



Permanent Mission of Italy
UN - Geneva

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NOTE VERBALE

The Permanent Mission of Italy to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights (OHCHR) and has the honour to transmit herewith Italy's reply to the Joint Communication from Special Procedures AL ITA 3/2024 dated 24 June 2024.

This Permanent Mission would be grateful for kindly confirming receipt of this Note Verbale and of the attached document.

The Permanent Mission of Italy to the United Nations Office and other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the United Nations High Commissioner for Human Rights the assurance of its highest consideration.

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Geneva,

23 AOUT 2024



Office of the United Nations
High Commissioner for Human Rights
GENEVA

ITALIA



Ministero degli Affari Esteri
e della Cooperazione Internazionale

COMITATO INTERMINISTERIALE PER I DIRITTI UMANI

Italy's Reply to UN Joint Communication AL ITA 3/2024

Agosto 2024

Further to UN Special Rapporteurs' joint communication (AL ITA 3/2024) dated June 24th, 2024, Italian Authorities are in a position to provide the following information.

General premises/introduction: elements provided by the Ministry of Justice

In order to understand the exact scope of the procedures that will take place in the areas covered by the Protocol between the Government of the Republic of Italy and the Council of Ministers of the Republic of Albania (so-called *MoU*), it is necessary to consider the regulations introduced by the ratification law, dated February 21, 2024, No. 14. Its guiding principle is the application of Italian law, as clearly provided for in Article 4(1) of Law No. 14/2024.

- **Retention and rights of defense**

The regulations regarding the duration of administrative retention and the conditions for the lawful adoption of such measure are identical to the national ones.

In particular, the retention for the purposes of examining the application for international protection under the accelerated border procedure, in accordance with the provisions of EU Directive 32/2013, Article 43, has a maximum, non-extendable duration of 28 days within which both the decision of the Territorial Commission and, in case of appeal, at least the decision on the suspension of the effects of the administrative decision must be adopted.

Article 35-ter of Legislative Decree No. 25/2008, which is also applicable to border procedures that take place in border or transit areas that are part of Italian territory, expressly provides that if the application for suspension is granted, the administrative retention loses effect, and the applicant must be allowed to cross the border and enter the territory.

Retention for the purposes of executing the return decision has a maximum duration of 18 months, as stipulated in Article 14(5) of the *Consolidated Immigration Act* (acronym in Italian, *Testo Unico sull'Immigrazione - T.U.I.*, Legislative Decree No. 286/1998).

Italian legislation also applies to the validation procedure of these types of retention, providing as follows:

- for the retention of the asylum seeker, the competence of the judge of the specialized immigration section and the conduct, as a rule, of the hearing with remote audiovisual connection, compulsory legal assistance and *ex lege* admission to legal aid (Articles 6 and 6-bis of Legislative Decree No. 142/2015);
- for the retention of the foreigner concerned by a return decision with compulsory execution, the same above rules apply with the only exception regarding jurisdiction: in this event, the law attributes it to the Justice of the Peace (*Giudice di Pace*). The relevant regulations, including the conduct of the hearing by videoconference systems, are contained in the *Consolidated Immigration Act* (see Article 14, paragraph 4-bis, *T.U.I.*).

- **Physical distance and effective exercise of rights**

As set forth in the preceding paragraph, Italian legislation provides in general for the use of videoconferencing systems, which allow for containing the maximum time limits of these procedures (as guaranteed by Article 13 of the Constitution), also with respect to an asylum seeker or an irregular migrant being subjected, respectively, to border procedure in transit zones physically connected to the national territory or to expulsion procedure within the territory.

More specifically, with regard to the procedures to which migrants present in the areas covered by the Protocol under reference are subject, the ratification law contains provisions that are intended to prevent distance from impairing the effective exercise of the right of defense.

To this end, Article 4(2) of the ratification law facilitates and simplifies the issuance of the power of attorney, and the subsequent paragraph 3 places on the Italian manager of the Center the responsibility of adopting all measures, including technical ones, necessary for the full and timely exercise of the right of defense.

These include measures that enable the telematic exchange of documents, and ensure the right to confer confidentially with the defense counsel by means of remote audiovisual modalities.

The same Article 4, in paragraph 5, provides that in the event of unavailability of audiovisual connection systems and thus the conduct of the hearing in presence, the migrant's lawyer who travels to the areas covered by the Protocol is entitled to reimbursement of travel and accommodation expenses.

- **Criminal jurisdiction**

In response to the concern expressed in the Joint Communication regarding the fact that the Protocol Italy/Albania (*MoU*) does not contain clear provisions regarding the identification of the authority and the criminal jurisdiction that can be exercised for acts that constitute violations of human rights, such as torture or inhuman or degrading treatments, within the areas or in the external perimeter, the following evaluation elements are offered below.

