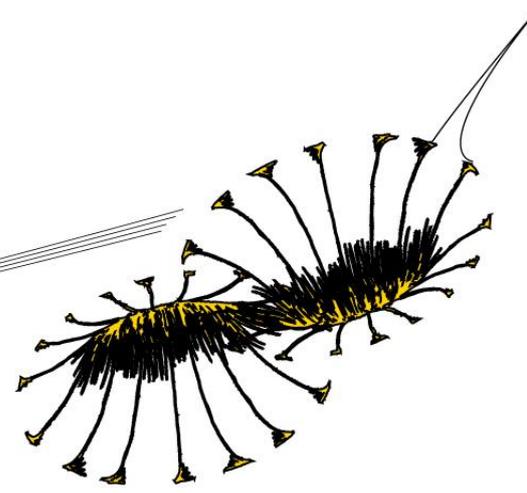


Managing migratory flows and the respect of fundamental rights. A case study on the cooperation between the EU and Libya

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Abstract

After the fall of the regimes in Tunisia, Libya and Egypt in the Arab Spring and the resulting chaos migrant streams trying to reach Europe grew. Migration over the Mediterranean is nothing new though. This study will look at what the EU does to manage migration on its southern border and more specifically at the cooperation between the EU, its member states and third states with regard to migration. For this specific case Libya was picked as it is one of the main transit countries for migrants trying to cross the Mediterranean to find their way to Europe and furthermore one of the least stable countries after the regime change. The thesis then assesses the impact of cooperation with Libya on the Fundamental Rights guaranteed by international and EU law applicable to refugees. This includes mapping activities of the EU and the member states starting from 2007 and the legal issues connected to some of the agreements. It is shown that cooperation mostly was and is intended to stop migrant flows before they leave the transit country. The study finds that the situation is indeed critical and that rights of migrants and refugees might indeed be violated. It can however be stated that the difficulties on the Libyan side due to the on-going civil war are at the moment too severe to expect change in the near future. This severely limits the possible effects of any cooperation between the EU and its member states on one hand and Libya on the other hand. This furthermore means that due to the newest unrest in Libya efforts are stagnating or had to be reduced.

List of abbreviations

CJEU Court of Justice of the European Union

EC European Commission

ECtHR European Court of Human Rights

ECHR European Convention of Human Rights

ECJ European Court of Justice

EP The Parliament of the European Union

EU European Union

EUROSUR European Border Surveillance System

FRA European Union Agency for Fundamental Rights

FRONTEX European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

JO Joint Operation

NGO Non-Governmental Organization

SBC Schengen Borders Code

TC Third Country

TEU Treaty on the European Union

TFEU Treaty on the Functioning of the European Union

UNHCR United Nations High Commissioner for Refugees

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1. Introduction

Migrants coming through Libya have been an issue for many years now. Libya has been a major transit country for migrants for years due to its relative closeness to Europe, especially Italy and Malta. The situation saw again high media coverage during the first months of this year due to the huge amount of migrants that were taken ashore by Italy in the Mediterranean. Especially after the fighting broke out in Libya in 2011 the number of migrants trying to reach Europe rose. In the time between the 1st of January and the 31st of July about 48,000 irregular migrants reached Italy, of which 23,267 arrived from Libya (Carrera, Den Hertog, & Parkin, 2012, p. 4). The origins of these migrants lay for the majority in sub-Saharan Africa. These figures were provided by the Italian Ministry of Interior at a press conference held in mid-August 2011 (Nascimbene & Di Pascale, 2011, p. 343). About 1,500 people arrived in Malta in the spring and summer of that year, mainly coming through Libya and also originating from sub-Saharan Africa (Carrera, Den Hertog, & Parkin, 2012, p. 4). For the year 2014 it was reported that the number of migrants reaching Italy by sea had grown to 170,100 (IOM, 2015a).

In the EU immigration control is increasingly extra territorialised (Rijpma & Cremona, 2007, p.23). This means that the EU and its member States try to push back the EU's borders or govern them at least at a distance to control migration flows (Rijpma & Cremona, 2007, p.12). This is done in order to prevent non-EU nationals from leaving their home countries or at least keep them from entering the EU. It also entails that if they enter the EU they will be repatriated or returned to a safe third country (Rijpma & Cremona, 2007, p.12). This development seems to let the responsibilities of states and the possibility for individuals to claim the rights they have under international law fade. On top of this, operations to control migration are not only replaced to the territory of third states but are also put in the hands of instances that cannot be held accountable, both in law and in practice, for wrong actions that might occur. Part of this development are the interception of vessels used for transporting migrants, giving financial aid to migrant detention facilities on the territory of non-EU member states and making surveillance equipment available to such third states. This development has been described as 'offshoring and outsourcing' of immigration control by Gammeltoft-Hansen (2011, p.10).

The cooperation with Libya on irregular migration is part of this development. Libya started its cooperation with European countries in the field of irregular migration in the 2000s as it desired the removal of the international embargo and the return of foreign investment (Migration Policy Centre, 2013, p. 1). Part of this was bringing its policy of welcoming needed Sub-Saharan migrants and its involvement in discussions on irregular immigration control into balance. Therefore Libya abandoned its open door policy and introduced visas for both Africans and Arabs and changed its regulations concerning labour and stay (Migration Policy Centre, 2013, p. 1).

The FRA report "Fundamental rights at Europe's southern sea borders" (2013) lists which agreements were at that time in place between the EU and third countries and the state of the human rights side of those agreements. It comes to the conclusion that although there might

be positive aspects in externalization practices the dangers are also very prominently present (FRA, 2013). Research on the issue has for example been done by Silja Klepp, who looked at the legal insecurities surrounding the issue of tightening border controls on the one hand and refugee protection on the other hand. She explicitly mentions the principle of *non-refoulement*, which although it is binding on EU member states and agencies is weakened in practice before changes are actually made in the legislative process (Klepp, 2010). Local actors like Italy (Klepp, 2010, p.7) and Malta (Klepp, 2010, p.15) are modifying EU legal norms, adapting them and bending them to their need (Klepp, 2010, p.7), sometimes by informal or even illegal means. She clearly shows that there is no fixed scheme for EU migration policy and that in this area core values of the EU are under threat.

Although Libya was for a long time a country of immigration for Sub Sahara Africans, the worsening conditions in the country for immigrants have made it an increasingly important transit country. This is especially true for migrants trying to reach Malta and the Italian Island of Lampedusa (Migration Policy Centre, 2013, p. 1).

With regard to the legal implications of this study, Violetta Moreno-Lax for example tries to clarify the international and EU legal framework that is binding upon the EU, its agencies and its member states when they operate at sea (2011, p. 174). The implementation of these legal obligations however only goes so far as they are construed (Moreno-Lax, 2011, p. 174). This means that a consistent interpretation is necessary for these legal obligations to be effective. Legislation like the Schengen Borders Code for example must therefore be interpreted in line with the EU Charter of Fundamental Rights (Moreno-Lax, 2011, p. 217). A fragmented interpretation of for example border controls and obligations towards possible refugees limits the effect of fundamental rights. A conclusion she therefore draws is that member states should align their border controls with the rights refugees have under international and EU law (Moreno-Lax, 2011, p. 220). She furthermore states that compliance with the rights conferred to migrants, even though it might attract asylum seekers, is not disputable and must be guaranteed by member states (Moreno-Lax, 2011, p. 218). No international cooperation takes these responsibilities away from the EU member states.

This study will be related to research in the area of European Union Law. The general topic is then “externalisation of border controls to third countries”. In this specific case this means that the EU and its member states move part of their migration control to the high seas. Italy for example conducted joint patrols with Libya. By doing so they externalized their border controls leaving the migrants to Libya (Triandafyllidou, 2014, p. 15). More specifically the study will analyse the legal aspects surrounding cooperation of the EU and its member states with third countries, which in this case will be Libya, on migrants and the readmission of them. Studying recent developments in the area of migration in the EU will be relevant for the existing body of knowledge as it creates a better picture of what is done by the EU to manage migration. Additionally it will give a picture of how far the EU is willing to go in keeping migrants out and to what extent this is in line with human rights principles and standards the EU is legally bound to. Human rights and especially the rule of law belong to the core principles of the EU.¹ The issue of possible human rights violations touch upon these core

¹ Article 2 TEU.

principles, principles that are fundamental to the EU. It is important to see how the EU and the member states work with the difficult situation in Libya and how this situation influences the application of international law principles in practice. Thus this study also has societal value. Further research in this area might shed a light on the issue and in the case of violations or miss practices lead to a reassessment of the cooperation with certain third states. The relevance of this study is undeniable when taking into account the never ending news stories of migrant boats that are intercepted on their way from Libya towards the EU and the tragedies that occur not only at sea but also in the countries bordering it.

The following section presents the research question and the methodology of this study.

2. Research Questions and Sub-Questions

The specific research question to be answered within this bachelor study will be:

“To what extent do the policy and cooperation framework between the EU, its member states and Libya on migration and border controls respect Fundamental Rights?”

