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DEPORTED:

The Right to Asylum at EU's External Border of Italy and Libya

In *International Migration*, 48:1, 148-174, 2010

DEPORTED:

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Abstract:

During the past year the temporary holding centre for irregular migrants in Lampedusa, Italy's southernmost island, has been repeatedly denounced for instances of procedural irregularities and alleged human rights violations. This study presents an overview of events and policies implemented by the Italian and Libyan Governments, the European Union and the International Organization for Migration and outlines the contentions surrounding these policies. It argues that the implementation of the detention and return schemes, commonly discussed in terms of the externalization of asylum, does not actually relocate the asylum procedures outside the EU's external borders but rather deprives asylum seekers of the possibility of accessing asylum determination procedure. It further suggests that policies geared towards deterring irregular migratory flows into Europe and combat smuggling in migrants in Libya, might paradoxically result in 'illegalizing' the movement of migrants in northern Africa and increasing the involvement of smuggling networks. The study ends by raising the issue of the political responsibility of all actors involved and suggests the most affective ways to balance the rights and responsibilities on asylum at the EU's southern border.

DEPORTED:

The Right to Asylum at EU's External Border of Italy and Libya¹

Introduction

During last year the temporary holding centre for irregular migrants in Lampedusa, Italy's southernmost island, has been repeatedly denounced for instances of procedural irregularities and alleged human rights violations. The 'temporary stay and assistance centre' (CPTA) on Lampedusa came to public attention in the fall of 2004 when Italian authorities expelled more than thousand undocumented migrants to Libya on military and civilian airplanes. Numerous and consistent allegations of degrading treatment of third-country nationals in detention in the holding centre, the difficulty in gaining access to the asylum determination process and the large scale expulsions to Libya, brought it to the attention of European and international institutions. The European Parliament (EP), the European Court of Human Rights (ECHR) and the United Nations' Human Rights Committee (CCPR) all called on Italy to respect asylum seekers and refugees' right to international protection and to refrain from collective expulsions of asylum seekers and irregular migrants to Libya, a country that has no asylum system and has not signed the Geneva Convention on Refugees.

Positioned some 200 km south of Sicily and 300 km north of Libya, the island of Lampedusa became the main point of arrival for boats carrying undocumented

migrants and asylum seekers from Libya to Italy in 2004. A total of 10,497 migrants, 412 of whom were minors and 309 women, transited through the Lampedusa CPTA that year (EP 2005: 2). Migrants commonly depart from Libya in overcrowded and makeshift boats and undertake a perilous sea journey which can last up to several weeks. Once in the Italian waters near Lampedusa, the boats are intercepted by Italian border guards and migrants transferred to the island's holding centre. After staying in the holding centre for a period that varies usually between five and 45 days, the majority of migrants are transferred to CPTAs in Sicily or southern Italy while others are expelled to Libya.

No official data are available on the countries of origin or the reasons for migrating for migrants detained in Lampedusa. The CCPR points to the presence of refugees and asylum seekers among those detained as well as among those expelled to Libya. The CPTA's authorities refer to all third-country nationals held in the centre as 'illegal migrants' and claim that there are nearly no asylum seekers present among migrants who depart from Libya. They also assert that the majority of third-country nationals are economic migrants of Egyptian nationality (EP 2005: 3). The data gathered in Lampedusa by the Italian NGO ARCI and the Médecins sans Frontières identify instead Middle East (Iraq and Palestine), Maghreb, Horn of Africa (including Sudan) and Sub-Saharan Africa as migrants' regions of origin (ARCI 2005a; 2005b). More consistent data on migrants' countries of origin and the nature of their journeys remain however unavailable in spite of the continuity of migratory flows from north Africa to the south of Italy since the end of the 1990s.

The CPTA in Lampedusa is one of eleven existing holding centres, most of which are located in the south of Italy. CPTAs are instruments for the detention of undocumented migrants pending expulsion and their purpose is to ensure effective functioning of expulsion procedures. Identified as complementary, detention and expulsion of undocumented migrants are crucial pillars of Italy's politics towards irregular migration. In the effort to control undocumented migratory flows from Africa into its territory, Italy established cooperation on illegal migration with Libya, its southern Mediterranean neighbour. Initially signed in Rome in 2000 as a general agreement to fight terrorism, organized crime and illegal migration, and strengthened in 2003 and 2004 via follow-up agreements, today Italian-Libyan partnership extends to include readmission agreement, training for Libyan police officers and border guards, and Italian-funded detention and repatriation programmes for irregular migrants in Libya.²

This essay presents an overview of events and policies implemented in Lampedusa and Libya respectively, and outlines the issues surrounding these policies. Using the material provided by the Italian authorities, European institutions and the NGOs, the paper further examines the schemes developed by the Italian and Libyan Governments, the European Union and the International Organization for Migration (IOM) as main actors involved in implementing immigration-related programmes and policies in Lampedusa and Libya. A methodological note is necessary here. The data available on measures regarding detention and deportations of irregular migrants and asylum seekers in Lampedusa and Libya are often contradictory and incomplete. In the case of Lampedusa, scarce information provided by Italian authorities was lately supplemented by data gathered by the European Parliament, the NGOs and

journalists. When it comes to Libya, the content of agreements, whether between the Italian and Libyan Governments or between the latter and the IOM, remain undisclosed. Hence, rather than offering an exhaustive description of legislative acts the first two sections of the paper make use of the legislative framework as a way of contextualizing the main procedures and policies carried out in Lampedusa and Libya.

Having examined, in the first two sections of the paper, the issues surrounding Italy's alleged violation of the right to asylum, the *non-refoulement* principle and the prohibition of collective expulsions, the following two sections focus on migratory patterns into and from Libya that raise questions about a number of assumptions behind the Italian Government's detention and deportation policies. The third section questions the idea of the mass influx (i.e. invasion) of undocumented migrants commonly summoned by both Governments and the media to portray migratory flows from Africa and shows that this notion gives an erroneous representation of contemporary Mediterranean migration. They conceal Italy's reluctance to assume its share of asylum responsibilities within the European Union.

