. But the agreement had already come into force between the Parties and on the basis of it – as previously mentioned – the Chambers had authorised the continued participation of Italian military personnel in the bilateral support mission in Niger.

The presentation of the bill of authorisation for ratification has been here a mere delaying act, by which the Government has procrastinated authorisation that could not be extended because it was later than the agreement's entry into force. The text of the agreement also clearly showed its political nature[47], touching on the fields of military cooperation, security and defence policy, peacekeeping and humanitarian assistance operations, participation in military operations (Article 2). This means that, in accordance with the constitutional dictum, there should have been the involvement of Parliament, not in the form of an *ex post* approval law of the agreement, but in the form of prior authorisation for ratification. Otherwise, the parliamentary scrutiny would result in an empty formal involvement.

This case shows that the adoption of a law of «approval» after the agreement came into force – instead of a law prior to ratification – would confine Parliament to a role of formalistic rubber-stamping of the Government's foreign policy choices. In so doing, however, not only would the Parliament be confronted with a *fait accompli*, which would place it in the political-institutional condition of no longer being able to withhold approval of the executive agreement, but it would be politically responsible for that agreement, with the consequent perverse effect of incentivising the degenerative practice of signing executive agreements even in the cases referred to in Article 80 of the Constitution, and of calling Parliament into question only when the agreement is already in force[48]. Therefore, what should be an instrument of political control of Parliament over the work of the Government would paradoxically turn into a weapon of Government blackmail against Parliament.

After all, the reduction of the Chambers to being a Parliament merely «ratifying» the international commitments made in other venues – instead of being the "diligent" and properly informed Parliament on foreign policy issues – responds fully to Italy's decades-old trend towards the divestment of parliamentary prerogatives, the demonisation of parliamentary debate, and more generally the dismantling of representative democracy.

46. This is Bill no. 1468, finally passed by Parliament last July 11 (Law no. 80/2019).

47. The political nature of the Niger Agreement has been, moreover, proved by the accompanying report to Bill no. 1468, which on the one hand has stated that the agreement is intended, among other things, to «improve mutual understanding of security issues (fighting irregular immigration, terrorism and illegal trafficking)», while on the other hand also recognising that the parliamentary legislative intervention is necessary to implement the agreement under Article 80 of the Constitution, since it «constitutes a specific political commitment made by the Italian Government with the Nigerian Government».

48. See especially A. Cassese, *Art. 80*, supra note 27, p.150.

3. The 2016 Statement between the EU and Turkey: on the way to deformalising border management and migration control

The EU has also embarked on the path of deformalised external action, with the aim of being a driving force in the externalisation of migration and asylum policies and to set the pace in the juxtaposition between cooperation with third countries and the need to contain migration flows. Consider the Joint Statement between the European Union and Turkey on 18 March 2016 (hereafter the «Statement»), following a meeting aimed at deepening relations between the two sides and addressing the so-called refugee crisis of 2015. The Statement marked significant step in the evolution of the EU's approach to migration through its external action, and this emerges both in terms of the content and purpose of the act, as well as in the form and manner in which this anomalous agreement was concluded.

With regard to the content and purpose of the Statement, it is first of all the language used in it that is striking, because no distinction is drawn between migrants, refugees and asylum seekers, as the levelling expression of irregular migration is preferred. As a temporary and extraordinary measure, the Statement stipulated that all new irregular migrants having crossed from Turkey into the Greek islands starting 20 March 2016 would be returned to Turkey, if not having applied for asylum, or whose application had been found unfounded or inadmissible in accordance with Directive 2013/32/EU. For Syrian migrants only (and, therefore, in discriminatory terms compared with those of other nationalities) the so-called «1:1 programme» was established[49]. Finally, there was Turkey's commitment to take any necessary measures to prevent new sea or land routes for illegal migration from Turkey to the EU, and to cooperate with neighbouring States as well as the EU to this effect.

One year later, the EU Commission was fully satisfied with the effectiveness of the Statement[50], having seen a 97% reduction in irregular landings and having subsequently found in it a sign of a turning point in the EU's approach to migration.