This descriptive research question will explore the cooperation between the EU and Libya to understand what this cooperation implies for Fundamental Rights.

In order to answer this question, three sub-questions have been added:

“Which international and European legal principles and rules are applicable to transnational cooperation on migration and border controls?”

“To what extent does the situation in Libya pose a challenge to develop cooperative mechanisms on border controls and migration?”

“What is the existing framework governing cooperation between the EU, its member states and Libya?”

The study will be begin by showing the main legal provisions that are in place to guard migrants that try to enter the EU using Libya as their last station before entering the EU. In order to enter the EU like this they must cross the Mediterranean, which will be taken account. The structure of this study then follows the sub-questions. First, past and current EU cooperation programs will be outlined. This will include amongst others the EUBAM mission to Libya, launched in 2013. Secondly cooperation programmes between single member states and Libya will be described. The countries involved are mainly Italy and Malta and special emphasis is placed on the relationship between Italy and Libya, starting with a readmission agreement from 2000 (Andrijasevic, 2010, p. 154). Thirdly official reports, scientific research and case law will be assessed in order to see if fundamental rights are respected by all three

parties (the EU, EU member states and Libya). By outlining these three issues it will in the end be possible to give an answer to the main research question.

The following will describe how the research was carried out. In order to answer the research question, documents from various sources of qualitative data are analysed. These sources will mainly consist of policy documents and legislation.

Important legal documents are:

- The Treaty on the European Union, together with the Treaty of the Functioning of the European Union, as in force since the Lisbon Treaty including the Charter of Fundamental Rights of the European Union
- The Geneva Convention relating to the Status of Refugees from 1951 and the 1967 Protocol

Furthermore scientific literature and articles which deal with the cooperation in the area of border controls and the international law principles that are part of this development are used. A special focus is put on the principle of *non-refoulement*. A broad range of literature is available in this field as a variety of scholars have dedicated their research work to this area.

All in all the data collected contains primarily qualitative data from international treaties and agreements, national and EU legislation, case law and reports by NGOs. Additionally the most relevant scientific work that has been carried out in the field of cooperation of EU border controls, possible externalization of border controls in the wake of cooperation and the possible infringement of international and EU law is included.

3. The international and European legal framework to protect fundamental rights in the fields of migration and border controls

This chapter describes several legal concepts which are of importance when assessing the means of cooperation that are used in the relationships between the EU, its member states and Libya. They will later also be picked up again in the assessment of the *Hirsi* case and its implications for cooperation between the EU and its member states with third states.

3.1 The notion of Refugee and its relevance for the EU – Libya cooperation framework

A definition for ‘refugee’ must be provided here as the legal concepts that will be looked at e.g. *non-refoulement* are also, though not exclusively, applied in the protection of refugees.²

² *Non-refoulement* for example also applies with regard to extradition, see Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The starting document is the Geneva Convention from 1951 defining the status of refugees. Together with the protocol added in 1967, which removed geographical and temporal limitations of the Convention, it is a key document concerning the definition of refugees.

“A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”³

At least with regard to migration in the Mediterranean people are on the move and not at their planned destination yet and have not been formally recognised the status of refugees. Looking at the ‘note on principle of *non-refoulement*’ adopted by the United Nations High Commissioner for Refugees (UNHCR) is therefore clarifying. It defines further to whom this principle is applicable.

“In the case of persons who have been formally recognised as refugees under the 1951 Convention and/or the 1967 Protocol, the observance of the principle of non-refoulement should not normally give rise to any difficulty.

In this connection, particular regard should be had to the fact that a determination of refugee status is only of a declaratory nature. The absence of formal recognition as a refugee does not preclude that the person concerned possesses refugee status and is therefore protected by the principle of non-refoulement.

In fact, respect for the principle of non-refoulement requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established”⁴.

Two cases are described: The first one deals with formally recognized refugees. Here there is no doubt on the application of the *non-refoulement* principle. The second case concerns non-formally recognized persons. To these not-formally recognized individuals the principle applies as well. They are protected before they have been granted asylum. This principle is also valid against transit countries.

³ Geneva Convention relating to the Status of Refugees (1951), Art. 1.

⁴ UN High Commissioner for Refugees, UNHCR Note on the Principle of Non-Refoulement, November 1997, Retrieved 10.6.2012 from: <http://www.unhcr.org/refworld/docid/438c6d972.html>.

3.2 Search and rescue operations and their legal framework

Rescuing people in distress at sea is one of the oldest and most fundamental principles of maritime law and is widely recognized as customary law norm (Moreno-Lax, 2011, p. 194). It is for example stated in the United Nations Law of the Sea Conference (UNLOSC), where it is said that:

“every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers [...]. to render assistance to any person found at sea in danger of being lost”

and furthermore

“to proceed to the rescue of persons in distress [...]”.⁵

It is necessary to define the notions ‘distress’ and ‘rescue’ in order to continue. ‘Distress’ has been defined by the International Convention on Maritime Search and Rescue (SAR Convention) as “a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance”.⁶

As the International Law Commission has stated that distress includes situations that are a serious danger, however the “very existence of the person concerned” does not necessarily need to be endangered (Moreno-Lax, 2011, p. 22). Following this interpretation unseaworthiness may already by itself involve distress (Moreno-Lax, 2011, p. 22). The European Commission has in the past estimated that 80 per cent of all illegal traffic in the Mediterranean is carried out with unseaworthy boats putting the lives of the passengers in danger. This might lead to the conclusion that all persons on board of such vessels can be defined as in distress and therefore from the start in need of rescue (Moreno-Lax, 2011, p. 23).

A definition of ‘rescue’ in the SAR Convention includes actions ‘to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety’.⁷ The state that is responsible for the SAR region in which assistance was provided has the responsibility to make sure that survivors are brought to a place of safety.⁸ The obligation of the coastal state is however limited to cooperation and does not include the disembarkation onto its own territory. It does however include an obligation of result, meaning that an SAR operation cannot be seen as accomplished until survivors have disembarked (Moreno-Lax, 2011, p. 196). Considering the notions of ‘place of safety’ and ‘safety’ itself it must be said that neither are defined. Therefore there is still room for interpretation especially with regard to place of safety. Moreno Lax states that effective implementation of rules and responsibilities can only go so far as their interpretation lets them, with regard to disputes between for example Italy and Malta existing rules show their limitations.

⁵ UNLOSC (1982), Art. 98(1)

⁶ SAR Annex, para. 1.3.13.

⁷ SAR Annex, para. 3.1.9

⁸ SAR Annex, para. 3.1.9

3.3 The non-refoulement principle and its relevance for the EU – Libya cooperation framework

The principle of *non-refoulement* gives refugees protection from expulsion to places, which are mostly the countries of origin, where their lives and freedoms are endangered. In the context of irregular migration this principle is particularly important as it prohibits the simple expulsion or rejection of individuals that applied for protection by state authorities without any assessment of the individual's case.

The UNHCR gives a general description of the *non-refoulement* principle:

*“[...] this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger”*⁹.

Lauterbach and Bethlehem (2003) give a far more detailed description of both the scope and content of the principle. They give a general explanation concerning the interpretation and application of the principle. Lauterbach and Bethlehem draw up three different parts of which the principle consists. The first one is that *non-refoulement* applies to anybody who has a well-founded concern that they may be to be the subject of abuse in their home-country; in this case other states are not allowed to return the individual (2003, p. 115). Secondly states must carry out individual assessments of claims and verify them (2003, p. 118). The third point is that persons claiming that they are in need of international protection cannot be sent back to a territory that is unsafe for them (2003, p. 121). Additionally individuals may also not be sent back to a state which later on might expel the person to an unsafe territory. An example for this can be seen in the case of *Adnan*¹⁰, which saw a Somali and an Algerian national who were both seeking asylum in the UK not returned to France and Germany even though they were their states of entry. The reason for this was that neither Germany nor France accepted the asylum claims of the applicants as they were not threatened by their countries governments but by private organisations. Returning the applicants to Germany and France would then have been an indirect violation of the *non-refoulement* principle as the UK actually recognized the threat that was posed to the applicants by private organisations.

The principle of *non-refoulement* has multiple legal sources which are all concerned with guaranteeing that states have the obligation not to expel people whose legal protection cannot be guaranteed if they are returned to either their country of origin or their transit country. It appears in different treaties and this is linked to the fact that it is applicable in different factual situations. International protection is then granted according to each treaty. Generally the objective is always to protect individuals from different forms of persecution.

⁹ UN High Commissioner for Refugees, *UNHCR Note on the Principle of Non-Refoulement*, November 1997.

¹⁰ *Regina v Secretary of State for the Home Department, ex parte Adnan* [2001] 2 AC 477.