Italy's implementation of schemes that hamper asylum seekers' right to access the asylum procedure raises the issue of the European Union's responsibility and its commitment to the protection of refugees. The return of undocumented migrants from EU Member states and the collaboration with Libya on matters of irregular migration will soon be regulated by the EU Return Directive and the Libya-EU Joint Action Plan. These instruments are designed to provide a minimum set of procedural and legal safeguards for the return, removal and custody of third-country nationals residing illegally in EU Member States and limit the EU's involvement in the detention

facilities in Libya to the provision of health care and services rather than support of return schemes. The analysis in section five of the Return Directive and the Action Plan, as well as of the European Commission (EC)-funded IOM programmes in Libya raise the issue of whether or not the EU and its Member states are effectively contracting out of their responsibilities over migration and asylum matters and whether the Return Directive and the Action Plan leave too large a space for the Member states to circumvent the EU framework and apply restrictive exceptions.

Lampedusa holding centre: detention and the right to asylum

As instruments for the detention of irregular migrants and asylum seekers, CPTAs were established under ‘Turco-Napoletano’ law with the purpose of administrative detention of third-country nationals pending expulsion from Italy. Asylum seekers, as well as migrants who have been served an expulsion order, are detained in CPTAs for a maximum of 60 days when they present an asylum application after having received an expulsion or refusal of entry order and/or if their appeal is at the final stage and they are awaiting the court’s decision on the appeal. The CPTAs however do not cater primarily to asylum seekers. The so-called ‘Bossi-Fini’ law amended the detention regulations set by ‘Turco-Napoletano’ law and established ‘identification centres’ as specific centres for the detention of asylum seekers. While detention of asylum seekers cannot be carried out with the sole purpose of examining their application, it is nevertheless mandatory in cases when asylum seekers present their application after being arrested for entering or attempting to enter the country illegally, and/or residing in Italy in an irregular situation. The Italian Government is currently in the process of

establishing ‘polifunctional’ immigration centres to carry out administrative and juridical functions of both CPTAs and identification centres.

Throughout 2004 and 2005, the holding centre on Lampedusa was denounced for the lack of access to the asylum procedure. European NGOs have drawn attention to the failure of the centre’s authorities to provide information about the possibility of claiming asylum and to guarantee individual examination of asylum through in-depth interviews that assess asylum seeker’s individual circumstance. Migrants and asylum seekers, the NGOs remark, have no effective access to an interpreter, and are often identified by staff not qualified as interpreters by the use of improvised identification procedures in which the migrant’s nationality is determined on the basis of their skin colour and facial characteristics.³ The centre is permanently overcrowded and the detention conditions degrading: there is for example, no access to the proper health assistance and the hygienic conditions are substandard. Moreover, journalistic sources have disclosed the abuse of migrants while in detention and the use of coercive methods in order to carry out deportations (Gatti 2005a).

On the basis of gathered data ten European NGOs⁴ have taken legal actions against the Italian Government, filed a complaint with the European Commission and called the Commission to sanction Italy for

- Violation of the right of defence both with regards to access to an interpreter or and a lawyer, or to be possibility of appealing against the expulsion; the principle of hearing the different; and hence the right to asylum as recognised by the Amsterdam Treaty

- Violation of the prohibition of torture and inhuman or degrading treatment, provided for in article 4 of the European Charter of fundamental rights and article 3 of the European Convention for the protection of human rights and fundamental freedoms

In the complaint of the 20 January 2005 as well as in successive open letters to the Council and the Commission,⁵ Amnesty International urged the Commission to publicly distance itself from the actions of the Italian authorities and to carry out an independent investigation regarding Italy's compliance with international legal obligations as part of the EU *acquis*.

Italian authorities confirm the NGOs' data on the 350-400 daily average presence in the Lampedusa CPTA, as well as the case of overcrowding of up to 1000 people during the summer months. Their position diverges though on other points raised by NGOs. Even though there are cases when third-country nationals are detained for up to 60 days, the Italian authorities maintain that in most cases migrants' stay at the CPTA does not exceed four to five days. They state that the majority of detained migrants are Egyptian nationals and that nationality is determined on the basis of their physical characteristics and accent, as well as by a short individual interview, to which everyone is entitled. As explained by the Italian authorities, if migrants do not come forward to request asylum they are immediately repatriated to Libya or to their country of origin (EP 2005: 3). Those who however do request asylum are moved to the Crotone CPTA, on the Italian mainland. The authorities state also that the majority of third-country nationals arriving from Libya are not asylum seekers but rather economic migrants.

Despite the denial by the Italian government that human rights violations take place in Lampedusa holding centre,⁶ the United Nations' Human Rights Committee (CCPR) expressed concern about the conditions of detention and procedures there. It called on Italy to keep the Committee closely informed about the ongoing administrative and judicial inquiries on matters of detention conditions, procedural irregularities and collective deportations to Libya.⁷ Given the seriousness of the numerous allegations raised by NGOs, a delegation of twelve MEPs, part of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE) of the European Parliament, arrived on the island of Lampedusa on 15th and 16th September 2005 in order to assess the identification and removal procedures, the treatment of the detainees and the running of the CPTA. Following this visit, the EP called on the European Commission to ensure that the Member States comply with their obligations under EU law.

Libya and the case of collective expulsions

Between October 2004 and March 2005, Italian authorities returned more than 1500 irregular migrants and asylum seekers to Libya from Lampedusa holding centre. The biggest operation took place between the 1st and 7th of October 2004, four days before the EU lifted its eight-year-long arms embargo on Libya on 11th October 2004. During those six days, a total of 1153 irregular migrants and asylum seekers were expelled to Libya. No information is available concerning the whereabouts of migrants and

asylum seekers expelled to Libya. Human Rights Watch believes that the majority has been detained in Libyan detention camps (HRW 2005: 373).

