

The Externalization of the EU's Southern Border in Light of the EU/Libya Framework Agreement

A Lawful Alternative or a Neo-Refoulement
Strategy?

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Abstract

During the last few years the European Union has intensified its cooperation with its neighbours, especially in relation to migration management. With a view to contextualize the recent negotiation on a Migration Cooperation Agenda and a Framework Agreement between the EU and Libya, this paper analyzes the actions adopted at the EU level, including bilateral activities, such as the Italy/Libya Treaty on Friendship, Partnership and Cooperation. It makes clear how such instruments can be framed in a wider strategy directed towards the externalization of migration management and raises serious human rights concerns. It demonstrates how so far such strategy has proven to be a major failure, especially if adopted without a clear assessment of the neighbours' countries human rights situation, compared to the immediate control at the borders. The paper concludes with a comprehensive analysis of the problems involved and aspects concerned and address a number of recommendations to the actors involved in order to be able, in a close future, to set down a credible externalization in line with human rights standards and the aspirations to liberty of the people living in the partner countries concerned.

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List of acronyms and abbreviations

Acronyms

See, See also – For an in deep study or further information you can also consult the following article or information.

Idem – Same quotation as in the above note.

Supra – The page is referred to the citation quoted in note “...”.

Abbreviations

AA – Association Agreement

ARC African Refugee Convention

CAT – Convention Against Torture

CFSP – Common Foreign and Security Policy

CJEU – Court of Justice of the European Union

CSP – Common Security Policy

CSP – Country Strategy Paper

DG – Directorate General

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECRE – European Council on Refugees and Exiles

EDFs – European development founds

EMP – European Mediterranean Partnership

ENP – European Neighbourhood Policy

ENPI – European Neighbourhood and Partnership Instrument

EU – European Union

ESS – European Security Strategy

FCA – First Country of Asylum

GOL – Government of Libya

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICMPD – International Centre for Migration Policy Development

ILO – International Labour Organization

IOM – International Organization for Migration

ITCN – Intern Transnational National Council

JHA – Justice and Home Affairs

MEP – Member of the European Parliament

MOU – Memorandum of Understanding

NGO – Non-Governmental Organization

OAU – Organization of African Unity

RPPs – Regional Protection Programme

R2P – Responsibility to Protect

SCO – Safe Country of Origin

STC – Safe Third Country

UDHR – Universal Declaration of Human Rights

UfM – Union for the Mediterranean

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

US – United States

USA – United States of America

INTRODUCTION

The aim of this paper is to make a point with regard to an argument discussed since a long time but never really considered under its human rights aspect: the externalization of the European borders in the context of migration from the North African region. In the 21st century, when the South of the world is always poorer and the North grows more developed every day, immigration is becoming a sensitive topic in the European security agenda pursued by the so called “venue shopping” concept¹, and the old Europe finds itself in the difficult position to adopt a clear strategy to securitize its internal *acquis* territory.

Taking inspiration from the recent negotiation and partial adoption of the Framework Agreement between European Union (EU) and Libya and considering the Friendship Agreement between Italy and Libya, both suspended due to the Libyan 17 February 2011 Revolution, I will try to make clear what was, till the end of May 2011 (date of conclusion of the following research paper), the European strategy in dealing with the massive migration from the South and which are the perspectives for the future. It is important to clarify what the concept “externalization” means in this context; if it is another way to violate the *non-refoulement*² principle of customary international law, if it is a *neo-refoulement* strategy³, in others world a “geographically based scheme of preventing asylum by restricting access to territories that provide protection to refugees”⁴, or a lawful concept which also takes into consideration the human right perspective and refugees’ rights.

I will argue that if the EU is really resolute in its strategy towards the adoption of externalization, as an alternative instrument to ensure the control at its immediate borders, it should also take into account the social and political circumstances and be

¹ Guiraudon, 2000, p. 257-258.

² See Article 33 of the 1951 Refugee Convention, Article 3 para.1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (CAT), Art. 7 para. 1 of the International Covenant on Civil and Political Rights (ICCPR) expressly prohibits cruel, inhuman or degrading treatment or punishment. Although the ICCPR does not explicitly refer to *non-refoulement* but this principle has been derived from the legal precedents established with regard to Art. 3 European Charter of Human Rights (ECHR).

³ Hyndman & Mountz, 2008, abstract.

⁴ *Idem*.

aware that this result can be obtained only following a clear renewal of its current policies.

For what concerns the methodology, I will explain the law ruling the EU migration agenda, define the externalization paradigm, its roots and development in the time. Then I will analyze, compare and discuss the EU/Libya Framework Agreement and the Italy/Libya Treaty on Partnership, Friendship and Collaboration. Lastly I will reach my conclusions, express my critics and make proposal in order to make a better job. In so doing I will use as sources academic articles, the EU's primary and secondary law, EU's documents, United Nations' (UN) documents, governmental confidential sources and documents (namely United States (US) Embassy's Wikileaks Cables, always taking into consideration their relative significance), human rights Non-Governmental Organizations reports, articles captured in the Web and interviews with eminent Members of the European Parliament dealing with the topic.

My paper will conclude with a number of recommendations.

First, that the EU and the single member states should renounce the current “remote control⁵” strategy that shifts the control on migration further from the territory of the member states to the countries of origin without any clear human rights assessment.

Second, that the EU should adopt an “effective⁶” safeguarding action as a principle inspiring the protection of the refugees, imprinting its Neighbourhood Policy and Development Aid Programmes on the promotion of human rights and not, as a diplomatic weapon to influence the negotiation concerning its security agenda, in order to sign as many readmission agreements as possible.

Lastly, that the EU should distance itself, till there is not a regime change or better attitude towards human rights, from ideas such as trying to negotiate a Framework Agreement with countries as Libya, with a poor human rights record; alternatively try to

⁵Zolberg, *Guarding the Gates*, 2002, on line paper available at http://essays.ssrc.org/sept11/essays/zolberg_text_only.htm, (consulted on 1 June 2011).

⁶Haddad, 2008, p. 203.

adopt a “third way” between regime change and support of autocrats⁷, preferring stability, democratization and reform in countries of migration origin⁸.

Firstly I will set up the legal framework. In the subchapters I will try to define the concept of externalization of migration management in the context of EU external policy, its genesis and evolution over time. I will consider the Euro-Mediterranean Partnership, the Western Mediterranean Forum, the European Neighbourhood Policy and the Union for Mediterranean.

In the second chapter I will introduce the Italy-Libya relations in migration management. In the subchapters I will deal with their historic development, the content of the Treaty on Friendship Partnership and Collaboration, some practical case and the principle of *non-refoulement*. In the end I will deal the principle of *non-refoulement* applied in the practice adopted by Italy and Libya in the South Mediterranean sea mentioning also the human rights situation in Libya.

The third chapter will be dedicated to the former Framework Agreement EU/Libya. In the subchapters particular attention will be given to the EU/Libya process of engagement, the EU/Libya Migration Cooperation Agenda included in the framework agreement, the behind the scenes of the latter and its scrutiny operated by the public opinion. The last part will deal with its evaluation in light of human rights.

In the final chapter all the pieces will be brought together. In the subchapters I will deal with other EU experience in the externalization process in Africa compared to the Libyan one, the means mainly used so far in the externalization process and those programmed for the future, I will elucidate the European Neighbourhood Policy in Libya so far and I will conclude with the real “state of the game” underlining how the externalization worked so far and how it should work in the future in the Libyan context as elsewhere.

The last part will be dedicated to the conclusions.

⁷ Biscop, 2005, p. 7.

⁸ *Idem.* p. 6.

1 SETTING THE LEGAL FRAMEWORK

1.1 THE LISBON TREATY AND THE IMMIGRATION LAW

As it was already affirmed in the Constitutional Treaty under article III-265 the European Commission is the most important actor as concerns proposing initiatives in the area of asylum, immigration, border control and judicial cooperation in civil matters but this power is to be shared always with the Member States in police and judicial cooperation in criminals matters⁹.

Under the Lisbon Treaty the Union has a general competence to develop a common asylum policy always ensuring the respect for the principle of *non-refoulement* and in accordance with the 1951 Geneva Convention¹⁰.

Asylum, immigration and border checks are under Title V Chapter II of the Lisbon Treaty in the section dedicated to the Area of Freedom, Security and Justice, but this title covers also other thematic issues such as cooperation in police, civil and criminal matters between member States¹¹.

In this area the Council of Ministers uses the qualified majority vote and the European Parliament has power of co-decision¹². The treaty also establishes an integrated management system for external borders and strengthens the power of FRONTEX¹³.

Under the Lisbon Treaty, the Charter of Fundamental Rights acquired legally binding status, henceforth FRONTEX is subjected to the Charter and can be called upon to account for its actions before the Court of Justice of the European Union (CJEU) with respect to reviewing legality, actions for failure to act (Article 265) and preliminary rulings concerning the validity of acts (Article 267)¹⁴. The Court now has jurisdiction expanded to give preliminary rulings on matters relating to asylum, visas and immigration, but its jurisdiction do not cover the responsibility of agencies. In the

⁹ Roots, 2009, p. 10.

¹⁰ *Idem*.

¹¹ *Idem*. p. 1.

¹² Foundation Robert Schuman, 2007, p. 15.

¹³ European Agency for the Management of Operational Cooperation at the External Borders.

¹⁴ Migreurop, *FRONTEX Agency: Which Guarantees for Human Rights?*, p. 8 and 23, 2011 Report, available at <http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>, (consulted on 24 June 2011).

recent months the regulation establishing the agency was revised, giving her more autonomy from the member states, a bigger budget and the possibility to sign agreements with EU neighbours countries but such situation raise serious concerns about the compatibility of such reforms with respect of fundamental rights¹⁵.

The structure of Part III, Title V, Chapter I Art. 79 of the Lisbon Treaty makes clear that the general establishment of a common immigration policy does not allow legislative action in order to harmonize national immigration law¹⁶, and as we will see later on in this paper, this imply a wide range of self decision making by States in this context.

Art 79(5) specifies that the quantity of migration is under the discretion of the Member States but in the other fields gives an extensive legislative option¹⁷.

Article 79(4) establishes that the EU may provide incentives and support for the action of Member States thus meaning that there is not space for a full harmonization in integration legislation but integration can be promoted by financial support or policy programmes. This means that the EU will use financial programmes to push Member States to adjust their national programme to EU's certain prescribed policy guidelines, making this way the EU become only a substantial source of money¹⁸.

Art. 79 does not make clear to what extent Member States can conclude agreements with third States in matters of migration and this aspect is only partially covered by Art. 73 which affirms that Member states can enter "between themselves" into form of cooperation and coordination as they deem appropriate in order to safeguard national security¹⁹. At the same time the guarantee under the 1951 Geneva Convention can be lifted if a refugee poses a threat to national security or, having been convicted by final judgment of particularly serious crime, is considered to be a danger for the community²⁰.

Art. 79 states that the EU can conclude agreements with third countries for the "readmission of nationals to their countries of origin of provenance which do not or no

¹⁵ *Idem*, p. 8.

¹⁶ Hailbronner, 2010, p. 2.

¹⁷ Roots, 2009, *supra* note 9, p. 2.

¹⁸ Hailbronner, *supra* note 14, p. 3.

¹⁹ Roots, 2009, *supra* note 9, p. 11.

²⁰ 1951 Geneva Convention, Art. 33(2).

longer fulfil the conditions for entry, presence or residence in the territory of Member States”. Under Part V-Title V-Art. 217 “the Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”, and under Art. 218 “without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the procedure” as set in the subsequent paragraphs of the latter article²¹.

Lastly Art. 8 of the Treaty on the European Union establishes that the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

This last article of the Lisbon treaty represents the umbrella under which instruments such as the Association Agreements, still the EU’s most important bilateral instruments, are negotiated and it will be useful to later on analyse in which context the main document of this thesis’ analysis was negotiated, namely the EU/Libya Framework Agreement.

This legal basis will be of great relevance for the further development of this paper proving how so far a full harmonization was not still reached and how the internal and external legal framework appears inconsistent and susceptible to be circumvent bringing to a possible violation of the European fundamental principles protecting migrant’s human rights.

In the next section the concept of externalization of migration management will be defined, especially at the European regional level, trying to give a first overview on the notion and explaining its main features.

²¹European Parliament, *The EU’s External Relations-The Southern and Eastern Mediterranean Countries*, available at http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=en&id=74&ftuId=FTU_6.4.5.html, (consulted on 21 April 2011).

1.2 TRYING TO DEFINE THE EXTERNALIZATION

The term externalization is commonly used in the field of economics to indicate multinational companies that establish subsidiaries in developing countries²².

I decided to use this definition as starting point because in my opinion it perfectly suits to explain what is happening in Europe. The EU can, in this context, be equated with a “multinational company” or corporation, namely an entity composed of different sub-entities (in this case the Member States) that work for the accomplishment of a common goal. In my imaginary this huge European company establishes its “subsidiaries”, which work in its interest, around its boundaries, namely its neighbourhood that usually corresponds to “developing countries”.

Now the most important point of this metaphor is the aim this multinational company wants to achieve. In our case this is the delocalization of migratory controls in third countries.

The terminology externalization is never mentioned as such in the European documents because the European policies always talk about their “external dimension”²³, indicating with this terminology all the different aspects of the commitment and policies directed towards the external dimension of its borders. In these terms externalization usually refers to different European policies such as: creation of camps for migrants and refugees outside the European territory, measures aimed at the border control with an emphasis on the external borders, fight against irregular immigration and construction of fences and patrol systems. Added to the latter, it also refers to measures of repatriation for illegal migrants or rejected asylum seekers, readmission agreements with third countries and EU actions on root causes of migration and refugees in countries of origin hidden behind development aids. But especially refers to the proposal for processing asylum seekers claims outside the European Territory through regional protection and transit processing centres²⁴.

²² Clochard & Dupeyron, 2007, p. 38.

²³ Benedetti, 2006, p. 1.

²⁴ *Idem.* p. 2.

This is in general a process that moves the migration control policies beyond the European external borders giving the impression of defining better perimeters of security²⁵. The process goes also from posting Immigration Liaison Officers in countries of origin to carrier sanctions. The latter consists in imposing penalties for air, rail or road carriers who admit passengers without documentation. Then there are the visa restrictions, which is one of the most powerful and used instrument of the European Neighbourhood Policy and allows the EU to impose its own security agenda to strengthen the border's control in countries of origin²⁶. By mean of visa restrictions the EU actually use the prospect of visa facilitations as the carrot for countries in the neighbourhood.

The problem of this process is that usually the responsibility to halt the presumed irregular migrants it is shift from the EU to countries with a really poor human rights record such as Morocco, Tunisia and Libya²⁷.

This is a “work in progress process”, a practice started in the 90's during the Austrian EU Presidency when the Austrian government issued a strategy paper on immigration and asylum²⁸.

Equally, geographically talking it is not new either: the European externalization of the migration management is nothing more then a strategy adopted in the United States (US) at the borders with the South American States. The only difference is that in the European context this discussion on security and asylum take place primarily in the context of migration, rather then terrorism like the US homeland security strategy²⁹.

As already evidenced, the word “security” it is a key point. Immigration from the European prospective is perceived as a security issue. This architecture of securitization and of “enmity, framed as protection is a deliberate political project generated by fear and buttressed by substantial financial aids in the name of security”³⁰.

²⁵ Bigo & Guild, 2002, p. 5.

²⁶ Paoletti 2010, p. 3.

²⁷ *Idem*.

²⁸ Hyndman & Mountz, 2008, *supra* note 3, p. 263.

²⁹ Paoletti, 2010, *supra* note 26, p. 18. *See also* Baylis Elena, *National Security and Political Asylum*, Ford Institute for Human Security Working Papers, 2006, p. 18.

³⁰ Hyndman & Mountz, 2008, *supra* note 3, p 269.

In the view of the Commission this strategy of the Regional Protection Programmes (RPPs) would be accompanied, according to the 24.05.2011 communication from the Commission³¹, by reforms in the regions concerned, such as promotion of good governance, judiciary reform, institution building, democratization and human rights, in order to access to durable solutions and remove the need for refugees to move from their countries of origin³².

Such a positive perspective in the eyes of the inexperienced can appear as a disinterested promotion of democracy and a sustainable solution, but it also has its negative outcomes.

In the recent years we have seen a shift from human rights to human security, and this concept as enshrined in the UN doctrine of “responsibility to protect³³” (R2P), represents sometimes a pure politicization of human rights, a shift of civilians’ protection from the domain of international law to that of politics, where human security renders human rights conditional either in the context of the United Nations Security Council’s decisions or in the case of the decisions taken by the European Union’s Commission³⁴. The preventive protection and displacement of people had already proved insufficient and dangerous in the past in the context of the Bosnian conflict, for instance.

This concept of “insiders and outsiders” had already demonstrated ruinous also in the context of the Pacific Solution where Australia refuses to land migrants arriving from the islands surrounding its territory and subcontracted out to small poor islands north of its national sea, the dirty work, declaring also part of its archipelago extraterritorial land. The Australian High Court recently criticized this strategy³⁵.

³¹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2011) 292 final. A dialogue for migration, mobility and security with the southern Mediterranean countries, 24.5.2011.

³² Haddad, 2008, *supra* note 6, p. 193.

³³UN General Assembly, *The responsibility to protect*, 63/308, 7 October 2009, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/513/38/PDF/N0951338.pdf?OpenElement>, (consulted on 28 May 2011).

³⁴ Hyndman & Mountz, 2008, *supra* note 3 p. 251.

³⁵ See recent decision of the High Court of Australia on the “Pacific Solution”, High Court of Australia, Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41, 11 November 2010, available at <http://www.austlii.edu.au/au/cases/cth/HCA/2010/41.html>, (consulted on 28 May 2011).

As a preliminary conclusion we can say that externalization in Europe, as in other part of the globe, encompass attempts to securitize borders by transforming Europe into a “fortress” and rendering the Refugees Convention less applicable and more conditionally depending on the political decisions at high level.

In the next subchapter I will make clear how the idea of externalize the European borders was born and what were its development so far, giving attention to the interests hidden behind.

1.3 THE GENESIS OF EXTERNALIZATION

The origin of the externalization concept goes back to 1992 when emphasis on migration and people’s movement acquired an EU dimension through the development of the Justice and Home Affairs (JHA) pillar in the Maastricht Treaty (1992) and then in 1997 a new chapter dealing with free movement, migration and asylum was introduced in Title IV of the Amsterdam Treaty³⁶.

Two years after in the EU 15 Summit taking place in Tampere in 1999, where it was stressed the importance of cooperation with third countries, the EU gave a kick start to the Common Area of Freedom and Justice and defined the main points concerning this area: creation of a common European asylum and migratory policy, the Common European Asylum System, the creation of the European area of justice, cooperation against crime but especially a stronger external action³⁷.

In 2004 with Hague Programme 2005-2010 to overcome the major obstacle of the necessity of unanimity for the creation of a coordinated European Migration and asylum policy, it was proposed to adopt the qualified majority decision-making, officially incorporated under the Treaty of Lisbon, in the field of asylum, migration and border control leaving the principle of subsidiary to the legal migration subject³⁸.

Therefore a strict agenda for migration management and asylum with deadlines set for 2004 was established. After that date an evaluation of the progress was done and one of

³⁶ Geddes, 2009, p. 19.

³⁷ Benedetti, 2006, *supra* note 23, p. 3.

³⁸ *Idem*.

the main achievements results to be the adoption of Council Resolution establishing minimum standards for the reception of asylum seekers³⁹ (Reception Conditions Directive), and the Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted⁴⁰ (Qualification Directive).

The last document will become the basic provision for the determination of the so called principles of “first asylum country” (FCA), “safe third country” (STC) and “safe country of origin” (SCO) with the future inclusion of the STC principle in the Dublin Convention⁴¹, now Dublin II Regulation⁴². The latter it is well known for its negative effects, establishing basically the country that must take into consideration the asylum application and sets up that claims are to be considered in the State where the asylum seeker first entered Europe. The main critic to this regulation is the burden sharing issue and that it puts a lot of pressure on the south European countries that usually are the first countries in which asylum seekers board.

The aforementioned three legislative documents together with the Asylum Procedure Directive constitute the main blocks of the Common European Asylum System (CEAS). The Asylum Procedure Directive⁴³ aims to ensure that throughout the EU, all asylum procedures at first instance are subject to the same minimum standards. Subject to some exceptions, the Directive guarantees the opportunity of a personal interview for asylum applicants as well as the basic principles and guarantees for the examination of claim.

In general a new CEAS will contribute to the setting up of a common area of protection and solidarity based on a common asylum procedure and an uniform status for those granted international protection making more coherent the EU internal and external action⁴⁴.

³⁹ Council Directive 2003/9/EC of 27 January 2003.

⁴⁰ Council Directive 2004/83/EC of 29 April 2004.

⁴¹ Costello, 2005, p. 41.

⁴² Council Regulation 2003/343/EC of 18 February 2003.

⁴³ Council Directive 2005/85 of 1 December 1.12.2005.

⁴⁴ Communication from the Commission to the European Parliament and the Council, COM(2011) 291 final, Annual Report on Immigration and Asylum 2010, 24.5.2011.

Later on in 2005, following the request of the Hampton Court that took place on 27 October 2005, it was issued the Global approach to migration⁴⁵ with priority actions focusing on Africa and the Mediterranean. In 2008 the Commission adopted a Communication⁴⁶ and a Policy Plan⁴⁷. The Communication puts forward ten Common Principles on which to base the common immigration policy, grouped under the three main strands of EU policy: prosperity, solidarity and security. The Policy Plan on Asylum provides for the architecture of the second phase of the Common European Asylum System.

But already in 2003 the idea about what to do with the unwelcomed migrants was arising when Tony Blair presented his “external solution”⁴⁸. The United Kingdom started this process in 2003 when it proposed to the European Council of Thessaloniki that transfer-processing centres could be set in third countries⁴⁹. The centres were supposed to be managed by the International Organization for Migration (IOM), the screening procedure would be processed by the United Nations High Commissioners for Refugees (UNHCR) and the aim was to reduce the root causes increasing protection in region of origin, decreasing the cost of return of asylum seekers and to be a deterrent for non genuine applicants⁵⁰. The proposal was strongly criticized by various NGOs and the UNHCR stressed that the *non-refoulement* principle forbids direct and indirect *refoulement*⁵¹.

The UK idea came out not longer after the UNHCR’s Convention Plus⁵², an operative framework to address some main issues concerning migration. The programme of

⁴⁵ Global approach to migration: Priority actions focusing on Africa and the Mediterranean, 15744/05, ASIM 66, RELEX 761, 13 December 2005.

⁴⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2008) 359 final, A Common Immigration Policy for Europe: Principles, actions and tools, Brussels, 17.6.2008.

⁴⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, COM(2008) 360 final, Policy Plan on Asylum an Integrated Approach to Protection Across the EU, Brussels, 17.6.2008.

⁴⁸ Klepp, 2010, p. 8.

⁴⁹ Clochard & Dupeyron, *supra* note 22, p. 36.

⁵⁰ Benedetti, 2006, *supra* note 23, p. 5.

⁵¹ The indirect *refoulement* (*Chain refoulement*) consists of the danger that the direct *refoulement* can have as consequence the transport of a person to a third country which would in turn *refoul* the person to the country of origin.