A starting point for the principle of *non-refoulement* is the original mentioning of it in the Geneva Convention Relating to the Status of Refugees in Article 33:¹¹

“PROHIBITION OF EXPULSION OR RETURN (“REFOULEMENT”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

The principle is a cornerstone of the Convention and furthermore in the whole legal protection for people in need of international protection around the world. Lauterbach and Bethlehem take up this point and state that: “[...] within the scheme of the 1951 Convention, the prohibition on *refoulement* in Article 33 holds a special place. This is evident in particular from Article 42(1) of the Convention which precludes reservations inter alia to Article 33. The prohibition on *refoulement* in Article 33 is therefore a non-derogable obligation under the 1951 Convention. It embodies the humanitarian essence of the Convention” (Lauterbach & Bethlehem, 2003, p.107). As mentioned earlier, its legal importance is confirmed by the fact that it is reappearing in several other human rights treaties. It is for example laid down in the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR). In the relation between expulsions of refugees to for example Libya Article 3 of the CAT and Article 7 of the ICCPR are of importance. In addition this principle is part of the European Convention on Human Rights (ECHR) and generally in asylum law. The Charter of Fundamental Rights of the European Union clearly states the prohibition of expulsion in Article 19:

*“Protection in the event of removal, expulsion or extradition 1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.*¹²

In the ECHR the principle of *non-refoulement* is not expressly codified. However *non-refoulement* can still be considered to be stated in Articles 2 and 3 of the ECHR. Article 2 expresses the right of life and Article 3 refers to the prohibition of torture.¹³ It is debated how *non-refoulement* is stated in the ECHR. Den Heijer for example argues that the general idea according to which only articles 2 and 3 are relevant in the context of *refoulement* “has transformed into a self-fulfilling prophecy” (Den Heijer, 2008, p. 278). He made this

¹¹ Geneva Convention relating to the Status of Refugees (1951), Art. 33.

¹² Charter of Fundamental Rights of the European Union, Art. 19.

¹³ European Convention on Human Rights, Art 2 and 3.

comment as up until then the ECtHR had never found a breach of Articles other than 2 and 3 in cases where *refoulement* was feared (Den Heijer, 2008, p. 277). He continues with stating that it could even be stated that “in principle all of the Convention rights can contain a prohibition of *refoulement*” (Den Heijer, 2008, p. 279). Thus the direct incorporation of the *non-refoulement* principle in the ECHR is certainly ambiguous. Therefore the importance of this principle in the context of the ECHR is only visible through the case law of the Court than from the actual text of the Convention. The inclusion of ECtHR case law is therefore a necessity in order to assess which human rights must be taken into account when looking at expulsion procedures. In *Bader v Sweden* for instance the court applied a different Article than Article 3 with regard to expulsion. In this case the Court recognized the argument that both Article 2 and 3 of the ECHR would be violated in case the complainant returned to the country of origin, in his case Syria. In other cases the Court dismissed complainants arguments if they did not directly relate to Article 2 and 3. Another case, *Mamatkulov v Turkey*, saw the complainant argue that the hearing before the criminal court would not be fair as he had would not be represented by a lawyer of own choice. Article 6 of the Convention expresses the right to a fair trial; here however the Court dismissed the request. In a third trial, *F. v United Kingdom*, an explicit distinction was made between Articles 2 and 3 and other rights that are contained in the ECHR (Den Heijer, 2008, p. 283). The Court argued that “[...] its case law has found responsibility attaching to contracting States in respect of expelling persons who are at risk of treatment contrary to Articles 2 and 3 of the Convention. This is based on the fundamental importance of these provisions, whose guarantees it is imperative to render effective in practice. Such compelling considerations do not automatically apply under the other provisions of the Convention [...]”. Following this argumentation the fundamental character of Articles 2 and 3 allow for the use of the *non-refoulement* principle. In this respect Den Heijer states that in the context of *refoulement* the Court never excluded the possible role of other provisions than Article 3. In this context the importance of ECtHR case law also becomes clear again.

Turning to the EU legal order the principle is part of several Directives. It is part of EU legislation in the context of cooperation between Libya and the EU and its member states is subject of the further investigation of this study. The idea of cooperation between the EU and its member states with Libya with regard to migration issues must be assessed in connection with the principle of *non-refoulement*. Any possible cooperation must regard international standards and principles as well as EU and national rules. The issue of existing threats in the country of origin or expulsion is inseparable from the principle of *non-refoulement*. All EU member states are bound to this as Article 78(1) TFEU makes very clear:

“The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with the view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28. July 1951 and the Protocol of 31. January 1967 relating to the status of refugees, and other relevant treaties”.

This Article is relevant for the whole area of EU migration and asylum policy, also in regard with cooperation with third states, as this is one of the measures that are listed in Article

78(2), more specifically Article 78(2)(g), and are implementing the policy mentioned in Article 78(1). Article 78 TFEU is concerned with the EU's common asylum policy and humanitarian rights protection. It refers to respect for the Geneva Convention and the Protocol of 1967, states the obligation to protect third country nationals that are in need of it and guarantees the principle of *non-refoulement*. Furthermore three dimensions of human rights protection are featured in the Treaty of Lisbon, all under Article 6 TEU. In Article 6(1) the Charter of Fundamental Rights of the European Union is given the same legal value as the Treaties. Article 6(2) states that the EU accedes to the ECHR and Article 6(3) says that the fundamental rights stated in the ECHR, as they come from the constitutional traditions of the member states shall constitute general principles of EU law. This means that the EU and its member states must abide to a multi-dimensional human rights protection system. The implementation of their respective asylum, border and migration policies must abide to these different sources.

3.4 The international limits of restrictive practices: the Hirsi Case

The impact of cooperation with third states can best be assessed when looking at the *Hirsi* case and the implications resulting from the judgment. In *Hirsi* it was the Grand Chamber judgment of the European Court of Human Rights that found that the individuals sent back to Libya in one of the operations conducted together by Libya and Italy were sent back in breach of Articles 3, and 13 and Article 4 of Protocol 4 to the European Convention on Human Rights (ECHR). The Court's findings were unanimous (Moreno-Lax, 2012, p. 577).

Concerning Article 3 on *non-refoulement* the initial claim was two-fold: it was argued that through their return the applicants had been exposed to possible ill-treatment in Libya and also to further expulsion to their countries of origin by Libya, which would have been additional *refoulement*. Since *Soering*¹⁴ the ECtHR has repeatedly held that '*expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country*'. In such situations Article 3 ECHR forbids expulsion¹⁵ and requires the assessment of 'the situation in the receiving country in the light of requirements of Article 3'.

New since the *Hirsi* case is the relaxation of the burden of proof placed upon the applicant. This followed the line that began in *MSS*¹⁶ and says that protection under Article 3 does not require evidence of an individualised threat of torture etc.. This is a clear change from the position adopted in *Vilvarajah* and its related case law.¹⁷ If reliable information points out that

¹⁴ *Soering v United Kingdom* A161 (1989); 11 EHRR 439 at paras 90-1.

¹⁵ *Hirsi*, supra n 19 at para 114 and references therein.

¹⁶ *MSS v Belgium and Greece* 53 EHRR 2. For commentary, see Moreno-Lax, 'Dismantling the Dublin System: *M.S.S. v Belgium and Greece*' (2012) 14 European Journal of Migration and Law 1.

¹⁷ *Vilvarajah and Others v United Kingdom* A 215 (1991); 14 EHRR 248.

the situation in the receiving country make it ‘sufficiently real and probable’ that there is a risk for the person in the sense of a possible breach of Article 3, removal must be stopped.¹⁸

Furthermore, as the character of Article 3 ECHR is absolute, states must actively follow their obligations following from this provision. Following the Court, this means that in the case of *Hirsi* ‘it was for the national authorities, faced with a situation in which human rights were being systematically violated . . . to find out about the treatment to which the applicants would be exposed after their return’¹⁹.

Duties following from bilateral agreements do not relieve states from their duties. It was made clear by the Court that ‘[e]ven if it were to be assumed that those agreements [concluded between Italy and the Libya] made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States’ responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention.’²⁰ This follows the Courts findings in *Al-Saadoon*²¹. It is not enough for a state to presume safety based on existing legislation and the ratification of international human rights instruments by the third state, therefore the state is not released from its obligations stemming from the Convention.²²

When sufficient procedural safeguards to prevent indirect *refoulement* are not in place in the receiving state transfer should be stopped.

Therefore there can be no automatic reliance on international agreements that include the transfer of persons between states. Before any transfer takes place compliance with Article 3 ECHR must be established.²³ This is even more important when one of the states involved is not a Party to the ECHR.²⁴ When examining this, two factors must be considered. The first one is the situation in the country of origin and the second one is the safeguards in the intermediate state against arbitrary repatriation.²⁵

The Court assessed whether Italy could expect Libya to offer protection against *refoulement*. To do this the Court paid attention to the fact that Libya is not a Party to the 1951 Refugee Convention, has no asylum procedures, does not recognize the legal status of refugees and has indiscriminately removed irregular migrants to neighbouring states. This was noticed by different observers.²⁶ Therefore, Italy should have known that Libya did not offer sufficient protection. It was not enough that UNHCR was present in Tripoli, that Libya had ratified a few human rights instruments or that it had formally accepted and complied with the

¹⁸ Ibid. at para 136.

