

Maastricht University, Faculty of Law

European Master's Degree in Human Rights and Democratisation
A.Y. 2018/2019

A 'New European Border' on the doorstep of Africa:

The externalization of migration management and its effects on
migrants' human rights

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ABSTRACT

The aim of this thesis is to analyze the impact of external migration control on the human rights of migrants, asylum seekers and refugees. It will consider how the European Union (EU) and its Member States have pushed the border out towards the Mediterranean, and consequently into African countries, so migrants experience the country they wish to migrate to directly on their 'doorstep'. It will consider the rights afforded to migrants, asylum seekers and refugees within EU territory and determine how and if these rights are being violated through the external application of migration control. It will analyze the shifting of responsibility to third countries in managing migration, by looking specifically at the cases of Libya and Morocco and their bilateral agreements with Member States. Throughout this thesis various sections will explore the flexible sovereign borders of the EU, through its joint maritime patrols, surveillance, bilateral agreements, funding and border assistance missions, to understand how it has reached beyond national and EU borders and how this directly affects the human rights of migrants'.

Key words: migrant, asylum-seeker, external, control, migration, management, extra-territorial, cooperation, third-country

ACKNOWLEDEMENTS

I would like to express appreciation to my thesis supervisor, Dr. Natasja Reslow for her support throughout the process of this dissertation. Her knowledge and expertise helped provide new insights in the field of external migration control. Thank you for your revisions and valuable feedback, and thank you for always being available to meet with me to discuss my many questions. I would also like to thank my family for their interest in my work, and for always supporting everything I do.

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TABLE OF ABBREVIATIONS

CAT	Convention Against Torture
CEAR	Spanish Commission for Refugees
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GNA	Government of National Accord
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organization for Migration
LNA	Libyan National Army
MoU	Memorandum of Understanding
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSMIL	United Nations Support Mission in Libya
UNHCR	United Nations High Commissioner for Refugees

A 'New European Border' on the doorstep of Africa: the externalization of migration management and its effects on migrants' human rights.

1. Introduction: the 'New European Border'

Externalizing migration management has expanded across North America, Europe and beyond. The desire to control 'who shall come to this country and the conditions in which they come'¹ has arguably been a cornerstone theme in recent migration policies. Remote control² initiatives and the expansion and greater complexity of externalized policies have raised concerns about human rights and its position under international law.³ Externalization of migration control describes extraterritorial state action to prevent migrants and asylum seekers from entering the legal jurisdictions and territories of destination countries.⁴ These actions include unilateral, bilateral and multilateral state engagement, enlistment of private actors, direct interdiction and preventive policies, as well as indirect actions such as supporting security, surveillance or migration management practices in or by third countries.⁵ Borders act as a fundamental marker between territories, however the border has become increasingly less of a physical barrier.⁶ The movement of people constitutes a shift in the border to a place where control measures take place; in both law and practice, the border is no longer consistent with the edges of a physical territory of a Member State, but follows the movement of people.⁷ According to Guild, 'an important physical manifestation of borders results from attempts to move, the individual, through interaction with the

¹ Said by previous Australian Prime Minister John Howard (*Tasmania Policy Conference*, 02 November

² 'Remote control' was first introduced by Zolberg in 1999, under his definition it can take the form of visas, immigration officers, pre-clearance policies, asylum processing, re-admission, interdiction and detention

³ Zaiotti R, Mapping Remote Control' in *Externalization of Migration Management: Europe, North America and the Spread of 'remote control' practices* (Routledge 2016) ch 1, 4

⁴ Frelick B, Kysel I and Podkul J, 'The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants' (2016) *Journal on Migration and Human Security* 4(4) 19, 193

⁵ Ibid 193

⁶ Ibid 195

⁷ Guild E, 'Moving the Borders of Europe' (2001) *Faculteit der Rechtsgeleerdheid, Nijmegen* 1

state and other actors over the granting or withholding of rights, activates the “border” and engages with the government regarding the position of the border’.⁸

The contextualization of the border, not as physical entity, but more as an ‘invisible line’ that needs to be enforced, brought forth the emergence of modern external interdiction policies. In 1981 for example, the United States issued executive orders authorising the interdiction of vessels off the coasts of Haiti and Cuba, to prevent ‘entry of undocumented Aliens from high seas’⁹ with the purpose of curtailing immigration from Haiti. The US-Haiti 1981 agreement allowed the US to interdict vessels departing from Haitian territory and also allowed for the detention and return of Haitian flagged vessels and their passengers without permitting a claim for refugee status or protection.¹⁰ The US model of interdiction and extraterritorial processing has arguably provided a model for other countries in response to irregular migration at sea. This is seen in Australia’s ‘Pacific Solution’ between 2001 and 2007, where migrants were transferred for ‘processing’ on the islands of Nauru and Papua New Guinea.¹¹ The externalization of migration policy is an evolving phenomenon; it is one that has undergone significant transformations in the emerging field of ‘remote control’. External migration management in the European Union dates back to the 1980s in the form of cooperation agreements with countries of transit and origin in Africa¹², and has thus evolved in various dimension of externality to include: external asylum processing facilities, offshore detention and interdiction, overseas immigration officers, readmission agreements, preclearance and visas and the regulation of mobility.

The notion of ‘migration management’ emerged in the post-Cold War era and was elaborated in the context of ‘increased concerns’ about migrants ‘flooding to the

⁸ Ibid 1

⁹ The US approach is that the Coast Guard is permitted to interdict and return even within the United States territorial waters. See, *Sale v Haitian Centers Council* 509 US 155 (1993).

¹⁰ Ryan B and Mitsilegas V, ‘Extraterritorial Immigration Control: Legal Challenges’ (2010) 21 *Martinus Nijhoff* 25, 27

¹¹ Ibid 28

¹² Agreements between the EU-Niger, EU-Tunisia, EU-Mauritania

West’.¹³ The term migration management has further evolved at the international level and is used by European Union (EU) institutions and non-governmental organizations, such as the International Organization for Migration (IOM) ‘migration management for the benefit of all’ – to ensure safe, orderly and regular migration.¹⁴ The external aspect of migration management requires the extraterritorial action of the state to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries.¹⁵ The extraterritorial aspect of immigration control has become increasingly visible since the 1990s, and for the first time ‘migration became a relevant topic in international diplomacy at a global level within the UN’¹⁶, which has led to a shift in the ‘security agenda’ with a renewed focus on extraterritoriality and the surveillance of movement.¹⁷ Externalization is often framed under the ‘asylum-migration nexus’¹⁸, a strategy of irregular migration control to protect migrants and asylum seekers from the dangerous and fatal journeys as they attempt to reach the EU border. The ‘external dimension’ of EU asylum and immigration policy was officially embraced in 1999 at the Special European Council and Home Affairs in Tampere.¹⁹ Here, externalizing migration management has been referred to as ‘remote control’

¹³ The term ‘migration management’ was further elaborated by Bimal Gosh in 1993. See Geiger M and Pecoud A, ‘The Politics of International Migration Management’ (2010) *Palgrave Macmillan* 1

¹⁴ UN General Assembly, ‘Global Compact for Safe and Orderly Migration’ (11 January 2019) A/RES/73/195 para 13

¹⁵ Frelick (no 4) 193

¹⁶ In 1990s a burst in migration control activities, migration regulations, asylum laws and visa requirements took place. See Georgi, F, ‘For the Benefit of Some: The International Organization for Migration and its Global Migration Management’ in Geider M and Pecoud A (eds), ‘The Politics of International Management’ (2010) *Palgrave Macmillan*

¹⁷ Mitsilegas V, ‘Extraterritorial Immigration Control in the 21st Century: The Individual and State Transformation’ in Ryan B and Mitsilegas V (eds), *Extraterritorial Immigration Control* (vol 21, Martinus Nijhoff 2010) 39

¹⁸ UNHCR opted to change using the terminology ‘asylum-migration nexus’ as it implies south-to-north population movements, when a majority of the world’s refugees are found in developing regions. See UNHCR, ‘Research Paper, No. 155, Beyond the Nexus: UNHCR’s evolving perspective on refugee protection and international migration, Jeff Crisp’ (2008)

¹⁹ Lavenex S, ‘Shifting up and out: The foreign policy of European immigration control’ (2006) *West European Politics*, 29(2) 329, 340

and consists of shifting the locus of control further afield from the common territory.²⁰ The link between immigration control and the external dimension of asylum and migration was also outlined in the 2004 Hague Programme, introducing the second phase of the Common European Asylum System (CEAS) and overall the external dimensions of asylum and migration.²¹ The Hague Programme acknowledged the need for closer cooperation and partnerships with third countries to ensure a shared responsibility with countries and regions of transit. It outlines the importance of border management through the 'establishment of integrated management systems for external borders and the strengthening of controls and surveillance of the external borders of the Union', while other measures of importance include prevention and control of crime, particularly terrorism.²² For example, UK's border security plan outlines the need to determine people's identities at the earliest point, and identify risks to stop 'them' from entering the UK, as off-shoring border control is 'the keystone of our [UK] border defense'.²³ It is from this, and similar concepts of 'border security' developed in the United States,²⁴ that we arrive at what is identified as the so called '(in)security continuum', which aims to control irregular migration and fighting outside 'security threats'.²⁵ Migration has become increasingly politicized and can be a turning point for politicians in national elections, becoming a key topic of discussion. What is not often discussed however, is how these external migration management policies affect migrants and how often those most vulnerable and in need of international protection are the ones that are the most negatively affected. Although human smuggling must be sanctioned, it is debated that this battle is happening at the expense of the persons needing international protection. A 2017 European Parliament report outlines the role

²⁰ Lavenex S (no 19) 337

²¹ See Council Regulation 2005/ C 53/01 of 3 March 2005 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005) OJ C 53/1 section 1.6

²² Ibid

²³ UK Home Office, 'Securing the UK Border: Our vision and strategy for the future' (UK Foreign and Commonwealth Office London, March 2007) point 1.4, 3

²⁴ Mitsilegas V (no 17) 40

²⁵ Mitsilegas, V (no 17) 45

of EU external action in addressing refugee and migrant movements. This report reiterates the EU's commitment to better protect its external borders with the goal of preventing irregular entry into the EU, and additionally, by opening up safe and legal channels to asylum seekers and potential migrants.²⁶

The progression of migration management policies overall are aimed at saving lives by reducing fatalities at sea and land and by halting criminal networks of human smuggling and trafficking. In 2017, the sudden detections along the Western Mediterranean route hit a record high²⁷ – this reversal from the Central Mediterranean route is a significant development in EU's external borders since the implementation of the EU-Turkey deal.²⁸ In addition, related to the changing nature of migratory routes, the number of African migrants, particularly from Maghreb countries (Morocco, Algeria, Tunisia, Mauritania) has increased, resulting in African nationals accounting for 'two-thirds of irregular migrants arriving at the shores of the EU'.²⁹ Irregular crossings account for thousands of migrant fatalities each year; migrants set out on perilous journeys across the Mediterranean on un-seaworthy boats packed to capacity, exposing themselves to criminal organizations. The external policies of the EU focus on ensuring universal human rights and guaranteed safeguards for migrants and refugees through a shared commitment to address the challenges of irregular migratory flows – thus building on international engagement. However, despite the advances of international laws and obligations on the effective protection of migrants' rights, irregular migration continues to be viewed as a security concern which is at odds with a human rights approach that concerns 'the conceptualization of migrants as individuals and equal holders of human rights'. The EU focuses largely on 'easing migratory pressures' rather than examining the causes of irregular migration, and often lack focus of the individual human rights of persons in need of protection when enacting policies to tackle irregular

²⁶ Report (EU) of the European Parliament of 22 February 2017 on addressing refugee migrant movements: the role of EU external action (2017) A8-0045/2017, 16

²⁷ Frontex, *Risk Analysis for 2018* (2018) 6

²⁸ And arguably a result of the EU-Turkey statement

²⁹ Frontex (no 27) 9

migration.³⁰ In the summer of 2015, the Common European Asylum System (CEAS) welcomed all asylum seekers from the Western Balkan route and six months later, this same policy, allowed for the construction of border fences and introduced national limits for asylum applications and ‘fast track’ return procedures. At that time, there was a significant change in policy debates, shifting from one that welcomed refugees and vulnerable persons to gross objections of the arrivals of economic migrants and ‘illegal migrants’.³¹ The CEAS instrument is a system that aims to protect asylum seekers once on EU territory and assigns responsibility to Member States located at the external borders. It can be argued that the 2015 “migrant crisis” highlighted the shortcomings in the EU’s approach to policies on asylum, borders and migration, in terms of a shared responsibility in managing migration when irregular border crossings reached 1,82 million.³² Some arguments suggest that a policy shift was needed and justified, as a comprehensive approach for managing migration in all its aspects, and in May 2015 the European Commission presented the European Agenda on Migration.³³

To strengthen the EU’s external borders, the European Commission advised on strengthening the Schengen Borders Code, Europol,³⁴ the European Asylum Support Office (EASO) and revising Frontex (which was turned into the European Border and Coast Guard in 2016).³⁵ EU policies also took into account the external dimension of migration, which involves the geopolitical nature of changing migratory routes, the *modus operandi* of smugglers and the specific regional patterns of migration. In order to

³⁰ UN General, ‘Assembly Report of the Special Rapporteur on the human rights of migrants, François Crépeau - Regional study: management of the external borders of the European Union and its impact on the human rights of migrants’ (30 April 2013) A/HRC/23/46. 2013, 1-45

³¹ Ibid 10

³² Atanassov N and Radjenovic ‘EU asylum, borders and external cooperation on migrants’ (2018) *European Parliament Research Service* PE 625.194, 1

³³ ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration’ COM (2015) 240 final 13 May 2015.

³⁴ Europol is the European Union’s law enforcement agency – to support Member States in combating all forms of international and organized crime.

³⁵ Atanassov N and Radjenovic ‘EU asylum, borders and external cooperation on migrants’ (2018) *European Parliament Research Service* PE 625.194, 1

secure cooperation on migration issues, the EU has set out to strengthen relationships with third-party countries through a series of bilateral agreements, including political cooperation and financial assistance, while strengthening operations of EU agencies.³⁶ The securitization of EU immigration control is largely done through the coordination of the European Border Agency (Frontex), which plays a major role in extraterritorial immigration control. Some theorists are concerned with the inconsistent nature of the EU legal framework being applied at sea, and in regard to joint operations, to ensure Member States compliance with international obligations of migrants intercepted at sea.³⁷ Bilateral treaties permitting interdictions of irregular migrants on high seas include those conducted by the US,³⁸ Spain and Mauritania and Italy's agreements with Albania and Libya. The Italy-Albanian 1997 agreement allowed the Italian Navy to interdict on high seas and Albanian territorial sea and divert arrivals. In addition, Spain and Mauritania signed a Memorandum of Understanding (MoU) in 2007, giving Spanish authorities the ability to suppress illicit migration from Mauritania, and both countries agreed to tighten border control to deter thousands of migrants trying to enter Europe.³⁹ In addition, Spain agreed to contribute to interdiction operations in Mauritania's internal and territorial waters.⁴⁰

The year 2017 marked the first time the European Border and Coast Guard (Frontex) regulation clearly stated that the 'management of the external borders is a shared responsibility of the Union and the Member States.'⁴¹ This year also marked a drop in detections of illegal border crossings along the EU's external borders (with

³⁶ In March 2016 the Schengen Borders Code was amended to allow systematic checks of EU citizens at the EU's external borders

³⁷ Baldaccini, A 'Extraterritorial Border Control in the EU: The Role of Frontex in Operations at Sea' in Ryan B and Mitsilegas V (eds) *Extraterritorial Immigration Control* (no 17) 220-235

³⁸ *The 1981 Interdiction Agreement between the US and Haiti, allowed the US Coast Guard to interdict Haitian vessels on high seas, detain them and return them to Haiti. See, Frelick, B, Kysel I and Podkul J (no 4)

³⁹ 'Spain, Mauritania in migrant deal' (*BBC News*, 2006)

<<http://news.bbc.co.uk/2/hi/europe/4816312.stm>> accessed 04 March 2019

⁴⁰ Papastavridis E, 'Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law' (2009) *Syracuse Journal of International Law and Commerce* 36 (145) 146, 182

⁴¹ Frontex (no 27) 6

204,719 detections recorded that year), representing a 60 percent decrease from the previous year and an 89 percent decrease from detections at the height of the migratory crisis in 2015.⁴² This drop in detections can be a result of various factors, for example the shifting nature of migratory routes stemmed from conflicts, violence, human rights violations or the influence of strengthened border control policies. Since the closure of the Balkan migratory route, the EU has strengthened its focus on irregular migration coming from Africa, specifically countries of close proximity such as Libya and Morocco.

Migration, asylum and border management have been evolving and extending, and irregular migration flows and cross-border movements are continuously changing, as are the EU policies on protecting its external borders. Migration control is no longer something that is being performed only at the perimeter of a state's sovereign borders – it has expanded and advanced to include improved detection technology for interceptions at sea and strengthened border control on land. For many migrants, the first step of irregular migration is unauthorized entry, followed by application for asylum – however, this is changing as harsher anti-immigration policies become more prominent across governments and the outwards expansion of EU borders makes it increasingly difficult to ensure the consistent application and outside scope of EU law⁴³ and determining whose 'jurisdiction'⁴⁴ migrants fall into. Migrants are thus at greater risk of their rights being violated due to this outward shift of responsibility and increased rhetoric for harsher policies to tackle irregular migration. By analyzing bilateral agreements with EU and third countries, this thesis will research the changing

⁴² Ibid 6

⁴³ Hruschka C and Planck M, 'The border spell: Dublin arrangements or bilateral agreements? Reflections on the cooperation between Germany and Greece/ Spain in the context of control at the German-Austrian border' (2019) *European Immigration and Asylum Law and Policy*
<<http://eumigrationlawblog.eu/the-border-spell-dublin-arrangements-or-bilateral-agreements-reflections-on-the-cooperation-between-germany-and-greece-spain-in-the-context-of-control-at-the-german-austrian-border/>>

⁴⁴ Nussberger A, 'Concept of "Jurisdiction" in the Jurisprudence of the European Court of Human Rights' (2012) *Current Legal Problem*. 65, 241-268.

nature of the EU's external migration management policies and the effects it has on migrants' rights.

The cases of Libya and Morocco have been chosen to portray different situations of bilateral relations with the EU regarding migration management through external border management and third-country agreements. The aim of this paper is not solely to examine these specific policies of migration control, but to also look at the overall impact they have on migrants' human rights and their access to seek asylum.

1.2 Methodology

Current migration policy tends to focus on halting irregular migration altogether. A considerable focus is placed on the 'unprecedented phenomenon' of irregular migration as a problem that needs to be controlled. Migration control is no longer focused on the geographical physical border: it has shifted outwards and towards Africa. Much of the academic literature tends to focus on various mechanisms states use to control the 'unwanted' flow of people across borders, focusing on surveillance mechanisms, cooperation agreements, funding schemes and generally fail to focus on how human rights fit into the overarching theme of external control. This focus tends to single out the aspects of policy implementation, removal, return and reducing the number of irregular arrivals, essentially outlining these policies and determining how successful they have been in preventing irregular migration. There is little attention being paid to the consequences of external migration control on human rights, migrants and asylum seekers tend to be lumped into general categories, such as 'boat people', or 'illegal migrants' and this ensues a collective ideology on migrants, refugees and asylum seekers as a whole. To individualize the person's unique circumstances, their vulnerability, and to take into consideration how their specific rights may be violated

upon return or removal, is important in understanding how external migration controls affect the rights of migrants, refugees and asylum seekers.

A literature review will review theories and academic literature to provide an overview on the main arguments on external migration policies and its emergence, which will help contextualize previous arguments, address the gaps and challenges in current literature and show how they support the research of this thesis. Moreover, non-academic literature such as United Nations and NGO reports, articles of the European Commission and Parliament, newspaper articles, interviews and documentaries will be consulted for Section 5 (case studies of Libya and Morocco), to outline a brief history of these countries, their current political situations and their relationship with the EU. Due to the large availability of NGO reports and detailed reports of the conditions migrants face in both Libya and Morocco, interviews will not be conducted as current reports outline the ongoing situation of migrant and asylum seekers. Although interviews would have provided a unique and valuable contribution to the thesis, it would be challenging to access detention centers in Morocco and be impossible for Libya due to the current conflict. Thus, this section will specifically look at NGO reports, human rights organizations, the United Nations, news articles and civilian rescue operations to provide a situational assessment and analysis of these countries and how migrants, asylum seekers and refugees are directly affected by external migrations policies. Due to time constraints (as well as the current instability in Libya), interviews with relevant NGOs, civil society, governmental organizations and migrant and asylum seekers could not be conducted; however research will rely on the abundant reports of NGOs, civil society, and interviews with migrants conducted by these organizations to formulate an accurate assessment of the situation migrants face in Libya and Morocco.

1.3 Research question

Research question: How has the European Union externalized migration management and what are the effects on migrants' human rights?

Sub-question: Both Libya and Morocco are key transit countries from Africa to the EU. How has the externalized border and close cooperation with the EU shaped migration law and policy in these countries? What effect does this have on irregular migrants?

This dissertation will analyze the impact of external migration policies in non-EU countries, specifically Libya and Morocco, and will centralize human rights in the larger debate of migration management. The external aspect of EU migration policy is not a new phenomenon, but it is one that has recently been given considerable attention. The focus of external migration policy is put on the implementation of these policies and their effectiveness, measured often by increasing rates of interception, return and readmission.

