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The Italy-Libya Memorandum: stripping away the right of asylum in the Italian legal system

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ABSTRACT: On the 2nd of November 2022, the Italy-Libya Memorandum on migration was renewed for the following three years, giving continuity to the close collaboration between the two countries to stem the flow of migrants, refugees and asylum seekers onto the Italian territory. Libya, in fact, is the main point of departure for migrants and refugees wishing to reach the Italian shores. This paper argues that, with the Memorandum, Italy adopts a 'pullbacks' strategy which essentially translates into the practice of collective expulsion and refoulment. Nevertheless, it is in the prohibition of such practices that lies the indispensable premises to guarantee the effectiveness of the protection of the right to asylum, as safeguarded by international, European and national legislation. In fact, the Memorandum externalises the border across the Mediterranean and empties the right to asylum of its meaning, since it is structured in such a way as to make it impossible for people to reach European territory. It also denies the reality of mixed migration flows, precluding, a priori, the possibility for some migrants to be recognised as beneficiaries of international protection, while relying on the actions of a country, Libya, which has not signed the 1951 Geneva Convention on the Status of Refugees, has no functioning national asylum system and cannot be considered a 'Place of Safety' due to proven human rights violations perpetrated in its migrant detention centres. This paper further argues that the Italy-Libya Memorandum is in line with the securitarian migration policies and the strategy of borders' externalisation by the European Union (EU), which entrenches itself in a fortress on whose borders violence is carried out. In this context, bilateral agreements such as the Memorandum risk creating legal black holes whose purpose seems to be to circumvent the responsibilities stipulated at different levels of legislation. The jurisprudence of the Italian legislative system and of the European Court of Human Rights (ECtHR) seems to be paving the way for a more conscious approach to migrants and might fill in the void created by the solidarity crisis of the European approach to immigration, but not without the support of a policy approach focused on restoring the Italian constitutional structure of the right to asylum.

KEYWORDS: Italy-Libya Memorandum – right to asylum – externalization of borders – Italian Constitution.

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"*We want to know whether on the issue of immigration we have the European Union with its resources and political commitment behind us, or whether we must continue to fend for ourselves" (...) "Italy is capable of managing this issue, albeit with increasing difficulties. If Europe wants to recover its vitality, if it wants to change and bet on its future, it must have a common migration policy*"[1]

Former Italian Prime Minister Paolo Gentiloni,
Speech before the Italian Senate (ahead of participation in the Council of Europe), 21 June 2017

The history of cooperation between Italy and Libya on migration issues has its starting point in the Treaty on Friendship, Partnership and Cooperation signed in Benghazi in 2008 and ratified in 2009 by the then ruling governments of the Italian Prime Minister Silvio Berlusconi and the Libyan leader Muhammar Gaddafi.[2] While the first and second parts of the Treaty were directed at regulating relations between the two countries and establishing economic arrangements concerning Italian businesses and infrastructure support, the third part aimed at strengthening the Italy-Libya partnership in several sectors, including the fight against terrorism and the control of irregular immigration.[3] The foundations were laid for the construction of migrant reception centres in Libya and for joint patrolling of the territory and the high seas surrounding the African country, with the practical aim of moving the Italian maritime border beyond and towards Libyan territorial waters or the adjacent international ones.[4]

Nevertheless, except for a few general principles underlined in the first seven articles, which contained a vague reference on the respect for the fundamental rights of individuals, thus citing the United Nations Charter and the Universal Declaration of Human Rights, the Treaty did not mention any commitment aimed at ensuring compliance with the fundamental rights of migrants in the Mediterranean.[5] It was in this framework that the two countries conducted various patrol operations in the central Mediterranean which often resulted in the intercepted migrants being sent back to the same shores from which they departed, as well as to Libyan reception centres and, in some cases, to their countries of origin.[6]

After the downfall of the Gaddafi regime in 2011, Italy continued to develop its cooperation with the country by establishing relations with Fayez al-Serraj,[7] whose government established in Tripoli had been recognised by the international community. With the Declaration of Tripoli of 2012, the contracting parties negotiated the promotion of a land border control system in Libya[8] and the creation