⁵² UNHCR’s Convention Plus Targeting of Development Assistance for Durable Solutions to Forced Displacement.

action was based more or less on the same UK new vision of externalization, namely to readjust the current asylum system, to find a solution to the “asylum shopping”, to call for a major commitment of the States to find a solution to burden-sharing issues and to act in line with the principle of solidarity. The two initiatives shared common ideas such as the focus on countries of transit, the preoccupation for the secondary movement and to find durable solutions in regions of origin but after the refusal of the international community, especially of the NGOs, a counter proposal was necessary⁵³.

Indeed, the three main aspect pointed out as alternative were: in general need of a stronger protection and arrangement of solutions in the region of origin, transfer of unfounded asylum applicants to closed centres located in one or two member states from the countries considered safe and the improvement of the EU procedures of processing applications.

But the last straw, despite the strong criticism of the international community concerning the idea of externalize the asylum process, was the Cap Anamur Boat Accident that occurred in June 2004. After that event the German and Italian foreign ministers Otto Schily and Giuseppe Pisanu brought back even more strongly to consciousness the British proposal of establishing processing centres outside of Europe. The problems created by the coverage of the media interest for weeks on the case and the desire to shift their responsibilities to third counties of origin and transit, brought the EU to develop a brand new external agenda. The key points were concentrated on migrants and development, protection in regions of origin, management of migrant’s remittances, involvement of diasporas, reduction of brain drain and integration of migrants in host societies and in countries of origin⁵⁴.

This new policy have the appearance of being pushed by an altruist desire to change things and make them better but what is effectively hidden behind is a quite clear reality, a reality of fear of the stranger. There is a desire to push migrants the farthest possible from the EU with a high visibility given to the securitarian aspect and lack of transparency in bilateral agreements. This will be further analyzed when it will come

⁵³ Benedetti, 2006, *supra* note 22, p. 8.

⁵⁴ Klepp, 2010, *supra* note 48, p. 8.

the time to talk about the Italy/Libya bilateral agreement, which has been always formally criticized by the EU but at the same time more than welcome.

In the following subdivision I will introduce some of the main instruments that were used to implement the externalization strategy, giving space to their characteristics, advantage and disadvantage.

1.4 EXTERNALIZATION BETWEEN EMP AND 5+5

In 1995 the European and Mediterranean Ministers of Foreign Affairs established a new partnership, namely the Euro-Mediterranean Partnership (EMP), which is described in the Barcelona Declaration⁵⁵. The so-called “Barcelona Process” final aim is to transform the Mediterranean region in a peaceful and prosperous area and establish an Euro-Mediterranean market zone⁵⁶.

The Barcelona Process’ three main goals are: dialogue on security and political issues to create stability and respect for human rights, dialogue on financial and economic cooperation to create a common market and dialogue on social cultural issues to strengthen civil society links⁵⁷.

The European Mediterranean Partnership added a “political-military dimension to the traditional economic focus of the European’s Mediterranean policies”⁵⁸ but with a strong commitment to inter-relations and dialogue. The achievements so far have been modest and many agree that it did not live up to the expectations initially expected⁵⁹. After ten years of EMP, a serious reform of the instrument was under pressure. The middle-east peace collapsed and the relations between Palestine and Israel broke into a cold war with some acts short of war. The events of 11 September 2001 left space to a “clash of civilization” and the USA invasion of Iraq led to a further destabilization of

⁵⁵ Barcelona Declaration, adopted at the Euro-Mediterranean Conference - 27-28/11/9, available at http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf.

⁵⁶ Doukouré & Oger 2007, p. 1.

⁵⁷ *Idem*.

⁵⁸ Biscop, 2005, *supra* note 7, p. 3.

⁵⁹ Del Sarto & Schumacher, 2005, p. 17.

the region with clear repercussion on the general regional situation of instability. As a consequence the regional cooperation between the eight countries is almost inexistent⁶⁰. Libya in this context has always represented an exception, even if situated at the centre of the region in consideration. It has always refused to take part into the EMP for various reasons and also for political circumstances (Lockerbie case), it has never been included in the Barcelona Process having only an observer status in the EMP. Libya perceives itself as an African country and wishes primarily to develop excellent sub-Saharan African relations and what is more, it does not accept the shared EMP prospective to contribute to the peace in the Israel-Palestinian conflict⁶¹. Later on in the development of this paper we will see which are the other informal and political reasons because of which Libya has always refused and have been refused to take part in the EMP, but it can be already made clear that this decision mostly reflects its bad attitude towards democracy and respect for human rights.

The EMP is characterized by two main aspects that were also the reason of its defeat in dealing with the complex range of multicultural actors it was facing.

The Barcelona Process introduced the principle of “negative conditionality” so it means that every single Association Agreement (AA), in other words the main instrument used in the bilateral negotiations between the EU and the Mediterranean countries, contained a clause that the agreement could be suspended if the respective parties violated human rights⁶², indeed it represented somehow an *ex post* control. The EU never called into cause this principle, neither in the notorious Sa’ad Eddin Ibrahim⁶³ case⁶⁴ in Egypt nor in the Tunisian President Bin Ali’s 96 per cent election victory in 2004⁶⁵.

The other deficiency were in the bilateral Association Agreements themselves, as the EMP did not generalize the association to a common agreement but to bilateral ones. But at the same time the main issue of these instruments was that they were based on a

⁶⁰ *Idem.* pp. 2-3.

⁶¹ Aliboni, 2005, p. 9.

⁶² Del Sarto & Schumacher, 2005, *supra* note 60, p. 22.

⁶³ *Idem.*

⁶⁴ The EU did not suspend the funding even when the Egyptian authorities imprisoned Professor Sa’ad Eddin who was conducting a human rights project.

⁶⁵ Biscop, 2005, *supra* note 7, p. 6.

similar association agreement with all individual Mediterranean partner without giving space to a specific individual assessment of the local situation or complexity⁶⁶.

Upon consideration the EMP failed to reach its aim and, like also the former president of the Commission Prodi pointed out in 2001 during a meeting with some students in Bruges, Europe needed a new instrument, an instrument that would create “an arc of stability at Europe’s gates”⁶⁷.

Another instrument of collaboration was settled in 1990 in Rome; the Western Mediterranean Forum, also known as the 5+5 Dialogue. It is an instrument for “informal” political dialogue, and I want clearly to emphasise the terminology “informal” because in this framework we can notice the presence of Libya, plus on one side Morocco, Algeria, Mauritania and Tunisia and on the other side Italy, France, Spain, Portugal and Malta. It is not casual the Libya decided to join such a forum, but this is only due to its informal features, as we will see further on.

The main issues the forum always tried to address were the movement of persons, cooperation in migration and co-development⁶⁸.

During the 2006 5+5 Rabat conference it was initiated a reinforced dialogue between Europe and the African countries, mainly on migration management and development and the main aim was to encompass the Maghreb countries in an Euro-African cooperation for the prevention of the irregular immigration. What came out during the conference was later on also confirmed by the Global Commission on International Migration and the UN high level dialogue, in other words, the need for a strongly requested connection between migration and development, more attention to migrants rights and need for coordinated labour migration.

Till now we could notice a strong attention of the EU for the migration agenda, but in relation with its neighbours, it is quite evident the intention to Europeanize its language the most possible, giving not to much attention to the local actors and trying only to Europeanization the countries geographically closest to its borders⁶⁹.

⁶⁶ Del Sarto & Scumacher, 2005, *supra* note 60, p. 21.

⁶⁷ Romano Prodi, An Enlarged and More United Europe, a Global Player – Challenges and Opportunities in the New Century, address before the College of Europe, Bruges (November 12, 2001)

⁶⁸ Doukouré & Oger, 2007, *supra* note 57, p. 21.

⁶⁹ *Idem.* p. 23.

In the following section I will analyze the main instrument developed so far, the European Neighbourhood Policy, as the actual instrument adopted to securitize the European neighbourhood and promote, in my view, the externalization of migration management.

1.5 EXTERNALIZATION, ENP AND UFM

The European Neighbourhood Policy (ENP) with its European Neighbourhood and Partnership Instrument (ENPI) which is the financial instrument which supports the ENP through concrete assistance actions, is at the same time the newest European instrument for the external relations and the oldest. As we will see that it is a quite recent instrument but imprinted on an old strategy, that makes use of vintage instrument and does not have a clear connection between the its apparatus and the aims it want to reach.

The ENP was first outlined in 2003 but it was officially launched in 2004⁷⁰ and it represents somehow the European institutional response towards its post-enlargement frontiers⁷¹. The ENP consist of a soft evolution of the enlargement instrument that was used for the opening of Europe towards the East countries and later on for the relation mostly with Ukraine and Moldova. The Neighbourhood Policy physically originates in the enlargement department and it has always been dominated by the later. Recently, the Directorate General (DG) for the external relations should become the main body responsible for ENP but this is still to demonstrate considering that its officials are still from the enlargement department⁷².

The main aim of the ENP is to replicate the success of enlargement methodologies and to securitize the neighbour countries that theoretically represent a threat to its security⁷³, but in my opinion these two points correspond to its deficiencies, particularly the former, as I will make clear later on. The EMP is meant to develop and area of

⁷⁰ *Idem.* p. 11.

⁷¹ Magen, 2006, p. 390.

⁷² Del Sarto & Scumacher, 2005, *supra* note 60, p. 27.

⁷³ Magen, 2006, *supra* note 72, p. 390.

prosperity and friendship, in a way a ring of friends and in so doing the ENP offers contractual relationships in all major areas of European cooperation but without the formal rights associated with full accession, which as we will see, is usually badly evaluated by the country partner in the relation between conditionality and compliance⁷⁴ or cost-benefits.

The criteria which the selection for the partnership is based on naturally corresponds mostly to the interest involved and usually the proximity to the EU territory, but officially talking this kind of partnership is meant to be applied to countries which share the “common values”, namely democracy, respect for human rights and the rule of law as set out in the European Charter of Human Rights (ECHR)⁷⁵.

In 2004, as starting point of its neighbourhood policy, the Commission published a European Neighbourhood Policy Strategy Paper as well as a series of national Action Plans on various countries from the east to the south of Europe⁷⁶.

The southern regional dimension of the ENP builds its relations on the already existing agreements, such as the Association Agreements. These represents the bilateral dimension of the Euro-Mediterranean Partnership and are still forming the basis of cooperation between the EU and the Mediterranean countries together with the Partnership and Cooperation agreements or the Barcelona Process, but its main instruments consist of the so called ENP Action Plans⁷⁷.

The Action Plans are mutually agreed not legally binding accords between the EU and each partner-country which are anticipated by a Country Report assessing the economic and political situation in order to define how and when the relation can be deepened. Once the assessment is done, an Action Plan is put in place, proposed by the Commission and enacted by the Council and in so doing an agenda is defined with the consequent incentives offered to obtain progress in relevant reforms⁷⁸. These incentives

⁷⁴ *Idem.* p. 392.

⁷⁵ Communication from the Commission to the Council and the European Parliament, COM(2003) 104 final, Wider Europe - Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, 11.3.2003.

⁷⁶ Communication from the Commission, COM(2004) 373 final at 3, European Neighbourhood Policy Strategy Paper, 12.5.2004.

⁷⁷ Benedetti, 2006, *supra* note 23, p. 13.

⁷⁸ Doukouré & Oger, 2007, *supra* note 57, p. 11.

consist, like already said, in greater integration into the European programmes and networks, increased assistance, enhanced market access⁷⁹ but mostly money, a lot of money. The Commission then will proceed with the evaluation of the progress publishing a report.

The differences between the EMP and the ENP are mainly two. The first is the intrinsic character of the country reports and Action Plans which, differently to the Association Agreement, are based on a individual assessment of the country and therefore are still bilateral but differentiated in their nature and aim. This can be also defined as “joint ownership”, no more lack of consultation and involvement in the formulation of the country specific priorities but bilateral dialogue⁸⁰. But as we will see this dialogue is not always based on fair and balanced way to influence each other decisions but rather on an unbalanced form of command and control.

The second difference is the conditionality element that we have already considered in the EMP. Here the situation is different, we are in presence of a “positive conditionality”, a “shift of gears”⁸¹. In this case we have the opposite, the increased aid or trade concession depends on willingness to promote democratic reforms in the country and in general there must be always a follow up of the action first envisaged, therefore the control is *ex ante*. This puts a quite evident pressure on the partner who theoretically is pushed to do always better in order to get the reward. As we will see this is not how it works always in practice but unfortunately not because of the potential of the partner country, but exactly the opposite, because of the inconsistency in the strategy of the EU, whose final aim sometimes does not correspond exactly to the promotion of democracy and rule of law, but in the case of most of the Mediterranean countries, just corresponds to the will of controlling the migration flow from countries of migration transit.

The ENP from different point of view can be regarded as a development in the Common Foreign and Security Policy (CFSP)⁸² and its security rationale is mirrored in the European Security Strategy (ESS), on the basis of the assertion that civilian initiatives

⁷⁹ *Idem.* p. 11.

⁸⁰ Del Sarto & Scumacher, 2005, *supra* note 60, p. 29.

⁸¹ *Idem.*

⁸² Aliboni, 2005, *supra* note 62, p. 2.

such as trade and development can be regarded as powerful instruments for promoting reform, better governance and assistance programmes which will contribute to implement the European Security Strategy. In a close future the security, stability and sustainable development that the ENP brings to its citizens will no longer be easy to distinguish from its interest in close cooperation with the neighbours⁸³.

At the same time the Strategy Paper makes clear that the new policy will also support the efforts to realize the objectives of the ESS, primary through good governance in the immediate neighbourhood⁸⁴.

A common element defined in the Strategy Paper and mirrored by the single Action Plan is expressed by the so called “phases of approximation”. This is one of the most interesting aspects of the ENP compared to the EMP and which reflects its attitude towards the dialogue, the positive conditionality and the differentiation, making clear that the alignment with the partner depends on the economic structure of the country partner and the current level of harmonization with the EU legislation. The Action Plans negotiated, for instance, vary greatly in their reference to the expected original alignment and the final one envisaged⁸⁵. As we will see, for what concerns our branch of interest in the following discussion, the alignment envisaged usually makes strong reference to the visa issuing and the control on migration flow, elements usually present in all the Action Plans regarding the North African countries.

As we have seen the ENP represents certainly a development compared to the EMP, it somehow reflects a more mature attitude of the European Diplomacy towards the countries neighbours, set on a different strategy and is aware of the past errors committed showing a certain adaptation.

But not even this instrument is perfect and indeed it suffers of a syndrome of emulation for the success obtained in the enlargement process, trying to use the same instruments but in a different context demonstrating to suffer of a path of dependency.

⁸³ Wider Europe Communication, *supra* note 67.

⁸⁴ Magen, 2006, *supra* note 72, p. 401.

⁸⁵ *Idem.* p. 406.

The only difference between the old enlargement and the ENP can be perfectly described in the terminology of the former President of the Commission Prodi: “everything but membership”.

This is in general the offer done to every single country of the neighbourhood with few exceptions (Turkey). Every country has the prospect of a stake in the EU’s internal market and further integration and liberalization to promote the free movement of persons, goods, services and capitals, but not membership. This is a double-edge sword⁸⁶.

So following the enlargement logic means rely on the same instruments, incentives and normative underpinnings as toward potential EU members but the cost-benefit ratio for the country partner in the ENP is not the same as in the case of prospective EU membership⁸⁷.

As the academic Amichai Magen makes clear is that in the ENP first we have a phase of “Path Dependency and Policy Adaptation”⁸⁸. The EU’s values as democracy, respect for human rights and rule of law, as set in the Charter of Fundamental Rights, now legally binding, are essential normative standard to which every country must align with, in any future relations with the EU. The ENP Strategy Paper stresses also a commitment that must be sought to certain external action of the EU as, fight against terrorism, proliferation of weapons of mass destruction and efforts to achieve conflict resolution.

The ENP’s Strategy Paper therefore suggest a phase of approximation on a base of commonly agreed priorities for the stimulation of trade and economic integration taking into account the partners’ peculiarities and level of harmonization. The Action Plan also provides alignment in other range of areas such as visa issuing and control of migration flow. The ENP’s Country Reports then summarizes the state of relations between the EU and the partner country with the inclusion of a legal framework ruling the relationship. A second section of the Country Report conducts an assessment of the country’s four main political issues such as, democracy and the rule of law, human rights and fundamental freedoms, regional and global stability and justice and home

⁸⁶ Del Sarto & Shumacher, 2005, *supra* note 60, p. 34.

⁸⁷ *Idem.* p. 37.

⁸⁸ Magen, 2006, *supra* note 72, pp. 401- 405.

affairs. The Action Plan and the Country Report constitute the main instruments to induce and monitor the country's compliance in line with the principle of differentiation that takes into consideration the peculiarities of the country.

Then the Action Plan sets out a listing number of incentives offered by the EU in return of political and economic reforms and there is a regular follow up of the goals achieved. As a matter of fact the strategy of the EU towards its neighbours is to link "Conditionality with Compliance" but everything in this phase depends of the country's capacity and willingness of adaptation.

The local decision making of the partner country are linked to the cost-benefits of compliance, if they do not comply they are punished with less incentives according to the positive conditionality (*ex ante* control). "The EU links the award of perceived goods to the acceptance of its rules regarding legal, political and economic domestic" reforms providing the reward *ex post* but, the effectiveness of the EU positive conditionality depends on four set of factors: the "Size and the Speed of the Rewards", the "Determinacy of the Conditions", the "Credibility of the EU Conditionality" and the "Size of Adoption Costs" for domestic decisions making⁸⁹.

Shortly considered this four set of factors if not properly considered can bring to the success or the failure of the ENP policy.

The size and the speed of rewards are two clear elements, in other words it means the quality and attractiveness of the reward in presence of the well know absence of a membership perspective and the speed refers to the temporal quickness of the reward.

The determinacy of conditions means that the more legalized the rule and the clearer it is about the extent of the domestic change expected, the higher its determinacy value. Higher determinacy brings better effectiveness of conditionality helping credibility and reducing reinterpretation in the host country. In the ENP case the determinacy is law, the Action plans are with no formal legal force therefore the compliance is undermined by absence of a comprehensive roadmap reform⁹⁰.

The credibility of conditionality means that the positive incentives depend on their credibility. If conditionality is not credible and the benefit is awarded even without

⁸⁹ *Idem.* pp. 410-420.

⁹⁰ *Idem.* pp. 411-415.

compliance to the original standards, then the final results is less expectable. This usually happens because the EU's ENP conditionality is weakened by several factors, among the others; doubts about what incentives are offered and which ones are in fact deliverable and the mixed confusing signals coming from the documents and the statements of the Commission and Council in reference to the seriousness about conditionality. In practice the tone of the conditionality has been toned down and "diluted" by the ENP's competing goals of promoting short-term security and stability⁹¹ in the Mediterranean region, mostly concerning the migration flows.

The last element, the size of adoption costs is the most important element, making a difference between success and failure.

In this case since the EU rules are likely to be implemented by state decision-making, the effectiveness of the external incentives depends from the local government and the desire to change the *status quo*. But the ENP has not a good record so far. Since the goal of the EU is to promote liberal political and economic reforms, the domestic cost of compliance will be higher in non-democratic countries, compared with a more democratic model of society. This system would work better in a county where democratic transition had already taken place and the social cost would be lower. Since none of the ENP countries is a "free" state, but most of them are authoritarian or hybrid regimes, the cost of democratic reform is high and this is likely less easy to happen. In these cases the cost-benefit calculation points against compliance. Where compliance needs a de facto regime change, like in Libya, the ruling governments are unlikely to comply⁹². Everything depends on the local governmental regime but the external incentives of the ENP, like it happened also with the enlargement, can be an incentive also for a regime change and therefore a easier way to comply with the standards demanded, pushing the electorate to choose for example a reformist candidate government whose aim is to comply with the democratic reforms⁹³ requested at the international level. But the EU leverage in these cases depends on, first *a priori*

⁹¹ *Idem.* pp. 416-417.

⁹² *Idem.* pp. 417-419.

⁹³ Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 200 final, A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean, 8.3.2011.

existence of real political competition in the domestic sphere and second on a high level of society affinity with the goal of EU incentives or standards⁹⁴.

In late 2005 the European Commission announced a joint EU-Libya Action Plan to address the risk of migration pressure on the EU⁹⁵. This happened only one year after the embargo on Libya was lifted, a lift strongly supported by the Italian government who was one of the major sustainers for a new reintegration of Libya in the international community⁹⁶ due to different reasons, mainly economic ones. Today is clearly well known that before the escalation of the 17 February Revolution, a set of negotiations with Libya started in the context of the European Neighbourhood and Partnership Instrument⁹⁷ in 2008, a Strategy Paper and National Indicative Programme 2011 – 2013 was set up and a first part of the EU funds in the context of the ENP were on their way to Libya. What is not clear till now is the content of the national country report. Does the Libyan human rights and political situation is in conformity to the European human rights standards as set down in the European Chart of Human Rights? Does really the Libyan human rights situation is in line with European Union's "shared values"?

In my opinion in this case we are really in presence of a massive dilution of the positive conditionality of the ENP and an inversion of influence. As we have seen and we will see further on, in the discourse of partnership and equal dialogue, the policy making sometimes is very unilateral, like in the case of the EU and the north African countries, where the two parts do not have the same bargaining power, nor decisional power, with the balance always shifted in favour of the EU. But this principle is not in force for Libya. In this case the balance is shifted in favour of Libya and the EU accepts whatever condition just in exchange of cooperation in the migration management.

There was already a bilateral agreement signed between Italy and Libya (which is now suspended)⁹⁸, and also a Framework Agreement between EU and Libya⁹⁹, suspended as

⁹⁴ Vachudova, 2001, p. 29.

⁹⁵ Baylis, 2006, p. 26.

⁹⁶ Benedetti, 2006, *supra* note 23, p. 18.

⁹⁷ The European Neighbourhood and Partnership Instrument has been the financial instrument for the implementation of the Partnership since 2007.

⁹⁸The Wall Street Journal, *Italy suspends Friendship Treaty with Libya*, available at <http://online.wsj.com/article/SB10001424052748703796504576168774016612758.html>, (consulted on 20 March 2011).

well and both of them in line with the different strategic options considered by the European Commission for the strengthening of its cooperation with the transit and origin countries of irregular migrants¹⁰⁰.

In this case if the ENP with its accessories advantages is negotiated with local authoritarian authors, without any human rights assessment of the situation in place, the bad management by local authorities, including excessive defence expenditure, and obstacles posed by traditional structures can contribute to the worsening of the internal politic situation. To the extent that local elites manage to control how resources made available by the EU are used, these can be made to reinforce the political and economic *status quo* rather than introduce reforms¹⁰¹.

The conclusion is that sometimes these kinds of agreements without a minimum human rights assessment and which sometimes enforce the local authoritarian regimes, put even more pressure on the actual situation and push local and in transit people to escape from the declining situation of authoritarian countries such as Libya.

Another framework for the EU's external relations results to be the Union for Mediterranean, the southern regional cooperation branch of the ENP, created at the Paris summit in July 2008 as a new umbrella structure for cooperation with the Mediterranean countries, under the auspices of the French President Sarkozy. This structure is indeed to give cooperation fresh impetus and re-lunch the Barcelona Process. Its members are the 27 EU Member States, the 10 countries of the Barcelona Process and the new members Albania, Bosnia-Herzegovina, Croatia, Monaco, Montenegro and Mauritania and the Arab League was given observer status at all levels¹⁰².

