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# THE CONCLUSION OF BILATERAL AGREEMENTS AND TECHNICAL ARRANGEMENTS FOR THE MANAGEMENT OF MIGRATION FLOWS: AN OVERVIEW OF THE ITALIAN PRACTICE

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## Abstract

*The present article offers an overview of the Italian practice related to the conclusion of bilateral agreements for the management of migration flows, with a view to analyzing the international and constitutional law implications. This practice consists in the conclusion of agreements following a simplified procedure, or secret agreements, which inevitably encroach upon the prerogatives of the Parliament. Given the specificity of the subject-matter of such agreements and the violation of human rights that their implementation causes, this article suggests a more cautious approach. In this regard, the recent judgment of the Tribunale Amministrativo Regionale del Lazio (TAR) is particularly welcomed as it will contribute to increasing knowledge of the various international agreements concluded by the Italian Government on migration-related issues. Reaffirming the duty of the Government to publish the text of all international agreements concluded by it might also contribute to enhancing control of the Parliament.*

Keywords: Art. 80 Italian Constitution; secret agreements; treaty-making power; migration flows; readmission; pull back policy

## 1. INTRODUCTION

Both the European Union (EU) and its Member States are increasingly making recourse to the conclusion of technical agreements or political arrangements with States where migration flows originate or transit to regulate a huge variety of aspects: from the repatriation of irregular migrants to the exchange of information. Agreements of this kind are not labelled as proper treaties, rather they are referred to as Memoranda of Understandings (MoUs), technical arrangements, statements, etc. This appears to be deliberate, to avoid the complexity and the length of international and domestic constitutional procedures for the conclusion of international treaties. Furthermore, the stipulation of these agreements reflects the 2015 European Agenda on Migration, which encouraged the simplification of repatriation procedures of irregular third-party citizens on the territory of the EU, through bilateral agreements. The best exemplification of this practice is the EU-Turkey Statement of March 2016, which actually served as a model for subsequent similar agreements. In this context, therefore, the bilateral agreements or technical arrangements stipulated by the Italian Government with Tunisia (2011), Sudan (2016), Libya (2017) and, most recently, Niger (2017) share common features that deserve attention. First, they confirm the predilection of the Government to conclude agreements following a simplified procedure in the field of migration. Moreover, the MoUs concluded with Tunisia and Sudan and the agreement concluded with Niger reveal the desire of the Government to conceal the text of the agreements.

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Although this practice might help in speeding-up the management of migration flows, especially when a State is confronted with a migrant crisis, it lacks any parliamentary control and it can not be subjected to judicial review. Furthermore, the absence of publicity makes it difficult for civil society (and for other Constitutional bodies) to scrutinize the conduct of the Government. This appears to be difficult to accept as this practice is not limited to obtaining the cooperation of third countries in the management of mass movement, but it also directly or indirectly impacts on the procedures relating to the entry of foreign individuals into Italy and to their repatriation, thus affecting their human rights.

Against this background, the article aims at contextualizing the Italian practice relating to the conclusion of bilateral agreements and technical arrangements on migration related issues in the light of international and constitutional law with a view to understanding if and to what extent it is possible to enhance the control over the discretionary power enjoyed by the Government. To this end, this article, in its first part, will offer an overview of the various agreements recently concluded by the Italian Government in the management of migration flows. In a second part, the article will present a legal analysis of the practice presented in the first part, in the light of international law and constitutional law. Finally, the article will scrutinize the legal remedies available to challenge this practice. In this regard, the recent judgment of the *Tribunale Amministrativo Regionale del Lazio (TAR)* that obliged the Italian Government to publish the agreement concluded with Niger under the so-called Freedom of Information of Act (FOIA) will be considered.

## 2. A LOOK AT THE “ITALIAN PRACTICE” RELATING TO THE CONCLUSION OF AGREEMENTS IN MIGRATION-RELATED ISSUES

When the European Court of Human Rights (ECtHR) condemned the Italian Government for the violation of the *non-refoulement* principle in the *Hirsi and Jamaa* case for the policy of pushing-back migrants to Libya, it stated that “Italy cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya”.<sup>1</sup>

The implicit message of that judgment was that the push-back policy of the Italian Government was not in compliance with the Convention and that the conclusion of a bilateral agreement could not serve as a basis for justifying the practice, hence for diluting human rights obligations in respect of migrants. That judgment might have contributed to clarifying the boundaries of States’ action in the management of migration flows; indeed, the Italian Government seems to have abandoned the practice of pushing back migrants at sea on the basis of that agreement.

However, as an unwanted effect, the ECtHR could also have paved the way to new practices. After the judgment in the *Hirsi and Jamaa* case, States realized that push-back policies, even if grounded on a valid international treaty, were not compliant with human rights law and that the involvement of State organs in similar operations would trigger their responsibility.<sup>2</sup> Consequently, in order to face the migration crisis that has been occurring since 2015, States have apparently abandoned such policies in favour of more sophisticated ones

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<sup>1</sup> *Hirsi and Jamaa and Others v. Italy*, Application No. 27765/09, Grand Chamber, Judgment of 23 February 2012, para. 129.

<sup>2</sup> See accordingly PJINENBURG, “From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?”, *European Journal of Migration and Law*, 2018, p. 396 ff., pp. 401-402.

developed in – and inspired by – the wider context of the European Agenda on Migration<sup>3</sup> and of the European Partnership Framework with Third Countries.<sup>4</sup>

The first document builds on four pillars: the reduction of incentives for irregular migration; the management of external borders; the revision of the European common asylum system and of the rules governing regular migration in the EU. The first two pillars of the European Agenda on Migration are of particular relevance for the present analysis. In fact, among the key actions to reduce incentives for irregular migration, the Commission regarded as crucial the “partnership with countries of origin and transit”.<sup>5</sup> Moreover, in order to reach the goal of better management of external borders the European Agenda on Migration focused on the development of a higher standard of efficiency in order to “make it easier for Europe to support third countries developing their own solutions to better manage their borders”.<sup>6</sup>

The second document, which appears to be a coherent evolution of the European Agenda on Migration, focuses in particular on the relationship with third countries with a view to enhancing the “cooperation to help facilitate identification and readmission of their nationals”.<sup>7</sup> The key recommendations of the Commission in the Partnership Framework include the following: “Coordinated and coherent EU and Member State coordination on readmission where the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements”.<sup>8</sup> As already pointed out, the approach of the EU toward the management of migration flows is based on the concept of externalization of border controls and on fast return arrangements with third Countries: an approach that appears to be developed to avoid legal responsibility, in particular as far as the protection of human rights is concerned.<sup>9</sup>

The first use of this modality of cooperation with third Countries by the EU was the Statement agreed with Turkey on 18 March 2016.<sup>10</sup> As is well known, the Statement sets forth a scheme for returning irregular migrants to Turkey, and in particular Syrian migrants.<sup>11</sup> Although the Court of Justice of the EU stated the contrary,<sup>12</sup> the Statement appears to be a real international agreement, which, however, was concluded outside the ordinary procedures and rules of the EU.<sup>13</sup>

The EU-Turkey Statement confirms the new trend encouraged by the European Agenda on Migration and the Partnership Framework. This trend rests on two pillars: the limitation of the flows upstream and the conclusion of agreements with third countries for the facilitation of

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<sup>3</sup> Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration, 13 May 2015.