Since 2000, Italy and Libya have developed a close collaboration on issues of irregular migration. Beginning with a general agreement to fight terrorism, organized crime and illegal migration in 2000, the collaboration extended in 2003 and 2004 to include a readmission agreement, border guard training programmes, the construction of detention centres and the funding of deportation schemes. In 2003 and 2004 Italy financed the construction of three detention centres for irregular migrants in Libya, as well as a programme of charter flights for the repatriation of irregular migrants from Libya to West Africa (EC 2005: 61-62). Future detention and expulsion schemes are being developed in collaboration with IOM, a key partner for both Italian and Libyan governments. Following the agreement signed on the 9th August 2005 for opening of an IOM office in Tripoli,⁸ IOM and Libya defined a programme of activities with the aim of supporting the Libyan Government to counter illegal migration and develop a long-term migration management approach. Under the *Programme for the Enhancement of Transit and Irregular Migration Management (TRIM)*, IOM will be responsible for:

- Labour selection programmes for migrant workers in order to supply Libya's labour demand;
- Information campaigns to warn potential migrants about the dangers of irregular migration;
- Improvement of services (such as health care) and conditions of detention for irregular migrants in detention centres in Libya;

- Development of an Assisted Voluntary Return Programme (AVR) and Reinsertion programme aiming to return irregular migrants in Libya to their countries of origin;
- Strengthening of cooperation on irregular migration between origin and destination countries (EC 2005: 15).

NGOs claim that the signing of the bilateral agreement between Libya and Italy in August 2004 led to widespread arrests in Libya of individuals from sub-Saharan Africa,⁹ and that 106 migrants lost their lives during subsequent repatriations from Libya to Niger (Gatti 2005b). Evidence gathered by Amnesty International (AI) points further to the risk that removed asylum seekers and irregular migrants face in Libya. As AI documented, in Libya migrants and asylum seekers in particular are often victims of arbitrary detention, inexistent or unfair trials, killings, and disappearances and torture in the detention camps (AI 2004). Once migrants and asylum seekers are detained in Libya there is virtually no way for NGOs to assist them or verify the conditions of detention or the expulsion procedures as UNHCR cannot operate its protection mandate in Libya.

In light of gathered data on current removal practices, a coalition of 13 European NGOs proposed to the Member States and the EU a number of core principles to be applied during the repatriations in order to ensure that the policies fully respect the needs and dignity of individuals.¹⁰ In the complaint filed with the European Commission concerning the expulsions from Lampedusa holding centre to Libya, the NGOs called onto the Commission to sanction Italy for:

- Violation of the prohibition of collective expulsions provided for in article 4 of the 4th Protocol of the European Charter of Human Rights (ECHR) and fundamental freedoms, and article II-19-1 of the Charter of Fundamental Rights and article 13 of the International Covenant on Civil and Political Rights
- Violation of the *non-refoulement* principle¹¹ prescribed in article 33 of the 1951 Geneva Convention on Refugees and Article 3 of the Convention against Torture¹²

Italian authorities have responded to the allegations of collective expulsions by invoking article 10 of Law 189/2002 and in particular the procedures regarding the refusal of entry (*respingimento alla frontiera*). The authorities claim that removals from the Lampedusa CPTA are not expulsions but rather refusals of entry on an individual basis. An expulsion needs to be decided by the judge and prohibits entry into Italy for ten years while a refusal of entry is an administrative measure that does not ban the migrant from entering the Italian territory in the future. Italian authorities insist that the refusals of entry take place on a case-by-case basis and that since the majority of migrants reaching Lampedusa are economic migrants rather than refugees, Italy is not in violation of the *non-refoulement* principle or in breach of the Geneva Convention.¹³

In its observations on Italy during its 85th Session in Geneva in November 2005, the UN Human Rights Committee raised the issue of the right to international protection and recalled the right of each person not to be expelled to a country where he/she might face torture or ill-treatment. Along similar lines, while the European Court of Human Rights¹⁴ sought clarification from Italian authorities on identification and

expulsion procedures followed, the European Parliament called on Italy to refrain from collective expulsions to Libya. In its *Resolution on Lampedusa* the EP took the view that these expulsions constitute a violation of the principle of *non-refoulement*. EP also called on Libya to allow access to international observers, halt the expulsions and arbitrary arrests of migrants, ratify the Geneva Convention and recognize the mandate of the UNHCR.

Misrepresentation of migratory flows to Italy

The Italian Government considers the detentions in the Lampedusa CPTA and the successive expulsions to Libya to be indispensable measures for countering the emergency caused by the influx of people from Libya and for deterring ‘a million illegal migrants’ waiting on Libyan shores from crossing over to Italy.¹⁵ At first glance, the image of ‘a million illegal migrants’ might express the Italian State’s difficulty in managing large-scale migration from the South. The expression, however, merits a more serious consideration because it brings together a number of misconceptions that inform Italy’s migratory policies: it inflates the numbers so as to produce the imagery of invasion, assumes that entries via the southern border constitute the majority of Italy’s undocumented migrants and conveys the image that the bulk of migratory flows in and through Libya is clandestine and headed towards Europe.

As for the migration from Eastern Europe during the 1990s –to which scholars now refer as ‘the invasion that never took place’ (Simoncini 2000)— so for the current

migration to Italy via Libya. The reference to the magnitude of migratory flows invokes the fantasy of invasion from the South. The existing data offer however a different image of migratory flows towards Italy. The recent report from the Italian Ministry of Internal Affairs indicates that the majority of third-country nationals residing illegally in the country have reached Italy neither via sea nor having crossed its borders undocumented. They have on the contrary, entered the country at its land borders with a valid entry clearance and have become undocumented either once their visa expired or after they overstayed their permit of residence. According to the same source, only 10% of undocumented migrants currently residing in Italy entered the country 'illegally' via its sea borders (Caritas/Migrantes 2005).

The arrival of circa 10,500 migrants and asylum seekers to the island of Lampedusa in 2004 certainly represents a heavy load for a small island of 20km² with a population of 5500. Yet, if we exaggerate the numbers and assume for analytical purposes only that all of 10,500 migrants are asylum seekers, this would certainly provoke a sharp increase in numbers of asylum seekers and refugees in Italy from 9019¹⁶ to more than its double. What might appear at a first glance as a worrisome perspective needs to be viewed in proportion to the national population size. The 9019 applications filed in 2004 translate roughly to Italy receiving 16 asylum seekers per 100,000 inhabitants.¹⁷ Even if doubled, the total number of requests for asylum in Italy would be of 34 per 100,000 and hence still remain below the EU average of 60 asylum seekers per 100,000 inhabitants.¹⁸ While this increase is a hypothetical one, it is nevertheless useful as to illustrate the gap between asylum trends in Italy and other EU countries and to point to Italy's reluctance to take on its share of asylum responsibilities within the EU. In fact, by not registering the 'illegal' entries Italy avoids the application of

the Dublin II Regulation, namely its duty to determine the asylum application as the responsibility for the examination of an asylum application lies with the member state where a link with the asylum seeker was first established.¹⁹

An example of this reluctance is the earlier discussed fact that the Italian authorities maintain that migrants arriving from Libya to Lampedusa are economic migrants rather than asylum seekers. They refer to all of them as illegal migrants. Since the Libyan government does not recognize the category of asylum seekers and since the authorities of Lampedusa CPTA allegedly fail to assess migrants' nationality and classify the majority as Egyptians, there is no record which would permit a systematic identification of migrants' countries of origin. If such a record was available, it would indicate that refugees are indeed part of migratory flows that transit Libya. This can be seen clearly in the case of Malta where the majority of new arrivals in 2004 were from the conflict affected countries of Eritrea, Ivory Coast, Sudan and Somalia (Pliez 2005).

