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Human Rights Challenged by European Policy Responses to Irregular Migration

ABSTRACT

Irregular migration has become a particular challenge for the European Union (EU) in the 21st century since thousands of people cross borders without legal permits and thereby undercut the sovereign state. Yet, many of these migrants are legitimate asylum-seekers with international and EU law legalising their irregular border-crossing. This article argues that international and EU human rights and refugee law have only a limited impact on the state's sovereign immigration and asylum policies at the cost of individuals' human rights. At the example of the case study countries Italy and Malta, the lawfulness of two common policy responses – namely return and detention – is analysed on the basis of European and international law. The challenged human rights are freedom from torture and inhuman or degrading treatment extending to an effective right to seek asylum and the non-refoulement principle in refugee law.

Keywords: *irregular migration, human rights, detention, asylum, refugee law, Mediterranean*

Irregular Migration to the European Union¹

Irregular migration has become a major challenge in the Mediterranean region in the early 21st century. Migrants, mostly Sub-Saharan and North African asylum-seekers, cross the Mediterranean by boat in order to reach European soil. In 2013, more than 30,000 people reached Italy and Malta, the most prominent European entry-points when departing from North Africa.² The peak year was 2011 when altogether 64,300

1 This article is an abbreviated, updated and revised version of the author's Master dissertation entitled *The Impact of International and European Union Law on National Irregular Migration Policies*, University of Cambridge 2011.

2 United Nations High Commissioner for Refugees (UNHCR): Mediterranean crossings to Italy and Malta exceed 8000 in first six months of 2013, 5 July 2013, available online at: <http://www.unhcr.org/51d6a0859.html> (accessed on 26 February 2014); of these estimated 8,400 people, 7,800 arrived in Italy and 600 reached Malta. Countries of departure

migrants arrived via the Central Mediterranean route mainly due to the political uprisings in Tunisia, Libya and Egypt.³ All these people risked their lives in order to reach European soil. At least 20,000 people lost their lives on the dangerous journey in the Mediterranean Sea in the past 20 years and these are only those documented with the actual death toll supposedly higher.⁴

In a legal sense, irregular migration constitutes a clash between the sovereignty of states and their respect for fundamental human rights, regardless of the nationality of the individuals. That is why this form of migration is often referred to as “illegal immigration”, since the official and formal legal ways to immigrate or to travel to a country are not respected.⁵ A more humane phrasing suggested for the situation in which a migrant does not possess the necessary documentation and visa to enter or stay in a country is the term “irregular”, which is suggested by the United Nations (UN) and used throughout this article.⁶

Irregular migration at national level is controlled by border enforcement officers concerned with national immigration and asylum law. Nation states are sovereign in controlling immigration, that is who may enter their territory, but the nation state concept of absolute jurisdiction is nonetheless subordinate to an international system of law and in the European case additionally subordinate to European law. Humans are enshrined with rights and states have committed themselves to respect basic rights to life, liberty, security and freedom. Under international refugee law people do have a legal right to move contrary to immigration law if their lives are endangered, they are persecuted or fear torture.⁷

were Libya, Greece and Turkey; countries of origin are Somalia, Eritrea, Egypt, Pakistan, Syria, Gambia, Mali and Afghanistan.

3 Frontex: Update on Central Mediterranean Route, 2013, available online at: <http://www.frontex.europa.eu/news/update-on-central-mediterranean-route-5wQPyW> (accessed on 26 February 2014).

4 Jack Shenker: Mediterranean migrant deaths: a litany of largely avoidable loss, in: *The Guardian*, 3 October 2013, available online at: <http://www.theguardian.com/world/2013/oct/03/mediterranean-migrant-deaths-avoidable-loss> (accessed on 26 February 2014).

5 United Nations (UN): UN Term “irregular migrant”, 2013, available online at: <http://unterm.un.org/dgaacs/unterm.nsf/WebView/E72293A92D0C03FB852572D-5007743CF?OpenDocument> (accessed on 26 February 2014).

