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**Negotiating the Principle
of Non-Refoulement in the
Mediterranean Sea:**

**Missions, Visions and Policies
at the Southern Borders of the
European Union**





Silja Klepp: Negotiating the Principle of Non-Refoulement in the Mediterranean Sea: Missions, Visions and Policies at the Southern Borders of the European Union.

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Negotiating the Principle of Non-Refoulement in the Mediterranean Sea: Missions, Visions and Policies at the Southern Borders of the European Union *

Silja Klepp

Abstract

The situation of refugees in the Mediterranean has become more difficult. During the past few years the border-ocean between Europe and Africa has become an EU-policy crucible. In the midst of the tightening of EU border controls and refugee protection claims, supranational, national and local actors find themselves in a phase of legal insecurity and negotiation.

This paper is based on ethnographical research carried out in Libya, Italy and Malta. It sheds light on the different actors' practices at sea and in the surrounding border region. It also explores how new parameters for refugee protection are emerging in the border regions of the European Union.

The paper argues that the policy practices of the co-operation between Italy and Libya as well as the informal operational methods carried out in the Mediterranean Sea function as a trailblazer of the overall refugee policy of the EU. In the long term, some of these practices will affect and change the legal basis and the formal regulations of the European refugee regime. The principle of *non-refoulement* could first be undermined and then abolished in this process.

Using an approach that combines the empirical study of border regions with a legal anthropological perspective, my paper analysis the Union's processes of change and decision-making on local, national and supranational levels and their interconnections.

* Parts of this paper have been presented at the Ninth Mediterranean Research Meeting, Florence and Montecatini Terme 12–15 March 2008, organised by the Mediterranean Programme of the Robert Schuman Centre for Advanced Studies at the European University Institute.

When you have a land border, here is country A and therefore the subject of law is country A, and here is country B, there is no limbo in between. At sea it's different. Here you have country A, here you have the high seas and here begins the jurisdiction of country B. But in between, on the high seas, things are a little bit delicate...

Commander Borg, Armed Forces of Malta

1. Introduction

During the past few years the situation of migrants and refugees in the Mediterranean has grown more difficult. On the one hand legal possibilities to enter the territory of the European Union were restricted with the implementation of the Schengen acquis and new visa regulations for non-EU nationals in the Mediterranean region. On the other hand, irregular migration routes across the Mediterranean Sea from the African continent to Europe were closed by military control. Many of the more direct and less dangerous routes are nearly out of use today. Other routes, such as from the west African shores to the Canary Islands and from Libya to Italy, were established in the past years, constituting today the most important routes across the Mediterranean Sea.

The European countries try to handle the phenomenon of irregular migration by sea in the context of European co-operation and on a bilateral basis. Moreover, the European border patrol agency Frontex constitutes a new actor in the Mediterranean. Frontex's mission of preventing boats from landing on EU territory clashes with the basic cornerstone of European refugee protection: the protection of refugees from being returned to places where they might be subjected to persecution and the prohibition of sending them back without considering their proposal for asylum (the principle of *non-refoulement*). Along with the tightening of EU border controls and EU's refugee protection claims, supranational, national and local actors find themselves in a phase of legal insecurity and negotiation. The border-ocean between Europe and Africa has become a contested field of EU-policy making.

In this essay, I use an approach that combines the empirical study of border regions with a legal anthropological perspective. New parameters for refugee protection that are emerging at the European Unions external borders will be described and discussed. The dynamic power relations that are operating between the actors in the border region and the European Union will be detailed in this paper. My findings make it clear that the policies realized in the border region have the potential to influence and change the overall refugee protection system of the EU.

The integration process of the EU is often conceptualised as a zero-sum game where decisional and operational power is relocated in a dualistic process between the European institutions and the member countries, transferring it step by step to the supranational level (Hess/Tsianos 2007, p.26). To study the phenomena around migration issues in the central Mediterranean, an approach that conceptualizes the integration of the EU as a functional process, where only the member states within the EU framework and European institutions are powerful actors, can not adequately grasp the intended and also unintended effects of the policies implemented in the border region. In this paper the ever-changing regime of migration policy across the Mediterranean Sea will be approached with the notion of a "multi-sited arena of negotiation" (Benda-Beckmann, F. von/Benda-Beckmann, K. von/Griffiths 2005, p.9). In this perspective, the inter-connections of local, national and supranational actors are studied, acknowledging the complex character of plural legal situations which do not follow a linear chain of command or a dualistic scheme. On the

contrary, in the case of the harmonisation of refugee protection in the EU, unintended inter-connections between border regions and Brussels as centre of power can be observed.

The paper will approach the role that the border region between Libya, Italy and Malta is playing for the development of the European refugee protection regime from two perspectives. They are representing the two main pillars of the current and future European border policy meant to prevent irregular migration: 1) intensifying co-operation with transit countries and countries of origin of migrants and 2) strengthening joint border control missions and the European border agency Frontex.

First, the co-operation in border and migration issues between Italy and Libya will be examined on the policy level. The collaboration between the two countries implies wide-ranging consequences for the closely interconnected policy field of refugee protection, especially for the principal of *non-refoulement*. I argue that through some characteristics of its co-operation politics with Libya, Italy is functioning as a trailblazer which the European Union starts to follow even though it contradicts the legal basis of the EU. After discussing the effects of the collaboration policy I will connect these political developments to the empirical data collected in Libya. The negative effects of the co-operation programme on the situation of migrants and refugees in Libya will be illustrated.

Second, the Frontex mission Nautilus II and its practices at sea will be studied on the operational level, especially regarding its implications for refugee protection. Some results from field research carried out in Malta in September and October 2007 will be presented. Member states and refugee lobby groups are split over the question if, when and how migrants' boats should be intercepted and who is responsible for the asylum claim of potential refugees on board. These legal insecurities allow the security forces in the Frontex mission to operate at sea in ways which do not conform to the European refugee protection regime.

In conclusion, I will present some ideas on the functioning of the European Union's processes of integration, decision-making and legal change.