[1] Excerpt freely translated by the Author.
[2] Giuseppe Morgese, "Italia, Libia e Questione Migratoria" in *Working Papers della Cattedra Jean Monnet - Hicom 2018-21 Sfide storiche, politiche della memoria ed integrazione europea. Mezzogiorno e area mediterranea*, Università degli Studi di Bari "Aldo Moro", February 2020, 1, accessed January 27, 2023, http://jmc.uniba.it/wp-content/uploads/2020/04/Feb2020_Morgese.pdf. (freely translated by the Author).
[3] La Repubblica, "Ecco il testo dell'accordo Va ratificato dal Parlamento", October 23, 2008, accessed January 30, 2023, https://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/testo-accordo/testo-accordo.html. (freely translated by the Author).
[4] Morgese, "Italia, Libia e Questione Migratoria".
[5] Diletta Scalpone, "I rapporti tra l'Italia e la Libia per la gestione dei flussi migratori irregolari nel Mediterraneo" (Bachelor diss., Libera Università Internazionale degli Studi Sociali Guido Carli, 2008) (freely translated by the Author).
[6] Morgese, "Italia, Libia e Questione Migratoria".
[7] Scalpone, "I rapporti tra l'Italia e la Libia per la gestione dei flussi migratori irregolari nel Mediterraneo".
[8] Scalpone, "I rapporti tra l'Italia e la Libia per la gestione dei flussi migratori irregolari nel Mediterraneo".

of the Department for Combating Illegal Migration (DCIM)[9] with the financial aid of the Italian government to prevent or limit the departures of migrants from the Libyan coast. Nevertheless, in the same year, such repressive practices resulted in a unanimous judgment by the ECtHR in the landmark ruling case "*Hirsi Jamaa and others vs. Italy*"[10] which condemned the country for sending back to Libya people rescued in international waters, thus violating several Articles of the European Convention on Human Rights (ECHR).[11]

The inability to eventually apply refoulment in international waters through maritime patrols resulting from the judgment led to a change in the Italian strategy, which called on the Tripolitan government to act in order to confine the migrants within Libya's land borders, thus preventing them from sailing towards the Italian coast.[12] To seal the deal, in 2017, the Prime Minister Paolo Gentiloni and Fayez Al-Serraj stipulated a "Memorandum of Understanding on Development Cooperation, Illegal Immigration, Human Trafficking and Reinforcement of Border Security".[13] With the Memorandum, Italy agreed to support and finance the Tripolitan security and military institutions, to start cooperation initiatives, and to provide support and funding for development programmes in the regions affected by illegal migration, in addition to supplying technical assistance to Libyan anti-immigration bodies (including the Border and Coast Guard), as stipulated in Article 1. There is also a commitment to take measures aimed at completing the land border control system in southern Libya (according to Article 19 of the 2008 Benghazi Treaty), improving

[9] Morgese, "Italia, Libia e Questione Migratoria".

[10] The case *Hirsi Jamaa and others vs. Italy* refers to the 2009 illegal refoulment of eleven Somali nationals and thirteen Eritrean nationals recovered in international waters by ships from the Italian Revenue Police (Guardia di Finanza) and the Coastguard and returned to Tripoli. "*The applicants stated that during that voyage the Italian authorities did not inform them of their destination and took no steps to identify them. On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on the following day, the Italian Minister of the Interior stated that the operations to intercept vessels on the high seas and to push migrants back to Libya were the consequence of the entry into force, in February 2009, of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration. Two of the applicants died in unknown circumstances after the events in question. Fourteen of the applicants were granted refugee status by the Office of the High Commissioner for Refugees (UNHCR) in Tripoli between June and October 2009. Following the revolution which broke out in Libya in February 2011 the quality of contact between the applicants and their representatives deteriorated. The lawyers are currently in contact with six of the applicants, four of whom reside in Benin, Malta or Switzerland, where some are awaiting a response to their request for international protection. One of the applicants is in a refugee camp in Tunisia and plans to return to Italy. In June 2011 one of the applicants was awarded refugee status in Italy, which he had entered unlawfully.*" See Judgment ECtHR *Hirsi Jamaa and Others v. Italy*, 23 February 2012, No. 27765/09, Article 4 of Protocol No. 4.

