

European Migration Policy in the Central Mediterranean:
Circumventing the “Right to have Rights” of Migrants?

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Abstract

Considering European policies aimed at controlling irregular migration, border control and asylum, this thesis aims to shed light on the legal implications that multilateral cooperation in these matters has for “the right to have rights” of migrants (Arendt, 1966). The study focuses on the actions of the official Libyan government, Italy and the EU, which are currently implementing policies aimed at closing the central Mediterranean migration route. After the EU concluded a deal with Turkey in 2016, stemming the flow of migrants to Greece, the central Mediterranean route remains the most frequented route by migrants and by far also the most deadly, with more than 13 000 documented deaths in the last 5 years. In this study, theories of the changing concepts of borders, asylum and migration are applied to test whether Italian-Libyan cooperation and a CSDP mission are circumventing migrant’s human rights. Supposedly, these programs aim at protecting people, migrants as well as Europeans. However, critics point out that their real purpose is to construct a “fortress Europe”, with walls that are impermeable for those deemed undesirable, among them many asylum seekers that should be able to request protection.

1. Introduction

In 2011, several Arab states, among them Libya, collapsed under popular uprisings and civil wars. These events, termed the Arab Spring by the media, led to a wave of violence that washed over North Africa and the Middle East and continues to do so (Engel, 2016). The pre-revolution nations in the Arab world were depicted by NBC correspondent Richard Engel as a “decaying house”, that just need a little prodding (Engel, 2016, p. 8). Libyans, fed up with Colonel Gaddafi’s 40-year rule were no exception, and quickly took to the streets to topple their government in the spring of 2011. The Libyan regime was subsequently “prodded” heavily, first by protests, then by riots, all-out civil war, and not least by NATO airstrikes¹. The regime collapsed in October 2011, and instability quickly replaced the repressive order under Muammar Gaddafi (Engel, 2016, p. 168; Stevenson, 2017). Now, in 2017, a record number of displaced persons, over 60 Million worldwide, many of them fleeing the insecurity in the Middle East and North Africa, as well as violence, environmental² and economic crisis, are under way to more prosperous and safe regions or are living in transit countries such as Libya with an unclear future ahead (International Crisis Group, 2016; Dabrowski, 2017). Their overwhelming of the European asylum system succeeding the events of 2015, when millions of refugees decided to march to central Europe, constitutes the European refugee crisis (BBC, 2016).

The parallels between today’s crisis, and that of the Jews fleeing Nazism in the 1930’s are striking: Today’s refugees that cross the Mediterranean on derelict fishing trawlers and rubber dinghies remind us of the impoverished, expropriated Jews that fled the Third Reich, for example on the MS St. Louis in 1939³. They found no refuge among the free nations of the west. The Nazis were successful in picturing the fleeing Jews as “the scum of the earth”, “[...] unidentifiable beggars, without nationality, without money, and without passports [...]” that would place a burden on possible host countries (Arendt, 1966, p. 269). In 2017, refugees are portrayed in a similar way by certain actors, which invoke a “Muslim Invasion of Europe” (Breitbart News, 2015), as a threat that must be contained outside of Europe. Back in the 1930’s, the unwillingness to provide asylum for the Jews would prove to become the moral staging ground on which the Nazis could build the furnaces of Auschwitz, while the world was indifferent to the fate of millions: “[...] before they set the gas chambers into motion they had carefully tested the ground and found out to their satisfaction that no country would claim these people.” (Arendt, 1966, p. 296). Will Europeans act different this time, bestowing upon them the moral and ethical authority to globally demand and foster the respect for human rights that we so cherish here in Europe? Europeans have learned a great deal since they last went to war with one another, however, as this study seeks to present, there are still many challenges to human rights in Europe, especially at the external border.

While a deal between Turkey and the EU managed to decrease the number of boat migrants that arrived in Greece, the central Mediterranean route from Libya to Italy remains “open”, and thus is the most widely used, much more deadly route for migrants and asylum seekers to clandestinely enter Europe (EPSC, 2017). 2016 was the deadliest year yet in the central Mediterranean, with nearly 5000 documented tragedies (Missing Migrants, 2017). As of the 1st of June 2017, more than 71 000 people had used the central Mediterranean route, with more than 2000 casualties, according to the Missing Migrants project.⁴ Libya is the

¹“Operation Unified Protector“, implementing UNSC Resolution 1970 and 1973.

² Additionally to the non-ending warfare in almost the entire Middle East, a severe drought has hit East Africa and may increase migration pressures:

<http://www.independent.co.uk/news/world/africa/east-africa-drought-starving-famine-catastrophe-climate-change-oxfam-kenya-ethiopia-sudan-somalia-a7704026.html>

³ The MS. St. Louis had to return to Europe, after no nation in the western hemisphere accepted the Jewish refugees. In this speech, a holocaust survivor compares the context around the MS. St. Louis to contemporary immigration policy: http://www.huffingtonpost.com/entry/holocaust-survivor-compares-ice-crackdown-nazis_us_593ab8dee4b0b13f2c69be40

⁴ See: “Change in Mediterranean Sea Arrivals to Europe and Recorded Deaths January 1 - June 21, 2016 & 2017”: <http://missingmigrants.iom.int/mediterranean>

departure country for 90% of illegal migration to the EU, accounting for approximately 181 000 departures in 2016⁵ (EC Joint Communication 25.01.2017). It is estimated, that up to a million migrants currently reside under volatile conditions in Libya⁶ (IOM, 2016; Brachet, 2011; Klepp, 2010). The EU's focus, and Italy's as the prime receiver of asylum applications now, is to "manage migration flows" (Mogherini, 2017) and decrease the deadly incidents that have characterized the boat migration from Libya to Italy in the past years.

To this end, Italy and the European Commission as well as the Council, have led the way to "cut this final route" (Plaut, 2017), the key to doing so being cooperation on border control with Libya⁷. Numerous programs have been designed and implemented⁸ to decrease the number of illegal crossings as well as save those migrants that find themselves in an emergency (European Political Strategy Centre, 2017). One of these is EUNAVFOR MED Operation Sophia (Operation Sophia), a CSDP⁹ mission initiated in June 2015 with a mandate set until July 2017. Its aim is to disrupt the smuggling business by seizing and destroying assets used by smugglers, and to enforce a UN arms embargo off the coast of Libya (European Commission, 2017). Even though Operation Sophia is an EU Mission, Italy plays a key role, since the mission relies heavily on Italian facilities and services, as well as being commanded by the Italian navy. In June 2016, the European Council extended the mandate of the mission to include training of the Libyan coastguard, which collapsed along with most public services during the revolution (European Commission, 2017; Sieff, 2015).¹⁰

Among the concerns about the European approach to curbing irregular migration is, that asylum seekers among the migrants will not be protected adequately, even *refouled* to insecure third countries (TC's), against the provisions of the 1951 UN Convention on the Status of Refugees (Carrera & Guild, 2013) and the basic human rights enshrined in the 1948 Declaration of Human Rights (Brachet, 2011; Albuquerque, 2012). The responses of the EU and the MS's concerned (in this case Italy) towards the refugee crisis in the central Mediterranean have been heavily criticized for not placing enough emphasis on the humane treatment of migrants and especially asylum seekers, for making it increasingly difficult for asylum seekers to request asylum, and for illegal detention and *re-foulement* practices (Purkey & Crépeau, 2016, Truong & Maas, 2011, Albuquerque, 2012; Marin & Spina, 2016; Vermeulen, 2012). Especially the Libyan security services have been repeatedly accused of unlawful conduct, of corruption as well as violence against migrants and NGO's, even when operating in international waters (Sieff, 2015; Plaut, 2017; Dearden, 2017).

This study is an analysis of the multilateral Italian, European and Libyan cooperation in the central Mediterranean, most importantly "EUNAVFOR MED operation Sophia" and an Italian-Libyan "Memorandum of Understanding" from 2017, by applying socio-legal concepts that characterize both the EU and its MS's approach to governing irregular migration, border control and asylum: The externalization, militarization and privatization of border controls (Marin, 2011; Purkey & Crépeau, 2016; Rumford, 2006; Balibar E., 1998; K. N. Bendixsen, 2016; Sklansky, 2012), their preemption in space and time (Weber, 2007), the overall securitization of migration (Bigo, 2014; Balzacq, 2008), and the "crimmigration" of

⁵ Among the migrants that use the central Mediterranean route, only a minority qualifies for asylum (European Political Strategy Centre, 2017). Approximately 90% of those that travel from Libya to Italy are Africans, mainly from West Africa (FRONTEX, 2017).

⁶ To a large part, these are internally displaced persons and do not necessarily wish to travel to Europe.

⁷ See: EC Joint Communication 25.01.2017 "Migration on the Central Mediterranean route Managing flows, saving lives", retrieved from: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20170125_migration_on_the_central_mediterranean_route_-_managing_flows_saving_lives_en.pdf

⁸ Recent examples are "Operation Triton", the replacement mission for Italy's SAR Mission "Mare Nostrum" and "EUBAM Libya", which is currently on hold.

⁹ The EU's Common Security and Defence Policy

¹⁰ In fact, before the revolution against the Gaddafi regime, there had been relatively little people-smuggling activity off the Libyan coast. Ironically, the NATO intervention in 2011 destroyed most of the coast guards assets, including patrol boats. The disintegration of government agencies in the Libyan state did the rest to dissolve the coast guard, making it incapable of intercepting vessels and stopping the flow of migrants to Europe (Sieff, 2015; Eliassen, 2017).

migrants (Sklansky, 2012; Woude, 2017). These practices, along with the European or national institutions that implement them (in cooperation with third countries), constitute what E. Balibar labels “the South-Mediterranean Fence” (Balibar, 2006). I shall describe the attributes of this “South-Mediterranean Fence”, which itself is only one part of “the Great Wall of Europe” (Balibar, 2006). The emphasis is on the assumption that this regime circumvents the Unions and MS’s obligations towards migrants and asylum seekers, respectively making it harder for these people to migrate in and from North Africa or claim their rights as refugees (Lendaro, 2016; Marin & Spina, 2016; Albuquerque, 2012; Carrera & Guild, 2013; Crépeau, 2013; Vermeulen, 2012; Purkey & Crépeau, 2016; Orsini, 2016).

In this context, I will examine the implications of the cooperation on irregular migration, border control and asylum since 2015 onwards. Coming to Hannah Arendt, it is precisely the question whether the practices that the European Border control and Coastguard Agency (Frontex), Italy and the Libyan coast guard engage in, render the subjects of these policies *de facto* rightless. International law for example grants people, regardless of their nationality, the right to leave their country and to flee persecution (Lendaro, 2016). Specific legal sources, such as the EU’s Fundamental Rights Charter and provisions in the founding treaties obligate the MS’s as well as the Union to respect these guarantees (Albuquerque, 2012; Gil-Bazo, 2008). Hannah Arendt in *The Origins of Totalitarianism* explores the existence of a “right to have rights”, which becomes apparent in the situation of the stateless and the refugee, who have severed all ties to a protecting state and are exposed to the goodwill of other nations to offer them refuge, “[...] a place in the world which makes opinions significant and actions effective” (Arendt, 1966, p. 296). The “right to have rights” thus implies belonging to a political community. It entails an access to justice and to have one’s case heard, of being treated as a rights-inherent subject, and not as a “naked” human, expelled from the community of states, a person who can be deprived of liberty without establishing guilt or motives for criminal actions (Arendt, 1966). Migrants and refugees especially have been uprooted from their established relation with a political community. They are particularly vulnerable, even more so while residing in and being subjected to violent authorities in a fractured political system without justice¹¹, as is the case in Libya (Lendaro, 2016; Orsini, 2016; EPSC, 2017). While the “right to have rights” is a broad concept, one that revolves mainly around the recognition of refugees in a host society, I will use a narrower definition to be explained in the next chapter, one that summarizes several fundamental rights of migrants and asylum seekers, such as every person’s right of migrating from their home country, the right to seek asylum and the right to *non-refoulement*.

The aforementioned possibility of a conflict between policies regarding irregular migration, border control and asylum, and the Unions and MS’s obligations to protect asylum seekers leads us to an interesting question: Do Operation Sophia, as well as the Italian-Libyan cooperation on border control, irregular migration and asylum, circumvent migrants and asylum seekers’ “right to have rights” in the central Mediterranean? This is the principle question the study seeks to give an answer to. Sub-questions are: What are the objectives of the cooperation and the real motives of the stakeholders? When the talk is of addressing root causes of migration, does this mean a deterrence strategy, raising the human and economic costs of migration so high that this deters potential migrants and asylum seekers (Guild & Carrera, 2013)? What is the exact mandate of Operation Sophia, and what potential legal conflicts might exist? Do the programs really contribute to their stated goals and save lives as well as disrupt the criminal economy revolving around smuggling in Libya?

The social and scientific relevance of this study stems from the fact that thousands of asylum seekers continue to dare the crossing from Libya to Italy and scores drown attempting to reach the shores of Europe. Military operations in the Mediterranean are expensive. They should be seen as a tool of last resort when confronting a humanitarian crisis, not least because military vessels are not designed to save migrants on rubber dinghies, but rather to

¹¹ The Libyan court system has effectively broke down, and thousands continue to be detained without trial and access to justice. See: Amnesty International Report 2016/17, available at: <https://www.amnesty.org/en/latest/research/2017/02/amnesty-international-annual-report-201617/>

“fire cruise missiles and hunt submarines”¹². Border control needs to be practiced in accordance with human rights conventions (Albuquerque, 2012; Guild & Carrera, 2013; Crépeau, 2013). Hence, it becomes necessary to observe the effects of policies on border control and asylum to rule out a legal conflict that could seriously damage the EU’s image and governing capacity, burden and destroy governance structures and traditional politics of northern Africa, as well as unnecessarily endanger countless migrants and asylum seekers (Crépeau, 2013; Purkey & Crépeau, 2016; Albuquerque, 2012; Brachet, 2011).

The study contributes to existing research in the way that it applies theories of global migration policy to a highly emblematic case, that of the central Mediterranean. Deploying Hannah Arendt’s concept of a “right to have rights” provides for a scope that encompasses more than just the technical workings of asylum application procedures. The “right to have rights”, “the one true human right” (Schaap, 2011), is more comprehensive than the narrowly and highly contested right to asylum. It is not that much the question, whether the law is applied technically correct, but rather, whether migrants are actually subjected to any lawful action at all, or are rather treated outside of the rule of law, be it in the desert, or in the high seas. That is why the study goes beyond examining migration policies effects only on the right to asylum, but on the most fundamental right: that to have and to be able to claim basic rights, to have access to justice, independent of nationality, race, economic status whatsoever.

Even without scrapping fundamental human rights such as the right to seek relations with people all over the globe, to leave ones home country etc., these can be undermined to the point where they loose their relevance for certain social groups (Rumford, 2008; Truong & Maas, 2011; Klepp, 2010). Drawing assumptions about European migration policy with an in-depth, single-case study in such an important setting as the central Mediterranean produces valuable insights about migration policies’ unexpected effects on human rights.

