



*The Permanent Representative of Italy  
to the International Organizations  
Geneva*

N. 1357

Geneva, 4<sup>th</sup> August 2021

Dear Ms. Balbin,

Following UN letter (AL ITA 2/2021), dated July 16, 2021, I have the honour to submit Italy's reply to Joint Communication by six UN Special Procedures.

By this reply, we take the opportunity to reiterate our firm willingness to continue full and extensive cooperation with all UN Special Procedures Mandate-Holders.

Should additional information be made available, allow me to ensure you that we will promptly share it with you.

Please accept, Ms. Balbin, the assurances of my highest consideration.

Sincerely yours,



Gian Lorenzo Cornado

**ITALY**



***MINISTRY OF FOREIGN AFFAIRS AND INTERNATIONAL COOPERATION***  
*Inter-ministerial Committee for Human Rights*

**ITALY'S REMARKS -  
JOINT COMMUNICATION  
No. 2/2021**

***August 4, 2021***

## **Italy's Remarks**

Following Letter of six UN Special Procedures, dated 16 July 2021 (No. 2/2021), we are in a position to provide the following information.

### **Introduction**

The investigations originated from statements made by some security staff on board a ship operating on behalf of an NGO, who had reported certain illegal behaviours by personnel working for that Organisation. These investigations were aimed at finding the networks linking the traffickers of migrants and those who, for various reasons, facilitated their operations.

The highly complex investigative activities were coordinated by the Judicial Authority of Trapani that regularly authorised all intercepts of communications, aimed at solely collecting evidence against the alleged crimes. The results of the technical activities were included in a final report, on the basis of which the Trapani Public Prosecutor's Office investigated 21 people for various fines and criminal offences.

At present, the suspects have been notified of the conclusion of preliminary investigations pursuant to Article 415bis of the Criminal Proceedings Code.

### **Turning to specific issues**

According to press reports, during the investigation on NGOs carried out by the Public Prosecutor's Office at the Court of Trapani, journalists who have been working for years on the Libyan migration route and lawyers involved in trials concerning crimes related to migration have been intercepted. Consequently, on 6 April 2021, the Minister of Justice ordered an inspection to verify whether the rules on the protection of the right of defense, the right to chronicle, personal liberty and the right to information had been violated.

The results of the inspection did not reveal any disciplinary issues and/or violations of procedural rules on wiretapping by the Public Prosecutor's Office of the Court of Trapani. This is based on the following assessments.

The Italian procedural law, when proceeding for certain offences such as those under investigation, allows the intercepts also of persons not under investigation if this may be useful to acquire evidence. In particular, when there are serious indications of a criminal offence (pursuant to Article 267(1)(a) of the Code of Criminal Procedure) and the wiretapping activity is considered absolutely essential for the continuation of the investigation (pursuant to Article 267(1)(b) of the Code of Criminal Procedure). Both such requirements - i.e. the serious clues and the absolute necessity - are of relevance from a twofold point of view:

In the first place, it is exclusively on the basis of the verification of their subsistence that the Judicial Authorities proceed with the intercepts - the subjective element not being important (except for certain precise categories of persons, such as - by way of example - the President of the Republic and the members of Parliament);

Secondly, provided that the requirements of serious evidence and absolute necessity exist, in order to obviate an illegitimate sacrifice of the fundamental right of secrecy of the communications of anyone (journalists and non-journalists), intercepts may be carried out only if there are no other investigative tools to achieve a full investigation of the facts.

Ultimately, the Italian Code of Procedure provides for the use of wiretapping as a last resort, in accordance with both to the principles enshrined in Article 10 of the European Convention on Human Rights, as interpreted by the consolidated case-law of the Strasbourg Court, and with the principles enshrined in Article 19 of the International Covenant on Civil and Political Rights.

In light of this legal framework, the following is a summary of the steps taken in the investigation against Ms.N.P. and the other journalists, in relation both to the intercepts carried out and to the transcription of the conversations.

Specifically in this case, it emerged that the journalist Ms.N.P. was wiretapped between July and December 2017, as authorised by the Trapani's Court GIP (acronym in Italian, standing for Judge for Preliminary Investigations).