Libya's migratory reality is that it is far from being either a country of massive emigration or that is exclusively a transit route for clandestine migrants from Sub-Saharan Africa to Italy. On the contrary, Libya is in firstly a destination country and the major country of immigration in the Maghreb. Foreign nationals constitute approximately 25 to 30% of Libya's total population. Large-scale economic and social development schemes in the 1970s, launched thanks to the revenues from the petroleum industry, relied in the first instance on migrant labourers from Egypt. Egyptian nationals, employed mainly in the agricultural industry and education, constitute today the largest migrant group in Libya (Hamood 2006). Libya is home

also to a large Maghrebi community (Morocco, Tunis and Alger) and the country's economic development relies on cheap and seasonal labour from the neighbouring countries of Niger, Chad and Sudan (Boubakri 2004; Pliez 2005). Since the 1990s, the presence of migrant workers from sub-Saharan states has been prompted by Libya's reorientation from pan-Arab to pan-African policy and its active role in the foundation of the Community of Sahel-Saharan states (CEN-SAD) which, as an economic project grounded in the free circulation of people and goods between its member states, is oriented towards regional cooperation and integration. Migrant workers from Sudan, Chad and Niger are generally present in the Libyan Saharan border areas where they work in sectors such as agriculture, tourism and local trade. These labour migrations, facilitated by an open border policy towards sub-Saharan Africa are of seasonal and pendular character rather than, as commonly assumed, the source of irregular migratory movements to Europe.

Inflating the numbers relative to the migratory flows to Italy from Libya, as some politicians and elements of the mass media have done, results in an erroneous and misleading representation of Libya's migratory history and of the contemporary migration in the Mediterranean area. Images such as a 'million illegal migrants' produce and manipulate the fear of invasion through a distorted account of migratory patterns in Libya and conceal Italy's reluctance to admit asylum seekers and refugees to its territory and, atypically for an EU state, its failure to pass an organic law on the right to asylum that has been under discussion since the 2002.

The production of illegal migration

Much attention has been given to collective expulsion of third-country nationals from Lampedusa CPTA to Libya in terms of the 'externalisation' of asylum. Externalisation refers to the propensity of several EU Member States to establish centres for processing asylum applications outside the EU's external borders. Deportations from Lampedusa to Libya occurred in fact in a highly charged political atmosphere surrounding the proposal to set up refugee processing centres in North Africa. The proposal, advanced initially by the Blair government, included 'Regional Processing Areas' (RPAs) and 'Transit Processing Centres' (TPCs); the former were to be located in the zones of origin of refugees with the aim of strengthening reception capacities close to areas of crisis, and the latter, positioned closer to EU borders, were envisioned as centres where asylum seekers could submit their asylum claims (Noll 2003). Even though the proposal was rejected by several EU member states, concerns about 'externalisation' to Libya remained strong, as in October 2004 the informal EU Justice and Home Affairs Council debated the implementation of five pilot projects in Libya and several other North-West African countries with the aim of upgrading existing detention facilities and developing asylum systems.²⁰

On the basis of this chronology of events, it is tempting to identify the collective expulsions from Lampedusa to Libya in terms of the externalisation of asylum. The fact that third-country nationals are precluded from presenting asylum claims, removed from Lampedusa to Libya and then most likely placed in the detention facilities financed by the Italian Government, might indeed seem to constitute the externalisation of asylum. The idea of externalisation presupposes however that asylum seekers and refugees are relocated to facilities where they are granted

protection and where they can access the asylum determination procedure. Since the external processing centres do not yet exist and since Libya in practice has no refugee policy, Italy's expulsion of third-country nationals to Libya constitutes a *retraction* of the right to asylum rather than its *externalisation*.²¹ As such, the policy of expulsions carries the risk of being counterproductive. Whereas the expulsions are carried out as a deterrent for undocumented migration, the obstacles to filing an asylum request are likely to increase irregular migration. In fact, those who would otherwise seek asylum might become irregular migrants due to the effective impossibility in accessing the asylum procedure (Hamood 2006: 33-46).

The deterrence of unwanted migration from Africa, the core element of Italian-Libyan cooperation on irregular migration, extends further to border guard training and the supply of devices and equipment requested by the Libyan authorities to achieve a better control of the country's sea and land borders, in particular those with Sub-Saharan Africa. These measures are *inter alia* geared towards combating the smuggling of migrants and preventing further loss of lives at sea due to overcrowded boats and smugglers' negligence. While well intended, the idea of strengthening border controls in order to prevent smuggling and trafficking in migrants can yield paradoxical consequences. The case of the EU's enlargement eastward showed that stricter immigration controls aimed at preventing trafficking do not necessarily protect migrants from abuse but might foster migrants' vulnerability to violence during travel, increase the costs of 'doing business' for traffickers and leave ample space for third parties' profiteering and abuse (Andrijasevic 2007; Salt and Stein 1997).

Following the EC's technical mission to Libya in 2004 and the follow up mission led by FRONTEX²² in 2007, experts confirmed that many migrants from these countries settled in the southern cities of the Libyan desert without the intention of further transit to Europe (EC 2005; FRONTEX 2007). Libya's open border policy towards sub-Saharan Africa is a key point in the regional integration of Sahelian Africa. Strengthening the control at the border between Libya and its sub-Saharan African neighbours is likely to create obstacles to the free movement of people and illegalise the region's seasonal labour migration (Maccanico 2005). The little data available from Libya confirm these findings. It is therefore puzzling that in its attempt to reduce irregular migratory flows into Libya and further into the EU, the FRONTEX-led EU technical mission to Libya focused exclusively on increasing the control of Libya's southern borders and on providing Libya with technical support and equipment as to strengthen the surveillance of southern desert regions (FRONTEX 2007).