Nonetheless, beyond the formalistic reminder of the principle of *non-refoulement*, many doubts have been raised both as to the actual ability of the migrants involved to apply for international protection, and with respect to the guarantees of their fundamental rights[51].

49. This is the mechanism by which, for every (irregular) Syrian being returned to Turkey from the Greek islands, another Syrian (refugee) is to be resettled from Turkey to the EU, taking the UN Vulnerability Criteria into account.

50. See Commission Communication, *First Report on the progress made in the implementation of the EU-Turkey Statement*, COM(2016)231 final, 20 April 2016, available at: http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf [last accessed 23 March 2020].

51. See O. Ulusoy, H. Battjes, *Situation of Readmitted Migrants and Refugees from Greece to Turkey under the EU-Turkey Statement*, 29 November 2017, VU Migration Law Series 15, available at

Turkey, in fact, signed the Geneva Convention, but it has a geographical reserve, under which it does not recognise refugee status to asylum seekers from countries that are not members of the Council of Europe[52]. What is more, this type of agreement puts the EU in a position of great vulnerability and blackmail in the face of the Government of a third country[53].

More generally, the Statement responds to a calculated strategy of the EU, which in the field of migration policies and control of external borders translates into an «experimentalist but not accountable»[54] governance, because it is tailored to *ad hoc* solutions and informal instruments which escape debate and parliamentary voting[55]. It also points to a more general escape from the democratic forms of political accountability, through informal agreements designed solely not to be subject to the oversight of representative bodies.

Moreover, the Statement lays itself open for multiple criticisms from the point of view of the instrument used and the form in which it is covered. Considerable concerns relate to its implications in terms of the relationship between EU law and international law, as it has been published on the European Council's and the Council of the EU's common website in the form of a (mere) press release[56]. This has raised many questions about whether this act could be described as an international agreement signed by the EU, since Article 218 TFEU prescribes a different and much more detailed procedure for the conclusion of agreements between the EU and third countries or international organisations.

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http://rechten.vu.nl/en/Images/UlusoyBattjes_Migration_Law_Series_No_15_tcm248-861076.pdf [last accessed 23 March 2020]; S. Peers, *The final EU/Turkey refugee deal: a legal assessment*, 18 March 2016, available at: eulawanalysis.blogspot.com [last accessed 23 March 2020].

52. See L. Haferlach, D. Kurban, *Lessons Learnt from the EU-Turkey Refugee Agreement in Guiding EU Migration Partnerships with Origin and Transit Countries*, in *Global Policy,* 2017, p. 88.

The Statement specifies that asylum seekers can apply to Turkey for international protection guaranteed by the Geneva Convention, thus assuming that Turkey is a «safe third country». Nevertheless, it is a highly questionable presumption: see J. Poon, *EU-Turkey Deal: Violation of, or Consistency with, International Law?*, in europeanpapers.eu, 1/2016, p. 1198; S. Peers, E. Roman, *The EU, Turkey and the Refugee Crisis: What could possibly go wrong?*, 05/02/2016, available at: eulawanalysis.blogspot.com [last accessed 23 March 2020].

53. See S. Carrera, L. den Hertog, M. Stefan, *It wasn't me! The Luxembourg Court Orders on the EU-Turkey Refugee Deal*, in ceps.eu, April 2017, p. 12.

This blackmailing effect has been evidenced by the fact that on several occasions President Recep Tayyip Erdogan has first threatened to suspend the Statement and then not to fulfil the Turkish commitments.

54. J. Pollak, P. Slominski, *Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders*, in *West European Politics*, 2009, p. 904.

55. See S. Carrera, et al., *The external dimensions of EU migration and asylum policies in times of crisis*, in S. Carrera et al. (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered*, Cheltenham, Edward Elgar, 2019, p. 11; S. Carrera, R. Cortinovis, *Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?*, in ceps.eu, June 2019.