[11] These Articles are: Article 1, according to which the contracting parties to the Convention have an obligation to respect the rights of individuals under their jurisdiction – something Italy failed to achieve by 'taking in' migrants on board its ships, which are Italian territory, and then returning them to Libya; Article 3 which states that no one shall be subjected to torture or inhuman or degrading treatment – a risk that, according to the Court's analyses of the countries of origin of the Eritrean and Somali nationals, they could have run if returned to Libya or their respective countries; Article 4, Protocol No. 4, whereby collective expulsions of foreigners are prohibited – while refoulement was indeed undertaken by Italy by returning persons who were under its jurisdiction at the time to Libya; Article 13, stating that everyone has the right to an effective remedy if he/she has reason to believe that his/her rights have been violated – a right that Italy failed to guarantee. See Irini Papanicolopulu, "Hirsi Jamaa v. Italy. Application no. 27765/09", *American Journal of International Law*, v. 107, no. 2 (2017): 417-423, doi: https://doi.org/10.5305/amerjintelaw.107.2.0417.

[12] Morgese, "Italia, Libia e Questione Migratoria".

[13] Scalpone, "I rapporti tra l'Italia e la Libia per la gestione dei flussi migratori irregolari nel Mediterraneo".

and financing temporary reception centres in the country and training Libyan staff working there, as well as supporting international organisations working in Libya in the field of migration (Article 2).[14]

Critical points of the Memorandum include the fact that Libya lacks an effective legal system capable of ensuring the prosecution of human traffickers and the protection of migrants' human rights.[15] Moreover, the word "*rights*" appears only once in Article 5, which states that the Parties "*commit to interpret and apply the present Memorandum in respect of the international obligations and the human rights agreements to which the two Countries are part*".[16] Nevertheless, Libya has not signed the 1951 Geneva Convention on the Status of Refugees and currently recognises refugee status to only seven nationalities under the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, which it has adhered to.[17]

Once again, and in line with previous agreements between Italy and Libya, the Memorandum makes no reference to the need to respect the right to asylum, therefore failing to acknowledge that among migrants who flee there are also some who might be entitled to receive international protection. In fact, the language of the Memorandum "*betrays a monolithic view of migration with migrants that are qualitied as 'illegal' or 'clandestine'*", "*opportunistically denying the reality of mixed migration flows*".[18] Nor was any consideration given to creating humanitarian corridors to enable the identification of asylum seekers and allow entry into Europe through legal and safe channels.[19] As a result, the Memorandum clearly implies the willingness to block entries into Europe and externalise the issues of managing regular migrants, an approach that might not be illegitimate *per se* but is particularly problematic in the Libyan context where there is a systematic violation of human rights. Indeed, abductions, torture and killings in different Libyan reception centres have been reported by several NGOs, which also highlighted the dual role of militias as members of the Libyan Coast Guard and human traffickers, along with the responsibility of public officials, members of armed groups and criminal gangs, as well as smugglers.[20]

Notwithstanding, on the 2nd of November 2022, in the absence of any action on behalf of the current government of Giorgia Meloni, there has been the tacit renewal of the Memorandum that will be valid for the next 3 years.[21] Despite

[14] Elisa Olivito, "The Constitutional fallouts of border management through informal and deformalised external action: the case of Italy and the EU", *Diritto, immigrazione e cittadinanza*, Fascicolo no. 2 (2020): 114-137, https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2020/595-the-constitutional-fallouts-of-border-management-through-informal-and-deformalised-external-action-the-case-of-italy-and-the-eu/file.

[15] Morgese, "Italia, Libia e Questione Migratoria".

[16] Olivito, "The Constitutional fallouts of border management through informal and deformalized external action: the case of Italy and the EU".

[17] *Ibid.*

[18] Morgese, "Italia, Libia e Questione Migratoria".

[19] Olivito, "The Constitutional fallouts of border management through informal and deformalized external action: the case of Italy and the EU".

[20] Morgese, "Italia, Libia e Questione Migratoria".