Following the signing of the bilateral agreement between Italy and Libya in August 2004, journalistic sources reported that Libyan authorities targeted sub-Saharan Africans with arrests, detentions and deportations (Gatti 2005b). These allegations were confirmed by the EC's technical mission to Libya during which experts verified that recent arrests and detentions were often of arbitrary nature and affected migrants from Niger, Ghana and Mali who have been working in Libya for more than a decade (EC 2005: 31-35). The operations of repatriation expose migrants to various type of abuse such as financial profiteering as following the increase in arrests and expulsions third parties who organize travel have allegedly tripled the price of the journey out of Libya; theft by third parties who steal migrants' belongings and leave them in the desert; labour exploitation as migrants who run out of money during the journey get

stuck in various settlements in the desert where they their work under harsh conditions in exchange for food and shelter; and death due to overcrowding in lorries or lack of water (Gatti 2005b). While more substantial figures on the impact of current immigration policies on migrants' lives in Libya are still missing, the data gathered so far suggest that the measures geared towards curbing irregular migration are likely to increase migrants' vulnerability and the involvement of third parties due to the rise in profit to be made from smuggling activities (Koslowski 2001).

The conditions of 'illegality' are however not only produced as a result of expulsions to or tightening of immigration control in Libya. While most of the attention so far has been paid to the implications of collective removals from Lampedusa to Libya, the fact that the majority of the irregular migrants and asylum seekers are transferred from Lampedusa CPTA to other Italian CPTAs went overlooked. This continuous detention follows the logic intrinsic to CPTAs' constitution, namely that detention is indispensable to ensure an effective removal policy. The data that appeared in the report from Italy's Audit Court undermine the argument that CPTAs are a key means for effective functioning of expulsions. The report shows in fact that out of 11883 irregular migrants detained in Italian CPTAs in 2004, less than half were deported while the rest escaped or were released after the expiration of the maximum detention period. Since the majority of migrants are actually released from the CPTAs after they have been served a removal order, scholars have suggested we view detention camps not as institutions geared towards deportations but rather as sites that on the one hand, function as a filter mechanism for the selective inclusion of certain groups of migrants and on the other, produce 'illegality' and hence the condition of 'deportability' (Andrijasevic 2008; Mezzadra 2004; Papadopoulos, Stephenson and Tsianos 2008).

This reasoning is of great relevance in particular for the asylum seekers transferred from Lampedusa CPTA to another Italian CPTA: asylum seekers' detention becomes in fact mandatory only after they have been served a refusal of entry order in Lampedusa. Moreover, once released from a CPTA with the order to leave Italy, asylum seekers find themselves in an irregular situation: if they overstay the period of five days within which they must leave the country, they are susceptible to incarceration on the basis of having committed an offence by failing to observe the expulsion order (FIDH 2005).

As research has shown in several instances, border controls, detentions and expulsion practices do not prevent people from moving from their countries of origin, nor from reaching Europe, but rather they raise the costs and dangers of migration. The alarmist portrayals that invoke the image of a massive influx of undocumented entries from Libya to Italy hinder a correct understanding of existing migratory patterns and the responsibility of the states in reducing legal channels of migration and impeding access to asylum so that in contemporary times illegality has become a structural characteristic of migratory flows (Mezzadra 2001).

Renounced Responsibilities: the EU framework

As well as being matters for Italy's national legislation and initiative, the return of illegal third-country nationals from Lampedusa holding centre and the collaboration with Libya on migration issues are also regulated by the EU framework. The EU Directive on Return and the Action Plan on Libya (both still to be finalized) are part

of the agenda to establish a comprehensive Community policy on immigration and asylum. The EU Return Directive provides a minimum set of procedural and legal safeguards for third-country nationals residing illegally in EU Member States concerning their return, removal and custody.²³ Once in force, by prioritising voluntary return over forced removal, by providing for a right to an effective judicial remedy with suspensive effect against return decisions and removal orders, and by limiting the use of temporary custody to the cases that present the risk of absconding, the Directive would legally oblige the authorities of the Lampedusa holding centre to revise their removal practices in accordance with the standards set by the EU. However, it is very likely that the Directive will not affect the situation and procedures in Lampedusa given the fact that the holding centre has a special status, namely, that of a clearing station (AI 2005). In fact, according to the Article 2.2 of the Return Directive, the Member States are not obliged to apply the directive to the third-country nationals who have been refused entry in a transit zone of a Member State. Classifying Lampedusa holding centre as a clearing station therefore circumvents the Return Directive and relieves Italian authorities of the obligation to bring removal practices in Lampedusa in line with common EU standards.

The discussions between the European Union and Libya regarding migration management have intensified throughout 2005 and are currently directed towards drawing a Joint Action Plan. Developed under the framework of the external dimension of the common European asylum and immigration policy laid out by the Hague programme with the aim of integrating asylum into EU's external relations with third countries, the cooperation between the EU and Libya is geared towards defining operational measures to counter illegal migration. The Joint Action Plan that

is currently being drafted outlines *inter alia* the enhancement of border control at Libya's sea, southern land and air borders, training of Libyan law enforcement officers including a thematic programme on asylum, refurbishment of detention camps and dialogue with main countries of origin as the main components of the EU-Libyan partnership. Given the fact that Libya does not have a functioning asylum system in place and that it is not party to the Geneva Convention, the Action Plan proposes to limit the EU's intervention as far as detention centres are concerned to the provision of health care and advice and to postpone assistance for return operations until conditionality requirements ensuring adequate protection of refugees are met by Libya.