<sup>4</sup> Communication COM(2016) 385 final from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, 7 June 2016.

<sup>5</sup> See European Agenda on Migration, *cit. supra* note 3, p. 8.

<sup>6</sup> *Ibid.*, p. 11.

<sup>7</sup> See Partnership Framework, *cit. supra* note 4, p. 7.

<sup>8</sup> *Ibid.*

<sup>9</sup> On the practice of externalization see CASOLARI, “The EU Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?”, *IYIL*, 2016, p. 109 ff; LIGUORI, “The Externalization of Border Controls and the Responsibility of Outsourcing States under the European Convention on Human Rights”, *RDI*, 2018, p. 1228 ff. On the responsibility of the EU for the conclusion of agreements such as the EU-Turkey Statement see DE VITTOR, “Responsabilità degli Stati e dell’Unione europea nella conclusione e nell’esecuzione di ‘accordi’ per il controllo extraterritoriale della migrazione”, *DUDI*, 2018, p. 1 ff.

<sup>10</sup> EU-Turkey Statement, 18 March 2016, available at <<https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>>.

<sup>11</sup> *Ibid.*, paras. 1 and 2. See on the scheme for returning migrants to Turkey: FERNÁNDEZ ARRIBAS, “The EU-Turkey Agreement: A Controversial Attempt at Patching Up a Major Problem”, *European Papers*, 2016, p. 1097 ff.

<sup>12</sup> Case T-192/16, *NF v. European Council*, Order of the General Court of 28 February 2017.

<sup>13</sup> Cf. CANNIZZARO, “Disintegration Through Law?”, *European Papers*, 2016, p. 3 ff.

repatriation and return of individuals. Such principles influenced and inspired Member States' conduct. In particular, and as far as Italy is concerned, the European policy documents served as the basis for the conclusion of different forms of cooperation agreements with transit countries that allow the latter to halt migrants before they reach European borders.

The MoU concluded in a simplified form by the Italian government with Libya represents the clearest example of this kind of cooperation agreement.<sup>14</sup> It represents, in fact, a framework agreement aimed at supporting security and military institutions in order to stem the flows of illegal migrants and to face the consequences deriving from them, in line with the provisions of the Treaty of friendship, partnership and cooperation signed between the two countries in 2009.<sup>15</sup> The Memorandum contains provisions which impose on the parties a generic obligation to cooperate and on the Italian Government more specific obligations to support, finance and provide technical support to the efforts of the Libyan Government to fight illegal immigration trafficking.<sup>16</sup>

The Memorandum is part of a rather new practice through which States are substituting a push-back policy towards migrants with a pull-back one. Accordingly, and technically speaking, migrants are not pushed-back by European States' agents or organs at their external borders, rather, they are pulled-back by the authorities of transit States such as Libya while they are still navigating in the territorial waters of those States. Indeed, it appears that States have learned the lesson of the *Hirsi Jamaa* judgment and are acting through a "legal work-around" to avoid direct implication in the management of migration flows. However, as has been already argued, even the pull-back policies might trigger the indirect responsibility under international law of European States, and in particular Italy; in fact, European countries, and Italy in particular, provide financial and logistic support and means to transit countries to halt migration flows upstream.<sup>17</sup>

It is useful to point out that the Memorandum with Libya was concluded in a simplified form, entering into force at the moment of the signature of the two Governments' representatives, which in the particular case was the two Heads of Government. The conclusion of the Memorandum thus did not follow the ordinary procedure for the conclusion of international treaties, which foresees that international treaties must be ratified by the President of the Republic<sup>18</sup> after an authorization from the Parliament in all cases prescribed in Article 80 of the Italian Constitution. This norm requires the act of ratification to be authorized by a law enacted by the Parliament when the treaty in question entails a modification of the territory, a modification of national laws or a financial burden; a Parliamentary authorization is also required when the treaty establishes dispute resolution mechanisms or when it is of a political nature.<sup>19</sup> This worrying choice of the Italian Government not to follow the ordinary procedure will be discussed below.<sup>20</sup>

The pull-back policy of the Italian Government has also been implemented through the conclusion of a bilateral agreement with the Government of Niger signed in Rome on 26

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<sup>14</sup> Memorandum d'intesa sulla cooperazione nel campo dello sviluppo, del contrasto all'immigrazione illegale, al traffico di esseri umani, al contrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, 2 February 2017, available at: <<http://itra.esteri.it/>>.

<sup>15</sup> *Ibid.*, Art. 1, lett. A).

<sup>16</sup> *Ibid.*, Art. 1, lett. B and C).

<sup>17</sup> See accordingly MANCINI, "Italy's New Migration Control Policy: Stemming the Flow of Migrants from Libya Without Regard For Their Human Rights", *IYIL*, 2018, p. 259 ff., pp. 277-280; PASCALE, "Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?", *Questions of International Law*, 2019, p. 35 ff. But see also, for the opinion that pull-back policies do not constitute violation of international human rights law: PASTAVRIDIS, "Recent "Non-Entrée" Policies in the Central Mediterranean and Their Legality: A New Form of "Refoulement"?", *DUDI*, 2018, p. 493 ff.

<sup>18</sup> See Art. 87 Italian Constitution.

<sup>19</sup> See Art. 80 Italian Constitution.

<sup>20</sup> See again MANCINI, *cit. supra* note 17. For a more detailed discussion see *infra* Section 4.

September 2017.<sup>21</sup> The agreement is presented by the Government as one of the legal bases for the establishment of Operation MISIN, an Italian military mission that since September 2018 has been deployed in Niger.<sup>22</sup>

From the technical data sheet of the mission<sup>23</sup> it is clear that it aims at increasing the capability of the Government of Niger to counter security threats, as part of a joint European and US effort to stabilize the area and to strengthen the territorial control capabilities of the whole region of Sahel. The mission is also deployed to provide support to the control and patrolling activities at southern border of Niger, providing aerial support. According to the statements of the current Italian Government's Minister of Defence, Operation MISIN will have, among others, the clear objective of limiting the influx of migrants on the Italian coasts.<sup>24</sup> According to the internal law that authorized the deployment of the mission, the legal basis of the operation is twofold: United Nations Security Council Resolution No. 2359 of 2017 and a bilateral agreement concluded between Italy and Niger.<sup>25</sup> This notwithstanding, it is doubtful whether the Resolution recalled in the law authorizes foreign States, explicitly or implicitly, to deploy their troops on the territory of Niger or of any other neighbouring States. Indeed, the Resolution addresses and welcomes the efforts of five States of the region of Sahel, Niger among them, to counter security threats through the deployment of a joint military mission but does not seem to go further.<sup>26</sup> As a consequence, the bilateral agreement concluded by Italy seems to be the only legal basis for the deployment of Italian troops on the territory of Niger, despite the fact that it is not at all clear whether the text of the agreement clarifies the exact content of the consent given by that Government. The uncertain legal basis of Operation MISIN possibly raises an issue under Law No. 145 of 2016, which regulates the establishment of and the participation of Italy in new military operations. Article 2 of the Law, in fact, binds the Government to clearly indicate to the Parliament the legal basis of each operation.