2. Theory and Concepts

In this chapter, the underlying concepts applied in this study shall be presented and clarified. This involves a discussion of relevant literature and empirical findings. The features of borders and border control in Europe of the 21st century will be presented, as the theories describing these trends and practices shall be applied to contemporary European migration policy. Also, the legal-philosophical concept of a “right to have rights” (Arendt, 1966) shall be discussed. Finally, the chapter ends stating hypothesis derived from earlier findings to be tested in the analysis.

For the purposes of this study, the term “migrant” denominates asylum seekers, economic migrants and refugees, which are asylum seekers that have been granted protection (House Of Lords, 2016). This is in line with official and scientific discourse concerning migration. The term “irregular migration” describes “Movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration.” (IOM, 2011). Irregular migration is often used synonymously with *illegal* migration, since this kind of movement is criminalized in most countries, including Libya.

2.1 What are the “New Borders” of Europe?

Several scholars attribute the changing perception of migration to a general climate of fear and xenophobia¹³ towards strangers (Balibar, 2006). According to them, xenophobia in Europe is on the rise, due to issues such as labor market or welfare abuse (Purkey & Crépeau,

¹² See: “Operation Sophia - Schlepperpropaganda statt Seenotrettung | Monitor | Das Erste | WDR”: <https://www.youtube.com/watch?v=NHaf0opG6FI>

¹³ “At the international level, no universally accepted definition of xenophobia exists, though it can be described as attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.” (IOM, 2011)

2016). This political climate over-simplifies and securitizes the issue of human migration, when the public for example believes that all trans-saharan migration flows ultimately lead to Europe (Brachet, 2011), and that migration should be treated as a security issue (Balibar E. , 1998; Delanty, 2008; Weber & Bowling, 2008; Kapoor, 2015). Immigrants¹⁴ are often used as scapegoats by populist parties, in a cultural as well as economic sense: They are accused of stealing jobs and / or welfare, of not assimilating and constituting a threat to national security (Balibar, 2006; Bloch & Schuster, 2005; Brachet, 2011; Delanty, 2008; Weber & Bowling, 2008; Sklansky, 2012). Delanty speaks of an “age of anxiety“ that characterizes the globalized world. Anxiety is especially related to fears of immigration and insecurity (Delanty, 2008).

The political climate surrounding a rise in xenophobia and fear towards strangers helps legitimize the increased focus that borders now receive (Purkey & Crépeau, 2016; Weber & Bowling, 2008). It is the prerequisite and the condition that certain stakeholders, such as European politicians must consider when they make immigration policies (Lehne, 2017). The central Mediterranean is special in this sense, as the pictures of impoverished and traumatized migrants arriving on boats send a powerful message that is used by opponents as well as supporters of immigration: The arriving “masses“ at Lampedusa are frequently invoked when populist news platforms warn of an “Invasion of Europe” (Breitbart News, 2015; Orsini, 2016). Very much related to this issue is the fact that there seems to be an over-emphasis on irregular migration, and especially boat migration in the mediterranean (Brachet, 2011; Crépeau, 2013) The arrivals in Italy make up only a tiny portion of the millions of third country nationals who travel to Europe each year though (Crépeau, 2013). Additionally, the vast majority of “illegal immigrants“ arrive in a regular manner, and simply overstay their visa (Guild & Carrera, 2013).

Borders and border control are changing in Europe: Globalization and European integration have changed the way borders, internally and externally, are conceptualized in contemporary policies in the EU and its MS’s, away from an approach of controlling (or *laissez faire* in some contexts) to one that manages mobility (Bigo, 2014; Rumford, 2006; Orsini, 2016). At the same time, the balance between supranationalism and intergovernmentalism in EU external border control (Zaiotti, 2011) is tilting towards a more centralized approach, with more and more responsibilities being delegated to the new European Border and Coast Guard Agency, known by the abbreviation “Frontex” (Frontex, 2016). Borders are no longer conceived as solid lines that demarcate sovereign states anymore: As sovereignty is projected beyond the nation state, internal and external security is increasingly merging (Bigo, 2014): “borders are no longer the shores of politics” (Balibar E., 1998, p. 220). Old, territorial borders become “new borders”, transcended in space and time (Bendixsen, 2016; Rumford, 2006; Weber, 2007). Borders are “vacillated” (Balibar, 1998), spread out and diffused. Nations, and especially societies, are “de-bordered” and “re-bordered” (K. N. Bendixsen, 2016). In fact, entire countries are now “borderlands” (Rumford, 2006; Balibar E., 1998), as we shall see in the case of Libya, situated geographically between Europe and Sub-Saharan Africa. With this merging of responsibilities, agencies and practices, border control and immigration becomes a security issue (Purkey & Crépeau, 2016; Rumford, 2006). Immigration from third countries is increasingly perceived to constitute a threat that must be dealt with by all possible means, including military operations (Delanty, 2008; Weber, 2007; Purkey & Crépeau, 2016, K. N. Bendixsen, 2016; Sklansky, 2012; Orsini, 2016). This perception contributes to legitimizing an approach to migration, border control and asylum that is highly restrictive and selective, most obviously in economic terms (Boswell, 2000; Weber, 2007; Delanty, 2008; Rumford, 2006; Rumford 2008). This paradigm in managing migration divides possible migrants in an “immobilized underclass”, which is *de facto* rights-deprived in contrast to the “globally mobile elites” (Weber, 2007).

¹⁴ Admitted refugees are also immigrants of course, and of the migrants that use the central Mediterranean route, a considerable share are refugees, which means that migrants which are rescued at sea must be brought to a place of safety, considering their status as potential asylum seekers (International Maritime Organization, RESOLUTION MSC.167 (78), annex 34, par. 6.12

With the establishment of the Schengen border area in 1986, as well as its incorporation into the Amsterdam treaty of 1997, internal border checks in Europe are largely a thing of the past. Instead, the EU member states (MS's) have gradually relocated border control to the external borders of the Unions' territory (Selm, 2005; Marin, 2011): "[...] domestic immigration and border control policies are increasingly externalized. These policies include interception strategies [...], aimed at preventing migrants arriving by boat from crossing the sea border illegally. Southern Member States have not only stepped up sea border controls and surveillance, but also expanded the areas in which controls are undertaken, including towards the high seas and the territorial waters of non-European countries". (Heijer, 2010, p. 172). At the same time, migration and asylum policy has become an integral part of the Unions' shared competences since the Maastricht treaty from 1992 (Treaty on the European Union [TEU], 1992), while its scope has been expanding ever since (Selm, 2005). The Common European Asylum System (CEAS), established with the "Tampere Programme" in 1999, seeks to harmonize the different practices of granting asylum in Europe, while ensuring protection for those in need (Crépeau, 2013).

The Dublin Convention (now Dublin Regulation), which first entered into force in 1997, determines the responsibilities of MS's in processing applications for asylum: Asylum seekers can claim asylum in one MS only. When an applicant for asylum illegally enters into a MS from a third country and is caught, the MS is obliged to fingerprint her: The biometric data is then uploaded to the "Eurodac", an information exchange system for the Schengen area (Balzacq, 2008). Accordingly, it is this MS where the person was first apprehended in Schengen territory, which is responsible for examining the asylum application (Dublin Regulation, Art. 6.). Hence, this system places the emphasis on the external borders of the Union, where it is more likely that migrants will enter illegally (Fratzke, 2015; Purkey & Crépeau, 2016; Orsini, 2016). The southern European MS's, which receive the majority of asylum seekers at their shores, feel unnecessarily burdened by this (Fratzke, 2015; Orsini, 2016; Marin, 2011).

This has implications for many asylum seekers, who come from poverty-stricken regions and have to physically reach the territory of the state where they wish to apply for asylum, which is now near impossible to do in a regular manner: It is illegal to travel to EU territory without valid travel documents or if not fulfilling the four other basic requirements in Art. 5. of the Schengen Border Code (SBC), such as the means to support ones stay in Europe. This hypocrisy is what many scholars believe to be the true source behind large-scale boat migration in the Mediterranean (Rosling, 2015). They argue, that the selectivity and the restrictions on regular migration have been the driving force behind a surge in irregular migration, leaving many migrants with little options but to pay a smuggler who will place them on a rubber dinghy heading north (Guild & Carrera, 2013; Purkey & Crépeau, 2016; Rosling, 2015). Since the adoption of EU Council Directive 2001/51/EC, which obliges MS's to impose sanctions on carrier companies that transport passengers from third country's to the EU, it is virtually impossible for a third-country citizen to enter the Schengen area without a visa (Rosling, 2015; Crépeau, 2013). Essentially, this privatizes and externalizes the decision of who should be able to enter the EU (Rosling, 2015), criminalizing everyone who crosses the external border without valid travel documents (Kapoor, 2015; Sklansky, 2012).

Another feature of European migration policy are readmission agreements, which facilitate the removal of third country nationals that irregularly reside in a MS and are not eligible for asylum or "legalization". The EU has several readmission agreements with third country's, the most prominent being the EU-Turkey "migrant swap deal" from 2016, although it is technically different from a traditional readmission agreement (Nielsen, 2016). Readmission agreements can be concluded by the Union as well MS's, which are expressly encouraged to do so according to the EC return directive (Directive 2008/115/EC). The Union has no such agreement with Libya (yet), since relations are still fraught, due to instability and a poor human rights record by the Libyan side (EPSC, 2017). The Italian government however, put a lot of effort into reaching a deal with the UN-backed Libyan Government of National accord (GNA), and took up diplomatic relations at the beginning of this year (Plaut, 2017). This memorandum is not the first, as Italy has concluded multiple treaties with Libya

on cooperation regarding illegal immigration in the Mediterranean in the last decade, before the civil war started (Ronzitti, 2009; Paoletti, 2011). These developments can be traced back to the adoption of the Hague Program and the Global Approach to Migration in 2005, where the importance of cooperation with third countries was initiated (Crépeau, 2013, EPSC, 2017, Selm, 2005).

What is meant by border control in this study? The Schengen Border Code (SBC) defines what border control in the EU is, and how it is to be conducted: ““Border Control” means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;” (SBC, Art. 2 (9)). Border checks are done at fixed border crossing points while these are open (SBC, Art. 2 (10)). Border surveillance then, according to the SBC, “means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks;” (SBC, Art. 2 (11)). Border surveillance is defined in Art. 12 of the SBC: “The main purpose of border surveillance shall be to prevent unauthorised border crossings, to counter cross-border criminality and to take measures against persons who have crossed the border illegally.” (SBC, Art. 12 (1)). Further: “That surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points.” (SBC, Art. 12 (2), emphasis added), and “Without prejudice to the exceptions provided for in paragraph 2 or to their international [refugee] protection obligations, Member States shall introduce penalties, in accordance with their national law, for the unauthorised crossing of external borders at places other than border crossing points or at times other than the fixed opening hours. These penalties shall be effective, proportionate and *dissuasive*.” (SBC, Art. 4 (3) emphasis added). In the preamble of the SBC, the MS’s agree to share the burden of external border control: “Border control is in the interest not only of the Member State at whose external borders it is carried out but of all Member States which have abolished internal border control.” and “The Member States shall assist each other and shall maintain close and constant cooperation with a view to the effective implementation of border control, in accordance with Articles 6 to 15. (SBC, Art. 16(1)). The SBC also refers to a EU agency that is tasked with overseeing this cooperation: “the European Border and Coast Guard”. In this paper, it is border surveillance rather than border checks, which are to be studied. The study focuses exclusively on the external dimension of borders in the EU.

In order to evaluate migration policies in respect to refugee protection, migration policies must be conceptualized: “Broadly defined, migration policies are established in order to affect behavior of a target population (i.e., potential migrants) in an intended direction.” (Czaika & Haas, 2013, p. 389). “[...] we can say that international migration policies are rules (i.e., laws, regulations, and measures) that national states define and implement with the (often only implicitly stated) objective of affecting the volume, origin, direction, and internal composition of immigration flows.” (Czaika & Haas, 2013, p. 389).

Pian (as cited in Czaika & de Haas, 2013) points to the fact that migration policy is often perceived as “irrational or incoherent” and therefore developed the concept of “discursive coalitions” to analyze such policies (Czaika & Haas, 2013; Hajer, 1993): “The idea is that all stakeholders in such a coalition agree upon a common, publicly stated definition of a situation or a policy objective—for instance, to “combat” illegal migration from Africa to Europe. However, the formation of a discursive coalition around such belligerent rhetoric does not necessarily imply the genuine sharing of a system of values or beliefs, since each stakeholder is focused on the pursuit of its own interests.” (Czaika & Haas, 2013, p. 492)

Hence, policymakers will have to include multiple stakeholders interests in their policies, which can render these completely ineffective in regard to their public goal, while satisfying the demands of individual stakeholders at the same time. An example would be how politicians struggle to appear “strong” on irregular migration in order to cater to a xenophobic electorate, while not being able to completely disregard human rights obligations (Czaika & Haas, 2013). Whether this is the case in Italian-Libyan relations and Operation Sophia remains to be

discussed.

2.2 The “Right to have Rights” in the Central Mediterranean

The “right to have rights” (Arendt, 1966, p. 296) is Hannah Arendt’s answer to a problem posed by the refugee crisis succeeding World War II: Protection was a privilege offered to an individual by a state, and as such, could not be claimed as a right. Refugees, who were *de facto* stateless, hence, had no “right to have rights”, and states were not obliged to offer them protection (Oudejans, 2014; Arendt, 1966, pp. 296-297). This problem was supposedly solved by the 1951 UN Convention, which expressly grants refugees certain rights regardless of nationality, such as the right to *non-refoulement*. (UN Convention relating to the Status of Refugees, 1951; Oudejans, 2014). Even today, asylum is still treated like a privilege and not an inalienable right, apart from the fact that it is not clearly defined in legal texts either (Encyclopedia of American Foreign Policy, 2002; Carrera & Guild, 2013). The way in which refugees are treated according to Arendt is completely unrelated to them as persons, who should deserve to be judged according to their actions (Arendt, 1966).

Arendt developed the “right to have rights” in an attempt to picture the situation of refugees: They had to rely on a host states generosity, which could end in any moment, had no public life and hence could not claim civil rights (Arendt, 1966; Oudejans, 2014). This aspect touches more on issues of integration into host societies than of protection at the external border. The territorial dimension of protecting the persecuted is what makes it necessary for them to migrate to a safe country in the first place though (Oudejans, 2014; Heijer, 2010; Barnes, 2014). Most scholars focus on the civil aspects of a “right to have rights”, such as actively being able to participate in a host society, although some also emphasize the dimension of asylum (Heuser, 2008). Seyla Behabib provides us with an adequate definition of Arendt’s concept that will be used in a similar manner in this research: “The right to have rights today means the recognition of universal status of personhood of each and every human being independently of their national citizenship” (Benhabib, 2004, p. 68). Most importantly, this implies that all humans belong to one community, a community of humans that are equal before the law, regardless of their nationality and so forth. The “right to have rights“ can be regarded as “the one true human right“ in this sense (Schaap, 2011).