As the international community has attempted to manage migratory pressures, this shift of external border control is often not accompanied by human rights guarantees; emphasis is instead placed on the capacities of third countries to stop migrants from exiting their territories, rather than ensuring that migrants' rights are protected with a formal process and in respect of international law. This dissertation does not aim to study the successfulness of external migration policies, how they are implemented, or measure the capacity of third countries to prevent migrants from leaving. The main focus will be on the rights afforded to migrants, asylum seekers and refugees under European and international law, and how these rights can be guaranteed *outside* the EU territory when a state is acting externally. Understanding where migrants, asylum seekers and refugees derive their rights from in external situations and how their rights can be protected, will help to understand how external

migration policies affect the rights of migrants outside EU territory, which will then be analyzed through two case studies: Libya and Morocco. These specific countries were chosen because they are key countries of origin and transit for migrants and asylum seekers attempting to reach Europe. In addition, these countries have vastly different histories and relationships with EU Member States, such as the longstanding relations between Spain-Morocco and Italy-Libya. These two cases will provide a unique example of the 'new European border', as this new border now extends towards Libya and Morocco.

The structure will be as follows: **Section 1** will introduce the topic and what it means in today's changing discourse of migration management policies. **Section 2** will provide a background on migration management and its integration into the EU agenda, and will define migrants, asylum seekers and refugees and how these terms will be used throughout the thesis. This section will also define the emerging concept of irregular migration, specifically how it is portrayed in EU policy and the influence of anti-immigration policies in the current shifting of responsibility to non-EU states in managing irregular migration. This section will also define externalization and the various terms of external migration control, and provide an overview of relevant conventions and global initiatives to outline the broader global initiatives on migration. **Section 3** will provide a literature review on migrations in the Mediterranean, focusing on academic journal articles, university publications and books. **Section 4** will outline the applicability of international refugee law, human rights law, and the law of the sea in situations where states exercise migration control outside their territory. This will provide an understanding of where migrants, asylum seekers and refugees derive their rights from and how/if these rights can be guaranteed outside EU territory through extraterritorial state action. This section will also cite relevant case law from the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU). **Section 5** will provide an overview of the general situations in the countries of Libya and Morocco, outlining a brief history of the countries, the current political situations,

asylum and migration law in the country, and their relationship with the EU and Member States. With this knowledge, it will contribute to the analysis of human rights protection in these countries, which will be covered in Section 6. **Section 6** will focus on how this ‘new European border’ affects migrants’ rights. By taking into consideration the applicability of law in external situations outlined in Section 4, and the situational assessment of the countries in Section 5, Section 6 will analyze this information to understand migrants’ rights under international law in the cases of Libya and Morocco and if these rights are being violated as a result of the externalization of migration control.

2. The Practice of External Management: A Background

2.1 People on the move: Refugee, Migrant or Asylum Seeker?

Although there is no universally accepted definition of a migrant, IOM defines a migrant as ‘any person who is moving away or has moved across an international border or within a state away from his/her habitual place of residence, regardless of (1) the person’s legal status, (2) whether the movement was voluntary (3) what the causes are for the movement or (4) the length of stay.’⁴⁵ A migrant is therefore defined as a person who changes his or her country of usual residence, or habitual residence. While most refugees are migrants according to this definition, refugees are governed by a distinct legal framework – the 1951 Refugee Convention, and the 1967 Protocol.

The 1951 Refugee Convention and the 1967 Protocol define refugee as a person who:

*‘owing to well-founded fear for being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or, owing to such fear, is unwilling to return to it’.*⁴⁶

Asylum seekers are individuals who move across borders in search of protection, but who may not fulfill the criteria outlined in the 1951 Refugee Convention. An asylum seeker is someone who has applied for protection as a refugee and is awaiting the determination of his or her status.⁴⁷ IOM defines asylum seekers as a person who seeks safety from prosecution or serious harm in a country other than his or her own and

⁴⁵ IOM ‘Migration and the 2030 Agenda: A guide for practitioners’ (*International Organization for Migration IOM*, 2018) <http://publications.iom.int/system/files/pdf/sdg_en.pdf> accessed 12 July 2019.

⁴⁶ Convention and Protocol Relating to the Status of Refugees (adopted 1951 and Protocol 1967) UNHCR, art 1 (A).

⁴⁷ UNESCO, ‘Asylum Seeker. United Nations Educational, Scientific and Cultural Organization’ (2017).

awaits a decision of the application for refugee status.⁴⁸ For the purpose of this dissertation, the term migrant will be used broadly to include any person who is outside their country of citizenship or habitual residence and shall encompass those fleeing from conflict, fear of prosecution or harm, natural disasters, seeking economic employment and other causes. This term will also be used to include those fleeing their country of citizenship or habitual residence for the purpose of seeking asylum in another country and those who would qualify under the definition of a refugee.

2.2 The emerging concept of irregular migration

Irregular migration is not a new development, in the 1970s a number of tragic incidents involving migrants trying to evade immigration controls in Western Europe occurred, bringing attention to the many cases and tragedies of irregular migration.⁴⁹ Irregular migration encompasses a wide range of irregularities in migration processes. Article 3 of the EU Return Directive, defines illegal stay as the presence on the territory of a Member State of a third country national who does not fulfill or no longer fulfills the conditions of entry set out in Article 5 of the Schengen Borders Code⁵⁰ or other conditions of entry, stay or residence in the Member State.⁵¹ IOM defines irregular migration as movement that takes place ‘outside the regulatory norms of the sending, transit and receiving countries’. There is no clear universally accepted definition of irregular migration, but for the purpose of the destination country it is entry, stay or

⁴⁸ IOM, ‘Key Migration Terms’ (2019) < <https://www.iom.int/key-migration-terms> > accessed 14 July 2019.

⁴⁹ One incident in 1973 involved 59 migrants from Mali found in a closed truck container in the Mount Blanc Tunnel: See, Cholewinski R (2004) 160

⁵⁰ ‘Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, Schengen Border Code’ *Official Journal of the European Union*. (2016) L 77/1.

⁵¹ Directive (EU) 2008/115 of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (2008) OJ L348/98.

work in a country without the necessary authorization or required documents.⁵² From the perspective of the sending country, irregularity occurs when a person crosses international boundaries without a valid passport or travel document or does not fulfill the requirements for leaving his or her country.⁵³ Defining irregular migration is often subject to debate, and is linked to the terms illegal, undocumented and unauthorized migration. The term illegal migration is often used in cases of smuggling of migrants and trafficking in persons.⁵⁴ Due to the association with criminality in the term 'illegal', migrants are often framed and/or treated as criminals.⁵⁵ The framing of immigration in terms of security has a strong impact upon central political issues, such as EU-citizenship and how the EU relates to its external environment.⁵⁶ Some theorists argue, that it is in *practice* that issues become a security threat – not necessarily because a real existential threat exists but because the issue is presented as a threat.⁵⁷ Exclusionary practices of threat management, involving the 'risk' assessment of migrants, arguably strengthens the public 'anxiety' through which migrants are labeled 'illegal' or 'criminal'.⁵⁸ As a result the space of the border is no longer just about patrolling the geographical border, the control of immigration flows becomes a questions of targeting risky spaces, risky populations and risky activities.⁵⁹

The linkage between development cooperation and migration policies has been promoted widely since 2000 onwards, EU cooperation and migration from third countries has been characterized as 'migration-security nexus', where uncontrolled migration is viewed as a potential threat to security.⁶⁰ From the beginning of the

⁵² IOM (no 48)

⁵³ European Commission 'Irregular Migration Definition' < https://ec.europa.eu/home-affairs/content/irregular-migration-0_en> accessed 13 July 2019

⁵⁴ IOM (no 48)

⁵⁵ European Commission (no 53)

⁵⁶ Munster van R, 'Securitizing Immigration: The Politics of Risk in the EU' (Palgrave Macmillan, 2009) 7

⁵⁷ Ibid 5

⁵⁸ Ibid 93

⁵⁹ Ibid 99

⁶⁰ Lavenex S and Kunz R, 'The Migration-Development Nexus in EU External Relations' (2008) *Journal of European Integration*, 30(3) 439, 442

Schengen agreement in the 1990s to early 2000s, cooperation on asylum and migration focused on limiting access of the ‘unwanted’ third-country nationals.⁶¹ This led to increased external border control, stricter entry requirements and visa policies and limited access to asylum procedures. Until 2005, external EU migration policies focused mainly on ensuring that countries of origin and transit focus on readmission agreements⁶² – stipulating that the contracting parties have to take back their own. Moreover, migration is a fundamental part of European history, yet, as UN Special Rapporteur François Crépeau states, ‘in recent decades migration within Europe has become a sensitive topic, leading to polarized and heated public debates, and has become a decisive electoral issue in national elections’.⁶³ The growing securitization of migration issues and the corresponding growth of electoral consensus for parties that advocated for closed-border policies, caused the increase in policies of interception across the Mediterranean. The Central Mediterranean route, in particular, has been for years the deadliest route in the world for migrants and one of the busiest in Europe.⁶⁴

Criminalization of Migration

The criminalization of migration has severe consequences on migrants’ human rights and can contribute to the ‘push’ for the development of external management policies of interception, detention and removal and protecting the EU’s external borders from unauthorized migration. Through the conceptualization of migrants as ‘criminals’, it creates a common language and constructs a collective identity, of the ‘other’ that needs to be kept out.⁶⁵ In 1997 Italian media commonly referred to the large influx of Albanian migrants as a ‘criminal invasion’, and portrayed them as thieves and smugglers, this strengthened the rhetoric for the need for interception policies to ‘stop

⁶¹ Ibid 444

⁶² *Readmission agreements stipulated that contracting parties have to take back their own nationals who have entered or stayed illegally in another country. See Lavenex S and Kunz R (no 60) 445

⁶³ See, UN Special Rapporteur Report A/HRC/23/46 (no 30) 13

⁶⁴ Chico Harlan, ‘Fewer migrants are making it to Europe. Here’s why’ *The Washington Post* (23 July 2018)

⁶⁵ See, Albahari, M ‘Crimes of Peace’ (*Pennsylvania Press*, 2015) 65

the Albanians’⁶⁶ Criminalization as prevention focuses on stopping migrants before they reach the border; which occurs in the form of interception, push-back and detention, in which migrants are criminalized for attempted or unlawful entry.⁶⁷ Criminalization of migration is arguably used to regulate migration in the territory, including efforts to exclude or remove migrants from territory and jurisdiction of EU Member States. This form of criminalization in which the migrants were not screened or assessed to be vulnerable persons or in need of protection, and were instead sent back to Libya where they faced detention.⁶⁸ Territorial borders are thus seen as points of division between ‘us’ and ‘them’ and the markers of national identity formation and controlling irregular migration before migrants reach the territorial border of the EU has become a priority in public policy.⁶⁹ It is through this creation of a ‘frontier’, either a physical border wall or a ‘line’ in the Sea outlining a state’s jurisdiction, where we see the application external migration management policies and often the criminalization of unlawful entry/migration in third-countries, and through the criminalization of migration and civilian rescue operations. In recent events, the relationship between the increased emergence of external migration control and criminalization is apparent not only in the criminalization of the migrant, but also in efforts to criminalize non-governmental organization (NGO) rescue activities. Countries (such as Italy and Malta) have opted for a non-entrée policy, effectively making it illegal for NGO rescue vessels to dock and disembark migrants at their ports. Currently, the captain of German NGO ship, *Sea-Watch* is facing criminal charges after docking at the Italian port in Lampedusa (without authorization) with 40 migrants onboard who were rescued off the Libyan Coast. In addition, Spanish rescue charity ship *Proactiva Open Arms* is also ready to face criminal

⁶⁶ Ibid 132

⁶⁷ Mitsilegas V, ‘The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law’ (2015) *Springer Publishing*

⁶⁸ Ibid

⁶⁹ Kostakopoulou, D, ‘Irregular Migration and Migration Theory’ (2004) In Bogusz B, Cholewinski R, Cygan A and Scyszak (eds) *Irregular Migration and Human Rights* (Immigration and Asylum Law and Policy in Europe, vol 7) 53.

charges to rescue migrants at sea, because “there is no one else out there” to assist migrants off the Libyan Coast.⁷⁰ Moreover, vessels that defy orders to stay out of Italian territorial waters could face large fines and potential seizure of vessels – Salvini maintains that responsibility lies with Germany (where the non-profit is headquartered) or the Netherlands, who’s flag the ship is flying. The number civilian rescue ships in the Mediterranean dropped drastically in 2018 due to stricter immigration policies by Italian and Maltese governments.⁷¹

Attempts by European Member States to combat irregular migration have been made through cooperation and readmission agreements with third-countries, imposing visa conditions, tighter border controls, carrier sanctions, increased maritime patrols. Some theorists argue that these developments have subsequently fueled migrant smuggling and trafficking, by further driving the problem ‘underground’.⁷² Attempts to control illegal migration into and across Europe have become a dominant paradigm, regardless of how it affects the possibility of claiming asylum.⁷³ With this external shift of migration control we are seeing fewer legal means by which refugees can reach Europe, and refugees can be subject to use more clandestine and hazardous means of travel.⁷⁴

⁷⁰ Al Jazeera, ‘Sea-Watch enters Lampedusa, captain Carole Racketea arrested’ (Al Jazeera 29 June 2019) < <https://www.aljazeera.com/news/2019/06/sea-watch-enters-lampedusa-captain-carola-racketea-arrested-190629050255767.html>> accessed 14 July 2019

⁷¹ Deutsche Welle, ‘Sea-Watch captain arrested as ship docks at Lampedusa’ (Deutsche Welle 29 June 2019) < <https://www.dw.com/en/sea-watch-captain-arrested-as-ship-docks-at-lampedusa/a-49407861>> accessed 14 July 2019

⁷² See Boswell C, ‘The External Dimension of EU Immigration and Asylum Policy’ (2003) *International Affairs* 79 (3) 619-638; Morrison J and Crosland B, ‘The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?’ (2000).

⁷³ Morrison J and Crosland B, ‘The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?’ (2000) *UNCHR Policy Research Unit*, 35

⁷⁴ *Ibid* 35

2.3 EU is ‘pushing its border out’; what does this actually mean?

By rethinking borders beyond the dividing line between nation-states and extending the idea of the border into forms of dispersed management practices across several states, externalization is an explicit effort to ‘stretch the border’ in ways that multiply the institutions involved in border management and extend and rework sovereignties in new ways. In this way, the definition of the border increasingly refers not to the territorial limit of the state but to the management practices directed at ‘where the migrant is’ (Casas-Cortes et al, 2015)

Border externalization by the EU has been discussed in terms of its transformations within EU’s foreign policies as an ‘offshoring of migration control’⁷⁵. This phenomenon has also been defined as the shifting geographical imagery and restructuring of border scales.⁷⁶ However, there is a growing attempt to focus on the image of the border as a ‘wall’ and its corresponding concept of exclusion of the migrant.⁷⁷ Borders function to allow passage as much as they do in denying it, enacting border policies to increase or decrease the speed of movement, prevent or reverse it.⁷⁸ There has been extensive literature on various external migration terminologies, such as remote control⁷⁹, extra-territorialisation, offshoring, outsourcing, buffering and border management. ‘Remote control’, as defined by Zolberg, is a process of

⁷⁵ Bialasiewicz L, ‘Off-shoring and Out-sourcing the Border of Europe: Libya and EU Border Work in the Mediterranean’ (2012) *Journal Geopolitics* 17 (4) 854

⁷⁶ Cobarrubias S, ‘Mapping Illegality: The i-Map and the Cartopolitics of ‘Migration Management’ at a Distance’ (2019) *Antipode* 51 (3) 775.

⁷⁷ Casas-Cortes M, Cobarrubias S, De Genova N, Garelli G, Grappi G and Heller C, ‘New Keywords: Migration and Borders’ (2014) *Journal of Cultural Studies* 29 (1) 55-87

⁷⁸ Ibid 57

⁷⁹ Zolberg A, ‘The Archaeology of ‘Remote Control’ in Fahrmeir A, Faron O and Weil, P, *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (New York: Berghan Books, 2003)

outsourcing border control and its constant extending of geo-juridical boundaries.⁸⁰ The external dimension of the fight against illegal migration has been primarily concerned with cooperation with ‘key’ third countries, primarily those of close proximity to Europe.⁸¹ Externalizing consists of ‘moving borders out’ of one’s territory and their redeployment elsewhere.⁸² This newly created frontier is not ‘real’ but rather metaphorical, the idea of building a ‘fortress Europe’ is not mainly material (as is a fence at a border wall), but can also be used to describe a bureaucratic ‘paper wall’ build on visas, or a ‘virtual wall’ built on surveillance and data tracking systems to prevent incoming migrants.⁸³ These aspects of external control need to be taken into consideration to understand how this ‘border’ is moving beyond Europe and the effect it has on safeguarding human rights, considering migrants access to asylum, violations of refoulement and detention. According to Zaiotti, initiatives such as ‘offshoring’ border checks, asylum processing, interdictions and migrant detention were initially introduced in the post cold war era, but since have experienced considerable transformations.⁸⁴ These changing patterns of regulation, management and control have led to various definitions of extra-territorialization – such as the means in which the EU attempts to push back their external border, by means of policing at a distance in order to control unwanted migration flows.⁸⁵ Extra-territorialization includes the way in which the EU and its Member States attempt to prevent non-Community nationals from leaving their countries of origin, by introducing measures to ensure that if individuals do enter the EU, they will be repatriated or removed to ‘safe third countries’.⁸⁶ A common feature of these measures is that migrants may encounter the state they wish to

⁸⁰ Cobarrubias S (no. 76) 773

⁸¹ Martenczuk B, ‘Migration Policy and EU External Relations’ In Azoulay L and Vries K, *EU Migration Law* (Oxford University Press, 2014) 69

⁸² Zaiotti R (no 3) 9

⁸³ Ibid 9

⁸⁴ Ibid 4

⁸⁵ Rijpma J and Cremona M, ‘The Extra-Territorialisation of EU Migration Policies and the Rule of Law’ (2007) *EUI Working Papers*, 1-29

⁸⁶ Ibid 17

migrate to long before they arrive at that state's territorial borders.⁸⁷ This process of relocating migration management and shifting responsibility of border control is 'drastically changing the nature of the border'.⁸⁸ According to Heijer, migration control is no longer solely focused on the geographical border as the main sovereign legal order, but is exported to other countries so a person may experience a foreign border within their own country of origin.⁸⁹

2.4 Evolution of external migration policies, and the shifting of responsibility to non-EU Member States

This section will outline the evolution of external migration policies and the shifting nature of responsibility to non-EU states in managing irregular migration. In order to demonstrate the context in which EU policies have developed, examples of previous models of interdictions and offshoring will be given, in the case of the United States and Australia.

The externalization of border management to third countries has become increasingly important in the governance and mobility within and into the EU. Displacing border control practice to places of origin or transit for migrants has resulted in a series of sea and land operations in Northern and West African countries.⁹⁰ Several examples of externalization have had significant implications on the policy developments of today's migration management, most notably the historic introduction of maritime interdiction and detention in the Caribbean.⁹¹ Interdiction is often used in conjunction with interception. Patrolling the coastlines with naval and coastguard ships can be a state's core security function, the presence of interception boats at high seas can be

⁸⁷ Heijer M, 'Europe and Extraterritorial Asylum' (2012) *Studies in international law* vol 39, 4

⁸⁸ *Ibid* 10

⁸⁹ *Ibid* 4

⁹⁰ Cobarrubias S (no 76) 10

⁹¹ Casas-Cortes M, et al (no 77) 20

traced to US interdictions in the 1980s and again in 2010 following the earthquake in Haiti.⁹² In the 1980s the United States government, under the Reagan administration, mobilized its 'external border' through interdiction policies at high seas to stop Haitian migrants.⁹³ The interdiction program prevented migrants from reaching the US and claiming the procedural protections afforded by the Constitution.⁹⁴ Border externalization has its roots in the US interdiction of Haitian refugees in the 1980s, the 1994 US interdictions of Cuban migrants trying to reach the US⁹⁵, and later in the 2014 Australian 'Pacific Solution'.⁹⁶ The emergence of external migration policies result from a strengthened urgency of standardising external border controls, which has further been reinforced by external threats. The legality of these external border policies has often been questioned by legal scholars and theorists and criticized as a direct attack on human rights.⁹⁷

In addition to external migration management through prevention and interdiction, we also witness externalization through offshore processing facilities outside EU territory. This idea was proposed by the United Kingdom (UK) government in 2003 to its European partners under the 'New Vision for Refugees' plan.⁹⁸ The plan called for a global network of 'safe havens', providing a place of safety while migrants wait for their claims to be processed.⁹⁹ This plan also proposed to establish protection

⁹² See Zaoiti R (no 3)

⁹³ Gutekunst, C 'Interdiction of Haitian Migrants on the High Seas: A Legal and Policy Analysis' (1984) *Yale Journal of International Law*, 1- (151)

⁹⁴ Ibid 157. See also case *Sale vs. Haitian Centers Council* (1993)

⁹⁵ * In 1994 the US coast guard interdictions of Cubans trying to reach the US by Sea. The US-Cuban 1994 migration agreement was formalized to ensure both nations take steps to regularizing migration, and the US agreed that Cubans rescued at high seas would not be allowed to enter the US but instead would be taken to 'safe-haven' camps. See, Bruno A, 'U.S Policy on Cuban Migrants: In brief' (*Congressional Research Service*, 2016) < <https://fas.org/sgp/crs/row/R44714.pdf>> accessed 14 July 2019

⁹⁶ * The Pacific Plan was Australia's offshore asylum processing scheme and resettlement programme to the islands of Nauru and Papua New Guinea. See, Frelick, Kysel and Podkul (no 4) 204.