The EU Return Directive and the Action Plan on Libya are both new instruments and both need to be finalized. Despite ample evidence of procedural irregularities and allegations of collective expulsions from Lampedusa holding centre, the Commission's Proposal for a Return Directive gives Member States the possibility of not applying the Directive in transit zones. In a similar manner, the EU also went ahead to develop cooperation on irregular migration with Libya despite evidence of human rights violations there, no guarantee of refugee rights and no official recognition of UNHCR protection mandate. Moreover, while the draft of the Action Plan specifies that no EU funding will be provided for return until the conditionality requirements are met, it does not mention any limitations to be imposed on bilateral agreements on return such as the one between Italy and Libya. Hence, the EU Return Directive and the Action Plan both strengthen Member States' discretion and leave ample space for the states, in this case Italy, to apply the exception (Balzacq and Carrera 2005). The wide discretion available for the application of restrictive

exceptions undermines the credibility of the Commission's monitoring responsibility and the EU's commitment to protect refugees.

The issue of the Commission's responsibility as far as the right of asylum is concerned is further raised by its co-financing of the TRIM programme in Libya.²⁴ Under the TRIM Programme, developed and implemented by the IOM, the Commission is funding IOM to improve the services and conditions of detention for irregular migrants in detention centres,²⁵ to develop a so-called Assisted Voluntary Return Programme (AVR) and Reinsertion programme to support irregular migrants in returning to their countries of origin, and to strengthen cooperation on irregular migration between origin and destination countries (EC 2005: 15). Contrary to its commitment not to assist Libya financially with repatriations, the Commission is *de facto* funding a return scheme for the repatriation of irregular migrants and asylum seekers via its collaboration with the IOM. Similar to Italy's expulsion of irregular migrants and asylum seekers to Libya and Libya's delegation of detention and repatriations matter to IOM, the Commission also contracts IOM to carry out policies in the field of migration and asylum as to further Commission's objectives. Yet, contracting IOM does not relieve Italy or Libya from their international obligation under norms prohibiting *refoulement* and norms protecting human rights.

These considerations raise the question of responsibility as regards IOM's interventions. In the case of the repatriations of those irregular migrant and asylum seekers who have initially been expelled from Lampedusa holding centre, IOM makes itself complicit in obstructing asylum seekers' right to asylum. Moreover, the fact that irregular migrants and asylum seekers are deported from Lampedusa without knowing

that they are being transferred to Libya, that the removals are executed by force and that once in Libya migrants are again detained in police-guarded structures, raises serious doubts that the IOM-run repatriations from Libya can be identified as voluntary. When the decisions to return are made under duress or as an alternative to state-run forced expulsions, 'voluntary' seems to designate an absence of viable options rather than a deliberate choice. Like any other international organization, IOM may be responsible for the violation of international legal obligations, although in the nature of things the range of obligations by which it is bound will differ from those applicable to the State.²⁶ However, in deporting irregular migrants and asylum seekers from Libya IOM is to be seen as assuming joint responsibility for any violation of fundamental rights asylum seekers and irregular migrants might suffer.

Conclusions

In the attempt to control the influx of 'irregular' migrants and asylum seekers to Italy via Libya, the Italian government developed a number of schemes within and beyond its state borders. In the holding centre situated on Lampedusa, Italy's southernmost island and the most frequent point of arrival in 2004 for boats departing from Libya, Italian authorities implemented detention and large-scale expulsion schemes that, according to NGOs, affected irregular migrants and asylum-seekers alike. In order to control the migratory flows prior to migrants reaching its territory, Italy strengthened its collaboration on illegal migration with Libya by signing a readmission agreement, refurbishing several detention facilities and funding a repatriation scheme for irregular migrants in Libya. Libya on its part increased internal checks on specific groups of

migrants, in particular those originating from Sub-Saharan states, a practice resulting in arbitrary detentions and unsafe repatriations in which more than one hundred people lost their lives.

Despite the Italian Government's denial that any human rights violations are taking place in the Lampedusa holding centre, the European Parliament and the United Nations' Human Rights Committee (UNHRC) expressed concern about the conditions of detention there. The EP's Committee on Civil Liberties, Justice and Home Affairs (LIBE) visited the holding center in September 2005 and assessed the detention conditions, the running of the CPTA and the treatment of migrants. Both the European Parliament and the UNHRC called on Italy to guarantee the individual examination of asylum and to refrain from collective expulsions of undocumented migrants and asylum-seekers to Libya. The European Parliament stated that these expulsions constitute a violation of the principle of *non-refoulement* that prohibits the forcible return of anyone to a territory where they might be at risk of serious human rights violations. To expel asylum seekers from Italy to Libya implies returning them to a country which does not recognize the mandate of the UNHCR, has no asylum system, is not a signatory of the Geneva Convention and in which, as NGOs documented, irregular migrants and asylum seekers are at risk of arbitrary detentions, unfair trials, disappearance and torture while in detention.

The procedural and legal safeguards for the return, removal and custody of third-country nationals residing illegally in EU Member States and the collaboration with Libya on matters of illegal migration are about to be regulated through the EU Return Directive and by the Libya-EU Joint Action Plan. The Directive prioritizes voluntary

return over forced return, introduces the suspension against a return decision and/or a removal order, and limits temporary custody to those situations where there is a risk of absconding. The Action Plan, on the other hand, proposes postponing EU assistance for return schemes for undocumented migrants in Libya until the Libyan Government demonstrates full respect for human rights and democratic principles, and a commitment to fulfil its international obligations toward refugees. Despite being instruments that would potentially oblige Italian authorities to revisit their detention and removal practices, the EU Return Directive and the Action Plan would still leave too much space for the Member States to apply restrictive exceptions and to develop bilateral partnerships. Wide powers are being left to the Member States to apply exception and develop bilateral partnerships, which in combination with the funding allocated to the IOM for a programme geared *inter alia* towards developing a repatriation scheme in Libya, undermines EU efforts to achieve a common framework on asylum and immigration, and thereby improve its credibility on refugee protection.

Scholars and policy analyst have approached the issue of detention and repatriation programmes outside EU borders in terms of the externalization of asylum. What this paper suggests however is that the implementation of detention and repatriation programs in Libya, especially when considered together with the expulsions from Lampedusa, do not actually relocate the asylum procedures outside the EU external borders but rather deprive asylum-seekers of the possibility of accessing the asylum determination procedure. This violation of the right to asylum is concealed by the imagery invoked by the politicians and the media of an impending mass arrival of undocumented migrants from Libya to the Italian shores. This imagery distorts the reality of migratory movements from Sub-Saharan Africa into Libya, which is an

established part of Libya's seasonal labour migration rather than a source of irregular migration into Europe. While producing an erroneous representation of migratory flows in the Mediterranean region, the imagery of impending mass arrival also conceals Italy's reluctance to admit asylum seekers into its territory and its unwillingness to apply the Dublin II Regulation and assume its share of asylum responsibility in the EU.