¹⁹ Ibid. at para 133.

²⁰ Ibid. at para 133.

²¹ *Al-Saadoon*, supra n 51 at para 138.

²² *Hirsi*, supra n 19 at para 128, referring to *MSS*, supra n 58 at para 353.

²³ *MSS*, supra n 58 at para 342. See also CJEU, Case C-69/10, *Brahim Samba Diouf*, 28 July 2011, at para 61. Endorsing explicitly *MSS*, see CJEU, Joined Cases C-411/10 and C-493/10, *NS and ME*, 21 December 2011. For analysis see Costello, ‘The Ruling of the Court of Justice in *NS/ME* on the fundamental rights of asylum seekers under the Dublin Regulation: Finally, an end to blind trust across the EU?’ (2012) *Asiel- en Migrantenrecht* 83.

²⁴ *Hirsi*, supra n 19 at para 147.

²⁵ Ibid. at paras 149-55.

²⁶ Ibid. at paras 153-54 and 123-30.

principles inscribed in the Universal Declaration of Human Rights when it ratified the Treaty of Friendship²⁷.

Collective expulsion is regulated in Article 4 of Protocol 4 ECHR. The ECtHR's findings on this Article are unprecedented. It prohibits the expulsion of people treated as a group but it has only been applied in very limited cases.²⁸ Before *Hirsi* there was only one other violation declared by the Court in such a case.²⁹ Regarding 'collective expulsion' a first formula was created in *Henning Becker*, though the case itself was held as inadmissible, with the goal to prevent states from removing groups of third country nationals without checking their individual backgrounds. In *Andric*, which was also held inadmissible, this was further developed to make clear that the term meant 'any measure compelling aliens, as a group, to leave a country'.³⁰

From the ECtHR's reasoning in *Conka* and *Hirsi* it also becomes clear that Article 4 of Protocol 4 ECHR includes a measure of procedural protection against arbitrary removal³¹. This means that when people are expelled as a group and their individual cases are not evaluated or they are not given the opportunity to put forward their arguments against their deportation a violation of the prohibition of collective expulsion takes place. When the applicants in *Hirsi* were transferred to Libya they experienced exactly this. The Italian military personnel was not trained to conduct individual interviews nor were they assisted by legal advisers or interpreters. The Court therefore found a violation of Article 4 of Protocol 4.³²

Further procedural protection is given by Article 13 ECHR when seen in combination with Article 3 of the Convention and Article 4 of Protocol 4. They give 'everyone whose rights and freedoms as set forth in [the] Convention are violated' an instrument so they can 'obtain relief at national level for violations of their Convention rights'.³³ In order to give effect to this provision of the ECHR a variety of procedural standards need to be guaranteed.

First the individual must be informed about procedures that can be followed to prevent being returned³⁴. Interpretation and legal assistance are also necessary in this regard.³⁵ Additionally states must offer the chance to individuals to defend their claims.³⁶ None of these safeguards were followed by the Italian authorities in *Hirsi*. The contrary was true as applicants were deprived of any possibility to get a rigorous evaluation of their claims before their return was enforced.³⁷

²⁷ *Ibid.* at paras 141-2.

²⁸ For an overview see Harris, O'Boyle, Bates and Buckley, *Law of the European Convention on Human Rights*, 2nd edn (Oxford: Oxford University Press, 2009) at 744ff; and White and Ovey, *White and Ovey: The European Convention on Human Rights*, 5th edn (Oxford: Oxford University Press, 2010) at 542ff.

²⁹ *Conka v Belgium* 2002-I; 34 EHRR 54.

³⁰ *Andric v Sweden* 28 EHRR CD218 at 'The Law', para 1

³¹ *Ibid.* at para 183ff, referencing *Conka*, supra n 84 at paras 60-3.

³² *Ibid.* at para 185.

³³ *Kudla v Poland* 2000-XI; 35 EHRR 11 at para 152

³⁴ *Hirsi*, supra n 19 at para 203.

³⁵ *Ibid.* at para 185.

³⁶ See *MSS*, supra n 58 at paras 301 and 319.

³⁷ *Hirsi*, supra n 19 at para 205

Here it is also added that not only assessment of the claim is needed but also the possibility to suspend the criticized measure.³⁸ This shows an evolution in the case law from the findings in *Conka*³⁹ over *Gebremedhin*⁴⁰ until *MSS*. In *MSS* the ECtHR affirmed that appeals without suspensive effect could not make amends to the applicant in suitable way.⁴¹ As a consequence, non-suspensive remedies do not fulfil the criteria of Article 13.⁴²

After *Hirsi* it is certain that the application of the ECHR in the field of border surveillance and migration management is not prevented by extraterritoriality. The Convention clearly forbids the systematic interdiction and *refoulement* of migrants without the assessment of every single case of all concerned individuals. *Hirsi* also finally clarified some uncertainties in relation to cases where a state only features very limited control over the intercepted persons in order to ascertain whether this low degree of control is sufficient to consider that the said state had jurisdiction over the individuals concerned (Klug & Howe, 2010, p. 96). This is exactly the case for most intercepted migrants. The judgment states that when a basis of *de jure* jurisdiction can be found, cases of weak physical control are important. *Hirsi* is therefore in line with the approach other human rights bodies adopted on the extraterritorial applicability of human rights guarantees.⁴³

3.5 Conclusion

It has clearly been shown that with regard to policies targeting irregular migration there is always a danger that fundamental rights are infringed. The best example is the mentioned *Hirsi* case. It concerned refugees or at least individuals whose status was not yet confirmed that suffered *refoulement*. In *Hirsi* fundamental rights of migrants were infringed. One aspect of the case that is especially relevant for this study is the fact that the breaches took place under a cooperation agreement between an EU member state and Libya. It must be seen if the current cooperation framework has changed or if there are still similar problems with regard to fundamental rights and especially *non-refoulement*. It can however be stated that the mere inclusion of the principle of *non-refoulement* is not enough if it is not applied in practice. Especially after *Hirsi* it has become clearer what the obligations of member states and Frontex regarding fundamental rights are, even though the ruling in *Hirsi* was not concerning a Frontex operation. Additionally, *Hirsi* showed that there are international and in particular European legal principles and rules on fundamental rights that also apply to transnational cooperation on migration and border controls. The principles discussed in this chapter fall into that category.

³⁸ Ibid. at para 198. See also Jabari, supra n 110 at para 50.

³⁹ Conka, supra n 84 at para 79.

⁴⁰ Gebremedhin v France 50 EHRR 29 at para 66.

⁴¹ MSS, supra n 58 para 393.

⁴² Sultani, supra n 106 at para 50: ‘un recours de pourvu d’effet suspensif automatique ne satisfaisait pas aux conditions d’effectivité de l’Article 13 de la Convention’. Confirmed also in Abdolkhani and Karimnia, supra n 116 at para 58.

⁴³ See, among others, Human Rights Committee, Mohammad Munaf v Romania (1539/2006), CCPR/C/96/D/1539/2006 (2009); 17 IHRR 45 (2010) and General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004; 11 IHRR 905 (2004). See also CAT Committee, General Comment No 2: Implementation of Article 2 by States Parties, CAT/C/GC/2, 24 January 2008; 15 IHRR 311 (2008).

There is however the possibility that the EU and its member states will try to push the border even further towards partner countries in order to reduce the possibility of situations like in *Hirsi* to occur. One might say that actors might try to circumvent similar breaches as in the aforementioned case by keeping migrants in third countries. Externalizing more controls to third country partners to make leaving for Europe more difficult could be such a method. This will be looked at more at a later point.

Furthermore it must however already be stated that the mere cooperation with a third country does not *per se* violate the principle of *non-refoulement*, as long as no active expulsion takes place. In principle it is possible to cooperate with third countries on border management and migration management, as long as this cooperation respects international obligations like the rights of migrants. Furthermore EU human rights standards must be met. This will be further elaborated on in the final conclusion.

4. State of affairs and human rights

This chapter will take a closer look at the migration movement taking place between Libya and the EU. This means more specifically the flow of migrants from Libya to first and foremost Italy. Additionally this chapter will show and assess the situation of migrants and refugees in Libya.

4.1 Migration between Libya and the EU

People trying to enter the European Union irregularly can take several routes. Libya is one of the most important transit countries in the Central Mediterranean route. Migrants using this route then arrive in Malta or Italy. In 2013 the Central Mediterranean route made up 38% of all detected irregular migrants having risen by 288% between the years 2011 and 2012. The end of the Gaddafi regime let the number of migrants decrease for a while, but according to Frontex (2013) in 2013 the total number of migrants (40,304) was again nearly as high as in 2011 (10,379). In 2013 most migrants taking the route through Libya were Syrian and Eritrean nationals followed by people from Somalia.