[21] Il Sole 24 Ore, "Migranti, termine scaduto: si rinnova per altri tre anni il Memorandum tra Italia e Libia", November 2, 2022, accessed January 27, 2023, https://www.ilsole24ore.com/art/migranti-termine-scaduto-si-rinnova-altri-tre-anni-memorandum-italia-e-libia-AE1NzHDC?refresh_ce=1 (freely translated by the Author).

the accusations and the protests carried out by NGOs, activists and third-sector organisations, the Italian government has not asked to review the agreement while the lives of migrants intercepted at sea remain critical.[22]

The new strategy to control migratory flows in the central Mediterranean continues with the shift from "pushbacks" to "pullbacks" practices, wherein the Libyan Coast Guard intercepts migrants and brings them back to Libya. In fact, "*the only difference with the Hirsi case is that Italy will not be doing so by itself, aware that this might be contrary to the ECHR, but will be providing technical, technological and financial aid to Libya, in effect attaining the same result*".[23] The practice of "*pullbacks*" is the characteristic feature of the new Italy-Libya cooperation model which, in line with a much broader securitarian European strategy, aimed at strengthening the process of externalisation, has "*introduced a system of 'delegation' of border controls based on a contact-less control exercised by Italy and 'a de facto' containment of migrants implemented by Libya, which has, once again, the effect of preventing access to European territory*".[24]

The externalisation of the management of migration flows protracted by bilateral agreements such as the Italy-Libya Memorandum can be seen as the first form of refoulement because they eliminate the necessity of having to apply refoulement in the first place, avoiding the problem of foreigners at the border or entering the EU territory.[25] However, such externalisation contains several problematic aspects in relation to constitutional principles and the protection of fundamental human rights.

Impeding the arrival of migrants precludes the possibility of carrying out an in-depth examination of their individual condition, an examination which is essential to determine whether the individual is indeed in need of protection.[26] Consequently, there is a risk of hollowing out the constitutional right to asylum because it allows the circumvention, if not the denial, of the two principles that represent the fundamental premises for guaranteeing the effectiveness of the protection of the right to asylum: the prohibition of collective expulsions and the principle of non-refoulement, as protected by international law, by the Charter of Fundamental Rights of the European Union (CFREU) and by the Italian legal system.[27] If these prohibitions are circumvented, as it is the case with the "*pullbacks*" strategy inaugurated by the Memorandum, the prerequisites for applying the third paragraph of Article 10 of the Italian Constitution are missing; the paragraph, in fact, states that a "*foreign national, who is denied – in his or her country – the enjoyment of the*

[22] *Ibid.*

[23] Anna Fazzini, "Il caso S.S. and Others v. Italy nel quadro dell'esternalizzazione delle frontiere in Libia: osservazioni sui possibili scenari al vaglio della Corte di Strasburgo", *Diritto, Immigrazione e Cittadinanza,* Fascicolo no. 2 (2020): 87-113, https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2020/594-il-caso-s-s-and-others-v-italy-nel-quadro-dell-esternalizzazione-delle-frontiere-in-libia-osservazioni-sui-possibili-scenari-al-vaglio-della-corte-di-strasburgo/file (partly freely translated by the Author).

[24] *Ibid.*

[25] Filippo Scuto, "Accesso al Diritto di Asilo e Altri Limiti Costituzionali al Respingimento", Diritto, ImmigrazioneeCittadinanza,Fascicolono.2(2020):48-86,https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2020/593-accesso-al-diritto-di-asilo-e-altri-limiti-costituzionali-al-respingimento-sovranita-statale-e-pericoli-di-allontanamento-dalla-costituzione/file (freely translated by the Author).

[26] *Ibid.*

[27] *Ibid.*

democratic freedoms established by this Constitution shall be entitled to the right of asylum in the Republic under such conditions as shall be established by law".[28]

Some, like the defenders of sovranist tendencies of the previous and current populist parties governing the Italian political realm, might argue that border control to protect public security is also an interest of constitutional importance; nevertheless, this does not justify the State to generally close its borders.[29] In fact, while the Italian Constitutional Court's Judgment No. 353 of 1997 recognised that in this area, a correct balancing of the values at stake is necessary, since both the requirements of human solidarity and the duty of the State of controlling its borders have full constitutional relevance;[30] Judgment No. 105 of 2001 of the Judge of Laws also established an essential point for such balancing – no matter how serious the problems of security and public order related to increasing migration flows are or may be perceived, the universal character of personal freedom cannot be undermined in the slightest since, as other rights proclaimed inviolable by the Constitution, individuals are entitled to it not as members of a given political community, but as human beings.[31]

This passage from constitutional jurisprudence provides a reminder that the two aspects, even if both have constitutional importance, cannot be fully equated. In the case of refoulement, the need to ensure satisfactory effectiveness of the right to asylum must be taken into consideration first and foremost because denying entry hinders the fundamental rights of the migrants trying to reach the Italian (and European) territory, putting their lives at risk. Such practice could only take place if strictly regulated with procedures respecting rights, without damaging or precluding the possibility of the foreigner to apply for protection. Considering the human rights violations taking place on Libyan territory, the lack of jurisdiction and stability of the State as well as the practical impossibility of asking for asylum in the African country, these preconditions are certainly not met.