⁹⁷ Cobarrubias S (no 76)

⁹⁸ Munster van R, *Securitizing Immigration: the politics of risk in the EU* (*Palgrave Studies in International Relations*, 2009)

⁹⁹ Ibid 106

zones both in regions of origin and along transit routes to the EU.¹⁰⁰ The ‘New Vision for Refugees’ plan was not approved as the plan was ‘too ambitious’ and lacked ‘clarity on legal obligations of EU States on who would be held responsible for human rights violations’.¹⁰¹ The legal regime would apply to reception and processing in third - countries, to the extent to which European States could be held responsible for violations under international law. In this regard, concerns surfaced as to which European State would be held responsible if violations did occur. The plan risked asylum seekers of being held in a so-called ‘legal vacuum’.¹⁰² Although the idea of ‘regional protection zones’ and ‘transit processing centers’ outside EU territory has not fully materialized, EU’s external borders debate has resurfaced in policy debates across Europe, most notably in 2004¹⁰³, 2015¹⁰⁴ and in 2018.¹⁰⁵ European governments have considered offshoring detention options as proposed by the UK, but the idea of directly managing processing facilities has been set aside (for now)¹⁰⁶, and instead EU Members States have focused on delegating origin and transit country governments the responsibility of building and managing centers for irregular migrants. Cooperation agreements between EU and third countries date back to 1998, with agreements between Italy and Tunisia on the readmission of irregular migrants – Italy provided financial assistance to create a migrant detention facility, and more recently in 2002,

¹⁰⁰ Heijer M, ‘Europe and Extraterritorial Asylum’ (2012) *Studies in international law vol 39, 1*

¹⁰¹ Ibid 2

¹⁰² Ibid 2

¹⁰³ * At the proposal of German Interior Minister, Otto Schily, where EU Justice and Home Affairs Ministers discusses the idea of setting up EU transit centers in North African countries. Several MSs (France, Belgium and Sweden) voices strong opposition to the plan.

¹⁰⁴ EU Commission proposed the ‘hotspot approach’ as result of the 2015 ‘refugee crisis’ to provide ‘hotspots’ – facilities for initial reception, identification, and fingerprinting of asylum-seekers and migrants arriving at EU’s external borders of Italy and Greece by Sea. See European Parliament Briefing, ‘Hotspots at EU external borders: state of play.’ (EPRS, June 2018) PE 623.563

¹⁰⁵ Herszenhorn D and Barigazzi J, ‘EU leaders consider neters outside bloc to process refugees’ (Politico, 19 June 2018) <<https://www.politico.eu/article/regional-disembarkation-platforms-eu-leaders-consider-camps-outside-bloc-to-process-refugees/>> accessed 14 July 2019

¹⁰⁶ The EU27 leaders at the Brussels summit in 2018 came to a ‘vague’ agreement on migration policy and agreed to explore the options of migrant processing centers in countries such as Algeria, Egypt, Libya, Morocco, Niger and Tunisia

Mauritania received support from the Spanish Agency for International Development Cooperation for the creation of a detention center for irregular migrants.¹⁰⁷

It is from 'EU's shifting border' that we see the EU taking various steps on the path towards integrated border management.¹⁰⁸ Integrated border management includes the aspects of border control (checks and surveillance), detection and investigation of cross border crime, measures in third countries and cooperation with neighbouring countries. According to European Council 2001 meeting conclusions, 'better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in of human beings'¹⁰⁹ In an attempt to stem the flow of migration along the Mediterranean migratory routes, the EU has fashioned third countries into Europe's new border through cooperation agreements and frameworks, that further strengthen a joint commitment on tackling irregular migration. This will be analyzed further in the subsequent section, with an outline of relevant migration conventions, frameworks and partnership agreements.

2.5 Overview of relevant covenants, conventions, and directives

The explicit adoption of the 'external dimension' of migration policy arguably took place in the 1999 Tampere Summit – and through the approval of the Global Approach to Migration (GAM) and its migratory route strategy in 2005.¹¹⁰ GAM prioritised Africa and the Mediterranean, and was strongly based on the principles of solidarity between the Member States, partnership with third countries, and the protection of migrants, particularly vulnerable groups. GAM led to an overall strategy for EU cooperation with Africa, which was defined in the *EU Strategy for Africa*, adopted

¹⁰⁷ Zaiotti R (no 3)

¹⁰⁸ Council of the European Union. Presidency Note on Integrated Border Management: Strategy Deliberations (2006) 13926/3/06

¹⁰⁹ Ibid 2

¹¹⁰ Cobarrubias, S (no 76) 775

by the European Council in 2005, and outlined the necessity for migration strategies to address the root causes of migration.¹¹¹ The subsequent EU-Africa Ministerial meeting in 2006, further identified priorities and paved the way for a joint action between Africa and the EU in the fight against illegal migration, to address the root causes of migration, with an emphasis on facilitating regular pathways of migration.¹¹² GAM was later renamed as the Global Approach to Migration and Mobility (GAMM) in 2011, becoming the overarching framework of the external migration and asylum policies. GAMM provides cooperation between non-EU countries to assist in combating irregular migration through bilateral and regional action plans, legal instruments and dialogue facilitation. Bilateral cooperation frameworks under GAMM consist of Mobility Partnerships (MP), and Common Agendas for Migration and Mobility (CAMP).¹¹³ GAMM constitutes an overarching political framework for dialogue and cooperation with third countries based on four pillars: prevention and fight against irregular immigration, strengthening border management and return; promotion of mobility and facilitation of legal migration opportunities; maximization of synergies between migration and development of countries of origin; and the promotion of asylum and international protection.¹¹⁴

Since 2005, the main tools managing the external dimension of migration policies have been covered under the Global Approach to Migration and Mobility¹¹⁵, and focus on addressing refugee and migration movements through the introduction of the

¹¹¹ European Council, Presidency Conclusions, Brussels, 15–16 December 2005, ‘Global Approach to Migration: priority actions focusing on Africa and the Mediterranean’ (EC December 2005) 4
<http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536469/IPOL_STU%282015%29536469_EN.pdf>

¹¹² Ibid

¹¹³ See, Andrade, P. EU Cooperation with Third Countries in the Field of Migration. *European Parliament, Civil Liberties, Justice and Home Affairs (LIBE), IPOL (2015)*.

¹¹⁴ Ibid

¹¹⁵ European Commission, ‘Global Approach to Migration and Mobility’ (EC, 2019).
<https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en> accessed 14 July 2019

European Agenda on Migration¹¹⁶. Subsequently, the Africa-EU Partnership on Migration, Mobility and Employment (MME) was launched in 2007 and adopted the Migration, Mobility and Employment Action Plan for 2010-2013.¹¹⁷ Moreover, the Africa-EU Partnerships have transitioned from one's that strongly promoted economic migration to focusing on greater coordination in combating irregular migration. After the 2014 EU-Africa Summit in Brussels, employment was eliminated from the continental dialogue, indicating that by 2014, Europe was no longer interested in legal labour migration from Africa.¹¹⁸ Today, the EU has imposed a 'vision of shared responsibility', that aims to respect the human rights of refugees and migrants, expanding access of resettlement to third-countries and easing the pressure and reliance on countries of EUs external borders that host refugees.¹¹⁹ Future EU policy focuses on shaping this 'vision of shared responsibility' in combating irregular migration, but it is moving beyond EU soil, expanding the EU border to Africa and externalizing migration management to third-countries.

Under the 2015 Joint Valletta Summit, the *EU Emergency Trust Fund for Africa* was introduced and is the most prominent financing instrument in migration management. In 2016 the European Commission proposed a new Migration Partnership Framework (MPF), which outlined a new approach to coordinated and structured cooperation with third countries.¹²⁰ The MPF is striving for better migration management between the EU and third countries and in the short-term, these frameworks aim to save lives at sea and in the desert, fight traffickers and smuggling networks, increase returns and prevent individuals from embarking on dangerous

¹¹⁶ Ibid

¹¹⁷ European Commission, 'Africa Report' (*Migration and Home Affairs, 2019*)

¹¹⁸ Koch, F. Carrot and Stick? EU Migration Policy on Africa Now Marching to a Different Drum. *FES AU Cooperation*. Pp.1-8

¹¹⁹ See the Comprehensive Refugee Response Framework (CRRF), UNHCR

¹²⁰ Baulez, C. The EU Migration Partnership Framework: and External Solution to the Crisis? *Refugee Law Initiative, EU Immigration and Asylum Law and Policy. 2017.*

*The European Commission reports that a total of available fund for 2016-2020 will account to 8 billion euros to support key third countries (including funding already used), See UNHCR, *Global Trends (2017)*, pp. 3

journeys.¹²¹ The long-term focus of MPFs is to establish ‘compacts’ with third countries, entailing political targets and joint commitments as well as economic development goals to combine various policy elements such as mobility, trade and development, with migration.¹²² Mobility Partnerships outline positive incentives to third countries to ensure full cooperation on agreements of visa facilitation, readmission, resettlement opportunities for individuals in need of international protection, or strengthening legal migration pathways to the EU.¹²³ In addition, these policies offer rewards to countries that fulfill international obligations and promote increased cooperation on migration management. The European Commission reiterates the EU’s continued support in the fight against smugglers and traffickers, particularly by providing support to Libya and countries most affected by the large influxes of migrants such as Spain, Italy and Malta.¹²⁴ The MPF differs from previous EU initiatives, such as the *Joint Valletta Action Plan on migration*, as the MPF focuses largely in implementing immediate measure to reduce irregular migration and save lives at sea, through various agreements with third-countries and promoting EU interests on readmission.¹²⁵

Soft law and non-binding instruments such as the Global Compact for Safe, Orderly and Regular Migration (GCM) and the Global Compact for Refugees (GCR) were adopted by the New York Declaration in 2016, and have acted to fill the void of some human rights law. The idea is that soft law plays a ‘progressive role’ in raising protection standards, and eventually solidifying them, and the state began to comply with these

¹²¹ European Commission. Migration Partnership Framework: A New Approach to Better Migration Management. Pp. 1-3. See Regulation (EU) No. 516/2014 Article 20: Union Actions (2) (f)

¹²² See, European Commission. Mobility partnerships, visa facilitation and readmission agreements. *Migration and Home Affairs*. 2019.

*The MPF has been implemented in five priority countries - Ethiopia, Mali, Niger, Nigeria and Senegal. Example of Niger as a ‘showcase’ country in adopting MPF goals. See European Union Niger Factsheet on MPF, 2016.

¹²³ Baulez, C. The EU Migration Partnership Framework: and External Solution to the Crisis? *Refugee Law Initiative, EU Immigration and Asylum Law and Policy*. 2017.

¹²⁴ European Commission. Joint Communication to the European Parliament (2017).

¹²⁵ Castillejo, C. pp. 6

eventual 'norms' which can stimulate the development of legally binding norms.¹²⁶ Although, these compacts have no legal background they are meant to ensure compliance with human right standards, the GCR provides a structural framework for responsibility and burden sharing to countries that receive and host refugees, also outlining vaguely reception and admission requirement - with some key suggestions to making reception centers gender and age specific¹²⁷ Readmission agreement, mobility partnerships and global compacts are key aspects in Member State cooperation with third-countries and the overall expansion of migration management practice, providing a brief overview of how pre-border controls fit into the larger sphere of EU migration policy and global initiatives. The following section will outline the rationale behind EU migration strategies, and various theories of what externalization means and how it takes place.

¹²⁶ Gammeltoft-Hansen, T. The Normative Impact of the Global Compact on Refugees. *International Journal of Refugee Law*, 20(10). Pp, 1-6

¹²⁷ United Nations 'General Assembly Endorses Landmark Global Compact on Refugees, Adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights' *General Assembly, 73rd session, 55th and 56th meetings GA/12107*, 17 December 2018

3. Literature Review

This review will provide an overview of relevant literature regarding external migration management policies used by the EU in cooperation with third countries in preventing irregular or unauthorized migrations. Academic articles will be examined to provide an overall understanding of theories regarding external application of migration policies, the gaps, challenges and recurring themes throughout the literature. The geography of migration routes is commonly examined, most notably how it changes and evolves as a result of policies of prevention and deterrence.

The 'external dimension' of EU immigration and asylum policy started as early as 1991 when the European Commission was calling for the integration of migration issues into EU's external policy.¹²⁸ This was generated as a result of fears of mass influx of immigrants and generated the need to sufficiently deal with 'unwanted migration', by revising traditional domestic control instruments.¹²⁹ The externalization of migration control involves two main components: first was the exportation of control instruments to sending or transit countries outside the EU, this being stricter border control, immigration and asylum policies.¹³⁰ Cooperation with third countries has arguably become a central component of the externalization of control tools and prevention.¹³¹

The 'management' of mixed migration flows has thus become a major concern, yet, current literature does not evenly distribute between rights (of refugees and migrants) and controls (exerted on them to administer their movement).¹³² There has been a large emphasis throughout literature on the notion of irregular migrations and the controls placed upon migrants to pre-emptively deter flows of 'illegal' arrivals

¹²⁸ Boswell (2003), pp. 621

¹²⁹ Boswell, C. The External Dimension of EU Immigration and Asylum Policy. *International Affairs* 79 (3) (2003). Pp. 619-638

oswell (2003) pp. 621-622

¹³¹ Boswell (2003) pp. 621

¹³² Frelick, Kysel, Podkul, (2016).

through interdiction. Often, what is lacking, but otherwise outlined in NGO reports (Amnesty International and Human Rights Watch) is the *human* aspect of external migration control, putting the migrants, asylum seeker or refugee at the center fold of the discussion to understand their journey, decisions and implications of these policies on their right to liberty, asylum and protection measures.¹³³ In addition, Frelick, Kysel, and Podkul discuss the development of a ‘toolbox’ for preventing migrants and asylum seekers from reaching destination territories, and the fact that migrants are removed quickly from a state’s territory which prevents access to asylum or status determination procedures. Ultimately, the rights of migrants and asylum seekers are violated in third countries as a result of destinations countries externalization efforts, such as the right to enjoy asylum and states directing migration to third countries that are not party to the refugee convention. This article provides recommendations to the European Union to ensure responsibility and policies that protect human rights.¹³⁴

Security-Humanitarian Nexus

Casas-Cortes et al, discuss how the 2015 migration ‘crisis’ has been shaped or mobilized by various practices of border and migration management.¹³⁵ Because migration itself has been defined as a crisis that needs to be managed, border management encompasses this concept into current policies of control. The authors provide a critical assessment of migration management, and attempt to destabilized the central ‘European’ focus regarding migration. The dominant European approach to irregular migration is broadly framed in terms of security and addressed through security measures,¹³⁶ and the emphasis is placed on protecting Europe through

¹³³ See, Amnesty International. *The Human Rights Risks of External Migration Policies* (2017), and *Detained and Dehumanized*, UNHCHR (2016), Human Rights Watch, *Italy-Libya Connection* (2009), Frelick, Kysel, Podkul, (2016).

¹³⁴ Frelick, Kysel, Podkul, (no 4)

¹³⁵ *Ibid* 59

¹³⁶ Carling, J. and Hernandez-Carretero M ‘Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa’ (2011) *The British Journal of Politics and International Relations*. 13(1) 47

controlling external borders. The language of security is found in the EU migration policy approach that works to integrate migration management into external relations and development cooperation with third countries.¹³⁷ The authors state that measures to contain boat migration are often presented as preventing illegal migration and the loss of migrants lives at sea.

The criminalization of migration and the military-humanitarian nexus are commonly discussed, the criminalization of persons seeking international protection is a matter of substantial concern in Europe.¹³⁸ The pathway to irregularity is not necessarily a construction of ‘push-factors’ that lead individuals to migrate, but as Duvell argues, it is until only recently, with the introduction of legislation and the political intention of preventing and reducing irregular migration, making it increasingly difficult for those who wish to immigrate, and thus pushing individuals to enter clandestinely, or by overstaying visas.¹³⁹ It is evident that such policies limit regular immigration - but despite the intention of preventing and reducing irregular migrations, various legislations instead contribute to its emergence.¹⁴⁰ The ‘new’ European border is circled by ever increasingly militarized and securitized borders. The militarized border of the Mediterranean Sea – which in recent years has become a highly surveilled and mapped space – uses counter-mapping as monitoring, increasing live surveillance imaging of illegalized migration as central practice to border control.¹⁴¹ The ensuing discourse of ‘illegal’ migrations, criminality and the escalation of migrant deaths and tragedies at Sea have arguably provided a pretext for reinforcing the fortification of border policing, which inevitably serves to drive illegalized channels of human mobility into more

¹³⁷ Ibid 44

¹³⁸ Council of Europe Issue Paper, ‘Criminalisation of Migration in Europe: Human Rights Implications’. *Commissioner for Human Rights* (2010) 5-38

¹³⁹ Duvell F, ‘Paths into Irregularity: The Legal and Political Construction of Irregular Migration’ (2011) *European Journal of Migration and Law*. 13, 275-295

¹⁴⁰ Ibid 293

¹⁴¹ Casas-Cortes et al (2014), pp. 65

perilous pathways and modes of passage.¹⁴² The extension of search and rescue operations and expanded responsibilities of EU states of migrant boats in distress at high seas comes with the prospect of apprehension and indefinite detention.¹⁴³ The military-humanitarian nexus and its tensions continue to resurface, from detention of migrants, to cases brought to the ECtHR, to military-humanitarian operations (such as Mare Nostrum) – all serving a ‘grey area’ between patrol and salvation.¹⁴⁴ Moreover, the ‘double-edged sword’ argument of protection, argues that the hardships migrants face can be turned into a rhetoric for the necessity of protective control measures, of a humanitarian nature. Carling argues that the humanitarian role of border control is seen throughout operations of Eurosur, SIVE, and Frontex’s Hera operations. Overall, the claim of life-saving in migration policies is overshadowed by the redirection to other migration routes or repeated migration attempts.

The potential of deterrence is outlined by various authors¹⁴⁵ as an important aspect to minimising migrants exposure to risk. The human cost will be reduced if fewer migrants set off on journeys that will evidently end in involuntary return. Crépeau states that migration policies based on deterrence are fundamentally at odds with human rights obligations. Migrants should be granted the same human rights as any other group of individuals, as they represent a positive contribution to Europe. According to Hathaway, ‘there is the common belief that when deterrence is conducted at an ‘arms-length from the homeland’ it is either legitimate, or immune from legal accountability.¹⁴⁶ Regardless of such various opinions on why states exercise deterrence policies, the most common argument for governments is that deterrence is done on humanitarian grounds, particularly for refugees and other arrivals by sea. There is a

¹⁴² De Genova N, *The Borders of Europe: Autonomy, Migration, Tactics and Bordering* (Duke University Press, 2017) 7

¹⁴³ Ibid 8

¹⁴⁴ Albahari M (no 65)

¹⁴⁵ See, Carling, J. and Hernandez-Carretero, M (2011), Bauloz, C. (2017), Crépeau, F (2013), Hathaway, J (2005), Gammeltoft-Hansen, 2017 (no 164)

¹⁴⁶ J.C. Hathaway, ‘The False Panacea of Offshore Deterrence’, 26 *Forced Migration Review* (2006), p. 56-57;

critical legal distinction between awareness raising campaigns on the dangers migrants face in attempting to cross the Mediterranean and providing information on traffickers and smugglers, and actively stopping departures as seen in the form of patrols.¹⁴⁷ The focus should be on the creation of protection options within regions of origin. Deterrence policies have come to dominate responses to asylum seekers arriving in developing states. The current ‘crisis’, he argues, should not be seen as the high number of refugees arriving but as a crisis of institutionalized responses pursued by states.¹⁴⁸ This shows how deterrence policies have come to dominate responses to asylum seekers arriving in developed states, and how such policies have continued to develop in response to changes in migration patterns as well as legal impositions. The dominance of the deterrence paradigm also explains the continued reliance on deterrence as a response to the most recent “crisis,” despite continued calls from scholars and civil society for a more protection-oriented and sustainable response. Thomas Gammeltoft-Hansen, suggests to critically re-examine the extraterritorial effect doctrine from a human rights perspective.¹⁴⁹ An array of human rights violations occur in the concept of cooperative deterrence, one needed approach is to ‘dive deeper into concept such as jurisdiction and different forms of state responsibility, including shared responsibility.¹⁵⁰ This effectively has resulted in extensive literature on extraterritorial state jurisdiction, and how to address issues of state jurisdiction and responsibility – but what is needed it to re-examine other bases for extraterritorial human rights jurisdiction.

The 2015 ‘migration crisis’ created a backdrop for the tough policy responses. EU Member States engaged sending and transit countries – through various agreements and initiatives such as the EU-Horn of Africa Migration Route Initiative (Khartoum Process) and the EU-Turkey deal. Zaiotti argues that these actions have had little success

¹⁴⁷ Ibid, pp 57

¹⁴⁸ Gammeltoft-Hansen, T (2017). The End of the Deterrence Paradigm? *Journal on Migration and Human Security*. 5(1), pp. 28-56

¹⁴⁹ Gammeltoft-Hansen T, Pijnenburg A and Rijken C, ‘Controlling Migration through International Cooperation’ (2018) *European Journal of Migration and Law* 20, 365-371

¹⁵⁰ Ibid 368

in stemming migration flows – although they do have an impact on the routes migrants have chosen for their journeys.¹⁵¹ The ‘currents of migration which would flow naturally in a certain direction traced out for them in the main by geographical features may be diverted or stopped altogether, by legislative enactment’¹⁵² Various scholars emphasize that the ‘externalization’ of asylum and immigration policy represents a natural response to more complex and divers migration flows – which has made it necessary to extend control over the entire length of the journey.¹⁵³ According to Carling, there are strong migratory pressures on Europe’s Southern ‘buffer zone’ states, which act as both long-standing countries of origin for migration to Europe, as well as countries of transit for migrants from sub-Saharan Africa, and Middle-East who rely on unauthorized entry to Europe. Morocco is a country that has come to constitute a protected ‘buffer zone’ state beyond the official borders of the EU.¹⁵⁴ The changing nature of migratory patterns illustrate the difficulty in containing irregular migration through border control measures. The development in the geography of unauthorized entry implies that addressing the ‘root causes’ of migration flows is an increasingly difficult challenge. However, this article points to the importance of understanding the migration dynamics of unauthorized entry; further research is needed in this field to understand why migrants choose to leave, the interaction with smugglers and traffickers and the consequences of various control measures, in order to understand the relationship between external migratory polices and safeguarding migrants’ rights, while continuously reducing the suffering and fatalities of migrants in transit.¹⁵⁵

¹⁵¹ Zaiotti, R. Mapping Remote Control

¹⁵² Zolberg, A. The Next Waves: Migration Theory for a Changing World.