The groups of irregular migrants that reach the EU arrive in what is called mixed flows. Their reasons for migrating are heterogeneous and groups consist for example of asylum seekers, economic migrants but also the victims of trafficking (EUROMED, 2013, p. 2). Additional to the usual groups of persons from Eritrea, Somalia and Sub-Saharan Africa in general the amount of people fleeing the civil war in Syria has been growing. Upon reaching the EU most of the migrants apply for asylum.

Libya started to be a major transit country for people coming from sub-Saharan Africa in 2002 when Gaddafi's open-door policy started to attract large numbers of immigrants to both Libya and the EU. In that year the number of migrants reaching Italy skyrocketed from 2,500

to about 20,000 (Hamood, “EU–Libya Cooperation on Migration”; Nyberg Sørensen, Mediterranean Transit Migration,).

For 2014 it was estimated that Italy will receive about 40,000 boat arrivals coming ashore in Lampedusa and Sicily (Triandafyllidou & Dimitriadi, 2014, p. 147). This proved to be underestimating the situation as by the end of 2014 a total of 170,100 asylum seekers reached Italy by sea. Compared to the 42,925 the Italian Ministry of the Interior reported in 2013 the number has nearly quadrupled (IOM, 2015a).

4.2 The situation of migrants in Libya

Before the Libyan civil war the country did not only function as a transit country but was as mentioned earlier an immigration country itself. It’s relatively stable situation attracted both migrant workers and also migrants using Libya as their transit route towards Europe. For refugees the situation was however always different than for migrant workers. Libya in contrast to its surrounding countries and to most countries in the world is not a signatory of the Convention Relating to the Status of Refugees.

Refugees from Sub-Saharan Africa face a high risk of *refoulement* to their home states. Furthermore it has been reported that since the start of the civil war the situation has even more deteriorated, making xenophobia and violence against migrants a wide spread problem (Amnesty International, 2012, pp. 5-6).

Libya currently has no national asylum system. Although drafts were made no legislation has yet been implemented. As a legal framework is missing different policies are applied to the groups of foreign nationals in the country. Basic services are for example available for Syrian refugees but not for asylum seekers from Sub-Saharan Africa. The lack of due process is one of the many problems migrants and refugees suffer from in Libya. Libyan law does not make a distinction between migrants, refugees, victims of trafficking or others that need international protection when it criminalizes irregular migration. A 2010 Law on Combating Irregular Migration makes it possible to detain individuals considered to be irregular migrants indefinitely and to deport them. These deportations are done without any legal safeguards and there is no way for migrants to challenge their deportation (Amnesty International, 2013, p. 16). The missing appeal system makes international humanitarian agencies currently the only possibility for many foreign nationals in Libya to challenge their deportation (Amnesty International, 2013, p. 16).

Contrary to the obligations the Libyan authorities have, foreign nationals that are held in ‘holding centres’ often have no consular assistance. The Vienna Convention on Consular Relations states that Libya must most notify detained third country nationals of their right to consular assistance.⁴⁴ If requested by detainee’s Libyan authorities must inform their consular services. Furthermore people needing international protection state they have no access to

⁴⁴ Vienna Convention on Consular Relations (1963), Art. 36.

UNHCR. As central power is weak and in some parts of the countries completely missing armed militias routinely arrest and detain migrants. It is often that case that degrading treatment, physical violence, and humiliation take place (Moreno-Lax, 2012, p. 21).

4.3 Conclusion

This section has important implications for the rest of the study for it can help to explain why Libya is an important country with regard to migration towards the EU. The most apparent reason is that the amounts of people reaching the EU through Libya are enormous and have reached new heights in 2014. For the first five months of 2015 the IOM estimated that over 45,000 migrants arrived in Italy by sea (IOM, 2015b). Compared to the 41,243 people that arrived in the same period of 2014 this is a slight increase (IOM, 2015b). This can however at least partially be explained by the situation in Libya itself. Staying is just not an option for most migrants. Interviews held by Amnesty International in Sicily in April 2015 brought up recent cases of abductions and extortions by smugglers, abuse on religious grounds, abuses in immigration detention centres and general racism. Furthermore even though two parallel governments are fighting a civil war for power the systematic detention of individuals for migration-related offences has continued (Amnesty International, 2015, p. 5). The humanitarian situation for them is just not acceptable and under such circumstances the option of taking a boat to Europe is apparently the most promising. These factors help explaining the approaches chosen by both the EU and its member states when trying to cooperate with Libya on migration.

5. Cooperation with Libya on the management of migration

5.1 Cooperation on EU level

It has been stated earlier that Libya never was an easy neighbour for the EU. In the 1980s it not only refused cooperation but even violently targeted Europeans, for example by bombing the flights Pan Am 103 and UTA 772 (Collins, 2004, p. 5). This Section will show how this isolation was ended and to what extent cooperation was possible. The assessment will be focused on cooperation in the field of migration.

5.1.1 General framework

From the beginning in 1969 Libya under Gaddafi had a very strong anti-Western foreign policy. This included active support for terrorist movements. After multiple attacks in Britain, Italy and Germany, EU member states imposed sanctions through the framework of the European Political Cooperation, the predecessor of the Common and Foreign and Security Policy (Gaub, 2014, p. 41). A weapons embargo and diplomatic restrictions were imposed and the foreign minister rejected “the unacceptable threats made by Libyan leaders against member states which deliberately encourage recourse to acts of violence and directly threaten Europe” (Hill & Smith, 2000, p. 325). The Lockerbie case in 1988 only reaffirmed this image

of Libya. This was the main reason behind the fact that Libya did not become a member of the EU's 1995 Barcelona process. A new chapter in EU – Libya relations was opened in 1999 when Libya handed over two suspects of the Lockerbie bombing and attended the Barcelona Process III conference as a special guest. It was also granted observer status for certain of the Barcelona process meetings. However, cooperation was not further institutionalized or deepened. The next possibility for this arrived in 2004 when Libya stopped its weapons of mass destruction programme and tried to reach settlements over some of the terrorist attacks it was suspected of having been a supporter of. Gaddafi assured EU Commission President Romano Prodi that Libya would start working on joining the Barcelona process (Gaub, 2014, p.42). Two months after this first meeting at the African Union Gaddafi travelled to the European Commission in Brussels declaring a new beginning of relations.

This however remained difficult. Gaddafi repeatedly called the Barcelona process a peaceful re-conquest trying to replicate the map of the Roman Empire (Gaub, 2014, p. 42). More important at this point was however the apparent confusion about the different EU instruments and their possible benefits for Libya (Gaub, 2014, p. 42). In the end the regime disliked the Barcelona declaration and its *acquis* too much as it emphasized political reform and economic liberalization and refused to accept it. The possibility of economic integration was just not interesting enough for the relatively wealthy economy of Libya (Gaub, 2014, p. 42). Therefore the areas of cooperation were very limited, including only illegal migration and the case of five imprisoned Bulgarian nurses (Gaub, 2014, p.42).

In general all EU policies in the field of migration are united under the EU's 'Global Approach to Migration and Mobility' (GAMM) which was adopted in 2008 to make all migration related policies more coherent. Its goal is to combat irregular migration while promoting regular migration through cooperation with third countries. It can already be said that this is not without difficulties and that the EU's approach is excessively targeted on security (Manrique Gil et al., 2014, p.8). This very security driven approach is sometimes not in line with the goals of EU migration policy in the Mediterranean. EU Council President Herman Van Rompuy also put the principles differently when he named them 'prevention, protection and solidarity' (European Council, 2013, p.1). Protection plays a major role in the EU's 'Integrated border Management' although the European Parliament for example finds it ambiguous since, in practice, this means protection from irregular migrants instead of the protection of migrants who are trying to cross the Mediterranean.

The Commission launched a Regional Protection Programme (RPP) in December 2011 to support capacity-building in refugee matters. This was aimed specifically at Tunisia and Egypt, with Libya following later (Carrera, Den Hertog, & Parkin, 2012, p. 8). RPPs are supported by the EU and depend on a partnership with the UNHCR to be implemented, then providing the EU with means to manage refugees beyond the EU's borders. The approach chosen tries to resettle refugees in the EU combined with capacity-building in the countries of origin and transit. These efforts to resettle refugees that were stranded in North-Africa in 2011 however proved to be fruitless.

The Commission also organized a ‘pledging-conference’ on the 12th of May 2011 trying to get member states to voluntarily resettle refugees in Northern Africa and Malta. The results were disappointing: member states and associated states agreed to relocate 300 refugees from Malta to their territory. Furthermore 700 places for refugees from Libya, Tunisia and Malta were created in eight member states, sharply contrasting the 7,000 places the which UNHCR had estimated to be in need for refugees from these countries a result, which Amnesty International for instance labelled “an abysmal response” (Amnesty international, 2011, p. 1) . Commissioner Malmström concluded that the EU had “failed” those people in need of protection fleeing the crisis (Malmström, 2012).