What is meant by “the right to have rights“ in the central Mediterranean then? Basic human rights that are granted according to *personhood* as opposed to *nationality*, are enshrined in the UN declaration of human rights from 1948. Concerning this study, the “right to have rights” shall be used as a concept to summarize the most vital rights a person is entitled to in the 1948 declaration, the 1951 refugee convention and the EU fundamental rights charter: This encompasses most importantly the right to life and liberty (Art. 3, 1948 Declaration), the right to live free from torture and be recognized as a person before the law (Art. 5-6, 1948 Declaration) and the right to free movement (Art. 13, 1948 Declaration). The latter has several dimensions: It contains the right to free movement *within* a country, as well as the right to leave from and return to ones own country (Oudejans, 2014). The “right to have rights” also encompasses the right to seek asylum as well as protection from *refoulement* (Art. 14, 1948 Declaration). There is an ongoing debate about whether there is a fundamental *entitlement to asylum*, a right to simply *seek* asylum, or also one to *grant* it (Heuser, 2008; Gil-Bazo, 2008). The EU Charter of Fundamental Rights, while not legally binding in itself, mentions a right to *seek* asylum (Gil-Bazo, 2008), as does the Italian constitution.

In practice, asylum is granted only upon reaching the territory of a state, when the obligation of *non-refoulement* arises and a state must determine whether a person is a refugee or not (Barnes, 2014). However, “A person is a refugee by virtue of the fact of being outside the country of their nationality, having fled due to a well-founded fear of persecution. Status as a refugee does not depend upon any constitutive act of the State processing the claim. Thus, in principle, a person possesses the refugee status before her appearance at the border.” (Ibid. p. 116). The right to asylum, can in the context of a refugees reliance on a host country, basically be seen as a “right to civil rights” (Heuser, 2008). Many scholars however emphasize, that it is a “paper tiger” (Heuser, 2008), or a “paper right” (Arendt, as cited in

Lendaro, 2016), which is not being upheld in its original meaning. Along with the right to asylum, the right to *non-refoulement* is critical in the treatment of possible asylum seekers on the high seas, guaranteeing asylum seekers that they will not be deported to a third country where their protection cannot be guaranteed, such as in Libya (Albuquerque, 2012).

Equally important for the “right to have rights” in the Mediterranean is the 1982 Montego Bay Convention (UN Convention on the Law of the Sea), which obliges ships “to render assistance to any person found at sea in danger of being lost” (Art. 98). Under the 1979 International Convention on Maritime Search and Rescue, persons rescued at sea must be “delivered to a place of safety, taking into account the particular circumstances of the case”. This provision again hints at the principle of *non-refoulement* and the right to seek asylum, which is endangered when refugees rescued at sea are brought back to the country they fled from (Albuquerque, 2012).

Scholars and activists warn, that widespread criminalization of migrants as well as those that aid them have led to a critical situation where potential rescue vessels do not respond to emergencies for fear of legal repercussions (Orsini, 2016). A situation arises, where an increase in law enforcement presence actually leads to a degradation of the rule of law (Orsini, 2016). Apart from that, the high seas are not exempt from the human rights obligations that MS’s are bound to: When states are exerting authority, even when outside of sovereign territory, human rights must be respected (ECHR, 2012).

2.3 Hypothesis

There are four hypothesis derived from these findings: One is that the Italian-Libyan cooperation, which is now being scaled up succeeding the recent memorandum of understanding (ASGI, 2017), is moving the external borders of Europe even further south: By implementing and strengthening border controls at the southern Libyan borders with Algeria, Chad, Niger and Sudan, trans-Saharan migration is to be controlled and reduced. This actually violates the principle of free movement in the Community of Sahel-Saharan States, a principle that North African nations embraced only a few decades ago (Brachet, 2011). This makes it harder for migrants from sub-Saharan countries to travel to northern Africa, based on the fear that they could then come to Europe. Effectively, it puts them under “house arrest”, and denies Africans the same regional integration and borderless society that Europeans enjoy (Brachet, 2011).

A second Hypothesis is that Operation Sophia, rather than combating smuggling and saving lives (European Commission, 2017), is doing the opposite: Because of the risk of arrest and seizing of assets, the smugglers are resorting to small inflatable dinghies that the migrants themselves must steer outside of Libyan territorial waters where they can be “rescued” by NGO’s, commercial vessels or the units participating in Operation Sophia. This essentially makes it impossible for Operation Sophia to apprehend smugglers since they do not leave the shore. It does not decrease the migrants incentive to depart from Libya either, and subsequently only endangers them more, because the boats they now use are even more unseaworthy, only designed to leave the territorial waters of Libya, which extend 22 kilometers off its coastline (Pelz, 2016).

Thirdly, Operation Sophia and the Italian-Libyan cooperation basically strive to prevent migrants from entering and leaving Libya. The Europeans’ reliance on the Libyans and their defunct institutions means that it is near impossible for the Libyan side to properly treat refugees and respect their rights while they are residing in Libya or traveling in its waters or southern border zones (Amnesty International, 2017). This deterrence shall prevent migrants from leaving a country where their rights can and won’t be properly respected.

The fourth and final Hypothesis is that with all these actions, the EU and Italy are circumventing the “right to have rights” of migrants and especially possible asylum seekers. This makes them a *de facto* rights-deprived “immobilized underclass” (Weber, 2007), which is doomed to live in legal limbo, declared “illegal” and “irregular”, confined to regions struggling with poverty and unrest (Brachet, 2011). While not abolishing the legal foundations of the “right to have rights”, this would make them worthless in the central

Mediterranean, creating a space devoid of human rights, and inviting abuse or maltreatment of migrants with impunity (Amnesty International, 2017; Arendt, 1966; Lendaro, 2016).

3. Methodology

3.1 Research Design

This research is of a socio-legal character and can be termed qualitative. The research question is descriptive and evaluative, since it seeks to discover, whether the rules “are in accordance with desirable moral, political, economical aims,” (Hoecke, 2011). This study can be defined as a case study. However, there are few clear definitions of case studies in social sciences (Willis, 2014). “The term case study refers to both a method of analysis and a specific research design for examining a problem” (University of Southern California, 2017). Case study here refers to the design and not the method, as the methods are borrowed from other fields of research. Gerring (2004) defines a case study as “*an intensive study of a single unit for the purpose of understanding a larger class of (similar) units. A unit connotes a spatially bounded phenomenon—e.g., a nation-state, revolution, political party, election, or person—observed at a single point in time or over some delimited period of time.*” This definition however points to the fact that assumptions derived from the study can be generalized for similar cases, which is not necessarily what this study aims to achieve. “Virtually any intensive study of a relatively bounded topic qualifies as a case study in this minimal sense, so long as it can be linked with some larger topic via a key word (e.g., class formation).” (Ibid.). The keyword here is the “right to have rights”, a concept that is explicitly universal. Studying how it is challenged in the central Mediterranean constitutes the “spatially bounded phenomenon” (Ibid.).

The case observed is European migration policy at the external borders. The design used is an “embedded case study design” (Yin, 2009, p. 50). In this design, there is only one single case, which is split into two embedded units of analysis in a certain context (ibid., p. 48). “In an evaluation study, the single case might be a public program that involves large numbers of funded projects – which would then be the embedded units” (Ibid., p. 50). The context of this study is the European migration crisis. The “program” in this sense is European migration policy (including Italy’s as a MS) since 2015, when Operation Sophia was initiated, and 2017, when Italy re-opened its embassy in Tripoli. This also defines the temporal limits of the study (Gerring, 2004). The two subunits of the analysis are Operation Sophia and the Italian-Libyan cooperation. The research setting or its “spatial element” (Ibid.) is the central Mediterranean. This setting encompasses the high seas, the Italian islands, as well as Libya (and its territorial waters) as a migrant host- and transit country.

A case study is defined by the researchers interest in a singular phenomenon, in extracting detailed information, and not by the “methods of inquiry” (Stake (2008) as cited in Willis, 2014). The methodology here is partly borrowed from evaluation research. Its objective is “to observe important unexpected outcomes” of public policy, and “whether a program met its stated goals” (Dooley, 2009, p. 284). Due to the limited scope of the research, I will focus on the *program impact* stage (ibid., p. 285). The “program impact evaluation tests whether the program causes the expected outcome”, (Ibid., p. 288) in this case a reduction in irregular migration and more protection for migrants. Although the program impact stage typically makes use of causal research methods, it can only superficially be established whether the programs, in our case Operation Sophia and the Italian-Libyan cooperation, meets its targets, using qualitative analysis. This is due to the lack of data on irregular migration in the central Mediterranean and the large number of possible causes and effects. It becomes necessary to judge the policy’s effectiveness, and whether it created un-intended outcomes, which may actually be contradictory to its original goals. This is also where the concept of “discursive coalitions” (Czaika & Haas, 2013) is used to exemplify the way different stakeholders positions must be accommodated in cooperation practices.

Czaika and de Haas distinguish three types of evaluating immigration policies: “the discursive gap (the discrepancy between public discourses and policies on paper), the implementation gap (the disparity between policies on paper and their implementation), and the efficacy gap (the extent to which implemented policies affect migration). To avoid confusion, empirical evaluations should specify the policy gap they are addressing.” (Ibid., p. 494). I focus on the “implementation gap” and the “efficacy gap” in this study.

The theoretical framework is composed of the previously mentioned theories describing borders and border control in the 21st century. They shall be used to describe the migration policies that are currently being implemented in the central Mediterranean. Hence, this study is confirmatory, testing these theories on a single case, and not exploratory, also due to the limitations of scope. The case observed here constitutes a “most-likely” case, “in which a theory is to be considered likely to provide a good explanation if it is to have any application at all” (Bennet and Elman as cited in Willis, 2014).

First, Italian-Libyan cooperation and its implications for inner-African mobility and human rights of migrants especially in the southern border zones shall be examined. Special attention in this regard goes to the assumption that the external border of the EU is moving further south and is practically located in the middle of the Sahara desert (Brachet, 2011; Guild, 2001). In the second and third part of the analysis, Operation Sophia shall be evaluated in light of its stated goals, which are “to save lives and combat smuggling” (European Commission, 2017). I will draw upon the example of a “discursive coalitions” (Czaika & Haas, 2013) and a program impact evaluation to illustrate how the operation itself scarcely contributes to a sustainable solution of the refugee crisis (Hoecke, 2011; Dooley, 2009). In the conclusion, the most important findings concerning the case will be presented. Where possible, they will be generalized to describe trends and effects of global migration governance on matters of human rights.

3.2 Case Selection

An advantage of splitting the case into two sub-units is that “subunits can often add significant opportunities for extensive analysis, enhancing the insights into the single case” (Yin, 2009, p. 52). This design can be problematic when too much attention is given to the subunits, and the analysis does not return to the level of the case itself, ignoring the “holistic” nature of the approach (Ibid.). The limitations of employing a case study approach lie mostly in the absence of strict methodological requirements (Willis, 2014). However, concerning this study, we incorporate methods (evaluation research) that seem adequate for observing the research phenomenon in this particular setting.

According to Yin, single case studies are appropriate when the case is defined thoroughly and when the single-case “represents [...] a critical test of existing theory, [...] or (c) a representative or typical case, [...]” (Yin, 2009, p. 52). European migration policy in the central Mediterranean was selected as a case because it is “purposeful” (rather than typical): the “cases for study [e.g., people, organizations, communities, cultures, events, critical incidences] are selected because they are “information rich” and illuminative. That is, they offer useful manifestations of the phenomenon of interest; sampling is aimed at insight about the phenomenon, not empirical generalization derived from a sample and applied to a population.” (University of Southern California, 2017). Further: “A phenomenon refers to a fact, occurrence, or circumstance that can be studied or observed but with the cause or explanation to be in question. In this sense, a phenomenon that forms your subject of analysis can encompass anything that can be observed or presumed to exist but is not fully understood. In the social and behavioral sciences, the case usually focuses on human interaction within a complex physical, social, economic, cultural, or political system.” (Ibid.). Our phenomenon of interest is the “right to have rights” in the central Mediterranean.

It is not specifically the objective to generalize assumptions about the “right to have rights” of migrants. The case observed could not be seen as a representative example of migration policy, since the symbolic and empirical significance of migration policy in the

central Mediterranean surpasses what one could term “typical” or “representative” of migration policies.

What kind of case then is European migration policy in the central Mediterranean? When referring to “Libya”, I mean the spatial setting of the study, the polity in which the observed programs are implemented. Even though Libya seems to be a *typical* migrant transit country in North Africa, but this is no longer the case. It is a former middle-income country in a severe economic and political crisis, known for hosting large numbers of seasonal inner-African migrants and now as the main departure point for migrants irregularly travelling to Europe (Brachet, 2011; Frontex, 2016). It is a prime example of a third state that acts as a “guard” (Crépeau, 2013) on behalf of a polity struggling to decrease a perceived influx of irregular migrants. However, Libya is an untypical case of a failed state acting not only as sending but also as transit country. A proxy war between several Middle Eastern nations¹⁵ is being fought on its soil, and the smuggling economy is now deeply interwoven with the informal economy after the revolution (Surana, 2017; Stevenson, 2017). This considerably increases any problems in cooperation (Purkey & Crépeau, 2016).

This case is representative in terms of the methods that the EU and Italy employ to solve the migration crisis¹⁶. However, concerning the scope and especially the situation of the GNA (Libya’s official government) as implementing partner, this case is very untypical. The research can be labeled a theory-confirming case study. The central Mediterranean, although it is not necessarily representative of the setting in which European migration policy is implemented¹⁷, may become typical following a further destabilization of the southern European neighborhood. Hence, this study also has a prototypical element to it.

The central Mediterranean was selected as a setting for the case simply because it is the single most important case in governing migration at the external borders of the Union, considering the large numbers of deceased migrants but also successful crossings (Frontex, 2016). Not only because of the empirical significance of the problem posed by the migration crisis in the central Mediterranean, but also because of its symbolic value was this case selected. Libya evolving into “second Syria” would constitute a disaster for the EU and what it considers to be effective, rights based migration control (Surana, 2017).

3.3 Data Collection

This study employs a “holistic perspective”: “the whole phenomenon under study is understood as a complex system that is more than the sum of its parts; the focus is on complex interdependencies and system dynamics that cannot be reduced in any meaningful way to linear, cause and effect relationships and/or a few discrete variables.” (University of Southern California, 2017). The data collected thus is qualitative data obtained from freely accessible sources, such as interviews with officials and smugglers participating in the missions, policy documents, progress reports, news reports and the likes. Further, as this is socio-legal research, it relies to a large part on legal sources: “[...] legal doctrine collects all relevant material, notably: (a) normative sources, such as statutory texts, treaties, general principles of law, customary law, binding precedents, and the like; and (b) authoritative sources, such as case law, if they are not binding precedents, and scholarly legal writings.” (Hoecke, 2011, p. 11). In the case of the central Mediterranean, important legal sources are customary international law, a recent Memorandum of Understanding between Italy and Libya, a CFSP council decision, and ECHR case law (e.g., *Hirsi Jamaa V. Italy*). To arrive at conclusions, I use an in-depth analysis of the data.

