



MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION

**ITALY'S REMARKS,
IN RESPONSE TO THE JOINT COMMUNICATION (AL ITA 4/2019)
FROM SIX UN SPECIAL PROCEDURES,
DATED MAY 15, 2019**

June 4, 2019

ITALY'S REMARKS

Further to letter dated May 15, 2019 (AL ITA4/2019), sent by six UN Special Procedures (Special Rapporteur on the situation of human rights defenders; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on trafficking in persons, especially women and children), Italian Authorities are in a position to provide the following remarks.

1. As for the remarks made by the eminent Special Procedures Mandate-holders (SPMHs) concerning the two Directives of the Ministry of the Interior, which would allegedly have the potential to impact on human rights, it is necessary to underline, on a general note, that all the initiatives taken by the Italian Government must be considered within a legal and factual framework of great complexity: this should always be taken into due consideration and it is crucial for a full and comprehensive evaluation of the issues at stake, as will emerge clearly throughout the present letter.

On the criminalization of civil society organizations carrying out search and rescue operations

2. In light of our above initial remarks, given the issues touched upon by the SPMHs' letter, it is therefore very important, from a factual point of view, to reiterate the enormous complexity of the phenomenon that Italy has been facing, which is epochal in nature and unprecedented in the history of the Country and, up to now, being *de facto* not adequately supported by the international community. The efforts undertaken by the Italian Government to fight against human smuggling and criminal organizations, which are characterized by a remarkable degree of adaptability, occur within an overall legal framework (in particular when it comes to international law), which is not exempt from antinomies and paradoxes.

3. Moreover, against this background, it is necessary to consider Italy's membership in particular of the EU and the obligations pertaining thereto. Notably, in this regard, it should be recalled that in the areas of freedom, security and justice and of the common policy on asylum, immigration and external border control set up within the European Union (Title V of Part III of the Treaty on the Functioning of the European Union), Member States (above all, those with external borders of the Union), as well as the EU institutions, have the right-duty to ensure "surveillance of external borders", and to carry out any proportionate and adequate activity, aimed at preventing the illegal crossing of common borders and at ensuring, inter alia, a high level security through measures to prevent and combat organized crime.

4. Within the above framework, as highlighted in the preamble to the Circular (Directive) dated March 18, 2019, containing "Provisions for the unified coordination of the surveillance activity of the maritime borders and for the fight against illegal immigration pursuant to Article 11 of Legislative Decree No. 286/1998¹", Italy, as a country situated at the external Schengen borders², is a *fortiori* called to ensure a reinforced protection of its borders, as they specifically constitute the borders of the EU as a whole, in order to protect the entire population of the Union and European public order – considering that this is an area of free movement with no internal borders. In this regard, Article 5 of the Schengen Borders Code (Regulation (EU) 2016/399) expressly envisages that Member States impose “effective, proportionate and dissuasive” sanctions in the event of the unauthorized crossing of external borders.

5. Moreover, the action carried out by the Ministry of the Interior, including through the Directives referred to in the SPMHs' Joint Communication, has never aimed at redefining the legal framework of search and rescue activities, nor at preventing such activities nor at impeding any vessel from carrying them out.

6. Likewise, it is to be highlighted that the aforementioned Directives are not meant to either sanction or criminalize rescue activities at sea. On the contrary, they are meant to reiterate that these activities cannot automatically determine regular entry into the national territory, nor be manipulated for this purpose.

¹ And reiterated by the Government during third-party intervention before the ECtHR (Case N.D. N.T. v. Spain).

² In addition to article 2, please kindly refer to Regulation No. 399/2016 of the European Parliament and of the Council (i.e. Schengen borders code): “(6) Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control. Border control should help to combat illegal immigration and trafficking in human beings and to prevent any threat to the Member States' internal security, public policy, public health and international relations”.

7. On the other hand, it is worth recalling that the behaviors of all public and private stakeholders, involved in various capacities, are constantly examined by the Italian judiciary in the exercise of their constitutional functions. In this context, with regard to the role of NGOs active in the Central Mediterranean, it is to be recalled that at present, the vessel Juventa of Jugend Rettet NGO is under judicial seizure by the Judicial Authority of Trapani pending the proceeding aimed to ascertain the criminal responsibility of the Captain. The vessel Sea Watch III has been seized and the Judicial Authority is assessing the existence of criminal responsibility on the part of the vessel's Captain. The Mare Jonio vessel, referred to in the SPMHs' Communication, is also under seizure and the position of the vessel's Captain is being examined by the competent Public Prosecutor's Office.

8. Moreover, it has emerged that precisely this last vessel, Mare Jonio, does not hold the necessary certificates attesting the requirements to carry out search and rescue activity, in accordance with the Italian legislation, and, therefore, any rescue activity carried out by this naval asset may also determine an exposure to risks, for the boat itself and the crew.