In the next chapter I will take into analysis the recent historic background in the relations between Italy and Libya therefore mostly considering the "Friendship"

⁹⁹Migrants at Sea, *EU and Libya sign unclear migration cooperation agenda*, article available at <http://migrantsatsea.wordpress.com/2010/10/06/eu-and-libya-sign-“unclear”-migration-cooperation-agreement/>, (consulted on 21 March 2011).

¹⁰⁰ Benedetti, 2006, *supra* note 23, p. 19.

¹⁰¹ Biscop, 2005, *supra* note 7, p. 6.

¹⁰² European Parliament, *supra* note 20.

agreement of Benghazi between Italy and Libya as one of the first example of bilateral settlement trying to regulate, among the others things, the migrations flows from Libya to Italy. I will put to the attention some limited content, considering the missing disclosure to the public, concerning the control of migration flows and the economic interest involved. Consequently I will consider the human rights respect implications considering some practical case and giving space to information collected by NGOs like Human Rights Watch and presented in two important reports concerning the topic.

2 ITALY/LIBYA RELATIONS IN MIGRATION MANAGEMENT

2.1 HISTORIC REFERENCES

On 15 April 1986, after several terrorist attacks attempted by the regime of Gadaffi in different European countries, the American air force bombed the main locations of the Gadaffi terrorist structure in Libya, mainly Tripoli and Benghazi. As act of revenge two Libyan missiles were directed to the Italian island of Lampedusa but without hitting their target.

In the next years, nevertheless the international sanctions from the UN (1992) for, *inter alia*, the participation of two Libyans in the terrorist attack of Lockerbie¹⁰³ and the lack of collaboration of Gadaffi, nonetheless also the European embargo on Libya (1986), the relationship between Italy and Libya continued to flourish¹⁰⁴.

In the late 90' a Joint Communication was signed by the two countries in which Italy apologized for the colonial past: such communication represented the starting point of a process of exchange of more or less formal communications and a “verbal process” which continued till the beginning of the 21st century.

On 13 December 2000 a Memorandum of Intent was signed, which was trying to address problems such as fight against the terrorism, drug-trafficking, organized crime

¹⁰³ 1988 Lockerbie airliner bombing over Scotland, which killed 270 people, 189 of them Americans, more information available at Lockerbie Case Blogspot, *Article in the Scotsman*, 23 July 2007, http://lockerbiecase.blogspot.com/2007_07_01_archive.html, (consulted on 1 April 2011).

¹⁰⁴ Paoletti, 2009, *supra* note 26, p. 4.

and most importantly, the unauthorized migration. The agreement entered into force after the ratification of the Italian Parliament in 2002¹⁰⁵.

During this time the Libyan government demonstrated its good intentions to collaborate with the international community in resolving the Lockerbie Case and in 2003 compensation to the families of the victims was paid¹⁰⁶ and the Security Council sanctions were lifted.

Since then the Italian-Libyan relations were driven by a process of increased collaboration, joint measures largely driven by security considerations in the migration and mobility domains and by a lack of transparency of the agreements. In 2003, during a visit of Minister of Interior Giuseppe Pisanu, an accord on the migration issue was reached between the two countries but was neither ratified by the parliament or made available to the public. Informal sources refer to the involvement of exchanges of information on migration flows and there was technical support from Italy to Libya with regard to border control equipment¹⁰⁷.

The Libyan diplomacy, as already underlined, welcomes more a verbal arrangement than a written document; issues are not formalized and this is one of the reason why many Italian officials declare that, if a country is less likely opened to formal agreement and it prefers its items to remain for a certain period of time secret, is much better obtain this kind of result than nothing¹⁰⁸. Similarly, it does not exist any readmission agreement officially formalized between the two countries, due to the fact that the Libyan government refuses to sign it, in order to have more discretion.

A month after the visit of Pisanu, the Italian Prime Minister Silvio Berlusconi had a well publicized visit in Tripoli and, during a four hours meeting session with Gadaffi, it seems that the accord earlier negotiated, was finally concluded.

Neither during this step of negotiation any information was made available to the public, despite the request of the European Parliament. Italy has been strongly criticized

¹⁰⁵ *Idem*.

¹⁰⁶ More information available at Lockerbie Case Blogspot, *Libya's Lockerbie Compensation Proposal*, 31 March 2008 <http://lockerbiecase.blogspot.com/2008/03/libyas-lockerbie-compensation-proposal.html>, (consulted on 1 April 2011).

¹⁰⁷ Paoletti, 2009, *supra* note 26, p. 6.

¹⁰⁸ *Idem*. p. 7.

by numerous international organization and NGOs because of this approach in entering into international agreements which lacks in transparency and any preconditions to ensure proper treatment of the sensible subjects involved¹⁰⁹. Thirteen NGOs and few members of the European Parliament, which inquired in Lampedusa, asked the European Commission to sanction Italy due to the collective expulsions adopted towards Libya, contrary to the European Charter of Human Rights, the 1951 Geneva Convention and the principle of *non-refoulement*, but the Commission reacted cautiously affirming that it would exceed its competences to condemn the Italian policy¹¹⁰.

Two months after the agreement the European Union lifted the eighteen years old embargo on Libya, mostly because of the country's inclination to abandon finally its weapons of mass destruction. Italy have always lobbied on the EU to retire the embargo, mainly because of its economic interest in the country and the desire to equip the Libyan authorities of the means necessary to control its borders and limit the migration flow¹¹¹. Few days before the EU's public embargo lift announcement, Ghadaffi praised Italy for lobbying the EU for a new 540 kilometres gas pipeline which runs from Libya to Sicily and will supply 10 per cent of Italy's energy needs¹¹².

But since then, the controversial practice of silent informal agreements had been interrupted, due probably to the reputational cost faced by Italy in trying to defend its foreign policy, compared to the expected benefits in repatriating migrants¹¹³.

On 29 December 2007 a joint patrolling agreement for the control of the northern coasts and ports was concluded. Italy agreed to furnish patrol boats and therefore the Italian Parliament allocated 6 million Euro to execute the agreement, however the joint patrolling didn't start until 2009, following the historic Friendship Agreement which was signed on 31 August 2008.

¹⁰⁹ Human Rights Watch, Report: *Stemming the flow, Abuses Against Migrants, Asylum Seekers and Refugees*, Part III of a three-parts series, 2006, p.101, available at <http://www.hrw.org/en/reports/2006/09/12/stemming-flow>, (consulted on 2 March 2011).

¹¹⁰ Klepp, 2010, *supra* note 48, p. 5.

¹¹¹ Human Rights Watch, 2006, *supra* note 110, p. 102.

¹¹² Alexander's Gas & Oil Connections, News and Trends: Europe, *New gas pipeline linking Libya to Italy opened* 23 August, 2002, available at <http://www.gasandoil.com/goc/news/nta23498.htm>, (consulted on 2 April 2011).

¹¹³ Paoletti, 2009, *supra* note 26, p. 7.

In the next section I will analyze the content of the “Friendship” agreement, paying particular attention to its provisions on migration management but also giving space to other interests involved.

2.2 THE TREATY ON FRIENDSHIP, PARTNERSHIP AND COLLABORATION BETWEEN ITALY AND LIBYA ¹¹⁴

The well known, but criticized Treaty of Benghazi, suspended on 26 February 2011¹¹⁵ by the Italian government, due to the 17 February Revolution, for years constituted a millstone in the Italian-Libyan relations, criticized by many but definitely appreciated by the most (for instance Malta and the EU itself), opened the doors to the legalization of violation of the basic human rights concerning migrants.

The provisions were already contained in the Joint Communication of 1998 but it was finalized on 30 August 2008, ten years later, and entered into force on 2 March 2009, when ratifications were exchanged.

It is important to underline that this agreement has been always strongly desired by both parties. The long process of negotiation began under previous Italian governments but was accelerated by the current Berlusconi administration.

The Treaty was meant to put an end to the colonial past and restore good relations between the two parties. Its signature was accompanied by the Italian Prime Minister’s strong regrets for the colonial period and an exchange of cultural properties usurped by the Italians during the past¹¹⁶.

In the preamble reference is made to “Italy’s important contribution in bringing the embargo on Libya to an end”.¹¹⁷ The Treaty is in Italian and Arabic and both texts are authentic. The treaty is the basis for special and privileged relations between the two

¹¹⁴ There is only an Italian and Arab version of the Treaty. The Italian version is annexed to the law authorizing the ratification and implementation (Law no. 7 of 6 February 2009) available at <http://gazzette.comune.jesi.an.it/2009/40/1.htm>, (consulted on 12 April 2011).

¹¹⁵ For more information See, Wall Street Journal, *Italy Suspends “Friendship” Treaty with Libya*, 26 February 2011, available at http://online.wsj.com/article/SB10001424052748703796504576168774016612758.html?mod=googlene_ws_wsj, (consulted on 2 April 2011).

¹¹⁶ Ronzitti, 2009, p. 2.

¹¹⁷ *Idem.* p. 3.

countries but without forgetting their duties and roles towards respectively, the European Union on one side and the African Union on the other.

The Benghazi Treaty is composed of three parts: general principles, ending of the dispute and the establishment of the partnership. In the Treaty there is also a reference to the regional cooperation and this is proved by the recent negotiations for a framework agreement between Libya and the European Union started in 2008¹¹⁸.

The part dedicated to the principles makes reference to norms of international customary law or the UN Charter, namely: respect for the sovereign equality, prohibition of threat or use of force (the main reason which comported its suspension on 26 February 2011), non interference in internal affairs, respect for human rights and fundamental freedoms. One of the main interesting features is probably Art 6 referring to Art 14 of the Universal Declaration of Human Rights (UDHR). The aim of Art 6 is to allow the parties to invoke, both the UDHR and the UN Charter, to be respected even if the Declaration is not a legally binding instrument¹¹⁹.

Another interesting part is Art 19.3 in which the parties commits themselves to prevent irregular immigration in the countries of origin through bilateral and regional initiatives. For what concerns migration, as we will see further on, Libya is not party to the 1951 Geneva Convention on Refugees, but as being party to the 1982 African Charter on Human and People's Right's, is obliged formally to respect provisions on the treatment of foreigners. Libya, as we will see in the fourth sub chapter in deep, is also party to the Organization of African Unity (OAU) and to the 1969 African Refugee Convention (ARC), which expands upon the 1951 Refugee Convention the definition of refugee and it also recognizes the 1951 Geneva Convention as "the basis and universal instrument relating to the status of refugee"¹²⁰. These legal provisions brings to the point that both Italy and Libya should, without being obliged, collaborate constructively with the UN High Commissioner for Refugees. But in reality we are far from such kind of collaboration.

¹¹⁸ For more information See, Migrants at Sea, "EU Signs Unclear Migration Cooperation Agreement", 6 October 2010, available at <http://migrantsatsea.wordpress.com/2010/10/06/eu-and-libya-sign-unclear-migration-cooperation-agreement/>, (consulted on 2 April 2011).

¹¹⁹ Ronzitti, *supra* note 117, p. 4.

¹²⁰ Human Rights Watch, 2006, *supra* note 110, p. 88.

There is also a second part of the Treaty concerning an investment for a total amount of 5 billion dollars with which Italy commits itself to build basic infrastructures within 20 years, with an annual expenditure of 250 millions in order to relief the country from the colonial past and support special initiatives for the benefit of the Libyan people, such as scholarships, rehabilitation of victims of land mines and the return of archaeological artefacts to the country of origin.

The most ambitious part of the Treaty is for sure the one related to the partnership. Principally of programmatic nature, it does not allocate any funds, except those for the fight against the irregular migration. The most interesting provision concerning the fight against irregular immigration, mainly by sea, is Art 19 which calls for an implementation of the agreements and protocols signed by the two and for a border control of the Libyan coasts by a satellite detection system jointly financed by Italy and the European Union.

This part of the Treaty is the one that raised the strongest human rights concerns, because of the planned interception of boats at high sea, the consequent migrants' push back and the adoption of a control strategy on the southern desert borders¹²¹.

The final part of the treaty mainly concerns the implementation of the treaty from the economic point of view. The Treaty has clear substantial cost for Italy but there are also some returns considering that since few years Tripoli has activated its diplomatic channel in order to invest in Italy fresh capital from Libyan sovereign funds.

Gadaffi wanted concentrate the 90 percent of Libya's foreign investment in Italy and give priority to Italian enterprises that want to operate in Libya¹²².

The reality is that this agreement mostly on migration is strongly connected to a broader agenda, such as gas and oil resources, foreign direct investment and strategic geopolitical factors. The geographical proximity and the economic interests have always influenced the bilateral foreign agenda of the two countries despite historical incidents¹²³.

¹²¹ Ronzitti, *supra* note 117, p. 6.

¹²² *Idem.* p. 7.

¹²³ Paoletti, 2009, *supra* note 26, p. 10.

Today, Libya accounts for some 15 percent of Italian multinational oil and gas company Ente Internazionale Idrocarburi's (ENI) total global hydrocarbons output and the ENI company has a number of key energy assets in Libya, starting with the Greenstream pipeline, which supplies Italy with around 15 percent of its natural gas imports.

Italy has also been one of Gadaffi's major arms suppliers since an EU arms embargo was lifted in 2004, a step for which Italy strongly lobbied, as we have already underlined and Italy since 2004 has contracted in weapons with Gadaffi for around \$400 millions. But the flow of capital and investments is not surely one-sided; Libya has invested in a number of Italian financial and industrial enterprises. Libya, or better Gadaffi, owns about 1 percent of ENI, and had stated its intent to increase its stake to 10 percent, 7.2 percent of UniCredit, Italy's biggest bank and 2 percent of weapons manufacturer Finmeccanica¹²⁴.

But now, leaving apart the various economic interests, let focus on how this special relationship between the two countries is framed in the context of migration management and what is the situation, so far, as far as the respect of human rights and migration customary law on the high sea between Libya and Italy is concerned.

2.3 THE HIRSI CASE, OTHER ACCIDENTS AND THE PRINCIPLE OF NON-REFOULEMENT

On 6 May 2009, for the first time after the finalization of the Treaty of Friendship, Partnership and Cooperation between Italy and Libya, Italy ordered its coast guard and naval vessels to forcibly push back and return a migrants' boat on the high sea to the country of origin without any screening to determine whether any passenger could apply for asylum or was in need of special protection¹²⁵.

In the concrete circumstances of the case 200 people, divided on three boats, departed from Libya with the aim to reach the Italian coasts. On the 6 May 2009, when the boats

¹²⁴ Stratfort, 2011Energie Sources, *Italy's Interests in Libya*, Forbes, 31 March 2011, available at <http://blogs.forbes.com/energysource/2011/03/31/italys-interests-in-libya/>, (consulted on 4 April 2011).

¹²⁵ Human Rights Watch, Report: *Pushed Back, Pushed Around-Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 2009, p. 4, available at <http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0>, (consulted on 5 March 2011).

were 35 miles south of Lampedusa, they were approached by navy forces from the Italian Guardia di Finanza. Immediately people were transferred on the Italian boats and sent back to Tripoli. The migrants concerned affirmed that neither before or after the transfer they were informed about their destination nor any procedure of identification was effectuated. Once reached the Libyan territory, the migrants were consigned to the Libyan authorities¹²⁶.

A FRONTEX German helicopter in the context of Operation Nautilus IV supposedly took part to the operation and such an involvement of the agency created great criticism, even if the FRONTEX executive director Laitinen always denied any participation and affirmed that FRONTEX has only a coordinating role¹²⁷.

This is one of the most famous cases concerning *refoulement* of refugees by Italy in the context of the agreement with Libya. Currently the case was subject to a relinquishment of jurisdiction from the Second Section of the European Court of Human Rights (ECtHR) to the Grand Chamber and the hearing is scheduled for 22 June 2011. The Hirsi. Vs Italy case was filed by 11 Somalis and 13 Eritreans which alleged the violation of Protocol 4, Art. 4 ECHR (Prohibition of collective expulsion of aliens), Art. 3 (Torture), Art. 1 (1) (General undertaking/HPC), Art. 13 (Effective remedy/national authority) and Art. 3 (Inhuman or degrading treatment).

The well known *non-refoulement* principle, presumably violated in the Hirsi case, among the other things, must be applied extraterritorially and constraints interdiction that can obstruct access to protection or expose migrants to risk or harm or torture. The interpretation given by the ECtHR so far of Art.3 of the Convention (and supplement by the interpretation of article 3 of the Shengen Borders Code¹²⁸) is in the direction to offer a practical and effective protection even if the conduct of *refoul* is not explicitly

¹²⁶ Circumstance of the case freely translated from, European Court Of Human Rights, Deuxième Section Requête n° 27765/09 présentée par Sabir Jamaa HIRSI et autres contre l'Italie introduite le 26 Mai 2009, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=859107&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, (consulted on 5 April 2011).

¹²⁷ Migrants at Sea, Inex, *transcript of interview with Mr. Ikka Laitinen, FRONTEX Executive Director*, p. 1, FRONTEX HQ, Warsaw, 12 May 2010, available at <http://migrantsatsea.files.wordpress.com/2010/11/inex-laitinen-interview-12may2010.pdf>, (consulted on 24 June 2011).

¹²⁸ *Idem, supra* note 14, p. 25.

mentioned by the article¹²⁹. According to the Court's practical approach, to the UNHCR, the UN Committee against Torture and the UN Human Rights Committee, the State responsibility (and in our case also the responsibility of the EU's agencies such as FRONTEX) is engaged wherever an individual comes under the effective authority, control or jurisdiction of the state, regardless of location¹³⁰. So the problem, according to Art. 33(1) of the 1951 Geneva Convention, is not from where refugees are being *refouled*, considering that principle is applicable from everywhere, but to where, safe or unsafe country.¹³¹

Therefore, first the *non-refoulement* principle does not have geographical limits and it is applicable outside the national territory, on the high sea and even in another State's territory; second, this obligation is absolute and applies even under exceptional circumstances such as a declared state of emergency¹³². The last affirmation is of particular interest considering the current international crisis in the North Africa and the limitless flow of migrants to the European Coasts, especially to Italy, which in different moments, through the media, tried to declare a state of emergency.

What follows from the above considerations is that is forbidden the direct transfer of an individual to a place where he can be at risk of torture or other harm, but is also forbidden the "chain *refoulement*", in other words, to expel an individual to a state which is likely to further expel him to a place where he can suffer the same risks. The *non-refoulement* principle, *ergo*, protects against the immediate effects of a State conduct but also by its foreseeable consequences. Another recent interpretation of the same principle affirms that the "push back" strategy can not be applied especially to the territorial waters of a State with poor human right records, where their lives or freedom would be in danger or where there is a conflict situation, which remind us clearly the current situation in Libya¹³³.

¹²⁹ Columbia Law School, 2010, p. 2.

¹³⁰ *Idem.* p. 3.

¹³¹ Human Rights Watch, 2009, *supra note* 126, p. 28.

¹³² *Idem.* p. 4.

¹³³ UNCHR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search>, (consulted on 6 April 2011).

Another important element of the *non-refoulement* principle is that requires a State to take affirmative steps to advise migrants of their protection rights and individually assess their claims. These are basic rules which derive from the due process rules regarding, the access to a fair and effective procedure to determine the status and protection needed, the advise regarding their rights and the evaluation their claims on an individual basis¹³⁴.

According to other sources, namely two Wikileaks US Department of State Cables, surely a less official source than the allegation of the facts to the ECtHR, but nevertheless nowadays more and more relevant, the reconstruction of the events occurred in the Hirsi case is confirmed. As claimed by the first cable¹³⁵, Italy, in implementation of the Friendship Agreement has returned approximately 500 migrants rescued and interdicted at sea to Libya during the week in which occurred the *refoulement* of the Hirsi case. The Libyan authorities have notified the arrival of the migrants to the International Organization for Migration (IOM) and the UNHCR in order to facilitate medical screening, identification and consular notification. Later on the migrants have been placed in detention centres, and after being interviewed by the UNHCR, it resulted that only a handful of the 500 were asylum seekers or Eritrean and Somali origin. Anyway the cable underlines that the practice consisted in Italy contacting the Libyan authorities to get the authorization for their return and consequently in transporting the migrants to Tripoli. As claimed in another cable named “UN official says Libya, Italy shirking HR responsibilities”¹³⁶, few months after the Hirsi case, UNHCR Chief of Mission Mohammed al-Wash complained that Italy was systematically breaking its commitments in respecting human rights returning asylum seekers together with other economic migrants. He cited another example of a return of 80 migrants, including refugees registered with UNHCR staff who were stopped on the

¹³⁴ UNCHR, Handbook on Procedures and Criteria for Determining Refugee Status, HCR/IP/4/Eng/Rev.1, 1992, available at <http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf>, (consulted on 5 April 2011).

¹³⁵ US Department of State Cable, *Libya takes back 500 Italy-bound migrants*, created on 14/05/2009, released on 31/01/2011, classified: Confidential, origin: Embassy of Tripoli, available at <http://213.251.145.96/cable/2009/05/09TRIPOLI391.html>, (consulted on 6 April 2011).

¹³⁶ US State Department Cable, *UN official says Libya shirking HR responsibilities*, created on 05/08/2009, released on 31/01/2011, classified: Confidential/Noform, Origin: Embassy Tripoli, available at <http://213.251.145.96/cable/2009/08/09TRIPOLI637.html>, (consulted on 6 April 2011).

high sea. The migrants in this case asked to talk with the ship's commander in order to inform him about their status of refugees and produced their UNHCR attestations. The Italian commander replied that he was under strict orders from his government to return migrants to Libya and ordered that all migrants should be removed from their vessel for the transport to Libya. At this point some of the migrants refused and as consequence physical altercations occurred between the migrants and the Italian crew. Some Africans were beaten with plastic, metal batons and electric shock ones, leaving at least six injured. The accident was filmed but the Italian Authorities confiscated phones, documents and personal belongings moreover Italians did not offer food to the migrants during the 12 hours interdiction and return operation. Al-Wash alleged that Italy was intentionally stonewalling the UN and that the Italian Ambassador refused several times to meet him declaring that he was a troublemaker. The UNHCR Chief of Mission was also hopeful that the EC would intercede to bring Italy in line, making reference to a recent letter from the EC to Italy reminding Italian obligation under the European rules and also making reference to the EC's precondition about Libya to sign a Memorandum of Understanding with UNHCR as prerequisite for a Framework Agreement.

As we have seen from the facts alleged, since a long time Italy and Libya put in practice at their sea borders a policy of denying basic human rights to migrants and of not respect the *non-refoulement* principle.

The Italian border control bodies are legally bound to the respect of international law concerned, not least because their activities have a functional territorial reference point and thus actually relate to sovereign territory. "Turning back, escorting back, preventing the continuation of a journey, towing back or transferring to non-European coastal states all constitute an exercise of jurisdiction requiring international human and refugee rights to be upheld"¹³⁷. The same is valid and legally binding even when the responsibility is transferred to African coastal States by means of operational cooperation and consequent displacement of immigration controls. As decided by the ECtHR in the *Xhavara* case, also at that time Italy did not fulfil its international responsibility for

¹³⁷ Fischer-Lescano & Löhr, 2007, p. 31.

borders control measures on the high seas and in Albanian coastal waters while implementing a bilateral agreement between Italy and Albania. In this case a boat of Albanian refugees sank after a collision with an Italian military vessel and the Court decided that Italy could not avoid its international responsibility by contracting out the forward displacement of border control measures¹³⁸.