6 *Ibid.*

7 Art. 31 [1] Convention Relating to the Status of Refugees, Geneva 1951 (hereafter: Refugee Convention): “The Contracting States are committed not to “impose penalties, on account of their illegal entry or presence [...] provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

The composition of people on migrant boats in the Mediterranean is typically a mix of economic migrants and asylum-seekers.⁸ Most of the Mediterranean boat people claim to qualify for international protection under the 1951 Convention Relating to the Status of Refugees, because of a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” in their country.⁹ Once that status is declared and refugee status granted by a state, the asylum-seeker is a refugee. Some of the irregular migrants crossing the Mediterranean even possess documents of the United Nations High Commissioner of Refugees (UNHCR) offices in North African countries that prove their status as refugee.¹⁰

Even if the legal status of irregular migrants might yet be undefined, they have a right to have their dignity, human rights and freedoms respected. In addition, international law and European Union (EU) law require states to commit to human rights and refugee law. The EU has codified the respect for human rights among its basic

- 8 UNHCR: UNHCR signs agreement aimed at ensuring refugee protection in Libya, News Stories, 4 July 2008, online at: <http://www.unhcr.org/486e48534.html> (accessed on 26 February 2014); Marianna Pavan: Can/Will Italy be held accountable for its ‘push back’ policy in relation to international refugee, human rights and European Union law? in: Migration Studies Unit Working Papers, No. 12, London School of Economics and Political Science, London 2011.
- 9 Art. 1[A] 2 CRS; see also Art. 2 [c] Qualification Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30 September 2004, hereafter: Qualification Directive; see also Preamble. At the time of the assessed events this Directive was in force. This article generally refers to the law in force in 2009 with regard to push-back and detention policies. Additionally, this article provides information on the revised Directives and whether the legal provisions are still valid. The revised version of the Qualification Directive 2011/95/EU, 21 December 2013 holds the same definition of the referenced Art. 2 [d] in Art. 2 [d].
- 10 Because the Refugee Convention definition of refugee does not encompass all modern situations experienced by individuals struggling for their very survival in failed states and fearing torture, rape and violence in fragmented political situations, the EU has extended its concept of international protection by granting subsidiary protection (Art. 15 Qualification Directive 2004/83/EC). In that case, an asylum-applicant may not qualify as refugee under the Refugee Convention, but there are nonetheless reasons to believe that the person would suffer serious harm if returned to the country of origin or departure (Art. 2 [e]). Therefore, subsidiary protection protects from refoulement (Art. 21 [1]), guarantees family unity and adequate standard of living (Art. 23 [1], [2]), and offers a permit of residence for one year (Art. 24 [2]). The revised Qualification Directive 2011/95/EU provides the same legal provisions for Art. 15, 2 [e], 21 [1], 23 [1], [2], except for Art. 24 [2] with a minor change of wording; the regulation applying to the permit for one year remains the same.

and constituting values.¹¹ This respect is affirmed in the national constitutions of all EU member states. Yet it seems that member states' practice in situations like border and immigration control may diverge from their stated commitments. One reason for this is the European system of border control and immigration policies within the framework of the Schengen *acquis*,¹² which led to the factual abolishment of internal borders and therefore the increased importance of external borders.¹³ Whoever reaches the Schengen area is practically able to move between the countries. The member states recognised early in the 1990s that common external borders require a common approach towards asylum and immigration law, especially in determining which member state is responsible for the examination of an asylum application.¹⁴ The Treaty of Amsterdam enabled the communitarisation of European migration and asylum policy.¹⁵ The Heads of States substantiated their goals for a common migration and asylum policy in their meeting in Tampere in 1999.¹⁶ This initiated a first phase of European secondary legislation on migration and asylum.¹⁷ The creation of an area of freedom,