This notwithstanding, the agreement mentioned in the law was published neither in the *Gazzetta Ufficiale*, nor in the Online Archive of International Treaties (ATRIO),<sup>27</sup> which forms part of the website of the Ministry of Foreign Affairs that hosts the publication of all international agreements concluded by Italy, both those concluded following the ordinary procedure and those concluded in a simplified form. Publication would allow scrutiny of the text of the agreement.

The absence of publicity characterizes another practice: the conclusion of bilateral agreements with third countries that permit the readmission of individuals with simplified identification procedures, which, as seen above, builds on the European Agenda on Migration and on the Partnership Framework. Agreements of this kind are regarded by the Italian

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<sup>21</sup> Accordo di cooperazione in materia di difesa tra il Governo della Repubblica italiana e il Governo della Repubblica del Niger, 26 September 2017.

<sup>22</sup> See Italian Ministry of Defence, "Missione bilaterale di supporto nella Repubblica del Niger (MISIN)", available at: [https://www.difesa.it/OperazioniMilitari/op\\_intern\\_corso/Niger\\_missione\\_bilaterale\\_supporto/Pagine/default.aspx](https://www.difesa.it/OperazioniMilitari/op_intern_corso/Niger_missione_bilaterale_supporto/Pagine/default.aspx).

<sup>23</sup> See "Autorizzazione e proroga missioni internazionali", DOC CCL No. 3 and DOC CCL-bis No. 1, January 2018, p. 1 ff., p. 17, available at: <http://documenti.camera.it/leg17/dossier/pdf/DI0660.pdf>.

<sup>24</sup> See a recent interview of the Italian Government's Minister of Defence, Elisabetta Trenta: "Migranti, con il bel tempo tornerà l'allarme sbarchi", *Il Messaggero*, 27 February 2019, available at: [https://www.difesa.it/Il\\_Ministro/Interviste/Documents/Intervista%20Ministro%20Trenta%20Messaggero.pdf](https://www.difesa.it/Il_Ministro/Interviste/Documents/Intervista%20Ministro%20Trenta%20Messaggero.pdf)

<sup>25</sup> See the technical data sheet of the mission, *cit. supra* note 23.

<sup>26</sup> Security Council Resolution No. 2359/2017, UN Doc. S/RES/2359 (2017). The only paragraph which seems to confer some sort of legal coverage to external interventions is the following: "[the Security Council] encourages further support from bilateral and multilateral partners including through the provision of adequate logistical, operational and financial assistance to the FC-G5S".

<sup>27</sup> Available at: <http://itra.esteri.it/>.

Government as “technical arrangements” between Ministries or Police Departments. International police cooperation in the area of migration is widespread: the Italian Government has entered 267 Police Agreements, which are normally devoted to settling technical rules of cooperation in the fight against various forms of international criminality, such as the smuggling of migrants.<sup>28</sup> Apparently, the conclusion of similar arrangements falls under the scope of application of Directive No. 4 issued by the Italian Ministry for Foreign Affairs on 3 March 2008.<sup>29</sup> According to this act, each Ministry and each internal Department is allowed to stipulate technical arrangements with Ministries or Departments of other States upon authorization by the Ministry of Foreign Affairs.<sup>30</sup> The Directive excludes expressly that arrangements of this kind are regarded as proper international treaties given their purely “technical-administrative” in nature.<sup>31</sup> Accordingly, the Ministry or the Department that concludes similar arrangements is not bound to make them available to the Ministry of Foreign Affairs, which is competent only for the conclusion of international treaties.<sup>32</sup>

From this point of view, the case of 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, border management and migration flows” is emblematic. This Memorandum, signed on 3 August 2016 by the Head of the Department of Public Security of the Italian Government’s Ministry of Interior, was never made public by the Government and its text is only available on the website of the Association for Juridical Studies in Immigration (ASGI).<sup>33</sup> The MoU demonstrates several problematic features: it was concluded following a simplified procedure; it was signed by a Head of a Department of a Ministry; it was kept secret.

Yet, the Memorandum contains measures aimed at establishing a framework of cooperation between the Governments of Italy and Sudan to speed up repatriation procedures. Among the measures envisaged, those that are of most concern are related to the identification of irregular Sudanese citizens, which is delegated to the Sudanese authorities, who undertake to proceed “without delay to the interviews of people to repatriate, in order to establish their nationality and, based on the results of the interview, without carrying out any further investigation into their identity, [to] issue Sudanese emergency travel documents (passes) as soon as possible, thus allowing the competent Italian authorities to organize and carry out repatriation operations by scheduled or charter flights”.<sup>34</sup> Article 14 of the Memorandum provides for the possibility of adopting even more simplified repatriation procedures when the Parties agree on the existence of an emergency situation. In such cases, the identification of irregular migrants is carried out in Sudanese territory, once the repatriation is accomplished.

Another example of the same practice is represented by the agreement concluded by the Italian Government with Tunisia in April 2011. Despite the fact that the agreement is still public, the Grand Chamber of the ECtHR, mentioned its existence in the judgment in the *Khlaifia v. Italy* case, which regarded the expulsion of individuals from Italy to Tunisia.<sup>35</sup>

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<sup>28</sup> See FAVILLI, “Presentazione”, *Diritto immigrazione e cittadinanza*, 2016, p. 11 ff., p. 15.

<sup>29</sup> See Directive No. A/XII/4, “Procedure relative agli accordi internazionali ed alle intese interministeriali o tecniche”, 3 March 2008.

<sup>30</sup> *Ibid.*, p. 3, lett. b).

<sup>31</sup> *Ibid.*, p. 3.

<sup>32</sup> *Ibid.*, p. 4.

<sup>33</sup> Memorandum d’intesa tra il Dipartimento della pubblica sicurezza del Ministero dell’interno italiano e la Polizia nazionale del Ministero dell’interno sudanese per la lotta alla criminalità, gestione delle frontiere e dei flussi migratori ed in materia di rimpatrio, 3 August 2016, available at: <[http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan\\_rev.pdf](http://www.asgi.it/wp-content/uploads/2016/10/accordo-polizia-Italia-Sudan_rev.pdf)>.

<sup>34</sup> *Ibid.*, Art. 9, paras. 1 and 2.