As demonstrated by empirical proofs and juridical practice, any bilateral agreement or *de facto* practice commonly accepted between the two countries cannot be used as grounds for an exception not to apply the law governing the protection of refugees, especially when the country to which the *refoulement* is practiced, has one of the poorest human rights record concerning refugees.

In the next section we will see why the principle of *non-refoulement* must be so strongly and strictly applied in the practice adopted by Italy, EU and Libya in the South Mediterranean sea; we will see shortly what is the situation concerning human rights in Libya, its national law concerning refugees, the general policy applied towards migrants and why it cannot be defined in any case so far a “safe third country”.

2.4 LIBYA: A COUNTRY WHERE REFUGEES DO NOT EXIST

Since coming to power Gaddafi repressed all the basic human rights for the purpose of some so called “education of the masses”, repressing any parallel political or ideological idea.¹³⁹

The Libyan political system is based on local Basic People’s Congresses where all the local citizens take part and elect a People’s Committee as executive body which is represented at the General People’s Congress by a member and where people in turn runs the committees which are the equivalent of ministers. Since 1977 Libya is also better known as Great Socialist People’s Libyan Arab Jamahiriya, a State bases on a hybrid ideology of Socialism and Islam.

In practice the Revolutionary Committee, which exist in every sector, is a parallel institution which maintains ideological and political control of all Libya’s activities, so

¹³⁸ *Idem.*

¹³⁹ Human Rights Watch, 2006, *supra note* 110, p. 10.

even if people do not elect their representatives but participate themselves in government, everything is controlled by Gadaffi¹⁴⁰.

In 1988 Libya adopted the Great Green Charter for Human Rights in the Jamahiriyan Era, that recognizes some basic rights as dignity and integrity of human being, independence of judiciary, freedom of thought, equality between sex and whose main aim is the abolishment of the capital punishment, yet not accomplished.

Generally after several waves of repressions, on 1998 there was another general improvement with campaigns against torture, political prisoners, reduction of crimes sentenced with death penalty and improvement of the due process¹⁴¹, but everything still is far from the international standards and mostly words are left on the paper without any concrete improvement on the ground.

Today the situation is critical, especially for foreigners. The Government does not acknowledge the existence of any national, ethnic or religious minorities, even if compared to the national population of 5.3 millions, there are 600,000 legal foreign workers and around 1 million irregular migrants. This massive migration is due to the fact that Libya is the second wealthiest country in Africa, with Africa's largest crude oil reserves and a welcoming policy that started in 1999 pushing African people to move to Libya.

Since years Libyan government assumes that they do not have political refugees because all the people moving to and through Libya are economic migrants who want to find an opportunity in Libya or they try to reach the European coasts. But the reality is different; most of them are fleeing persecution in their home countries, like Somalia, Eritrea, Darfur and Sudan¹⁴².

Nowadays Libya does not welcome any more migrants from the South as it did it in the past and they are now perceived as a security threat due to the high unemployment among the foreigners living in Libya, who according to the local government, also take part in most of the crimes committed. They are accused of introducing crimes as traffic of drugs and prostitution but even of contaminating people with HIV, therefore anti-

¹⁴⁰ *Idem.* pp. 10-11.

¹⁴¹ *Idem.* p. 12.

¹⁴² *Idem.* p. 15

foreigner sentiment in the country has risen. Xenophobia is present in the society, the police makes large-scale arrests and these people consequently try to move to Europe, where they found themselves rejected and forcibly returned to Libya.

Libya has no asylum law or asylum procedure for the well-known perception that there are no asylum seekers or refugees in Libya, but some officials recognize that there is the presence of refugees, but if the government would offer an option for asylum, people would come “like a plague of locusts”¹⁴³.

Nevertheless in the country it does exist a system of refugees protection offered by the national law but it is not implemented in concrete at all and it rest death paper. Libya’s Constitutional Proclamation from 1969 affirms that extradition of political refugees is prohibited and Law 20 of 1991 claims that Jamahiriya supports the oppressed and that refugees are protected and should not be abandoned to their destiny. Both the laws have constitutional value. Libya is not signatory of the 1951 Geneva Convention but has ratified the CAT (Convention Against Torture), the ARC and the customary law obliges her not to *refoul* people where they can face persecution or their lives or freedom are at risk.

According to members of the former government, an informal and hoc committee was settled to examine proposals for an asylum law but so far any progress has been made¹⁴⁴.

The UNHCR is present in the country since 1991 but a Memorandum of Understanding (MOU) was not signed so far with the UN agency. On 9 June 2010 the Libyan government ordered the agency to cess its activities and it was formally expelled from the country¹⁴⁵. Few weeks later, the agency was allowed to re-establish a partial activity¹⁴⁶ but the lack of formal working agreement restricts UNHCR from full performing its mandate. Most of the migrants in the country do not even know about the

¹⁴³ *Idem.* p. 20

¹⁴⁴ *Idem.* p. 23

¹⁴⁵ Migrants at Sea, *Libya Orders UNHCR Office Closed – Possible Link to EU-Libya Talks on Partnership Accord*, 9 Jun 2010, available at <http://migrantsatsea.wordpress.com/2010/06/09/libya-orders-unhcr-office-closed-%E2%80%93-possible-link-to-eu-libya-talks-on-partnership-accord/>, (consulted on 7 April 2011).

¹⁴⁶ Migrants at Sea, *Libya to Permit UNHCR to Resume Limited Activities*, 27 Jun 2010, available at <http://migrantsatsea.wordpress.com/2010/06/27/libya-to-permit-unhcr-to-resume-limited-activities/>, (consulted on 7 April 2011).

presence of the UNHCR office and consequently they do not know where to appeal for the respect of their rights¹⁴⁷.

As already underlined, another main problem are the arbitrary arrests of foreigners on a random basis and consequent detention in overcrowded detention facilities. After the arrest and, an indeterminate detention with a lack of access to any right accorded by the due process of law, migrants are expelled regardless of whether they might face persecutions or torture upon their arrival.

Libya is party to the International Covenant on Civil and Political Rights (ICCPR) whose Art. 9 states that “no one shall be subjected to arbitrary arrest or detention or deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”. Nevertheless it seems that in Libya, even if there is a law against public officers’ corruption and guidelines to protect the life and property of arrested foreigners, this law is not implemented even at a minimum level. Cases of abuses at the time of arrest, including beating, substandard conditions, denial of access to legal counsel, physical abuses, sexual violence, seizure of property and extortions are at the *ordre de jour*.

In Libya there are two types of facilities to hold undocumented foreigners before their deportations: voluntary and involuntary. But in reality the voluntary ones are only a formality, considering that most of the people go there just because of the fear to be arrested, maltreated and detained in the involuntary ones which conditions are deplorable.

Libya ratified the CAT whose Art. 3 does not allow to extradite a person to a country where there are substantial grounds for believing that he would be in danger of being subjected to torture and also the Libyan Law 20 “On Enhancing Freedom” forbids such practice as well. Despite that the Libyan government declares to send back only economic migrants, it pretends even to do a favour sending them home instead of allowing people to undertake a dangerous trip to Italy, for instance. Usually deportations are carried out by land and immediately after being deported from Italy they are subsequently transferred to their country of origin without any screening on their potential refugee status. The European Parliament passed different resolutions calling on Italy to stop the

¹⁴⁷ Human Rights Watch, 2006, *supra* note 110, p. 27.

collective expulsions to Libya in the context of the Friendship Agreement, due to the lack of respect for neither migrants' dignity nor their survival¹⁴⁸.

For what concerns the protection of minorities, Libya, under Art. 17 of the Great Green Charter for Human Rights affirms that the Jamahitiya society rejects any discrimination based on grounds of colour, sex, religion or culture, nevertheless the Committee on the Elimination of Racial Discrimination pointed out that Libya has no comprehensive legislation to prevent, prohibit or remedy to such discriminations¹⁴⁹.

Migrants, especially of black ethnicity, are subjected to several kind of violation of their dignity. Many times they are not paid for the work they have completed only on the ground that they are discriminated and even if they ask to the police to enforce their rights, they find themselves in front of the officers' hostility and indifference. In Libya formally foreigners enjoy the same rights than Libyans, but in practice there is a lot of discrimination between a citizen of the country and a migrant. If they only try to report violence from Libyans they risk to be arrested. In Libya rules the law of tribes not the law of fairness¹⁵⁰.

In the Libyan criminal justice system, foreigners enjoy the same rights as Libyans. They must be informed of the reason of their arrest, have access to counsel and receive a fair trial. Libyan law consider torture a crime. Art. 2 of the Great Green Charter for Human Rights prohibits any punishment that would "violate the dignity and the integrity of a human being". Nevertheless many migrants complained with NGOs about torture treatments committed especially by the police forces, about violation of the due process of law, including not being informed of the allegation, lengthy periods of pre-trial detention, restricted access to lawyers, poor translation and inability to mount an adequate defence¹⁵¹.

In the recent years the condition of the prisons in Libya have also improved but it is not up to international standard. The main problem is overcrowding and maltreatment.

Another problem, as already underlines is the executions of foreigners, as the capital punishment is still in place in the Libyan society.

¹⁴⁸ Human Rights Watch, 2006, *supra* note 110, p. 56.

¹⁴⁹ *Idem.* p. 61.

¹⁵⁰ *Idem.* p. 67.

¹⁵¹ *Idem.* p. 72.

In 1969 Libya adopted a post-monarchy Constitutional Proclamation until a permanent constitution is adopted. Regarding the rights of refugees, Art. 11 states that “the extradition of political refugees is prohibited”. Also Libya’s criminal code is formally fairly in accordance with the international standards, but the problem is the lack of implementation. The same problem concerns the international law. The government claims that international treaties take precedence over the domestic provisions but in practice there is no evidence of such a practice. International law is never cited in the daily work of judges and prosecutors.

As already underlined, Libya adopted the African Charter on Human and People’s Rights¹⁵² which affirms a wide range of human rights and is also party to the OAU Refugee Convention, which among the others things, expands the definition of refugee, including those who flee “external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country”. Without falling into analyse the difference and legal framework of the ARC and 1951 Refugee Convention, we can say that paragraph 9 of the preamble of the ARC recognizes her twin sister as basic universal instrument relating to the status of refugees, Art. 8 of the same convention requires States to cooperate with UNCHR, therefore the natural consequence is that the contracting party to the ARC should also accede to the 1951 Convention, or at least collaborate constructively with the UNHCR¹⁵³. Concluding, the ARC also has Art. 2(3) that contains the obligation of *non-refoulement*, so it seems that in Libya there is a complete lack of implementation and law enforcement.

What can be considered even more despicable, on the other side, is the Italian systematic interdiction on high see and consequent *refoulement* in the context of the Friendship Agreement to such kind of country. Libya cannot be considered a safe third country neither for the foreigners escaping from it nor actually (in consideration of the civil war) for its own citizens. There is no guarantee which can be offered formally or in practice that people pushed back to Libya will not suffer of their rights’ violation as protected by the customary principle of *non-refoulement*. Moreover the same way, there

¹⁵² African (Banjul) Charter on Human and Peoples’ Rights, Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

¹⁵³ Human Rights Watch, 2006, *supra* note 110, p. 88.

is not any guarantee, and instead is quite clear, that people sent back will be clearly *refouled* to a third country or to the country of origin, a practice against the principle of “chain *refoulement*” whose responsibility therefore is without any doubts imputable to the Italian Government, and partly to the EU which does not make anything concrete to make cess such practice.

This situation, as made evident by the practice demonstrated, represents, without any doubts, a bilateral partial externalization of migration management in the framework of an illegal agreement contrary to both sides’ international responsibilities as made evident by the international treaties signed and by the customary law in force. But the most scaring aspect is that actually the Libyan rebel leader promised Italy that a post-Gaddafi Libyan Government will respect all agreements with Italy by including those involving combating irregular migration¹⁵⁴. Maybe even a civil war is not enough to show people what is wrong and what is right, especially when the economic interest are so prominent.

In the next chapter I will accordingly proceed with taking into analysis a wider prospective and investigate the Framework Agreement negotiated between the EU and Libya in the context of migration management. I will make clear how this other instrument was not planned to be so different from the bilateral one between Italy and Libya, nevertheless the protracted critics of the EU directed at the Italian government and the critique expressed by the European Parliament concerning its negotiation procedure as contrary to the law settled in the Lisbon Treaty.

¹⁵⁴ Migrants at Sea, Libyan Rebel Leader Jalil Promises to Respect Immigration Agreements Between Libya and Italy, 29 March 2011, available at <http://migrantsatsea.wordpress.com/2011/03/29/libyan-rebel-leader-jalil-promises-to-respect-immigration-agreements-between-libya-and-italy/>, (consulted on 8 April 2011).

3 THE EU/LIBYA FRAMEWORK AGREEMENT

3.1 THE EU/LIBYA PROCESS OF ENGAGEMENT

When in 2003 the European Security Strategy was published, the EU had already well-established relations with all the relevant neighbours of the Mediterranean region except Libya. Libya with the largest proven oil reserves in Africa has always represented, in energy political terms, an ideal partner for Europe, considering also that its vast majority of oil reserves are sold to European countries covering 6.9 % of total EU imports of energy and that at the same time the EU is the first trading partner for Libya. In 2003 when the Libyan government turned towards the international community by disclosing and dismantling its nuclear, chemical and biological weapons programme, the EU in 2004, in recognition of the major efforts accomplished by the country, decided to embark upon a policy of engagement with Libya¹⁵⁵.

But already before the 2004 Council's decision to enter into relations with Libya, in 2002 during the European Council of Seville, the need for the integration of irregular migration issue into the Union's relation with third countries was perceived as urgent and the EU Ministers for Foreign Affairs underlined the need to initiate cooperation with Libya on this matter¹⁵⁶.

In 2004 therefore, in coincidence with the lift of the embargo imposed by the UN it was envisaged to dispatch a technical mission to Libya in order to evaluate the possibility of preparation of a plan to control irregular immigration. In 2005 the Council in the field of migration adopted a concrete commitment towards cooperation and an *ad hoc* dialogue with Libya was set.¹⁵⁷

In 2007 the Council proposed discussion on a EU/Libya Framework Agreement and

¹⁵⁵ Gianniou Maria, EU and Libya: A Give and Take Relationship, EKEM/EUROMEDO, 2010, available at http://www.ekemprogram.org/euromedo/index.php?option=com_content&view=article&id=176:eu-and-libya-a-give-and-take-relationship&catid=37:2010-05-05-10-07-53&Itemid=59, (consulted on 26 April 2011).

¹⁵⁶ *Idem*.

¹⁵⁷ Council of the European Union, Justice and Home Affairs Council, Conclusions on Cooperation with Libya in Migration matters, Luxembourg, 2-3 June 2005, 8849/05, available at <http://www.eu2005.lu/en/actualites/conseil/2005/06/02jai/jaijai.pdf>, (consulted on 16 May 2011).

invited the Commission to present draft-negotiating directives “according to the fundamental principles inspiring the foreign policy of the European Union”¹⁵⁸. Some months later the Commission submitted to the Council a negotiating mandate for a Framework Agreement with Libya and as a consequence the Commission’s negotiations mandate was approved by the Council and on November 2008 negotiations officially started but the seventh round of negotiations on the partnership accord began only on 8 June 2010.

In 2009 the Commission started preparing, in the context of the European Neighbourhood Policy Instrument, the first Country Strategy Paper (CSP) and a National Indicative Programme 2011-2013 for Libya¹⁵⁹. The former is a document referring to a certain country where the priorities of action are defined and the general aims of the Union’s assistance during a certain period of time are analyzed, based on an in depth analysis of the economic, social and institutional situation in the country. The latter contains a list of priority areas for cooperation as well as indications of results to be achieved by the programme. These are also included in the Strategy Paper. The draft process of such documents includes first a consultation of the relevant national stakeholders. In this phase Libyan authorities and other stakeholders not well defined in the explanatory note were consulted but without any clearance on the inclusion of the national civil society’s consultation. Then there was a presentation of an explanatory note to the Development Group, which represents the main external donors (in particular all main UN agencies such as UNDP, UNHCR, WFP, IOM UNODOC, WHO, UNIO, the USA, Canada, large oil companies as ENI, Petro-Canada, Exxon, Stat Oil Hydro, and a private university and NGOs). At the end there is the presentation of a Concept Note¹⁶⁰, which, with the relevant comments included by the national authorities, represents part of the final draft of the Country Strategy Paper (CSP).

¹⁵⁸ Libya: Commission proposes negotiating mandate for a Framework Agreement”, European Commission, Brussels, 27 February 2008, IP/08/308

¹⁵⁹ European Neighbourhood and Partnership Instrument, Libya, Strategy Paper and National Indicative Programme 2011-2012, available at http://ec.europa.eu/world/enp/pdf/country/2011_enpi_csp_nip_libya_en.pdf, (consulted on 16 May 2011).

¹⁶⁰ Concept Note Libya – Country Strategy Paper and National Indicative Programme 2011-2012, available at http://ec.europa.eu/world/enp/mid_term_review/final_concept_note_libya_en.pdf, (consulted on 16 May 2011).

The final Concept Note was circulated among EU Member States represented in Libya, the members of the DCG and the various international financial institutions, like the World Bank, and was posted on the website of the Commission. The Commission also informed the Brussels based civil society organizations with an interest in the ENP of the region, in order that they could provide comments on the concept note. But still, something is missing and it is the involvement of the local national Libyan civil society, which does not seem to have been consulted at any stage, bring at this point to the consideration that not all the interest are represented in the adoption procedure of such a document.

The EU aspirations were to conclude an agreement on the Framework Agreement by the end of 2010 even if the progress in the negotiation has always been slow, due to the fact that the Libyan government has always been conscious of its advantage *vis-à-vis* Europe as far as the migration issue was concerned and has always used it as a mean to forestall negotiations and to secure modern military equipment, training and funds. As an example of this attitude in May 2010 during an official meeting with Italian and EU authorities, the Libyan government complained about the fact that the EU and partially Italy were supposed to invest in a satellite border control system but so far only Italy had done its part and the EU had not.¹⁶¹

Another aspect that made its part in slowing down the negotiations, provoking also some criticism in the public opinion and in the top EU institutions, was the negotiation chapter concerning human rights. The EU was supposed to find a balance between solving the issue of irregular migration and fulfilling its duty to respect human rights as Europe's top foreign policy priority, but till the end, namely the interruption of the negotiations due to the 17 February Revolution, the Commission was accused by several parties of using a different standard with Libya and closing an eye on its poor human right record and limited interest in human right's promotion.

In the next section I will focus on the specific contents of the Migration Cooperation Agenda, as negotiated in the context of the Framework Agreement. I will concentrate

¹⁶¹ *Idem.*

on the Commission press release at the time of the signature as the only source of information referring to the document disclosed to the public so far.

3.2 THE EU/LIBYA MIGRATION COOPERATION AGENDA

On 4 and 5 October 2010 during a visit of the European Commissioner for Home Affairs and the Commissioner for Enlargement and European Neighbourhood Policy an agreement on a migration cooperation agenda was signed between EU and Libya¹⁶².

In consideration of the several positive developments in 2010 between the two parties, namely good progress in the negotiation of the Framework Agreement, increased financial aid for Libya's reforms amounting to 60 million for the period 2011-2013, the opening of a EU Office in Tripoli and an agreement to develop a migration cooperation, the document was finalized.

This cooperation agenda included concrete steps on border surveillance, mobility-related issues, smuggling and trafficking in human beings and dialogue on refugees and international protection. The protection of fundamental rights of all people involved in migratory and asylum flows was considered, by both Commissioners, as being at the centre of EU efforts to establish relations with Libya.

Among the other shared points, the two sides discussed establishing an informal group of senior officials that would oversee the implementation of the agreement and the possibility to implement the instrument with a range of activities such as sharing of experience and best practice, financing actions and acquisition of equipment in accordance with applicable rules.

Both sides also agreed on the below following initiatives as part of possible further dialogue and cooperation.

In the context of the Regional and Pan African dialogue and cooperation the two sides established a joint effort aimed at the development of the African countries of origin of the migration flows in order to address the root causes of migration and creating viable

¹⁶²European Commission press release, *European Commission and Libya agree a Migration Cooperation agenda during high level visit to boost EU-Libya relations*, 5 October 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/472>, (consulted on 27 April 2011).

economic alternatives. Under the agreement, the EU and Libya will support awareness-raising campaigns to take place in the main countries of origin and transit specially aimed at alerting migrants to the dangers of irregular migration. Both of them will work in the implementation of the Declaration of Tripoli on Migration and Development of 2006 and the EU-African Migration, Mobility and Employment Partnership adopted in Lisbon in 2007. The parties will increase the dialogue and exchange of information regarding the issue of smuggling and trafficking in human beings concerning the movement of people to Libya and to EU from Libya. Libya and EU will also establish a mixed consultative group of experts that will exchange information on development of policies benefitting Africa¹⁶³.

In the context of mobility both parties agreed to simplifying the granting of short stays visas to Libyan citizens and entry and exit visas requirements for EU citizens entering or leaving Libya and other requirements limiting circulation as the burden to translate the passport in Arabic. Still in theme of mobility it was decided to carry out seminars and exchange of information to improve the mutual knowledge of the procedures and practices ruling Libyan visas policy and the EU common visa policy.

With regard to ensuring effective management of migration flows, it was agreed to support the development in Libya of a more efficient system to manage labour migration allowing the maximization of the skills of those already present in the country and of the newcomers. It was decided to exchange the capacities of Libyan authorities, local NGOs and international organization in order to be able to launch and implement search and rescue operations in the desert and high sea and provide migrants with the necessary humanitarian assistance. It was set to provide decent treatment, reception and assistance to those intercepted, readmitted or to be returned by Libyan authorities with particular focus on the vulnerable groups. It was planned to offer assisted voluntary return home to irregular migrants intercepted, readmitted or to be returned by Libyan authorities and offer support for their social integration. It was also proposed to enhance the capacity to address smuggling and trafficking in human beings by taking into account also the Ouagadougou Action Plan (an AU instrument) to combat

¹⁶³ *Idem.*

trafficking in human being¹⁶⁴.

In relation to the border management it was decided to carry out gap analysis on the current modalities of the Libyan border and immigration services to prevent irregular migration and reinforce the capacities of control. It was planned to strengthen cooperation between Libya and the neighbouring countries transit and origin countries in issues of border surveillance and with regard to the prevention of attempts of irregular migrants to violate Libyan borders, through promoting joint patrolling. The two sides also agreed to support the development of Libyan patrolling capacities in territorial waters and high sea, to set up an integrated surveillance system along the Libyan borders and explore the concrete possibilities of cooperation between Libyan police, borders control authorities and agencies, with those of the EU member States.

Finally, in the context of international protection the two parties established to support Libya in its efforts to develop a protection system for asylum seekers and refugees in line with the international standards and in good cooperation with competent international agencies in particular providing advice in developing a legislation in line with the 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa. Lastly, another aim was to assist the Libyan authorities in screening migrants in order to distinguish between those in need of international protection and the unsuccessful asylum seekers supporting the voluntary return of some of latter back to their countries of origin¹⁶⁵.