Current Italian-Libyan partnership indicates a new reorientation of Libyan politics from a pro-African to a pro-European stance. This change in political balances, accompanied by Libya's tightening of border controls towards its Sub-Saharan neighbours is likely to clash with the principle of free movement of people that is a cornerstone of regional cooperation and integration in the Sahel-Saharan region. This shift could destabilize the current political balances between Libya and its neighbouring states, and may consequently 'illegalize' movements of large groups of Sub-Saharan nationals.

The implementation of detention and expulsion schemes that illegalize migratory movements and impinge upon migrants' right to seek asylum brings into question the political responsibility of all actors involved, whether they are Governments, supranational bodies or agencies. The Italian and Libyan governments, the European Union, and the International Organization for Migration all need to assume their share of responsibility for the violations of rights that asylum seekers and irregular migrants might suffer as a result of the measures and programmes they implement inside the EU and outside its borders.

Policy Recommendations

Given the fact that data available on measures regarding detention and deportations of irregular migrants and asylum seekers in Lampedusa and Libya are often contradictory and incomplete, that bilateral agreements on irregular migration remain undisclosed and that the European Union's framework leaves large discretion for the Member States to apply restrictive exceptions, this paper recommends transparency, accountability and legitimacy as key principles to guide Member States agenda and EU's partnership with neighbouring states in the field of asylum and immigration.

Transparency:

Developing a correct assessment of the situation regarding detention, expulsion and asylum at the EU's southern border is contingent upon gaining access to and rendering transparent the information, programmes and agreements that regulate repatriations of irregular migrants and asylum seekers in Lampedusa and Libya. Whether carried out by the Italian and Libyan states or by the IOM, a lack of transparency is common to the policies and schemes countering irregular migration from and into Libya. Information regarding the number, frequency and destinations of the return flights from Lampedusa CPTA, the content of the bilateral agreements between Italy and Libya and between Libya and IOM, and the content of the contract for the TRIM Programme co-funded by the EC must be made public in order to achieve a transparent Community policy on asylum and immigration.

Accountability:

With regards to the partnership with third countries in the area of migration and asylum, the EU must provide leadership in terms of human rights protection. The

divergent interests between national and EU competencies over borders, asylum and immigration should not leave Member States with ample space to apply the exception that, as in the case of the EU return directive, would result in the disregard of even the minimum safeguards on return. In cases where either the EU or states sub-contract to the IOM this does not exempt the EU, Italy or Libya from their international legal obligations under norms prohibiting *refoulement* and norms protecting human rights. IOM on its part must assure that its programmes do not impinge upon the right to seek asylum and must be held accountable for any violations that might occur as result of its actions.

The lack of safeguards and control mechanisms ensuring the right to seek asylum and Italy's tendency to circumvent its responsibilities on matters of asylum require an intervention from the European Parliament. With the co-decision on asylum and immigration, the EP is directly involved in the decision-making process and needs to propose amendments to the Return Directive and the Action Plan on Libya with the objective of achieving observance of human rights and international standards. The EP's intervention would play a crucial role in achieving a transparent and democratic procedure as regards to a common asylum policy and would steer it towards a rights- rather than a control-based approach.

Legitimacy:

Holding centres are aimed at facilitating an effective repatriation of third-country nationals who have entered Italy illegally. Lampedusa holding centre does not fulfil its main functions: it facilitates only a nominal amount of expulsions and it perpetuates ill-treatment rather than offering assistance. In order to ensure that

detention procedures and practices are in conformity with the existing domestic and international standards, a short-term objective is to mandate an independent monitoring body to make regular, unrestricted and unannounced visits there. The closure of Lampedusa holding centre should constitute a long-term objective.²⁷ Since it is classified as a clearing station, Italy is likely to disregard the set of minimum procedural and legal safeguards on return, removal and custody provided under the EU Return Directive. The centre's closure would prevent future violation of procedures and assure that migrants and asylum seekers rights are not sidestepped by the Italian authorities.

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² For a detailed overview of Libyan-Italian international cooperation see EC, p. 58

³ See 'Complaint against the Italian government for violation of European Community Law', 20 January 2005.

<http://www.gisti.org/doc/actions/2005/italie/complaint20-01-2005.pdf>

⁴ ANAFE - Association nationale d'assistance aux frontières pour les étrangers (France), Asociacion 'Andalucía Acoge' (Spain), APDHA - Asociación Pro Derechos Humanos de Andalucía (Spain), ARCI - Associazione Ricreativa e Cultura Italiana (Italy), Asociación 'Sevilla Acoge' (Spain), ASGI - Associazione per gli Studi Giuridici sull'Immigrazione (Italy), Cimade (France), Federación des Asociaciones SOS Racismo del Estado Español (Spain), Gisti - Groupe d'information et de soutien des immigrés (France), and ICS - Consorzio italiano solidarietà.

⁵ AI letter to JFS Commissioner Franco Frattini, dated 21 March 2005 (B456); and AI appeal to the EU regarding expulsions from Italy to Libya, dated 28 June 2005 (B472)

⁶ See Italian Ministry for Foreign Affairs' written reply prepared for the 85th session of the UN Human Rights Committee. Ministry for Foreign Affairs, Interministerial Committee of Human Rights, *Reply to List of Issues (CCPR/C/84/L/ITA) (Relating to CCPR/C/ITA/2004-5)*, U.N. Human Rights Committee 85th Session, Geneva 17 October – 3 November 2005.

⁷ CCPR/C/ITA/CO/5 dated 28th October 2005.

⁸ The cooperation between IOM and Libyan Government was developed in the framework of the 5+5 Regional Dialogue on Migration. As an informal dialogue on migration, 5+5 Dialogue is a forum that bring together the Maghreb countries (Algeria, Libya, Mauritania, Morocco and Tunisia) and the countries of the 'arc Latin' (France, Italy, Malta, Portugal and Spain) to promote the prevention and fight against irregular migration and trafficking in countries of origin, transit and destination. As a partner in the 5+5 Dialogue, as preceding the regional seminar on irregular migration in the western Mediterranean in Tripoli on 8 and 9 June 2004, IOM organized in cooperation with Libya's People's Committee for Public Security a training session for 100 Libyan officials and police representatives. The focus of the session was on border and migration management and on assisted voluntary return for irregular migrants in Libya. IOM, *Dialogue 5+5. Newsletter*, n. 1 issue, 2004.