56. See https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement [last accessed23 March 2020].

Although the Statement presents itself as a non-binding act[57], it appears to be an international agreement, with the consequences arising from avoidance of the procedure referred to in Article 218 TFUE and, in particular, from the European Parliament's lack of involvement. Nonetheless, the European Parliament[58], the EU General Court and, lastly, the EU Court of Justice have been of a different opinion, following the annulment appeals filed by two Pakistani nationals and an Afghan national. According to the applicants, the Statement is an international agreement concluded by the European Council with Turkey; therefore, it would be an illegitimate act, because it contravenes the TFUE's provisions relating to the conclusion of international agreements[59]. But the EU General Court has accepted the pleas raised by the European Council, stating that it is incompetent to hear of appeals and rejecting the complaints on the basis of Article 263, paragraph 1, TFUE[60].

Focusing on the "paternity" of the contested act, the EU General Court has came to conclusions that allowed the more problematic issues relating to the possibility for the EU to conclude informal agreements, and the legal constraints that would result from them, to be overlooked. Indeed, according to the judges, on the basis of the (controversial) elements provided by the European Council, «*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». In addition, «*even supposing*

57. See M. Gatti, *La Dichiarazione UE-Turchia sulla migrazione: un trattato concluso in violazione delle prerogative del Parlamento?*, 11 April 2016, available at: rivista.eurojus.it [last accessed 23 March 2020], who criticises the opinion that such an act would merely repeat existing obligations under other instruments, since it contains entirely original obligations, such as the so-called 1:1 programme, which is not covered by previous existing readmission agreements. See also C. Favilli, *La cooperazione UE-Turchia per contenere il flusso dei migranti e richiedenti asilo: obiettivo riuscito*, in *Dir. um. e dir. inter.*, 2016, p. 420.

58. See the opinion of the European Parliament's Legal Service, presented orally at the meeting of 9 May 2016 of the Commission on Civil Liberties, Justice and Home Affairs (Legal Aspects of the EU-Turkey Declaration of 18 March 2016 LIBE/8/06399).

59. The applicants had travelled from Turkey to Greece, where they applied for asylum, saying they risked persecution if they were deported to their countries of origin. This would have happened if their applications were rejected because, under the EU-Turkey Statement, they could have been sent back first to Turkey and then, from there, repatriated to Pakistan and Afghanistan.

60. EU General Court, *NF, NG and NM* v *European Council*, orders of 28 February 2017, cases T-192/16, T-193/16, T-257/16.

The orders were appealed to the EU Court of Justice, to which the applicants asked to reverse these decisions, arguing that the EU General Court has made a mistake in declaring its incompetence. The EU Court of Justice, however, has declared the appeals manifestly inadmissible due to a lack of clarity and insufficient delimitation of the pleas: ECJ, *NF, NG and NM* v *European Council*, order of 12 September 2018, joined cases C-208/17 P, C-209/17 P, C-210/17 P.

that an international agreement could have been informally concluded during the meeting of 18 March 2016 [...], that agreement would have been an agreement concluded by the Heads of State or Government of the member states of the European Union and the Turkish Prime Minister»[61].

The General Court has thus concluded that, since the evidence provided by the European Council would show that it was not the EU, but its member states as subjects of international law that had conducted negotiations with Turkey in this area, the Statement is not an act of a EU institution, the lawfulness of which it could be able to rule on.

In the end, with those orders the EU General Court has carried out both an act of extreme laxity, which ended up sacrificing institutional balance in favour of effectiveness of EU external action[62], and a real act of *denialism*, in order to respond to the needs of a short-term realism. Faced with the dubious consistency of the Statement with international and EU law, «the General Court has bent the authority of the European judicial system to the demands of *realpolitik*. However, at the end of the analysis, and in light of the many logical, constitutional and political pitfalls entailed by its decision, the question lingers whether realism is the appropriate ingredient that a court of justice must include in its recipe, in particular when fundamental rights of individuals are potentially at stake. In more general terms, one may further wonder whether avoidance is the right technique to adopt *vis-à-vis* situations that touch upon the very essence of the EU and its constitutional identity»[63]. Furthermore, this judicial epilogue shows that coherent policies do not necessarily result in good policies in line with the rule of law and EU values, because the Statement «may be internally coherent in pursuing the objective of "closing" the Eastern Mediterranean Route, but it is arguably incoherent with some EU constitutional values»[64].