2. The Italian-Libyan co-operation in migration issues

In recent years the perception of Libya by European migration policy makers and the public has changed. Once thought of as a country of destination for migrants from Arab and Sub-Saharan countries it is now widely discussed as a transit country for African migrants and refugees¹ trying to reach the Italian coast. Giuseppe Pisanu, the previous Italian Minister of the Interior, said that "one million illegal migrants" are waiting to cross the Mediterranean from Libyan to Italian shores (II manifesto, 22.04.2005). This famous quote illustrates the crisis reaction that the landing of migrants in Italy, the so-called "sbarchi", provoke.

In reality, numbers speak a different language (Table 1). Roughly 10% of undocumented migrants currently living in Italy came by sea. The phenomenon of "overstayers", who don't leave the country when their visa or residence permit expires and who come by plane or by land, is much more significant (Caritas/Migrantes 2005, p. 121).

1 In this paper the term "migrant" will be used as an umbrella term for labour migrants and refugees alike. According to the 1951 United Nations Convention Relating to the Status of Refugees, a refugee is a person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality, and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country.

A clear division of migrants in labour migrants and refugees should be seen as a legal construction anyhow, we won't find it in reality.

Numbers and statistics are unclear as well when it comes to Libya's migratory reality. "The Libyan authorities estimate the number of legal foreign workers at 600.000, while illegal immigrants are estimated to number between 750.000 and 1, 2 million." (European Commission 2005, p. 5). With a population of about 5, 5 million inhabitants it is apparent that Libya, besides being a transit country, mainly remains a country of immigration and destination. Libya did not establish a regulatory or administrative system that identifies and protects refugees. It is the only North African country which did not sign the 1951 Geneva Convention on Refugees and does not have an asylum system. "We do not have political refugees. (...) The problem is Africans who came in the framework of illegal immigration" states Sa'id Eribi Hafiana, Assistant Secretary of Foreign Liaison and International Co-operation at the ministry of foreign affairs talking to Human Rights Watch (Human Rights Watch 2006, p. 15). Another high-ranking official of the same ministry is even clearer "If Libya offered asylum the asylum seekers would come "like a plague of locusts." (Human Rights Watch 2006, p. 20)

Even though there is no asylum system, when one considers the countries of origin of migrants in Libya, such as Sudan, Eritrea, Somalia and the Democratic Republic of Congo, it becomes clear that they include many war and crisis areas. There is no doubt that many migrants in Libya are in need of protection (Andrijasevic 2006, p. 14). In 2004 more than 75.000 migrants were repatriated, more than 40.000 in 2005 (European Parliament 2005, p. 9) and 53.842 in 2006 (Frontex 2007, p. 10). Deportations from Libya are conducted to a large number of countries, amongst them Eritrea, where deported migrants are at risk of torture and the death penalty (Amnesty International 2006).

Since the late 1990's Italy began to promote bilateral co-operation with Libya. Migration issues played an important role from the beginning. The first contacts between Italy and Libya were established in a sensitive environment because Libya was regarded as a "rogue state" and was sanctioned by the UN and the EU. Based on the special relationship of a common colonial history and bounded by important economic ties, the talks progressed quickly. In December 2000 the first general agreement to fight terrorism, organised crime and undocumented immigration was signed in Rome (European Commission 2005, p. 58). Several high-level meetings followed and Italy had a key role to play in improving the relations between Libya and the world community. In 2003 and 2004 more bilateral agreements were signed and significant measures of co-operation were introduced under the presidency of Silvio Berlusconi. A programme of charter flights financed by Italy to fly undocumented migrants back to their home countries has been implemented. Technical equipment and training was provided to better control the Libyan borders, including patrol boats and kits for finger printing. (European Commission 2005, p. 59) The details regarding the content of the July 2003 agreement, which regulates the practical co-operation between the security forces of the two countries and was signed by the chiefs of police, have been kept secret until the present day. Furthermore there are several informal agreements where the content likewise is uncertain (Cuttiitta 2006, p. 187). Secrecy around the details of the agreements that were made and informality characterised the co-operation of Italy and Libya from the 1990s.

The peak of co-operation during the Berlusconi government was without doubt reached in late 2004 and during the year 2005. Since October 2004 more than 4000 third country nationals were returned from the Italian island of Lampedusa to Libya (Deutsche Welle 2005). Loud criticism followed these incidents. Various Italian and European NGOs and the European Parliament condemned the Italian authorities. Asylum seekers did not have the opportunity to make an asylum claim, as members of EP stated after their inquiries in Lampedusa (Deutsche Welle 2005). Thirteen NGOs asked the European Commission to sanction Italy for the violation of the prohibition of collective expulsions in the European Charter of Human Rights and the violation of the *non-refoulement* principle of the 1951 Geneva Convention on Refugees. The NGOs also underlined their concern

that migrants detained in closed centres in Libya can be victims of human rights violations (Andrijašević 2006, p. 11). The Commission reacted cautiously, declaring in April 2005 that it would exceed its competences if it were to condemn the Italian policy.

The government change in Italy in May 2006 brought an end to the much-criticised policy of returning third country nationals to Libya. Nevertheless, co-operation in terms of border security and the financing of deportation flights and detention centres in Libya was not stopped by the government led by Romano Prodi. On the contrary, further contracts with Libya were established. There is still secrecy about the formal and informal agreements between Italy and Libya. The content of the crucial July 2003 accord has not been revealed. Until today there still are no official readmission agreements for third country nationals between Italy or other European countries and Libya, but co-operation on migration issues on several other levels is further strengthened. In November 2007 the Minister of Foreign Affairs Massimo D'Alema visited Tripoli. He promised the construction of a long-demanded freeway and further enhanced the economic relations.² On this political and economical basis the latest agreement of the 29th of December 2007 introduces a new level of co-operation at sea. After the heavy criticism that followed the returning of migrants from Lampedusa to Libya in 2004 and 2005, Italy tried to influence Libya to cooperate closer in the maritime border regions. Libya was hesitating to tolerate foreign security forces on their territory. The new agreement is a breakthrough: for the first time the treaty allows Italian patrol boats in Libyan territorial waters. There will be joint maritime patrols by the Italian Police and Libyan army. These patrols will allow the return of migrants to Libyan territory who will have left its shores. The Italian Minister of the Interior Amato comments: "What we have concluded today is a long and confidential negotiation with Libya. From now on it will be possible to have joint patrols on the Libyan shores, in front of the harbours and bays where the boats of human traffickers are leaving." (Italian Ministry of Interior 2007)

In this case as well, the agreement was the fruit of secret negotiations by security experts. After critics stopped the *refoulement* practices in 2004 and 2005, the Italian government now has found a possibility to bring migrants back who have already left the Libyan coast.