¹⁵³ Gammeltoft-Hansen, T. Access the Asylum. *Cambridge University Press*. (2011). Pp. 6-310

¹⁵⁴ Carling C, ‘Unauthorized Migration from Africa to Spain. *International Migration*’(2007) 45 (4)

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¹⁵⁵ Ibid 28

4 The applicability of international refugee law, human rights law and law of the sea in situations where states exercise migration control outside its territory

This chapter will discuss the obligation of EU Member States under EU and international law to protect the rights of migrants and refugees both at the border and outside EU territory when exercising migration control externally. Sources of international human rights law and refugee law can be found in the Universal Declaration of Human Rights (UDHR), the 1951 UN Refugee Convention and the 1967 Protocol, the European Convention on Human Rights (ECHR), the EU Charter of Fundamental Rights (Charter) and the Common European Asylum System (CEAS). The current chapter will discuss the importance of determining jurisdiction in extraterritorial state action, presenting a summary of EU fundamental rights outlined in the EU Charter and the Refugee Convention and the Protocol; specifically the right to asylum, the principle of non-refoulement, protection against expulsion, inhumane detention and rights outlined in the CEAS on qualification, protection, reception, return and Member State responsibility. This chapter will also cover the material scope of application of these laws and cite relevant case law from the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU). Finally, in light of the recent policies of interception and return at sea, this chapter will look into the law of the sea, specifically which maritime laws apply to migrants and asylum seekers at sea, either in international waters or in the territorial waters of Member States or third countries. Section 4.3 will focus on the United Nations Convention for the Safety of Life at Sea (UNCLOS), the International Convention on Maritime Search and Rescue (SAR), International Convention for the Safety of Life at Sea (SOLAS Convention). Moreover, obligations and responsibilities of Member States to conduct search and rescue operations will also be discussed in relation to their involvement in the current arena of externalization of responsibility. The main focuses of this chapter will be the establishment of territorial reach, the importance of establishing jurisdiction in addressing human rights violations

in a court of law, and overall, where migrants and refugees derive their rights from, while outside EU 'territory'.

4.1 The Common European Asylum System (CEAS)

Asylum seekers within EU territory can derive rights under the Common European Asylum System (CEAS). The second phase of the CEAS was established as a result of the Hague Programme (building on the ongoing work of the Tampere Programme), which showed the necessity of a timely implementation of all measures in the area of 'freedom, security, and justice'.¹⁵⁶ The programme outlined the establishment of a plan for necessary action on the external dimension for asylum and migration. During the second phase of the CEAS, the Commission proposed to replace the existing minimum standards of the CEAS with a common set of rules meant to reduce disparities among Member States, focusing on legislative harmonization.¹⁵⁷ The move towards a 'continental asylum system' entailed that there was a need to externalize borders, which became a key subject of debate and a necessary shift after the deaths of thousands of migrants trying to cross the Mediterranean. The response of the EU institutions consisted in a mix of operations led by Frontex, resettlement schemes and overall a strengthened urgency to tackle irregular migration at the source.¹⁵⁸ The Common European Asylum System comprises of: the Qualification Directive 2011/95/EU, Asylum Procedures Directive 2013/32/EU, Reception Conditions Directive 2013/33/EU, the Dublin III Regulation (EU) No. 604/2013 and the Eurodac Regulation (EU) No. 603/2013. The Directives of CEAS will be discussed briefly to give an overview of the rights afforded to migrants and asylum seekers within EU territory in

¹⁵⁶ Council 2005/ C 53/01 of 3 March 2005 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005) OJ C 53/1

¹⁵⁷ Hailbronner K and Thym D, 'EU Immigration and Asylum Law: A Commentary' (2016) ed 2 (C.H. Beck/Hart/Nomos, 2016)

¹⁵⁸ Council 2005/ C 53/01 (no 171)

terms of reception, qualification for asylum and subsidiary protection, return, and Member State responsibility in processing asylum claims.

The Qualification Directive 2011/95/EU on common standards for the qualification and international protections of refugees and stateless persons lays down the common standards for the identification of non-EU citizens and stateless persons in need of international protection.¹⁵⁹ This directive outlines how an individual qualifies for refugee status, what an ‘act of persecution’ is and the different forms it can take, and the need for a ‘reason for persecution’ against the individual, such as targeting their race, religion, nationality etc. An individual qualifies for subsidiary protections when there is a risk of serious harm or suffering if the individual is returned to his or her country of origin, and if the person is stateless.¹⁶⁰ The content of subsidiary protection eliminates the possibility for some EU States to limit the access of rights to refugees *only*. Subsidiary protection is given to a person seeking asylum who does not qualify as a refugee, and thus offers protection from refoulement, which is the act of forcing refugees or asylum seekers (in some cases those whose claim or status has not been determined yet) to a country where they will face serious harm, persecution or inhumane or degrading treatment.¹⁶¹ Article 21 of the Qualification Directive protects from non-refoulement to ensure that no one is sent back to persecution.¹⁶² This guarantee is further exemplified in the case of *Hirsi Jamaa and Others v Italy*, and *Sharifi and Others v Italy and Greece*.¹⁶³ These cases emphasize that Member States cannot avoid their obligations under the ECHR by violating provisions against collective

¹⁵⁹ These standards determine who qualifies for international protections (Article 4), qualification for being a refugee (Article 9), qualification for subsidiary protection (Article 15), and protection from refoulement (Article 21) see the Qualification Directive 2011/95/EU

¹⁶⁰ Directive 2011/95/EU of the European Parliament and of the Council. On standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). *OJEU* L 377/9.

¹⁶¹ EUR-Lex, ‘Refugees and stateless persons – common standards for qualification’ (EUR-Lex, 2018). <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A4314891>> accessed 15 July 2019

¹⁶² Also, in Article 33 of the 1951 Refugee Convention

¹⁶³ ECtHR. *Sharifi and Others v Italy and Greece* (no. 16643/09), October 2014.

expulsion. In the *Sharifi* case, the Court found that in line with both *M.S.S v Belgium and Greece* and *Hirsi v Italy* cases, the refouling state has the obligation to assure that the receiving state offers sufficient guarantees that an individual will not be removed without proper assessment of the risks they would face if returned to their country of origin.¹⁶⁴

The Asylum Procedures Directive 2013/32/EU outlines common standards of asylum procedures, safeguards and guarantees, such as access to fair and efficient asylum procedures. It also establishes clear rules on how to apply for asylum, outlining responsible authorities and the right to remain in a Member State pending the examination of the asylum application (Article 9). Most importantly, applications for international protection should be examined on an individual basis; they should be examined objectively and impartially to other factors.¹⁶⁵ In addition, states should ensure that the examining authority has precise and up to date information regarding the general situation from sources such as EASO, UNHCR and relevant human rights organizations, and where necessary, from the countries through which they have transited.¹⁶⁶ Migrants can be at risk of interception at sea and of being returned without individual assessment of their asylum claims or need for international protection, if the determining authority does not adequately assess the situation of the country.¹⁶⁷

The Reception Conditions Directive 2013/33/EU outlines common standards for applicants for international protection. This Directive applies at all stages and types of procedures concerning applicants for international protection, in all locations and facilities hosting applicants, for as long as they are allowed to remain on a Member

¹⁶⁴ Ibid

¹⁶⁵ Article 10, Asylum Procedure Directive 2013/32/EU

¹⁶⁶ Article 10 (3) (b) of the Asylum Procedures Directive 2013/32/EU

¹⁶⁷ * ECtHR: for collective expulsion, not determining those in need of international protection, and returning individuals to an unsafe country see, *Hirsi Jamaa and Others v Italy* (no. 27765/09). For return on the grounds of the safe third country concept see, *J.B v. Greece* (no. 54796/16). See, *Ahmad v Greece* (no. 50520/09) on inhumane treatment if expelled to Afghanistan.

State territory.¹⁶⁸ Detention should be a measure of last resort; it should be given only where it is necessary for return, only upon individual's assessment of the necessity of detention¹⁶⁹ and it should be of the shortest duration possible (Article 9).¹⁷⁰ Although European Member States have not decided to offshore detention centers or asylum processing centers yet, they still actively focus on preventing irregular migrants through interception policies, which can place migrants in situations of indefinite or inhumane detention upon return to their country of departure. The mandatory detention irregular migrants face in third countries is often not subject to judicial review, does not have maximum time limits, offers no guarantees to resettlement options and can last indefinitely in inhumane and degrading conditions.¹⁷¹

4.2 International human rights and refugee law

Establishing Jurisdiction

There is a constant tension between the legitimate interest of a state to control access to its territory and the international obligation to protect the fundamental rights of migrants, asylum seekers and refugees. As long as government activity interferes with human rights, the law must provide guarantees against arbitrary interferences. This not only implies that persons held in an offshore facility may appeal against violations of their rights, but also that a state holding persons in such a facility must also ensure legal regulations are in place.¹⁷² Because of this, states cannot stray from their human rights obligations even when undertaking activities in a foreign territory. The most basic rights are outlined under Article 14 of the UDHR – 'everyone has the right to seek and enjoy in other countries asylum from persecution' – and Article 18 of the EU Charter, which

¹⁶⁸ Directive (EU) 2013/33/EU, L180/96

¹⁶⁹ Heijer (no 87) 287

¹⁷⁰ Article 8 of this Directive outlines necessary reasons for detention, such as the allowance for an applicant to be detained for the purpose of the return procedure under Directive 2008/115/EC

¹⁷¹ *See case law, A.F v. Greece (no.53709/11), Aden Ahmed v. Malta (no. 55352/12), Sufi and Elmi v. UK

¹⁷² *The right to appeal against refusal of entry is outlined under Article 47 of the EU Charter

outlines the right to asylum.¹⁷³ The question of the territorial scope of protection obligations towards persons seeking asylum become prominent when states actively seek to prevent migrants and refugees from arriving at their borders.¹⁷⁴ External activities allow states to circumvent their duties to protect asylum claimants. Overall, a state's obligation under international law, including human rights law, goes hand in hand with state activity, regardless of its external dimension, and 'the degree to which a state incurs responsibility for protecting people should be tied to the degree to which people are within the power of a state's authority'.¹⁷⁵

In order to understand the application of extraterritorial policies, it is necessary to understand the definition of *jurisdiction* and the extra-territorial application of EU law. Extraterritorial jurisdiction can be assessed through the validity of EU acts in accordance with the Charter, the Convention and relevant international law.¹⁷⁶ The exercise of jurisdiction is a necessary condition for a contracting state to be held responsible for 'acts or omissions which give rise to an allegation of the infringement of rights and freedoms set out in the Convention'.¹⁷⁷ The decisive nature that is needed in determining a state's responsibility is the exercise of physical power and control over the person and the effective control over the area. The Hirsi case is one example of how interception in international waters constituted effective control and an exercise of jurisdiction by the interdicting state (in this case, Italy).¹⁷⁸ Moreover, the concept of jurisdiction is often connected to sovereignty. Jurisdiction is described as an aspect of sovereignty: 'laws extend as, but no further than the sovereignty of the

¹⁷³ See the UDHR and EU Charter

¹⁷⁴ Heijer (no 87) 299

¹⁷⁵ Ibid 200; See also, Grahl-Madsen A, *Commentary on the Refugee Convention, 1951*. (Division of International Protection of the United Nations High Commissioner UNHCR, 1997)

¹⁷⁶ Mc Namara, Frank. Member State Responsibility for Migration Control within Third States – Externalisation Revisited. *European Journal of Migration and Law*. 15 (2013) pp. 319-335; Jurisdiction under Article 1, of the ECHR

¹⁷⁷ Ibid 324

¹⁷⁸ Ibid 325

state that brought them into force'.¹⁷⁹ Interception operations at sea and pre-emptive border controls on land can allow for loopholes of responsibility of human rights and safeguards guaranteed to migrants: failure to act on high seas can be justified as it is not in the jurisdiction of the state, due to obstacles establishing the maximum territorial breadth of a state's territorial waters and a state's 'contentious zone', or due to the difficulty in proving 'effective control' of the state over the individual¹⁸⁰ This causes geographical overlap and confusion on which Member State should respond to distress calls or on establishing responsibility in upholding human rights standards in cases of interception, removal and pre-emptive control.¹⁸¹ Overall, jurisdiction refers to the particular exercise of sovereignty, and it essentially is a right of the state to regulate conduct, with international law seeing the limits of this right.¹⁸²

The extraterritorial application of human rights law means that the alleged violation of an individual's human rights occurs outside the *physical* territory of the state party but under its *effective control*. If a state acts outside its sovereign borders – for example the killing of an Iraqi national on a UK military facility in Iraq¹⁸³ – it can be held accountable for such a violation if the individual is under the state's effective control; the same can be said if the individual is knowingly exposed to harm at the hands of third-parties, even if the harm may or may not materialize.¹⁸⁴ Jurisdiction is therefore the actual exercise of control and authority by the state, and this is important in human rights law and its extraterritorial application. Extraterritorial state action does not necessarily require an extraterritorial state act, but only that the individual concerned is

¹⁷⁹ Heijer den Maarten, 'Europe and Extraterritorial Asylum' (2012) *Studies in International Law*, 39, 19

¹⁸⁰ See, Koka E and Veshi D, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) *European Journal of Migration and Law*, 21 26- 52. Territorial waters extends up to 12 nautical miles, where a State contentious zone extends up to 24 nautical miles.

¹⁸¹ *Ibid*, pp. 26- 52.

¹⁸² Moreno-Lax V, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford Studies in European Law, 2017) 19

¹⁸³ See ECtHR case: *Al-Skeini v. UK and Al-Jedda v. UK*

¹⁸⁴ Milanovic, M (2011). *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*. Oxford University Press. Pp. 1-265

located *outside* the state territory and the injury/violation takes place (metaphorically) *inside* the state territory. Overall, extraterritorial state action requires the individual to be within its territory or jurisdiction. The ECHR and ICCPR give explicit references to the *de facto* control over territory and jurisdiction.¹⁸⁵ The key difference between these articles is the use of terminology: the ECHR discusses everyone “within its jurisdiction”, while the ICCPR discusses individuals “within its territory and subject to its jurisdiction”. A state needs actual or effective control over a territory in order to be able to fulfill its positive obligations to ensure the respect of human rights and international law.¹⁸⁶

External application of law in protecting the rights of migrants is outlined in the *Al-Jedda v. UK* and *Al-Skeini v. UK* cases. In the *Al-Jedda* case, the applicant, an Iraqi national living in the UK, was arrested in Basra, Iraq while travelling back with his family in 2004. The applicant was believed to be involved in terrorist activities, but no criminal charges were brought against him. He was held in a detention center for three years and then released in 2007. *Al-Jedda* was deprived of his British citizenship in 2007, which was later overturned by the UK Supreme Court in 2013, as this would have illegally made him stateless. In 2005, the applicant brought a judicial review claim in the UK challenging the lawfulness of his detention, and the refusal for his return to the UK. The Court accepted that the applicant’s detention within a British military facility brought him within the jurisdiction of the UK under Article 1 of the Convention, and that there was a violation of Article 5 (1) of the Convention. The case of *Al-Skeini v UK* concerned the killing of six Iraqi nationals by British soldiers in Southern Iraq, and the death of one Iraqi national at a UK army base in Southern Iraq. The Court held that the UK had assumed responsibility for the maintenance of security in Southern Iraq and was exercising ‘control and authority’ over Iraqi civilians by doing so.¹⁸⁷ These two judgments confirm that human rights obligations are not limited to the territory of the

¹⁸⁵ * Article 1 of the ECHR, Article 2 (1) ICCPR

¹⁸⁶ Milanovic, M (2011). *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy*. Oxford University Press. Pp. 1-265.

¹⁸⁷ *Al-Skeini v UK* (no.55721/07), *Al- Jedda v. UK* (no. 27021/08), *Blackstone Chambers*.

state, but extend overseas. This is important when analyzing how migration control, when applied outside EU territory, can establish responsibility for violations of rights found in human rights law, refugee law and international law. To better understand how migrants' rights can be violated in third states as a result of the external border, it is important to understand the applicability of jurisdiction and effective control to establish responsibility. Who is responsible for safeguarding these rights? Regardless if the migrant experiences the border in the Strait of Gibraltar, as they are intercepted by SIVE; at the fence that delimits the border of the enclaves of Ceuta or Melilla; in the Niger desert, as they attempt to reach Libya; or in international waters, as they are intercepted by the Libyan Coast Guard – it is important to understand what rights migrants, asylum seekers and refugees have, how they are being violated when they experience the 'new European border' and who is responsible to prevent these violations, protect and safeguard their rights.

The UDHR, ECHR and EU Charter

All EU Member States are party to both the Convention and its Protocol without limitations, and they should ensure that entry and border control policies are compatible with human rights and refugee law.¹⁸⁸ Article 14 of the Universal Declaration of Human Rights outlines that 'everyone has the right to seek and enjoy asylum from prosecution in other countries', and Article 3 of the Treaty on European Union (TEU) binds the EU as a non-state actor to align itself with United Nations norms¹⁸⁹ in promoting and protecting human rights in all its actions. This right to seek

¹⁸⁸ *Article 3 (b) of the Schengen Borders Code Regulation (EC) No 562/2006.

¹⁸⁹ *See United Nations, Protect Human Rights <https://www.un.org/en/sections/what-we-do/protect-human-rights/>

and enjoy asylum is also outlined under the ECHR Protocol No. 4 Article 2, and under the International Covenant on Civil and Political Rights (ICCPR).¹⁹⁰

Although international laws and universal declarations are in place to protect migrants' rights and their right to enjoy asylum, in some cases, *no entry* policies of extraterritorial control can circumvent protection and violate migrants' basic human rights. Relocating migration management and dispersing control to other actors complicate the identification of applicable law and of the actor who must be held internationally responsible for the potential violation.¹⁹¹ This process of relocation and outsourcing can be challenging within contemporary international law in terms of human rights obligations. However, Article 3 of the ECHR serves as a central guarantee against mistreatment in countries of origin and transit from which European States are asked to provide protection from, while Article 13 guides the procedural and judicial decision-making. Article 3 of the ECHR protects individuals against inhumane and degrading treatment or punishment. The ECHR established an 'obligatory judicial system enabling anyone to seek redress against violations of Convention rights before the ECHR'.¹⁹² The use of Article 3 can be seen in the case of *Ahmade v. Greece*,¹⁹³ where the Court found a violation of Article 3 regarding inhumane and degrading treatment while in detention, and Article 13 on right to effective remedy. The Court also found that the detention was not 'lawful' within the meaning of Article 5 (1) (f), and in violation of Article 5 (4) of the ECHR. Another example includes the case of *M.S.S v. Belgium and Greece* before the ECtHR, concerning an Afghan national who entered the EU through Greece, then travelling to Belgium where he applied for asylum. Belgian authorities transferred him back to Greece, under the Dublin III Regulation and first country of

¹⁹⁰ * See Article 12 of the International Covenant on Civil and Political Rights. General Assembly Resolution 2200 A of 16 December 1966. United Nations Human Rights Office of the High Commissioner.

<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

¹⁹¹ Heijer (2012), pp.299

¹⁹² Hailbronner, K and Thym, D. *EU Immigration and Asylum Law: A Commentary*. 2nd edition, 2016. Pp. 1050

¹⁹³ ECtHR: *Ahmade v. Greece* (no. 50520/09)

application. The Court found a violation of Article 3 and 13 of the ECHR against Greece, due to inhumane conditions of detention, deficiencies in the asylum procedure and the risk of his expulsion back to Afghanistan without serious examination of his application for asylum and access to effective remedy.¹⁹⁴ Although these are not examples of extraterritorial state control per se, they show the risks asylum seekers face in being sent to a country where they may face inhumane treatment, serious harm and potential refoulement to their country of origin under the ‘safe third country’ concept.¹⁹⁵ The rights afforded to migrants and asylum seekers within EU territory allow the applicant to challenge the application of the safe third country concept, on the grounds that they may be at risk of being returned to a third country that is not safe for his or her individual circumstances¹⁹⁶. No such safeguards exist to migrants and asylum seekers outside EU territory – if, for example, an Eritrean individual is intercepted at sea in the Mediterranean and returned to Libya, he or she risks being expelled back to Eritrea.