Although European scholars produced the majority of scholarly material, where

¹⁵ Turkey, Qatar, Russia, Egypt and other states all strive for influence in Libya, undermining efforts of unification and stabilization: <http://www.huffingtonpost.com/giorgio-cafiero/the-uac-and-qatar-wage-a-b-8801602.html>

¹⁶ This concerns particularly EU cooperation with third states, externalization and militarization of border controls e.g.

¹⁷ This applies especially in regard to EU cooperation with Turkey or Egypt, much more stable countries in regard to governing migration.

appropriate, scholars from other regions such as Australia or the United States are cited. The assumption is, that the underlying trends such as the externalization of border control can be witnessed in a variety of places all over the Globe (Jones & Johnson, 2016). Empirical data that is used, that is, concerning admissions and interceptions of migrants and refugees, is strictly from official sources such as the FRAN¹⁸ (Frontex , 2016). References are made to media reports to buttress arguments and provide side information. Additionally, NGO's such as Amnesty International or "Sea Watch" provide detailed information on the specific human rights situation in the central Mediterranean.

4. Analysis

4.1 Italian-Libyan cooperation and the 2017 Memorandum of Understanding: Moving the external border south?

In order to comprehend the workings behind Italian-Libyan cooperation, which go back decades, one must know the key figures on both sides of the Mediterranean. Explaining the complex situation in Libya 6 years after the revolution against Gaddafi would go well beyond the scope of this paper. I will therefore keep it short and focus on the most important players. There are currently three political power centers¹⁹ in Libya, (Toaldo, 2017; Stevenson, 2017): One is in Misrata, a two-hour drive from Tripoli, where industrialists and merchants employ various militias that amount to approximately 40 000 troops (Stevenson, 2017). The second, and arguably more potent power center is based in the east of the country, in Tobruq and Bengasi, and commanded by general Khalifa Haftar of the Libyan National Army (LNA), an alliance of militias and former army units (Toaldo, 2017; Surana, 2017). Allegedly, Haftar commands 50 000 men, by far the biggest military faction in the country (Stevenson, 2017). The Libyan legislative, the House of Representatives is also based in Tobruq. This power center is supported by Egypt, the UAE and to a lesser extent France. The LNA is also courted by the Russians (even though they maintain a certain ambivalence in their stance in Libya) (Surana, 2017; Toaldo, 2017). Russia supports lifting the UN-arms embargo in order to supply the Tobruq government and the LNA with arms to combat crime and terrorism (Deutscher Bundestag, 2017).

The third, officially recognized power center, and the one this study focuses on is the Tripoli based GNA, which is lead by a nine-member "Presidential Council". The presidential council in turn is represented by Prime Minister Fayeze al-Sarraj (Toaldo, 2017). He is the one whom Brussels and Rome call when they want to engage with the Libyans. The GNA has been criticized as too weak to govern, as it has to rely on the goodwill or corruptibility of the militias that control the streets with rocket launchers in the absence of official security forces (Stevenson, 2017). The Libyan Political Agreement²⁰, which superficially holds the country together, will expire by the end of 2017. Not many believe that it will have achieved any kind of unification of the country by then (Ibid.). In short, Libya is completely divided, along sectarian, tribal, regional, economic, ethnic and political lines (Stevenson, 2017; Toaldo, 2017; Amnesty International, 2017). The most divisive split is between the eastern parts of the country that are held by General Haftar and the militias in the west with their international supporters from Europe and the UN²¹ (Stevenson, 2017).

¹⁸ Frontex Risk Analysis Network.

¹⁹ Not governments, for there are many governments in Libya representing "a state which does not exist anymore" (Stevenson, 2017)

²⁰ The Libyan Political Agreement (LPA) was signed in December 2015 in Morocco, after UN-backed negotiations between rival factions fighting for control in the vast country. It followed a deteriorating security situation in 2014. The agreement calls for a government of national accord, to which the other factions cede power eventually.

²¹ Mustafa Sanalla, chairman of the Libyan National Oil Company: "State institutions have been devastated since 2011. Two camps claim to constitute the country's legitimate leadership. One, based in Tripoli, is backed by Western governments, Turkey and Qatar; the other, based in the eastern city of Tobruk, is backed by the United

A key figure on the Italian side in the past few months has been Marco Minniti, the Italian interior minister (Libya Herald, 2017). He is a center-left politician from the Democratic Party, in office since December 2016, when Prime Minister Paolo Gentiloni appointed him. His hard stance on immigration has earned him a title as a “law and order” politician,²² and he is one of the most popular ministers in Gentiloni’s cabinet.

Italy was the first EU MS to reopen an embassy in Tripoli, on the 12th of January 2017²³. In a statement on Twitter, Italy’s foreign minister Angelino Alfano termed the reopening “A great gesture of friendship to the Libyan people. Now more controls on migrant departures.” (Alfano, 2017; Reuters, 2017). The Italian embassy is to be a “coordinating center” for the fight against illegal migration, smuggling and terrorism (Ibid.).

Under Minniti’s authority, the Memorandum of Understanding (MoU) was negotiated with the GNA and concluded and signed in Tripoli by al-Serraj and Gentiloni on the 2nd of February 2017 (ASGI, 2017). The MoU builds upon a 2008 agreement between the Berlusconi government and the Gaddafi regime²⁴, which was amended in 2012 (Deutscher Bundestag, 2017; Ronzitti, 2009). Already in this treaty from 2008, both parties commit to combatting illegal immigration, Italy also pledged to allocate funds to this end (Ronzitti, 2009). Succeeding the 2008 treaty, Italy and Libya cooperated in patrolling the high seas and intercepting migrants. Some of the intercepted migrants were illegally *refouled* to Libya by the Italian navy (ECHR, 2012). One particular incident in 2009 led to a ECHR lawsuit against Italy (Hirsis Jamaa and others V. Italy), in which the court ruled that Italy²⁵ had violated its obligations under international human rights law (ECHR, 2012). Deportations of intercepted migrants, especially asylum seekers, to Libya were not possible from then on, especially as the revolution was soon to kick off. Libya and Italy severed all ties in 2011 during the NATO operation against Libya, leading to a preliminary end to all cooperation on illegal migration (Lombardi, 2011).

The Italian-Libyan memorandum emphasises cooperation on border control (ASGI, 2017). Specifically, both parties pledge to complete a border control system for Libyas southern borders, which it shares with Niger, Chad and Sudan (ASGI, 2017). Italy pledges to fund development programs in regions affected by irregular migration, as well as to finance so-called “hosting centers” for illegal migrants (Ibid.). The Italian government also commits to supporting Libyan authorities with technical means to enforce border security (Ibid.). “Both sides in the accord recognize that the security of Libya's southern border, a crossing point for almost all immigrants from sub-Saharan Africa, is fundamental to contain human trafficking, before the immigrants arrive in coastal towns.” (Pelosi, 2017). The agreement designates € 200 million to the GNA, funded by Italy²⁶, and another € 200 million which is provided by the EU (Stevenson, 2017). In article 5, the MoU makes reference to human rights agreements that the two countries are parties to²⁷ (ASGI, 2017). The MoU is not very detailed in its specifications, leaving many open questions in regard to the implementation of the agreed measures. It does not require ratification by either party’s parliament, as it is not a treaty.²⁸

In an informal EU summit meeting in Malta a day after the MoU was signed, the European leaders endorsed the agreement: “We have decided to support member states’

Arab Emirates, Saudi Arabia, Egypt and Russia.” In: <https://www.nytimes.com/2017/06/19/opinion/libya-and-another-oil-curse.html>

²² See: “Marco Minniti, il ritratto: il ministro di destra che come tutti i comunisti non sa di esserlo”: <http://www.liberoquotidiano.it/news/politica/12303578/marco-minniti-ritratto-comunista-che-non-sa-di-esserlo.html>

²³ The Italian embassy had to close in 2015 when violence in the capital reached a critical level (Reuters, 2017)

²⁴ The treaty on “Friendship, Partnership and Cooperation“, signed in August 2008

²⁵ Italy in its defense said it acted in accord with the law, citing a 2007 treaty between Italy and Libya along with EU directives encouraging cooperation with third countries (ECHR, 2012).

²⁶ See: “Italy allocates 200 m euros to stem migration influx in southern Libya”:

<https://www.libyaobserver.ly/inbrief/italy-allocates-200-m-euros-stem-migration-influx-southern-libya>

²⁷ Libya is not a party to the 1951 UN Refugee Convention, nor to the IMO SAR Convention

²⁸ See: „New Memorandum of Understanding on “illegal immigration” and border security signed”, <http://www.statewatch.org/news/2017/feb/italy-libya-mou.htm>

bilateral activities directly engaged with Libya,” said EU council president Donald Tusk²⁹. On the same occasion, the members of the council agreed on the so-called “Malta Declaration”, which addresses the central Mediterranean route.³⁰ The Tobruq government does not accept the MoU, and the agreement is apparently under scrutiny by the justice department in Tripoli.³¹ NGO’s involved in the refugee crisis were not amused: Arjan Hehenkamp, general director of MSF, stated in regard to February’s actions by Italy and the EU: “The European Union and its member states need a reality check. Libya is not a safe place—there is no way this can be considered a humane approach to migration management. There is currently a breakdown in law and order in Libya. Sub-Saharan Africans are being detained with no due legal process and with no way to challenge the lawfulness of their detention.” (Doctors Without Borders, 2017).

Negotiating the MoU was only the first step of Italy’s new government into the realms of a messy and increasingly failing state. The Italians have a considerable presence (and stakes) in Libya. Apparently, Italian intelligence services cooperate with militias in Misrata, Libya’s main industrial hub, which is important for ENI, Italy’s national energy corporation (Stevenson, 2017). One of these militias has been under attack by the LNA before, meaning that Italy partners with an armed force that clashes with another foreign-backed proxy³². Italy also maintains a military base in Misrata, which is officially a field hospital. 300 troops are deployed there (Ibid.).

“Europe and Italy have put all their eggs into this Government of National Accord”, says Mohamed Eljarh³³ (cited in Surana, 2017). But is this really so? Minniti seems to place his bet on multiple players in the game, knowing that it is probably only a matter of time until the GNA collapses. In April, only one month after the MoU was signed, 60 tribal representatives from southern Libya were secretly flown to Rome and negotiated a deal with the Italian Government (Longo, 2017). The “60 tribal leaders, notably the Tuareg of the southwest, the Toubou of the southeast, and the Arab tribe of Awlad Suleiman, had reached the 12-point deal after 72 hours of secret talks in Rome.” (Euractiv; AFP, 2017). Minniti had been preparing the deal in advance, in individual talks with tribal leaders (Longo, 2017). The deal, a peace deal in the official Italian discourse, is actually aimed at bringing warring tribes in southern Libya together in order for them to patrol the southern border with Chad, Niger and Algeria and intercept illegal immigrants. In a statement, Minniti said that “sealing the southern Libyan border means sealing the southern European border” (Longo, 2017).

During the Revolution, Italy seized 10 boats from the Libyan coast guard, some of which are being returned this year in order to equip the coast guard for intercepting migrants (AFP, 2017). On the 21st of April, the first of these boats was handed over to the Libyan coast guard.³⁴ The crews on these boats are being trained in Italy as part of Operation Sophia. In mid-May, another two boats were handed over (Libya Herald, 2017). On that occasion, al-Serraj also called on Minniti to concentrate on southern Libya in the effort to stem migration flows (Ibid.). This also became apparent in a joint letter to the EU commission by Minniti and Thomas de Mazière, the German interior minister. In the letter, both ministers urge the commission to set up a EU military mission along the southern Libyan border.³⁵

²⁹ See: “EU leaders approve plan to curb migration from Libya, Africa”: <http://www.euractiv.com/section/global-europe/news/eu-leaders-approve-plan-to-curb-migration-from-libya-africa/>

³⁰ See: “Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route”: <http://www.consilium.europa.eu/en/press/press-releases/2017/01/03-malta-declaration/>

³¹ See: “Libyan court suspends deal struck with Italy aiming to reduce refugee boat crossings over Mediterranean Sea”: <http://www.independent.co.uk/news/world/africa/refugee-crisis-migrants-latest-libya-italy-deal-agreement-suspended-tripoli-court-haftar-russia-a7650011.html>

³² The LNA is backed by Russia, Egypt and the UAE, France also supports Haftar’s position.

³³ Mohamed Eljarh is a non-resident fellow with the Atlantic Council, who is frequently consulted for his expertise on Libya. See: <http://www.atlanticcouncil.org/about/experts/list/mohamed-eljarh>

³⁴ See: “US has no plan for Libya Trump tells Italian PM”: <https://www.libyaherald.com/2017/04/21/us-has-no-plan-for-libya-trump-tells-italian-pm/>

³⁵ See: “Italy, Germany call for EU mission on Libya-Niger border”: <https://www.euractiv.com/section/africa/news/italy-germany-call-for-eu-mission-on-libya-niger-border/>

The question is now, how these actions, taken together, move the external border south, and how this denies migrants and asylum seekers access to human rights. “[...] European Union policy also increasingly operates to ensure that border control no longer takes place at the physical borders of the European Union. Achieved through a variety of means, the phenomenon, which has been termed “externalization” of border control, involves shifting the responsibility of preventing irregular migration into Europe to countries of departure or transit.” (Crépeau, 2013). This statement by the UN Special Rapporteur on the human rights of migrants directly applies to Italy’s cooperation with the GNA and other Libyan factions. By offering equipment, training, facilities, and most importantly money to hold the restless militias and tribes together, Italy facilitates the construction of a border control regime in Libya, which would otherwise not exist. Prior to the revolution and the current refugee crisis, crossing the southern borders and moving freely inside Libya was relatively easy for migrants³⁶ (Brachet, 2011; Andrijasevic, 2010; Hamood, 2006). However, the notion of “moving the responsibility” (Crépeau, 2013) for border control is especially noteworthy. In Europe, border control must be performed by professional agents, who answer to either their MS or Frontex (Marin & Spena, 2016). These agents, in principal at least, adhere to human rights provisions, as is envisioned in the SBC, Art. 4. Moving the responsibility for checking on migrants to tribes and militias in the middle of a vast desert is practically an invitation for them to abuse their authority. It also resembles a “militarization” of border culture in southern Libya, even though no troops are to be deployed (yet), since “militarisation includes the pervasive influence of military strategies, culture, technologies, hardware and combat veterans that are now policing the border” (Jones & Johnson, 2016).