The first reactions by NGOs have expressed concern: potential refugees amongst the migrants could be pushed back to Libya and will not have access to an asylum procedure (ASGI 2007). On the European level *refoulement* at sea is a contested practise. UNHCR (United Nations High Commissioner for Refugees) makes it clear that the principle of *non-refoulement* as the cornerstone of international refugee protection has to be applied unambiguously "wherever a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State." (UNHCR 2007)

On the ground, the development of the Italian-Libyan co-operation demonstrates how a complex policy programme was realized through a process of small steps and secrecy by the Italian government and the security forces. Its implementation circumvents parliamentary control and open discussion of the Italian co-operation policy with Libya. In spite of being the object of critics in the Italian parliament and various NGOs concerned about the violation of human and refugee rights, collaboration expanded rapidly. Although there are no official readmission agreements between Italy and Libya for third country nationals, there are numerous formal and informal instruments in the co-operation on migration issues, including the possibility of sending migrants and potential refugees back to Libya who have already left the Libyan shores.

2 On the 16th of October 2007 a contract about the investment of 27 billion dollars in the Libyan oil sector was signed between the two national energy companies ENI (Italy) and NOC (Libya).

3. Libya, Italy and the European Union

Having illustrated the co-operation between Italy and Libya in migration issues, I now correlate it to the broader European framework. The following section shows how Italy's policy towards Libya is functioning as a trailblazer for the EU and suggests what kinds of effects this might have on the overall European refugee system.

Europeanizing the migration policy of the member states is one of the core policy issues of the EU in recent years. One key characteristic of a common migration policy is the emerging European "global approach to migration", which promotes a close collaboration in migration issues with third countries, especially transit countries like Libya (Presidency Conclusions 2005). On a bilateral basis and in different EU-forums, co-operation with Northern African countries was fostered and has been intensified since the 1990s. As a "rogue state", Libya was excluded from this process and only in October 2007 were official talks between Libya and the European Union established (Libyaonline 2007).

Nevertheless, a "European Commission Technical Mission to Libya on Illegal Immigration" had already visited the country in December 2004.

The report of the Technical Mission, which was published in 2005, criticised the conditions in which migrants are detained in Libya and the arbitrariness of its detention system (European Commission 2005, p. 31 f.). Furthermore, the report acknowledged that there is no asylum system in Libya (European Commission 2005, p. 52). Despite these criticisms the Commission recommended co-operation with Libya in migration issues, stating that there should be a change in Libya's refugee policy (European Commission 2005, p. 7). In its adapted conclusions the June 2005 European Council linked co-operation with Libya closely to Libya's fulfilment of the needs to recognize UNHCR, the principle of *non-refoulement* and the full respect of human rights (Hamood 2006, p. 74). In June 2005 a high level visit by Jonathan Fall, Director General of the European Commission's Justice, Freedom and Security department initiated the Libyan-EU co-operation on an operational level, taking the Commission's report of 2005 as a basis of orientation for the future collaboration. The reinforcement of institution building, training initiatives for border management, management of asylum issues and awareness raising of the public were identified as key areas of co-operation (ib.).

In September 2006 Commissioner Frattini allotted technical equipment worth 3 million Euros to Libya (Cutitta 2007, p. 14). In November 2006 the EU-Africa Ministerial Conference on Migration and development held in Tripoli was a symbolically important step to closer relations. When Libya freed the foreign medics convicted for infecting Libyan children with HIV in July 2007³, which was celebrated in the EU with a media spectacle, a new era began for the EU-Libyan relations. In October 2007 official talks on a co-operation partnership began, touching on areas of mutual interest. The establishment of a system for the control of Libyan land and maritime borders at EU costs is included in the agreement (Libyaonline 2007).

On the formal political level the developments on co-operation in migration issues between Libya and the EU are still limited. It is once more the operational and practical component which produces rapid developments, leaving the formal democratic decision making processes behind. The border agency Frontex, which is itself criticised for a lack of transparency and democratic accountability in

3 The Libyan police in 1999 imprisoned 23 medical staff members working at the hospital of Benghazi. Gaddafi said the health workers had deliberately spread HIV among the children in the hospital at the behest of the CIA and Israel intelligence Mossad. Except for five Bulgarian nurses and a Palestinian doctor, all other workers were immediately freed. After international protest they were released in July 2007.

its work on the European external borders (Carrera 2007, p. 4), pushes for co-operation programmes with Libya. Deputy Executive Director of Frontex Gil Arias sent a letter to Libyan officials in May 2007 to ask Libya's co-operation in the Frontex joint operation in the southern Mediterranean Sea (Frontex 2007, p. 41). The aim of the requested co-operation with Frontex was similar to the latest agreement between Italy and Libya to patrol in Libyan waters and bring intercepted migrants back to Libya. The 2007 Frontex-report on Libya is a follow-up of the report of the European Commission of 2005 and makes it clear that Libya does not intend to sign the Geneva Convention (Frontex 2007, p. 9). Unlike the report of 2005 there are no remarks on the human rights situation in Libya or unacceptable detention conditions. Numbers and statistics on migrants deported and detained are the primary interest and policy recommendations do not include a link to an improvement for refugees or of the human rights situation, but instead invite both sides to fully cooperate with each other (Frontex 2007, p. 19). In the addendum of the report, a list of technical material required by Libya to improve its border management can be found, including 10 ships, 12 reconnaissance aircrafts, 18 helicopters, 22 fully equipped command centres, 28 patrol boats, 80 pick-ups, 86 trucks, 100 rubber boats, 240 four wheelers and more. Libya did not join the 2007 Frontex operation Nautilus II in the central Mediterranean and prohibited operations in its territorial waters. Nevertheless the latest agreements with Italy could be a hint that joint patrols on a European level will follow soon. Commissioner Frattini expressed several times that a Libyan participation would be of great use (Meltingpot 2007).

Obviously, on the European level and following the Italian example, relations with Libya in migration issues have been handed over to the security officials of Frontex. Human rights issues are not on the political agenda anymore, as the Frontex-report on Libya reveals.