One contested issue of extraterritorial state activity is whether any exercise of authority of the state, in whatever form it takes place, constitutes an ‘exercise of jurisdiction’.¹⁹⁷ Can this exercise of jurisdiction bring affected individuals within the personal scope of the state’s human rights obligations? Or is it only in exceptional cases that acts of the contracting states, performed outside their territories, bring individuals within the acting state’s jurisdiction? The case law of the ECtHR outlines that states need to have ‘effective control’ over the individual in order to effectively prove a violation of rights; this presumes that there must be a pre-existing relationship between the state and the individual.¹⁹⁸ Migrants held in offshore facilities may invoke the right to have access to a Court of effective remedy, under Article 13 of the ECHR and Article 2

¹⁹⁴ See ECtHR case: *M.S.S v Belgium and Greece*

¹⁹⁵ See Article 38 the concept of safe-third country in Directive 2013/32/EU, and Article 3 (3) of the Dublin III Regulation (EU) No 604/2013.

¹⁹⁶ See Article 39 (3) of Directive 2013/32/EU

¹⁹⁷ *Moreno-Lax, V. Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*

¹⁹⁸ ECtHR. *Hirsi Jamaa v. Italy* (no. 27765/09).

(3) of the ICCPR, if they are under effective control of the contracting state. Such examples of offshore processing facilities are the Australian asylum processing centers on the islands of Nauru and Christmas Island, which create a paradox in which human rights are protected but migrants are pushed farther away from the hands of responsibility.¹⁹⁹ Furthermore, Article 16 of the Refugee Convention provides that ‘a refugee shall have free access to the courts of law on the territory of all contracting states’. Offshore processing centers are often used to ensure that pre-border migration controls grant refugees a safe haven, but this system effectively abandons the procedural safeguards afforded to them under human rights law. The foundation of jurisdiction is *physical power* over the individual and should not be bounded to the territory of the Member State; instead, it should be extended to the offshore processing centers where migrants are detained. If jurisdiction can be effectively established, it can be argued that migrants are in direct control of that state, which therefore should take legal responsibility for any violations that arise.²⁰⁰ Within the EU detention, which is an obvious deprivation of liberty, is used as a last resort, in accordance to EU and international law; Member States should refrain from inhumane or degrading treatment and should respect the principles laid out in the Reception Conditions Directive, as well as the 18 month maximum for purposes of return and the right to judicial review. Yet, violations can still occur, as seen in the abundant case law before the ECtHR and CJEU regarding violations of Article 3 of the ECHR. An example is the *Mahmundi v. Greece* case, involving five afghan nationals attempting to seek asylum in Norway. The asylum seekers were rescued from a boat in distress by the Greek maritime police and brought to the Pagani Detention Center in the island of Lesbos.²⁰¹ The Court ruled a violation of ECHR Article 3, which exemplifies how detention on EU territory needs to ensure humane treatment of detainees. This case also shows the procedural rights afforded to migrants and asylum seekers rescued in the territorial waters of an EU Member State,

¹⁹⁹ Frelick (no 4).

²⁰⁰ See, Heijer M, ‘Europe and Extraterritorial Asylum’ (2011) 287

²⁰¹ ECtHR 14902/10 case

and the ability for judicial review and to bringing a violation before court. Through the outwards shift of the EU border and responsibility shift to third-countries, and the reduction of EU patrol operations at sea, migrants and asylum seekers are effectively prevented from redressing violations before a court of law.

In addition, there is little that can be done for the migrants, asylum seekers and refugees being held in detention centers in Libya as a result of being intercepted by the Libyan Coast Guard; or for those that have been arrested at the Spanish enclaves of Ceuta and Melilla by Moroccan border authorities and brought to detention facilities. Extraterritorial application cannot be stretched to protect migrants in these cases of interception and possibly indefinite detention (in the case of Libya), as they find themselves outside the EU territory – unless they can prove that they are under effective authority or jurisdiction of a Member State. This leaves a pressing question: “what counts as effective overall control?” The state obligation to respect human rights is not limited territorially, but the obligation to ‘secure and ensure human rights is limited to those areas that are under a state’s effective overall control’.²⁰²

Although most asylum systems and international refugee laws focus on the situation *after* the asylum seeker has reached state territory – the externalization of asylum policies shift the focus on the situation *before* the asylum seeker reaches state territory.²⁰³ This is done through enhanced cooperation with non-EU countries, extending collaboration beyond the EU to the international waters and the territorial waters of third states, moving the borders out to ‘somewhere’ in the Mediterranean. The following section will discuss the law of the sea, outlining the shift of migration management beyond EU territory and explaining how maritime law fits in with this outwards shift.

²⁰² Milanovic M, ‘Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy’ (2011) *Oxford University Press* 1-265.

²⁰³ Hailbronner K and Thym D, ‘EU Immigration and Asylum Law: A Commentary’ (2016) ed 2, 1039

4.3 Law of the sea

Apprehending migrants before they reach the external EU border is a serious challenge to migration management, particularly for those countries experiencing unauthorized migration by sea. Many governments seek to intercept vessels carrying migrants at sea and prevent them from reaching the EU coast, but what we see today is that the breadth of interception is extending far past the territorial waters of the EU state. The Sea Borders Regulation promotes the protection of fundamental rights, including the principle of non-refoulement, prohibiting the disembarkation of intercepted or rescued persons to a third country if the EU Member State was or should have been aware that the third country is engaged in human rights violations.²⁰⁴ The ECHR can be applied extraterritorially whenever a contracting state exercises jurisdiction over a person, such as in cases where he or she has been transferred to an European border guard vessel at high seas.²⁰⁵ For the purpose of this sub-section, it is important to understand the extraterritorial scope of international law and its application in a state's territorial waters and in international seas. Areas within a state's jurisdiction are considered the state's *territorial waters*, which extend up to 12 nautical miles. Areas outside a state's territorial waters, but still under its control, are considered a state's *contiguous zone*, which extends up to 24 nautical miles from the baseline.²⁰⁶ However, a contiguous zone must be claimed by the state – as Italy did, claiming a contiguous zone of 24 nautical miles.²⁰⁷ Sometimes, due to the geographical location of some states, it is difficult to claim a maximum territorial breadth of 12 nautical miles; Greece and Turkey, for example, agreed to a territorial sea of 6 nautical miles.²⁰⁸

²⁰⁴ Sea Borders Regulation (EU) No. 656/2014 on search and rescue operations (2014)

²⁰⁵ Hailbronner K and Thym D (no 220) 1052

²⁰⁶ Part II of UNCLOS, Article 3 establishes the breadth of territorial sea to not exceed 12 nautical miles. Article 33 establishes contiguous zone, as a zone contiguous to its territorial sea, the coastal state may exercise control to not extend beyond 24 nautical miles from the baseline with the breadth of the territorial sea.

²⁰⁷ *Italian legislative law on navigation, Article 2. No 359 (1974)*

²⁰⁸ Koka and Veshi (no 180) 36

Moreover, once a vessel reaches a state's territorial waters, that state becomes responsible under the Dublin III Regulation and international refugee law for those individuals, and cannot return them to their country of departure or any third state without first assessing each passenger's individual situation.²⁰⁹

It is outside the state's territorial seas that the realm of law in protecting human rights obligations becomes murky. Overall, the territorial scope or application of human rights law refers to the territory in which the state is responsible for protecting human rights, but it is often difficult to establish responsibility in international waters, particularly in carrying out search and rescue operations.²¹⁰ For example, consider the hypothetical case of a ship in distress within the international waters of the Mediterranean, but located at the point where Malta and Italy's search and rescue zones intercept. Is it Malta's duty to respond to the distress call? Or is it Italy's duty? Is it duty of the Greek commercial fishing vessel, located in close proximity to the sinking ship, to respond to the call? Or is it responsibility of the Spanish NGO rescue vessel located 50 km away, bearing the flag of the Netherlands? Once establishing who is responsible for rescuing the migrants in distress, is it then their responsibility to disembark them at the nearest port or safety or dock at the rescue ships own country? States are responsible for protecting the human rights of all individuals present within their territory, and as seen in the Hirsi case, jurisdiction does not only mean the entry into one's physical borders: the application of authority over an individual outside its territory also constitutes as jurisdiction. Anyone in danger or distress at sea should be rescued and brought to the nearest safe port and allowed to disembark, both the 1974 SOLAS and 1979 SAR Conventions explain the obligations of states and individuals regarding rescue at sea. Shipmasters and captains often face difficulties finding a safe port to disembark, due to State closing their ports and a general lack of coordination in

²⁰⁹ Ibid 35

²¹⁰ Wouters, C, 'International Standards for the Protection from Refoulement' (2009) *Leiden University Publications*.

rescue operations and regarding safe disembarkation options.²¹¹

In the case of *J.H.A v. Spain*, on 4 February 2007 the *Luz de Mar* (a Spanish maritime rescue tug) responded to a distress call of the *Marine I*, located in the Senegalese search and rescue zone.²¹² The *Marine I* capsized in international waters with 369 migrants on board. The *Luz de Mar* towed the boat off the coast of Mauritania, where it remained anchored. Negotiations began between Spain, Mauritania and Senegal. On 12 February, the Spanish and Mauritania government reached an agreement that allowed the passengers of the vessel to disembark at the port of Nouadhibou, Mauritania. The migrants were identified, and 70 persons were sent to the Canary Islands to initiate asylum applications procedures on advice of the Spanish Commission for Refugee Assistance (CEAR). Twenty-three individuals refused to sign a voluntary repatriation agreement and remained in detention in Mauritania, supposedly in inhumane conditions. The Spanish authorities offered them an agreement; either stay in detention indefinitely *or* repatriate *or* transfer to one of the following countries: Morocco, Senegal, Mali, Egypt or South Africa. The complaint states that although they were being detained in Mauritania, they were effectively under Spanish control, and argues that they were not given access to remedy or judicial proceedings and did not have their rights explained to them. The State party points out that the actions were at all times consistent with the International Convention for the Safety of Life at Sea (SOLAS) and the International Convention on Maritime Search and Rescue (SAR), and it was Senegal (whose search and rescue zone they were in) that authorized the transfer to Nouadhibou, Mauritania. Although the Court found the complaints inadmissible, the case shows the complexity in establishing responsibility at sea. Moreover, the agreement between Spain and Mauritania provided temporary presence in Mauritania, and Spain denies that immigrants were irregularly detained or put in danger of being returned to their country of origin. The complainant of the case also stated that the

²¹¹ UNHCR, 'Irregular Migration by Sea: Frequently asked questions' (UNHCR, 28 May 2009)

²¹² See, UN Committee Against Torture, *J.H.A v Spain* (CAT/C/41/D/323/2007, 21 November 2008)

migrants were not taken to a safe port, and that the only safe port in the area would have been the Canary Islands, and since Mauritania had not signed the SAR Convention they did not ‘feel obliged to let them disembark until they received payment from Spain’.²¹³ The State party’s observation on the merits was that ‘Spain bears no responsibility because the incidents took place outside its jurisdiction’.²¹⁴ Ultimately, there was a lack of jurisdiction of the State party, absence of *locus standi* and a failure to exhaust available domestic remedies. In addition, the High Court also held that measures to offload persons at Nouadhibou were taken by Mauritanian authorities and pursuant to the law of that country, and that therefore it was up to the Mauritanian courts to determine whether irregularities actually occurred. This case reiterates the complexities of affirming human rights laws afforded to asylum seekers and migrants in accordance with the jurisdictional limits of a state to be held responsible for supposed violations. Although this case was inadmissible, it provided a unique outline of how states can ‘offshore’ responsibility for migrants and asylum seekers rescued at sea through agreements with third countries, and the risks external migration control can have on migrants and asylum seekers, particularly when there is a failure to disembark at a safe port.

The duty to rescue those in peril at sea is codified in various international law and human rights obligations, such as the United Nations Convention for the Safety of Life at Sea (UNCLOS), the International Convention on Maritime Search and Rescue (SAR), International Convention for the Safety of Life at Sea (SOLAS Convention), International Convention on Salvage of the International Maritime Organization (IMO), and the Sea Borders Regulation.²¹⁵ However, beyond this duty to rescue and protect those seeking protection, maritime law continuously brings forth the issue of jurisdiction, such as responsibility, territorial waters, contiguous zones, overlapping

²¹³ J.H.A v. Spain, the Committee against Torture (CAT)

²¹⁴ Committee Against Torture (CAT). J.H.A v. Spain.

²¹⁵ United Nations Convention for the Safety of Life at Sea (UNCLOS), International Convention on Maritime Search and Rescue (SAR), International Convention for the Safety of Life at Sea (SOLAS Convention)

search and rescue zone - the 'murky waters' of responsibility at high seas (as seen in the hypothetical case). UNCLOS, SOLAS, SAR and the 1958 Convention on the High Seas lay out explicit obligations to rescue persons in peril on the high seas. UNCLOS outlines the 'obligations of the master to render assistance to those in distress at sea regardless of their nationality'. UNCLOS also imposes an obligation to every coastal State Party to promote the establishment and operation of an effective search and rescue service, and mutual regional arrangement to co-operate with neighbouring states (Article 98 (2)). The SOLAS Convention maintains cooperation and coordination in attending to distress calls at sea around its coasts.

The law of the sea is of particular importance throughout this dissertation, as in most cases migrants and asylum seekers are most directly affected by interception and interdiction operations at sea. Establishing effective control and overall jurisdiction is a fundamental aspect in ensuring responsibility for violations, and through the case law cited above it is clear that states are accountable for state action in extra-territorial situations, as states are responsible for protecting human rights within their territory and when individuals are under their effective control, either directly or indirectly. The following case studies of Libya and Morocco will help contextualize the current situations in these countries and the overall cooperation with EU Member States. Subsequent sections will draw on this and apply the laws outlined in section 4, in order to analyze if these rights are being violated in the cases of Libya and Morocco (section 6).

5 Case Studies: Libya and Morocco

5.1 Libya

Historical Background

Libya has faced decades of conflict, civil war and political uncertainty, with no single functioning government controlling the country and growing tension between governing forces, the country's current situation has raised considerable concerns on the safety of civilians and migrants and the inability to adequately protect them. This section will provide a brief background on the Libyan conflict, the Libyan government and the country's political situation, to help contextualize how the EU border effectively shifted into Libya – or at the very least into its territorial waters – and how this affects migrants.

Historically, Libya was a key country of destination for labour migration during the 1960s, due to the discovery of large oil reserves. Libya experienced large immigration flows of migrants from sub-Saharan Africa as well as neighbouring Arab countries.²¹⁶ Before the 2011 crisis, estimates state that there were over 600,000 regular foreign workers, and approximately 1,2 million irregular foreign workers in Libya.²¹⁷ Libya's open-door policy on immigration evolved in the 2000s when large numbers of migrants from sub-Saharan Africa were entering the country, the Tripoli's government started to engage in international discussions on illegal immigration control.²¹⁸ From 2003 to 2005, the Libyan government was involved in large-scale expulsions and repatriations, although the majority were economic migrants, some

²¹⁶ Fargues P, 'EU Neighbourhood Migration Report 2013' (2013) *European University Institute. Migration Policy Centre*.

²¹⁷ *Libyan authority estimates to the European Commission delegation in 2004. See European Commission, 'European Commission technical mission to Libya, exporting Fortress Europe' (Statewatch, vol 15, 2005) <<https://www.statewatch.org/news/2006/jul/libya.pdf>> accessed 15 July 2019

²¹⁸ *Libya began cooperating with Europe on tackling irregular migration

were asylum seekers who faced a real risk of persecution upon being returned.²¹⁹ Moreover, in 2007, after years of cooperation, Libya imposed visas on African and Arab countries, effectively turning many immigrants into irregulars overnight, as the EU began pressuring Libya to control illegal migration, as large number of irregular migrants began the perilous journey to Lampedusa and Malta.²²⁰ The *2011-2013 EU-Libya Strategy Paper*, developed by the European Commission, outlined the future cooperation objectives with Libya and stressed the “increased migratory pressure from irregular migration on Libya’s Southern border, reflected by 2008 sharp increase in irregular migration across the Mediterranean to Italy and Malta.”²²¹ This strategy paper also outlined Libya’s commitment of cooperation to ‘cope with the challenges posed by irregular migration into the country’ with key countries like Italy.²²²

Economic migration all but ceased in 2011, with the fall of Libya’s previous dictator, Muammar Gaddafi, who became the de facto leader in 1969 ruling for 42 years. In 2011, the UN Security Council imposed sanctions against Libya due to growing civil unrest and crimes against humanity. NATO also began its surveillance over Libya and established a no fly zone, later conducting ‘humanitarian’ operations. The Libyan Civil war erupted in 2011 between government forces and anti-Gaddafi forces, and Gaddafi’s authoritarian regime crumbled in 2011 with the fall of Tripoli.

Following the 2011 civil war, Libya has seen mass political division and armed conflict as the governments of Libya – the UN backed Government of National Accord (GNA) based in Tripoli and the ‘Tobruk Government’ based in Benghazi – fight for

²¹⁹ Human Rights Watch, ‘Libya: Stemming the Flow: Abused Against Migrants, Asylum Seekers and Refugees’ (HRW, 13 September 2006)

²²⁰ Ibid

²²¹ European Commission, ‘European Neighbourhood and Partnership Instrument, Libya Strategy Paper & National Indicative Programme 2011-2013’ (EC, 2011)

<http://eeas.europa.eu/archives/docs/enp/pdf/pdf/country/2011_enpi_csp_nip_libya_en.pdf? Accessed 15 July 2019

²²² Ibid 12

legitimacy and control over the country.²²³ The country lacks a single government with authority over the whole country and instead is divided between three main powers: the GNA, General Khalifa Haftar's Libyan National Army (LNA) forces who are loyal to the Tobruk administration, as well as Islamic State groups.²²⁴ Most recently, civil unrest peaked in March 2019 as the LNA forces (commanded by Khalifa Haftar) marched into Tripoli in an attempt to seize the capital. War has ensued since, making the life of migrants held in detention centers across Tripoli and neighbouring cities extremely dangerous.²²⁵

Current Situation for Migrants

Libya is not a 'safe-third country' nor is it party to the 1951 Refugee Convention or its Protocol. Libya has no asylum law or procedures and there are no formal mechanisms for individuals seeking protection once inside Libya.²²⁶ In 2017, the UNHCR estimated that up to 90 percent of people crossing the Mediterranean sea to Europe departed from Libya.²²⁷ Libya has been a key country of departure and transit for many African and Arab migrants, and with increasing rates of interception and return migrants are being returned back to Libya at a far greater rate than Libya authorities can manage and accommodate.²²⁸ As of July 2019, the UNHCR reports that there are 52,902 *registered* refugees and asylum seekers in Libya, and 268,629 internally displaced

²²³ The NTC was the de facto government of Libya for 10 months between 2011 and 2012 following the fall of the Gaddafi regime.

²²⁴ Although IS was expelled from its territory in 2016 and is now a diminished force, it still has a small presence in desert hideouts and possibly responsible for attacks in the capital

²²⁵ Tripoli has six currently active detention centers as of information collected in 2018; See, *Global Detention Project: Libya*

²²⁶ Human Rights Watch, 'Libya: Stemming the Flow: Abused Against Migrants, Asylum Seekers and Refugees' (HRW, 13 September 2006) <<https://www.refworld.org/docid/4517c8f94.html>> accessed 15 July 2019

²²⁷ UNHCR, 'Libya' (UNHCR, 23 October 2017) < <https://www.unhcr.org/libya.html>> accessed 15 July 2019.

²²⁸ * Arab migrants mainly from Syria and Iraq. UNHCR, 'Operational Portal: Refugee Situations, Libya' (UNHCR, 2019)<<https://data2.unhcr.org/en/country/lby>> accessed 15 July 2019

persons.²²⁹ The highest proportion of registered refugees and asylum seekers are of Syrian, Sudanese and Eritrean nationality. In 2019 alone, 3,686 refugees and migrants were rescued/intercepted at sea by the Libyan Coast Guard and returned to Libya, where they potentially face indefinite detention. Currently there are 3,800 individuals held in detention centers in main conflict areas around Tripoli.²³⁰ In the latest fighting in the capital, more than 2,800 people have fled their homes in Tripoli fearing for their life, airstrikes have also significantly damaged the city's only functioning airport.²³¹ According to *Global Detention Project*, Libya has 52 active detention centers as of 2017/2018, and 6 confirmed in use for 2019.²³²

Migrants, asylum seekers and refugees are regularly exposed to indefinite detention in centers run by the Interior Ministry's Department for Combating Illegal Immigration or by local militias.²³³ The criminalization of migration is an important aspect in the outwards shift towards policies that combat irregular migration flows. Criminalization aims to stop migrants before they reach the border through deterrence mechanisms, or in the form of push-backs and detention for irregular entry. Libya's legal framework concerning irregular stay, entry and exit and detention predates the 2011 civil war, provision are contained under two laws: Law No. 6 (1987) regulating entry, residence and exit of foreign nationals to/from Libya and; Law No. 19 (2010) on combating irregular migration.²³⁴ Under both law, violations of migration provisions are criminalized with fines, sanctions and imprisonment. Irregular stay, entry and exit from Libya is a criminal offence under Libyan law, the law provides that "illegal migrants" will be put in jail and condemned to hard labour, or pay a fine of 1,000 LYD (approximately

²²⁹ * The actual number of asylum seekers is believed to be much higher given the operational constraints placed on the UNHCR by Libya. UNHCR can only register individuals from certain nationalities: Eritrean, Oromo Ethiopian, Iraqis, Palestinians, Sudanese from Darfur, Somalis, Syrians, Yemenis, and South Sudanese. See also, Bialasiewicz (no 75) 19-20

²³⁰ UNHCR, 'Libya Update' (UNHCR, 3 July 2019)

²³¹ Ibid

²³² Libya Immigration Detention' (*Global Detention Project*, August 2018)

<<https://www.globaldetentionproject.org/countries/africa/libya>> accessed 13 April 2013

²³³ Ibid

²³⁴ Ibid

723 USD) and be expelled from Libyan territory.²³⁵ Under Libyan law there is no distinction between migrants, refugees, victims of trafficking or others in need of international protection. Upon arrival in Libya, refugees and asylum seekers, particularly from sub-Saharan African countries, are “treated as illegal migrants and are at risk of arbitrary arrest and detention.” As it stands, Libya currently criminalizes irregular migration through policies such as mandatory and often indefinite detention and lacks a legal and regulatory framework on immigration detention. Without complete harmonization on procedures or criteria, migrants, asylum seekers and refugees are all considered to be ‘illegal’ and thus subject to fines, detention and expulsion.²³⁶ The criminalization of migration in Libya and the arbitrary and inhumane conditions migrants and asylum seekers face will be further analyzed in Section 6.2 to understand how specifically, external migration control affects these rights in Libya.