9. Aside from further judicial-related developments – which pertain to the independent assessments of the Judiciary –, it is clear that the repeated transfer of migrants by some NGOs, with the sole aim of heading towards Italy, objectively constitutes an essential piece of a more articulated and structured chain, which leads to breaking the provisions on the legal entry into the national territory, the respect of which falls within the primary competences of the Ministry of the Interior.

10. These reiterated conducts may risk to *de facto* complement the transportation activity of the migrants by sea and, thus, allowing the achievement of the ultimate goal to which smugglers aim through the landing on the shores of a European state.

On the right to life and lack of reference to international human rights standards in the Directive

11. With regard to the issue under reference, we would like to start by recalling that the normative-administrative measures of the Ministry of the Interior fall within the Italian domestic system of extensive safeguards and guarantees, which directly stem from the 1948 Italian Constitution, which was coeval with the Universal Declaration of Human Rights. It is a normative

framework which has few equals in the world in the field of human rights – as also acknowledged during the last oral discussion before the UN Committee on Economic, Social and Cultural Rights (UN Doc. E/C.12/2015/SR.58, dated September 30, 2015). In particular, it should be recalled that the Italian Constitution is characterized by its *rigidity*, namely that whole text is marked by guarantees and rights, from the Fundamental Principles (Articles 1-12) up to the last Articles of the Constitution, which set out the procedure to revise it: Italian Constitution cannot be amended except through a so-called “aggravated” legislative procedure (Article 138).

12. Given the relevance to the subject at hand, among the various Articles of the Italian Constitution, attention should be focused on: Article 2, dedicated to inviolable human rights; Article 3, dedicated to the principle of formal and substantial equality, which is the criterion and yardstick for the action of the whole Italian legal system; Article 10, Paragraph 3, dedicated to the recognition of the right to asylum; Article 11, underpinning Italy's participation in International Organizations that ensure peace and justice among nations. This system also provides for constitutional review (ex post) by the Constitutional Court.

13. In this regard, even more so, it is also to be underlined that the reference made by the Special Rapporteurs to the fact that these Directives are not based on and have not been confirmed by any decision by the competent Judicial Authority does not seem appropriate. Within the domestic legal system, by virtue of the principle of separation of powers, there is no form of prior judicial control over Governmental acts.

14. Moreover, it should be noted that a broader and more specific overview of the Italian Constitution, the powers of the State, and the constitutional and non-constitutional guarantees, is contained in the *Common Core Document of Italy forming part of the reports of States parties* (UN Doc. HRI/CORE/ITA/2016, dated July 25, 2016).

15. In light of the system described above, we reiterate that the Italian Government's action has always been marked by the utmost respect for the fundamental rights provided for by the aforementioned constitutional system. The respect and promotion of these rights are and continue to be priority objectives, firmly pursued by the Government, both outside of its territory - for example, by combating smuggling and activating legal channels and humanitarian corridors – and inside, in terms of protecting fundamental rights and guaranteeing the forms of protection to which asylum-seekers are entitled.

16. A careful reading of the content of the Directives under reference highlights not only their conformity with the framework of relevant national and international legislation, but also the fact that the primary interest of safeguarding human life at sea constitutes a key principle of the Italian governmental and administrative action.

17. In fact, in the face of the extreme complexity of the situation under reference - as previously illustrated -, we would like to emphasize that the Italian Government has always had the protection of life as its main objective. In this respect, it cannot be underestimated that, actually, the initiatives implemented so far have contributed to drastically reduce the number of deaths at sea.

18. According to the statistics of UNHCR (as updated at last May 15th, 2019), the figures relating to people who have died or were missing in the Mediterranean Sea showed a steady decline since the peak reached in 2016 (5,096) and were essentially halved in 2018 (2,277). This trend, which also consolidated in the first part of the year 2019 (with 486 dead/missing people), corroborates the evident direct proportionality between the reduction in departures and the drop in deaths, thus clearly proving wrong the position of those who argue that the policies of the Italian Government to combat illegal immigration increase the risks of loss of human lives at sea.

19. Despite these important results, it must be considered that their achievement – a key objective of the Italian Government - is instead jeopardized precisely by all those conducts aimed at breaking the aforementioned legislative framework and the relating instructions by the internationally recognized competent Maritime Authorities. Indeed, such conducts further contribute to put human lives at risk.

On stigmatizing migrants in distress at sea and denying their right to seek asylum and to be identified as victims of trafficking in persons

20. With a view to effectively safeguarding human life, in which the intention of the Italian Authorities is absolutely not to hinder SAR operations, it is important to draw the attention to the clear results of the investigative and risk analysis by the competent bodies, the Italian National Anti-Mafia Directorate and the EU Frontex Agency: the *modus operandi* of the smugglers consists

in exploiting the intervention or the distress call, including by artificially creating dangerous conditions for migrants' lives and, thus, intentionally causing distress at sea.