Italy played an important role for the rise of an EU-Libyan partnership. The country had already improved its relations with Libya in the late 1990s, when it was still a pariah state and since this time has fostered bilateral co-operation. During the last few years, the Italian governments have actively pressured the European Union to abolish the EU-embargo against Libya, which was initiated in October 2004, and have encouraged the EU to co-operate with the Gaddafi regime (Cuttitta 2006, p. 178). In doing so, Italy is without a doubt functioning as a trailblazer of the European Union and different aspects of the bilateral collaboration now characterise co-operation in migration matters at the European level. Co-operation programmes between Libya and the EU and financial help were established before official relations were realized on a formal political level. Following the Italian model and contrary to its own agreements, the EU no longer asks for legal guarantees or for an improvement of the situation of migrants and refugees in Libya before fully co-operating.

As Carrera reveals in his article on the Spanish Frontex mission Hera also in this joint operation bilateral readmission agreements between Spain as hosting nation and the West African States where migrants were turned back to, were the fundament of a "successful" mission (Carrera 2007, p. 21). Without the bilateral agreements that preceded the joint operation of Frontex, the return of migrants to these countries, mainly Mauritania and Senegal, would not have been possible. Also in this case, "the highly politicised nature of the objectives included in these bilateral agreements back in the countries of origin has justified that both agreements remain highly secret and not open to the public." (Carrera 2007, p. 22) Interestingly, in the case of Italy, it is the EU member state itself which seems to fear the publication of the agreements with Libya. Furthermore in the Italian-Libyan case the co-operation is not based on official, though secret, bilateral agreements, but on informal collaboration. Regarding the principle of *non-refoulement*, the case of the Spanish co-operation with West African States and the Frontex mission Hera is to some extent different from the Italian-Libyan example. In the case of Hera all involved countries signed the 1951 Geneva Convention on Refugees. Nonetheless, the Spanish policy and the Frontex mission are contested and also in this

case potential refugees are pushed back to transit countries or to their home countries (Ceriani, Fernández et. al., p.23).

As can be observed here and in the context of migration co-operation of the European Union with other third countries, “ad-hoc-politics” on an administrative level can be very productive, leaving the democratic decision process out or behind. For example, in Turkey the German research group “Transit Migration” showed how a migration control regime, which created the hitherto unknown label of the “illegal migrant”, was established by the European Union since the late 1990s. The main actors were not official institutions of the EU, but rather International Organisations, mainly UNHCR and IOM (International Organization for Migration), and NGOs, which were financed by the EU and which established a new discourse by introducing the term of “illegal migration”. The research group identifies a new policy culture of governing the external borders of the EU, where the knowledge of experts and security officials plays a central role and their recommendations are realised based on a “multi-level-governance” in different formal and informal working groups and through various actors (Hess, Karakayali 2007, p. 49).

Similar to the Turkish case in which undocumented migrants were victimised as defenceless victims of smugglers, following the Italian-German “Cap Anamur” incident in the summer of 2004, a discourse around migrants drowning “humanitarianised” the problems at the external borders of the Mediterranean Sea. It was used by the Italian Minister of Interior Giuseppe Pisanu and his German counterpart Otto Schily to promote the idea of *Regional Protection Zones* and *Transit Processing Centres* in Northern Africa, which had been brought up by Tony Blair in 2003. This “external solution” would put an end to the humanitarian problem of so many migrants drowning in the Mediterranean (Hess/Tsianos 2007, p. 34). Formally, these ideas never received official consent on the European level. Contrary to this fact, in the last years Italy established a close co-operation programme “on the ground” with Libya and other North-African countries. Today Italy is financing detention centres and deportation flights in Libya and has signed an agreement with Libya that allows pushing back potential asylum seekers on the Mediterranean Sea. Contrasting the official proposals made by Tony Blair, which included the idea of an asylum procedure outside the EU, in the Italian case refugee protection is not part of the co-operation programme. As Andrijasevic states, the implementation of the co-operation programmes with Libya are not relocating the asylum system outside the EU external borders, “but rather deprives asylum-seekers of the possibility to access the asylum determination procedure.” (Andrijasevic 2006, p.9). The result is not the externalisation of the asylum system but its abolishment.

All of these incidents around the shores of the Mediterranean Sea are happening in the context of the harmonisation process of refugee protection in the EU, where a common asylum law has been in place since 2005. The different national laws and conditions for asylum seekers and refugees are thus now meant to be consolidated. Contrary to this official aim, on the external borders of the European Union we can find striking new developments which come through the back door and are undermining the cornerstone of the international and European refugee system, the principle of *non-refoulement*.

Ulrich Beck and Edgar Grande characterize the integration process of the European Union as a “side-effect-regime” (*Nebenfolgeregime*) (Beck/Grande 2004, p. 60). An underdeveloped European public and the notorious democratic deficit of the EU are leading to circumstances where the process of Europeanization itself is intended by the national and supranational institutions, but the consequences of this process are often unintended or not foreseen. They perceive the integration process as an “institutionalised improvisation”, following no master plan, where very often it remains unclear or it can be judged only afterwards who is the initiator of sometimes far-reaching decisions or processes (Beck/Grande 2004, p. 62). This is the case with the Italian-Libyan agreements and

their effects for the overall European refugee protection system. Being driven by a process which has developed its own dynamics and lacks the control of democratic institutions, the danger of exporting border control regimes to Northern Africa without setting European standards for human rights and refugee protection is high, as Cuttitta observes (Cuttitta 2006, p. 199). By that the European Union is abandoning its own declared aspiration of spreading human rights through co-operation with neighbour countries, stated for example in the Barcelona declaration adopted by the Euro-Mediterranean Conference in 1995. Libya, because of several reasons, especially economic ones, is less open to European influence than other Northern African countries. It is likely that European standards of co-operation will be undermined instead of positively influencing the human rights agenda of Libya. The “imperial character” that is said by several scholars to characterize the European migration policy towards third countries is working under converse paradigms in Libya. It is not the European Union, nor Italy that are establishing the conditions of that co-operation. Instead, it is the Libyan government. Following a European embargo that lasted until 2004, Libya is now aiming at being re-armed by the Europe Union itself, as the list of required equipment demonstrated above. The next chapter shows that the chances are good that it will succeed without making compromises in its human rights or refugee protection policy.