5.1.2 Specific cooperation with Libya

As previously mentioned, the European Council found it “essential to initiate cooperation with Libya“, to start “intensified cooperation on the management of migration flows with third countries”. A first exploratory mission was sent to Libya at the beginning of 2003 to investigate the willingness of Libya to cooperate with the EU on migration. The will for cooperation was at this point present. In October 2004 it was therefore decided by the European Council to “embark upon a policy of engagement with Libya” (Council of the European Union, 2004). Further activities were however put to rest by Gaddafi for nearly a year until Libya finally agreed to engage in cooperation for example on border controls together with Niger and activities together with the United Nations High Commissioner for Refugees and the International Organisation for Migration (Gaub, 2014, p. 43). Gaddafi’s own views on migration remained somewhat ambivalent during this time, as he called borders, official papers etc. artificial and new things. He furthermore described the EU’s ambitions aimed at the restriction of migration as “rowing against the stream” (Gaub, 2014, p.43).

On October 26th in 2004 The European Council adopted Regulation 2007/2004 which created Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. Its aim is providing the EU a trustworthy coordinator in the field of external border controls and an important piece in the creation of a common EU policy for Integrated Border Management. Frontex began to play a role in the cooperation with Libya from the ‘FRONTEX-LED’ mission started in early 2007. This paved the way for Nautilus which was launched to take on the ‘flow of illegal immigrants embarking from Libyan shores, to enhance knowledge/intelligence of the Maltese authorities and to increase the percentage of successfully identified illegal immigrants’ (Frontex Annual Report 2006).

Cooperation on migration was mainly focused on the more active task of border controls and later surveillance, meaning the rather ‘passive’ collection of data, was added (Gaub, 2014, p.43). Measuring its success is difficult, but taking migration statistics as an indicator this cooperation can be considered to be only partially effective and yielding modest results (Gaub, 2014, p.43). Rates remained high until they dropped sharply in 2009 (Frontex, 2013).

It is highly likely that this drop was caused by the Friendship Treaty signed between Libya and Italy in 2008. In the following years Gaddafi exploited Europe's concerns and fears of migrations making statements about how Europe would "become black" and "be destroyed", which could only be prevented by giving Libya €5 billion a year (Squires, 2010).

In October 2010 the European Commission had, despite criticism by NGOs on Italy's cooperation with Libya, signed a 'cooperation agenda' with Libya. The agenda contained payments to Libya of about €50 million to help improve border management capacities. Furthermore negotiations had started concerning a 'Framework Agreement' between the EU and Libya which was to include a readmission agreement, meaning Libya would take back third country nationals who had entered the EU through Libya. Human Rights organizations followed these negotiations with great concern since Libya, as previously mentioned, has no asylum system and is still not a signatory of the 1951 Geneva Convention (Triandafyllidou, 2014, p. 15).

The execution of Gaddafi in 2011 led to a situation of severe uncertainty in the relationship between the EU and Libya. His death resulted in the destruction of central authority, leaving power vacuums in parts of Libya, where because of on-going unrest and fighting, neither police nor rule of law exist. This has partially led to the worsening of the situation for migrants as described earlier. Still the EU continued its cooperation in the field of irregular migration.

In early 2011 the EU launched its 'Partnership for Democracy and Shared Prosperity with the Southern Mediterranean', followed by 'A new response to a changing Neighbourhood' forming the EU's strategy for the Arab countries in transition (Gaub, 2014, p.47). The EU allocated €95 million to support Libya. The largest part of this money (€20 million) was intended for goals related to migration (Gaub, 2014, p.47).

In 2012 the European Parliament adopted a resolution concerning the situation of migrants in Libya. This resolution called on the EU only to proceed with making further agreements on migration control with Libya after the country showed respect and protection of the human rights of "refugees, asylum-seekers and migrants and puts in place satisfactory systems for assessing and recognising claims for international protection". In May 2013 the European launched a civilian technical mission with the goal to build capacities for the Libyan authorities to increase the "security of Libya's land sea and air borders". The European Union Border Assistance Mission (EUBAM) tries to support Libya in developing and setting up a broader border management strategy. The mission's initial mandate is two years (until May 2015). The security situation made it necessary to relocate the mission to Tunisia in August 2014 from where it has been operating since then. The mission was then downsized to 17 mission members on the 14th of October of the same year (European External Action Service, 2015). Regarding that the security situation has only worsened in the last months it seems unlikely that the mandate will be extended. As a country with a landborder of 4,348 km, largely consisting of desert and shared with six countries, and a maritime border of 1,770 km, illegal actions at its borders are not a new issue for Libya (Gaub, 2014, p. 50). After the regime change it has however become more difficult for Libya to control its borders (Gaub, 2014, p. 50). To help Libya on developing its border controls capacity, EUBAM supports the

training of 500 Libyan military personnel who will guard the Libyan air, sea and land border. It is stated that the annual budget of the mission is around €26 million (European External Action Service, 2015).

In the short term since the beginning of the mission Frontex was also planning “concrete activities under EUBAM’s flag” (Paleologo, 2014). This falls under the authority of Frontex to launch assistance projects in third states and to exchange liaison officers (Triandafyllidou & Dimitriadi, 2014, p. 155). In the longer perspective this cooperation between EUBAM and Frontex would mean stopping the influx of migrants from Libya to Europe by setting up a full-scale patrol of the Libyan border (Paleologo, 2014). However, no activities were started and until now EUBAM has remained a civilian mission under the Common Security and Defence Policy. Two year earlier a military mission, EUFOR Libya, was authorized but never deployed due to lack of consensus between member states and the dependency of the mission on a request from the UN Office for the Co-ordination of Humanitarian Affairs, that request was never made (EUobserver, 2011). EUBAM has no executive mandate and the European Parliament states that the mission can “only partially respond to the urgent security challenges on the ground” (Manrique Gil et al., 2014). It tries to achieve its goals mainly through transfer of expertise and know-how, not financial aid (European External Action Service, 2015).

The EUBAM mission also faces problems that lie outside of its mandate and setup (Gaub, 2014, p. 50). Infrastructure is poor, there is a lack of awareness with regard to law enforcement and a largely military mind-set of Libyan border guards which sharply contrasts with the more civilian European approach to border management (Gaub, 2014, p. 50). These challenges make the situation difficult and can only be overcome in time, which might be a scarce good for Libya (Gaub, 2014, p. 50).

The possible negotiation of a Mobility Partnership with Libya was also discussed as these Mobility Partnerships are cooperation frameworks under the GAMM, alongside other frameworks like the Common Agendas for Migration and Mobility, that amount to a non-binding form of bilateral cooperation between the EU and partner countries. After the Arab Spring partnerships were, for example, concluded with Morocco and Tunisia but not with Libya, most likely due to the fact that Mobility Partnerships are conditional and commitment from the third-country concerned is a necessity. Though it must be said that the focus of Mobility Partnerships lies on legal migration Mobility Partnerships often also contain provisions regarding irregular migration, which is also the main difference with regard to other cooperation frameworks under the GAMM like the Common Agendas for Migration and Mobility, as those frameworks do not. As a result of this, Mobility Partnerships do include clauses on readmission whereby third countries agree to “readmit irregular migrants who are not entitled to stay in the territory of the Member States and take effective action aimed at preventing irregular migration, establishing integrated border management, document security and to fight organised crime, including trafficking in human beings and smuggling of migrants” (European Commission, 2011, p. 17). Such a clause is of special use regarding countries that serve as transit countries for migrants and, accordingly, should be in the interest of the EU and its member states when negotiating with Libya. Since negotiations seem to have halted at the moment it is very likely that, at this point, Libya is unable to fulfil

the requirements necessary for a Mobility Partnership. With effect, Mobility Partnership are not agreements and, as stated above, not even binding on the parties, which can be seen as an indicator that Libya is not able to commit itself to the least demanding existent form of cooperation.

In 2013 the EU came under criticism by the UN Special Rapporteur on the human rights of migrants. His report stated that the EU was engaging in the “externalization of border control” by encouraging and financing the detention of irregular migrants in non EU-countries. This can certainly be found with regard to the agreements between EU member states and Libya. The EU itself, at least in the case of Libya, is more concerned with basic capacity building. It is stated that the EU pursues this policy as “as a means of ensuring that irregular migrants in third countries are stopped prior to entering the European Union”.

The EU, as admitted by the European Parliament, generally sees migration from the Middle East and North Africa as a short term security problem, which explains the measures taken to combat the problem. In the Mediterranean a network has therefore been established allowing participating states to directly exchange information on incidents and surveillance. This can nearly be done in real-time via satellite communication. Libya is already part of this Seahorse Mediterranean Network between the Mediterranean EU member states and north african nations, other countries are expected to join in 2014. The system was planned to be fully operational in 2015.

Furthermore Libya has up until now not moved beyond an expression of its intent to join the Union for the Mediterranean as an observer country nor has it resumed the negotiations for a Framework Agreement with the EU (Gaub, 2014, p. 51). There are two main reasons for this stand still. The first one is a lack of capability. Libya has lost capacity not only in its Foreign Ministry but some of its representations abroad are not yet in line with the government and system (Gaub, 2014, p. 51). The second reason is that right now it is simply not a priority to engage with the EU on these matters as its other challenges are just too big (Gaub, 2014, p. 51). So even though the EU is currently trying to deepen its ties with Libya and to formalise them the relationship remains difficult (Gaub, 2014, p. 52). This is mainly caused by the developments on the Libyan side which neither of the partners can control (Gaub, 2014, p. 52).