Libya-EU and Italian Cooperation

The structure of Italian border enforcement in North Africa is apparent in its close cooperation with countries of close proximity to the Italian border in managing the flow of irregular migration. Partnership with the EU began as early as 2002, when the European Council initiated cooperation with Libya to focus on migration management from the region. In 2007, Italy and Libya signed an agreement on conducting joint patrols throughout the Libyan territorial waters to intercept and return irregular migrants.²³⁷ In 2008, Italian Prime Minister Berlusconi visited Benghazi to sign the *Treaty of Friendship, Partnership and Cooperation* with Gaddafi, aimed at preventing irregular migration from Libya to Italy. Under the Treaty, the Italian government promised \$5 billion over a period of 20 years to Libya, in an effort to ‘close the past’ and provide

²³⁵ Libyan Law No. 6 (1987) regulating entry, residence and exit of foreign nationals to/from Libya as amended by Law No. 2 (2004)

²³⁶ Libya Immigration Detention’ (*Global Detention Project*, August 2018)

<<https://www.globaldetentionproject.org/countries/africa/libya>> accessed 13 April 2013

²³⁷ Ronzitti N, ‘The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: New Prospect for Cooperation in the Mediterranean?’ (2019) *Bulletin of Italian Politics*, 1 (1) 125-133.

reparations to Libya for the damages caused by Italian colonialism.²³⁸ This Treaty provided a favourable climate for future relations and bilateral cooperation between the two countries. The most interesting section of the Treaty is the section outlining *Partnership*, which focuses explicitly on the fight against illegal immigration²³⁹ In addition, under this agreement, approximately 1,000 km of the Libyan coastline were to be patrolled by mixed crews on patrol boats provided by Italy, Libyan land borders were to be controlled by satellite detection systems jointly financed by Italy and the EU.²⁴⁰ This part of the Treaty raised considerable human rights concerns regarding control systems at the Libyan land border, and the fate of migrants turned back and left in the desert.²⁴¹ Although the latter has not *fully* materialized yet along Libya's land borders, the EU has moved to step up its cooperation in managing the flow of illegal migrants with Niger and Tunisia. Most notably, in March 2011 through the EU-Tunisia agreement committed to providing assistance to Tunisia, on the basis that Tunisia readmits those who have fled to Italy.²⁴² Under the Italian- Libyan Treaty of Friendship, Italy carried out numerous maritime operations where it intercepted irregular migrants and returned them to Libya.²⁴³ This Treaty was suspended in 2011 as a result of civil unrest in the region during the end of the Gaddafi regime, effectively halting maritime operations.

The fall of Gaddafi in 2011 brought the country into a civil war, and destroyed the Libyan Coast Guard assets, effectively leaving the 12 miles of territorial waters and contiguous waters off Libya 'unguarded'.²⁴⁴ The international waters separating Libya

²³⁸ Ronzitti N (no. 252)

²³⁹ Sarrar S 'Gaddafi and Berlusconi sign accord worth billions' (Reuters, 30 August 2008) <<https://uk.reuters.com/article/uk-libya-italy/gaddafi-and-berlusconi-sign-accord-worth-billions-idUKLU1618820080830>> accessed 15 June 2019

²⁴⁰ Ronzitti N (no 252) 130.

²⁴¹ Ibid, pp. 130

²⁴² Badalic V 'Tunisia's Role in the EU External Migration Policy: Crimmigration Law, Illegal Practices, and their Impact on Human Rights' (2019) *Journal of International Migration and Integration* 20(10) 85, 90

²⁴³ Pijnenburg, A, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the making in Strasbourg?' (2018) *European Journal of Migration and Law* 20, 396-426.

²⁴⁴ Santer K, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli' (2019) *European Journal of Migration and Law* 21, 141

from Malta, Lampedusa and Sicily has been a contested space of governance, responsibility and protection. Following the civil war, Italy aimed to regain close partnership with Libya and has entered into a number of bilateral agreements with the country. In 2017, Italy and Libya concluded a Memorandum of Understanding (MoU) in which Italy declared it will provide support to the Libyan Coast Guard.²⁴⁵ One particular feature reflected in this MoU is found under Article 1 and 2, outlining Italy's agreement to both support and finance development programmes, as well as provide technical and technological support to Libyan institutions in the fight against illegal immigration, represented by the border guards and coast guard of the Ministry of Defence.²⁴⁶ Article 2 of the MoU commit to complete a system of border control in Southern Libya. This article also discusses the commitment to job creation initiatives, income replacement opportunities and training of Libyan personnel within reception centers.²⁴⁷ Overall, this partnership between Italy and Libya and the commitment to stem the flow of illegal migration is part of a much wider European approach, which was endorsed under the Malta Declaration in 2017.²⁴⁸

The Malta Declaration focused on addressing the problems of migration in the Central Mediterranean route, focusing on Libya and its North African and sub-Saharan neighbours. This declaration also outlines the importance to 'stabilize Libya' while remaining 'committed to an inclusive political settlement to support the Presidency Council and the Government of National Accord'.²⁴⁹ Moreover, priority will be given to provide training, equipment and support to Libyan national coast guards and other relevant agencies and helping to reduce pressure on Libya's land border, working with Libyan authorities and neighbours of Libya to enhance their border management

²⁴⁵ Santer K (no 259)

²⁴⁶ See Article 1 (b) and (c), Memorandum of understanding in cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic.

²⁴⁷ Ibid, Articles 2 (3) and (4)

²⁴⁸ European Council Press Release, 'Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route' (EC 03 February 2017)

²⁴⁹ Ibid

capacity.²⁵⁰ This declaration also outlined the need to work closely with IOM and UNHCR to ensure ‘adequate reception facilities and conditions in Libya for migrants’.²⁵¹

The Central Mediterranean route is one of the commercially busiest seas in the world, with thousands of fishing and cargo vessels sailing daily, it is also one of the most heavily monitored (although this may be changing as border patrols and surveillance increase along the Western Mediterranean route).²⁵² Cooperation between the EU and Libya regarding maritime patrols and joint operations is of particular importance due to the vast number of individuals migrating from Libya towards the Italian island of Lampedusa. The majority of cooperation agreements with Libya focus on stemming the flow of irregular migration by sea through the increased capacity of the Libyan Coast Guard. The Government of Italy established Operation Mare Nostrum in 2013 to save lives at sea and combat human trafficking and smuggling in the Central Mediterranean.²⁵³ The Italian navy rescued approximately 150,000 people in Libyan and international waters, until the operation ended in 2014. Following Mare Nostrum, Frontex launched Operation Triton focused on border control, surveillance and search and rescue. Operation Triton, under Italian control, was responsible for rescue operations off the Italian coasts until 2018, when it reportedly shifted its mandate to responding to distress calls but no longer actively searching for boats in distress.²⁵⁴ Operation Themis, a joint Frontex operation replaced Triton in 2018, with an operational area covering flows from Algeria, Tunisia, Libya, Egypt, Turkey and Albania.²⁵⁵ The reason for this new EU maritime operation is the apparent shift in migratory

²⁵⁰ European Council, Malta (no 263)

²⁵¹ Ibid

²⁵² Albahari M (no65) 110

²⁵³ European Council on Refugees and Exiles, ‘Mare Nostrum to end – New Frontex operation will not ensure rescue of migrants in international waters’ (ECRE, 10 October 2014) <<https://www.ecre.org/operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters/>> accessed 20 May 2019

²⁵⁴ BBC News, ‘Operation Triton: Europe’s Mediterranean border control’ (BBC News, 13 November 2014) <<https://www.bbc.com/news/world-africa-30039044>> accessed 15 July 2019

²⁵⁵ Frontex, ‘Main Operations: Operation Themis’ (Frontex, 2019) <<https://frontex.europa.eu/along-eu-borders/main-operations/operation-themis-italy-/>> accessed 15 July 2019

routes, allowing the operation to cover a larger area ‘than any other Frontex operation before’.²⁵⁶ Since 2015, the EU has deployed three operations at sea: Operation Sophia, targeting migrant smugglers in the Mediterranean; Operation Themis (formerly Operation Triton), covering the Central Mediterranean; and Operation Poseidon, covering the Eastern Mediterranean.²⁵⁷ In 2016, Operation Sophia’s mandate (also known as EUNAVFOR MED) was expanded to build the capacity of the Libyan Coast Guard.²⁵⁸ Operation Sophia has ceased maritime patrols, withdrawing its vessels from the sea. Although operations and naval assets have been suspended, the mandate has been extended to 30 September 2019, in which, Operation Sophia is will continue surveillance by air assets, and reinforcing support to the Libyan Coast Guard and Navy in law enforcement tasks at sea.²⁵⁹ This is a significant shift in EU external migration control through maritime operations as EU maritime patrols have all but ceased search and rescue operations in the Central Mediterranean, effectively relying on the work of humanitarian search and rescue vessels (limited operational capacity, i.e the criminalization of humanitarian NGOs) and the Libyan Coast Guard.

Overall, since 2014, the EU has mobilized €338 million on migration related projects. Specifically, €318 million were mobilized under the EU Emergency Trust Fund for Africa and €20 million as bilateral assistance.²⁶⁰ The EU programs’ overarching focus in Libya fits under three main themes: protection and assistance to those in need, stabilization of Libyan municipalities and integrated border management (IBM). Regarding IBM, the first phase of support to Libya focused on strengthening SAR operations and related coast guard tasks, setting up basic facilities for Libya Coast

²⁵⁶ Ibid

²⁵⁷ European Council, ‘Saving lives at sea and targeting criminal networks’ (EC, 2019).
<<https://www.consilium.europa.eu/en/policies/migratory-pressures/sea-criminal-networks/>> accessed 15 July 2019

²⁵⁸ Ibid

²⁵⁹ European Council Press Release, ‘EUNAVFOR MED Operation Sophia: mandate extended until 30 September 2019’ (EC, 29 March 2019) <<https://www.consilium.europa.eu/en/press/press-releases/2019/03/29/eunavfor-med-operation-sophia-mandate-extended-until-30-september-2019/>>

²⁶⁰ European Commission, ‘EU cooperation on migration in Libya’ (EC, December 2018)
<<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eutf-noa-libya.pdf>>

Guards, surveillance operations, assisting Libyan authorities in defining and declaring a Libya SAR region, and finally building operational capacity of Libyan authorities on the land border, while increasing surveillance and control in the desert.²⁶¹ The second phase (2018) of IBM in Libya focuses on land and sea border control and surveillance, including the development of standard operating procedures (SOP) on land and SAR at sea.²⁶² In the Mediterranean, SAR is often conducted as a shared responsibility. For example, Italian Operation Mare Nostrum of 2013, was a military-humanitarian operation extending over operational area zones in Libya and Malta.²⁶³

Moreover, in 2017, €46.3 million was contracted under the EU Trust Fund for Africa, between the Commission and Italy to spend in Libya on a border management program, which included reception centers along Libya's border.²⁶⁴ This program focuses on providing supported the Libyan Coast Guard in the form of training and equipment (i.e. repair of existing vessels, supply of communication and rescue equipment, rubber boats and vehicles).²⁶⁵

As migrants, asylum seekers and refugees continue to be intercepted in the Mediterranean by the Libyan Coast Guard (which is happening at a much faster rate than they are being evacuated or repatriated), migrants continue to face indefinite detention as well as gross violations to their basic human rights. With the increasing rates of interception in Libyan territorial waters, this leads to a pressing question on how these external migration policies and cooperation between the EU and Italy and Libya plays a role the safety, lives and freedoms of individuals sent back to Libya through interception operations, which will further be analyzed in in Section 6.1.

²⁶¹ European Commission, 'Support to integrated border and migration management in Libya – First Phase' (EC, 27 June 2017) https://ec.europa.eu/trustfundforafrica/region/north-africa/libya/support-integrated-border-and-migration-management-libya-first-phase_en

²⁶² Ibid

²⁶³ Carrera, S and Lannoo, K, 'We're in this boat together time for a migration union' (2018) *CEPS Policy Insights. No 2018/09*, 1-9

²⁶⁴ European Commission, 'Integrated Border Management' COM (2018) 250 final, 12

²⁶⁵ European Commission, Libya (no 275)

5.1 Morocco

Historical Background

Spain has two land borders with Morocco – the two Spanish enclaves of Ceuta and Melilla, with a combined length of only 18km.²⁶⁶ Since the 1990s and early 2000s, Spanish immigration policies have been described as libertarian and egalitarian.²⁶⁷ Prior to 1991 Moroccan citizens moved freely to Spain as temporary and seasonal workers, the introduction of visa requirements in 1991 interrupted an era of circular migration, effectively ‘pushing’ migrants into permanent settlement.²⁶⁸ Sustained economic growth between the mid-1990s and 2007 were arguably the main drivers in Spain’s dramatic rise in immigrants; as Hein de Haas argues, ‘a better economy leads to greater number of immigrants’.²⁶⁹ Several regularization campaigns were conducted to allow irregular migrants to acquire papers and regularize their stay in Spain. In 2005, for example, Spain regularized over 570,000 foreign workers, a majority of whom were Moroccan.²⁷⁰ This in turn incentivized a pattern of increasing immigration to Spain, and the number of non-nationals living in the country rose quickly – in January 2010 about 12 percent of the population were non-nationals.²⁷¹ The 2005 regularization of foreign workers was the largest and most efficient in Spain’s regularization history – the new policy contributed to the number of individuals allowed to enter legally and helped lower the proportion of unauthorized immigrants.²⁷² Moreover, it can be argued that restrictions tend to interrupt the ‘circulation’ of people and essentially pushes migration

²⁶⁶ Carling (no 110) 317

²⁶⁷ Senge K, ‘Co-responsibility between countries of origin, transit and destination: Lessons from Spain’s experience with migration’ (2018) *European View* 17(1) 66–73

²⁶⁸ Hein de Haas, ‘Myths of Migration’ (*The blogger*, 2017)

<<http://heindehaas.blogspot.com/2017/03/myths-of-migration-much-of-what-we.html>> accessed 15 July 2019

²⁶⁹ Ibid

²⁷⁰ Teevan, K, ‘Morocco, the EU and the migration dilemma’ (2018) *European Council on Foreign Relations*

²⁷¹ Arango J, ‘Exceptional in Europe? Spain’s experience with Immigration and Integration’ (2013)

Migration Policy Institute

²⁷² Ibid 3

into situations of permanent settlement.²⁷³ This is perhaps what happened to the Moroccan ‘guest workers’ in Spain throughout the 1970s and 1980s. Fearful they would not be able to re-admit after temporary return home, many decided for permanent, often ‘irregular’ settlement. Arguably, through the introduction of visa requirements, and the consequences of the Schengen Agreement, this ‘set in motion the phenomenon of illegal boat migration’ and the permanent settlement of Moroccan workers in Spain.

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Current Situation for Migrants

Morocco is party to the 1951 Refugee Convention and its 1967 Protocol. While Morocco is the first country in North Africa to introduce a migration strategy and to regularize migrants in the country, many migrants are determined to go to Europe and remain in Morocco illegally when they fail to cross the land borders or by sea to mainland Spain.²⁷⁵ Morocco introduced its first Migration Act in 2003, which provides sanctions for immigration related violation as well as rule for the proper treatment of non-citizens who are taken into custody.²⁷⁶ The Migration Act also provides ground for deportation, and expulsion of foreign nationals who enter Morocco unauthorized. However, procedural safeguards exist in the 2011 Moroccan constitution against arbitrary detention and guarantee the right to information about grounds for detention, legal assistance and communication with relatives (Article 23)²⁷⁷

Although Morocco has made efforts to regularize migrants, such as the 2013 regularisation programme, which gave permits to more than 50,000 migrants – allowing migrants access to jobs, healthcare and training and education. Migrants interviewed by

²⁷³ Czaika M and de Haas H, ‘The Globalization of Migration: has the world become more migratory?’ (2015) 48 (2) *International Migration Review*, 283

²⁷⁴ Arango J (n 286)

²⁷⁵ Teevan C, ‘Morocco, the EU and the migration dilemma’ (European Council of Foreign Relations, 19 November 2018) <https://www.ecfr.eu/article/commentary_morocco_the_eu_and_the_migration_dilemma> accessed 01 July 2019.

²⁷⁶ ‘Morocco Immigration Detention’ (*Global Detention Project*, February 2014) <<https://www.globaldetentionproject.org/countries/africa/morocco>> accessed 02 June 2019

²⁷⁷ ‘Moroccan Constitution’ (2011) No. 5964

Al Jazeera claim that even though they have retained at residence permit they are unable to find a job, 'we are not treated well, and we are mistreated by the authorities' migrants state that they are continuously harassed by police and cannot find a regular job, ultimately waiting to save up enough to pay smugglers to take a boat to Spain'.²⁷⁸

Morocco-EU and Spanish Cooperation

EU-Morocco cooperation in the field of migration spans over 10 years, as early as 1992, Spain signed a readmission agreement with Morocco, under which Morocco was to readmit all migrants who had entered Spain illegally through Morocco, regardless of nationality.²⁷⁹ Cooperation continued, and in 2004 Morocco and Spain signed an MoU to focus on mixed patrol operations of the Guardia Civil of Spain and the Royal Gendarmerie of Morocco.²⁸⁰

On 7 June 2013, Morocco became the first Mediterranean country to enter a Mobility Partnership with the EU.²⁸¹ The goal of the partnership was to 'ensure that the movement of persons is managed as effectively as possible'. The agreement established four operational priorities: mobility, regular immigration and integration; prevention and fight against irregular immigration, human trafficking and border management; migration and development; international protection. The first operational priority (mobility, regular immigration and integration) highlights the cooperation on the field of readmission. Since 2014 the EU has allocated €232 million to Morocco across 27 programs.²⁸² This cooperation focuses on five different areas of intervention, the largest: strengthening migration management, border management and mobility. Nine

²⁷⁸ Al Jazeera, 'Morocco under the spotlight for treatment of African migrants'(AJ,16 November 2018) <<https://www.aljazeera.com/news/2018/11/morocco-spotlight-treatment-african-migrants-181115081201093.html>>

²⁷⁹ Carling (no 110) 323

²⁸⁰ European Commission Press Release, 'Migration and Mobility Partnership Signed between EU and Morocco' (EC, 7 June 2013) <http://europa.eu/rapid/press-release_IP-13-513_en.htm>

²⁸¹ Ibid

²⁸² European Commission, 'EU Cooperation on Migration with Morocco' (EC December 2018) <<https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eu-morocco-factsheet.pdf>>

different programs are implemented in this area, for a total funding of €92 million. One program under this umbrella of cooperation – the Migration Policy Support Program – was signed in 2017, allocating €36 million for four years and is aimed at reinforcing migrant protection and facilitating ‘socio-economic integration of migrants’ in Morocco, while also strengthening the system of voluntary return of migrants to their country of origin.²⁸³

The Western Mediterranean route has become the most active migratory route in the world; there has been an increase in irregular arrivals in Spain via the Western Mediterranean route, which doubled to 57,000 in 2018.²⁸⁴ In response to the growing influx of irregular migrants from sub-Saharan Africa attempting to reach Europe, Spain has intensified surveillance over the Strait of Gibraltar and the Canary Islands through a system called Integrated System of External Vigilance (SIVE). SIVE mobilized a budget of €150 million from 1999 to 2004 – an average of 1,800 euros for each migrant intercepted.²⁸⁵ SIVE is based on a system of fixed and mobile sensors that detect vessels 10 to 25 kilometers from the shore. When a vessel is detected, an interception unit is deployed to apprehend the passengers of the vehicle and bring them to a reception center (usually in Morocco, Western Sahara or Mauritania), the system was later expanded to cover the entire Andalusia coast.²⁸⁶ Since 2004, Spanish and Moroccan police cooperation has been promoted via regular meetings of a joint commission that establishes migration priorities. The two police bodies have operated joint maritime

²⁸³ Ibid

²⁸⁴ Frontex reports that the number of detections across the Mediterranean route plunged 80% compared to 2017. See, Frontex News Release 2019, ‘*Number of Irregular Crossings at Europe’s Borders at lowest level in 5 years*’ (Frontex, 2019) <<https://frontex.europa.eu/media-centre/news-release/number-of-irregular-crossings-at-europe-s-borders-at-lowest-level-in-5-years-ZfkoRu>> accessed 14 July 2019

²⁸⁵ Migration Policy Institute, ‘The Merits and Limitations of Spain’s High-Tech Border Control’ (MPI June 2007) <<https://www.migrationpolicy.org/article/merits-and-limitations-spains-high-tech-border-control>>

²⁸⁶ Ibid

patrols to intercept migrants crossing the border illegally, allegedly reducing arrivals from Morocco by 40% between 2004 and 2005 since its inception.²⁸⁷

Operation HERA, was initiated under the request of Spain in response to the migration flows departing from the coast of West Africa towards the Canary Islands.²⁸⁸ The first stage of Operation HERA began in 2006 and focused on identification of irregular migrants who arrived without documentation to the Canary Islands, the overall purpose was to identify main countries of origin and assist in return operation. Phase two of the operation – HERA II – focused on border surveillance to control the area between West Africa and the Canary Islands and divert vessels trying to reach Spanish territory.²⁸⁹ The main purpose of this operation was deterrence. When boats did set out on sea, joint forces of Frontex would intercept migrants in the territorial waters of Mauritania and Senegal and transport them back to the shore.²⁹⁰ Joint operations like HERA can only take place in the territorial waters of third states with the consent of these third-countries, and usually through cooperation agreements. Frontex maintained that refugees who managed to cross territorial waters were granted the possibility to claim asylum, and thus the operation did not violate the principle of non-refoulement. However, intercepting migrants without establishing their legal status or need of protection in the territorial waters of third states severely hampers the mobility of these migrants and their right in claiming asylum.²⁹¹

The EU is intensifying its support to Morocco to address increased migratory pressure along the Western Mediterranean route. Additional funding from the EU Emergency Trust Fund for Africa will bring overall assistance from EU to Morocco to

²⁸⁷ Luca L, 'Beyond transactional deals: building lasting migration partnerships in the Mediterranean' (2017) *Migration Policy Institute, Brussels*

²⁸⁸ Weis, Maas, 'Fleeing to Europe: Europeanization and the Right to Seek Refugee Status' (2008) *Institute of Social Studies Working Paper, no 454, 2-50*

²⁸⁹ Migration Policy Institute, "The Merits and Limitations of Spain's High-Tech Border Control", June 2007, <https://www.migrationpolicy.org/article/merits-and-limitations-spains-high-tech-border-control>

²⁹⁰ Weis M (no 303) 41

²⁹¹ Weis M (no 303) 43

€148 million.²⁹² The new program will assist Moroccan border agencies to address irregular migration, fight against migrant smuggling and trafficking of human beings and develop its border management system. Spain and Morocco also announced new cooperation deals at the end of 2018, aimed at dismantling illegal migration networks and stopping illegal attempts to cross the border. In April 2019 the number of migrants that reached Spain dropped by 52% (compared to the same month in 2018), according to data provided by IOM.²⁹³ Several NGOs have criticized the deals, reporting widespread violence, repression, detention and refoulement of migrants in Nador and Tangier, Morocco (the last stop before the land borders), especially targeting migrants of Sub-Saharan origins.²⁹⁴ Moreover, despite continuous cooperation, Mobility Partnerships and MoUs, the EU and Morocco have never reached a conclusive agreement on an EU-wide readmission deal. Morocco considers the readmission of migrants coming from third countries as an unnecessary burden and it is afraid it would be 'unpopular among the civil society'.²⁹⁵ Section 6.2 will look specifically at how this history of cooperation and partnership has affects migrants, asylum seekers and refugees in Morocco.