4. In Tripoli

In the following I will link up the Italian and European policy regarding transit migration in Libya with my own research experience. The main interest during field research in Tripoli was to learn more about the daily life of migrants and refugees in Libya. My main question was to understand more about the impact of the co-operation program between Italy and Libya on the lives of migrants and refugees and the decisions they make.

Doing fieldwork in Libya

A stay in Tripoli for October and November 2006 was planned as part of the field research to be carried out for my PhD-project on the European border and refugee regime on the Mediterranean Sea. Libya is a tightly controlled nation with very little room for criticism of the ruling government or ideologies. It was clear from the beginning that studying the situation of migrants and refugees is a sensitive research subject in Libya and some precautions had to be taken to protect both my informants and myself. Although that was the case, thanks to some valuable contacts in the community of Sub-Saharan Africans, visits and interviews in the segregated neighbourhoods of Tripoli where migrants and refugees from Sub-Saharan countries live were possible. Despite the extraordinary research conditions, I opted for the research trip, being of the opinion that empirical research should be carried out as well in challenging and constraining research fields.

This paper is written from the focus of changing refugee rights and is therefore referring to a group of people who are vulnerable and often in difficult living conditions. Nonetheless, describing the encounters I had in Tripoli, I would like to avoid a black and white moralising image of my research field, with its clear definition of power arrangements and a victim-offender divide.

“Libya is a trap”

The stories I heard from my interviewees were often similar: the difficult trip through the desert to reach Tripoli, declining living and working conditions in the city and increasing fear of being detained

by Libyan security forces. It became clear to me, that even those refugees who were holders of an official letter from UNHCR, were encountering difficulties when they came into contact with Libyan security forces. Although it included an order to treat them with consideration of their special need of protection, the letter did not help them in this situation. One of my interviewees from Liberia was in detention for more than a year until some weeks before our meeting, although he was officially recognised as a refugee by UNHCR. "They treated us like animals" he said again and again about his experience in Libyan detention. Furthermore, the overcrowding, the poor hygienic conditions and the insufficient food were a problem. Daniel Gayflor said that for the whole period of his detention he stayed with about 80 other persons in a room of 35 square meters.

During my interviews I heard from different sources, that whole groups of migrants are detained with the accusation that they wanted to cross the Mediterranean and go to Italy, although this was not their intention. In addition, the Liberian refugees stated that it would be clear that before the visits of high-ranking missions from European countries the imprisonment of migrants and raids in the Sub-Saharan neighbourhoods rise strikingly. For the young men the reason was clear: "The Libyans want to show that they are doing something against migrants to satisfy the European countries which are important for their economy."⁴ When the delegation of the European Commission visited detention centres in Libya in December 2004, they had the impression that "the majority of the people (mainly from Niger, Ghana and Mali) seem to have been arrested the day before the experts' visit." (European Commission 2005, p.31) This confirms the statement of the Liberian refugees that detention centres in Libya are filled up before delegations from European countries visit them. According to an assessment made by UNHCR, the government crackdowns and wide-scale imprisonment of migrants began soon after Italy started to return migrants to Libya and their deportation to the countries of origin in autumn 2004 (Human Rights Watch 2006, p. 26).

Some migrants I met during my stay in Libya have lived there for many years and seemed to lead a well established life with a regular job. Astonishingly, they also did not see their future in Libya. An Eritrean woman said: "Today I don't know anybody who wants to stay in Libya. Before it was different, Africans could earn some good money in Libya and then return to their families. Today they don't find a job and have to fear detention. Some go back to their home countries. Me, I can not go back to Eritrea. I am planning to go to Italy."⁵

Like Mrs. Nara⁶ from Eritrea, other migrants who lived in Libya for years were also worried about their future. As with Mrs. Nara, who lost a sister crossing the Mediterranean Sea, most migrants are perfectly aware of the risk they face when they travel to Italy by boat. Nonetheless they opt for the journey. "We feel trapped in Libya" was a sentence I heard several times talking to Sub-Saharan migrants.

The number of drowned migrants nearly doubled in 2007 compared to the year before, caused by increasingly smaller boats and absent nautical experience of the travellers. The number of missing migrants registered in 2007 in the central Mediterranean between Libya, Malta and Italy was 551 (Fortress Europe 2008).

Especially migrants that come from war or crisis areas are likely to try to reach the European shores, as the countries of origin of the migrants who arrive in Sicily and Malta show. In Malta, Somalia, Eritrea and Ethiopia are the main countries of origin of arriving migrants.⁷ In Sicily these countries are amongst the most important countries of origin (Italian Ministry of Interior 2007).

4 Interview with refugees from Liberia, 26/10/06, Tripoli.

5 Interview with Mrs. Nara, 10/10/2006, Tripoli.

6 All names from informants have been changed.

7 Numbers given to the author by the spokes person of the Maltese Ministry of Interior, Michael Howards, on the 18th September 2007 in Valletta, Malta.

Around 60% of the migrants arriving at the Italian coast are applying for asylum, which means that for most asylum seekers in Italy, crossing the Mediterranean by boat remains the only route of escape (Caritas/Migrantes 2005, p.51).

Although it remains difficult to judge which of the new restrictions of Colonel Gaddafis migration policy are due to internal decision making and which are due to external pressure, the impact of the Italian and European co-operation policy on the situation of migrants can be observed in Tripoli. Living and working conditions for migrants in Libya have changed for the worse in recent times. Possibilities of securing a livelihood and the possibility to move about freely have been restricted. Migrants and refugees who never planned to risk the journey to Italy, but intended to work and live in Libya, now “feel trapped” in Libya and fear harsh detention conditions and bad treatment by Libyan officials. The changes in the lives of migrants in Libya in recent times, when studied against the background of the Italian and EU co-operation policy make visible that from a humanitarian and a border security perspective *alike*, the bilateral and European co-operation policy is counterproductive: to escape the declining situation in Libya not fewer, but more migrants are trying to reach Italy. Numbers of landings were heavily rising from 2004 to 2006. At the beginning of 2008 thousands of migrants are reaching the shores of Lampedusa in numbers never before seen during this period of the year. In February 2008 1855 migrants landed in Sicily, compared to 355 in February 2007 (Fortress Europe 2008). My data suggest that these arrivals are closely connected to the Italian and European co-operation politics with Libya, which contribute to an ever harsher anti-migration politics in Libya.