For migrants, many of who have travelled frequently to Libya in search of employment, and asylum seekers that cross these borders, the stepping up of border controls will only make it more costly to cross and stay in Libya: “As research has shown in several instances, border controls, detentions and expulsion practices do not prevent people from moving from their countries of origin, nor from reaching Europe, but rather they raise the costs and dangers of migration.” (Andrijasevic, 2010, p. 160). It is impossible for migrants to regularize their stay in Libya (Amnesty International, 2016; Dearden, 2016): “Research findings suggest that the vast majority of refugees and migrants, including those coming from Sudan and the Horn of Africa, enter Libya illegally or in fear of being illegal due to the lack of clarity over their legal status in the country.” (Hamood, 2006, p. 47). “Even in times when migration from sub-Saharan Africa was tolerated or even encouraged, migrants were generally denied full legal status since Libyan authorities rarely legalized their arrival on Libyan territory” (Brachet, 2011, p. 60). It is to be feared, that further criminalization of migrants and asylum seekers in Libya may actually strengthen the smuggling economy and further impede the human rights of those subjected to this regime (Andrijasevic, 2010; Amnesty International, 2016). Securitizing the issue of migration in Libya and framing EU policies as humanitarian means to deny those subjected to these policies a human rights based approach³⁷ (Carrera & Guild, 2013).

Not only individual human rights, but also the collective rights of Africans may be under assault: The Italian-driven approach to sealing off the southern border denies Africans the possibility of regional integration and encroaches on the sovereignty of Libya: “The process of externalizing, or multiplying, the border is not unproblematic. As borders are not only tools which may be rightfully used to preclude entry of migrants, they also mark the point beyond which the exercise of State sovereignty is subject to the rule of non-intervention.” (Heijer, 2010, p. 170). Now, even though a representative of the GNA was present at the secret talks in Rome conducted by Minniti and tribal leaders, it is unclear what

³⁶ Of course there were also crackdowns on illegal migration and border closures, but border control agents were easily paid off by the tribes and gangs that controlled the smuggling business (Brachet, 2011).

³⁷ “The problem with a humanitarian-based approach is that, at both a practical and a conceptual level, the offer of protection is made at the behest of the state and is understood as a privilege, not a right. Traditional humanitarianism is based on charity, not rights, and it is centred on a relatively narrow discussion of essential needs.” (Carrera & Guild, 2013)

role the GNA, on paper the only legit government, can actually play when it does not have money or force to coerce. Apart from that, Italy and other nations all pursue different interest, clandestinely and with military as well as civilian means, on all power levels (Stevenson, 2017; Toaldo, 2017). Libya, or what is left of it, hardly enjoys any sovereignty any more: “Where sovereign power [of the EU & its MS’s] is translated across physical borders, it is transported to the outermost reaches of the “shadow of the law,” stretching accepted understandings of sovereignty to the limit.” (Weber, 2007). The southern Libyan border truly constitutes a vast territory in the “shadow of the law”.

Then there is the question of Africans legitimate claim to regional integration and an area of free movement: Libya played an “active role in the foundation of the Community of Sahel-Saharan states (CEN-SAD) which, [...] is oriented towards regional cooperation and integration. Migrant workers from Sudan, Chad and Niger are generally present in the Libyan Saharan border areas where they work in sectors such as agriculture, tourism and local trade. These labour migrations, facilitated by an open border policy towards sub-Saharan Africa are of seasonal and pendular character rather than, as commonly assumed, the source of irregular migratory movements to Europe.” (Andrijasevic, 2010, p. 158). Migrants, even before the revolution, enjoyed no legal security or access to justice in Libya. At times, they were used as scapegoats by the regime (Czaika & Haas, 2013; Brachet, 2011), but were generally tolerated as a source of cheap labor in sectors such as agriculture or construction (Andrijasevic, 2010; Brachet, 2011; Hamood, 2006). Migrants have circulated in northern Africa since the 1950s, contributing heavily to economic development in northern and western Africa (Brachet, 2011; Hamood, 2006). Cracking down on migration flows in southern Libya will not only unfairly burden asylum seekers among the migrants, but also runs the risk of increasing socioeconomic problems in northern and western Africa due to these economies dependence on remittances (Brachet, 2011; Hamood, 2006).

Southern Libya, and especially the border regions, is notoriously lawless (Brachet, 2011; Stevenson, 2017). It will be very difficult to seal off a 5000km border in practically uninhabited territory. Upon the conclusion of the MoU, opinions were mixed. Some hailed tribal unity as the foundation for any stability, while others regarded the bypassing of the GNA as problematic and criticized that there was no way of enforcing the provisions (Davis, 2017): “If people [from the tribes involved in the deal] don’t get paid, they will look for other sources of revenue, and they may look to benefit from the same activities that they are trying to stop now,” [...] “Migration is already becoming a family and tribal business in southern Libya, where living conditions are deteriorating” (M. Eljarh (2017) in Davis, 2017). Previously, exactly these tribes that now committed to peace and unity for choking off the flow of people, ran the people-smuggling business. They had enormous experience navigating in the desert and knew how to bypass controls as well as which officials to bribe (Brachet, 2011). A keyword here is also “Monetisation”: “Corrupt regimes [...] taking western money and charging more for bribes for border crossers.” (Cox (2016) as cited in: Safdar & Strickland, 2016). The fares for irregular migrants will doubtlessly rise, they will be increasingly targeted by militias and the likes, harassed, interned, perhaps tortured and sold into slavery³⁸ (Amnesty International, 2016; Stevenson, 2017; Andrijasevic, 2010).

The externalization of actual border checks and the responsibility for what happens at the external borders is being relocated thousands of miles from the European mainland. This is a decades old trend in Europe: “In both law and practice the border for the movement of persons to and within Europe is no longer consistent with the edges of the physical territory of the member states.” (Guild, 2001). Libya can now be termed a “borderland“ (Balibar, 1998), the most important link in the „south-mediterranean Fence“ (Balibar, 2006), where border control is conducted arbitrarily and intransparently by armed militias, funded by Italy and the EU. This not only moves the border south, but by doing so relocates the decision-making process of who can or cannot enter the EU to non-state actors in an environment of complete lawlessness. European border control and the decision of admittance is being “preempted” in

³⁸ See: “Migrants from west Africa being ‘sold in Libyan slave markets’”: <https://www.theguardian.com/world/2017/apr/10/libya-public-slave-auctions-un-migration>

space and time: this involves the “manipulation of the location of borders in time and space to preempt the arrival of “offshore entry persons.”” (Weber, 2007). Since it is not a sovereign state conducting border control but rather tribes and militias, it is also adequate to say that border control in Libya is being privatized, along with the detention of those intercepted³⁹. The ones who are to suffer the most are the most vulnerable; asylum seekers. “The introduction of new ‘non-entrée’ mechanisms, externalized measures of control [...] (in the name of efficiency and security at the expense of accuracy) reflect a generalized abdication of responsibility to protect the right to seek asylum.” (Heijer, 2010, p. 170).

The human rights provisions in the MoU and other agreements with Libyan actors can in no way be enforced or monitored adequately. There is no asylum system in Libya, immigrant detention centers are run by private actors, under no judicial oversight, without access for international observers and in a climate of impunity for human rights abuses (Stevenson, 2017; Amnesty International, 2017). Sub-saharan africans are treated like second-class humans by many Libyans, this is extensively documented by researchers and the media alike (Hamood, 2006; Andrijasevic, 2010; Amnesty International, 2017). Although it is still too early to judge the full extent of Italy’s and Libya’s cooperation, the plans envisioned, and the means by which they shall be accomplished point towards a circumvention of migrants “right to have rights”: It becomes harder and harder for asylum seekers to reach safe countries or to apply for asylum from abroad. The same goes for migrants, even those that do not even wish to come to Europe. Nobody in Libya enjoys protection by the law anymore, least of all migrants and asylum seekers (Amnesty International, 2017; Doctors Without Borders, 2017).

The MoU, the tribal peace-deal, as well as the Malta declaration have been extensively criticized by human rights groups⁴⁰ for their lack of consideration for asylum seekers (Doctors Without Borders, 2017, Davis, 2017). There is still a considerable number of migrants in Libya, and the flow of people is not subsiding (FRONTEX, 2017). “Leaving Libya via land is not considered an option, with widespread reports of border guards and militias shooting those trying to get out, even setting one man attempting to leave on fire, and gangs stealing passports and documents to make legal travel impossible.” (Dearden, 2016). Libya has virtually become a trap, where the only option to escape is via the sea (Amnesty International, 2016).

4.2 EU-Libyan cooperation: EUNAVFOR MED Operation Sophia, combatting smuggling or endangering lives?

This chapter evaluates Operation Sophia in regard to its goals. I shall argue, that the high seas also constitutes a territory “in the shadow of the law”, where anything goes. I shall also argue, that Operation Sophia, far from accomplishing its mandate, actually reinforces and exacerbates the problem of people smuggling, along with the risks to migrants and asylum seekers in the central Mediterranean.

The mission was initiated in June 2015, and has its legal foundation in a CFSP council decision⁴¹ from May 2015. The legal foundation of CSDP missions is enshrined in section 2 of the TEU. According to Art. 43(1) of the TEU: “The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. [...]” Art. 43(2): “The Council shall adopt decisions relating to the tasks referred to in paragraph 1, defining their

³⁹ There are private detention facilities run by militias. In some cases, detained migrants are being sold as slaves or forced into prostitution.

⁴⁰ See: <http://www.asgi.it/english/libya-eu-italy-asylum-migration/> ; <http://www.euractiv.com/section/global-europe/news/eu-leaders-approve-plan-to-curb-migration-from-libya-africa/>

⁴¹ See: COUNCIL DECISION (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)

objectives and scope and the general conditions for their implementation. [...].”

The council had decided to act, after more than 1000 migrants and asylum seekers died in shipwrecks in April 2015 alone. Italy at the time was executing the majority of Search and Rescue (SAR) missions in the central Mediterranean (EPSC, 2017), and the Renzi government quickly demanded more burden sharing on a European level. Right after a shipwreck with 850 casualties, “Renzi ruled out a naval blockade in international waters, which has been touted as a possible solution. The prime minister said that would be a gift to smugglers because it would essentially allow them to send migrants off by the thousands to be picked up by the European vessels.” (Bonomolo & Kirchgaessner, 2015). Operation Sophia is not a naval blockade, but it still has to “pick up” migrants that are encountered in distress situations: In point (6) of the preamble, reference is made to the UN Convention of the Law of the Seas and the 1951 Refugee Convention, with its principle of *non-refoulement*. Vessels participating in the mission must assist migrants in distress (Albuquerque, 2012). Further, these migrants cannot be brought back to Libya, as it does not constitute a “place of safety” (ECHR, 2012). It must be noted however, that Operation Sophia is not primarily designed to be a SAR mission, but rather a military operation against human traffickers (European Commission, 2017; House Of Lords, 2016).

Operation Sophia was conducted in three phases: The first one consisted of Information gathering on smuggler networks (Art. 2(2) a. Council Decision 2015/778/CFSP), and has been concluded. In the second phase (Art. 2(2) b. Ibid.), the mission will “conduct boarding, search, seizure and diversion on the high seas of vessels suspected of being used for human smuggling or trafficking [...]”. Reference is made to a UNSC resolution that makes an operation in the coastal waters of a third state possible: “in a third phase, in accordance with any applicable UN Security Council Resolution or consent by the coastal State concerned, [the mission will] take all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable, which are suspected of being used for human smuggling or trafficking, in the territory of that State, under the conditions set out in that Resolution or consent.” (Art. 2(2) c. Ibid.).

One year after it started, in June 2016, Operation Sophia’s mandate was extended by one year, and two tasks were added: Training of the Libyan coast guard and implementation of UNSC resolution 2292⁴² (European Commission, 2017). The mandate of the mission ends in July 2017. Operation Sophia has now entered operational phase 2, since October 2015, which means that it is authorized to board and seize suspected vessels (Ibid.). However, as no UNSC resolution and / or invitation by the GNA was submitted, the operation could not be extended into Libyan territorial waters or onto shore (Deutscher Bundestag, 2017; House Of Lords, 2016). Two “training packages,” of the Libyan coast guard, the second of which started in January 2017, have been concluded (Ibid.). The first module of the second training package was concluded in Greece and ended in February, the second is being implemented in Italy (Deutscher Bundestag, 2017). In January 2017, the Italian “Guardia di Finanza” signed a technical agreement with Operation Sophia on the training of Libyan officers.⁴³ The costs of the mission, that is the common costs excluding MS contributions, are estimated at €18.5 million for the two-year period (European Commission, 2017). 25 MS’s currently participate in the mission, with 5 naval assets, two helicopters and 4 “air assets”, presumably Airplanes and UAV’s (Ibid.). According to a German parliamentary inquiry, Operation Sophia also makes use of NATO supply infrastructure in the Mediterranean (Deutscher Bundestag, 2017). The mission cooperates with Europol, Eurojust, NATO, as well as third countries’ militaries such as the US African Command (Ibid.). Its operational area also overlaps with that of “Operation Triton”, a Frontex-led mission that operates closer to the Italian shore. Operation Sophia’s headquarters are in Rome, as is the “Maritime Rescue Coordination Centre”

⁴² See: “Security Council Authorizes Inspection of Suspected Embargo-Breaking Vessels off Libya’s Coast, Unanimously Adopting Resolution 2292 (2016)”: <https://www.un.org/press/en/2016/sc12401.doc.htm>

⁴³ See: “EUNAVFOR MED and the Italian “Guardia di Finanza” sign a technical agreement on the Libyan training”: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/19613/eunavfor-med-and-italian-guardia-di-finanza-sign-technical-agreement-libyan-training_en

(MRCC) (FRONTEX, 2017). The Italian navy has the command (Rear Admiral Enrico Credendino) and coordinates SAR operations in the missions' operational area with commercial vessels and NGO's (European Commission, 2017).

So what are the results of this Operation, shortly before it is coming to an end? So far, the mission has apprehended 110 "smugglers", and destroyed 452 boats⁴⁴. By June, 36 000 people had been rescued, all of which were brought to Italian reception centers.⁴⁵ Weapons were also found on at least two occasions, though these amounts to small-scale hardware in comparison to Gaddafi's plundered depots.⁴⁶ Intelligence that is gathered from interviewing migrants is used to construct evidence against smuggling rings. Some 140 Libyan coast guard agents had been trained by the end of April⁴⁷, while Italy returned some of their assets.

Are these remarkable figures for a multi-year, multi-million Euro effort, involving dozens of high-tech navy ships and aircraft as well as thousands of rotating troops? Since 2014, the number of irregular crossings in the central Mediterranean route is rising, and reached approximately 181 000 in 2016. (FRONTEX, 2017). At the same time, the number of deaths is also rising "dramatically", despite the SAR efforts (Ibid.). SAR operations are increasingly being undertaken by NGO's (40% of all operations in 2016 as compared to 5% in 2015), which operate closer to the 12-mile zone than the navy vessels (Ibid.). The operations' mandate is to disrupt the smuggling business. Instead, the smuggling economy has adapted, in a way that makes it nearly impossible to disrupt. In an evaluation of the mission by the EU committee of the House of Lords, several experts gave testimony to the fact that the mission has "failed" in its stated goals. First of all, the mission employs a small number of assets to monitor a huge territory nearly the size of central Europe (House Of Lords, 2016). Operation Sophia must rely on information sharing with NGO's, commercial vessels as well as information obtained from migrants. However, the criminalization of migration has forged a climate of keeping quiet in the Mediterranean, of "crimes of obedience" (Orsini, 2016).