As concluding remark, there is not too much to say about the content of this Migration Cooperation Agenda, first because its content is quite generic and standard and second because only its future implementations would show its capacities and long term plan on the ground. What is quite clear is that any reference to preconditions referring to the enforcement of human rights standard in Libya, before the entering into force of the agreement, is absent.

In the next section I will take therefore into analysis three US Embassy Cables published by Wikileaks as sources of evidence of the various interests and problems

¹⁶⁴ *Idem.*

¹⁶⁵ *Idem.*

hidden behind the negotiations of the Framework Agreement and its Migration Cooperation Agenda.

3.3 THE EU/LIBYA FRAMEWORK AGREEMENT: BEHIND THE SCENES

In July 2008, an US Embassy Cable¹⁶⁶ was written by the US Embassy's Chargé d'Affaires John Godfrey and it gives a particular overview on how the Framework Agreement was apparently perceived by the Government of Libya (GOL).

Libya has always viewed the Framework Agreement as a reward for the Libya's decision in 2007 to release six Bulgarian and Palestinian health workers accused of having infected over 400 Libyan children with HIV. The GOL in order to avoid the perception that it caved to foreign pressure to resolve the case, outshined to the public opinion the mirage of a EU framework agreement as relevant concession and success of the Libyan diplomacy. At the time, the draft agreement laid the foundations for easier access to Schengen visas for Libyan citizens and increased infrastructure investments in Libya, and, when the announcement of good development in the approval of the mandate to open the negotiations was given, it kept alive GOL's hopes for rapid progress.

Libya's main aim, according to some EU diplomats, as the French, Spanish and German, was to reduce the mandatory waiting period for Schengen visas from 10 days to 48 hours, as the cable makes clear, and many GOL officials, one year after Ferrero-Waldner, former commissioner for external relations and neighbourhood, initiated a draft memorandum on the EU-Libya agreement, said that the 48 hours Schengen visa point was already in place¹⁶⁷.

In the draft version Libya agreed in principle also to negotiate a human rights chapter within the text of the framework agreement but it was categorically refused to include discussions on individual human rights cases. Much more emphasis was put on the need by the EU to fund a surveillance mechanism along Libyan land and sea borders to

¹⁶⁶ US State Department Cable, *The EU-Libya Framework Agreement: Veni, Visas, Veto*, created on 14/07/2008, released on 01/02/2011, classified: Confidential, Origin: Embassy Tripoli, available at <http://wikileaks.ch/cable/2008/07/08TRIPOLI567.html>, (consulted on 9 May 2011).

¹⁶⁷ *Idem*.

combat irregular migration.

Some curiosities coming out from the cable result to be that certain countries, after having perceived the Libyan enthusiasm to move ahead in the negotiation, have tried to block the agreement as a means by which to obtain bilateral concessions by the country, mainly with regard to commercial and human rights issues.

Italy, for instance, tried to put an end to the Libyan discriminatory commercial practices targeting Italian firms. France and Greece tried to dangle a veto threat in order to resolve commercial disputes; the Netherlands put on the table Libya's remarkable private debt to Dutch firms; Denmark wanted a lift on the bans on Danish imports and Danish participations in infrastructure projects in Libya due to the Danish cartoons depicting Islam and they also wanted the release of a Danish-Libyan dual national citizen arrested in 2007 after being accused to have connection with the organization of a political demonstration; Maltese diplomats considered a veto due to the great dissatisfaction with the Libyans attitude towards the flow of irregular migrants and some problems between the two countries in the patrolling of the national Search and Rescue maritime zone¹⁶⁸.

In general, European diplomats believed that the EU had little to gain from a closer cooperation with Libya, apart the possible help in combating the irregular migrant's flows from sub-Saharan Africa and South Asia through Libya to Europe.

As we have seen, at that time, some countries such as Italy pushed more for a bilateral cooperation considering such approach more efficient than acting in the context of a broader EU framework agreement. Italian diplomats made a donation of six vessels to Libya's coast guard and offered to train Libyan security officials as a sign of considered meaningful EU engagement on illegal migrant flows from Libya¹⁶⁹. Nevertheless, as made clear in another cable¹⁷⁰, at the time, the Italian Ambassador Francesco Trupiani was quite disappointed by the Libyan attitude and collaboration in stemming the migrants flow towards Italy, mainly because of the Italian strong efforts to collaborate

¹⁶⁸ *Idem.*

¹⁶⁹ *Idem.*

¹⁷⁰ US State Department Cable, *The Frogman Who Couldn't Swim: A Cooperation Cautionary*, created on 17/02/2009, released on 01/02/2011, classified: Confidential, Origin: Embassy Tripoli, available at <http://wikileaks.ch/cable/2009/02/09TRIPOLI155.html>, (consulted on 9 May 2011).

and the funds allocated. In his opinion, large numbers of irregular migrants were transiting through Libya with the tacit consent of the GOL officials because an increased number in irregular migrants moving to Europe meant an increase in the amount of money involved. For him there was a nexus between smuggling of irregular migrants, arms trafficking, movement of terrorists and he lamented that no one was doing something to make the GOL more accountable about this issue. The GOL appeared to intentionally fail in addressing these problems and collaborate with Italy and the EU, with the final aim to force negotiations for a Libya-EU Framework Agreement and use these issues as blackmail.

As made clear in the pre-cited cable, the GOL was conscious of its power towards the EU for what concerns the control of the migration agenda and accused Europe of trying to create a bulwark against irregular migration from the sub-Saharan Africa. This was underlined for instance, when Sarkozy proposed Libya to participate to his Union for Mediterranean as an attempt, in Gadaffi's opinion, to make Libya run off from the African Union and the Arab League commitments.

One of the most interesting aspects is clearly the one concerning human rights in the context of the framework agreement's negotiations. There is a full cable¹⁷¹ relative to this detail, namely concerning the International Criminal Court and crimes against humanity.

According to the content of the document, Libyan negotiators were against any public statement affirming that EU and Libya agreed to discuss crimes against humanity in an international context and affirmed that any mention of the International Criminal Court (ICC) or text similar to the Rome Statute would cause a total breakdown of the negotiations of the agreement.

The EU member states' diplomats taking part to the negotiations said that discussions on the political framework were particularly heated. These kinds of affirmations sounds unusual because according to the UK Embassy, nothing in the political dialogue paper is binding on either parts and that is nothing more then an agenda-setting for future

¹⁷¹ US State Department Cable, *EU-Libya Framework Agreement Hangs On ICC, Trade, Migration*, created on 19/07/2009, released on 31/01/2011, classified: Confidential/Noform, Origin: Embassy Tripoli, available at <http://wikileaks.ch/cable/2009/07/09TRIPOLI579.html>, (consulted on 9 May 2011).

discussions¹⁷².

From the tone adopted by the Libyan negotiators in the case of the ICC it is possible to get the impression that they were fully conscious of their power and political advantage over the EU in negotiating the agreement and that they were ready and resolute in taking advantage of this position. On the other hand the EU delegation seemed, as we have also underlined previously, in the mood to pander their requests and close an eye on the chapter concerning human rights and the possible Libyan commitment to the international standards for what concerns crimes against humanity. They were tempted to overlook the poor Libyan human rights record in order to proceed quickly in the negotiations¹⁷³.

In the next section I will consider some assessments and criticism voiced against the framework agreement, especially those released by members of the European Parliament involved in the case or representing the institution on the matter, together with opinions from relevant NGOs. But my starting point will be a famous declaration of the EU Commissioner for Home Affairs, Cecilia Malmstrom.

3.4 THE FRAMEWORK AGREEMENT UNDER THE PUBLIC SCRUTINY

During a visit in Rome in April 2010, EU Commissioner for Home Affairs, Cecilia Malmström, declared that the European Union in any agreement with Libya on immigration would not follow Italy's footsteps, namely the Benghazi pact. She underlined that *conditio sine qua non* for any agreement with Libya would be the country to adhere to the 1951 Geneva Convention, to which the Italian-Libyan agreement makes no reference¹⁷⁴.

As we already know in June of the same year the GOL ordered the UN Refugee Agency to close its offices in the country, a quite clear illustration of Libya's approach to refugee protection.

On October 4-5, 2010 Cecilia Malmström and Stefan Füle, respectively Commissioner

¹⁷² *Idem*.

¹⁷³ Hamood, 2008, p. 24.

¹⁷⁴ Euroactiv, *Europe Against the Italian asylum policy*, 30 April 2010.

for Home Affairs and Commissioner for Enlargement and European Neighbourhood signed the migration cooperation agenda included in the framework agreement with Libya. Such decision left the public opinion speechless and astonished because since the beginning of the establishment of the bilateral collaboration between Italy and Libya, Europe has always been critic calling on the respect for human rights and asking the Italian government to clarify its content. Few months later, instead, a pact was signed and one of its main authors, Commissioner Malmström, was the one who used to criticize Italy for the lack of inclusion of human rights in its treaty with Libya.

As already evidenced the specific content of the migration agenda has never been disclosed to the public and all we have it is its content according to the press release of the Commission at the time.

Few days after the agreement was finalized, the European Council on Refugees and Exiles (ECRE) published an interview with Member of the European Parliament (MEP) Sylvie Guillaume¹⁷⁵ from which we can get a first impression on the agreement. From the interview it is possible to evince the preoccupation for engaging in cooperation with a country that did not sign the Geneva Convention, where the word “refugee” is a taboo and which recently closed the UNHCR office. The MEP underlines that this way member States are giving up on their responsibilities in terms of respect for human rights, negotiating in financial and trade terms as compensation to the third country for doing the “dirty” job in managing the migrations flows. For three years the attempts of the Commission in negotiating with a supposed reliable partner had failed mostly on the question of human rights and now it seemed that nothing is changed, apart the EU attitude to close an eye. This agreement also legitimized somehow the Italian push back policy and sending migrants back, would become a formality when the European borders would be pushed further and further out of its territory outsourcing the EU’s borders.

But one of the key points of the interview is that the EP has not been kept informed on the ongoing negotiations, despite the new rules set by the Treaty of Lisbon regarding the matter.

¹⁷⁵ ECRE interview with Sylvie Guillaume (S&D, France), member of the LIBE Committee available at http://www.ecre.org/resources/ECRE_actions/1641, (consulted on 10 May 2011).

The same concept is expressed by another interview¹⁷⁶ of January 2010 by ECRE with MEP Ana Gomes, special rapporteur on the negotiations on the EU-Libya Framework Agreement. In this interview Gomes underlined again that the EP was not informed about the phases of negotiation and even herself, as its rapporteur on the agreement, did not have the possibility to access the mandate given by the Council to the Commission for the negotiation till January 2010. The rapporteur in the interview expressed also another important concern related to the mandate, namely about its content which seems to be fairly standard. This was surprising because Libya did have a very poor record in the rule of law standards.

The special rapporteur also expressed the idea that any bilateral agreement, such as those between Italy and Libya on one side and France and Libya on the other, should be clearly disciplined by a EU framework agreement that is firmly based on human rights and European principles and values (even, as we have seen, this is not even happened in the EU case). She also express the idea that any readmission agreement between EU and Libya can interest irregular migrants, but needs to exclude who can be considered asylum seekers, refugees or persons in need of international protection.

What is easy to capture from these interviews is the strong position of both MEPs towards the respect of human rights and the role the EP should play in pushing on the Commission in order to keep its action, in the negotiations of the agreement, more close to the EU values and in respect of human rights.

But what is even more interesting, especially making reference to the second interview is the fact that the day before the interview, the EP has adopted a recommendation¹⁷⁷ prepared by the above special rapporteur, but this recommendation did not express the apparent strong disappointment of the MEPs. This can be due to the procedure normally adopted by the Parliament's committees, where before a recommendation is adopted in its final version, it must pass the scrutiny of the different members, that usually in this

¹⁷⁶ ECRE Interview with Ana Gomes, MEP (Portugal, S&D) on 21-01-2011 available at http://www.ecre.org/files/2011_01_21%20ITW%20Ana%20Gomes.pdf, (consulted on 10 May 2011).

¹⁷⁷ European Parliament recommendation of 20 January 2011 to the Council on the negotiations on the EU-Libya Framework Agreement, INI/2010/2268 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0020+0+DOC+XML+V0//EN&language=EN>, (consulted on 10 May 2011).

phase, have the possibility to amend the text and change its final outcome, as many times in my work at the Parliament I noticed happening.

Before the above recommendation was passed a draft proposal¹⁷⁸ was prepared, but the substantial difference between the two was that the final text adopted, compared to the draft proposal, contained very weak language regarding the negotiation of the readmission agreement with Libya. The final text still is critical of the secrecy of the Council/Commission negotiations with Libya but it eliminated the call for an end to the negotiations on readmissions and replaced that part with a call for the respect of the rights of persons subjected to a future readmission agreement, resulting in the end slightly watered.

From this analysis it is quite clear that even the EP, which should check somehow the work of the other institutions, is attempting not to criticize too strongly what has been so far in the negotiations. This can be given by the clear necessity, acknowledged probably also by the EP, that an agreement with Libya at this time is impellent, whatever it is its temporary content, more or less respectful of the adoption procedure or of the human rights assessment. This is also demonstrated by a recent Draft Resolution¹⁷⁹ adopted on 16 March 2011 by the EP's Foreign Affairs Committee calling for the reinstatement of the EU-Libya cooperation agreement on migration, signed in Tripoli on 4 October 2010 by Commissioner Cecilia Malmström, as soon as a new transition government able to respect human rights is in place in Libya.

In my opinion calling for only a reinstatement without a clear scrutiny of what has been done so far is like accepting the work done and legitimize the secret approach adopted during the phase of negotiation, showing that even the EP is in the end interested only in getting an agreement with Libya, it does not matter in which way, with which content but as soon as possible in order to block the “black wave”.

¹⁷⁸ Draft report with a proposal for a European Parliament recommendation to the Council on the ongoing negotiations on the EU-Libya Framework Agreement, 2010/2268/(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE452.883>, (consulted on 10 May 2011).

¹⁷⁹ Draft report on migration flows arising from instability: scope and role of the EU foreign policy, 2010/2269(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.355+02+DOC+PDF+V0//EN&language=EN>, (consulted on 11 May 2011).

My position, for what concerns the reinstatement of the agreement, is closer to that of MEP Ms. Ana Gomes. She recently, on 17-20 May visited Libya having also the opportunity to meet the representative of the Interim Transnational National Council (ITCN) and published a report. In the latter she stressed that “several interlocutors evidenced that the aim of the 17 February Revolution was to establish a secular democracy, with full respect for human rights for all. The leader of the Libyan Muslim Brotherhood the same way had concurred that equality should allow for women to be also eligible to the presidency of the state in a future Constitution”¹⁸⁰. Ms. Gomes also underlined that “ITCN representatives were keen to assure that the democratic state they envisage to build in Libya will be a reliable partner for Europe in preventing their country from encouraging migrations to Europe”¹⁸¹. In view of the latter considerations she supports the idea that once there will be a transitional government administering the whole territory of Libya, negotiations should be restarted anew and of course, human rights, the rule of law and democracy promotion must be at the top of the agenda. She thinks that the new authorities will be sensitive and supportive of this approach, at least from what she heard from ITNC members in Benghazi¹⁸². In my opinion therefore the most urgent thing, once Gadaffi will be eventually out of the games, is to renegotiate the framework agreement with the new Libyan government that will be in place and pay more attention to the human rights aspect.

¹⁸⁰ Report – *Visit to Benghazi 17-20 May 2011* – by MEP Ana Gomes, p. 2, available at <http://www.anagomes.eu/PublicDocs/03538245-849e-4c99-aa4a-3971226294e3.pdf>, (consulted on 31 May 2011).

¹⁸¹ *Idem*.

¹⁸² Content extracted from my short question time with MEP Ms. Ana Gomes on 31 May 2011 on the official European Parliament’s facebook chat, available at https://www.facebook.com/europeanparliament?sk=app_188929731130869, (consulted on 31 May 2011). Full quote is as follows: Paolo Biondi: “Honourable Ms Gomes, what do you think we should do for the future of the EU/Libya framework agreement? Do you think Libya is ready to fulfil the EU’s human rights standards requested by the European Neighbourhood Policy for a country to be part of the latter?” MEP Ms. Ana Gomes: “Once we will have a transitional government administering the whole territory of Libya, I think we should restart negotiations with that end. And of course, as EP has recommended in its January resolution on that agreement being negotiated, human rights, the rule of law and democracy promotion must be at the top of the agenda. That is crucial to also ensure protection of refugees and migrants, including those who Libya will continue to need. I think that the new authorities will be sensitive and supportive of this approach, based on what I heard from TNC members in Benghazi”.

Now that Gadaffi is in political control difficulty, the EU has the unique opportunity not only to create a buffer zone in Libya in the context of its externalization of migration management, but also to impose its conditions. But the question is: does the European Union have enough political weight and will to influence Libya?

Such kind of agreement, set in the context of the ENP, can provide the EU with genuine tools to influence the human rights situation in Libya. The precondition to participate in the ENP is the acceptance and employment of certain principles, such as democracy, rule of law and respect for human right. Hence in consideration of this conditionality the EU could set precise benchmarks, such as development of national asylum legislation in compliance with the international standards, abolition of physical abuse and maltreat and a full screening of process for asylum seekers¹⁸³. By means of the ENP the EU could also support the local civil society, provide assistance to NGOs, human rights organizations like the UNHCR, independent media as well as promote human rights campaigns concerning the human rights violations¹⁸⁴.

Hence there would be tools to use, but is the EU ready to use them even in consideration of the economic interests involved and the struggle to prevent the flow of people at any cost?¹⁸⁵

3.5 EVALUATION IN LIGHT OF HUMAN RIGHTS

As we have already seen in chapter 1.5 the Associations Agreements still constitute the main bilateral instrument of negotiation for the EU and our EU-Libya Framework Agreement is precisely one of those, even if in the new context of the ENP. The main critics from the human rights point of view by NGOs and European institutions, principally the EP, at this point came out because of the apparent dilution of the positive conditionality in negotiating the agreement with Libya. The final strategy of the EU in the context of the ENP towards its neighbours should be to link conditionality with

¹⁸³ Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 303 final, A New Response to a Changing Neighbourhood, 25.05.2011.

¹⁸⁴ Kananen, Marko, *Externalization of migration management – the Libyan case*, 2009, available at http://www.afrique-europe-interact.net/index.php?article_id=193&clang=1, (consulted on 11 May 2011).

¹⁸⁵ *Idem*.

compliance; the control on the compliance or the accomplishment of the requirements must be made *ex ante* (by an effective monitored implementation) and the country must fulfil certain criteria and demonstrate good willingness in promoting certain reforms before obtaining the EU funds. But in the Libyan case the EU did not use its bargaining power as usual, but on the contrary demonstrated to be ready to close an eye on the human rights enforcement in Libya.

The particular attitude of the EU towards Libya was already demonstrated in 2004, when a report by the Commission's technical mission in Libya to evaluate the possibility to for future cooperation, criticized the foreigners detention condition but affirmed that the conditions were critic but "acceptable in view of the general context". In 2007 a FRONTEX agency delegation, carrying out a visit to the detention centre of Kufra, did not express any comment on the detention conditions, but said that "its members "were able to appreciate both the diversity and the vastness of the desert"¹⁸⁶.

As already evidence in chapter 2.4 the conditions and treatment of foreigners in Libya can be defined in anyway but not "acceptable". According to the Human Rights Watch report from 2009¹⁸⁷, all migrants interviewed and detained in the Kufra centre reported maltreatments and bad conditions of stay which goes from making people sleep on the floor with or without mattresses, disposability of one toilet for 100 persons, possibility of corporal cleaning once per week, regular beating by guards, impossibility to distinguish if detained by official police or smugglers, corruption among the police, confiscation or extortion of money by the police in exchange of liberty, sexual violence on women, torture practices and common limitless detention without any given information.

The establishment of any precondition for cooperation with Libya did not support the EU rhetoric on the importance of human rights standards as a condition for migration cooperation. The Commission never followed the advice coming from NGOs and the EP in including as preconditions for the opening of any collaboration with Libya, the

¹⁸⁶ Migreurop, *European borders, controls, detention and deportations*, 2009-2010 Report, p. 41, available at http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-2-121110.pdf, (consulted on 17 May 2011).

¹⁸⁷ Human Rights Watch Report 2009, *supra* note 126, pp. 75-79.

signature and implementation of the 1951 Geneva Convention, collaboration with UNHCR, or that Libya implement the Migrant Workers Convention.

As we know the UNHCR was pushed out of the country in June 2010, few months before the signature of the Migration Cooperation Agenda, and this in my opinion can be everything but not a sign of good willingness to promote a change or a reform in the country. At the same time such exclusion of the UN agency is also indicative of the Libyan missing commitment to the Justice and Home Affairs Council Conclusion of June 2005, which called the Libyan authorities to “demonstrate a genuine commitment to fulfil their obligations under the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which recognizes that the Geneva Convention on Refugees constitutes the basic and universal instrument relating to the status of refugees and which requires effective cooperation with UNHCR and the respect of the principle of *non-refoulement*”¹⁸⁸.

For what concerns the implementation of the Migrant Workers Convention, before the 2011 revolution, something like 2.5 million migrants worked in Libya, making of it one of the biggest importers of labour in Africa. Migrant workers in Libya have always been subjected to various abuses at the hands of their employers and others profiteers who make money off the migrant economy. Many were forced to pay great sums to employment brokers who treated them as slaves garnishing their wages until the debt was paid. Others were promised to be well paid but in the end they were not paid at all. The forced labour was and is not uncommon as well and according to the US State Department’s 2009 human rights report, 1% of irregular migrants are victims of human trafficking forced into commercial sex work. Workers are also subjected to many abuses also outside the workplace. They risk always to be beaten and robbed and the impunity idea that whatever crime you commit towards a migrant in Libya is not going to be punished, makes of them a preferable target of crimes by the local population¹⁸⁹.

¹⁸⁸ Council of the European Union, Justice and Home Affairs Council, Conclusions on Cooperation with Libya in Migration matters, Luxembourg, 2-3 June 2005, 8849/05, available at <http://www.eu2005.lu/en/actualites/conseil/2005/06/02jai/jajai.pdf>, (consulted on 16 May 2011).

¹⁸⁹ December 18, *Migrants workers in Libya*, available at <http://www.december18.net/article/migrant-workers-libya>, (consulted on 17 May 2011).

Nevertheless all the problems underlined in the above section, since the beginning of the idea to establish a collaboration on migration with Libya, as during the negotiations and till the signature of the Migration Cooperation Agenda in October 2010 as later on, it seems that the only idea the EU was concerned about, was make of Libya a “safe third country”. The concept of safe third country constitute one part of a trilogy of mechanisms Europe is adopting since few years in order to accomplish the so called “externalization idea”¹⁹⁰. So far only two out of this three mechanism were put in place: “safe third country” and “capacity building”. The latter is part of the ENP programme and is a strategy which utilizes development aid to create sufficient protection conditions in a third country so that the EU can conclude readmission agreement with that country. This way the country will meet a minimum protection standard, fewer migrants and refugees will feel in need to take dangerous smuggling routes and would supposedly find a better protection in the region. However these countries have also to strengthen border controls and immigration enforcement as other told to prevent the departures. In the former concept, on the other side, asylum seekers are readmitted to these supposedly safe non-EU countries, through which they pass, by means of readmission agreements, with little effective concern if they really enjoy the full protection offered by Art 33 of the 1951 Geneva Convention (No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion). Once there they can also be subjected to further deportations to countries which in theory should complain to the same minimum standards of migrants treatment, as Art 33 establishes also that the latter country would not send the applicant for asylum elsewhere in a manner contrary to the principles of the Convention, but which usually have less capacity to adjudicate migrant’s claims fairly or meet their basic needs. As also demonstrated by a recent decision¹⁹¹ of the European Court of Human Rights, even a country as Greece cannot fulfil sometimes the requirements requested by the fair

¹⁹⁰ Human Rights Watch Report 2009, *supra* note 126, pp. 91-98.