The Libyan government decided in January 2008 to summarily deport all undocumented foreigners, amongst them potential refugees. Furthermore housing officials were instructed to demolish everything that irregular migrants use as shelter in the suburbs of the capital Tripoli and in other cities. As newspapers report, Libya’s actions against migrants and refugees are backed by some member states of the European Union, especially Italy and Malta (Neue Zürcher Zeitung, 21.01.2008). Nonetheless these practices of the Libyan government against migrants and refugees have an effect that stands in diametrical opposition towards official EU policies and interests.

5. “We are obviously in the front line” – visiting Malta

Having now discussed some aspects of the European border management and its effects on refugee protection from a policy perspective, I will now shed light on the operational practices of joint EU border protection missions on the Mediterranean Sea. I will then connect my observations to the question of what the practices of the joint Frontex missions mean for refugee protection in Europe.

As mentioned above, for UNHCR the answer to the question of obligations towards potential asylum seekers is clear at any time, including the border region. When a state is exercising jurisdiction it is responsible for all potential refugees and their asylum claims. On the ground and between the member states, this is a point of contention, evidence being the following communication from the European Commission to the European Council:

Another issue which merits particular attention is the extent of the States’ protection obligations flowing from the respect of the principle of non-refoulement, in the many different situations where State vessels implement interception or search and rescue measures. More specifically, it would be necessary to analyse the circumstances under which a State may be obliged to assume responsibility for the examination of an asylum claim as a result

of the application of international refugee law, in particular when engaged in joint operations or in operations taking place within the territorial waters of another State or in the high sea. (European Commission 2006, p. 11).

Obviously, the principle of *non-refoulement* and other legal aspects linked to a functioning system of refugee protection at sea are in a phase of legal negotiation and insecurity.

One of the crucial questions from the beginning of my research was how the main task of the European Agency for the Management of Operational Co-operation at the External Borders of the Member States of the European Union (Frontex), which clearly aims to prevent the arrivals of irregular migrants, matches with the principle of *non-refoulement*. The goal of the Nautilus II mission, which can be found in the Frontex Press Kit, is the following: "Aims: Joint Operation aimed at combating illegal immigration coming from North Africa countries via the EU maritime borders in the Central Mediterranean area and disembarking in Malta and Lampedusa." (Frontex Press Kit 2007)

Nonetheless, the *non-refoulement* principle has to be respected also by European security forces in the border-region of the Mediterranean Sea and there are no readmission agreements between Malta and Libya which could eventually 'help out' the Frontex mission. Moreover, although there are currently no guidelines on how to operate at sea for the joint missions, Frontex is already functioning. My aim was therefore to understand how Frontex-officials and actors on the ground would deal with these legal gaps and inconsistencies.

The Nautilus II mission of Frontex was operating between Libya, Malta and Italy when I was visiting the island from September 9th to October 14th 2007. It came into force by the request of the Maltese government. There has been a first period of the mission with Malta as a host nation from June 25th to July 27th 2007. Other participating member states of the second stage of the mission were Germany, France, Greece, Italy, Portugal, Romania and the UK. As operational resources the EU-states provided four offshore patrol vessels, six coastal patrol vessels, three helicopters, four aircrafts and eleven experts to be sent to Malta (Frontex Press Kit 2007).

As a Frontex host nation, Malta has a crucial role within the Nautilus II mission. Therefore, I will describe Malta's overall approach to migrants coming by sea before discussing the work of the Frontex mission.

Although Malta is a small country and cannot provide economical incentives, on a diplomatic level its role within the European migration policy should not be underestimated. On the one hand, Malta has good relations with Libya and has been trying for some years to reach a formal readmission agreement for third country nationals (Hamood 2006, p.66). On the other hand, because of its small size it fears being 'run over by migrants' coming by sea. Since 2002 ca. 8000 migrants landed in Malta. The perspective and the policy of the Maltese government to handle the phenomenon were illustrated to me in an interview held with Jason St. John, official advisor to the Maltese government on irregular immigration:

Jason St. John: We are obviously in the front line. We are obviously a front line state and in strategic terms an important location. As you know Frontex is operating at the moment and we are very keen on that, but we are also conscious that until Frontex will receive the co-operation of Libya it will be only half as effective as it should be. (...) Our view is they have come to us from Libya, but this is not where they are originated from. The place that one would turn back to is Eritrea or Somalia. But we are not turning them back to Eritrea or Somalia; we are turning them back to Libya.

S.K.: But Libya has no asylum system. This is really a discussed point, no?

*I think in fine legalistic terms that is absolutely true, but we have to deal with the reality. And the reality on the ground is that although Libya is not a signatory to this agreement it's got its own laws which they tell us take care of the illegal immigrants that are in their country. (break) And it's really not for us to second guess what the Libyans do.*⁸

With a perspective of a “frontline state” the Maltese government has no intention to respect the “fine legalistic terms” of the European and Maltese refugee law, as Jason St. John calls the principle of *non-refoulement*. Furthermore, Malta and also Italy have to care about “what the Libyans do” to returned migrants. According to international law, especially in cases where the partnership in border co-operation issues is known for violations of human rights, a country becomes an accessory to the crimes committed by this nation (Weinzierl/Lisson 2007, p.80). According to international law Malta and Italy are actually responsible for what is happening to migrants that are brought back to Libya.

On the European level the Maltese government is trying to employ all its weight to make the EU fully cooperate with Libya. In the summer of 2005 the Maltese Minister of Interior complained about “too many pre-conditions based on democracy and human rights” that other European countries were asking in such collaboration (Hamood 2006, p.65). Talking about migrants at sea and Libyan co-operation, two employees of the Maltese ministry of the interior told me in an interview independently from each other that 700 irregular migrants were brought back to Libya within the frame of the Frontex-mission Nautilus II, stage II. They emphasized that the co-operation of Libya and turning back intercepted migrants to Libyan shores was crucial to the success of the mission.