Criminal jurisdiction in the event of offenses committed outside the territory of Italy, as far as relevant here, is governed by the Criminal Code.

Article 7, paragraph 1, No. 4) of the Criminal Code provides that a citizen or foreigner who commits on foreign territory, among others, "*offenses committed by public officials in the service of the State, abusing their powers or violating the duties inherent in their functions,*" shall be punished under Italian law.

The same Article, in number 5), provides that it is punishable under the first paragraph "*any other crime for which special provisions of law or international Conventions establish the applicability of the Italian law.*"

As a result, the possibility for the Italian State to prosecute, in particular, public officials who commit offenses of the type indicated in the Joint Communication, within the areas covered by the Protocol, is ensured under current criminal law.

With respect to these areas, Article 6 provides, in paragraph 1, that the competent authorities of Italy and Albania shall cooperate in order to maintain the security of the areas.

Paragraph 2 assigns to the Albanian Authorities the task of ensuring public order and safety in the perimeter outside the areas and during the transfer, since this is territory fully under the jurisdiction of Albania.

On the other hand, the Protocol assigns to the Italian Authorities alone, pursuant to paragraph 3, the task of ensuring the maintenance of order and security inside them.

The ratification law guarantees the effective exercise of the powers necessary for the maintenance of order and security within the areas, including for the protection of migrants who are conducted there.

There is, in fact, the provision for the establishment of a Coordination and Liaison Unit, reporting to the Rome Police Headquarters (*Questura di Roma*), under Article 3, paragraph 1 (d) of Law No. 14/2024; and, pursuant to paragraph (f), the establishment of a judicial Police Unit at the same areas, whose members - for human rights violations that integrate facts of crime, such as torture or inhuman or degrading treatment, committed within the areas - will be required to fulfill the duties corresponding to the qualifications they hold: when they receive a complaint, therefore, they will have to transmit it to the Italian Authority.

It should also be pointed out that the ratification law, pursuant to Article 4(3), places on the person in charge of the Center a general duty to make available to the migrant all the tools necessary to make contact with an Italian lawyer, transmit to him/her, when necessary, a power of attorney and confer with him/her confidentially.

The members of the Coordination and Liaison Unit - as it is also aimed at optimal cooperation with the competent Albanian authorities - as public officials, if they become aware of the commission of a crime that integrates human rights' violations, such as torture or inhuman or degrading treatment committed in the outer perimeter, are obliged, in accordance with general rules set forth in Articles 331 et seq. of the Code of Criminal Procedure, to report it to the Italian Authority according to the ordinary rules, and may inform the competent Albanian Authorities when necessary.

Reply to the Joint Communication's questions: elements provided by the Ministry of the Interior

As for questions No. 1 and 2, where it is requested to “[...] provide any additional information and/or comments on the observations above (in the communication) mentioned” and to “[...] provide clear indications on how the establishment of the Centers in Shengjin and Gjader, Albania, as outlined in the soon to be implemented Memorandum of Understanding, complies with Italy's international obligations, particularly with regard to its human rights commitments. Please indicate how Italy will ensure that the rights of migrants, asylum seekers and refugees are upheld throughout the entire process, from rescue to reception and asylum determination”, with respect to the procedures that will be carried out at the sites established in Albania to implement the Protocol signed by the Government of the Italian Republic and the Council of Ministers of the Republic of Albania on the strengthening of cooperation in migration matters, it is to be noted that a pre-screening will be carried out from the stages immediately following the rescue or recovery of migrants by means of naval assets at the disposal of the State Authorities, **so as to exclude that those with vulnerabilities are taken to Albania.**

This approach was also endorsed by the European Commission during the interlocutions that preceded the launch of the complex exercise, agreeing with the principle of anticipating screening, to rule out the bringing of migrants immediately identifiable as vulnerable to Albania.

This is, in practice, an anticipation of the *hotspot* procedures, which, as is well known, are based on **a multidisciplinary integrated model** by all those stakeholders involved in the assessment of the migrant's position, including the health team, also with support from International Organizations, such as **IOM**, institutionally involved in the procedures under consideration.

It is also envisaged that **UNHCR** will carry out, from the initial stages, specific monitoring activities to ensure that the way the Protocol is implemented complies with international law and international standards.

It should be noted that **all individuals being not eligible for the accelerated procedures to be carried out in Albania will be brought to Italy.**

On a more specific note, following interventions of naval assets aimed at SAR operations, as soon as the contacts of interest are reached and all the activities of competence are put in place, aimed first and foremost at ensuring the safe completion of operations with respect to migrants on board the intercepted or rescued vessels, the operating personnel - when weather and sea conditions and the operational context permit - will trans-ship them onto the intervening assets, taking care that all the activity takes place within a framework of security, if necessary with the possible assistance of other Forces present in the area.