<sup>35</sup> *Khlaifia and Others v. Italy*, Application No. 16483/12, Grand Chamber, Judgment of 15 December 2016, para. 37. Notice of the agreement can be also found in a press release of the Ministry of the Interior, see “Immigrazione, siglato l’accordo tra Italia e Tunisia”, available at:

According to the ECtHR, “Tunisia undertook to accept the immediate return of Tunisians who had unlawfully reached the Italian shore after the date of the agreement. Tunisian nationals could be returned by means of simplified procedures, involving the mere identification of the person concerned by the Tunisian consular authorities”.<sup>36</sup>

The above overview allows some preliminary and partial conclusions. First, with the exclusion of the agreement with Tunisia, which was concluded in 2011, the agreement concluded with Niger and the MoUs concluded with Libya and Sudan appear to be an indirect implementation of the European Agenda on Migration and of the related and subsequent EU policy documents. Second, all the agreements considered raise doubts as far as their legal nature and validity under international law is concerned. Indeed, the label chosen for the Memoranda concluded with Libya seems to indicate non-binding engagements, while it is not at all clear if the agreement with Niger is provisionally applied, given that Italian soldiers are deployed but the agreement has not yet been ratified by the Parliament. Last, but not least, it is doubtful whether such a practice as a whole is compatible with the Italian Constitution.

### 3. THE “ITALIAN PRACTICE” UNDER INTERNATIONAL LAW

The preliminary issue that must be addressed relates to the legal nature of the above-mentioned agreements under international law. Such an inquiry is necessary in order to tackle, in the next Section, the related domestic constitutional issues. Such a problem is particularly relevant for the two Memoranda concluded with Libya and Sudan. As we will see, the agreement with Niger poses different legal challenges.

As for the Memoranda, one might question whether the label chosen impacts on the legal nature of the acts. In fact, the label MoU usually indicates non-binding agreements, namely agreements that do not bind States to respect them,<sup>37</sup> which, as noted above,<sup>38</sup> Directive No. 4 regarding the conclusion of technical arrangements, explicitly excludes regarding them as proper international treaties. However, the nature of a treaty cannot be simply inferred from the choice of the label, as the appellative of a legal document does not influence its legal nature. Rather, as stipulated in the Vienna Convention on the Law of Treaties (VCLT), a treaty is an “international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more instruments and whatever its particular designation”.<sup>39</sup>

The nature of an MoU as an international treaty must therefore be assessed in the light of other elements. The crucial one is surely represented by the intention of the Parties.<sup>40</sup> If the Parties agree, expressly, to exclude the bindingness of an MoU their intention is manifest and plays a decisive role.<sup>41</sup> When the intention is not expressly manifested in an MoU, its legal

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<[http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala\\_stampa/notizie/immigrazione/000073\\_2011\\_04\\_06\\_accordo\\_Italia-Tunisia.html](http://www1.interno.gov.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/000073_2011_04_06_accordo_Italia-Tunisia.html)>.

<sup>36</sup> *Khlaifia and Others v. Italy*, *cit. supra* note 35, para. 38.

<sup>37</sup> Cf. CONFORTI (IOVANE ed.), *Diritto internazionale*, 11th ed., Napoli, 2018, p. 80. See also AUST, *Modern Treaty Law and Practice*, 3rd ed., Cambridge, 2013, p. 28 ff.

<sup>38</sup> See *supra*, Section 2.2.

<sup>39</sup> Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, Art. 2.

<sup>40</sup> See CONFORTI, *cit. supra* note 37, p. 81; AUST, *cit. supra* note 37, pp. 32-33. See also FITZMAURICE and ELIAS, *Contemporary Issues in the Law of Treaties*, Utrecht, 2005, p. 29.

<sup>41</sup> CONFORTI, *cit. supra* note 37, p. 81. It must be noted however, that the International Court of Justice diminished the role of the intention of the Parties in assessing the legal nature of a “note verbale” in the dispute between Qatar and Bahrain. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 1 July 1994, ICJ Reports, 1994, p. 112 ff., para. 27.

nature can be derived from other elements and in particular from its actual terms.<sup>42</sup> In its rules concerning the interpretation of treaties, the VCLT makes use of an objective approach based on the principle good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose, which can be found in the Preamble.

As for the MoU concluded by the Italian Government with Sudan, it is noteworthy to highlight that in the preamble of the MoU the Parties recognize “the necessity to enhance police cooperation in the fight against transnational organized criminality” and especially “irregular immigration”, “fully committed to stop the dangerous travels of migrants who seriously risk their lives” and “persuaded that an effective repatriation policy would have a considerable deterrent effect”. Hence, the purpose of the MoU strongly suggests that the document has legal effects because is intended to bind the parties in order to reach a necessary common objective through the establishment of procedures of repatriation. Moreover, the Preamble also suggest that the Parties intend the MoU to be regulated by international law: this can be inferred from the reference to the respect of the national sovereignty and international obligations of both States.<sup>43</sup>

As for the terms of the MoU with Sudan, it is difficult to deny that it binds the two contracting States. This is demonstrated by Articles 5 and 6, which regulate, in detail, the modalities of a possible request of assistance that one of the two Contracting States can address to the other. Also, it can be stressed again that the MoU with Sudan regulates the procedures for the repatriation of individuals that must be followed by the Parties. Italy implemented the procedures laid down in Article 9 of the MoU and actually returned to Sudan a group<sup>44</sup> of Sudanese in August 2016. The binding nature of the MoU with Sudan seems also to be demonstrated by the final clauses that regulate the entry into force and its validity. In fact, in Article 20 the Parties agreed that the MoU is valid until one of them denounces it and that six months after the denunciation, the agreement ceases to be in force.<sup>45</sup> In this regard, it is worth noting that the Directive No. 4, which should be the basis of the conclusion of the MoU with Sudan, clearly indicates that technical arrangements must not contain final clauses on the entry into force, on the denunciation and on the settlement of disputes, as these would alter the purely “technical-administrative” nature of the MoU.<sup>46</sup>

The “actual terms” of the MoU concluded with Libya allow similar conclusions to be reached. In fact, even a superficial reading of the text of the agreement discloses the intention of the Parties to abide by legal obligations. This emerges from the employment of expressions such “The Parties commit themselves” (“*Le parti si impegnano*”) that precede the actual engagements.<sup>47</sup> Moreover, the MoU concluded with Libya is very precise as far as the duties of the Parties are concerned. In particular, the Italian Government is tasked with the performance of specific support activities such as the supply of medicines and the training of Libyan personnel to be deployed in the camps where migrants are held.<sup>48</sup>

Against this background it is difficult to deny that the two MoUs concluded with Sudan and Libya are treaties “governed by international law”. In light of the procedures followed for their conclusion, they can be regarded as treaties concluded in a simplified form, according to Article 12 VCLT.