¹⁹¹ European Court of Human Rights, Case of M.S.S v. Belgium and Greece, Application no. 30696/09, 21 January 2011, available at

treatment of migrants, therefore under the application of the Dublin Regulation II both Belgium and Greece were condemned for several violations of the European Convention of Human Rights. In particular of Art 3, which as we already seen is comprehensive of the *refoulement* concept, according to the longstanding interpretation given to the article by the ECtHR, therefore even migrants sent back to Greece in application of the Dublin II Regulation, which mandates that asylum claims are to be considered in the state where the asylum seeker first entered Europe, can be exposed to risks linked to the deficiencies in the asylum procedure. Libya on the other side cannot be compared to Greece, so if Greece was condemned, and, in the case in question did not fulfil the minimum requirements for asylum seekers protection, can we really imagine Libya fulfil such requirements anytime soon?

So as made clear by the consideration above, as in the precedent chapters, the idea of making of Libya a safe third country was and can be noble and auspicial, but so far the country does not fulfil any of the programmatic requirements it should have, therefore any negotiations established, any agreements signed or programmed for the future in line with the actual attitude of the European Union towards Libya is less then in line with the international standard.

In the next chapter I will try to come to some conclusions in consideration of what already evidenced, trying to draw a line which will connect the Friendship, Partnership and Cooperation Treaty to the Migration Cooperation Agenda signed in the context of the Framework Agreement and explain how this two bilateral agreements can be considered part of a single wide idea which brings us to the concept of European externalization of the its South borders.

<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, (consulted on 17 May 2011).

4 BRINGING THE PIECES TOGETHER

4.1 TWO WEIGHTS AND TWO MEASURES

In July 2010 the new Director General for Migration and of DG Home Affairs made a strong statement affirming that the European Commission finds nothing wrong with Libya taking back illegal migrants rescued at sea by Italy. In the same interview he also affirmed that the Commission have been notified with the agreement between Italy and Libya and it found it to be perfectly in conformity with EU law¹⁹².

Such statement is alarming but what is relevant and worrying is that it is basically true and reflects the real situation. The Italy-Libya agreements is in line with the rules set up in the treaty of Lisbon, namely Art. 73 and 79, so legally speaking it is in line with EU law. What is to be demonstrated is if also the results it comports are lawful, namely in respect of the *non-refoulement* principle, and if it shared by the EU.

As we have seen the Parliament have several times criticized the agreement but the Commission always stayed apart and this silence somehow looks like a tacit consent and approval.

But coming back to the framework agreement, as I already explained shortly in the last chapter, the MEP and rapporteur on the framework agreement expressed her surprise in finding the Council's mandate fairly standard, considering that we were dealing with Libya. From an anonymous interview with a Libyan official of January 2010, conducted by Migreurop, it results that the framework agreement proposed to Libya reflected the same content of the one used in the negotiations with another north African country, namely Mauritania¹⁹³. But the two countries are completely different; Libya has the longest coast, is a transit country to Europe and has a big economy capacity. This alone should be enough to understand that such a decision is not acceptable, without mentioning the special role Libya plays and its atypical political and human rights situation already analyzed.

¹⁹² Times of Malta, *Brussels defends Italy-Malta agreement*, 27 July 2010, available at <http://www.timesofmalta.com/articles/view/20100727/local/brussels-defends-italy-libya-agreement.319697>, (consulted on 18 May 2011).

¹⁹³ Paoletti, 2009, *supra* note 26, p. 18.

But such a decision probably is not only indicative of the poor attention paid to the singularities of the contractors but mainly of the strategy hidden behind and of the result to be obtained, as I will demonstrate now.

Both Libya and Mauritania are part together with other African and European partners of the so called 5+5, as already underlined. The main aim of the EU in the context of its general neighbourhood policy is to sign as many readmission agreements as possible in order to contain migrants arriving from the south¹⁹⁴. Since 2005 in order to contain such a flow, Mauritania became a privileged partner of the EU and Spain¹⁹⁵. Since then, by the agreements reached, Spain and EU impose measures upon Mauritania to manage its controls at the sea borders and in repatriating migrants. The European Development Funds (EDFs) were allocated to Mauritania and its capacity to manage the migration flows has become an indicator of its governance profile, just like human rights and rule of law¹⁹⁶. In order to fulfil the requests of the big sister EU and obtain the funds, Mauritania arrests, detains and arbitrary returns back people suspected or wishing to migrate to Europe. This can be surely considered another mean by which the EU subcontracts its duties outside its territories promising “carrots” in case of fulfilment.

This is another story but to an observant eye probably it did not escape the particular similarity even if necessary to be contextualized. Two couples of actors, Spain and EU on one side and Italy and EU on the other. Similar means, different actors but still the same aim: the externalization of migration management through a *neo-refoulement* strategy.

Briefly considered, Libya is not Mauritania, Italy is not Spain but still Europe is the same.

With this phrase in rhyme I aim to say that the contractual power which Mauritania probably had towards Spain and Europe was not the same as Libyan had towards the same Europe and Italy. Libya never agreed to sign a readmission agreement with Italy, for instance, in order to be freer and use more contractual discretion, differently from Spain who was able to sign a readmission agreement with Mauritania. The same way

¹⁹⁴ Migreurop, 2009-2010, *supra* note 187, p. 17.

¹⁹⁵ *Idem.* p. 18.

¹⁹⁶ *Idem.* pp. 19-20.

Libya caused a lot of troubles in the negotiations of its agreement to the EU. The GOL posed a lot of preconditions, tried and achieved to make Europe close an eye on its human rights record and it opened and closed from time to time its south borders frontiers to migrants, making also them depart from Libya with a non officialised collaboration with the smugglers, in order to make Europe understand who was controlling the situation, and make the old Europe “taste” the prospective of a “black invasion”.

All this peculiarities in the negotiations with Libya are clearly due to the extent of its territory, to the closeness to the EU south borders but probably mainly to the various economic interests involved, as already evidenced.

We can say that with Mauritania the EU used the stick and a diligent application of the positive conditionality (even if in this case only to promote its interest in stopping the migrants flow and not as mean to promote country reforms). The EDFs were given only after obtained results and the EU used strictly its barging power to obtain the result expected.

In the Libyan case we faced, instead, a different reality of facts. The GOL showed instantly who was dictating the game’s rules and Europe used the carrot, promising millions of euro, barely touching human rights concerns and trying to obtain an agreement whose final aim would have been only to transform Libya in an European detention centre for migrants. All this has been done not in line with the international standard and violating this way also its commitments for the promotion and respect of human rights abroad. The same way any positive conditionality criteria was adopted. Libya obtained the results expected even without trying to show a little commitment to the international standards or institutional reform in the country, instead they kicked out the UNHCR from the country.

In the next section I will consider more in deep the concept of “safe third country” and explain which means the EU uses in order to go on with its externalization agenda, using also as a term of reference Ukraine in the context of the ENP.

4.2 MANY WAYS TO EXTERNALIZE

As mentioned in chapter one the issue of the asylum seekers' application is mainly regulated by the so called Asylum Procedure Directive which in theory gives to every single asylum seeker the possibility of his case to be singularly assessed. This directive have been strongly criticized because in practice, due to the list of safe third countries, the applicant do not have the possibility to rebut the presumption of safety associated with the proposal for safe third country list, in addition it allowed individual member states such as Italy and Spain to introduce restrictive measures as immigration detention, falling recognition rates for refugees, the withdrawal of social benefits and lack of effective opportunities to challenge detentions and deportations with a risk of *refoulement*¹⁹⁷.

As we will see here, the determination of a country as “safe third country” or “safe country of origin” means that, in the first case a person coming from such a country and applying for asylum will be rejected as manifestly unfounded and in the second case the asylum claim cannot be even considered because the country is presumed safe *a priori*. Both of them are two of several ways to proceed with the externalization idea. Among the others means we can find: interdiction at sea, the conclusion of readmission agreements by which countries outside of the EU agrees to accept the return from Europe of migrants and asylum seekers who transited through these countries, support for border enforcement and detention facilities in countries of transit, carrier sanctions and controls at the airports of departure¹⁹⁸.

All this means are part of the idea of externalizing the hosting of asylum seekers. This external dimension emphasizes development, capacity building and aid conditionality in countries of origin in order increase their ability to secure the borders. Through the RPPs the EU tries to reach the goal of strengthening the protection capacity and improve durable solutions in targeted countries, certainly a laudable solution but not without raising concerns.

¹⁹⁷ Human Rights Watch, *European Union Managing Migration Means EU Complicity in Neighbouring State's Abuses of Migrants and Refugees*, October 2006, p. 2, available at <http://www.hrw.org/en/reports/2006/10/17/managing-migration-means-potential-eu-complicity-neighboring-states-abuse-migrant>, (consulted on 19 May 2011).

¹⁹⁸ *Idem*, p. 3.

The obvious question that arises is if the EU uses the existence of such programmes in order to be able to declare the target country, as Libya, a safe third country. This way the EU can return asylum seekers and migrants who transited through these countries, using also the readmission agreements, even if the country is not effectively able to protect and guarantee asylum seekers rights, but only on the paper.

Returning to the “safe third countries”, although they are not safe, it is all in the EU interest and it also in its interest to characterize them as such. This way more and more asylum seekers application will be considered unfounded and all the other migrants and rejected asylum seekers will be returned there under the readmission agreements.

This way the EU is trying to offer protection in regions of origin, or this is what she wants us to believe.

As already said in chapter 3.5 the EU use mainly a trilogy of systems to obtain this result. We already considered the “safe third country” method, and partially the “capacity building” one, both of them already in use, but is still missing the third one, namely the “Outsourcing”.

Under this version, all asylum seekers who arrive in the EU and apply for asylum would be sent to a country, considered safe, outside of Europe for processing the request by EU appointed officials, with the collaboration of international organizations such as the UNHCR or IOM. These can be defined as transit processing centres, where they will be sent regardless if they passed through or not before reaching Europe and the EU member states will not have any binding legal obligations regarding refugee protection. Once there, the EU countries will pick up and chose how many refugees to accept. Refugees for sure would have reduced procedural rights, or maybe any, and they will be resettled into EU on a quota basis, but it is not clear how long they might have to wait and which legal guarantees would be accorded to them¹⁹⁹.

After have cited Mauritania, I find opportune to put under the light another country which was included in this web, namely Ukraine. Now Ukraine is not of course part of the south regional ENP, but of the eastern one and this case is useful in order to explain how the EU worked in this context, what were the results and what could be have done

¹⁹⁹ Human Rights Watch, 2009, *supra* note 126, p. 92.

better, in order also to have more clear what could be and can be the Libyan case destiny.

Ukraine as Libya falls short of its international obligations towards migrants and refugees, lacks of any human rights culture and the national law formally in accordance with the international standards lacks of implementation. Migrants and asylum seekers in Ukraine are routinely subjected to bad detention conditions, physical abuses and verbal harassment, making of Ukraine a place no more comfortable for migrants than Libya.

Despite the strong critic of NGOs for the conditions of detention and the problem of *refoulement* in Ukraine, in 2008 the EU signed a readmission agreement with Ukraine, paid back by visa facilitation, even if the country cannot provide effective protection and guarantee the human rights of asylum seekers and migrants in its territory²⁰⁰.

It is unclear if in Ukraine there was and is an effective mechanism to ensure that returnees from the EU would have their asylum claims processed in a fair way after the readmission and it also created concern whether or not these subject returned would have the right to appeal with suspensive effect against *refoulement*, including return to risk of torture.

The EU is Ukraine's biggest donor and has a significant influence on its democratization reforms process. The EU has never encouraged Ukraine to make an application for EU membership but gave her a place in its ENP. So far Ukraine did not deserve a different treatment from Libya. Both of them are out of any membership perspective, both of them have a poor human rights record, but in Ukraine the EU with the perspective of a part in its ENP obtained significant democratic reforms which culminated in the "Orange Revolution". So the EU has with Ukraine a readmission agreement, an EU Action Plan, soon an Association Agreement and the priorities for their cooperation include also border management, the same way as with Libya.

The temporary conclusion, before coming back to talk about Libya and Ukraine as a methodological example, is that turning Libya into a safe country of first asylum, as Ukraine, programming a readmission agreement, and sending back migrants, would be

²⁰⁰ *Idem*, p. 9.

a laudable goal in terms of refugee protection, but only if this would consist in a “real and legal outsourcing methodology”, where attention is paid to the human rights standard in the country, where affective protection to asylum seekers against maltreatment and *refoulement* is assured and where everything is accompanied by a good dose of country democratic reforms. So far any country in the European neighbourhood demonstrated to be up to this standard and this is way the outsourcing instrument is far to be applied. Therefore, indeed the human rights’ situation, I would never encourage such a test in Libya

The Ukrainian case demonstrates that the EU did not pay so much attention to human rights standard when it attempts to keep migrants out of Europe and that any human rights assessment was done in Ukraine so far. The only results EU was able to reach in the country was a temporary soft regime change, a turn into a more democratic regime which anyway did not resist so long, and now the situation is not so different from the one envisaged at the beginning of the Ukrainian ENP adventure. This mostly due to the fact that the main goal of the EU in the country has never been a regime change, maybe indirectly, and people always thought that an accession to the EU was still possible, but in the end when the real situation showed up, even this little result was absorbed.

Therefore it would auspicial not to commit the same mistake with Libya.

In the next section I will try to reach some conclusion for what concerns the effectiveness of the ENP in the countries taken into analysis, in order to assess the possibility of success of an EU framework agreement in Libya in line with the actual EU tendency.

4.3 THE ENP IN THE LIBYAN CONTEXT

In chapter one in the context of the ENP we have considered how the ENP works in order to obtain a certain result from a country.

As we have seen there is a first phase of: (A) path dependency and political adaptation, then (B) the conditionality is linked with compliance and the effectiveness of the EU positive conditionality depends on four set of factors, namely: the size and the speed of rewards, the determinacy of conditions, the credibility of conditionality and size of

adoption costs.

The size of adoption cost for sure is the most important element to take into account, together with all the others. As we have seen in the authoritarian countries like Libya, many of the incentives offered by the EU could be perceived as threats rather than inducements. In the more liberal ENP countries as Ukraine the response to the launching of the ENP has been perceived with some excitement and the negotiation on the Action Plan were more serious. On the other side in countries such as Morocco and Egypt, for obvious reasons considering also the actual outcome of their policy, the new initiatives have greeted scepticism.

The Ukraine of 2004 can suggest “that conditionality may work indirectly through the differential empowerment of domestic actors”²⁰¹. The external incentives served to reform change in the domestic environment in favour of reformist committed to closer relations with the EU and strengthened their bargaining power *vis-a-vis* their opponents at the governmental and social level allowing them to win the elections. The EU incentives were a sufficient catalyst to produce an electoral change through domestic empowerment but the EU leverage in this case depended on a priori existence of real political competition and a level of social affinity with the goal of EU accession or at least visa opening. The old government was perceived as a threat to the people’s aspiration to be included in the EU’s ENP programme, so they mobilized the electorate against the former government. But Ukraine is an exception because effective differential empowerment of domestic actors was and is absent in most of the ENP countries and in Libya as well.

The last phase, as Magen makes clear, consists of linking (C) Socialization and Compliance²⁰².

This theory makes clear that domestic decision makers respond to a logic of appropriateness. Bilateral interests are understood better as product of social structure and interactions rather than materialistic cost benefit balancing. The actors who enter into relations usually are different so the process of rule adoption is commanded by engagement, argumentation, persuasion and complex learning socialization by which

²⁰¹ Magen, 2006, *supra* note 72, p. 419.

²⁰² *Idem*, p. 420.

norm leaders persuade the other part to adhere to their preferred norms²⁰³. What is fundamental is to understand the preferences of the targeted states.

Together with the size of adoption costs, Magen explains that there are three remaining factors that affects the ENP's influence and are: legitimacy, persuasion and learning.

For what concerns "legitimacy" the influence of a good norm is given by its clarity, specificity and content, therefore if such a norm include this aspects it is more likely to be perceived as a legitimate rule by those to whom it is addressed.²⁰⁴ A rule must indeed have a certain degree of clarity in how it communicates its content, integrity of the process by which is made and is applied and must have a venerable pedigree and conceptual coherence²⁰⁵. The EU rules are reduced when they are defined ambiguously.

For what concerns "persuasion", "persuasion by the socializing agent is a core mechanism of strategic social construction"²⁰⁶, and "persuasion has to do with cognition and the active assessment of the content of a particular message"²⁰⁷. A targeted actor needs of argumentation and of being convinced in accordance with the rules previously defined by the socializing actor.

Lastly, the "Learning" process of the ENP, as an instrument for strategic social construction is shaped by its ability to facilitate social learning²⁰⁸. This involves good communication and self-understanding perception of reality and normative expectations. Legal norms can be internalized and become part of the domestic legal and political process but only if such internalization is facilitated by an interaction between domestic ad international norm entrepreneurs and translational networks²⁰⁹.

Now, trying to apply this long process of policy analysis and construction, which constitutes the ENP, to the Libyan case we can see if in practice the procedure was applied properly during the long phase of construction and negotiations of the agreement and see if anything is lacking.

²⁰³ *Idem.*

²⁰⁴ Franck, 1988, p. 706.

²⁰⁵ Franck, 1990, p. 38.

²⁰⁶ Magen, 2006, *supra* note 72, p. 423.

²⁰⁷ Johnson, 2001, pp. 477-448.

²⁰⁸ Magen, 2006, *supra* note 72, p. 424.

²⁰⁹ *Idem.* p. 425.

First we know that the criteria used in the selection of the candidate country are: shared common values, democracy, respect for human rights and rule of law. If we look to the Libyan situation at the time of the beginning of negotiation we cannot really say that it fulfil at least one of the above criteria. The Action Plan did not take into proper consideration the Libyan human rights system and weakened of good propositions.

Second, The Action Plans, as one of the main instrument of the ENP are mutually agreed not legally binding accords between the EU and each partner-country which are anticipated by a Country Report assessing the economic and political situation in order to define how and when the relation can be deepened. What is not clear till now is the content of the national Country Report. I do not think that the Libyan economic and political assessment meets enough compliance with the European human rights standards as set down in the European Chart of Human Rights.

Third, the draft process of the Country Strategy Paper includes also consultation of the relevant national stakeholders and a first presentation of an explanatory note to the Development Group, with a consequent presentation of a Concept Note, which with the relevant comments included by the national authorities, represents part of the final draft of the CSP. The final Concept Note was circulated to the EU Member States represented in Libya, to the members of the DCG and various international financial institutions like the World Bank. The Commission also informed the Brussels based civil society organizations with an interest in the ENP of the region in order they could provide comments on the concept note. Now few points are unclear: if with consultation of “national stakeholders” in the draft process of the Country Strategy Paper they mean also consultation of the national civil society; why do they accept relevant comments only from the national authorities and not even of the representatives of other interest like those of the civil society? Why the Commission informs only the Brussels civil society organizations and not also the national ones?

Fourth, the “size and speed of the reward” in the Libyan case was even too efficient. Gadaffi asked for 2 billions of euro and the EU had already ready e departure budget of 50 millions. For what we know such amount of money, if the revolution did not started would have been probably offered without any assessment of the EU positive conditionality effectiveness, making of Libya an exception more than it already was.

Fifth, “the credibility of conditionality” means that the positive incentives depend on their credibility. If conditionality is not credible and the benefit is awarded even without compliance to the original standards the results is likely to be accomplished. In the Libyan case, it can be argued, that the credibility of the EU positive conditionality was weakened by a clear intent to push migrants outside the EU as soon as possible without paying attention to the willingness of the GOL to promote any regime change, reform or attitude towards the human rights standard, rendering this way the general strategy weak of long term effectiveness.

Lastly an important consideration that the EU should be kept in mind for the future in the relations with Libya and in any other idea to make work the old or a new framework agreement.

During the “phase of approximation”, which can be framed in the “Path Dependency and Policy Adaptation” phase, the “size of adoption costs” must be taken into proper account.

In this case since the EU rules are likely to be implemented by state decision-making, the effectiveness of the external incentives depends from the local government and the desire to change the *status quo*. Since the goal of the EU is to promote liberal political and economic reforms, the domestic cost of compliance will be higher in non-democratic countries, compared with a more democratic model of society. This system would work better in a county where democratic transition had already taken place and the social cost would be lower. In the Libyan cases the cost-benefit calculation points against compliance. Where compliance needs a de facto regime change, like in Libya, the ruling governments are unlikely to comply. Everything depends on the local governmental regime but the external incentives of the ENP, like it happened also with the enlargement, can be an incentive for a regime change and therefore a easier way to comply with the standards demanded, pushing the electorate to choose for example a reformist government whose aim is to comply with the democratic reforms requested at the international level. But the EU leverage in these cases depends on, first *a priori* existence of real political competition in the domestic sphere and second a high level of society affinity with the goal of EU incentives or standards.

So let me conclude as follows: in Ukraine the ENP for a certain period of time settled down and worked because there was a real political competition and in general people were free to choose between different candidates and vote, but in Libya this perspective was and is far from reality. In this case, following my opinion, the EU should pay as much attention as possible to the local peculiarities, and if it is possible, try to define a new strategy, through different means such as the EU electoral observation prerequisite in order to accede to the ENP, giving this way people a real possibility to decide whether or not comply with the ENP requirements and conditionality. Another option could be simply to consider a longer range of time during the phase of approximation, in order, for the country, to have more time and possibility to reach the results expected.

In the next paragraph I will make clear what is the actual situation concerning the EU's externalization process and I will try underline some ideas which could be adopted in order to make the externalization a more lawful project.

4.4 THE REAL STATE OF GAME

As we have seen, so far a “distorted” version of externalization has been promoted mainly through two means: “Capacity Building” and “Safe Third Country”²¹⁰. The last mean, “Outsourcing” has not still been put in place because contrary to the other two ways, it is the final stage and it is also the one which, if not applied in respect of the international standards and refugees human rights, is more likely able to violate systematically refugees' rights. The outsourcing is the pure version of the externalization idea, which was proposed in 2003 by Tony Blair by settling transit processing centres outside of the EU's borders.

Now, externalization as such is not intrinsically violative of human rights, if it can be applied with the proper cautions. But so far nothing of this has been done. We are just in presence of what I call, a “distorted externalization” and a *neo-refoulement* policy that violates most, if not all refugees' human rights.

²¹⁰ Human Rights Watch, 2006, supra note 110, p. 91.