The cooperation between Frontex and Libya, which was part of the Italy-Libya partnership, sparked strong criticism from the European Ombudsman, NGOs and the UNHCR. It must be noted that at the same time the detention facilities at the Greek-Turkish border saw equal criticism. This led to the appointment of a Fundamental Rights Officer in 2012 and the establishment of a Consultative Forum on Fundamental Rights. The Fundamental Rights Officer is designated by the Management Board and is independent. Reports are made directly to the Management Board and the Consultative Forum (Marin, 2014, p. 96). The Officer contributes to the monitoring of fundamental rights. In case breaches of FR are reported Frontex has the possibility to use various measures from voicing its concern to a member state and informing the Commission to temporarily suspending or even terminating joint operations (Triandafyllidou & Dimitriadi, 2014, p. 156). The Fundamental Rights Officer bases his measures on visits in the field, which are conducted on own initiative. Additionally the

Fundamental Rights Officer assesses input from the reporting system of joint operations. All in all his powers are mainly limited to recommendations, though this might change in the future (Pascouau & Schumacher, 2014). From the creation of this still rather new position it seems like the EU is taking the aspect of FR with regard to Frontex and its missions more seriously. This has been welcomed as a step in the right direction though practice will have to show the effect of the Fundamental Rights Officer (Marin, 2014, p. 96).

5.2 Cooperation on national level

This part of the chapter will look at the cooperation that takes place on the national level. The countries that are affected by migration streams of the central Mediterranean route are as previously mentioned Malta and Italy. The cooperation of both countries will be shown. The Italy-Libya relationship has however always been more active in cooperating in migration management and externalising its border controls.

Irregular migration has been on the agenda of Libya and Italy for many years, starting in the late 1990s. The Italian Coast Guard had increased its patrols around Sicily and Lampedusa since the mid 2000's. The results were however relatively poor as the area patrolled is vast and boats carrying migrants were often intercepted too close to Italian coasts and hence had to be brought in (Triandafyllidou, 2014, p. 13). Furthermore there were quarrels between Italy and Malta concerning the patrols. Malta objects the principle stating that migrants have to disembark in the closest harbour of the country holding the Search and Rescue (SAR) area (Triandafyllidou, 2014, p. 13). Italy on its part accuses Malta of not guarding its own sea waters effectively as only boats in distress are stopped (Triandafyllidou, 2014, p. 13). Therefore boats that are not in distress can pass through the Maltese SAR and enter the Italian SAR, where Italy becomes responsible for the boats and their passengers. To make its controls more effective Italy then looked for more intense cooperation with Libya. A general agreement was found in 2000 after which the two countries increased their cooperation to fight terrorism, organized crime and irregular migration. In 2003 and 2004 cooperation was extended.⁴⁵ In this time 5,688 people were returned to their countries by charter flights financed to some extent by Italy (Triandafyllidou, 2014, p. 13). These operations took place without taking the principle of *non-refoulement* into consideration and gave irregular migrants no possibility to apply for asylum when they reached Italy (Triandafyllidou, 2014, p. 13). Despite these actions the way through Libya and Italy remained a preferred route. In 2007 Italy concluded a protocol on maritime cooperation with Libya, which made it possible for Italian navy ships to enter Libyan waters to conduct patrols together with their Libyan counterparts (Triandafyllidou, 2014, p. 14). This trend was followed by the conclusion of the Treaty of Friendship, Partnership and Cooperation in 2008 (EUobserver, 2010). This treaty is of special importance as it started Italy's 'push-back' policy, meaning that intercepted migrants were not brought to Italy in order to eventually assess the legitimacy of their

⁴⁵ A readmission agreement was included as were "border guard training programmes, the construction of detention centres and the funding of deportation schemes" (Andrijasevic, 2010, p. 154).

protection claims, but were immediately returned to Libya (EUobserver, 2010). In return for cooperating on border controls and on the repression of migratory movements from Libya to Italy, Libya obtained considerable investments for a number of projects, from infrastructures to cultural development aid (Triandafyllidou, 2014, p. 14). A “Protocol” and an “Additional Technical-Operational Protocol” were signed in 2007 and 2009 in which Italy and Libya agreed to carry out joint patrolling missions in international and in Libyan territorial waters by mixed Italian and Libyan crews (Amnesty International, 2012, p.8). The agreements were not made public and therefore details come only from unofficial sources or have been made public through court action (Amnesty International, 2012, p.8). Article 19 of the Treaty for example provided for the implementations of earlier agreements and the creation of a satellite control system of Libyan land borders, which would be funded by Italian and EU funds and set up by Italian companies (Triandafyllidou, 2014, p. 14). Especially this part of the treaty raised concerns of NGOs considering the fate of turned back immigrants left in the desert (Triandafyllidou, 2014, p. 14).

This proved to be highly successful leading to an almost complete stop of irregular migration from Libya to Italy in the period between 2009 and January 2011. UNHCR saw this in a different light and strongly condemned the Italian agreement with Libya, especially the push back operations at sea possibly resulting in *refoulement* (Triandafyllidou, 2014, p. 14). Even though the Italian government refused these accusations its relationship with the UNHCR was heavily damaged by this controversy (Triandafyllidou, 2014, p. 14). In February 2012 Italy was condemned by European Court of Human Rights for these push back operations in *Hirsi et al. v Italy* (Triandafyllidou, 2014, p. 14). This judgment will be looked at in greater detail later on as it is fundamental for the assessment of current policies.

The externalisation policy implemented by the Italian authorities was special as it did not create extra-territorial reception centres but border control strategies including both Italian and Libyan authorities with the goal to keep migrants out of Italy. It therefore brought the islands of Lampedusa and Linosa which had been the outposts of Italy’s migration control to the inside and moved the external dimension to the high seas. Italy simply partly externalized its border controls through joint patrols and left the ‘rest’, which included the pushed back migrants and asylum seekers, to Libya (Triandafyllidou, 2014, p. 15).

The civil war and subsequent fall of the Gaddafi regime in 2011 saw the further implementation of the Treaty of Friendship suspended (Amnesty International, 2012, p.8). This fall of the regime and the bilateral agreements which had been concluded with member states in the past meant that EU member states quickly began to reposition themselves to set up new bilateral agreements, this time with the post-revolutionary state (Carrera, Den Hertog, & Parkin, 2012, p. 5). However, pre-existing agreements were not set aside. Italy quickly signed a Memorandum of Understanding with the Libyan National Transitional Council on 17 June 2011, even though the civil war was still being fought, focusing on cooperation in the fight of illegal migration and the return of irregular migrants (Amnesty International, 2012, p.8). This memorandum formed the basis for a new document, the Declaration of Tripoli which was signed in January 2012 and included the main provisions of the former Treaty of Friendship, including the repatriation of irregular migrants. This declaration was followed

shortly after by the conclusion of the *Processo Verbale* signed by the Ministries of the Interiors of Libya and Italy, which focused on migration management. These documents were not made public and their compliance with international law and the principle of *non-refoulement* has been questioned. NGOs particularly criticized the agreement between Italy and Libya as it is claimed to disregard international and European legal standards (Statewatch, 2011).

The first visible sign of this renewed cooperation was the return of 13,000 migrants in the time between January-July 2011 (Carrera, Den Hertog, & Parkin, 2012, p. 6). A Ministerial Conference was held in Rome on the 6th of March 2014, where the current situation in Libya was discussed. Part of this discussion was also about the patrolling of borders and the issue of irregular migration (Paleologo, 2014). The EUBAM must also again be mentioned in this paragraph because although it is an EU mission it is closely related to national missions conducted for example by Italian personnel. The Libyan personnel to be trained are for example not only trained in Libya but also in Italy. Furthermore their selection is controlled by 15 members of the Italian military (Paleologo, 2014). Allegedly the Italian military personnel working for the EUBAM are also part of Italy's Military Mission in Libya which in 2013 followed Operation Cyrene.

As already stated above practical cooperation between Libya and Italy is nothing new. This cooperation has been called practical as it involved the ratification of pacts of understanding⁴⁶ rather than agreements ratified by parliament (Paleologo, 2014). Formal agreements between the two countries on migration were also made difficult by the fact that Libya is not a signatory of the Convention relating to the Status of Refugees. Therefore cooperation has been implemented by police forces under the supervision of their respective Ministries of the Interior.

The lack of a common foreign policy on EU level to tackle not only the problem of irregular migration, but also its causes like conflicts in the proximity of the EU, creating new flows of asylum seekers next to already existing flows of migrants, plays an important role in the current situation. This gap is then filled by national policies. France is another country that started negotiations with Libya which were aimed at establishing a readmission system, but no readmission agreement has been concluded yet.