It is important to notice that the legal doctrine refers to a duty of hospitality linked to the need to allow entry of asylum seekers and refugees, which should prevail over the rules on fighting illegal immigration. This might suggest that, apart from cases of humanitarian protection and asylum, it would be legitimate for the State to deny access to non-citizens. Nevertheless, the wide use of rejection policies makes it harder to identify persons in need of international protection at the border, besides assuming that economic migrants escaping deep poverty do not face the same needs of asylum seekers. Constitutional asylum must presuppose, as a precondition for its effectiveness, the possibility of verifying the individual condition of a foreigner and of applying for protection.

Therefore, from this point of view, the provision of Article 10, third paragraph, "*cannot concern the regulation of entry, but rather the discipline of ascertaining who is entitled to obtain protection*".[32] In the case of the intercepted boats of migrants either in Italian territorial waters or in international ones, the particularly urgent nature of the situations relating to their rescue does not permit such examination. Also, if the

[28] La Costituzione *Principi fondamentali*, Aggiornata alla Legge Costituzionale, November 7, 2022, no. 2, Articolo 10 (freely translated by the Author).
[29] Filippo Scuto, "Accesso al Diritto di Asilo e Altri Limiti Costituzionali al Respingimento".
[30] Judgment Italian Supreme Court of Cassation *Granata*, 13 November 1997, Case 353/97, recital 2.
[31] Judgment Italian Supreme Court of Cassation *Ruperto*, 22 March 2001, Case 105/2001, recital 4.
[32] Filippo Scuto, "Accesso al Diritto di Asilo e Altri Limiti Costituzionali al Respingimento".

Libyan Coast Guard is the first to intervene – or the first to be asked to act while the Italian authorities retract –, it will be up to the Libyan State to advance the corresponding procedures. However, Libya is not a member of the EU nor a party to some relevant international regulations on migration (such as the abovementioned 1951 Geneva Convention on the Status of Refugees), thus not having any obligation in this respect. Under these conditions, it is very likely that the screening will not (and does not) take place.

Furthermore, the reference in Article 10, third paragraph, of the Constitution to the right to asylum "*in the territory of the Republic*" should be intended as the space in which the foreigner, once the status has been obtained, can enjoy the right of asylum, but cannot be considered a requirement for the submission of the application. Ordinary courts have themselves had the possibility to intervene on this point, leaving aside the question of territoriality in relation to constitutional asylum, as in the case of the Kurdish leader Öcalan. In that instance, the Court of Rome directly recognised the right of constitutional asylum to a person who was no longer in Italy and justified the decision on the basis that the presence of the applicant in the Italian territory is not a necessary condition, since it is not required by the constitutional provision.[33] Put into practice, this would allow migrants entitled to international protection to present their cases for examination even from outside the Italian-EU territory, at least in theory. However, this does not correspond to the current political will of the Italian and European governments in general, which purposely tend towards outsourcing. In addition, the Libyan State does not have any legal infrastructure to carry out such practices, while it also shows a complete disregard for human rights, as it is visible in the case of the migrants detained in its reception centres.

The need to allow foreign citizens at the border to enter the territory of the State in order to enable an examination of his/her individual condition is also confirmed by a strand of jurisprudence of the Supreme Court. As per the Judgment No. 25028 of 2005, in the Court's opinion constitutional asylum is to be understood "*not so much as a right to enter the territory of the State, but rather, and above all, as the right of the foreigner to enter it in order to be admitted to the procedure for examining the application for protection*" (...) "*a right aimed at allowing subsequent verifications for a final judgment on the identity of the refugee status or qualification*".[34] On the basis of this orientation, the Court of Cassation later identified, in Judgment No. 26253 of 2009, the existence of a right to submit an application for international protection even when the foreigner has illegally entered the territory of the State,[35] a reference that is in contrast with the adoption of widespread rejection policies aimed at preventing, in any case, the possibility of entry into State territory. The right to asylum, which is among the fundamental principles of the Italian Constitution, is a right that must possess a certain "extraterritoriality" in order to impede its circumvention and compression by rejection policies that, by denying the entry in the country, hinder the possibility of foreign citizens to submit an application for protection.[36]