Both the bilateral agreement between Italy and Libya, which it has been demonstrated “it is in line with the different proposals examined by the EU for strengthening of its cooperation with transit and origins countries of irregular migrants”²¹¹, and the framework agreement itself between the EU and Libya, have demonstrated to be for the purpose to establish the African “distorted” externalization.

These kind of bilateral agreements, as others already established by the EU in the region brings to the following consideration.

They are contrary to article 13.2 of the UDHR and article 12.2 of the ICCPR which both affirm that “everyone has the right to leave any country, including its own”. Through a “venue-shopping” policy making, shifted upwards into inter-governmental cooperative bodies at the European level that are dominated by the security agendas of interior ministers and the local capacity building²¹², the EU is trying to securitize people in region of origin in the name of a bad interpretation of the UN concept of R2P. This is made for the purpose of durable solutions in region of origin and to remove the need for refugees to move away from their country of asylum²¹³. This is a way to export a “remote control” to third countries far from the EU’s existing borders, in order to “construct a security agenda abroad far from the watching eyes of the Brussels-based NGOs and human rights campaigners”²¹⁴.

This is made in name of a clearly not solidarity-oriented approach to address better the root cause of forced migration, through the promulgation of extra-territorial protection norms by the EU and to make migrants stop fleeing across continents in search of protection²¹⁵.

But this cannot be done without taking in proper account the local human rights situation because this way the local protection is not concrete and effective anymore.

Numerous awareness campaigns have been put in place in Libya as in other countries, including the prospect of death, but this do not appear to deter the vast majority of

²¹¹ Benedetti, 2006, *supra* note 23, p. 19.

²¹² Zolberg, 2002, *supra* note 5.

²¹³ Haddad, 2008, *supra* note 6, pp. 193-194.

²¹⁴ Samers, 2004, p. 43.

²¹⁵ Haddad, 2008, *supra* note 6, pp. 196-202.

people trying to flee out of the country²¹⁶. People decide to leave these countries because they have no other choice, as they declare themselves. In Libya “the hostile environment in which refugees and migrants find themselves, encourage them to seek security and stability abroad”²¹⁷. This problem can be addressed only in taking concrete steps to relieve the hard situation of migrants in Libya by promoting a national working and effective system for refugee protection and the respect for migrant’s rights. A recent research has also shown that the EU’s approach in increasing measures of border control and surveillance has a limited success in stemming the flow. People due to the situation of these countries, try to attempt to leave them, even if pushed back by the EU again, because they know they do not have a future there.

This therefore can be a short term solution, but the “protection in the regions of origin cannot be considered a substitute for protection of spontaneous arrivals within the EU”²¹⁸. First because, as demonstrated recently, the flows are unlikely to be reduced and then because the establishment of effective and “legal” instruments for protection in regions of origin will take long time. But also because there is not, as well, any obligation under international law for asylum seekers to present their applications in regions of origin rather than in the EU²¹⁹.

As MEP Mario David said in Strasbourg during the plenary of 4-7 April 2010, “the EU supported non democratic countries in the South for the sake of stability and did not pay enough attention to the enforcement of fundamental rights”²²⁰.

This is demonstrated by the bad application in the past, of the negative conditionality and in the present, of the positive one. The conditionality practice, so far, demonstrated to be very limited if non-existent²²¹. If the ENP rewards are given without a strict application of the positive conditionality, “the possible bad management by local authors, including arms expenditure, can reach the point that local elites manage to

²¹⁶ Hamood, 2008, *supra* note 174, p. 36.

²¹⁷ *Idem*, p. 38.

²¹⁸ Benedetti, 2006, *supra* note 23, p. 21.

²¹⁹ *Idem*.

²²⁰ MEP Mario David’s web site, Reviewing EU policy on its Southern neighbours, 6 April 2010, available at <http://www.mariodavid.eu/noticias/reviewing-eu-policy-on-its-southern-neighbours-mario-david-motin-discussed-today-in-strasbourg>, (consulted on 21 May 2011).

²²¹ Biscop, 2005, *supra* note 7, p. 6.

control how the resources made available by the EU are applied and this can bring to reinforce the political and economic status quo rather than induce reform”²²².

This comprehensive approach has been insufficiently translated into practice, as we have seen, and the general impression is that EU prefers regime stability, if linked with application of a strict borders’ control over democratization and reform.

As argued previously, protection in the regions of origin cannot be considered a substitute for protection of spontaneous arrivals within the EU. Refugee screening is “most efficiently done at the borders of the receiving country”²²³.

It has been demonstrated that if migrants who make it to European and are efficiently processed, and, if without need of protection, swiftly repatriated, many others will be deterred from making similar attempt. This is because migrants do not have to see their migration attempt as a question of luck²²⁴. “Repatriation after arrivals has a greater deterrent effect than return by patrols in African waters”²²⁵.

As another solution ECRE has proposed for people who flee from countries marked by civil wars or systematic abuses of human rights, is that they should be exempt from visa requirements in order to accede to the European protection in a more proactive way²²⁶. The UNHCR could provide a list of eligible countries and the EU countries could construct principles for the distribution of responsibilities among themselves about who might create visa openings for which refugee generating country²²⁷.

Another different possibility is for the embassies of Western countries settled in countries of origin of migration flows, to process asylum claims in situ and then give a visa travel to the Western countries if the claim is credible²²⁸. This would prevent refugees from leaving their state and seek protection abroad, risking this way the smugglers routes, passing through countries which do not respect migrant’s rights and being intercept at sea by the EU after have paid thousands dollars to smugglers. Moreover, Western states should also consider to support financially and logistically,

²²² *Idem*.

²²³ Guild & Bigo, 2010, p. 1.

²²⁴ Carling & Hernandez-Carretero, 2011, pp. 55-56.

²²⁵ *Idem*.

²²⁶ Gibney, 2005, p. 13.

²²⁷ *Idem*, p. 18.

²²⁸ *Idem*, pp. 13-17.

the establishment of asylum processing centres only in “real safe third countries” within major regions of forced migration outflow, without meaning with this the establishment of places to which asylum seekers, who reach Europe, could be deported for screening, as suggested by the original externalization idea supported by Tony Blair²²⁹.

As we see there are many ways to come out of the actual bad situation dealing with migrant from Africa but the question is: is Europe ready to sacrifice some interest and undertake a new way?

5 CONCLUSIONS

As a way to reach some conclusions, I would like to note that my research covers events up to the end of May 2011.

The Partnership Treaty between Italy and Libya contained a human rights clause, on this basis in any further collaboration with Libya, such clause should, not only be present, but carefully respected. Both Italy and Libya, in any future collaboration, should, without being obliged, collaborate constructively with the UN High Commissioner for Refugees, involve the UNHCR in any further negotiation and make steps towards a system that fully recognize and sustains migrants and refugees in Libya. The Commission should act proactively and do not affirm again that the scrutiny of such an agreement would exceed its competences being also be open to condemn Italy as any other country, if it commits human rights violations. If this is not possible, considering the Libyan human rights situation so far, no treaty should be signed²³⁰.

The Dublin Regulation should be revisited. Such document puts too much pressure on border countries, which are ultimately responsible for examining an asylum application when a person first enters into the EU. Such situation pushes these countries, as Italy and Spain, to pass the buck to unsafe non-EU countries third countries through bilateral

²²⁹ *Idem*, p. 17.

²³⁰ Open Democracy site, *EU migration control: made by Gadaffi?*, by Gregor Noll and Margarita Giuffrè, 25 February 2011, available at <http://www.opendemocracy.net/gregor-noll-mariagiulia-giuffre%C3%A9/eu-migration-control-made-by-gadaffi>, (consulted on 24 May).

readmission agreements²³¹. Full harmonization was not still reached, a Common European Asylum System is still work in progress and now the internal and external legal framework appears inconsistent and susceptible to be circumvent bringing to a possible violation of the European fundamental principles protecting migrants human rights.

The FRONTEX agency regulation should be revisited in consideration of its recent increased power and autonomy. The deployment by FRONTEX of operations in the territorial waters of third countries, poses serious risks in terms of respect for the principle laid down in the UDHR Art. 13.2 and ICCPR Art. 12.2²³².

“Existing association agreements between the EU and other Northern African countries should be suspended until they have been revised and reinforced concretely with a human rights positive conditionality assessment clause and impartial monitoring”²³³. This “multinational company” or “corporation” called EU, should renounce to the current “venue shopping²³⁴” policy and “remote control²³⁵” strategy that shifts the control on migration further from the territory of the member states to the countries of origin without any clear human rights assessment giving this way rise to an unlawful “distortion” of the externalization idea and promoting a new *neo-refoulement*.

The EU should adopt an “effective²³⁶” safeguarding action as a principle inspiring the protection of the refugees, imprinting its Neighbourhood Policy and Development Aid Programmes, as the delivery of the financial sources under the European Development Found (EDF)²³⁷, on the promotion of human rights and not, as a diplomatic weapon to influence the negotiation concerning its security agenda, in order to sign as many readmission agreements as possible. It should adopt a “third way” between regime

²³¹ *Idem*.

²³² *Idem, supra* note 14, p. 13.

²³³ *Idem*.

²³⁴ Guiraudon, 2000, *supra* note 1, pp. 257-258.

²³⁵ Zolberg, 2002, *supra* note 5.

²³⁶ Haddad, 2008, *supra* note 6 p. 203.

²³⁷ Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, available at <http://eur-lex.europa.eu/lex/LexUriServ/LexUriServ.do?uri=OJ:L:2006:378:0041:0071:EN:PDF>, (consulted on 14 June 2011).

change and unconditional support of autocrats²³⁸, preferring stability, democratization and reform in countries of migration origin²³⁹. The externalization in Europe, as in other part of the globe, encompass attempts to securitize borders by transforming Europe into a “fortress” and rendering the Refugees Convention less applicable and more conditionally depending on the political decisions at high level.

Till now we could notice only a strong attention of the EU for the migration agenda, but in relation with its neighbours, using whatever channel or framework of collaboration, the EU seems try to Europeanize its language the most possible, without giving to much attention to the local actors and trying only to actuate an Europeanization of the countries geographically closest to its borders²⁴⁰.

In the specific Libyan case, in any future collaboration, the EU should not forget the actual asylum seekers, refugees and migrants’ situation in the country and therefore pay particular attention to the development, international law-abiding and effective local administrative system in line with the international standard. Does the Libyan economic and political assessment meets enough compliance with the European human rights standards as set down in the European Chart of Human Rights? Does really the European Union’s “shared values” correspond to the actual Libyan ones? Any further attempt of collaboration should consider the inclusion of Libya signing a Memorandum of Understanding with UNHCR as prerequisite for a renegotiation of a new Framework Agreement. Libya should set an efficient asylum law or enforce concretely the actual one and as contracting party to the ARC should also accede to the 1951 Geneva Convention, or at least collaborate constructively with the UNHCR²⁴¹. In my opinion, so far in this case, we have only assisted to a massive dilution of the positive conditionality of the ENP and an inversion of influence. “Double standards should never be used as a means to tackle foreign policy, no matter how urgent it is”²⁴².

The ENP, if is negotiated with local authoritarian authors, without any human rights assessment of the situation in place, the bad management by local authorities, including

²³⁸ Biscop, 2005, *supra* note 7, p. 7.

²³⁹ *Idem.* p. 6.

²⁴⁰ *IbidIdem.* p. 23.

²⁴¹ Human Rights Watch, 2006, *supra* note 105, p. 88.

²⁴² Gianniou Maria, 2010, *supra* note 150.

excessive defence expenditure, and obstacles posed by traditional structures, can contribute to the worsening of the situation. To the extent that local elites manage to control how resources made available by the EU are applied, these can be made to reinforce the political and economic *status quo* rather than introduce reforms²⁴³.

The conclusions are that these kinds of agreements, without a minimum human rights assessment put even more pressure on the actual local situation and push people to escape from the declining situation of authoritarian countries such as Libya. The ENP provides the EU with powerful tools to influence countries such as Libya. Participation in the ENP should be conditioned by the respect of certain standards for what concerns democracy, rule of law and respect for human rights. The EU could set clear benchmarks, such as development of national asylum system and abolition of human rights violation²⁴⁴; through the ENP the EU could also support the emergence of the Libyan civil society, NGOs, human rights organizations and independent media. This could be done with a mayor involvement of the local national civil society, which does not seem to be usually consulted at any stage of the ENP procedure of consultations, bring at this point to the consideration that no all the interest are represented in such a strategy adoption.

The ENP positive conditionality, supported by an EU electoral observation prerequisite in entering to the ENP quests' list and a longer time of phase of approximation, may work indirectly through the differential empowerment of domestic actors²⁴⁵ and bring to a regime change. Hence there would be tools, but is the EU ready to use them?²⁴⁶

The countries of the South Mediterranean zone, in order to limit the bad consequences of an unilateral EU policy and externalization of migration management towards the south, should develop an "efficient and united south-south regional framework" in order to be able to discuss in a stronger and united voice with the EU²⁴⁷, and therefore constitute a better interlocutor, able to make enforce its interests and rights.

²⁴³ Biscop, 2005, *supra* note 7, p. 6.

²⁴⁴ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2011) 248 final, Communication on Migration, 4.5.2011.

²⁴⁵ Magen, 2006, *supra* note 68, p. 419.

²⁴⁶ Kananen, 2009, *supra* note 178.

²⁴⁷ Doukouré & Oger, 2007, *supra* note 52, pp. 33-34.

Lastly, as far as the European Parliament is concerned, in order not to commit the mistakes of the past and risk to be cut out again, like it happened with the Framework Agreement, it should welcome with great enthusiasm and appreciation proposals such as that of the MEP Mr. Saryusz-Wolski. This famous international diplomat expressed his concerns about the ability of the European Parliament to react in an effective and rapid manner to the current developments in its close neighbourhood both in the South and the East. In his view the EP needs new institutional instruments in order to cope with the new challenges. Therefore, he proposed to create, a new subcommittee of the Committee on Foreign Affairs that would deal specifically with neighbourhood issues. Setting-up a new subcommittee would boost the parliamentary expertise, competence and diplomacy on our neighbourhood thus reinforcing the position of the Parliament as a fully-fledged partner in this domain for both the relevant commissioner and the High Representative²⁴⁸.

The key word to solve the actual situation is one: solidarity. Solidarity among the EU member states and solidarity with the neighbours.

²⁴⁸ A full interview with MEP Mr. Saryusz-Wolski on this matter was conducted on 14th June 2010 in European Parliament, in Brussels, by the author of the following paper and it is attached as an ANNEX to the latter.

Bibliography

Articles

Achermann, Alberto & Gattiker, Mario, *Safe Third Countries: European Developments*, pp. 19-38. *International Journal of Refugee Law*, Vol. 7 No. 1, Oxford University Press, 1995, available at <http://ijrl.oxfordjournals.org/content/7/1/19.full.pdf>, (consulted on 12 April 2011).

Baylis, Elena, *National Security and Political Asylum*, Ford Institute for Human Security Working Papers, 2006, at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=28050> . (consulted on 19 March 2011).

Benedetti, Sara, *Externalization of European asylum and migration policies*, available at <http://www.eui.eu/RSCAS/Research/SchoolOnEuro-MedMigration/2006pdfs/Paper%20Debenedetti%202006%20FINAL.pdf>, (consulted on 16 March 2011).

Biscop, Sven, *The European Security Strategy and the Neighbourhood Policy: A New Starting Point for a Euro-Mediterranean Security Partnership?*, Paper presented at the EUSA Ninth Biennial International Conference, Austin, Texas, 31 March- 2 April 2005, at http://www.egmontinstitute.be/papers/EUSA_ESS_EMP_Biscop.htm . (consulted on 15 March 2011).

Columbia Law School, Human Rights Clinic, *In the European Court of Human Rights, Application No. 27765/09, Hirsi and Others v. Italy*, Written Comments of the: Columbia Law School Human Rights Clinic, African Refugee Development Centre Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Centre for Social Justice at Seton Hall University School of Law, Florida Coastal School of Law Immigrant Rights Clinic, Institute for Justice & Democracy in Haiti, Migrant and Refugee Rights Project of the Australian Human Rights Centre, at the University of New South Wales School of Law, Physicians for Human Rights, Professors James Gathii, Tally Kritzman-Amir and Stephn H. Legomsky & Maragret L. Satterthwaite, 2010, available at <http://ijdh.org/wordpress/wp-content/uploads/2010/06/HirsivItalyFINALbriefColumbiaLaw.pdf> , (consulted on 5 April 2011).

Doukouré, Ounia & Oger, Helen, *The EC External Migration Policy: The Case of the MENA Countries*, Report no: CARIM-RR; 2007/06, European University Institute,

Florence, 2007, at <http://cadmus.eui.eu/handle/1814/7991> , (consulted on 18 March 2011).

Fischer-Lescano, Andreas & Löhr, Tillmann, 2007 LEGAL OPINION: *Border Controls at Sea: Requirements under International Human Rights and Refugee Law*, European Centre for Constitutional and Human Rights, 2007, available at http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Kampagnen/Stoppt_das_Sterben/Gutachten_Frontex_ENG.pdf , (consulted on 6 April 2011).

Fondation Robert Schuman, *The Lisbon Treaty.10 easy-to-read fact sheets*, 2007 (updated on 2009 at the time of entry into force of the Lisbon Treaty, at <http://www.robert-schuman.eu/doc/divers/lisbonne/en/10fiches.pdf>, (consulted on 16 March 2011).

Geddes, Andrew, *Migration as a Foreign Policy? The External Dimension of EU Action on Migration and Asylum*, report presented at the seminar “Migration as Foreign Policy”, Stockholm, 21 April 2009, at <http://www.sieps.se/sites/default/files/528-2009-2rapport.pdf> (consulted on 17 March 2011).

Hailbronner, Kay, *Implications of the EU Lisbon Treaty on EU Immigration Law*, paper presented at the Fourth Workshop of the Transatlantic Exchange for Academics in Migration Studies, San Diego, March 29-30, 2010, at <http://migration.ucdavis.edu/rs/files/2010/hailbronner-implications-of-the-eu-lisbon-treaty.pdf> . (consulted on 16 March 2011).

Hyndman, Jennifer & Mountz, Alison, *Another Brick in the Wall? Neo-Refolement and the Externalization of Asylum by Australia and Europe*, pp. 249-269, *Volume 43, Issue 2 2008*, at <http://onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00251.x/abstract> ,(consulted on 14 March 2011)

Paoletti, Emanuela, *Externalization and visa policies in the relations between Italy, Libya and the EU: where do we go from now?* Paper first presented at the seminar “The Four Seas Basins and the Global Economy. Do the EU 4 Freedoms Work? held in Kyiv, Ukraine, on June 9-10, 2010, available at http://www.eu4seas.eu/index.php?option=com_content&task=view&id=200&Itemid=23, (consulted on 14 June 2011).

Ronzitti, Natalino, *The Treaty on Friendship, Partnership and Cooperation Between Italy and Libya: New Prospects for Cooperation in the Mediterranean*, Documenti IAI (Istituto Affari Internazionali), paper presented at the Mediterranean Strategy Group Conference on “ Is regional cooperation in the Maghreb possible? Implications for the Region and External Actors”, in cooperation with German Marshall Fund for the United States, Genoa, 11-12 May 2009, at <http://www.iai.it/pdf/DocIAI/iai0909.pdf> , (consulted on 2 March 2011).

Vachudova, Milada Anna, *The leverage of international Institutions on Democratizing States: Eastern Europe and the European Union* (EUI Working Papers, RSC No. 2001/33, 2001, at http://cadmus.eui.eu/bitstream/handle/1814/1742/01_33.pdf?sequence=1, (consulted on 20 March 2011).

Articles in edited books

Clochard, Oliver & Dupeyron, Bruno, *The maritime borders of Europe: upstream migratory controls*, pp. 19-40, in Emmanuel Brunnet-Jailly, *Borderlands, Comparing Border Security in North America and Europe*, Published by the University of Ottawa Press, 2007.

Guild, Elspeth & Bigo, Didier, *The Transformation of European Border Controls*, pp. 257-281, in Ryan, Bernard & Mitsilegas, Valsamis, *Extraterritorial Immigration Control. Legal Challenges*, 2010, Martinus Nijhoff publ, Leiden.

Haddad, Emma. (2008), *The External Dimension of EU Refugee Policy: A New Approach to Asylum?* pp. 190–205 in *Government and Opposition*, Volume 43, Issue 2, 2008.

Hyndman, Jennifer & Mountz, Alison, *Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe*, pp. 249-269 *Government and Opposition*, Volume 43, Issue 2, 2008.

Books

Franck, Thomas, *The Power of Legitimacy Among Nations*, Oxford University Press, 1990, available at <http://www.oup.com/us/catalog/general/subject/Law/JurisprudenceandLegalPhilosophy/?view=usa&ci=9780195061789> , (consulted on 21 May 2011).

Journals/Revues

Aliboni, Roberto, *The Geopolitical Implications of the European Neighbourhood Policy*, pp. 1-16, *European Foreign Affairs Review* 10, 2005.

Bigo, D, Guild, E, *De Tampere a Seville, vers une autre gouvernementalisation de la domination transnationale ?* pp. 5-25, in *Cultures & Conflicts* n.45, 2002 available at <http://conflits.revues.org/index762.html> . (consulted on 16 March 2011).

Carling, Jorgen & Hernandez-Cartero, Maria, *Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa*, pp. 42-58 *The British Journal of Politics and International Relations*, Volume 13, Issue 1, 2011.

Costello, Cathryn, *The Asylum Directive and the Proliferation of Safe Country Practices: Deterrence Deflection and the Dismantling of International Protection?*, pp. 35-69, *European Journal of Migration and Law* 7, The Netherlands, 2005.

Del Sarto A. Raffaella & Schumacher, Tobias, *From EMP to ENP: What's at Stake with European Neighbourhood Policy towards the Southern Mediterranean?*, pp. 17-38, *European Foreign Affairs Review* 10, , 2005.

Franck, Thomas, *Legitimacy in International Systems*, pp. 705-759, *The American Journal of International Law*, Vol 82, Issue 2, AM. INT'L L. 705, 1988, available at <http://academic2.american.edu/~dfagel/Philosophers/TOPICS/HumanitarianIntervention/Legitimacy%20In%20The%20International%20SystemSmaller.pdf>, (consulted on 20 May 2011).

Guiraudon, Virginie, *European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping*, pp. 251-271, *Journal of Common Market Studies*, Vol. 38, No. 2.

Hamood, Sara, *Eu-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?*, pp. 19-42, *Journal of Refugees Studies* Vol. 21, No. 1, 2008.

Johnson, Alastair Iain, *Treating International Institutions as Social Environments*, 45:3, *International Studies Quarterly*, pp. 487-505, 2001, available at <http://www.wcfia.harvard.edu/sites/default/files/socialization.pdf>, (consulted on 21 May 2011).

Klepp, Silja, *A Contested Asylum System: The European Union Between Refugee Protection and Border Control in the Mediterranean Sea*, pp. 1-22 *European Journal of Migration and Law* 12, Leiden, 2010.

Magen, Amichai, *The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?* pp. 383-420, *Columbian Journal of International Law* 12, 2006.

Roots, Lehte, *The impact of the Lisbon Treaty on the development of the EU immigration legislation*, *Croatian Yearbook of Legal Studies*, Vol 5, 2009.

Samers, Michael, *An Emerging Geopolitics of "Illegal" Immigration in the European Union*, pp. 27-45, *European Journal of Migration and Law* 6, 2004.