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<sup>42</sup> *Ibid.* See also and more generally on the role of objective elements in the determination of the nature of a treaty in international law KLABBERS, “Qatar vs. Bahrain. The Concept of ‘Treaty’ in International Law”, *Archiv des Völkerrechts*, 1995, p. 361 ff.

<sup>43</sup> Memorandum with Sudan, *cit. supra* note 33, Preamble.

<sup>44</sup> For more details on this see *infra*, Section 5.

<sup>45</sup> Memorandum with Sudan, *cit. supra* note 33, Art. 20.

<sup>46</sup> See Directive No. A/XII/4, *cit. supra* note 29, p. 4, lett. d).

<sup>47</sup> Memorandum with Libya, *cit. supra* note 14, Arts. 2, 3 and 4.

<sup>48</sup> *Ibid.*, Art. 2, paras. 2 and 3.

The MoU with Sudan raises at least other two peculiar problems, because it was never made public by the Government, like the agreement with Tunisia, and it was signed by the Head of a Department of the Ministry of Interior. As for the first problem, is it possible to regard the MoU with Sudan as a secret agreement? And does the answer impact on the legal nature of the MoU? According to a scholarly position, secret agreements are non-legal acts that fall outside the scope of the VCLT.<sup>49</sup> However, it must be acknowledged that international law is neutral towards the conclusion of secret agreements and that, eventually, their validity can be challenged under domestic law.<sup>50</sup> The discussion on the secrecy of the agreement will be developed in the next paragraph.

As for the power of the Head of the Department of Public Security of the Ministry of Interior to represent Italy in international negotiations, it cannot be considered evident to any State, acting in accordance with normal practice and good faith, that such an agent does not have the competence to bind Italy by means of an international agreement. In fact, the Head of the Department of Public Security is a State organ which can be delegated by the Government to represent Italy in the stipulation of an international treaty. This could be justified under Directive No. 4 on the conclusion of technical arrangements. However, as seen above, the terms of the MoU with Sudan and the inclusion of final clauses on the entry into force, denunciation and dispute settlement allow the formulation of two hypotheses: either the MoU was concluded in violation of Directive No. 4, or it was not considered as a purely “technical-administrative” arrangement. In both cases, it seems that the Italian Government followed an unorthodox procedure, which could be illegitimate under constitutional law thus becoming relevant under that could be considered under Article 46 VCLT.<sup>51</sup>

Before moving to the next level of the analysis it is worth discussing the status of the agreement concluded between Italy and Niger in international law. At present, in fact, the only information available on the document is the following: it was signed in Rome on the 26 November 2017, but the signature was not considered sufficient for the entry into force as per Article 10 of the agreement;<sup>52</sup> a law authorizing the President of the Republic to ratify it has not yet been approved by the Parliament.<sup>53</sup> Given that Operation MISIN is already deployed in Niger, the agreement has been provisionally applied. In the text of the agreement nothing is said on its provisional application, however, there seems to be no doubt that this matches the intention of the Parties.<sup>54</sup> The presence of the troops on the territory of Niger is a clear demonstration. In fact, pending the approval of the authorization by the Parliament, the two Governments agreed on the status of the Italian soldiers participating in Operation MISIN through an exchange of letters dated 10 January 2018.<sup>55</sup>

#### 4. THE “ITALIAN PRACTICE” UNDER DOMESTIC LAW

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<sup>49</sup> FOIS, “Il trattato segreto nel sistema degli accordi internazionali”, RDI, 1990, p. 809 ff.

<sup>50</sup> CONFORTI, *cit. supra* note 37, p. 81.

<sup>51</sup> See *infra*, Section 5.

<sup>52</sup> Accordo di cooperazione, *cit. supra* note 21, Art. 10. According to this norm the treaty enters into force once the completion of national procedures of ratification are notified between the Parties.

<sup>53</sup> It appears from the website of the *Camera dei Deputati* that the law authorizing the ratification was approved by that Chamber: <<http://www.senato.it/leg/18/BGT/Schede/Ddliter/51116.htm>>.

<sup>54</sup> The provisional application of treaty must not necessarily be expressed in the treaty itself but can be inferred from the application of a subsequent agreement. See KRIEGER, “Article 25. Provisional application”, in DÖRR and SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties. A Commentary*, Heidelberg, 2012, p. 407 ff., pp. 414-415.

<sup>55</sup> Note verbale concernant l’Accord de coopération en matière de défense entre le Gouvernement de la République Italienne et le Gouvernement de la République du Niger, 26 September 2017, available at: <<http://itra.esteri.it>>.

The previous paragraph showed that the MoUs concluded with Libya and Sudan can be regarded as treaties concluded following a simplified procedure and that the agreement with Niger has been provisionally applied pending the approval of a law authorizing the ratification.

This practice of the Italian Government of concluding international agreements following a simplified procedure represents one of the most debated and controversial issues in international and constitutional law as far as the international treaty-making power is concerned.<sup>56</sup> Article 87 of the Italian Constitution vests the President of the Republic with the power to ratify international treaties, while Article 80, as seen above,<sup>57</sup> requires the act of ratification to be authorized by a law approved by the Parliament when the treaty regards specific questions and when it is of a political nature.<sup>58</sup> Consequently, in all the matters that are not mentioned in Article 80, the Italian Parliament might not be involved in the ratification procedure. As for this category of treaties, a minority position in Italian scholarship holds that Article 87 nonetheless requires an act of ratification of the President of the Republic.<sup>59</sup> The treaty-making practice of the Government disproves this theoretical position. In fact, in line with the VCLT, which allows States to bind themselves simply through the signature of their representatives, the Italian Government regarded itself free to conclude international agreements following this simplified procedure.<sup>60</sup> The adoption of Law No. 839/1984 confirmed the consistency of this practice with the Italian Constitution, because it binds the Government to publish the text of international agreements concluded following a simplified procedure.<sup>61</sup>

This notwithstanding, the scope of application of Article 80 still remains open to debate, in particular when it comes to assessing the political nature of a treaty that makes it necessary for the Parliament to authorize its ratification. In fact, it is known that the Italian Government grants itself a wide margin of appreciation in determining when a treaty falls within – *rectius* outside – the scope of application of Article 80 to avoid the Parliamentary authorization.<sup>62</sup> The Constitutional Court has not had many chances to clarify the boundaries of Article 80. In a relatively old judgment, it held that the provision should be interpreted so as to allow the Parliament to scrutinize the text of a treaty in order to evaluate whether an authorization law is necessary; hence proving that Article 80 suffers no exceptions.<sup>63</sup> Despite this judgment, many authors opine that the above-mentioned practice represents the objective element of a customary constitutional rule that allow the Government to conclude agreements in a simplified form even for matters falling within the scope of Article 80.<sup>64</sup> The subjective element of this customary

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<sup>56</sup> The literature is broad and it is not possible to give account of all the pieces that have dealt with this issue. In general, see *ex multis* MONACO, “La ratifica dei trattati nel quadro costituzionale”, RDI, 1968, p. 630 ff.; MARCHISIO, “Sulla competenza del Governo a stipulare in forma semplificata trattati e trattati internazionali”, RDI, 1975, p. 533 ff.; CASSESE, “Art. 80”, in BRANCA (ed.), *Commentario della Costituzione*, Bologna, 1979, p. 150 ff.