²⁹² European Commission – Press Release, 'W'estern Mediterranean Route: EU reinforce support to Morocco' (EC, 14 December 2018) <http://europa.eu/rapid/press-release_IP-18-6705_en.htm>

²⁹³ ReliefWeb, 'Spain: Irregular Migrants Arrivals Drop by 52% in April thanks to Cooperation with Morocco' (RW, 2 May 2019) < <https://reliefweb.int/report/spain/spain-irregular-migrants-arrivals-drop-52-april-thanks-cooperation-morocco>>

²⁹⁴ European Council of Refugees and Exiles, ' (ECRE, 7 June 2019) <<https://www.ecre.org/situation-worsens-for-migrants-on-western-mediterranean-route/>>

²⁹⁵ Abderrahim T, 'A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia' (IEMed, 2018)

6 How the 'New European Border' affects migrants

6.1 Migrants' rights under international law – how are these being violated in Libya

The premise of the Refugee Convention requires international cooperation to protect refugees and outlines a state's obligations of fulfilment towards refugees. Governments should continue to receive refugees in their territories in the spirit of international cooperation, so that these refugees may find asylum and the possibility of resettlement.²⁹⁶ A 'safe third country' is defined as a country where individuals will be provided with necessary protections and are not at risk of persecution. States have an obligation towards refugees who have not been granted the right to enter/stay to ensure that the principle of *refoulement* is not violated, and that they will be returned to a territory where they will not face prohibited treatment.²⁹⁷ The transfer of responsibility from a state to another state, in those cases where the receiving state is not considered a 'safe third country', causes a fundamental concern regarding safeguarding the rights of migrants and asylum seekers. The Member State has an obligation to ensure protections under international and human rights law when acting extra-territorially. Despite their transfer to another state, the individual should be entitled to their rights and the Member State must ensure that those rights are respected in the receiving country, that this country is in fact a 'safe third country' where they will not risk being sent back to their country of origin, and that this country has the necessary means to provide protections and resettlement.

Libya has experienced years of armed conflict and political division that have weakened its institutions, leaving the government unable to address the abuses and violations committed against migrants at the hands of smugglers and armed groups.

²⁹⁶ Gil-Bazo M 'The Safe Third Country Concept in International Agreements on Refugee Protection' (2015) 33(1) *Netherlands Quarterly of Human Rights* 42, 43

²⁹⁷ *Ibid* 44

Continued conflict has essentially destabilized law enforcement functions and has opened up Libya's borders to migrants, due to reduced controls and large operations of smugglers and traffickers willing to take them onwards to Europe. The overall 'lawlessness' in the country has created a climate favourable to large smuggling and trafficking operations that now operate on Libya's coast – where migrants and asylum seekers will pay to attempt the perilous journey to Italy.

Libya is not a signatory to the Refugee Convention or its Protocol, has experienced ongoing conflict and is without a single stable government; therefore it can be safely argued that it is not a 'safe third country'. Directive 2013/32/EU²⁹⁸ defines the 'safe third country concept' to a country where: an individual's life and liberty is not respected, there is a risk of harm, the principle of non-refoulement is not respected, individuals are removed and put at risk of inhuman and degrading treatment, migrants and asylum seekers face indefinite detention violating their freedom of movement and there is no possibility to request refugee status. Migrants and asylum seekers who are intercepted in international and Libyan territorial waters are returned to Libya where they face indefinite detention, inhumane and degrading treatment with no access to formal judicial proceedings or accessing the asylum system.

Arbitrary Detention

Migrants and asylum seekers in Libya are often exposed to indefinite detention in centers run by the Interior Ministry's Department for Combating Illegal Immigration (DCIM). The UN reports that migrants are held arbitrarily in detention, violating their rights to liberty and security of person (Article 3 UDHR).²⁹⁹ Migrants and asylum seekers are brought to the centers where there is no formal registration, no legal process, and no access to lawyers or judicial authorities, violating an individual's *rights to effective*

²⁹⁸ Directive 2013/32/ EU of the European Parliament and the Council of 26 June on common procedures for granting and withdrawing international protection (2013)

²⁹⁹ United Nations Support Mission in Libya, 'Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya: Survivor voices and accounts' (UNSMIL, 2018) 27

remedy by a competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law (Article 8 UDHR). Moreover, conditions in detention centers are generally inhumane: the facilities are severely overcrowded, without adequate access to toilets or washing facilities, food, or clean water. Migrants and asylum seekers are subject to cruel, inhumane and degrading treatment (Article 5 UDHR, Article 3 ECHR). Interception and return policies can violate the principle of non-refoulement, that prohibits removal, expulsion or extradition to a state where there is a serious risk that the individual could be subjected to the death penalty, torture or other inhumane or degrading treatment or punishment (Article 19 EU Charter, Article 4 Protocol No. 4). State parties are bound to respect provisions outlined in the EU Charter and the European Convention.

The extra-territorial jurisdiction to State parties of the ECHR is apparent in the legal case law of the ECtHR, and Article 1 *all high contracting parties shall secure to everyone within their territories the rights defined in this Convention*. Although the ECHR set limits on the reach of the Convention (as discussed in Section 4), the concept of jurisdiction is not restricted to national territory, and as seen in case *Loizidou v Turkey* of the ECtHR, can extend extra-territorially. For instance, as in this case, state responsibility may arise from military action (lawful or unlawful) if they have effective control over an area outside the Contracting State, whether it is done directly through the state's armed forces, or indirectly through a subordinate local administration.³⁰⁰ The indirect action of a Contracting State should secure the rights and freedoms of the ECHR to the persons in which they are exercising indirect control. Consequently, when partnerships are established between EU Member States and third countries, the extension of rights afforded to EU citizens or those within its territory do not always extend to the people under the state's jurisdiction, by virtue of acts of local administration funded or supported by the Contracting State. Acts and violations should

³⁰⁰ European Court of Human Rights – Factsheet, 'Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights' (ECtHR, July 2018) < https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf> accessed 14 July 2019.

not be solely confined to the Libyan Coast Guard officials, or the DCIM operating the detention facilities but should also extend to the extra-territorial ‘force of power’ assisting the Libyan Coast Guard in intercepting migrants and asylum seekers and thus driving them in detention.

The right to liberty and security of a person is also outlined in the ICCPR, (Article 9). The right to leave any country – including one’s own – is outlined under Article 12 and the Refugee Convention, Article 31 outlines the prohibition of penalties on account of illegal entry or presence.

The United Nations Support Mission in Libya (UNSMIL) conducted interviews with migrants and asylum seekers who had escaped after captivity in Libya. The information gathered showed an overwhelming majority of women and teenage girls who faced instances of sexual assault and rape as they attempted to transit through Libya. Women are extremely vulnerable while in transit through the country, and they risk of being captured by criminal networks in Barak al-Shatti, Bani Walid and al Khoms and sold from ‘one smuggler to another’.³⁰¹

An Eritrean woman, interviewed by UNSMIL, entered Libya in 2017 and was held captive and repeatedly assaulted until her family was able to pay the ransom they requested. Studies report that Eritrean and Somali women are the most vulnerable to prolonged captivity.³⁰²

Another female interviewed accounted for being immediately sold to traffickers in Kufra upon entering Libya in 2017. She reported instances of sexual assault and torture until her family paid her ransom; however, instead of being freed, she was taken to Bani Walid center, where she was held in captivity and forced to pay ransom again – only to be taken after to Barak al-Shatti, another detention center.³⁰³

An 18-year-old from South Sudan reports of his detention in Triq al-Sika, a detention center in Tripoli where he was held with approximately 1,000 other men in a

³⁰¹ UNSMIL (no 314) 26

³⁰² UNSMIL (no 314) 28

³⁰³ UNSMIL (no 314)

confined space. The 18-year old reports that most men were hoping to travel to Europe in search of work but were stopped and intercepted at sea by the Libyan Coast Guard.³⁰⁴ BBC reports that some migrants have stayed in the center for six months in inhumane conditions, and for many this is where the 'dream of reaching Italy has come to an end'.³⁰⁵

Reports from various NGOs, UN agencies and civil society account for the degrading conditions migrants and asylum seekers face in detention centers. In September 2018, hundreds of migrants were moved from a detention center in Tripoli to Zintan detention center in North-West Libya, after detention centers were caught in violent clashes between the Libyan GNA and LNA forces.³⁰⁶ A recent airstrike in Tajoura detention center, in June 2019, killed 53 people and has caused international outrage on the escalating conflict and the safety and treatment of migrants in the country.³⁰⁷

Al Zintan Detention Center, located in al-Gharbi district, is an immigration detention facility. Detainees who were recently interviewed by *Al Jazeera* provided that at least 22 migrants and refugees have died in Zintan since last September, almost all of them facing indefinite detention after being returned from EU-supported Libyan Coast Guard.³⁰⁸ Detainees in Zintan claim a lack of healthcare, inhumane and unsanitary conditions, with limited access to water and food; many detainees need treatment for serious infections but are not being provided the care needed for these serious diseases (dozens have tuberculosis); women and children are also being held in detention.

³⁰⁴ Guerin O 'Libya detention centre: 'It's like hell' (BBC News, 7 September 2017) <<https://www.bbc.com/news/world-africa-41189247>> accessed 14 July 2019

³⁰⁵ Guerin O, (no 325)

³⁰⁶ Hayden S, 'We are in need of urgent help: Refugees perish in Libyan detention centre' (Al Jazeera, 7 June 2019) <<https://www.aljazeera.com/indepth/features/urgent-refugees-perish-libyan-detention-centre-190606185251273.html>> accessed 14 July 2019.

³⁰⁷ See, Human Rights Watch, 'Deadly airstrike in Libya should be Wake-up call for EU' (HRW, 4 July 2019); See also, The New York Times, 'Libya airstrike kills 40 in migrant detention center, official says' (NYT, 2 July 2019)

³⁰⁸ Al Jazeera. 'We need urgent help': Refugees perish in Libyan Detention Centre' (AJ, 7 June 2019) <<https://www.aljazeera.com/indepth/features/urgent-refugees-perish-libyan-detention-centre-190606185251273.html>> accessed 14 July 2019

Medecins sans Frontieres reports that the conditions in detention centers are ‘dire’ and more than 650 people remain in Zintan, in severely overcrowded facilities that lack proper ventilation, and ‘a lack of sanitation facilities which presents a serious health threat’.³⁰⁹

Yet, the EU has continued to train the Libyan Coast Guard and border officials to ‘enhance their capacity to prevent people from leaving the country’,³¹⁰ bringing migrants and asylum seekers at risk of arbitrary detention, impacting their liberty and right to seek asylum. Externalized efforts of migration control lead to increased interceptions and returns, risking complicity with human rights violations.³¹¹

The Right to Leave

The expansion of migration control policies, such as ‘push-backs’ at sea and interdiction measures to prevent irregular entry, can directly affect an individual’s right to leave. The *right to seek and enjoy asylum in other countries free from persecution* is outlined in Article 14 of the UDHR, and the right to leave any country, including one’s own is protected by Article 2 Protocol No. 4 ECHR and Article 12 of the ICCPR. The right to leave a country is restricted through external migration control that prevents migrants from claiming asylum and international protection. As a result of the expanded and enhanced capacity of the Libyan Coast Guard, migrants and asylum seekers who are intercepted at sea are returned back to Libya – a country which is not party to the Refugee Convention, and a place where migrants do not have access to asylum processes. The *right to leave and seek asylum* will be analysed in terms of Libya’s recent

³⁰⁹ Medecins sand Frontieres, ‘Out of sight, out of mind: refugees in Libya’s Detention Centres’ (MSF, 12 July 2019) <<https://www.msf.org/out-sight-out-mind-refugees-libyas-detention-centres-libya>> accessed 14 July 2019.

³¹⁰ United Nations, *Detained and Dehumanised: Reports on human rights abuses against migrants in Libya* (UNSMIL, OHCHR 13 December 2016)

³¹¹ Amnesty International, *Human Rights of External Migration Policies* (Amnesty International, 13 June 2017)

expansion of their Search and Rescue (SAR) operations, and how this affects migrants' and asylum seekers' rights.

In June 2018, the Libyan government officially declared a large section of the Mediterranean as their SAR zone. Prompted by the European Commission, the Italian Coast Guard was asked to assist Libya in declaring a SAR region. The SAR zone will now extend up to 74 nautical miles off the Libyan coast, giving the Libyan Coast Guard a larger claim to intercept boats in international waters.³¹² In 2017, the Libyan government banned all privately owned rescue vessels from entering its 12 nautical mile territorial waters to rescue migrants, prompting rescue ships to wait just beyond the 12 mile mark. The territorial sea of 12 nautical miles permits vessels by right of innocent passage; Libya, by claiming to ban NGO vessels from entering its recently established search and rescue zone of 74 nautical miles, contradicts international law and is inconsistent with UNCLOS provisions on freedom of navigation.³¹³ In addition, a Spanish NGO rescue vessel, *Proactiva*, reported that a Libyan Coast Guard vessel fired warning shots at their rescue vessel which was waiting outside Libyan territorial waters for migrants in distress.³¹⁴ The recent formalization of Libya's SAR zone allows Libya to have a larger control and responsibility to intercept and return irregular migration where EU Member States, which has been officially been endorsed by the International Maritime Organization (IMO).³¹⁵

In cases of arbitrary detention and interception, there is a denial of access to asylum procedures. Migrants and asylum seekers are denied the right to leave 'any

³¹² Cuddy A 'Prompted by EU, Libya quietly claims right to order rescuers to return fleeing migrants' (Euronews, 07 July 2018) <<https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants>> accessed 14 July 2019.

³¹³ Riemer L, 'Keep out!- Libya's search and rescue region to ban NGO rescue vessels violates international law' (*Netzwerk Fluchtforschung*, 29 September 2017) <<https://fluechtlingsforschung.net/keep-out-libyas-search-and-rescue-region-to-ban-ngo-rescue-vessels-violates-international-law/>> accessed 14 July 2019.

³¹⁴ The Maritime Executive, 'Libya excludes NGO vessels from 'rescue zone'' (The Maritime Executive, 11 August 2017) < <https://www.maritime-executive.com/article/libya-excludes-ngo-vessels-from-rescue-zone>> accessed 14 July 2019.

³¹⁵ European Parliament, 'Search and Rescue off Libya' (*Parliamentary Questions to the Commission*, 03 July 2018) P-003665-18, rule 130

country’ and denied ‘the right to seek and enjoy asylum’, which is outlined under the Universal Declaration of Human Rights (UDHR). As Hathaway argues, ‘it is a refugee’s right to decide when the risks of staying put are greater than the risks of setting sail’.³¹⁶

Non-Refoulement

Article 32 (1) of the Convention prohibits expulsions in a Member State territory, and Article 33 prohibits return or refoulement to a frontier or territory where his life or freedom would be threatened.³¹⁷ The European Court of Human Rights challenged the use of collective expulsion in the *Hirsi* case against Italy,³¹⁸ but this holds true since the migrants were on board an Italian vessel. The principle of non-refoulement, also outlined under Article 3 of the CAT, states that: *no one shall expel, return (refouler) or extradite a person to another state*. The non-refoulement obligation requires authorities to conduct a fair, case-by-case assessment to determine the vulnerability of each person and if they would be at serious risk of human rights violations if returned to a certain country. The principle of non-refoulement also holds that a person could experience not only a risk in the country to which they are being sent back, but also a risk that that country will send them back to their country of origin where they could face persecution. ‘Libyan authorities have been documented to regularly deport migrants to countries of origin, regardless of their conditions or right to asylum’.³¹⁹ Those deported to the Libya-Niger border face the drastic conditions of the Niger desert.³²⁰ Moreover, the EU has stressed the importance of strengthening Libya’s Southern border. This has already been done in some aspects through the 2016 EU-Sudan partnership, and Sudan’s Rapid Support Forces (RSF) being tasked with border control, to include

³¹⁶ Hathaway C (no 163) 56

³¹⁷ See Charter of Fundamental Rights of the European Union (2000) 2012/ C 326/02, Article 19 (1) (2)

³¹⁸ Also, *J.H.A v Spain* (CAT/C/41/D/323/2007)

³¹⁹ Bialasiewicz L (no 75) 854

³²⁰ Bialasiewicz L (no 75) 855

stopping people believed to be irregular migrants towards Libya.³²¹ This cooperation has faced criticisms due to intensified brutality towards migrants, and as the tendency to label Sudan as just a country of transit downplays the country's role as one of the largest producers of refugees in the world.³²² Human trafficking and smuggling remain a large concern throughout Niger, as the vast empty swath of desert places migrants travelling north in dangerous and life-threatening situations. The journey between Niger and Libya is dangerous: fatalities occur frequently on this route due to car breakdowns, heat, thirst and at the expense of various militias operating along the route. The new law will save lives, according to the EU who pushed for its introduction.³²³ Although, there is much needed measures to be put in place to ensure migrants and asylum seekers safety along this route, it will also bring the border further into Africa, and into the Sahara desert, which could possibly lead to migrants finding longer and more dangerous migration routes.

6.2 Migrants' rights under international law – how are these being violated in Morocco?

European policies and media attention have largely been directed to the flow of irregular migrants across Europe's southern frontiers. The emerging anti-immigration policies of some Member State in border control and confrontations with the humanitarian mandate to 'let migrants in' and increase rescue operations at sea, open borders, and a stop to the criminalization of NGOs. The Central Mediterranean route

³²¹ Amnesty International, 'The Human Rights Risks of External Migration Policies' (Amnesty International, 2017) 8

³²² Clingendael, 'Effects of EU Policies in Sudan' (Clingendael, September 2018) <<https://www.clingendael.org/pub/2018/multilateral-damage/3-effects-of-eu-policies-in-sudan/>> accessed 15 July 2019.

³²³ Al Jazeera Documentary, 'Niger: Europe Migration' (AJ, 10 January 2019) <<https://www.aljazeera.com/programmes/peopleandpower/2019/01/niger-europe-migration-190110051916545.html>> accessed 15 July 2019.

received considerable attention in regard to recent events involving Italy closing their ports and disallowing disembarkation of migrants rescued at sea. NGOs and civil society organization have outlined the atrocities migrants and asylum seekers face as a result of external migration control, and migrants effectively being sent back to a country like Libya, where their safety and human dignity are not respected. However, noting the considerable differences between Libya and Morocco, it is not the only country where gross human rights violations occur. Considerably less attention is paid to the migrants held in detention in Morocco (although less severe than in Libya), to the violent ‘push-backs’ along Spain’s southern land border and to the reoccurring violence of Moroccan police towards migrants. Although NGOs and humanitarian organization have continuously stressed the unequal and discriminatory treatment sub-Saharan migrants face in Morocco, the country highlights its progressing commitment towards fair treatment of migrants. Regardless of Morocco’s commitment to national immigration and asylum strategies, migrants, and asylum seekers in Morocco continue to face degrading treatment, restrictions to their freedom of movement and claiming asylum, threats of expulsion and discriminatory treatment notably towards sub-Saharan Africans.