Jurisprudence

European Court of Human Rights, Case of M.S.S v. Belgium and Greece, Application no. 30696/09, 21 January 2011, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=880339&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, (consulted on 17 May 2011).

European Court Of Human Rights, DEUXIÈME SECTION Requête n° 27765/09 présentée par Sabir Jamaa HIRSI et autres contre l'Italie introduite le 26 mai 2009, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=859107&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, (consulted on 5 April 2011).

High Court of Australia, Plaintiff M61/2010E v Commonwealth of Australia; Plaintiff M69 of 2010 v Commonwealth of Australia [2010] HCA 41, 11 November 2010, <http://www.austlii.edu.au/au/cases/cth/HCA/2010/41.html>, (consulted on 1 June 2011).

UN General Assembly, *The responsibility to protect*, 63/308, 7 October 2009, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/513/38/PDF/N0951338.pdf?OpenElement>, (consulted on 1 June 2011).

Sites

Alexander's Gas & Oil Connections, *New gas pipeline linking Libya to Italy opened*, News and Trends: Europe 23 August, 2002, available at <http://www.gasandoil.com/goc/news/nta23498.htm>, (consulted on 2 April 2011).

December 18, *Migrants workers in Libya*, available at <http://www.december18.net/article/migrant-workers-libya>, (consulted on 17 May 2011).

European Commission press release, *European Commission and Libya agree a Migration Cooperation agenda during high level visit to boost EU-Libya relations*, 5 October 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/472>, (consulted on 27 April 2011).

ECRE interview with Sylvie Guillaume (S&D, France), member of the LIBE Committee available at http://www.ecre.org/resources/ECRE_actions/1641, (consulted on 10 May 2011).

ECRE Interview with Ana Gomes, MEP (Portugal, S&D) on 21-01-2011 available at http://www.ecre.org/files/2011_01_21%20ITW%20Ana%20Gomes.pdf (consulted on 10 May 2011).

European Parliament, *The EU's External Relations-The Southern and Eastern Mediterranean Countries*, available at http://www.europarl.europa.eu/parliament/expert/displayFtu.do?language=en&id=74&ftuId=FTU_6.4.5.html (consulted on 21 April 2011).

Gianniou Maria, *EU and Libya: A Give and Take Relationship*, EKEM/EUROMEDO, 2010, available at http://www.ekemprogram.org/euromedo/index.php?option=com_content&view=article&id=176:eu-and-libya-a-give-and-take-relationship&catid=37:2010-05-05-10-07-53&Itemid=59 , (consulted on 26 April 2011).

Gibney, J. Matthew, *Beyond the bounds of responsibility: western states and measures to prevent the arrival of refugees*, Global Commission on International Migration, No. 22, 2005, available at <http://www.unhcr.org/refworld/publisher/GCIM,,,42ce4f304,0.html> , (consulted on 21 May 2011).

Human Rights Watch, Report: *European Union Managing Migration Means EU Complicity in Neighbouring State's Abuses of Migrants and Refugees*, October 2006, p. 2, available at <http://www.hrw.org/en/reports/2006/10/17/managing-migration-means-potential-eu-complicity-neighboring-states-abuse-migrant>, (consulted on 19 May 2011).

Human Rights Watch, Report: *Pushed Back, Pushed Around-Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 2009, available at <http://www.hrw.org/en/reports/2009/09/21/pushed-back-pushed-around-0> , (consulted on 5 March 2011).

Human Rights Watch, Report: *Stemming the flow, Abuses Against Migrants, Asylum Seekers and Refugees*, Part III of a three-parts series, 2006, available at <http://www.hrw.org/en/reports/2006/09/12/stemming-flow> , (consulted on 2 March 2011).

Hyndman & Mountz, 2008, abstract, available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1477-7053.2007.00251.x/abstract> (consulted on 14 March 2011).

Kananen, Marko, *Externalization of migration management – the Libyan case*, 2009, available at http://www.afrique-europe-interact.net/index.php?article_id=193&clang=1 , (consulted on 11 May 2011).

Lockerbie Case Blogspot, *Article in the Scotsman*, 23 July 2007, available at http://lockerbiecase.blogspot.com/2007_07_01_archive.html , (consulted on 4 April 2011).

Lockerbie Case Blogspot, *Libya's Lockerbie Compensation Proposal*, 31 March 2008, available at <http://lockerbiecase.blogspot.com/2008/03/libyas-lockerbie-compensation-proposal.html> , (consulted on 4 April 2011).

MEP Mario David's web site, *Reviewing EU policy on its Southern neighbours*, 6 April 2010, available at <http://www.mariodavid.eu/noticias/reviewing-eu-policy-on-its-southern-neighbours.-mario-david-motin-discussed-today-in-strasbourg> , (consulted on 21 May 2011).

Migrants at Sea, *EU and Libya Sign "Unclear" Migration Cooperation Agreement*, 6 October 2010, available at <http://migrantsatsea.wordpress.com/2010/10/06/eu-and-libya-sign-unclear-migration-cooperation-agreement/>, (consulted on 21 March 2011).

Migrants at Sea, Inex, *transcript of interview with Mr. Ikka Laitinen, FRONTEX Executive Director*, p. 1, FRONTEX HQ, Warsaw, 12 May 2010, available at <http://migrantsatsea.files.wordpress.com/2010/11/inex-laitinen-interview-12may2010.pdf>, (consulted on 24 June 2011).

Migrants at Sea, *Libya Orders UNHCR Office Closed – Possible Link to EU-Libya Talks on Partnership Accord*, 9 Jun 2010, available at <http://migrantsatsea.wordpress.com/2010/06/09/libya-orders-unhcr-office-closed-%E2%80%93-possible-link-to-eu-libya-talks-on-partnership-accord/>, (consulted on 7 April 2011).

Migrants at Sea, *Libya to Permit UNHCR to Resume Limited Activities*, 27 Jun 2010, available at <http://migrantsatsea.wordpress.com/2010/06/27/libya-to-permit-unhcr-to-resume-limited-activities/>, (consulted on 7 April 2011).

Migrants at Sea, *Libyan Rebel Leader Jalil Promises to Respect Immigration Agreements Between Libya and Italy*, 29 March 2011, available at <http://migrantsatsea.wordpress.com/2011/03/29/libyan-rebel-leader-jalil-promises-to-respect-immigration-agreements-between-libya-and-italy/>, (consulted on 8 April 2011).

Migreurop, *European borders, controls, detention and deportations*, 2009-2010 Report, available at http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-2-121110.pdf , (consulted on 17 May 2011).

Migreurop, *FRONTEX Agency: Which Guarantees for Human Rights?* 2011 Report, available at <http://www.migreurop.org/IMG/pdf/FRONTEx-PE-Mig-ENG.pdf>, (consulted on 24 June 2011).

Open Democracy site , *EU migration control: made by Gadaffi?*, by Gregor Noll and Margarita Giuffrè, 25 February 2011, available at <http://www.opendemocracy.net/gregor-noll-mariagiulia-giuffr%C3%A9/eu-migration-control-made-by-gaddafi> , (consulted on 24 May).

Report – *Visit to Benghazi 17-20 May 2011* – by MEP Ana Gomes, available at <http://www.anagomes.eu/PublicDocs/03538245-849e-4c99-aa4a-3971226294e3.pdf>, (consulted on 31 May 2011).

Stratfort, Energie Sources, *Italy's Interests in Libya*, Forbes, 31 March 2011, available at <http://blogs.forbes.com/energysource/2011/03/31/italys-interests-in-libya/>, (consulted on 4 April 2011).

Stratfort, 2011Energie Sources, *Italy Interests in Libya*, Forbes, 31 March 2011, available at <http://blogs.forbes.com/energysource/2011/03/31/italys-interests-in-libya/>, (consulted on 4 March 2011).

US Department of State Cable, *Libya takes back 500 Italy-bound migrants*, created on 14/05/2009, released on 31/01/2011, classified: Confidential, origin: Embassy of Tripoli, available at <http://213.251.145.96/cable/2009/05/09TRIPOLI391.html> , (consulted on 6 April 2011).

US State Department Cable, *UN official says Libya shirking HR responsibilities*, created on 05/08/2009, released on 31/01/2011, classified: Confidential/Noform, Origin: Embassy Tripoli, available at <http://213.251.145.96/cable/2009/08/09TRIPOLI637.html> , (consulted on 6 April 2011).

US State Department Cable, *The Eu-Libya Framework Agreement :Veni, Visas, Veto*, created on 14/07/2008, released on 01/02/2011, classified: Confidential, Origin: Embassy Tripoli, available at <http://wikileaks.ch/cable/2008/07/08TRIPOLI567.html> , (consulted on 9 May 2011).

US State Department Cable, *The Frogman Who Couldn't Swim: A Cooperation Cautionary*, created on 17/02/2009, released on 01/02/2011, classified: Confidential, Origin: Embassy Tripoli, available at <http://wikileaks.ch/cable/2009/02/09TRIPOLI155.html> , (consulted on 9 May 2011).

Times of Malta, *Brussels defends Italy-Malta agreement*, 27 July 2010, available at <http://www.timesofmalta.com/articles/view/20100727/local/brussels-defends-italy-libya-agreement.319697> , (consulted on 18 May 2011).

Wall Street Journal, *Italy Suspends "Friendship" Treaty with Libya*, 26 February 2011, available at http://online.wsj.com/article/SB10001424052748703796504576168774016612758.html?mod=googlenews_wsj , (consulted on 2 April 2011).

Zolberg, *Guarding the Gates*, 2002, on line paper available at http://essays.ssrc.org/sept11/essays/zolberg_text_only.htm, (consulted on 1 June 2011).

Treaties/Conventions/Directives/Regulation

African (Banjul) Charter on Human and Peoples' Rights, Adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf, (consulted on 8 April 2011).

Barcelona Declaration, adopted at the Euro-Mediterranean Conference - 27-28/11/9, available at http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf, (consulted on 1 June 2011).

Concept Note Libya – Libya – Country Strategy Paper and National Indicative Programme 2011-2012, available at http://ec.europa.eu/world/enp/mid_term_review/final_concept_note_libya_en.pdf, (consulted on 16 May 2011).

Communication from the Commission, COM (2004) 373 final at 3, European Neighbourhood Policy Strategy Paper, Brussels, 12/05/2004, available at http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf, (consulted on 1 June 2011).

Communication from the Commission to the European Parliament and the Council, COM(2011) 291 final, Annual Report on Immigration and Asylum 2010, 24.5.2011, Available at http://ec.europa.eu/home-affairs/news/intro/docs/110524/291/1_EN_ACT_part1_v8.pdf, (consulted on 14 June 2011).

Communication from the Commission to the Council and the European Parliament, COM(2003) 104 final, Wider Europe — Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours, Brussels, 11/03/2003, available at http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf, (consulted on 1 June 2011).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2008) 359 final, A Common Immigration Policy for Europe: Principles, actions and tools, Brussels, 17.6.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0359:FIN:EN:PDF>, (consulted on 14 June 2011).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. COM(2011) 292 final. A dialogue for migration, mobility and security with the southern Mediterranean countries, Brussels, 24.5.2011, available at

http://ec.europa.eu/home-affairs/news/intro/docs/110524/292/1_EN_ACT_part1_v12.pdf, (consulted on 14 June 2011).

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, COM(2011) 248 final, Communication on Migration, 4.5.2011, available at http://ec.europa.eu/home-affairs/news/intro/docs/1_EN_ACT_part1_v11.pdf, (consulted on 14 June 2011).

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, COM(2008) 360 final, Policy Plan on Asylum an Integrated Approach to Protection Across the EU, Brussels, 17.6.2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>, (consulted on 14 June 2011).

Council Directive, 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>, (consulted on 1 June 2011).

Council Directive, 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>, (consulted on 1 June 2011).

Council Directive, 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>, (consulted on 1 June 2011).

Council of the European Union, Justice and Home Affairs Council, Conclusions on Cooperation with Libya in Migration matters, Luxembourg, 2-3 June 2005, 8849/05, available at <http://www.eu2005.lu/en/actualites/conseil/2005/06/02jai/jaijai.pdf>, (consulted on 16 May 2011).

Council Regulation, 2003/243/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>, (consulted on 1 June 2011).

Draft report on migration flows arising from instability: scope and role of the EU foreign policy, 2010/2269(INI), available at

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-454.355+02+DOC+PDF+V0//EN&language=EN>, (consulted on 11 May 2011).

Draft Report with a proposal for a European Parliament recommendation to the Council on the ongoing negotiations on the EU-Libya Framework Agreement, 2010/2268/(INI), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE452.883>, (consulted on 10 May 2011).

European Neighbourhood and Partnership Instrument, Libya, Strategy Paper and National Indicative Programme 2011-2012, available at http://ec.europa.eu/world/enp/pdf/country/2011_enpi_csp_nip_libya_en.pdf, (consulted on 16 May 2011).

European Parliament recommendation of 20 January 2011 to the Council on the negotiations on the EU-Libya Framework Agreement, INI/2010/2268 available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0020+0+DOC+XML+V0//EN&language=EN>, (consulted on 10 May 2011).

Global approach to migration: Priority actions focusing on Africa and the Mediterranean, 15744/05, ASIM 66, RELEX 761, 13 December 2005, available at <http://register.consilium.europa.eu/pdf/en/05/st15/st15744.en05.pdf>, (consulted on 14 June 2011).

Joint Communication to the European Council, the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 200 final, A Partnership for Democracy and Shared Prosperity with the Southern Mediterranean, 8.3.2011, available at http://eeas.europa.eu/euromed/docs/com2011_200_en.pdf, (consulted on 14 June 2011).

Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(211) 303 final, A New Response to a Changing Neighbourhood, 25.05.2011, available at http://ec.europa.eu/world/enp/pdf/com_11_303_en.pdf, (consulted on 14 June 2011).

Organization of African Union, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf, (consulted on 1 June 2011).

United Nations, 1951 Refugee Convention and Protocol relating to the status of refugees, available at <http://www.unhcr.org/3b66c2aa10.html>, (consulted on 1 June 2011).

United Nations, Universal Declaration of Human Rights, adopted on 10 December 1948, available at <http://www.un.org/en/documents/udhr/index.shtml>, (consulted on 1 June 2011).

UNCHR, Handbook on Procedures and Criteria for Determining Refugee Status, HCR/IP/4/Eng/Rev.1, 1992, available at <http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf>, (consulted on 1 June 2011).

UNCHR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, available at <http://www.unhcr.org/cgi-bin/teXis/vtx/refworld/rwmain?docid=45f17a1a4&page=search>, (consulted on 6 April 2011).

UNHCR's Convention Plus Targeting of Development Assistance for Durable Solutions to Forced Displacement, Convention Plus at a Glance available at <http://www.unhcr.org/403b30684.pdf>, (consulted on 1 June 2011).

Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, available at <http://eur-lex.europa.eu/lex/LexUriServ/LexUriServ.do?uri=OJ:L:2006:378:0041:0071:EN:PDF>, (consulted on 14 June 2011).

Annexes

Transcript of interview with Mr. Saryusz-Wolski, Member of the European Parliament, Head of the Polish Delegation EPP Group and with Mr. Karol Reczkin Adviser to the Polish Delegation EPP Group

European Parliament, Brussels, 15 June 2011

Dr. Paolo Biondi

Transcript (B = Biondi; S = Saryusz-Wolski; R= Reczkin)

B: How did you develop the idea to promote the creation of a new sub-Committee for the Neighbourhood Policy within the AFET?

S: I had some concern about the ability of the European Parliament to react in an effective and rapid manner to the current developments in our close neighbourhood both in the South and the East. We need not only to be able to embrace those changes and deal with their far-reaching consequences but also to be pro-active and formulate a long-term vision of our relations with the countries participating in the European Neighbourhood Policy which have impact on our security and economy. I am fully convinced that in the present context of the important, sometimes negative line in the East or tectonic the line in the South, the Parliament needs new institutional instruments in order to cope with the new challenges. Therefore, I proposed to create, according to rule 190 of the Rules of Procedure, a new subcommittee of the Committee on Foreign Affairs that would deal specifically with neighbourhood.

B: How do you think this new committee could be an added value in the work and role of the EP especially in its relations with the EC?

S: As former chairman of the Committee on Foreign Affairs, I can attest that the AFET committee will not be able to be effective if overloaded: some of the major issues might be overlooked and monitoring of the situation weaker than required. Setting-up a new subcommittee would boost the parliamentary expertise, competence and diplomacy on our neighbourhood thus reinforcing the position of the Parliament as a fully-fledged partner in this domain for both the EC as a whole than the relevant commissioner and the High Representative.

Another added value of a new subcommittee would be its horizontal nature. Indeed, membership in this new body should be open, with fixed quotas, to Members from selected committees competent in the areas of trade, transport, energy, environment, budget, migration and asylum to draw upon their expertise

and enrich the depth of analysis and long- term strategic approach. Hence, thanks to multidisciplinary competences of our Members the subcommittee would reinforce the holistic approach to the neighbourhood policy.

B: As expert and promoter of the EU enlargement to the East of Europe but at the same time as advocate of this new idea, what do you think is nowadays the relation between the EU enlargement and the ENP?

R: I think we are in presence of two different instruments for the EU external relations. One devoted especially for the EU process of integration and access and the other for the EU relations with its neighbours. The enlargement is a process divided in many phases which allows willing and virtuous countries to gain a possibility to access to the EU. The ENP on the other side can be framed in a wider geographical context, from the EU south boundaries to the east and oriental ones and its aim is mostly to create a ring of friends around the EU borders. Within the ENP the EU offers our neighbours a privileged relationship, building upon a mutual commitment to common values, namely democracy and human rights, rule of law, good governance, market economy principles and sustainable development. Nevertheless both of them, despite the different aims which they are created for, have many points in common and the presence of these 16 countries in the ENP does never prejudice how their relations with the EU may develop in the future. In my opinion nowadays we are in need of a reform of both these instruments in order to make them more up to the actual needs and political evolutions, without never forget that flexibility should be a key aspect of their daily action.

B: There are few academic which claim that the ENP is nothing more then a softly modified version of the enlargement used for purposes and applied to countries which have nothing to do with Europe and the consequent access to the Union. What do you thing about this theory?

R: Well, behind every theory there is a little bit of truth and especially when we talk about enlargement, whose instruments have demonstrated to be largely successful, then it is not easy to resist to try to repeat the same success but in another context. If we look with attention to both of them we can notice that they make large use of visa policies. This is something that have been demonstrated to be successful in the enlargement process, and considering that the ENP offers more or less the same awards as enlargement, with the exclusion of accession, then it is almost automatic adopt the same instruments and strategies.

S: What I would like to underline, nevertheless, is that sometimes we have to be prepared to change and adapt ourselves to the new situations and challenges. What has demonstrated to be successful in the past maybe cannot be that much nowadays anymore. The Arab Spring, for instance, and the people calling for democracy and flowing to Europe are a good example. We have to adapt our strategies to this new *status de facto* in order not to be found unprepared again.

B: What do you think about the actual situation in the north of Africa and the new people's freedom movements and call for democracy in countries such as Tunisia, Egypt and Libya?

R: I think this is a great step for those countries and a positive evolution, but it is also a big challenge for the EU. The problems of coordination raised in the recent months demonstrated that we are in need of more solidarity, first among us and then also with those countries on the other side of the Mediterranean shore.

S: We need more commitment of the EU countries, we need to be credible and not only be interested in energy. The EU countries should demonstrate more solidarity among them in dividing the burden of the refugees' resettlement and without trying to block the migrant's flows to the EU in the name of some security strategy.

Poland will take up next month the role of the rotating presidency of the Council of the European Union for the first time since its access, and will not remain indifferent to the momentous changes taking place on the southern shore of the Mediterranean. The development of events highlights the difficulty of the EU to intervene quickly (especially in the mission emerged in Libya) and some serious delays, to take a coherent position on the so-called "Arab Spring".

Poland in its new role will try to mediate the different dimensions of the neighbourhood policy, the east and the Mediterranean, emphasizing the complementary, and will propose that we increase the funding for the development of cooperation with neighbours to the east and south. The current review of the neighbourhood policy offers an excellent opportunity to create new synergies between the two dimensions, trying to pay greater attention to the civil society and putting apart the economic interests. Poland moreover, has some experience in the transition from an authoritarian regime to a democratic one. What has been said so far is also valid for safety. Without the intervention of NATO, probably the course of events in Libya would have been different. The EU should reflect on the need to acquire their own military capabilities, even starting with small size. But the issue goes far beyond security and military intelligence.

B: What do you think about the Framework Agreement recently negotiated by the EC and therefore suspended due to the anti Gaddafi revolution, between the EU and Libya in the context of the ENP?

R: I do not know the specific content of the agreement but those kinds of documents are quite standard in the ENP context. The relations between the EU and the neighbours countries must be regulated through these kind of agreements in order to settle down clearly both sides' duties and goals to be accomplished.

S: What I can say is that the agreement in question was strongly criticized by the European Parliament for its presumed lack of human rights clauses and the phase of negotiations. There has been a missing involvement of the European Parliament in accordance to the new Treaty of Lisbon according to which the European Parliament must be informed step by step and any kind of agreement must first pass its scrutiny before being adopted.

B: Recently on 16 March 2011 a draft resolution on the EU-Libya Migration Agreement was voted and the MEPs called for the suspension of the Cooperation Agenda to be revoked till there will be a new transitional government willing to promote a democratic and human rights based implementation of the agreement". The draft resolution was adopted by 53 votes to 1, with 3 abstentions. Don't you think that this position is incoherent with the precedent criticism opposed by the EP to the EC concerning the phase of negotiation of the Cooperation Agenda and the lack of disclosure of information concerning the Council's mandate?

R: The truth is that the Council does not want probably the Members of the European Parliament to be informed immediately because of the secret which must be kept for the purpose of the negotiations to work better. I can understand that certain intimacy is necessary otherwise everything can be compromised. At the same time the documents' procedure of adoption in the European Parliament is particularly complex and each resolution must pass a phase during which can be amended and then all the amendments must be voted. In democracy not everybody share the same opinion and it can happen that resolution like this, which can apparently look incoherent with precedent positions, can be adopted.

B: What do you think about the actual migration flow from the north of Africa and the consequent crisis of its management concerning mainly Italy but also the EU as a whole? Do you have any suggestion to address to any of the above actors, namely the EU and Italy, in order to do better their job but at the same time respect people's fundamental right to leave their own country in search of better possibilities in another?

S: We are of course in presence of tragic a migration. These people are moving pushed by different reasons. There is on one side the economic migration which is something normally happening from poor countries to those more developed and which sometimes we underestimate and try to control or regulate. But on the other side we are also in presence of these so called "hope journeys", people escaping from war and dictatorial persecution and here is where we have to pay more attention. The 1951 Geneva Convention must be always applied and we cannot push back people in need of protection.

R: On the other side our neighbours have also some responsibility. We can sign up all kind of agreements and furnish funds, but sometimes money cannot replace a self-strong commitment to the principles and rules inspiring the civil living. The ball is also on their side. They must be more concentrate on their people, try to give them a way to express their aspirations and try to make out of it a reality. On our side we can also make a better job, trying to send there diplomats who are much more competent and sensible to the local problems. The readmission agreements are not everything and sometimes we have to try new roads.