The agreements between Italy and Libya also affected Malta since the latter country has also seen the arrival of asylum seekers mainly from sub-Saharan Africa through Libya and Tunisia. Malta's large Search and Rescue (SAR) area means that practically every boat leaving Libya must pass through Malta's SAR area. As mentioned earlier, most boats are allowed through Malta's SAR area without intervention and Maltese Armed Forces only come to the aid of boats in distress. Malta has adopted an interesting system of externalizing its border controls with regard to migrants. To make its border control more effective and at the same time prevent processing of too large numbers of irregular migrants and asylum seekers it indirectly transfers its own sea border control to Italy by letting boats from Libya and Tunisia pass through its waters towards Italy. In other words: Malta does not intercept the boats it should.

⁴⁶ This includes for example the protocols of 2007 and the treaty of friendship signed in 2008.

Malta therefore makes use of Italy's policy for its own means and indirectly helps externalizing control to Libya (Triandafyllidou, 2014, p. 17).

5.3 Conclusion

This Chapter sought to give an answer to the question what the existing framework governing cooperation between EU, its member states and Libya actually is. It mainly looked at policies on both EU and national level. Furthermore it took into consideration agreements and decisions that were reached with Libya during the time of Gaddafi's regime and after his fall. The different policies and programmes of the EU and its member states paint a picture that shows a fragmented framework. This fragmentation can be seen on all levels, between all actors but also within the policies of single actors, particularly the EU.

There seems to have been a change, as in the past especially some countries were very actively trying to push their policies through bilateral agreements with Libya. After the fall of Gaddafi it seems that although bilateral agreements were not given up more space for an EU approach came clear, which however seems to have brought only little improvement in terms of cohesiveness.

With regard to the new cooperation it can also be concluded that even though new agreements have been reached and EU missions could actually take place in Libya itself, the present situation creates an environment in which feasible cooperation is nearly impossible. Libya is a country torn apart by civil war and unrest. This means that the policies and programmes that were planned shortly after the fall of Gaddafi in 2013 were far too optimistic. Maybe the two most important example for this too optimistic view resulting in programmes with in the end little impact are the now (May 2015) ending EUBAM Libya and the never really started negotiations about a Mobility Partnership. The tools the EU is able to use can have some effect, but in order to have feasible cooperation the first thing necessary in Libya would be a stable government with the will to cooperate.

6. Conclusion

After having outlined the situation for migrants that are kept out of the EU and in Libya and having furthermore given an overview over the current cooperation programmes between the EU, its member states and Libya it is now possible to give an answer to the main research question.

It is important to notice in this context that the changes that were made with regard to bilateral cooperation between Italy and Libya were not caused by the Fall of Gaddafi, the civil war in Libya and the rise of an expected democracy in Libya. All changes resulted from legal and institutional changes in Europe. The 23rd of February 2012 saw a ground-breaking judgment of the ECHR when it condemned Italy for pushing back migrants into Libya on the 6th of May 2009. A group of 200 was picked up at sea by Italian forces and returned to Libya. The Consiglio Italiano per i Rifugiati (Italian Council for Refugees) working in Libya since 2009

took in 2 of these 200. They decided to refer to the ECtHR as they had been unable to file a request for asylum before they were returned to Libya. The Court found in its judgment that Italy had violated Article 3 of the Convention for the Protection of Human Rights, since there was an actual risk for the applicants to be the subject of inhumane treatment and that they had been the subject of arbitrary repatriation. It was also argued that Italy had violated Article 4 of Protocol No. 4 as Italy had not assessed the applicants' individual situations. It was furthermore argued by the Court that there had been a violation of Article 13. Very important was the notion of the Court that Italy could not "evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya". Besides this remarkable decision also the EU took steps implying that such practices are no longer tolerated, for example with the creation of the Fundamental Rights Officer for Frontex.

The security-driven approach of the EU concerning migration has been widely criticised. The EU has also been criticized for funding of detention centres without establishing the means to monitor the human rights situation of those detained. The effects of this policy and the situation in which migrants in such detention centres live have been described earlier. The UN Special Rapporteur on the human rights of migrants François Crépeau also stated that detention of migrants should not become the rule but must be an exception (Crépeau, 2013, p. 21). The Mediterranean Task Force has admitted the problem and promised to especially engage with Libya about this issue. A couple of requirements are however necessary to make this a success. Proper benchmarks and an effective monitoring of assistance programmes are needed.

It must also be noted that the overall approach of the EU seems very fragmented and might therefore lack effectiveness. The small quarrels between Italy and Malta are only one example of many. In order to be more effective a coherent integration of the different measures taken by the EU and its member states is necessary.

Though it is certainly difficult to draw overall conclusions from the Libyan case as it might be one of the best (or rather worst) examples of how a state can fail it can still be stated that shortcomings in the EU framework are apparent. The missions conducted in Libya and the aid that was provided were not the right measures at that point in time.

All in all it can be stated, as it has been before, that the situation in present day Libya has not changed much from the environment under Gaddafi, at least with regard to the situation of migrants and refugees. Multiple NGOs have found this and sketch an alarming picture. In order to find *to what extent the policy and cooperation framework between the EU, its member states and Libya on migration and border controls respects fundamental rights*, it can be clearly stated that cooperation as it took place in the past was not compliant with EU fundamental rights standards. For the current state of cooperation the picture is less clear. The main cooperation mission between the EU and Libya, EUBAM, focuses on capacity building. One of its objectives was ensuring that Libya could guard its own borders to keep migrants from entering or at least from leaving Libya for the EU. EUBAM Libya however faced enormous challenges making any form of cooperation increasingly difficult. The outbreak of an all open civil war in Libya between multiple factions did not make matters easier either. Up until the writing of this in April 2015 the EU has made no comments on a possible

extension of EUBAM Libya's mandate, which has ended in May 2015; and the fact that most of its staff has been transferred to other missions however shows that at this point another mandate seems highly unlikely. All in all it can be concluded that although there have been serious infringements of fundamental rights of migrants especially before *Hirsi* cooperation between the EU, its member states and Libya has nearly come to a standstill.

The EU itself has however not come to a standstill and on the 13th of May 2015 a Communication from the Commission was sent to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions containing a new European Agenda for Migration.⁴⁷ The included proposals for immediate action directly touch upon the issues discussed in this study. This increased budgets for the Frontex joint-operations Triton and Poseidon to increase their capacities to save lives at sea, but also Common Security and Defence Policy operations with the goal to destroy vessels used by smuggler to transport migrants. Such operations could possibly be targeted on locations in Libyan waters or territory and it remains to be seen how such operations would be conducted and if this would include cooperation with Libyan forces. The only time Libya is actually mentioned, is with regard to support for incentives of the UN calling for a government of national unity to bring back at least some stability, which is a necessary first step. Without such a government cooperation on border controls and migration management will practically not be feasible. Cooperation will be deepened and help will be increased for those third countries which share a heavy burden, for example as transit countries, by creating or extending Regional Development and Protection Programmes, specifically in North Africa.

With regard to migrants that try to flee Libya saving their lives should be a priority. The maybe 'best' way for asylum seekers would be through resettlement, which poses a considerable risk with regard to the on-going civil war in Libya, but at the same time would allow people that are in need of protection a legal way to gain this protection by entering the EU. The more common way to enter the EU remains through rescues at sea of those that managed to get on board of a vessel. In a second step those people should be relocated within the EU. All three measures are rightly included in the new European Agenda for Migration. It can be criticised however that the 20,000 resettlement places for the EU per year by 2020 will still not be enough, forcing the majority of people trying to get Europe to resort to smugglers. In that case, which will remain the most common for the migratory flows coming from Libya it would seem most feasible to use the new 'Hotspot' approach as outlined in the European Agenda for Migration, meaning that the migrants will be managed in a frontline member state, which would be supported by European Asylum Support Office, Frontex and Europol to protect those migrants that need it. This would guaranty compliance with the *non-refoulement* principle while at the same time creating the capacity to manage big migratory flows like the ones coming from Libya at the moment.

Furthermore four levels of long-term action are addressed in the proposal, to firstly reduce the incentives for irregular migration, secondly manage the borders to save lives and at the same time secure the borders, thirdly an improved common asylum policy and fourthly new policy on legal migration. For this study the first and second parts of the proposed long-term action

⁴⁷ European Commission, COM(2015) 240 final

are most interesting. Under the first point for example cooperation with third countries is mentioned as being critical, especially to stop smugglers but more importantly, to address the causes of migration and forced displacement. Similarly, the second action also addresses the idea to strengthen the capacity of North African states to secure their own borders. Regarding Libya these points are certainly well meant but as can be seen from this study not entirely novel. EUBAM Libya already had similar objectives but was in the end not successful. Even with this new approach it remains at this point very difficult to build and maintain any form of cooperation with Libya and its parallel governments. None the less, cooperation with other states could be improved by the measures described in the Communication, while at the same time maintain human rights standards. Implementing the new European Agenda for Migration is at the same time however a good step away from the fragmented picture that is visible in this study towards a more consistent common policy on migration, something that is absolutely necessary.

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