Once the migrants have been transshipped onto the operating units - save, in any case, the urgent evacuation of all persons in need of immediate care - they will reach a ship specifically designated for the purpose. Upon reaching that ship, the personnel operating on board the units intervening on the migration event, always in the utmost security, will carry out a second transshipment to the aforementioned hub ship, with the exclusion of those persons who are ineligible in an absolute sense such as women, migrants who are visibly under age and unaccompanied, persons with manifest illnesses or physical impairments, the elderly, and persons who voluntarily hand over their passport or equivalent document, except in cases where the presence of such persons on board is indispensable solely to ascertain any family ties relevant to the procedures under reference.

A general health assessment of each migrant will be conducted on board the ship, aimed at ascertaining health conditions worthy of attention and/or additional conditions of vulnerability. Subsequently, a pre-identification phase is planned, aimed - among other things - at the collection of statements about nationality and family ties.

In all cases, it remains the activation of the MEDEVAC procedure under the coordination of the Coast Guard.

All screening and pre-screening procedures of the rescued migrants will be carried out by specialized personnel selected by the Ministry of Interior.

All those being ineligible for the accelerated procedures to be carried out in Albania will be taken to Lampedusa or other Italian ports.

The above operations will be carried out as quickly as possible.

Safe and decent accommodation for all migrants will be ensured on the ships identified to bring migrants to *Shengjin*. Overcrowding of the ships is to be ruled out. However, the presence of a contingent of law enforcement agencies is planned to ensure security on board of the ships.

The number of migrants that can be transported each time will depend on various factors, not the least of which is the ability to conduct the procedures within the timeframe established by law.

Should other forms of vulnerability emerge upon arrival in *Shengjin* that fall under those listed in Article 17 of Legislative Decree No. 142/2015, the individuals concerned will be promptly transferred to Italy.

On a more general note, as to the procedures for identifying vulnerabilities, it is to be pointed out that in Italy instructions are constantly conveyed to operational Offices which emphasize the principles

that:

- the position of the immigrant must be carefully assessed;
- the immigrant must be interviewed, in order to highlight that information necessary to ensure the completeness of the preliminary activity and the possibility for the immigrant concerned to manifest any condition of vulnerability or need for protection;
- special attention must be paid to explaining the reasons underlying any measure taken.

The administrative Authorities in charge must, therefore, precede any activity related to the foreigner by a careful assessment of the personal situation, which can be detected during the ritual interview and can be documented by the Offices in charge, by filling out the appropriate “*news sheet*” (“*foglio notizie*”).

In any case, the migrant is informed about the possibility of applying for international protection at different stages of the procedure.

Regarding the procedures to be carried out in *Gjader*, asylum applications will be processed in accordance with the provisions on accelerated procedures - on par with those observed in Italy.

At the end of the procedures, if international protection is granted, the applicant will be promptly transferred to Italy and will be included in the second level reception circuit referred to in Article 1-sexies of Law-Decree No. 416/89 (*SAI* reception system), conditions being met.

It is worthy of mention that all immigration administrative procedures that will take place in Albania, related to the implementation of the Protocol under reference, will trace the national ones for the management of landing events and subsequent tasks.

If the prerequisites under Italian law for eligibility for border procedures, as recalled by the Protocol, are met, the adoption, for the migrant, of the retention will be considered by the issuance of an express and reasoned measure.

The issuance of a retention order follows the completed identification of the individual, as well as the formalization of the application for international protection (*C3*) and, therefore, it will be issued seamlessly with the prodromal fulfillments referred to in the so-called *hotspot* model.

The legal bases of such orders are represented by the same rules that regulate the retention in the Italian territory, namely, Articles 6 and 6-bis of Legislative Decree No. 142/2015.

At the procedural level, in the forms adopted in support of the territorial offices, the assessment of *non-refoulement* is an integral part of the motivational part of the measure.

Provision is made for asylum seekers to meet their lawyers by telephone, videoconference or even in person (moreover, the ratification law No. 14/2024 has provided a financial allocation to cover the expenses of one choice’s lawyer who intends to be present).

As mentioned earlier on, at the end of the procedures, if international protection is granted, the applicant will be promptly transferred to Italy and will be included in the second-level reception circuit referred to in Article 1-sexies of Decree Law No. 416/89 (*SAI* reception system), provided that the conditions are met.