21. This strategy is nurtured by the presence of naval assets near the Libyan coasts, constituting a *pull factor* exploited to achieve the criminal objective of aiding and abetting the illegal entry of migrants into the Italian territory.

22. In light of these elements, clearly indicating smugglers' activities, the National Anti-Mafia Directorate stated that a coordinated interpretation of the provisions of international law, oriented towards the protection of fundamental human rights (and, therefore, also relevant to the implementation of Articles 7 through 9 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime), leads to believe that the only effective countermeasures, aimed to counteract an organized activity (such as the one already being ascertained by the domestic Judicial Authority, aimed at a massive and continuous smuggling of migrants and used to unscrupulously jeopardize the lives of many people), do consist also of those blocking the instrumental means and players concerned, through which the aforementioned traffic materializes.

23. In this regard, within the framework of the *Travaux préparatoires* to the Palermo Convention (2000) and to the above-mentioned Protocol against the Smuggling of Migrants, of relevance is the interpretation note on Article 8, which proposes an extensive interpretation of the concept of ship in the event of aiding and abetting illegal immigration whereby the term "engaged" refers to both cases of direct and indirect engagement.³

24. In this context, search and rescue operations in non-Italian SAR areas, in violation of the responsibilities incumbent on other States and of the rules provided for by the relevant international Conventions, confirm the existence of improper, or otherwise different, purposes from those relating to the rescue activity – thus, showing the impossibility of recognizing the exercise of the right of innocent passage pursuant to Articles 17, 18, 19 of the United Nations Convention on the Law of the Sea (UNCLOS).

25. As regards the allocation of a port of landing following interventions carried out in non-Italian SAR waters, it must be reiterated the responsibility of other coastal States, as well as of the

³ Please, kindly refer to p.506: "The word "engaged" in paragraphs 1, 2 and 7 of this article and in paragraph 1 of article 10 should be understood broadly as including vessels "engaged" both directly and indirectly in the smuggling of migrants".

flag States, since Italy cannot be requested to take charge of managing the consequences of any sea rescue event not only outside of its territorial waters, but also well beyond its own SAR area.

26. From a different perspective, as regards the possibility of considering all rescued migrants as victims of trafficking, it should be noted that almost all of them – as it has been ascertained during interviews carried out by the Frontex Agency teams – appear to have paid a sum of money as transport fee, thus enabling them to illegally enter Italy; and that they appear not to have been forcibly transported and disembarked in Italy.

On the lack of consideration for the principle of *non-refoulement*

27. As for the remarks made by SPMHs concerning Libya, it is necessary to primarily highlight, on a general note, that by developing effective cooperation with the other countries concerned – aimed at both safeguarding life and respecting and promoting human rights –, Italy has always intended to guarantee full and absolute respect for the sovereignty of these countries.

28. With specific regard to Libya, it is to be underlined that Italy is among the very few States that are actively contributing to support this country, day-by-day (with its own Embassy, which is open and operational in Tripoli), in terms of dialogue, stabilization, and collaboration, aimed at increasing Libyan institutional capacities.

29. Italy is at the forefront of helping to improve the living and humanitarian conditions of migrants, within the framework of a structured collaboration with the countries of origin and transit of migratory flows. Through the Italian Fund for Africa, 33 million Euros have been allocated to UN organizations (IOM and UNHCR) and to other international organizations in this country, for key activities of support and protection of migrants. In particular, the activity of assisted voluntary repatriation carried out by IOM has secured, over the last three years, over 42,000 people, who have chosen to return to their respective countries of origin, by benefiting from reintegration and assistance programs.

30. Moreover, Italy has also played a decisive mediation role vis-à-vis local Authorities for the opening of the *Gathering and Departure Facility* (GDF) in Tripoli. This is a transit centre managed by UNHCR with the aim of hosting the most vulnerable refugees in view of their subsequent

resettlement to third countries and from which several hundreds migrants particularly at risk due to poor security conditions have recently been evacuated.

31. In this context, Italy is the first country in terms of humanitarian resettlements of particularly vulnerable refugees and migrants directly from Libya. To date, thanks to the support of UN system-related organizations, over 600 beneficiaries have been rescued from Libya and transferred to Italy since the end of 2017. It is also worth recalling that a programme of direct assistance has been developed by the Italian Development Cooperation Agency that relies on the contribution of Italian NGOs to improving the centres for migrants and also to provide basic services and psychosocial assistance. This two-fold Italian action also aims to promote and encourage the activity of international observers (NGOs and UN agencies) in the centres managed by the Libyan Authorities.