4. Conclusions: towards a rule of law that pretends to migrate elsewhere?

In the usual role-playing between the EU and member states, there are currently some (legal and political) obstacles to hold national and EU institutions accountable for «outsourcing agreements» with Libya and Turkey. This is demonstrated by the aforesaid judgment of the EU General Court, but also by order no. 163/2018 of the Italian Constitutional Court.

61. EU General Court, *NF, NG and NM* v *European Council*, at paras 71-72 (italics added).

62. See L.N. González Alonso, *Lost in Principles? Institutional balance and democracy in the ECJ case law on EU external action*, in J. Santos Vara, S.R. Sánchez-Tabernero (eds.), *The Democratisation of EU International Relations Through EU Law*, New York, Routledge, 2019, p. 27.

63. E. Cannizzaro, *Denialism as the Supreme Expression of Realism. A Quick Comment on* NF v. European Council, in europeanpapers.eu, 2/2017, p. 257.

64. L. den Hertog, *In Defence of Policy Incoherence - Illustrations from EU External Migration Policy*, in S. Carrera et al. (eds.), *EU External Migration Policies in an Era of Global Mobilities. Intersecting Policy Universes*, Leiden, Brill, 2019, p. 378.

The Italian Constitutional Court has indeed declared inadmissible appeals for conflict of competence between branches of state, which some deputies proposed against the Italian Government, in relation to the failure to submit the draft law authorising the ratification of the Libya MoU. The appeals have been lodged after parliamentary questions and requests for clarification have been not sufficiently answered by the Government and the Chamber of Deputies has not taken action to restore parliamentary prerogatives undermined by the Government's omission. Nonetheless, according to the Court, the constitutional competences deducted by the applicants – such as the power to debate, amend and vote on the bills authorizing the ratification of international treaties (articles 72 and 80 of the Constitution) – can be traced back to the prerogatives of which the parliamentary assembly is the only holder, and not its individual members. Therefore, it is only up to the assembly to assess whether possible violations of those competences can arise and decide if and how to remedy them.

But if Parliaments show that they are no longer "moral tribunes" in international relations[65] and the EU or national judicial path proves difficult to pass, for reasons that are not only procedural, what alternatives remain?

In the short term, the choice of EU and member states to rely on informal and/or deformalised agreements with third countries could undergo the review of the European Court of Human Rights (hereafter «ECtHR»). Even if the road to Strasbourg is not able to meet many constitutional crucial needs and its deterrence force could then resolve in the search for new externalisation strategies (as it has in fact happened after the well-known *Hirsi* judgment[66]), it can be a further demonstration of the legal shortcomings that the externalisation strategy suffers from.

Strasbourg is a path already attempted, in the first case with the appeal of a Syrian citizen, of Christian and Armenian origin, who, following the rejection of his application for asylum in Greece and the subsequent decision of the Greek authorities to send him back to Turkey (as a «safe third country»), appealed to the ECtHR and invoked Articles 3 and 13 of the European Convention of Human Rights (hereafter the «ECHR»)[67]. In particular, to the extent of interest here and as concerns the possible indirect fallout from the Statement, the applicant invoked Articles 3 and 13 ECHR because, in his opinion, if he were sent back to Turkey, he would run the risk of *refoulement* in Syria.

65. See N. Reslow, *Human rights, domestic politics, and informal agreements: parliamentary challenges to international cooperation on migration management*, in *Australian Journal of International Affairs*, 2019, 547.

66. *Hirsi Jamaa and Others* v *Italy* (Grand Chamber), Application No 27765/09, Judgment of 23 February 2012.

67. *J.B.* c *Grèce*, requête n° 54796/16.