<sup>57</sup> See *supra*, Section 2.

<sup>58</sup> See Art. 80 Italian Constitution.

<sup>59</sup> Cf. GHERA, “Art. 80”, in CELOTTO, OLIVETTI and BIFULCO (eds.), *Commentario alla Costituzione*, Torino, 2006, p. 1569 ff., p. 1570.

<sup>60</sup> See SASSI, “Il puzzle costituzionale del *treaty-making power* in Italia”, *Rivista AIC*, 2014, p. 1 ff., pp. 5-6.

<sup>61</sup> Law No. 839/1984, Art. 1. For the position that the adoption of Law No. 839/1984 is an implicit confirmation that the Government is free to conclude agreements in a simplified form see SASSI, *cit. supra* note 52; PALOMBINO, “Sui pretesi limiti costituzionali al potere del Governo di stipulare accordi in forma semplificata”, RDI, 2018, p. 870 ff., p. 872.

<sup>62</sup> See accordingly RAFFIOTA, “Potere estero del Governo e accordi internazionali in forma semplificata: una ricerca sulla prassi”, *Forum di Quaderni Costituzionali*, 2009, p. 1 ff., p. 17.

<sup>63</sup> *Corte Costituzionale*, Judgment of 19 December 1984, No. 295, para. 6. For a comment on this judgment see CATALDI, “In tema di rapporti tra ordine di esecuzione alla ratifica e ordine di esecuzione del trattato”, RDI, 1985, p. 520 ff.

<sup>64</sup> MARCHISIO, *cit. supra* note 56, p. 545; PALOMBINO, *cit. supra* note 61, p. 845-846. But see *contra* CATALDI, *cit. supra* note 63, pp. 531-532.

rule would lie in the attitude of the Parliament and of the President of the Republic, who has not contested the practice of the Government. Furthermore, in many cases the Parliament authorized the President of the Republic to ratify *ex post* treaties concluded by the Government in a simplified form, thus proving some acquiescence towards this practice.<sup>65</sup>

This above-mentioned position could arguably reflect a consolidated practice and it might provide constitutional legitimacy to agreements concluded in simplified form. However, when it comes to considering the conclusion of agreements in a simplified form for managing migration flows there are some complicating factors that must be taken into account. First, as the agreements with Libya, Sudan and Niger show, migration issues are not limited to the readmission of individuals. Second, as the MoU concluded by Italy with Sudan and the Cooperation agreement with Niger show, there is a tendency to resort to secret agreements and/or to avoid making the treaty in a public manner. Third, as the same MoU demonstrates, agreements concluded following a simplified procedure impact on the juridical situation of aliens, a matter which is covered by a statutory reservation as per Article 10 of the Italian Constitution.

As for the first aspect, it is nowadays difficult to maintain that agreements concluded for managing migration flows are mere technical cooperation arrangements. Indeed, as the practice analyzed above shows,<sup>66</sup> migration issues are treated in broad comprehensive agreement with third countries. The MoU with Libya and the agreement with Niger, for example, show that the management of migration flows is strictly intertwined with military cooperation. In particular, the MoU with Libya implemented the so-called Valletta Action Plan, through which European and African States agreed on political solutions for the management of migration flows.<sup>67</sup> The political dimension of the Valletta Action Plan was stressed by the European Council, which explicitly regarded cooperation with Libya as a tool to facilitate a political settlement of the migration crisis.<sup>68</sup> Against this background, it is difficult to maintain that agreements concluded in migration-related issues might not be discussed by the Parliament as they involve matters that inevitably regard the long-term foreign policy of the State thus representing a clear and manifest example of treaties of a “political” nature.<sup>69</sup>

In this regard, the agreement concluded with Niger represents a good example, despite the fact that it was not made public by the Government, which is the second reason for concern. It is worth recalling that the practice of secret agreements is subject to specific restrictions deriving both from the Constitution and from secondary legislation. In fact, the conclusion of secret agreements must be excluded in all the matters listed in Article 80 of the Constitution, because this would be contrary to the requirement of a prior authorization of the Parliament. Moreover, Law No. 839/1984, as seen above, binds the Government to publish the text of all international agreements. Law No. 124/2007 provides for the possibility of keeping some secret, but explicitly limit this to agreements the publication of which risks endangering the integrity of the State, its independence and the independence of third countries, or which concern its military defence.<sup>70</sup> In general terms, it seems difficult to maintain that agreements

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<sup>65</sup> See again PALOMBINO, *cit. supra* note 61, p. 847; SALERNO, *Diritto internazionale. Principi e norme*, Milano, 2017, p. 179.

<sup>66</sup> See *supra*, Section 2.

<sup>67</sup> Valletta Summit, 11-12 November 2015, “Action Plan”, available at: <[https://www.consilium.europa.eu/media/21839/action\\_plan\\_en.pdf](https://www.consilium.europa.eu/media/21839/action_plan_en.pdf)>.

<sup>68</sup> European Council, “Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route”, 3 February 2017, [available at: <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/>](https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/), paras. 5 and 6.

<sup>69</sup> For the view that treaties that impact on the foreign policy must be concluded following the ordinary procedure see CASSESE, *cit. supra* note 48, p. 162.

<sup>70</sup> Law No. 124/2007, Art. 39.

concluded in the field of migration fall within one of those categories.<sup>71</sup> Looking at the content of the MoU concluded with Sudan it appears that one part is devoted to regulating cooperation between police departments, which might require some degree of secrecy, though police activity has nothing to do with military defence. However, the most debated part of the Memorandum regulates the procedures for repatriation of individuals of Sudanese nationality, which is actually difficult to consider a matter that needed to be covered in secret according to Law No. 124/2007.

This last point brings us to the third concern, relating to the impact of the implementation of international agreements on the juridical situation of aliens in Italy. In fact, according to Article 10, paragraph 2, of the Italian Constitution, “[t]he legal status of foreigners is regulated by law in conformity with international provisions and treaties”. Accordingly, the treatment of aliens is subject to a statutory reservation that must be in conformity with Italy’s international obligations, which includes human rights standards and conventions.<sup>72</sup> Consequently, any interference with the rights of aliens must be prescribed by law and in conformity with human rights, among which the prohibition of removal of an individual who would be under a serious risk to be subjected to torture in the place of destination plays a pivotal role.<sup>73</sup> Moreover, Article 10, paragraph 3, of the Constitution establishes a statutory reservation also for the exercise of the right of asylum by a foreigner in Italy.