32. Despite this daily commitment, under no circumstances it could surreptitiously be argued that Italy has a sort of "jurisdiction" (understood as a responsibility) vis-à-vis the Libyan situation, or in any case well outside its own territory and beyond its "effective control", according to relevant definitions of the UN Human Rights Committee.

33. In this context, the reference made by the Special Rapporteurs to an alleged delegation by the Italian Authorities to the Libyan ones regarding the search and rescue activities is completely misleading. The Directives referred to in the Joint Communication do not provide for any delegation in this respect, but are legitimately inspired by the principles set out above. Plus, Italy is not the only State that must guarantee compliance with international conventions on SAR, least of all in waters which do not fall within its own responsibility.

34. Moreover, in this context, it is worth stressing that the Libyan search and rescue activity, financially supported also by the European Union, including over past months, is continuing without interruption, by virtue of continuous and undisputed international recognition; and that UNHCR reception centre in Tripoli is also fully operational.

Conclusion

The Italian Authorities take this opportunity to express the hope that the information provided by the present letter, also in connection with the five final questions referred to in the SPMHs' Communication, respond in the widest possible way to the issues under reference.

With regard to statistical questions, please find attached, herewith, all the available statistical data (Annexes No. 1, 2).



Ministero dell'Interno

DIPARTIMENTO DELLA PUBBLICA SICUREZZA
DIREZIONE CENTRALE DELL'IMMIGRAZIONE E DELLA POLIZIA DELLE FRONTIERE
SERVIZIO IMMIGRAZIONE

ANNEX NO. 1

Year	SAR Event	Total of disembarked people
2018	No	5.999
	Si	17.371
2019	No	966
	Si	299

As at May 20, 2019



Ministero dell'Interno

DIPARTIMENTO DELLA PUBBLICA SICUREZZA

DIREZIONE CENTRALE DELL'IMMIGRAZIONE E DELLA POLIZIA DELLE FRONTIERE
SERVIZIO IMMIGRAZIONE

ANNEX NO. 2

2018

Nationality	Total of persons put under arrest in accordance with Art.12
Ucraina	43
Egitto	24
Tunisia	18
Georgia	11
Russia	10
Lettonia	9
Turchia	7
Algeria	6
Sudan	5
Guinea	4
Senegal	4
Siria	4
Grecia	3
Libia	3
Moldavia	3

Azerbaijani	2
Eritrea	2
Gambia	2
Pakistan	2
Sierra Leone	2
Bangladesh	1
Belarus	1
Cameroon	1
Italy	1
Kazakhstan	1
Lithuania	1
Mali	1
Niger	1
Romania	1
Total	173

2018 up to May 20:

Nationality declared	Total of persons put under arrest in accordance with Art.12
Afghanistan	0
Algeria	2
Bangladesh	0
Benin	0
Belarus	0
Burkina Faso	0
Cameroon	1
Central Africa	0
Chad	0
Comoros	0
Congo	0
Côte d'Ivoire	0

Egitto	2
Eritrea	2
Etiopia	0
Gambia	2
Ghana	0
Guayana Francese	0
Guinea	3
Guinea Bissau	0
Guinea Equatoriale	0
India	0
Iran	0
Iraq	0
Kenya	0
Kosovo	0
Libano	0
Liberia	0
Libia	1
Mali	0
Marocco	0
Mauritania	0
Nepal	0
Niger	1
Nigeria	0
Pakistan	0
Palestina	0
Romania	1
Russia	3
Sconosciuta	0
Senegal	3
Sierra Leone	1
Siria	1
Somalia	0
Sri Lanka	0

Sud Sudan	0
Sudan	4
Togo	0
Tunisia	5
Turchia	3
Ucraina	12
Yemen	0
Total	47

2019 up to May 20:

Nationality declared	Total of persons put under arrest in accordance with Art.12
Not Available	0
Afghanistan	0
Algeria	0
Bangladesh	0
Benin	0
Burkina Faso	0
Camerun	0
Ciad	0
Costa d'Avorio	0
Egitto	0
Eritrea	0
Federazione Russa	2
Gambia	0
Ghana	0
Guinea	0
Guinea-Bissau	0
Iran	0
Iraq	0

Liberia	0
Libia	0
Mali	0
Nigeria	0
Pakistan	0
Palestina	0
Repubblica Centrafricana	0
Repubblica del Congo	0
Senegal	0
Siria	0
Somalia	0
Sudan	0
Togo	0
Tunisia	1
Turchia	2
Total	5

2018

Total of persons put under arrest in accordance with Art.12
173

2018 (up to May 20)

Total of persons put under arrest in accordance with Art.12
47

2019 (up to May 20)

Total of persons put under arrest in accordance with Art.12
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Rome, as at May 20, 2019