For Italy, an important front could open up as a result of the application filed on 3 May 2018 by seventeen Nigerian citizens[68], under the patronage of Global Legal Action Network (*GLAN*) and *ASGI*. The applicants directly call into question the Libya MoU and the operations of the Italian Coast Guard, in order to assert the Italian responsibility in the execution of the so-called *respingimenti per procura* (pushbacks by proxy) to Libya[69], resulting in indirect support for the violent actions of the Libyan Coast Guard and the inhumane detention of migrants pushed back to Libya[70]. Italy's involvement in this application resulted from one of the incidents of migrant rescue operations in international waters[71], in which the intervention of the Libyan Coast Guard was coordinated remotely by the Italian Maritime Rescue Coordination Centre (hereafter «IMRCC»). In the applicants' opinion, that episode is just one example of the «rescue at sea» practices that arose as a result of the agreements between Italy and Libya and that constitute a violation of Articles 2, 3, 4 and 13 ECHR and Article 4 of Protocol no. 4 of ECHR.

The Italian authorities are accused of implementing (with the declared support of the EU)[72] strategies to apparently outsource rescue operations at sea, aimed at disguising serious violations of fundamental rights and circumventing multiple responsibility for international law. In this regard, the Libya MoU and its enforcement acts are a sign of the gradual transition from the paradigm of deterrence and the closure of migration routes to that of consensual containment of flows, through instances of «(externalised) contactless control»[73] and co-operative practices of «non-entrée»[74]. And this new paradigm not only

68. *S.S. et autres* c *Italie*, requête n° 21660/18.

69. In the case of Italy's responsibility for collective expulsion, consider also that the ECtHR accepted the appeals lodged by five Sudanese citizens, concerning the collective repatriation measures to Sudan: *W.A. and Others* v *Italy*, application no. 18787/17. The repatriations were carried out as a result of the Sudan MoU, which provided for procedures and few guarantees for the migrants involved.

70. As to the situation of the migrant detention camps in Libya see, lastly, United Nations Human Rights Office, *Abuse Behind Bars: Arbitrary and unlawful detention in Libya*, 2018, available at: http://www.ohchr.org [last accessed 23 March 2020].

71. The appeal stemmed from an episode on 6 November 2017, when the ship belonging to the NGO *Sea Watch* and a Libyan Coast Guard patrol vessel (the latter being part of the four units delivered to Libya by Italy) headed simultaneously to a boat with about one hundred and thirty migrants on board, which was in difficulty in international waters. During a conflicting rescue operation, while *Sea Watch* was able to rescue fifty-nine migrants, at least twenty migrants (including two minors) died, while another forty-seven were brought back to Libya. During their detention in Libya, many of them suffered physical violence, and some were sold to another kidnapper and subjected to torture in order to demand ransom from the families.

72. See the *Malta Declaration of the Members of the European Council on external aspects of migration: addressing the Central Mediterranean route*, available at: https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/ [last accessed 23 March 2020].

73. V. Moreno-Lax, Hirsi Jamaa and Others v Italy *or the Strasbourg Court versus Extraterritorial Migration Control?*, in *Human Rights Law Review*, 2012, p. 574.

74. T. Gammeltoft-Hansen, J.C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, in *Columbia Journal of Transnational Law*, 2015, p. 248, but see also N. Markard, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, in *European Journal of International Law*, 2016, p. 591.

consists of replacing the (otherwise prohibited) practices of pushbacks at sea with measures to subsidise and support the detention of migrants (pull-backs), in this case subcontracted to the Libyan Coast Guard and militia forces, but it also consists in eschewing parliamentary scrutiny and the rule of law.

The considerations made thus far show that the EU-Turkey Statement, the Libya MoU and the Niger Agreement are only three pieces of plans (European and Italian) to contain migration flows through the outsourcing of the control of EU external borders. The implementation of these plans relies on a multiplicity of executive agreements and *soft law* instruments[75] that, avoiding the constitutional rules of democratic scrutiny, on the external level are aimed at transferring to third countries the operations of rejection or preventive detention of migrants (and asylum seekers) and internally (as in the EU) are intended to circumvent democratic controls and parliamentary guarantees[76].