Against this background, it is worth recalling that the MoU with Sudan, in particular at Articles 9 and 14, lays down special procedures for the identification of Sudanese citizens, which might be speeded up if the Parties so agree. It is doubtful whether the identification procedures agreed in the arrangements allow the proper evaluation of the position of each individual, in particular when their repatriation is decided without further investigation, as per Article 9, paragraph 2, of the MoU.

Recently, a group of Sudanese citizens found in Ventimiglia and repatriated on the basis of Article 9 of the MoU brought an application to the ECtHR claiming a violation of the prohibition of *refoulement* under Article 3 ECHR.<sup>74</sup> According to the applicants, who come from the Darfur province, they did not receive proper legal information or legal counselling concerning the asylum procedures. Moreover, they claim that the Italian authorities returned them to Sudan without any evaluation of their personal situation and at the risk of being subjected to torture or inhuman and degrading treatment, which appears to be a concrete one, considering the ongoing human rights violations civilians suffer in Darfur.<sup>75</sup>

The content of the MoU with Sudan and its implementation suggest that it has had a real and direct impact on the rights of aliens; accordingly, it should have been discussed by the Parliament and authorized through law.<sup>76</sup> On a more general note, it seems fair to conclude that all the agreements setting forth repatriation procedures must fall within the statutory reservations of Article 10, paras. 2 and 3, of the Italian Constitution.<sup>77</sup> Consequently, there is

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<sup>71</sup> FAVILLI, “Quale modalità di conclusione degli accordi internazionali in materia di immigrazione?”, RDI, 2005, p. 156 ff., p. 163.

<sup>72</sup> See accordingly Cassese, “Art. 10”, in BRANCA (ed.), *cit. supra* note 56, p. 461 ff., p. 521.

<sup>73</sup> See among the others ECtHR, *Vilvarajah and Others v. The United Kingdom*, Applications No. 13163/87 and 4 others, Judgment of 30 October 1991, para. 103; Human Rights Committee, “CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, 1992, para. 12.

<sup>74</sup> See *W.A. v. Italy*, Application No. 18787/17 lodged on 13 February 2017.

<sup>75</sup> Recently, the Chair of the Security Council Committee established pursuant to Resolution 1591 (2005) declared that the ongoing clashes in Darfur have “a negative impact on the civilian population, including various human rights violations and abuses”: UN Doc. SC/13530 (2018), available at: <<https://www.un.org/press/en/2018/sc13530.doc.htm>>.

<sup>76</sup> See accordingly ALGOSTINO, “L’esternalizzazione *soft* delle frontiere e il naufragio della Costituzione”, *Costituzionalismo.it*, 2017, p. 139 ff., pp. 166-168.

<sup>77</sup> Cf. FAVILLI, *cit. supra* note 71, p. 165.

no doubt that the conclusion of technical arrangements that affect the rights of aliens is contrary to the above-mentioned constitutional provisions.

## 5. IS THERE A WAY TO CHALLENGE THE “ITALIAN PRACTICE”?

The legal framework presented in the previous paragraphs clearly shows that agreements concluded in a simplified form or as “technical arrangements” as per Directive No. 4 in migration related issues challenge the Constitutional framework relating to the treaty-making power. Even if one accepts the position according to which the Government is in principle allowed to enter into agreements in matters covered by Article 80 of the Constitution without any authorization of the Parliament, it is undeniable that agreements such as those analyzed in this article affect the rights of aliens.

One might argue that the conclusion of the MoU with Libya and Sudan following simplified procedures, the secret nature of the MoU with Sudan, and the competence of the Head of the Department of Public Security to bind Italy in international relations constitute grounds for invoking the invalidity clause in Article 46 VCLT. In light of the findings of the previous paragraph, it is possible to regard the MoUs with Libya and Sudan as being concluded in violation of fundamental internal laws on the competence to conclude international treaties. Article 46 VCLT, however, requires the violations to be manifest to the other Parties. According to the interpretation of this latter element, when “deux pays concluent un accord par échange de lettres, accord qui, pour des raisons constitutionnelles, exige l’approbation du Parlement de l’un d’eux, il est d’usage de faire mention de cette circonstance dans le texte ou au cours de la négociation”; should this not be the case, the invalidity clause cannot be invoked.<sup>78</sup> As the overview of the practice showed, the agreements concluded by Italy in simplified form are formulated in clear terms when they exclude the need for ratification. One might also argue whether the conclusion of “technical arrangements” without the competence to do so could trigger Article 46 VCLT. As seen above, this might be the case for arrangements such as the MoU with Sudan. In this regard, Directive No. 4 appears to solve only part of the problem, as the delegation of competence to a single Ministry or to the Head of a Department must be in conformity with the law. However, it seems difficult to see how a contracting Party could maintain that an application of Directive No. 4 contrary to the law is manifest as per Article 46 VCLT.

It appears difficult, therefore, to consider the invocation of invalidity under international law as a way to challenge this practice.

Domestic legal remedies are also not encouraging.

The conflict of attribution, which the Parliament can bring before the Constitutional Court under Article 134 of the Constitution, represents one of the few judicial avenues. In fact, constitutional organs can apply to the Constitutional Court when they deem that other organs have violated the principle of the attribution of competences. In the case under examination, the Parliament – *rectius*: the two Chambers of the Parliament – is entitled to ask the Court to adjudge and declare that the Government violates Article 80 of the Constitution to the extent that it does not involve the Parliament in the treaty-making procedure in matters clearly falling under the scope of application of that provision. The Court approaches this remedy with a certain degree of chariness, in particular as far as admissibility is concerned. This approach brought the Court to affirm that a conflict of attribution could be admissible only if it is presented before it by one of the Chambers of the Parliament. This means, in clearer terms, that according to the settled jurisprudence, a single Member, or a group of Members, of the *Camera*

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<sup>78</sup> *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Award of 31 July 1989, International Reports of Arbitral Awards, 2006, p. 19 ff., para. 58.

*dei Deputati* or of the *Senato della Repubblica* cannot present a conflict of attribution. If they are willing to do so, they must ask their own Chamber to bring the conflict before the Court.

This is what the *Corte costituzionale* affirmed in Order No. 163/2018, which declared inadmissible a conflict of attribution regarding the conclusion of the MoU with Libya raised by five Members of the *Camera dei Deputati*.<sup>79</sup> Despite its formal consistency with the constitutional practice, it is possible to express discomfort at this decision. In fact, when the Government exercises its treaty-making prerogatives without any involvement of the Parliament, there appear to be no constitutional safeguards<sup>80</sup> as it is very unlikely that the majority of the Parliament will present a conflict of attribution against the Government that represents it.<sup>81</sup> A more recent decision of the Court, however, partially mitigates the discomfort over Order No. 163/2018. In Order No. 17/2019, the *Corte costituzionale* affirmed that a single political party and even a group of members of the Parliament can raise a conflict of attribution before the Court “where serious and manifest violations of their constitutional prerogatives have occurred”.<sup>82</sup> In that case, the violation at stake regarded the approval of the law on the 2019 budget of the State. One might wonder whether similar conclusions could apply in future to the treaty-making power. In other words, it remains open to see whether the Court will extend to the conclusion of treaties the part of Order No. 17/2019 in which it affirmed the existence of prerogatives belonging to each member of the Parliament.