As seen in Section 5.2, Morocco and Spain have a longstanding history of cooperation and partnership, ranging from mobility partnerships and readmission agreements to joint patrolling operations and information sharing along land crossings. But where does this leave migrants and asylum seekers?

In 2018, over 49,300 people arrived to Spain by sea and almost 6,000 crossed the country’s land borders into the North African enclaves of Ceuta and Melilla.³²⁴ Migrants and asylum seekers attempt to enter Spain predominantly in three ways: crossing the Atlantic ocean that separates West Africa from the Canary Islands; crossing the Strait of Gibraltar to mainland Spain; or attempting to cross Spain’s only land borders, located around the enclaves of Ceuta and Melilla. This section will look specifically into how

³²⁴ Global Detention Project, ‘Immigration Detention in Morocco’ (GDP, February 2014) 1-32

external migration control of the EU and Spain affects the rights of migrants in Morocco. It will draw upon specific rights outlined in Section 4 and elaborate on the history of EU-Morocco cooperation and agreements, outlined in Section 5.2, to analyze the specific rights that are being violated as a result of the EU migration control externalization. The subsequent paragraphs will review the measures of pre-border surveillance that effectively prevent migrants from reaching the border of Spain, such as joint operations at sea, high tech surveillance equipment and close coordination with Moroccan authorities. These policies will be seen through a human rights lens to understand if they have a consequential impact on migrants and asylum seekers.

Through the development of its border control externalization policy, Spain has disallowed refugees and others seeking protection for the possibility of seeking asylum in Spain; this is ‘coupled with a sense of impunity for the human rights violations that may take place outside Spanish territory, but still within their effective power or control’.³²⁵ For example, regarding the J.H.A case (summarised in Section 4), the Spanish Supreme Court found that the ‘lack of powers to act’ in the high seas and foreign territory means that no human rights violations were perpetrated by Spain – including violations of fundamental rights such as the right to asylum and the right to effective remedy.³²⁶ Unlike in the *Hirsi* case, where jurisdiction of Italy was argued on the basis of effective control of the individuals aboard an Italian vessel, in the J.H.A v Spain case, Spain claimed to have ‘no responsibility because the incidents took place outside its jurisdiction’.³²⁷ In the observations of the case, the Committee Against Torture (CAT) took note of the bilateral agreements that assisted the return of minors, signed by Spain with Morocco and Senegal. The Committee expressed its concerns ‘about the absence of safeguards and the identification of children who may be in need of international protection’. The Committee thus called on Spain to ensure protection against

³²⁵ Gil-Bazo M ‘The Safe Third Country Concept in International Agreements on Refugee Protection’ (2015) 33(1) *Netherlands Quarterly of Human Rights* 42, 58

³²⁶ Gil-Bazo (no 313) 59

³²⁷ UN Committee Against Torture, *J.H.A v Spain* (CAT/C/41/D/323/2007, 21 November 2008)

repatriation of children who have fled their country for a well-founded fear of persecution.³²⁸

Under EU Directive 2013/32/EU, the EU Member State must first establish whether the country is a 'safe third country' when considering return decisions, providing little obligation for EU Member States to consider asylum applications from this country as it is deemed 'safe' for individuals that, if returned, should not face persecution; this is arguably the basis of the EU-Turkey deal, where the EU holds that Turkey is a safe third country for Syrian refugees.³²⁹ It arguably becomes apparent that the application of the 'safe third country' concept has moved away from its original intentions of asylum determination, and has shifted into an added measure of external migration control, finding legality in interceptions and return on the basis of cooperation agreements and that the country of return is a 'safe third country' – such is the case of Spain and Morocco. These policies do not offer asylum seekers access to procedural safeguards or determination procedures, nor in Spain, nor in the 'safe third country' they are being sent to.³³⁰ In the specific case concerning Morocco, the *Audiencia Nacional* (National Court of Spain) has implied and made previous reference to Morocco being a safe third country.³³¹ In addition, the Spanish Office of Asylum and Refuge (OAR) has also made reference to Morocco being a safe third country, most recently in a case in 2018.³³²

Due to increased surveillance, border enforcement and cooperation with Moroccan border guards, migrants and asylum seekers have increased difficulty

³²⁸ UN Committee Against Torture, *Concluding observations of the committee against torture - Spain* (UN Doc. CAT/C/ESO/CO/5, 9 December 2009 para 16)

³²⁹ Carrera S and Guild E 'Offshore processing of asylum applications: out of sight, out of mind' (2017) *Centre for European Policy Studies CEPS*; See also, Ulusoy O 'Turkey as a safe third country?' (2016) *Oxford University Law*.

³³⁰ Gil-Bazo (no 313) 59

³³¹ See 'Country Report Spain' *Asylum Information Database* (2018) <

https://www.asylumineurope.org/sites/default/files/report-download/aida_es_2018update.pdf>

accessed 15 June 2019; also see Audiencia Nacional, Decision SAN 3736/2016, 13 October 2016; Decision SAN 3839/2016, 17 October 2016;

³³² *Ibid*

accessing Spanish territory, particularly through Ceuta and Melilla. The border separating Melilla and Morocco is a three-tier fence reaching six metres high, and in Ceuta the border currently reaches eight meters and is equipped with barbed wire. The Spanish Minister of Interior states that they will increase the height of the double border fence to reach 10 meters, and the barbed wire used in the fence will be replaced with 'non-injurious measures'.³³³ More than 4,700 migrants and asylum seekers in Ceuta and Melilla have jumped the fence from Morocco in 2018, with a majority of them arriving in Melilla. Any of those who manage to cross the border fences are left waiting in temporary shelters.³³⁴

The Melilla border is monitored 24/7 with motion sensors and infrared cameras. Many migrants and asylum seekers claim that, 'there is no other way but over the fence', and report of attempting on multiple occasions to cross the fence without success and experiencing brutal beatings by Moroccan police.³³⁵ Criticisms of the Spanish policy of push-backs have been voiced by NGOs as well as the Spanish Ombudsman, who carried out an investigation in 2018 regarding the push back of migrants from Melilla back to Morocco.³³⁶ In August 2018, the Spanish government, backed by its 1992 readmission agreement with Morocco, returned 116 sub-Saharan Africans to Morocco within the course of 24 hours, the migrants had crossed into the Spanish territory of Ceuta and were forced back to Morocco – this event was largely

³³³ Kasraoui S, 'Irregular Migration: Spain to increase border height in Ceuta' (Morocco World News, 24 February 2019) < <https://www.moroccoworldnews.com/2019/02/266599/irregular-migration-spain-ceuta-morocco/>> accessed 10 July 2019

³³⁴ Ibid (no 352)

³³⁵ Ayed N and Jenzer S 'Spain built fences 20 years ago to keep migrants out. Here's how that worked out' (CBC News 25 September 2018) < <https://www.cbc.ca/news/world/migrants-spain-melilla-morocco-europe-1.4835930>> accessed 2 June 2019

³³⁶ Cordobes A 'The Ombudsman investigate the return to Morocco of 114 people in August' (Cuarto Poder 22 October 2018) < <https://www.cuartopoder.es/derechos-sociales/2018/10/22/el-defensor-del-pueblo-investiga-la-devolucion-en-caliente-a-marruecos-de-114-personas-en-agosto/>> accessed 02 July 2019

condemned by human right activists as constituting mass expulsion.³³⁷ Human rights organizations have repeatedly called for Spain to investigate summary returns to Morocco at the Spanish enclaves, as well as the use of violence to prevent efforts of migrants crossing the border.

In general, it is asylum seekers at the border that face the most difficulties accessing both information and the asylum procedures themselves. Migrants attempting to cross the land borders to Ceuta and Melilla are often not provided information on the procedures and legal pathways unless they have succeeded in crossing the fences. In addition, asylum seekers located on the border have difficulty in accessing NGOs and the UNHCR, especially if they are in detention centers or temporary holding centers.³³⁸ Save the Children Melilla's programme reports how minors attempt to catch a 'free ride' and stow away in trucks that take the ferry from Melilla back to mainland Spain. Spain's civil guards use 'sniffer dogs and heartbeat monitors to ferret out the migrants, in what is dubbed *Operación Feriante*'.³³⁹ The majority are returned to Melilla, where they will wait for other opportunities to reach Spain. Crossing the border fence is just one of the many obstacles these migrants and asylum seekers face, many hoping to move onward to Spain or neighbouring Member State countries, as Melilla offers little opportunities in terms of employment.³⁴⁰

The *Guardia Civil* also ensures maritime surveillance around the Ceuta border, when a migrant boat is detected, the *Guardia Civil* notifies the Royal Moroccan Navy which then intercepts the vessel before it reaches the territorial waters of Spain.³⁴¹ These practices – involving information sharing of potential unauthorized entry with the

³³⁷ Stolton S 'Spain defends hard line on North African border immigration' (EURACTIV, 29 August 2018) <<https://www.euractiv.com/section/politics/news/spain-defends-hard-line-on-north-african-border-immigration/>> accessed 20 June 2019

³³⁸ Country Report Spain (no 25)

³³⁹ Ayed N and Jenzer S (no 354)

³⁴⁰ Report of the fact finding mission by Ambassador Tomáš Boček, Special Representative to the Secretary General on migration and refugees, to Spain, 18-24 March 2018' (*Council of Europe*, 2018) SG/Inf (2018)25

³⁴¹ *Ibid*, para 3.1

neighbouring country, in order for them to intercept migrants and asylum seekers before they can approach the border – brings forth the question of an individual’s rights to seek asylum, and the right to leave a country, enshrined in the UDHR Article 13.

At the land border crossing in Melilla, migrants are normally allowed to request asylum if they come from countries such as, Syria, Palestine and Algeria. Once inside, they are given an appointment with Ministry of Interior officials to assess their claim.³⁴² However, an EU fact-finding mission reported that persons from sub-Saharan countries are prevented by Moroccan authorities from approaching regular border crossing points, and do not have access to asylum procedures. Without the ability to approach the border in a regular, legal and safe manner, persons – including women and children – turn to smugglers or traffickers to transport them across the sea, particularly the Strait of Gibraltar by boats that are unseaworthy, or stowing away in trucks – thereby exposing themselves to risks of trafficking in human beings, violence and sexual abuse”.³⁴³

Article 31 of the Refugee Convention prevents contracting states from imposing penalties on account of illegal entry or presence for persons who are coming from a territory where their life or freedom was threatened.³⁴⁴ In Melilla and Ceuta, migrants and asylum seekers are accommodated in centers for the Temporary Stay of Foreigners (*Centro de Estancia Temporal de Inmigrantes, CETIs*). In mainland Spain, asylum seekers are accommodated in refugee reception centers (*Centros de acogida de refugiados, CARs*) as well as reception centers or apartments managed by NGOs.³⁴⁵ The Council of Europe’s Special Representation on Migrants and Refugees criticized the migrant holding centers (CETIs) in Melilla and Ceuta, reporting that the Spanish authorities

³⁴² Report of the fact finding mission by Ambassador Tomáš Boček, Special Representative to the Secretary General on migration and refugees, to Spain, 18-24 March 2018’ (*Council of Europe*, 2018) SG/Inf (2018)25 para 4.1

³⁴³ Council of Europe fact finding mission (no 359), para 4.1

³⁴⁴ 1951 Convention Relating to the Status of Refugees (1951) Res 2198 (xxi) adopted by the United Nations General Assembly

³⁴⁵ Council of Europe fact finding mission (no 359), para 5

should ensure the same standards in these facilities – living conditions, education, healthcare and training courses – that asylum seekers are entitled to and receive in mainland Spain. Reports stated that these centers were overcrowded and holding unaccompanied minors. The concerns regarding CETIs focused mainly on the centers being overcrowded and on the restriction to the freedom of movement of the people held there. While the Spanish enclaves are in Spanish territory, and Ceuta and Melilla form part of the Schengen territory, migrants and asylum seekers are unable to travel to mainland Spain without permission from the National Police.³⁴⁶ This forms an added barrier, although these migrants have effectively reached the European Union. These restrictions violate their freedom of movement and act as an ‘extra’ control measure in the fight to stop irregular migrants from reaching Europe.

Returns at the Spanish enclaves are common, and have amounted to violations of Article 4 of the ECHR against collective expulsions.³⁴⁷ The case of N.D. and N.T. v. Spain involved two individuals, a Malian and an Ivorian, who attempted (with a group of other sub-Saharan migrants) to cross the Melilla land border crossing. The Melilla border fence is made up of three six-metre-high barriers; N.D. and N.T. scaled the first two barriers and claimed the Moroccan authorities threw stones at them. They were assisted down from the second fence by the Spanish Police, immediately arrested by the *Guardia Civil* and returned to Morocco. At no point were their identities checked, nor were they given the opportunity to explain their individual situations. The territorial application of this case shows that the event occurred outside the jurisdiction of Spain, since the applicants had not succeeded in entering Spanish territory – the Court also considered that it was unnecessary to establish whether the border crossing erected between Spain and Morocco was located in Spain. Since there was ‘control over another, this was de jure control exercised by the state over the individuals concerned’.

³⁴⁶ Martin M ‘Council of Europe slams conditions for migrants in Spain’s exclave cities’ (El Pais, 6 September 2018) < https://elpais.com/elpais/2018/09/06/inenglish/1536232097_658790.html > accessed 8 June 2019

³⁴⁷ See, ECtHR N.D and N.T v. Spain, application no. 8675/15 and 8697/15

The Court found that from the moment the applicants climbed down from the barriers, they had been under exclusive control of Spanish authorities, and therefore fell within the jurisdiction of Spain within the meaning of Article 1 of the ECHR. The Court also found a violation of Article 13, right to effective remedy – since the applicants were immediately expelled they had no access to interpreters or legal assistance, thus they were not informed on relevant provision of asylum law or procedures available to them, in addition a violation of Article 4 of Protocol No. 4 of the ECHR, as there was no assessment of each individual situation, and no identification procedure had been carried out by Spanish authorities.³⁴⁸

In February 2014, hundreds of African men and women made their way to the border fences at Ceuta. Blocked by Spanish forces and unable to get through the fences, the migrants proceeded to the sea where the beach was separated by an extension of the fence. Panic ensued, the *Guardia Civil* claimed to have fired rubber bullets to ward off swimmers and 15 people drowned that day. De Genova argues that, in this particular instance, the border guards failed to differentiate between Ceuta’s land border and its sea perimeter and effectively used land responses of “crowd control”, which in a maritime setting proved lethal.³⁴⁹ The 23 survivors that made it to the shore in Ceuta were immediately handed over to Moroccan border guards.³⁵⁰ According to Amnesty International, at least 5,000 people have been ‘swept up in the raids around Morocco, piled on to buses and abandoned in remote areas close to the Algerian border’.

The Integrated System of External Vigilance (SIVE) has used advanced radar technology to detect boat migration to the Canary Islands and throughout the Strait of Gibraltar. Due to increased boat surveillance, boat migrants arrivals have spread to less-surveilled areas.³⁵¹ The development of SIVE has contributed to shifting the migratory routes between the Strait of Gibraltar and Canary Islands, smugglers to adopt new

³⁴⁸ ECtHR Press Release. *N.D and N.T v. Spain*, application no. 8675/15 and 8697/15

³⁴⁹ *De Genova N* (no 157) 87

³⁵⁰ Human Rights Watch, ‘Spain: A year on, no justice for migrant deaths’ (HRW, 30 October 2014)

³⁵¹ *Carling J* (no11) 326

routes and use less seaworthy boats such as inflatable rubber boats, which allows them to increase the numbers of passenger per journey.³⁵² NGOs criticize the primary responsibility of persons is on the State within whose territory or territorial waters the interception occurs, especially because recent EU agreements are ‘pushing’ interceptions to third-countries through increased support and thus ‘shifting’ the responsibility to them. Through the deployment of the joint Operation Hera, Spain’s *Guardia Civil* vessels patrolled the coasts of Mauritania, Cape Verde and Senegal in alliance with their authorities. They were supported by Spanish military planes, Frontex-funded planes operated by participating EU Member States circled the Atlantic and the Spanish sea rescue vessel *Salvamento Marítimo*, that searched the high seas for boat migrants in distress. In addition, the Senegalese and Mauritania maritime forces had been subcontracted to carry out further controls, resulting in an abundance of actors, all tasked with fighting ‘illegal’ migration, with an overarching priority to save human lives.³⁵³ The joint patrols in West African territorial waters under Hera were made possible through memorandums of understanding between Spain and Senegal, Cape Verde and Mauritania.

Migrants and asylum seekers continue to attempt to cross from Morocco to Spain, either by land or sea to avoid informal expulsion by civil guards at the perimeter. As Spanish policing cooperation with Morocco deepens, the fences are also strengthened.³⁵⁴ Managing large influxes of migrants can be challenging for external border countries, who are most directly affected by large influxes of people – but this should be a responsibility of all member states, not solely the ones at the external borders, to ensure that external border control and security are paired with the protection of human rights and refugees, in compliance with international refugee law, human rights law and European standards.

³⁵² Goodwin-Gill ‘The Extraterritorial Processing of Claims to Asylum or Protection: The Legal Responsibilities of States and International Organisations’ (2007) *AU Journal*, 375

³⁵³ De Genova N (no 157) 73

³⁵⁴ De Genova N, *The Borders of Europe: Autonomy, Migration, Tactics and Bordering* (Duke University Press, 2017) 85

7 Conclusion

As political, social, economic and environmental factors continue to drive people away from their homes, the world will continue to have migrants. Migration control is not a new phenomenon however, it creates new challenges in the field of international law and its applicability in extra-territorial situations. There is a continuous shift of responsibility to non-Member States to manage irregular migration flow, as the EU expands its border, expands its protections and safeguards to migrants, asylum seekers and refugees are left behind.

The universal protection of human rights, has gone from an issue that fell within exclusive competence of the state, to becoming a legitimate concern of the international community.³⁵⁵ Through the outsourcing of migration control, the duty to protect and respect human rights should be upheld, regardless of the transfer of responsibility and direct or indirect action. As proven through the extra-territorial applicability of Article 1 of the ECHR, and the abundant case law of the ECtHR and the CJEU involving extra-territorial state action, it can be argued that states do have an obligation to protect human rights when acting outside its territory, but in situations where individuals are either directly or indirectly under the Contracting States jurisdiction or effective control. A State cannot absolve itself from international human rights obligations by delegating tasks to actors in a third-country.

The rights of migrants and asylum seekers should go where they go, and this included not only the right to seek and enjoy asylum free from persecution, but also extends to ensuring humane detention conditions, access to clean water, access to healthcare and judicial remedy in the state that you are externalizing migration management to. Monitoring bodies should focus specifically on external migration policies, whether through the creation of new institutions specifically focused on

³⁵⁵ Gómez F and de Feyter K (eds), *International Human Rights Law in a Global Context* (2009) University of Deusto, Bilbao 58

monitoring external migration policies to ensure they adhere to international, EU and human rights law needs to be created, or a sort of ‘corporate social responsibility’ as an international self-regulation of State actions in ensuring the rights of migrants abroad. The lack of safeguard mechanisms or national complaint mechanisms at the disposal to migrants in detention or faced with a violation of their rights as a result of externalization is an issue that should be addressed to insist on human rights protections.

Human rights are considerably influenced by actions and decisions made elsewhere, and these decisions can cause harm to individuals who are not under their direct territorial control. There is a need for a shared responsibility among States and third-states to contribute to an overall responsibility in protecting human rights, the collective action of the two parties, and not mainly ‘offshoring’ or shifting the responsibility to a country where human rights are not respected. As seen in the case studies, the conditions migrants and asylum seekers face in detention centers in Libya, interceptions at sea leading to indefinite detention, and in Morocco through forceful ‘push-backs’, expulsions and overall violations of individuals freedom of movement and rights to seek asylum.

The transfer of responsibility from a State to another State, even when the State is considered a ‘safe third country’ should not end there, the State has an obligation to ensure protections of the refugee under international and human rights law, and these have been engaged by an exercise of jurisdiction. The individual, by a mere transfer of responsibility should still be entitled to these rights and that this country is in fact a ‘safe third country’ where they will not risk being sent back to their country of origin without the opportunity to apply for asylum or resettlement. Focus should be placed on the individual migrant or asylum seeker, their individual situation and vulnerabilities, and not a collective movement of ‘irregular’ and ‘illegal’ individuals towards the EU borders. Migrants and asylum seekers returned to Libya and Morocco are at risk of being returned to their country of origin and ‘there is no worse catastrophe for an individual

who succeeded to leave his/her country where he/she was facing persecution, than to be returned to that country.³⁵⁶

The key challenge for states in exercising offshore policies, such as sea border controls, there is arguably a lack of regulating responsibility between states, or mechanisms to identify which state needs to ensure protections and procedural safeguards when they enter into partnership. Considerable attention is granted towards the shift of responsibility and how the Member State deploys these police by moving away from the State that is legally bound to uphold the rights of migrants – and transfers the responsibility of deterrence and preventative measure to the third country. The principle of non-refoulement is applicable to state actions outside its territory, but still requires establishing a connection between the contracting state and the individuals in question. Migration policies and refugee studies continue to be based around the ‘crisis’: real or fictitious, this crisis has been utilized by states to further enable the necessity of hardline migration policies and pushing the border even further to the coasts of Africa, Libya and Morocco, even as far as the Sahel region. Nonetheless, there is a growing attention towards the human rights abuses faced by migrants in countries of transit, where they find themselves effectively stuck at the new borders of Europe, but still miles away from the protections and safeguards against human rights violations that Europe offers.

³⁵⁶ Moreno-Lax (no 212) 251

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