The report by the House of Lords notes, that not only the sheer size of the operational area, but also the "resourcing model" of the mission was questionable: "Mr Roberts⁴⁸ expressed two further concerns about the resourcing model. He pointed out that as Operation Sophia had "no fixed forces", its assets "rotate in and out". There was no "consistency in the force's design", because the vessels at the mission's disposal depended "very much on the short-term political needs of individual nations." 56. The assets were also, in Mr Roberts' view, too sophisticated for Operation Sophia's mission. He told us that aircraft designed to hunt nuclear submarines in the north Atlantic are being used to hunt small rubber dinghies. This, he considered, was probably a "wasted resource." 57. He suggested that the EU should use "much cheaper commercial vessels" for the search and rescue elements of the mission." (House Of Lords, 2016). Norway, which participates in Operation Triton, leases a commercial vessel, which is better equipped for SAR missions than a military vessel and costs much less (Eliassen, 2017). In a statement to German television, Udo Fox, director of the German SAR entity "DLRG", said that the efforts undertaken in the central Mediterranean are totally inadequate to the demand, as the vessels are not equipped for these large-scale SAR operations.⁴⁹ For comparison, while all the vessels participating in Operation Sophia together rescued 36 000 people, the "Sea-Watch 2", a modified, 100 year-old fishing trawler in use by a German NGO, saved over 20 000 migrants.

⁴⁴ See: "Operation SOPHIA crews act again to implement UN arms embargo": https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/28540/operation-sophia-crews-act-again-implement-un-arms-embargo_en

⁴⁵ Ibid.

⁴⁶ See: "EUNAVFORMED operation SOPHIA seizes weapons on board a vessel in International waters": https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/25373/eunavformed-operation-sophia-seizes-weapons-board-vessel-international-waters_en

⁴⁷ See: "EU skeptical over Libyan plan to stop migrant flow": <http://www.dw.com/en/eu-skeptical-over-libyan-plan-to-stop-migrant-flow/a-38606192>

⁴⁸ Senior Research Fellow, Sea Power and Maritime Studies, Royal United Services Institute.

⁴⁹ See: "Operation Sophia - Schlepperpropaganda statt Seenotrettung | Monitor | Das Erste | WDR": <https://www.youtube.com/watch?v=NHaf0opG6FI>

Disturbing images from the mission include the burning of small wooden fishing boats and inflatable dinghies by warships equipped for nuclear war, after the passengers of these boats have been rescued by NGO's (Eliassen, 2017). Equally disturbing are pictures of "saved" migrants being clothed in identical overalls, crammed onto the deck of a navy destroyer under ship canons, and being attended to by military personal in white bio-hazard suits (for it is feared that the migrants carry infectious diseases)⁵⁰. Propaganda-style videos, provided for by the media strategists of the mission, show navy ships cruising under blue skies and aircraft taking off from the "Garibaldi", the flagship of the mission. Speedboats rush towards sinking inflatables full of migrants on the verge of panicking, with action-film-like music playing in the background⁵¹.

Operation Sophia forced an evolution in smuggling: Smugglers stopped accompanying their boats, instructing the migrants to steer themselves, often for a reduction in the fare, and call the MRCC in Rome from a satellite phone (Eliassen, 2017). At the same time, because the navies were seizing larger boats once they left Libyan territorial waters, the smugglers resorted to importing cheap rubber boats. The British committee notes: "The smugglers have adapted. Lieutenant General Wosolsobe said that the mission had "forced the traffickers to amend their business model": the more expensive wooden or fibre-glass boats were no longer used, as they represented a "significant financial loss" when they were destroyed. Instead, smugglers and traffickers are bulk-buying inflatable rubber craft from China. These "have less carrying capacity and are more limited by sea conditions"; in other words, they are more unsafe. There is no legal basis for preventing shipments of these rubber crafts into Libya."⁵² (House Of Lords, 2016).

While there have been no reports of returns to Libya by Operation Sophia itself (European Commission, 2017), there have been incidents however, in which the Libyan coast guard applied unnecessary force, and where asylum seekers died in the process (Amnesty International, 2016). Libya did not sign or ratify the International Maritime Organizations Convention on SAR, which entered into force in 2004.⁵³ In October 2016, shortly before training by Italy was to begin, the coast guard interfered in a rescue operation, which Sea Watch claimed was outside of territorial waters. At least 30 migrants drowned after the Libyan boat had rammed their dinghy and prevented the NGO from assisting⁵⁴. Sea Watch sued the Libyan coast guard in a German court⁵⁵. However, the court dismissed the case, stating that the identities of the perpetrators could not be verified (even though they might have been trained by the German navy). Sea Watch has also asked the ICC in The Hague to expand its investigations into human rights abuses in Libya to the coast guard. In a statement, the NGO said that the coast guard could intervene in oil and weapons smuggling off its coast, but had no right to stop people fleeing the country on boats⁵⁶.

However, the Law of the Seas does provide a legal basis for action against human smuggling in territorial waters: "Within this zone, the coastal State exercises sovereignty [...] Coastal States are entitled to regulate migration activities within their territorial sea and this clearly extends to measures intended to prevent the infringement of immigration laws. This is provided for by Article 21(1)(h) of the UNCLOS, which explicitly provides for the power to enact laws relating to passage to prevent the infringement of customs, fiscal, immigration or

⁵⁰ See: "EU's naval mission "Operation Sophia": <http://www.dw.com/en/german-parliament-extends-naval-ship-patrols-off-libya-in-eu-led-mission-sophia/a-19387209>

⁵¹ See: "Operation Sophia: EU naval mission to stop people smugglers 'failing'": https://www.youtube.com/watch?v=oKq_1mGeZXc&t=158s

⁵² See also: "Rubber boats for Libyan human smugglers imported from China, transhipped through Malta": <http://www.independent.com.mt/articles/2016-02-20/local-news/Rubber-boats-for-Libyan-human-smugglers-imported-from-China-transhipped-through-Malta-6736153656>

⁵³ See: "Sea Watch is pressing charges against Libyan coast guard": <https://sea-watch.org/en/sea-watch-is-pressing-charges-against-libyan-coast-guard/a->

⁵⁴ Ibid., See also: "Libyan interference in rescue may have caused 30 migrant deaths -German group": <http://news.trust.org/item/20161025151559-azzi8>

⁵⁵ Sea-watch ships sail under the German flag

⁵⁶ See: "Sea Watch prepares legal measures to enforce the „pricipal of non-refoulement“: <https://sea-watch.org/sea-watch-bereitet-juristische-schritte-zur-durchsetzung-des-non-refoulement-prinzips-vor/>

sanitary laws and regulations of the coastal State.” (Barnes, 2014, p. 120). This only requires that irregular migration must be criminalized under Libyan law, which it is: “Libyan law criminalizes entering, exiting and staying in Libya irregularly and allows for the *indefinite detention* of foreign nationals for the purpose of deportation. Those detained often stay in centres for months without access to their families, lawyers or judges and are unable to challenge their detention or access protection given the *lack of any national asylum law or system in Libya*. Deportations are carried out without any safeguards or assessment of individual claims.” (Amnesty International, 2016, emphasis added).

This month, a UN agency began mapping these detention centers, but in instances where militias run the centers, it is impossible to gain access⁵⁷. It is well known that human rights abuses have been a daily experience for migrants detained in Libya since decades (Amnesty International, 2017). Even before training of the coast guard began, it was capable of intercepting and returning thousands of migrants to Libyan ports⁵⁸, a task that would be illegal for any EU mission (Gauci, 2017).

In one incident, which was extensively documented by Sea Watch, approximately 350 migrants were returned to Libya from international waters: On the morning of the 10th of May 2017, the Sea-Watch 2 was called by the MRCC to assist a wooden boat 20 nm off the coast and hence outside of Libyan territorial waters. As the Sea-Watch 2 approached the migrant boat and dispatched a smaller boat to assist, it was called by the MRCC to stand by, as a Libyan coast guard ship (Patrol Ship 206) was going to take over. The coast guard ship then performed a risky and illegal maneuver, nearly ramming the Sea-Watch 2, and forced the migrants onto their ship, threatening them with firearms. Patrol Ship 206 had not responded to calls from the Sea Watch 2 to coordinate the rescue. Later, a colonel from the coast guard confirmed the “rescue” of 350 migrants that had been returned to Tripoli and detained there⁵⁹.

Sea Watch argues, that this and similar operations are illegal following the “Draft articles on Responsibility of States for Internationally Wrongful Acts” by the UN International Law Commission. A state commits a wrongful act, when “conduct consisting of an action or omission [...] (b) constitutes a breach of an international obligation of the State” (Art. 2 (b) of the ILC). Italy is a party to the 1951 Refugee Convention with its principle of *non-refoulement*, as well as the EU fundamental rights treaty, the IMO SAR Convention and UNCLOS. The MRCC is a state agency, and since it coordinated the interception of the migrants it could be held directly responsible (Gauci, 2017). Migrants and asylum seekers that are returned to Libya face the risk of torture and inhumane treatment in Libya as well as in third countries (the risk of being returned from a third country to an unsecure country is termed “chain *refoulement*”) (Ibid.). Italy therefore *de facto* violates the principle of *non-refoulement* and chain *refoulement* by ordering the Libyan coast guard to “rescue” the migrants (Ibid.).

Gauci (2017) explains further that: “Italian responsibility can also be established under Article 16 of the Articles on State Responsibility. Article 16 deals with aiding and abetting the internationally wrongful act of another State. It provides that: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.” (Art. 16, ILC). This implies 3 cases in which an assisting state assumes responsibility for a wrongful act: when it knows of the circumstances that render the act unlawful, when the assisting state facilitates the committing of a wrongful act, and when the act committed by the other state would be illegal if committed by the assisting state (Gauci, 2017).

⁵⁷ See: “UN Migration Agency Launches Detention Centre Mapping in Libya”: <https://www.iom.int/news/un-migration-agency-launches-detention-centre-mapping-libya>

⁵⁸ See: “Libya says 1,425 migrants turned back over two days”: <http://www.reuters.com/article/us-europe-migrants-libya-idUSKCN11M1AP?il=0>

⁵⁹ See: “Return of a fully loaded wooden boat”: <https://sea-watch.org/sea-watch-fordert-unabhaengige-untersuchung-der-illegalen-rueckfuehrung-eines-vollbesetzten-holzbootes/>

The same goes for the EU as an international organization, to which the 2011 ILC draft articles on the responsibility of international organizations apply: Article 14 states that: “An international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization.” Clearly, the provision of funding and equipment to the Libyan coast guard can be seen as “aiding or assisting” in forced returns of boat migrants from Libyan territorial and international waters. As the *Hirsi Case* established, the returning of migrants by Italian ships to Libya would be illegal (ECHR, 2012). Hence, Italian agencies should know that the returning of migrants from international waters to Libya by the Libyan coast guard constitutes a wrongful act. By providing boats, funding and training, Italy directly facilitates the returning of intercepted migrants (Gauci, 2017).

So what are the shortcomings of Operation Sophia? There seems to be an “implementation gap” (Czaika & Haas, 2013) in that the mission has not been able to seize assets or people of importance to the smuggling economy: “The arrests that Operation Sophia has made to date have been of low-level targets, while the destruction of vessels has simply caused the smugglers to shift from using wooden boats to rubber dinghies, which are even more unsafe.” (House Of Lords, 2016). Prosecutor Salvatore Vella from Agregento, Sicily, is in charge of prosecuting the alleged “smugglers”. He observed that they were often migrants, who are taught in crash courses on the beach how to steer the craft. Some of them saw the sea for the first time in their lives when they embarked.⁶⁰ Mr. Roberts, comes to a similar conclusion: “[he] was less positive about the added value of Operation Sophia in intelligence gathering. It was doing “nothing new”; “you could go to an Italian or Libyan fisherman and glean exactly the same kind of information that the naval and air forces have been gathering“. He [Mr. Roberts] criticised the use of naval forces that had “no experience of intelligence-gathering against organisations ashore”, and were “unfamiliar with some of the forensic evidence-gathering required to provide the linkages higher up the chain.” (House Of Lords, 2016).

The mission has not been able to seize large amounts of weapons either, considering the three inspections conducted so far, where only light weapons were discovered. Not only has Operation Sophia failed to disrupt the smuggling business, it has changed it in a way that exacerbates the problem: The risk to smugglers, of being apprehended and of losing their investments, has been minimized (Eliassen, 2017; House Of Lords, 2016). They do not re-use their assets and they do not have to leave the shore. The assets used to smuggle, a satellite phone and a rubber dinghy, cost a fraction of what a smuggler can earn with one single boat, which can be up to € 9000⁶¹. They make a profit regardless of whether their boat actually reaches international waters and is rescued or not. When the Libyan coast guard intercepts a boat and the migrants are returned and detained, it is highly likely that they will attempt to leave Libya in the same way once they have the chance (Amnesty International, 2016). This gives everyone involved in the smuggling economy further opportunities to prey on these migrants by exploiting them until they can afford another journey. It is estimated, that smugglers can earn as much as US \$ 5000 with one migrant (FRONTEX, 2017). Since the operation cannot proceed to operating in Libyan territorial waters or on land, it has indeed become what Matteo Renzi in 2015 feared: a “gift to smugglers”, paid for by European taxpayers.

The “efficacy gap”, the extent to which implemented policies affect migration (Czaika & Haas, 2013), is even more pronounced: Crossings are increasing now for the third year in a row and have reached an all-time record in 2016, along with the death toll

⁶⁰ See: “Prosecutor Salvatore Vella, on migrant smugglers by Investigate-Europe”: <https://www.youtube.com/watch?v=CDwC5yVEHAY>

⁶¹ This is a figure mentioned by a smuggler interviewed in the Documentary: „Libya’s Migrant Hell“, which aired on Sky TV in April 2017 and was produced by Ross Kemp.

(FRONTEX, 2017). The latter is in part due to ruthless techniques by smugglers, who have little regard for safety, while the total number of crossings in increasingly unseaworthy craft is also rising, leading to more deadly incidents, which are less visible (Ibid.). The latest IOM statistics, from June 2017, point to a 17% decrease in deaths in comparison to the same period 2016, while the total number of arrivals had increased by 27%⁶². This may be due in a large part to the combined SAR effort of multiple NGO's as well as Operation Sophia and Operation Triton. It is to be feared however, that the returning of migrants who do not manage to flee the territorial waters of Libya helps to keep an economy running which is based on exploiting migrants. The abuse that migrants face constitutes an enormous push-factor. Operation Sophia simultaneously acts as a "magnet" for migrants, who know that they only have to reach international waters undetected in order to be saved (House Of Lords, 2016). This rather increases migration flows in the central Mediterranean.