However, relying on these instruments reveals a short-term strategy, because it feeds on the illusion of being able to stop or harness migration flows on the basis of rigidly predefined solutions, and neglects to consider how those agreements will not help to eliminate, but will only shift migratory routes. In fact, the apparent closure of one migration front inevitably leads to the opening (or the reinforcement) of another front, as a result of the evolution of broader geo-political *equilibria*[77]. Thus, while agreements are signed with third countries and the EU operations to reduce arrivals from Libya or Turkey are discussed, the flows of migrants in the area between the Sahara and the Sahel or in the Ténérè desert have never stopped.

The short-term nature of the actions taken so far at national and European levels is also demonstrated by the fact that, in the face of the structural deficiencies and the ineffectiveness of the Dublin III Regulation, the choice continues to fall on *ad hoc* measures, carved out on limited geographical areas or adopted on the wave of specific emergencies. This occurred, for example, with the hotspots system proposed by the EU Commission with the 2015 European Migration Agenda[78], and the establishment of temporary relocation

75. See P. Garcìa Andrade, *EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally*, in *Common Market Law Review*, 2018, p. 192.

76. As to the side-effects of the externalisation strategies in terms of undermining accountability and democratic legitimacy in regions bordering Europe see V. Moreno-Lax, M. Lemberg-Pedersen, *Border-induced displacement: The ethical and legal implications of distance-creation through externalization*, in *Questions of International Law*, 2019, p. 32.

77. See T. Gammeltoft-Hansen, N.F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, in *Journal on Migration and Human Security*, 2017, p. 43.

78. COM(2015) 240 13 May 2015.

measures in the field of international protection, formally for the benefit of Italy and Greece[79].

These measures and the informal or deformalised guise of which they are covered testify to the disavowal of the structural and kaleidoscopic character of migratory phenomena, their inescapable constitutional side effects and the absence of a more demanding strategy, based on the combination of short-term solutions, medium-term agreements and long-term reforms. In this sense, there is a lack of a careful mix of elements, in which cooperation with third countries should be only one of the pieces and should not disregard the constitutional requirements related to external action.

In fact, if we look to the long term, a profound rethinking of the Dublin system seems essential and it cannot be superseded through bilateral and deformalised agreements. Its reform should be based on the permanent and structural actuation (not only financially) of that principle of solidarity and fair sharing of responsibility between the member states that should govern EU policies in the fields of border controls, asylum and migration (Article 80 TFUE)[80].

Although the EU Court of Justice has stated that this principle can result in concrete and legally binding obligations for the member states, which are therefore likely to be subject to judicial review[81], the not merely emerging implementation of solidarity in this area postulates institutional and political choices, that have profound constitutional implications for the EU as well as for the member states. Indeed, the systemic challenge stemming from migration flows embodies one of the many constitutional conflicts afflicting the EU integration project.

The constitutional dimension of this challenge[82] cannot be neutralised or simplified through a purely intergovernmental approach, aimed only at calibrating the strength of opposing national interests and tailored to avoid the rule of law, but must be valued and

79. Council of the European Union, Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. See B. Nascimbene, *Refugees, the European Union and the "Dublin System". The Reasons for a Crisis*, in *europeanpapers.eu*, 1/2016, p. 106; E. Guild, C. Costello, V. Moreno-Lax, *Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Study for the LIBE committee*, 7 March 2017, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf [last accessed 23 March 2020].

80. See V. Moreno-Lax, *Solidarity's reach: Meaning, dimensions and implications for EU (external) asylum policy*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 740; S. Morano-Foadi, *Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures*, in *European Journal of Migration and Law*, 2017, p. 223.

81. *Slovak Republic and Hungary* v *Council of the European Union*, (Grand Chamber) Joined Cases C-643/15 and C-647/15, Judgment of 6 September 2017.

82. See D. Thym, *The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy*, in *Common Market Law Review*, 2016, p. 1573.

placed in a framework that, in not forgetting about the human lives involved, does not disregard the respect for the fundamental rights of migrants and the EU and member states constitutional principles. In this sense, the appearance of which those agreements have been covered can be a sign of a European project that risks selling its soul to the devil.