Regarding question No. 3 where it is requested “[...] to clarify what measures will be implemented

to avoid any delays in emergency responses that could jeopardize the safety of people in distress at sea. Please also provide clear guidance on how Your Excellency's Government will ensure the swift disembarkation of rescued persons at a "safe place," other than the rescue vessel, and which is more than 500 nautical miles (700 kilometers) from the area where rescues are commonly conducted", in compliance with national, EU and international provisions concerning migration, Italy will carry out the rescue operations and take charge of the shipwrecked persons by identifying and providing as soon as possible the availability of a place of safety - *Place of Safety* - to be meant as the place where the rescue operations are understood to be concluded and the safety of the survivors guaranteed. For Italy, the *Place of Safety* is determined by the SAR Authority in coordination with the Ministry of the Interior.

In accordance with the Guidelines on the Treatment of Persons Rescued at Sea (Res. MSC.167-78 of 2004) annexed to the SAR Convention, "a place of safety is a location where rescue operations are considered concluded; where the safety of the survivors or their lives is no longer threatened; the basic human needs (such as food, shelter and medical care) can be met; and transportation of the survivors to the near or final destination can be arranged" (para. 6.12).

The Centers granted for use to Italy by Albania will ensure both the physical protection of persons and the respect for their fundamental rights and are equated with border or transit zones, as identified by the Ministry of the Interior's Decree of August 5, 2023 issued pursuant to Article 28-bis, paragraph 4, of Legislative Decree No. 25/2008, by which, under given circumstances, it will be possible an accelerated procedure for the examination of international protection applications.

It is to be reiterated that the transfer to Albania is not envisaged for migrants who, due to health or other needs, are unable to cope with it.

Since these are also very recently built facilities, the *Shengjin* and *Gjader* Centers will be able to offer migrants more modern housing conditions that will make their stay fully dignified while respecting the protection of human rights.

Regarding question No. 4, where it is requested "[...] please provide clear information on the measures taken to ensure that persons rescued at sea, particularly children, pregnant women and survivors of trafficking and torture, among other vulnerable individuals, receive proper identification, immediate medical care, and psychosocial support. Please provide information on measures taken to prevent the detention of children and other persons in need of special care", **the accelerated procedure does not apply to accompanied and unaccompanied minors**, and, more generally, to the categories referred to in Article 17 of Legislative Decree No. 142 of 2015, i.e. the so-called vulnerable persons: "minors, unaccompanied minors, persons with disabilities, the elderly, women, with priority for pregnant women, single parents with children, victims of human trafficking, persons with serious illnesses or mental disorders, persons for whom it has been established that they have suffered torture, rape or other serious forms of psychological, physical or sexual violence or violence related to sexual orientation or gender identity, victims of genital mutilation".

As for question No. 5, where it is requested "[...] to specify any measures planned to ensure that immigration detention is used as a measure of last resort for adults only, for the shortest period of time, subject to judicial authorization and judicial review. Please clarify what specific measures are being taken to address potential violations of the right to liberty, including automatic and prolonged detention, as highlighted in international human rights law and standards", in accordance with EU Directives 2013/32 and 2013/33, the Italian legislation provides that **the retention of applicants shall be of the shortest possible duration** and persist as long as the reasons justifying its application exist.

Retention is always subject to scrutiny by the Judicial Authority and, to this end, all organizational procedures are provided for and regulated to ensure the validation of retention orders by the competent judicial authority.

The period of stay of migrants in the retention center cannot exceed the maximum period of retention provided for by current Italian law.

As mentioned earlier on, the Italian Authorities, upon completion of the procedures carried out in accordance with Italian regulations, will transfer the migrants to Italy.

To ensure the protection and effectiveness of migrants' rights, access to the facilities will be allowed to lawyers, their assistants, as well as to international organizations providing advice and assistance to applicants for international protection.

Migrants will also be able to address oral or written petitions or complaints, including in sealed envelopes, to the National Guarantor Authority for the Rights of Persons Deprived of their Liberty (*Garante nazionale dei diritti delle persone private della libertà personale*).

As for question No. 6, where it is requested “[...] to specify the measures taken by Italy to comply with international policies with respect to the principle of non-refoulement. Please also provide details on how Your Excellency's Government intends to facilitate access to fair and effective asylum procedures for asylum-seeking migrants transferred to Albania, considering the physical distance from the competent authorities and potential obstacles to legal assistance and participation in proceedings”, asylum applications will be processed in accordance with the provisions on accelerated procedures, on par with those observed in Italy.

It is also worth mentioning that in Italy administrative retention ordered by the administrative Authority is subject to the scrutiny of the judicial Authority that verifies its legitimacy.

The measure by which the Quaestor (*Questore*) orders that the foreigner be retained at a *C.P.R.* is validated by the Judicial Authority, in compliance with the terms provided for by the Italian Constitutional Charter for measures restricting personal liberty (Art. 13 of the Constitution).

CONCLUSION

We take this opportunity to reiterate our firm willingness to continue cooperating fully with all UN Special Procedures.