Concerning the legal implications of Operation Sophia, The possibility of unlawful action by equipping, funding and training the coast guard so it can return migrants to Libya cannot be ruled out (Gauci, 2017). So far no weapons can be delivered to Libyan forces, since the arms embargo is still in place. Several boats have been returned by Italy but they amount to little in regard to the length of coast that the coast guard must protect. The coast guard supposedly proposed a "shopping list" to the EU commission, but MS's and EU officials are reluctant to support Libyan forces with hardware and possible military equipment, considering the enormous instability in the country (Deutscher Bundestag, 2017).⁶³ The coast guard is still considered highly unprofessional and possibly linked to smuggling rings (Sieff, 2015). In 2016, Mr. Roberts remarked that: "the captain of the only Libyan coastguard vessel that operates out of Tripoli is a fisherman who owns a restaurant; that is his main job." Tribal factionalism was manifest: "the headquarters of the coastguard in Tripoli cannot and will not communicate with its subordinate units in the east of the country because they are from a different faction." According to the *Financial Times*, the Libyan coastguard relies on a "fleet of a dozen or so small inflatable craft with limited room for passengers and a recommended range of no more than five nautical miles". (House Of Lords, 2016).⁶⁴

Operation Sophia was designed based on the first EU Naval Mission, Operation Atalanta, an anti-piracy mission off the coast of Somalia. "The Meijers Committee notes a fundamental difference from the EUNAVFOR operation Atalanta against piracy off the Somalian coast, which was taken as a model for EUNAVFOR Med." (Meijers Committee, 2015)⁶⁵. The previous mission had the consent of the coastal state, Somalia, and could therefore operate much closer to the bases of suspected pirates. This is not the case in the central Mediterranean, where European vessels heed care not to come too close to Libyan waters. Operation Sophia was designed as a military mission from the start, not taking into account that a large part of the mission is obviously SAR related. The Meijers Committee also highlighted the fact that "unlike piracy and international crimes, international law does not establish universal criminal jurisdiction over human smuggling [...]" (Meijers Committee, 2015; Ventrella, 2016).

In conclusion, Operation Sophia represents a militarization of the external border, and an externalization of border control to the outermost regions of Europe. The mission does not fulfill its ambitiously formulated mandate (Eliassen, 2017; House Of Lords, 2016). On the

⁶² See: "Change in Mediterranean Sea Arrivals to Europe and Recorded Deaths January 1 - June 21, 2016 & 2017": <http://missingmigrants.iom.int/mediterranean>

⁶³ See: "EU skeptical over Libyan plan to stop migrant flow": <http://www.dw.com/en/eu-skeptical-over-libyan-plan-to-stop-migrant-flow/a-38606192>

⁶⁴ It is not my intention to it the Libyan coast guard. For the most part, they are honorable men and women who work day and night for a meager pay (€ 400 per month), with little international support and outdated equipment. They are under threat by armed oil, people and weapons smugglers, illegal fishing, and rival militias. Most resist the urge to be bribed. Their main task is to round up corpses from the beaches and coastal waters, since it is impossible for them to assist all the boats in distress. See: <https://www.youtube.com/watch?v=Ih1iicUd3ls>

⁶⁵ "The Meijers Committee is an independent group of legal scholars, judges and lawyers that advises on European and International Migration, Refugee, Criminal, Privacy, Anti-discrimination and Institutional Law. The Committee aims to promote the protection of fundamental rights, access to judicial remedies and democratic decision-making in EU legislation."

contrary, it reinforces the smuggling economy and constitutes a pull-factor for migrants (Ibid.). The way that smuggling has evolved in the central Mediterranean minimizes the risks to smugglers while maximizing their profits and the risks to migrants, which have to rely on their services (FRONTEX, 2017; Deutscher Bundestag, 2017). It cannot disrupt the smuggling business and the economy that has evolved around migration in Libya, on the contrary, all evidence points towards the fact that Operation Sophia actively sustains this economy (House Of Lords, 2016; Amnesty International, 2016). By supporting the Libyan coast guard and facilitating the return of migrants to Libya that are caught by the coast guard, the question of who can come to Europe is solved arbitrarily: Migrants that manage to leave the 12nm zone and are spotted by European vessels get a free ride to Sicily, while those that do not make it either drown or are detained in Libya. The smugglers and the militias that they are affiliated with make their profit anyway. Problems of efficacy and implementation aside, it is also highly questionable whether the mission has a solid legal foundation in combatting human smuggling (Ventrella, 2016; Meijers Committee, 2015) and training the coast guard to intercept migrants (Gauci, 2017; Amnesty International, 2016).

4.3 The Stakeholders Objectives in a Discursive Coalition

In this chapter, I shall argue that the stakeholders in the central Mediterranean form a “discursive coalition” (Czaika & Haas, 2013): “all stakeholders in such a coalition agree upon a common, publicly stated definition of a situation or a policy objective—for instance, to “combat” illegal migration from Africa to Europe.” (Ibid., p. 492). By analyzing migration policy in the central Mediterranean using the concept of “discursive coalitions,” (Ibid.) it becomes possible to establish exactly why these policies are so incoherent and irrational at a first glance. According to Hajer, who coined the term, a “discursive coalition is basically a group of actors who share a social construct” (Hajer, 1993, p. 47). The actors involved in European migration policy are quite diverse, including Military and Frontex officials, Italian ministers, the CFSP council, to Libyan politicians, warlords, and tribal leaders

Taking on the smuggling economy is neither desirable nor feasible for the GNA. It is not going to invite European troops to conduct an anti-smuggling operation in Libyan territory either. The British parliamentary inquiry into Operation Sophia considered this: “Mr Lindsay explained that once a GNA was in place, tackling migration “will not be their very top priority“. Mr Kingsley added that the idea that the new government’s “first action would be to invite western powers in—and thus underline the fact that they are the puppet government that their critics claim they are—seems very far-fetched.” Professor Joffé had already told us in July 2015 that the EU’s plan to deal with migration from Libya was “seen by many in Libya ... to be an overt threat.” (House Of Lords, 2016). The first thing the GNA did after it was brought to Tripoli from Tunisia, on board an Italian navy ship, was to request airstrikes on ISIS from the US. Apparently, Washington told them to do so. This did the GNA no favor in terms of public relations (Surana, 2017). Libyan officials are deeply suspicious of European politics in the central Mediterranean. This becomes clear in an interview with Brigadier Ayoub Qasim, spokesman of the Libyan navy: “Thus, the EU formed Sophia on the pretext of fighting illegal immigration when it really lies ready to protect Europe from any threat they think is posed against their security.” He also accused the EU of idly watching while Libyas’ oil and marine resources were being robbed, as the coast guard did not have the equipment to interfere and the EU was giving Libyans the wrong kind of assistance: “[...] We told the EU that we do not need training, but we need boats and other equipment. Europe should pay for the Navy and Coast Guard personnel; it should pay Libya for the burden of fighting the illegal immigration.”⁶⁶ Libya suffers under frequent armed clashes, the economy is in ruins, blackouts occur daily, and a fifth of the population is internally displaced. While the smuggling economy and especially the African migrants are increasingly viewed as

⁶⁶ See: “Navy spokesman: Operation Sophia is propaganda; Italy wants to have more time to continue stealing Libya’s resources and smuggling its fuel”: <https://www.libyaobserver.ly/news/navy-spokesman-operation-sophia-propaganda-italy-wants-have-more-time-continue-stealing-libya’s>

unfavorable, tribal leaders acknowledge that they cannot do much against it either, as smuggling has become a main income source for many regions, constituting around half of economic activity in coastal towns⁶⁷.

Italy on the other hand wants to decrease illegal migration as much as possible, and seemingly cooperates with anyone it can, from the GNA to tribes in southern Libya, buying them off with equipment and “development programs” (ASGI, 2017). Italy funds the “hosting centers” where migrants that are caught in the territorial zone are brought to for indefinite detention (Ibid.). Italian political rhetoric since 2016 indicates a hardened stance on irregular migration, while migrants in the central Mediterranean are increasingly framed as pure economic migrants, who have no right coming to Europe (Simmelroggen, 2015). In the past, boat migration from Libya was criminalized to the point where fishermen would let migrants in distress simply drown for fear of being arrested as facilitators of illegal immigration (Orsini, 2016). Italian authorities seem to be in favor of return operations by the Libyan coast guard, as every intercepted and sunk boat resolves Italy of the responsibility to detain and care for hundreds of migrants. That the MRCC does not intervene in, but rather orders the obviously illegal return operations from international waters supports this assumption⁶⁸. Recently, an Italian prosecutor from Sicily spread the unfounded rumor that NGO’s were actively cooperating with smuggling rings⁶⁹. This prompted a surge of distrust and apathy towards the NGO’s and their SAR operations. At the same time, Italians feel abandoned by other European States and the Union itself (Fratzke, 2015), which is why the Italian government in 2015 called for a EU-led mission in the first place. However, the Schengen *acquis*, along with the Dublin Regulation and the restrictions on regular migration from Sub-Saharan Africa (Rosling, 2015), together with Libyan instability and migration pressures from conflict and poverty will continue to place Italy at the forefront of any irregular migration wave to Europe (Purkey & Crépeau, 2016; Fratzke, 2015; Stevenson, 2017).

The European actors, from the CFSP council, Frontex and the External Action Service, believe that techno-military solutions to social problems are possible: “the Western African route – perhaps the most dangerous migration route – was closed thanks to an effective combination of border surveillance, return operations, and joint law enforcement work with countries of origin / departure. This model represents one of the best ways to prevent a future migratory crisis in the Central Mediterranean.” (FRONTEX, 2017). Federica Mogherini, in a visit to a vessel participating in the mission, emphasized the need to combat push-factors, because these were far more important than certain pull-factors (e.g., SAR missions off the coast).⁷⁰ The focus on short-term operations in crisis mode (Purkey & Crépeau, 2016) shall simply show that the EU is active, whether effective or not: “In a leaked report written by Admiral Credendino, he describes the missions success: “While still much needs to be done to disrupt the smugglers’ business model, *EUNAVFOR MED* has nonetheless achieved significant results in its first six months. In this respect, *the main message to the international community is that the EU is capable of launching a military operation in record time, displaying a strong resolve and remarkable unity of intent, [...]*” (emphasis added).⁷¹ They perceive the smuggling economy and Libyan instability to be a principle cause of the migration crisis. This is highly questionable: “Mr Roberts has written that “migrants in boats are symptoms, not causes, of the problem.” Mr Symonds agreed: “If

⁶⁷ See: “Ross Kemp: Libya’s Migrant Hell review – a deeply powerful plea” <https://www.theguardian.com/tv-and-radio/2017/feb/22/ross-kemp-libyas-migrant-hell-review-a-deeply-powerful-plea>

⁶⁸ See: “Return of a fully loaded wooden boat“: <https://sea-watch.org/sea-watch-fordert-unabhaengige-untersuchung-der-illegalen-rueckfuehrung-eines-vollbesetzten-holzbootes/>

⁶⁹ See: “In Italy, conspiracy theories about collusion between smugglers and charities rescuing migrants are spreading“: https://www.washingtonpost.com/news/worldviews/wp/2017/05/02/in-italy-conspiracy-theories-about-collusion-between-smugglers-and-charities-rescuing-migrants-are-spreading/?utm_term=.1b56567df209

⁷⁰ See: Federica Mogherini’s visit at EUNAVFOR MED Sophia vessel ITS San Giusto“: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/25140/federica-mogherinis-visit-eunavfor-med-sophia-vessel-its-san-giusto_en

⁷¹ See: Rubber boats for Libyan human smugglers imported from China, transhipped through Malta“: <http://www.independent.com.mt/articles/2016-02-20/local-news/Rubber-boats-for-Libyan-human-smugglers-imported-from-China-transhipped-through-Malta-6736153656>

you do not have an answer to the situation of those people [apart from detention centers], we are sceptical about the mere targeting of the smugglers.” (House Of Lords, 2016). Ms. Mogherini also believes that a “safer sea“ will encourage Libyans to fish, giving them an economic alternative to smuggling⁷². One must catch a lot of fish though, to earn the € 9000 that a smuggler can make in a single night with one boat.

Coming back to the discursive coalition, Hajer further notes that: “The discourse coalition approach suggests that once a new discourse is formulated, it will produce story lines on specific problems, employing the conceptual machinery of the new discourse (e.g., sustainable development).” (Hajer, 1993, p. 47). The discursive coalition in the central Mediterranean frames migrants as victims of evil traffickers and smugglers, but also as economic migrants. Since 90% of the migrants in the central Mediterranean are of African and not of Middle Eastern origin, the public assumes that they do not flee war, but poverty (Semmelroggen, 2015).

This “story line” is what is needed to justify a military operation: Illegal immigration is portrayed as a “threat” to Europe (FRONTEX, 2017). Since the smugglers and traffickers are perceived to be the problem, it is possible to pursue them and “disrupt” their business model. If the root of the problem is the smuggling economy, disrupting it will stop the migrants, so the commonly heard explanation. This belief is partly due to the EU’s success in combatting piracy, however, piracy and human smuggling are very different conceptually (Meijers Committee, 2015; House Of Lords, 2016).

Also, by framing all migrants as economic migrants that illegally cross borders, it becomes possible to justify the current regime of externalizing barriers to their arrival. An economic migrant has a choice, and can choose where to go for a living. This simplification underestimates the fact that a considerable number of migrants are asylum seekers, and they do not have an alternative way of requesting protection (Rosling, 2015; Amnesty International, 2016). The most troubling effect of the social construct of “irregular migration” in the central Mediterranean is that this conveys to Libyans the image of an unwanted people, since they “illegally” cross borders (Semmelroggen, 2015) and Europe doesn’t want them. Libya has a troubled history of race-relations. Black Africans had always encountered a certain level of racism, but at least their labor force was demanded (Brachet, 2011). Now, they are stigmatized as bringing drugs, alcohol and prostitution, of being lazy economic migrants (Stevenson, 2017). This justifies treating them like second-class humans. Indeed, survivors have frequently stated that their Libyan captors in the detention camps call them “animals”. Violence and discrimination are common (Amnesty International, 2016). Apparently, most Libyans do not see this as a problem, since authorities speak openly about using violence, and do not hesitate to hit migrants with hoses and cables, even when they know they are being filmed. None of the detained knows why they are being detained or when they will be released (Ibid.). Neither do the Libyan “authorities” that run the centers.