[33] Andrea Maria Pelliconi and Marco Goldoni, "La banalità dei porti chiusi per Decreto. Osservazioni sui profili di legittimità del Decreto Interministeriale 150/2020", *Diritto, Immigrazione e Cittadinanza*, Fascicolo no. 2 (2020): 224, https://www.dirittoimmigrazionecittadinanza.it/archivio-saggi-commenti/note-e-commenti/fascicolo-2020-3/599-la-banalita-dei-porti-chiusi-per-decreto-osservazioni-sui-profili-di-legittimita-del-decreto-interministeriale-150-2020/file (freely translated by the Author).

[34] Judgment Italian Supreme Court of Cassation, 25 November 2005, Case 25028, p. 6.

[35] Judgment Italian Supreme Court of Cassation, 15 December 2009, Case 26253, p. 3.

[36] Filippo Scuto, "Accesso al Diritto di Asilo e Altri Limiti Costituzionali al Respingimento".

Moreover, the adoption of rejection measures must also take into account other limits of primary constitutional importance, first and foremost, the principle of solidarity and the relative mandatory duties of solidarity referred to in Article 2 of the Italian Constitution. In effect, the duty of solidarity translates into the need to put humanitarian needs in the foreground and, in particular, the protection of those potentially in need of protection and asylum, while also taking into account the personalist principle, which represents the constitutional norm that grounds "*the attribution of rights to every foreign citizen as a person, regardless of their status and the policies adopted in immigration matters*".[37] The personalist principle and the solidarity principle of Article 2 of the Constitution thus represent a double constitutional limit for rejection.

As shown, bilateral agreements such as the Memorandum, which provide for simplified procedures for the removal of irregular foreigners and readmission agreements, hinder the effective protection of the right to asylum; this should automatically impede the use of such procedures with countries whose standards of protection of human dignity and fundamental rights are not satisfactory and where effective protection of the right to asylum is not guaranteed, as it is the more than evident in the Libyan case.

Finally, the Italian legislation on the right to asylum, which is largely of European origin, provides for another constitutional limit which stems from the internationalist openness of the Italian Constitution, guaranteed by Articles 10, 11 and 117, first paragraph. According to these Articles, refoulement policies that conflict with international law and EU law are not allowed, as it follows from ECtHR case law. Moreover, border control can no longer be considered as an exclusive state competence since the EU now has a concurrent competence in immigration and asylum matters. Therefore, Italy's accession to the EU imposes a new limit on the adoption of border entry and crossing rules contrary to EU law.

Nevertheless, it is the very same EU that is promoting securitarian migration policies based on externalising borders, entrenching itself in a fortress where, just outside its territory, violence is carried out. In fact, while on one hand the EU condemned Italy in 2012,[38] on the other hand it is adopting and favouring the new strategy of "*pullbacks*" that relies on the same objectives of "*pushbacks*" practices, stipulating agreements with third countries,[39] thus undermining the respect of international human rights principles. If the EU dictates the way forward on important topics and defines the legislation of the constitutional right of asylum, which is of clear EU provenance, is it possible to affirm that it is also dictating the path to undermining the meaning of fundamental rights ascribed in the Constitutions of its Member States? If this appears overly harsh to state, it is at least clear how bilateral agreements such as the Italy-Libya Memorandum are being signed with the complicity of EU's political will, which is failing to draw a more solidarity-focussed framework for migration.

The above-mentioned judgments, stemming from the Italian legislative system as well as ECtHR case law from the ECtHR seem to be paving the way for a more conscious approach to migrants. Even if it is true that only a few cases reach the courts, the jurisprudence might fill in the void created by the solidarity crisis of the

[37] *Ibid.*

[38] See the previously mentioned *Hirsci and others vs. Italy* case.

[39] See, for example, the EU-Turkey Agreement of 2016.

European approach to immigration. Nevertheless, even if it can certainly mitigate some of the excesses of the current course, its intervention must be backed up by the imperative that policymakers return to the issue with a different approach, "*restoring and restructuring the constitutional edifice of the right to asylum*".[40]

[40] Filippo Scuto, "Accesso al Diritto di Asilo e Altri Limiti Costituzionali al Respingimento".