An insight into the operational aspects was mainly given to me in interviews during a field trip to Malta in September and October of 2007 with Commanders of the *Armed Forces of Malta* (AFM) who were involved in the Frontex mission.

Commander Borg, expert of international law of the sea, illustrated the legal situation of the Frontex mission of intercepting boats on the high seas in the following words:

*Commander Borg: The state of mission as an agency is to protect Europe's external borders, whether if they have an adequate legal background is the question, especially at sea. (...) The fact is if you look at the current status of international law it doesn't really facilitate this type of interception operations. Because even if you look at some types of other laws, if you look at the Palermo protocols, they don't really apply here, about the nature, about the fact that they still believe in flag state permission and these are not wearing a flag, if you look at UNCLOS itself, the crimes which attract international jurisdiction are still slavery, piracy or illegal transmission. This is neither slavery or piracy or illegal transmission. Drug trafficking under the Vienna convention could have been a possibility but that isn't drug trafficking either. There is no body of international law which covers it. Now again we have said that stateless vessels on the high sea are subject to anyone's jurisdiction, but A you have to have something in your national law which covers it and Malta hasn't, and B you have to talk about proportionality...*⁹

Commander Borg demonstrates that from a perspective of international law of the sea the interception of boats of migrants within the Frontex missions is based on a shaky legal ground. The confusion grows even bigger if it comes to refugee law and the principle of *non-refoulement*. I was

8 Interview with Jason St. John, 02/10/2007. Valletta.

9 Interview with Commander Borg (AFM), 21/09/07, Luqa Barracks

alarmed at the information that I got from the Maltese Ministry of the Interior that 700 migrants were brought back to Libya by Nautilus II.

Astonishingly, talking to the Commanders of the Maritime Squadron, they said exactly the contrary:

Commander Borg: The fact is that turning back (to Libya) is not really on the cards. (...)

S.K.: So you don't think that 700 people were sent back?

I would prefer not to express an opinion on that point. (...) I keep constant contact with Frontex...

So what do they do if they meet a boat? They tell them that they should go back...?

They can inform them that what they are doing is illegal and dangerous, entering the EU in this way. That's what we do. We say listen you are going to be detained. You have to inform them. But at the end of the day, if you see which risk they are taking, and how they are taking this risk, you know. Pregnant women, children, I don't think telling them that this is illegal will stop them, you know. We had birth on board; she left Libya in a state of pregnancy that was so advanced... They are so fixated on doing that, it's very hard to turn them back, we can't use force. (...)

So what exactly is the mission of Frontex?

First of all to raise awareness of how things are happening, there is an intelligence aspect. Before you can stop a flow you have to be aware of what is happening. Sure that in the future missions will be conducted by the consent of Libya. Having this knowledge will make it obviously more efficient. ¹⁰

Soon I was quite confused on what is really going on at sea: Different persons in charge of or very close to the Frontex mission gave me unclear or contrary information. After several interviews with the Maritime Squadron of AMF it seemed convincing that no undocumented migrant had been sent back to Libya. But still there was a lack of transparency around the Frontex mission. As the Commanders of AFM stated, every participating nation keeps command control over their own ships or other vehicles. The jurisdictional framework given by Frontex is extremely broad or still absent, as the operational guidelines for the joint missions working at sea. All operations within the joint missions are carried out following national law. According to Commander Gonzi, even the interception of a boat with migrants within the Frontex operation follows different national rules. By asking the Supreme Commander of Frontex, Commander Fenek – who is responsible at sea – which were the legal basics for the joint operations that were carried out, I hoped to get a clearer picture:

S.K.: Who is responsible for the patrols, how do you reach decisions? You said you sit around a table?

10 lb.

Commander Fenek: Basically yes, there is no rigid command structure. It's more like a committee where member states providing assets have one representative and we sit around the table and discuss how the operation is going. (...) It's on an ad hoc basis... For example the weather plays a big role in our decisions, the sea conditions...

Are you operating with the Schengen border codex?

Not yet. We are not part of Schengen yet.

So on which legal basics are you operating? On which ground are the Frontex missions operating?

You have to ask Frontex that question.

So actually what is happening here is all on an ad hoc basis and you are searching for an agreement with the member states present at the table.

Exactly. I mean it doesn't just happen. It starts in December, then we have meetings and the member states that decide to participate send assets and officials to Malta and then we have daily meetings where we discuss the evolving of the mission. It doesn't just happen.

Are there sometimes disagreements on how to intercept and where?

We don't have major disagreements normally. We had problems when it came to considering actively diverting boats back. That's when we had major disagreements between us. I think it's all based on the effect that it is having on the security and stability of the country. If Malta is very affected by the situation then Malta is willing to take a tougher stand compared to a country that is not affected by the migration problem.

So you wanted to send boats back but other countries didn't agree?

I prefer not to go into this subject; it's a very sensitive subject. It never happened so I would prefer not to discuss it.¹¹

The interview demonstrates that one of the central aspects of EU-law – that of respecting the principle of *non-refoulement* – is not part of the basic legal foundation of the Frontex operation. Actually, no such legal basis exists. How to intercept migrants, where to take them and other main issues such as these are discussed on an ad-hoc basis among military and security officials. The only reason why migrants at sea are not brought back to Libya is because of the fact that Libya doesn't cooperate yet. The leading nation of Nautilus II, which is Malta, shows no humanitarian or legal reservations to push migrants at sea back to Libya. Libya's attitude to the Frontex missions will probably be different in the near future. The Commander is also convinced of this. Commander Fenek also mentioned that Malta, a country especially affected by irregular migration, is trying to convince other countries of its 'tough' position.

11 Interview with Commander Fenek (AFM), 05/10/07, Maritime Squadron Valletta

As he states during the interview, Commander Borg is personally taking part in the so-called Frontex guideline talks in Brussels. In this context as well, the small country of Malta has an outstanding role:

S.K.: Which role plays Malta in the guideline talks?