In conclusion, the stakeholders form a discursive coalition revolving around deterrence but also of “humane conditions for migration”. They do not trust each other and have different aspirations regarding solutions to the crisis in the central Mediterranean. They know that Operation Sophia is not deterring anyone and will not alter the general volume of migration flows, nor remove the root causes of migration. The coalition is held together by necessity, as the GNA is dependent on the EU and Italy for funding and political support (Stevenson, 2017; Surana, 2017). However, Libyans can and will only go so far in combatting illegal migration. Populists in Europe will seize this as an opportunity to denounce the EU’s seemingly dysfunctional handling of the crisis. The aspects of protecting migrants and respect for human rights are mentioned frequently in treaties and policy papers, but they amount to little in the face of chaos in Libya (ASGI, 2017). The objective seems to be to out-source the

⁷² “And together with security - I would like to mention this - comes also the economy. And this is why we have another interest we share. You know very well, a safe sea, a sea free from smuggling and trafficking of every kind is also crucial to restart the Libyan fishing industry and this will provide Libyans with an economic activity that is safe, profitable, dignified and sustainable.” Federica Mogherini, 08.02.2017 See: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/20236/speech-hrvp-federica-mogherini-visit-eunavfor-operation-sophia_en

responsibility of handling migrants, as Ms. Mogherini quite subtly puts it: “[...] we see that people who are dying now are not anymore in international waters but in Libyan waters. This is a Libyan responsibility, not a European responsibility, but we can help in saving lives and trying to make this not happen again.”⁷³ The message is evidently: Europe will pay the bill, but keep them away from us.

4.4 The “Right to have Rights” in the “Shadow of the Law”

What do all these actions taken together mean for the “right to have rights” of migrants? The central Mediterranean has indeed evolved into a “global borderland”, a “space of wonder” (Rumford, 2008, p. 639): Libya as a borderland is “not subject to the rule of law. This is a realm where ‘global outcasts’ reside, refugees, migrants, asylum-seekers living in a state of ‘permanent transitoriness’ (Bauman as cited in Rumford, 2008, p. 639). As I argued before, the central Mediterranean is in “the shadow of the law” (Weber, 2007). Despite the fact that no Libyan government has ever signed or ratified the most important human rights conventions, there is no state to provide adequate protection (Amnesty International, 2016; Doctors Without Borders, 2017; Stevenson, 2017).

No migrant from Sub-Saharan Africa can legally reside or travel in Libya (Ibid.). Essentially, this labels millions of people criminals, while the only crime they committed is to be in the wrong place at the wrong time. The very notion of an “illegal immigrant” suggests that a human can be defined as legal or illegal, in which case penalizing action must be taken against him or her. Irregular migration is also conceptually linked to the issue of security⁷⁴, in an economic sense as well. This allows for the framing of migrants as “dangerous” (Rumford, 2008). “A certain level of dangerousness takes a human being outside the bounds of the law [...]” (Butler, 2004, p. 76). This justifies “indefinite detention” (Ibid.), and preempting a persons’ arrival based on the assumption that he or she may constitute a threat in the future (Weber & Bowling, 2008). Migrants who are caught in Libya are indefinitely detained without trial. This includes women and children. If a pregnant woman gives birth to a child in detention, the child is detained along with her. Some migrants are held captive for years, with no possibility to communicate to the outside world (Amnesty International, 2016). European officials know that “Conditions in the centres where migrants are held are unacceptable and fall short of international human rights standards.”⁷⁵ They not only fall short of, they are run in clear violation of universal human rights law which establishes that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted [...]” (Art. 8, 1948 Declaration of Human Rights), and “No one shall be subjected to arbitrary arrest, detention or exile” (Art. 9, Ibid.). The detention of children and minors, which is common in Libya, is contrary to the rights of the child (Art. 37 (b), Convention on the rights of the child). Even though Libya did not sign this declaration, all European nations did. These rights are also enshrined in the African Charter of Human and People’s Rights of the African Union, of which Libya is a founding nation.

As discussed earlier, the “right to have rights” entails freedom of movement (Art. 13, 1948 Declaration of Human Rights), nationally and internationally (Oudejans, 2014). S. Fine compared the domestic right to freedom of movement *in a nation*, which is generally accepted in theory and practice, to the concept of an international right to freedom of movement. Since the right to leave (and return to) ones country is established, this should also entail the possibility of entering another country: “The mere fact that states claim the right to exclude would-be immigrants now is no reason to assume that the existence of such a right is obvious or that the right itself morally uncontroversial. [Since this would entail using violence

⁷³ See: “Remarks by the HRVP Federica Mogherini at the press conference following the Foreign Affairs Council”: https://eeas.europa.eu/csdp-missions-operations/eunavfor-med/20031/remarks-hrvp-federica-mogherini-press-conference-following-foreign-affairs-council_en

⁷⁴ The existence of terrorist groups such as ISIS in Libya facilitates the framing of migration as a security issue.

⁷⁵ See: “Questions & Answers: Migration on the Central Mediterranean route”: http://europa.eu/rapid/press-release_MEMO-17-135_en.htm

to restrict immigration]” (Fine, 2013, p. 256). Thus, the right to freedom of movement in the central Mediterranean is now severely violated. Migrants can be apprehended by anyone with a gun on Libyan territory, now, since they are all declared illegal (Amnesty International, 2016; Stevenson, 2017). Freedom of movement is also restricted because travelling in the central Mediterranean has become so dangerous that migrants have to rely on smugglers and cannot travel independently anymore (FRONTEX, 2017). Where it is not restricted, this right is assigned arbitrarily, according to whether one is caught or not, has the money to bribe, and one's race or religion: Muslims and light-skinned people are treated better than black, Christian people (Amnesty International, 2016). Apart from that, because the EU is encouraging North African governments to close their borders, this denies Africans an area of free movement (Brachet, 2011; Andrijasevic, 2010).

The right to asylum (Art. 14, 1948 Declaration of Human Rights) is basically restricted to international waters in the central Mediterranean now. Any asylum seeker on Libyan territory can be intercepted and detained up until the 12-mile zone. Only those that manage to flee the country and get past the coast guard can access the asylum procedure, that is, if they are rescued in time. That the right to request asylum is territorially restricted and can only be accessed upon setting foot in a safe states' territory renders it practically worthless to anyone who cannot survive the obstacles along the way: “People who die at sea trying to cross the Mediterranean on overcrowded boats do not have any actual fundamental rights regardless of the circumstances. The effectiveness of these rights, in fact, depends on the nationality of the person and the State within which those rights are claimed.” (Lendaro, 2016, p. 155). This runs counter to the idea of universal personhood (Benhabib, 2004). It should be possible to request asylum without exposing oneself to such dangers (Albuquerque, 2012). Libya does not have an asylum system and does not respect fundamental human rights. The EU and Italy knowingly contribute to the “trap” that Libya constitutes for asylum seekers, since all migrants that are detained risk degrading treatment, in Libya and when they are later *refouled* to third countries (Amnesty International, 2016). This also runs counter to the right to live free from torture and be recognized as a person before the law (Art. 5-6, 1948 Declaration of Human Rights). There is, in practice, no rule of law in Libya and no protection from being treated like an animal instead of a human being.

The right to life and liberty (Art. 3, 1948 Declaration of Human Rights) is seriously violated in the central Mediterranean: Irregular migrants are criminalized, indefinitely detained without trial and access to a legal procedure (Amnesty International, 2016). Migrants frequently die in detention since medical treatment is denied and holding conditions are despicable (Ibid.). Apart from that, it should not be necessary to travel in these kinds of conditions in the 21st century (Rosling, 2015). The EU and Italy, by contributing to the criminalization of migrants in Libya, impose on migrants the necessity of relying on smuggling networks, to use such dangerous routes in the first place (Amnesty International, 2016; Rosling, 2015).

As a matter of fact, one could say that many migrants originally departed as economic migrants, but because of the difficulties in travelling to Europe and the political unrest in many transit countries, their journeys have taken much longer than anticipated, changing the nature of the migration. They might have fallen victims to human traffickers, kidnappers and terrorists. Essentially, the odyssey that Mediterranean boat refugees go through makes their economic migration become an escape from persecution (Simmelroggen, 2015; Dearden, 2016).

5. Conclusion: Is the “Right to have Rights” no longer valid in the Central Mediterranean?

Operation Sophia has failed its two-tiered mandate of protecting migrants by deterring them and to contribute to Libyan stability by combatting the smuggling economy. The criminal economy is increasing, together with the death toll and the arrivals in Sicily. Migrants who are intercepted by the Libyan coast guard face incredible abuse. Migrants who

are intercepted by Operation Sophia are detained in Italian “Hot Spots”, where their rights are respected to a much greater extent. The EU approach to concentrating irregular migrants in “Hot Spots” and deporting unwanted ones brings its own problems, though.⁷⁶ Certain aspects of the multilateral cooperation, such as equipping the Libyan coast guard, may in fact be illegal (Gauci, 2017). Together with Italian contributions, EU migration policy is aimed at deterring migrants from travelling to Libya, not at protecting their human rights. If this were the case, Italy and the EU would seek to abolish detention centers, loosen restrictions on irregular migration as well as extra-territorial asylum claims. Although Libya is now a free country, where no tyrant spies on and pursues his adversaries, this includes the freedom for Libyans to treat migrants as they see fit (Stevenson, 2017). Human rights abuses have reached a whole new level ever since Operation Sophia began. This is not to say that European migration policy is to blame entirely, but it does not contribute to enhancing the conditions of migrants either and could do a lot more.

That the EU and Italy seemingly pursue irrational, inhumane and inefficient policies is because they must form a discursive coalition with Libyans who do not share their views on migration policy and have other priorities and grievances.

With Operation Sophia, a space where migrants can claim rights has encroached up to 20km off the coast, while Libya itself became a space where no one, least of all migrants, can claim rights. This applies only in times when assistance can be given however. When there are no boats out to pick up the migrants, they have sailed out in vain, to face a certain death. Once a migrant arrives on the Libyan shores, he or she knows that “Europe” is possibly only a short ride away. The sunk costs are simply too high at this point. Staying in Libya means to risk detention, exploitation and deportation (Hamood, 2006; Amnesty International, 2017; Andrijasevic, 2010). While the mission personal believes to have a deterring effect, thousands of migrants embark on the perilous journey every night being perfectly aware of the enormous risk (FRONTEX, 2017). Smugglers in interviews openly acknowledge that their business model depends on navy vessels and NGO’s to pick up boat migrants. The only deterrence effect arises from the risk of being caught by the coastguard and detained indefinitely. The way that boat migration is framed in official EU discourse, and the way that “solutions” are implemented, robs migrants and asylum seekers of all dignity and exposes them to danger and exploitation that is highly unnecessary, deepening the instability and strengthening the criminal economy of Libya.

It seems as if irregular migration via Libya is not necessarily fueled by economic motives, but by rumors⁷⁷ and sheer frustration, once migrants realize what they got themselves into and are ruthlessly exploited (Dearden, 2016; Amnesty International, 2016). Many of those interviewed on SAR vessels say that they do not know or care where they are taken to, as long as they are not returned to Libya (Ibid.). Externalizing border control relocates the responsibility of who takes care of the migrants and asylum seekers, since they no longer reach European territory where their claims must be heard (Heijer, 2010). This is irresponsible since Libya is in no way capable or willing to care for so many people (Amnesty International, 2016). The organizations entrusted with implementing the EU’s non-military aspects of migration policy, namely UNHCR and IOM, can hardly work in Libya (Ibid.; Doctors Without Borders, 2017). European politicians know of the terrible conditions in migrant detention centers, and that it is illegal to detain someone indefinitely without trial, yet the multilateral cooperation in the central Mediterranean seeks only to enhance the conditions in the centers, but not to abolish them. This would only make detention a bit more comfortable, but hardly legal.

When examining European immigration policy in the central Mediterranean, it becomes apparent that Europeans do not find it morally controversial to “re-border”

⁷⁶ See: “Italian refugee centre allegedly run by mafia”: <https://euobserver.com/migration/137913>
Some deportations of third country nationals have been as expensive as € 90 000 per person, see: “Skyrocketing costs for returning EU migrants”: <https://migrationsansfrontieres.com/2017/05/06/skyrocketing-costs-for-returning-eu-migrants/>

⁷⁷ Spread by smugglers, promising a trip to paradise (Amnesty International, 2016).

(Rumford, 2006) the Mediterranean in order to exclude would-be immigrants. The right to leave one's home country, a key aspect of the right to have rights of migrants, does not matter anymore: "Phillip Cole argues, the right to exit is virtually meaningless and worthless, because in order for people to enjoy a right to exit they must also enjoy a right to go elsewhere. In our world of states, that means a right to go to another state, a right to immigrate" (Fine, 2013, p. 256). Europe has made clear what it makes of this, erecting barriers to human movement as far south as the central Sahara.

The people that work erecting the "southern European fence" (Balibar, 1998) do not necessarily see themselves as the first line of defense in a "war on migrants". (Bigo, 2014). Instead, "They see their mission as protecting international order, disciplining chaotic flows of people, avoiding the 'catastrophic consequences of inaction' and of 'free travel between these countries in turmoil and the countries that enjoy peace and development'" (Ibid., p. 212). Rather than applying raw force, they want to deter, to protect the migrants from embarking on a dangerous journey. This mindset is paternalistic and does not take migrants' real motives into account. Further, it is built on the assumption that migration, if left unchecked, leads to chaos and insecurity. This mindset has not always existed, neither in Europe nor elsewhere; it is a paradigm that has evolved in the late 20th century and must not be taken for granted.

I argue, that European and Italian officials underestimate the political consequences, not necessarily of their own actions, but of the migration paradigm as it has been constructed in a climate of anxiety and "fear of the stranger" (Delanty, 2008). The intention was not to circumvent human rights, but rather to create an international order of managed, as opposed to uncontrolled, mobility. However, the distinction between *regular* and *irregular* migrants, the focus on controlling borders and managing migration, in order "to facilitate the level of mobility needed for a liberal society at a specific moment" (Bigo, 2014), of trying to deter these *irregular* migrants, of deporting and cooperating with third countries has indeed led to the division of the world in a "globally mobile elite" and an "immobilized underclass" (Weber, 2007).

The latter *de facto* does not enjoy a "right to have rights" in the central Mediterranean, and when it does, this is assigned arbitrarily. The "recognition of universal status of personhood" (Benhabib, 2004, p. 64) is only a boat ride away for these migrants. If a European vessel is there to assist that is. If not, the "right to have rights" remains a dream for most. For Arendt, the "right to have rights" becomes apparent in a situation where exclusion of the individual from the community of states means expulsion from humanity, since all humans are organized in states. "[...] there was longer any "uncivilized" spot on earth, because whether we like it or not, we have really started to live in one world". (Arendt, 1966, p. 297). Today, despite the interconnectivity and global integration, the "right to have rights" becomes apparent in the division of this one world into places where rights can and will be respected, and those in the "shadow of the law" (Weber, 2007), where raw survival mode has undermined any civilized state that may have once existed. In these territories, it does not matter what rights one has in theory. What matters, is how one can physically reach the territory of a state where rights are respected in practice as well.

6. Literature

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