Recently, however, the *TAR* delivered an important judgment on the publicity of the international agreements concluded by Italy. As mentioned above, the cooperation agreement concluded with Niger was not published by the Italian Government after its conclusion. This prompted two Italian associations – the already mentioned ASGI and the Italian Coalition for Civil Liberties and Rights (CILD) – to request the Ministry for Foreign Affairs to disclose the agreement concluded with Niger under the Freedom of Information Act (FOIA)<sup>83</sup> to understand the exact boundaries of Italy’s actions in Niger. As the Ministry denied access, the two associations presented an application to the *TAR* challenging the decision of the Ministry not to disclose the text of the agreement even after the request under the FOIA. The decision of the *TAR* in favour of the applicants, despite its relatively brief argumentative reasoning, seems to go beyond the circumstances of the specific case. In fact, the administrative tribunal stated that there is a duty of the Government to disclose all international agreements entered into by Italy, whatever their forms; the wording of the decision seems to extend this duty also to international agreements signed by the Government that need to be ratified by the Parliament even if the authorization law is not yet adopted.<sup>84</sup> The only limit posed by the *TAR* is represented by the possibility to apply the State secret doctrine as under Article 39 of Law No. 124/2007.<sup>85</sup>

The decision of the *TAR* is important for two reasons. First, it appears to be a bold limit on the conclusion of secret agreements. In other words, it reaffirms the duty of the Italian Government to disclose all international agreements concluded by it. The second reason is linked to the possible control of the activity of the Parliament with respect to the international

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<sup>79</sup> *Corte costituzionale*, Order of 4 July 2018, No. 163/2018.

<sup>80</sup> See for a critical comment on Order No. 163/2018: BIN, “Riserva di legge e conflitto di attribuzione: dov’è finita la caccia alle ‘zone franche’? Breve nota a Corte costituzionale, ord. 163/2018”, *Forum di Quaderni Costituzionali*, 2018, p. 1 ff, available at: <[http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/07/bin\\_nota\\_ord-163-2018.pdf](http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/07/bin_nota_ord-163-2018.pdf)>.

<sup>81</sup> LAURO, “Il conflitto fra poteri dello Stato e la forma di governo parlamentare: a margine delle ordinanze 163 e 181 del 2018”, *Forum di Quaderni Costituzionali*, 2018, p. 1 ff., p. 4, available at: <[http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/10/nota\\_163\\_181\\_2018\\_lauro.pdf](http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2018/10/nota_163_181_2018_lauro.pdf)>.

<sup>82</sup> *Corte Costituzionale*, Order of 10 January 2019, No. 17/2019, paras. 4.2-4.3.

<sup>83</sup> Decree-Law No. 97/2016.

<sup>84</sup> *Tribunale amministrativo del Lazio*, Judgment of 16 November 2018, No. 11125, *Fachile v. Ministero degli Affari Esteri e della Cooperazione Internazionale and Ministero della Difesa*, p. 6.

<sup>85</sup> *Ibid.*

treaty-making power of the Government. It allows the Parliament and in particular the Commissions for international affairs of the two Chambers, to exploit their competence to monitor the international activity of the Government.<sup>86</sup> In this regard, one should not underestimate the possibility of a single member of the Parliament presenting a proposal for a law authorizing the ratification of international treaties. It is important to remember that such a possibility is not regulated (nor prohibited) by the Constitution.<sup>87</sup> Usually, it is the Government that proposes the adoption of a law authorizing the ratification of an international treaty; however, the silence of the Constitution leaves room for initiatives of single members of the Parliament.<sup>88</sup> This is actually confirmed by a constant and coherent practice inaugurated by the adoption of the law that authorized the ratification of the Convention on Certain Conventional Weapons.<sup>89</sup> Interestingly, the members of the *Camera dei Deputati* who proposed that law stated that their action was necessary to avoid an unjustified compression of Parliamentary prerogatives.<sup>90</sup> Since then, proposals originating from Members of the Parliament force the Government to present its own proposal, hence initiating the ordinary legislative procedure following the more usual practice.

The judgment of the *TAR*, therefore, restates the duty of the Government to avoid secrecy and to inform the Parliament of the international agreements it has entered into. This is not something new, as that duty was already set forth in Law No. 839/1984; however, the practice illustrated in this article proves that a reminder of this from the judiciary was necessary. In this regard, the judgment of the *TAR* is already producing its first effects: the Government, on 28 November 2018, presented to the Parliament a proposal for a law authorizing the ratification of the cooperation agreement with Niger;<sup>91</sup> at present, the proposal is subject to the second reading of the Senate.

## 6. CONCLUDING REMARKS

The conclusion of international agreements following a simplified procedure represents an established practice of the Italian Government. The need to face the migratory crisis brought the EU and many EU Member States to increase their recourse to similar agreements for managing migration flows. The compression of the prerogatives of the Parliament might be justified on the grounds of a customary constitutional rule and is surely compatible with international law, however, as this article has shown, agreements concluded in migration-related issues add a complicating layer that suggests a more cautious approach, especially because such agreements often lack publicity.

In this regard, the recent judgment of the *TAR*, which reaffirms the duty of the Government to publish all international agreements concluded by it, is welcomed as it could, in principle, allow the Parliament to control the international treaty-making power of the

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<sup>86</sup> On the role of the Commissions see CASSESE, “I trattati internazionali e il ruolo delle Commissioni Affari Esteri”, in CASSESE (ed.), *Parlamento e politica estera. Il ruolo delle commissioni affari esteri*, Padova, 1982, p. 107 ff.

<sup>87</sup> See in general on this issue OLIVITO, “Il *cul-de-sac* costituzionale degli accordi in forma semplificata: iniziativa legislativa parlamentare ed esternalizzazione delle politiche migratorie”, *Diritto pubblico*, 2018, p. 435 ff.

<sup>88</sup> *Ibid.*, p. 458-459.

<sup>89</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, entered into force 2 December 1983. The Parliament authorized the President of the Republic to ratify the Convention with Law No. 715 of 14 December 1994.

<sup>90</sup> Battistuzzi and others, A.C. 5611, 17 April 1991.

<sup>91</sup> See Italian Government, Press Release No. 29 of 28 November 2018, available at: <http://www.governo.it/articolo/comunicato-stampa-del-consiglio-dei-ministri-n-29/10455>.

Government and to contribute to directing Italy's foreign policy. It is questionable whether or not the exercise of this power will actually contribute to a better management of migration flows; but it does increase knowledge of the modalities agreed internationally by Italy in migration-related issues and offer a way out of the long-standing and unresolved debate on the competences of the Parliament (and of the Government) as far as the treaty-making power is concerned.