⁹ AI, 'Immigration Cooperation with Libya: the Human rights perspective. AI briefing ahead of the JHA Council 14 April 2005'.

[Http://www.amnesty-eu.org/static/documents/2005/JHA_Libya_april12.pdf](http://www.amnesty-eu.org/static/documents/2005/JHA_Libya_april12.pdf)

¹⁰ 'Common Principles on removal of irregular migrants and rejected asylum seekers', August 2005 by Amnesty International, EU Office; Caritas Europa; Churches' Commission for Migrants on Europe (CCME); European Council for Refugees and Exiles (ECRE); Human Rights Watch Jesuit Refugee Service –Europe (JRS); Platform for International Cooperation on Undocumented Migrants (PICUM); Quaker Council for European Affairs; Save the Children; Cimade (France); Iglesia Evangelica Espanola; Federazione delle Chiese Evangeliche in Italia (FCEI); and SENSOA (Belgium).

¹¹ The *non-refoulement* principle has been reaffirmed by the EU as the cornerstone of refugee protection. It prohibits the forcible return of anyone to a territory where they would be at risk of serious human rights violations: "No contracting state shall expel or return (*refouler*), a refugee in any manner to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion". This principle makes reference to the lack of individual assessments and to the removal of persons to countries where there exists a serious risk to the physical integrity of those concerned (mentioned in article 19§2 of the European Charter).

¹² Migrants and asylum seekers are deported to Libya, a country lacking minimum guarantees of protection. This is in contravention with the article II-19-2 of the European Charter of Fundamental Rights, according to which "No one may be removed, expelled or extradited to a State where there is a serious risk that they may be subjected to the death penalty, torture or inhuman or degrading treatment". Italy's obligation to *non-refouleur* to a country lacking minimum guarantees of protection is reinforced by the fact that it is a party to the 1951 Refugee Convention, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹³ The response by Alessandro Pansa, the Director General of the immigration and border police of the Italian Ministry of Interior delivered to the UN Human Rights Committee during its 85th Session on the 20th October 2005. Notes taken by Claire Rodier, GISTI. [Http://www.migreurop.org/article909.html](http://www.migreurop.org/article909.html)

¹⁴ Following Application No 11593/05 filed by a group of expelled migrants, on 6 April 2005 ECHR called to Italy of to provide information on the situation in Lampedusa.

¹⁵ This number was given by Italian Ministry of Interior, G. Pisanu. See *il manifesto* 22nd April 2005, p. 9. [Http://www.ilmanifesto.it/Quotidiano-archivio/22-Aprile-2005/art74.html](http://www.ilmanifesto.it/Quotidiano-archivio/22-Aprile-2005/art74.html) (consulted on 25/04/2005)

¹⁶ Data from Italian Ministry of Interior, [Http://www.cir-onlus.org/Statisticheitalia.htm](http://www.cir-onlus.org/Statisticheitalia.htm) (consulted 10 December 2005).

¹⁷ Asylum levels in Italy are in fact among the lowest in Europe and in 2004 reported a fall of 26%, which is 5% above the EU average (UNHCR's 2005)

¹⁸ This calculation does not take into consideration that out of 9019 requests for asylum filed in 2004, only 781 were approved. The readers are hence asked to bear in mind that a hypothetical increase calculated above concerns only requests for asylum rather than the allocation of the asylum status.

¹⁹ (EC) No.343/2003, OJ L 50/1, 25.2.2003.

²⁰ The Commission denied that these pilot projects are directly linked to plans to create EU reception centres in North Africa. Antonio Vitorino, Justice and Home Affairs Commissioner, declared however that "in the short term the Commission could envisage the possibility of setting up humanitarian reception centres in the countries bordering the Mediterranean." EUOBSERVER, 4th October 2004.

²¹ The danger of this happening was foreseen by Gregor Noll in his brilliant piece on legal and practical issues raised by the idea of external processing where he argues that the proposal to establish processing and protection centres outside the EU represents a serious threat to the existing institution of asylum and that these are likely to result in ending of legal and factual protection for certain groups of people. Noll 2003.

²² FRONTEX stands for the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

²³ Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals. Brussels. Brussels, 1st September 2005, COM(2005) 391 final, 2005/0167 (COD).

²⁴ A sum of 2 million euros has been allocated by the Commission under the 2004 budget for the AENEAS Programme. See Annex 1 of the Communication from the Commission to the European Parliament and Council. Thematic Programme for the cooperation with third countries in the area of migration and asylum. COM(2006) 26 final dated 25 January 2006.

²⁵ The degree of IOM's involvement with detention camps in Libya remains to be seen. IOM's involvement with reception centres in the north Africa dates back to 2002 when IOM, UNHCR, the European Commission, the Netherlands and Denmark met in an informal meeting to discuss the UK's proposal for 'in the region and off-shore processing' and drafted a memorandum that set a number of practical, legal and financial issues concerning the external processing. IOM has already managed off-shore processing detention centres, such as the one set by the Australian authorities on Nauru island, for which it came under attack by Amnesty International and Human Rights Watch, who urged it to stop arbitrary detention and impingement of migrants' right to seek asylum. IOM is currently also responsible for realization of two large new camps for irregular migrants in Ukraine, one of the potential countries to host EU's Regional Protection Programme.

²⁶ For summaries of the discussion on the international legal responsibility of international organizations in the International Law see Clapham (2006: 109-10); on the related issue of refugee rights in camps and settlements Goodwin-Gill, G. S. & McAdam, J., (2007: 466-71); and, International Law Association (2004).

²⁷ The majority of Italy's Regions support the closure of the holding centres. In summer 2005, fourteen Provincial Governors and their representatives met at the forum *Mare Aperto* in Bari and drafted a document in which they undertook to launch a political-institutional dialogue geared towards changing current Italian immigration law, closing the CPTAs, creating a comprehensive law on asylum, and doing away with the administrative detention. The final document is available at <http://www.meltingpot.org/articolo5676.html>