Commander Borg: It's a very proactive role. We are in an exposed position so it is our interest to do so. The positive thing is that is a one country – one voice system. So Malta is as important as Germany. And we are standing up there, because if you don't stand up they will pass you the entire burden. So we stand up and talk. The countries that have a very proactive role are Italy, Greece, Cyprus and Malta. Not Spain, although I thought so, but they are not so active. So all countries that have direct experience with illegal migration. (...) ¹²

Due to the voting system of the European Union, Malta and the other coastal states that might eventually have a similar "frontline-approach" have the chance to dominate important forums where the future of the European border management and, closely linked, the rules of European refugee protection, are negotiated. Lobbying for refugee rights is weak in EU-policy forums, as the harmonisation process of refugee protection law in the EU has shown. Other member countries are probably not likely to actively work against the "frontline-countries".

As Commander Borg stated during our interview, one of the main points discussed concerning refugee protection in the guideline talks is the question if vessels of a member state that take migrants on board during a joint mission of Frontex are automatically bound by the Dublin II convention and are responsible for their asylum claim. Commander Borg illustrates the crux of the matter:

Commander Borg: For Nautilus the German government made it very clear. Everyone rescued by a German helicopter we'll take them to Germany. But the numbers are minor. If the helicopter rescues two people, it goes first to Malta and then to Germany. The helicopter is sovereign territory so that was their first entry. But what about when you are taking on board 250 people... It's all up to discussion. There are some legal authorities who say even when you are alongside the ship they can claim asylum. (...) This is another reason why we do transfers with small boats.

S.K.: Why?

Because there are some legal authorities who say when you bring them alongside your warship they can claim asylum. These are things that have to be handled. You know.

But not on the small boat?

No, because that is not a registered warship. Or a registered state vessel. ¹³

Commander Borg's statement shows how AFM is trying to manoeuvre around its refugee protection obligations. The lack of legal clarity on the European level and within the Frontex mission is

¹² Interview with Commander Borg (AFM), 21/09/07, Luqa Barracks

¹³ Ib.

the reason why these manoeuvres are possible. When a judgement is required on how to treat intercepted migrants and potential asylum seekers, the decisions are being made on an ad hoc basis. The future of migrants at sea is being determined without sufficient legal foundation.

This paper shows that it is on the Mediterranean sea border of the EU that the parameters of refugee protection and the principle of *non-refoulement* are negotiated. The decisive actors in this bargaining process are not the democratically elected agents of the civil societies of the EU. It is through informal practices and ad-hoc decisions in the border region by military and security experts in forums that are often hidden from the public and from democratic control that discussions regarding the future of the basic principles of the European refugee protection regime take place.

The fact that Frontex is operating without an elaborated legal background is worrying. The legal gap gives room for operational practices at sea that do not conform to the European refugee law. Between ad-hoc decisions and different national procedures it is often unclear what is really happening at sea. Furthermore, there is the risk that the informal practices carried out in the border region are becoming formalised in European forums where the border states of the EU are calling the tune.

This dialectical process between centre and presumed periphery of the European Union could form a downward spiral, dismantling step by step the legal basis of refugee protection in border regions and elsewhere. The case of *non-refoulement* at sea has changed hands from the centre pivotal point of the European Union to only some of the players within the Union. It is the peripheral countries at the external borders that define policy, approach and practicalities in this regard.

6. Conclusion

The paper shows that on the Mediterranean Sea the principle of *non-refoulement* is at risk. Although the EU-member states and EU-bodies such as Frontex are clearly bound by a commitment to the principle of *non-refoulement*, in the border regions *fait accompli* are created before decisions have been taken in the EU forums concerned. Moreover, some of these forums are characterised by questionable decision-making procedures.

Hess and Tsianos criticise that in the scientific discourse around the European migration policy it often seems that the Europeanization process follows a pre established agenda, relocating decisive power step by step to the supranational level (Hess/Tsianos 2007, p. 26).

The effects of the Italian migration policy and the joint missions of Frontex show that the integration process of the European refugee protection regime, which finished its procedure of creating a unified legal code mainly in 2005, does not follow this functional scheme. In this case it is not the supposed legal sovereign in Brussels or the member states in the European forums which are designating the future conditions of refugee protection in the European Union. It is the peripheral countries at the external borders. On different levels they are remodelling the EU-refugee regime through their "frontline perspective", pressuring for their positions in European decision making forums and formalizing informal practices established in the border regions. From a mid- or long-term perspective on the future, it is likely that some of these practices will affect and change the legal basis and the formal regulations of the European refugee regime. The principle of *non-refoulement* in the border regions could first be undermined and then abolished in this process.

The research group "Transit Migration" observed in the process of Europeanizing the Turkish migration and border policy that the first repressive measures were established. Infrastructure and legal basics followed, hesitantly, thereafter. (Hess/Karakayaki 2007, p. 43) The Libyan case

is distanced from this European policy logic developed for its neighbour countries. An improvement of the situation of migrants and refugees due to Italian or European co-operation cannot be observed. On the contrary their living conditions in Libya have declined and the European Commission has given up its admonisher role of criticising the situation of migrants and refugees in Libya and requiring an improvement before engaging in co-operation. The task of negotiating with the Libyan government was handed over from the EU institutions to the security officials of Frontex, who are not interested in questions concerning human rights or refugee protection, as the Frontex-report reveals. Following the Italian agreements it is very likely that in the near future also Frontex missions in the region will push back migrants and refugees to Libya, without considering the lack of refugee protection and human rights in the country.

The findings of this paper show that the border regions of the European Union are not merely enforcing legal norms created by the European Union. The process is much more complex: on the ground, legal gaps are filled by regional actors through informal or even illegal practices, asserting their own claims at their conveniences. Furthermore, informal practices, which have been created in a situation of legal reorganization or insecurity on a local or national basis, are able to influence overall EU regulations. Thus, the homogenisation of law that is envisaged by the EU in practice is a fragmented and ambiguous set of regulations, creating space for negotiation (Benda-Beckmann, F. von/Benda-Beckmann, K. von/Griffiths 2005, p. 19). The developments in European Union migration politics are neither following a fixed scheme, nor are they always driven by democratically legitimate or obvious actors. They should be closely observed because they constitute an arena in which the parameters of the future of the EU and its core values are negotiated.

Annex

Table 1:
Landings on Sicily and the minor Sicilian islands

2000	2001	2002	2003	2004	2005	2006
2.782	5.504	18.225	14.017	13.594	22.824	21.400

Italian Ministry of Interior 2007, Notizie Immigrazione,
www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/immigrazione/notizia_23488.html,
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