No intercepts were made against other journalists. In fact, only incidental dialogues were picked up during intercepts on users not in use by journalists, while the intercepts authorised by the GIP against journalist, Ms. ■■■, were interrupted after 15 days, as soon as it emerged that the user was in use by that journalist rather than by another subject under investigation and against whom the intercepts had been authorised.

As regards the intercept of the journalist Ms. N.P., she was intercepted as a person on board one of the ships under investigation. The intercept did not take place in order to learn, in circumvention of the prohibition laid down in Article 200(3) of the Code of Criminal Procedure, her sources of information, but rather to acquire information on what she perceived and heard concerning the activities taking place on a ship, the navigation and conduct at sea of which was the subject of a criminal investigation.

At the end of the preliminary investigations, the investigating bodies did not include the relevant transcripts in the final report, having considered the material collected as irrelevant. However, although irrelevant, the transcripts cannot be prevented. It is worth reiterating that, according to the procedure, the contents of the intercepted conversations are all noted (ex Art. 268, paras.1 and 2, Code of Criminal Procedure); at a later stage, the relevant ones are distinguished from the irrelevant ones; finally, those made in violation of the prohibitions of the Law are destroyed (Art. 271, Code of Criminal Procedure), while those legitimately acquired, but held not to be useful for trial purposes, are, however, conserved (Art. 269, Code of Criminal Procedure).

In the case under reference, the three steps summarized above were followed. Therefore:

- There was no breach of the law as long as all the conversations and text messages intercepted on Ms. N.P. 's mobile phone were summarily recorded;
- As regards the distinction between relevant and irrelevant intercepts, it should be noted that a certain conversation, as deemed irrelevant by the Prosecutor, could well be deemed essential for the defense of a suspect. And it is precisely for this reason that the selection of the probative material must necessarily take place pursuant to Article 268, paragraphs 4, 5, 6 and 7 of the Code of Criminal Procedure (in the text in force), after depositing the acts, in cross-examination of the parties, in the course of a hearing purposely held - so-called "excerpt hearing (*udienza stralcio*)" - or, as happens in almost all cases, at the first hearing of the trial destined to the probative requests of the

parties and upon Judge's decision. Therefore, only after having listened to the parties and exclusively by the Judge, it is possible to proceed to the excision of the manifestly irrelevant conversations, or rather, of those eventually acquired in violation of the law and to the integral transcription of those selected (which, at this point, substitutes and renders, in fact, irrelevant, the "summary" transcription made by the Investigative Police), to be carried out with the modality of the expert report, with the possible contribution of technical consultants. Having said that in general, with specific reference to the intercepts concerning Ms. N.P., it is to be noted that none of these appear in the final report;

- As regards the destruction or preservation of the intercepted material, the documentation acquired during the inspection carried out on behalf of the Ministry of Justice has shown that none of the provisions of the law have been violated. As a result, the documents relating to the wiretapping operations are attached to the documents of the proceedings, without any provision having been made outside the mechanism provided for by paragraphs 6 and 7 of Article 268 of the Code of Criminal Procedure, for the removal of those hypothetically irrelevant and, even less so, for their destruction, which, if it had occurred, would have constituted a very serious breach of the law. However, the Public Prosecutor's Office of Trapani has stressed that no kind of trial's use will be made of the material collected through the wiretapping activities carried out against the journalist Ms. N.P. and that a request has already been made for the setting of the hearing (*udienza stralcio*) for the separation of the irrelevant wiretaps.

With reference to the intercepts of conversations with defense counsel, which are expressly prohibited under Article 203(5) of the Code of Criminal Procedure, it should be noted that they are of a totally random nature: the lawyers heard were identified as such only at the end of the listening. There was no record of their appointment as defense counsel of the suspects. Therefore, none of the electronically recorded interviews was related to a defense mandate given by the above-mentioned journalist. No procedural use has been or will be made of these interviews by the Trapani Public Prosecutor's Office.

Therefore, on the basis of the procedural law in force, it must be drawn that the wiretapping of the journalist Ms. N.P. was lawful, provided that, to carry out electronic surveillance of a person, it is not necessary that he/she is a suspect, but it is necessary that there are serious (or sufficient) indications of a criminal offence and that the wiretapping is absolutely essential (or necessary) for the continuation of the investigation.

### **Conclusion**

Italian Authorities take this opportunity to reiterate their firm willingness to continue cooperation with UN Special Procedures. Once additional information is made available, we will share it.