- 11 Art. 2, Art. 6 [3] The Treaty on European Union; Preamble, Charter of Fundamental Rights of the European Union (2000/C 364/01).
- 12 Protocol No 19, Treaty on European Union, Protocol on the Schengen Acquis integrated into the framework of the European Union, OJL 115, 9 May 2008, 290–292. Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, OJL 295, 6 Nov. 2013, pp. 27–37.
- 13 This was confirmed by a decision of the ECJ in the case *Wijnsbeek* 1999, case C-378/97, Judgement of the Court, 21 September 1999, paragraph 40: The Court reasoned that the abolishment of “controls of person at the internal frontiers of the Community [...] presupposes harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions.”
- 14 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities. Dublin Convention, OJC 254, 19 August 1997, pp. 1–12.
- 15 Title IV, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, OJL C 340, 10 November 1997.
- 16 European Council: Tampere European Council 15 and 16 October 1999, Presidency Conclusions, Annex A: Common EU Asylum and Migration Policy.
- 17 European Commission: Communication from the Commission to the Council and the European Parliament Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM/2000/0755 final, 22 Nov 2000, Preface: The first phase was called into action with the Tampere European Council (15 and 16 Oct. 1999). The Commission translated the policy strategies and goals suggested by the European Council into Directive drafts for a legislation programme towards a common asylum procedure and a common status for people that are granted international protection in the European Union. The first phase of secondary legislation on a common

security and justice was incorporated as major goal in the Treaty of Lisbon in 2009.¹⁸ Thereby the common asylum agenda gained further importance. With the revision and adoption of four asylum-related measures between 2011 and 2013, the Common European Asylum System takes shape.¹⁹ It is furthermore strengthened by case law decisions of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ) that both emphasise the pre-eminence of basic rights and human rights in the context of immigration and asylum law.²⁰

In case of irregular migration, however, the European member states define a rather national approach: According to the Dublin Regulation, a contracting state of the Schengen area is responsible for any landings on its territory.²¹ The Commission suggested in its Regulation Proposal of 2001 that criteria for determining the responsible member state are “designed to deal with the consequences of a Member State failing

asylum policy (planned for 2000–2004 and finished by 2005) was already planned to be followed by a revision of the legislation and policy instruments on the basis of reports on implementation of the Directives. The second phase of legislation towards a Common European Asylum System started after the coming into force of the Lisbon Treaty with several Directives of 2011 and 2013 that updated and extended the rights codified in the Directives of the first phase.

18 Art. 3 [2] Treaty on European Union.

19 Harald Dörig: Auf dem Weg in ein Gemeinsames Europäisches Asylsystem, in: *Neue Zeitschrift für Verwaltungsrecht* 3 (2014), pp. 106–110, p. 110.

20 European Court of Justice: Judgement of the Court, Case C-411–10: *N. S. v Secretary of State for the Home Department and M. E. and others (C-493/10) v Refugee Applications Commissioner und Minister for Justice, Equality and Law Reform*, 21 Dec 2011, paragraphs 15, 76, 77f, 99: The Court emphasised that measures in immigration law and common asylum law have to respect basic rights. Furthermore, the Court underlined the humanitarian responsibility of the European Union in asylum matters and proclaimed the pre-eminence of basic rights prior to secondary law (in that case: immigration and asylum law). For the ECtHR see: *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Strasbourg, 21 January 2011, paragraphs 229–230; *Louled Massoud v Malta*, Application no. 24340/08, Strasbourg 27 July 2010; *Hirsi Jamaa and others v. Italy*, Application no. 27765/09, ECtHR 23. Februar 2012; *Aden Ahmed v Malta (2012)*, Application no. 55352/12, Strasbourg 23 July 2013; *Suso Musa v Malta*, Application no. 42337/12, Strasbourg, 23 July 2013.

Ibid.

21 Art. 10 Council Regulation [EC] No 343/3004 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *ABI*. L50, 25 February 2003, 1–10. The reference is found in the revised Regulation in Art. 13 Council Regulation No 604/2013/EU of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), *ABI*. L 180, 29 June 2013.

to meet its obligations in the fight against illegal immigration.”²² Hence, irregular migration is recognised as a phenomenon in which a member state has not guarded its external borders well enough.²³ Solidarity in this reading means that the member state affected by irregular migration is responsible to deal with any landings on its territory and accordingly with any asylum claims made.²⁴ There is no quota system to distribute arriving asylum-seekers and refugees at the external borders of the EU Schengen area according to country and population size proportionalities.²⁵ Yet there is a system to cooperate in the protection of external borders. Since especially the Southern and Eastern external borders of the EU are possible entry points to the Union and Schengen area, those states have a particular responsibility to control their external borders. The creation of a European agency for the protection of external borders (Frontex) supports the external border countries that see many irregular landings by facilitating interventions at borders and on the high sea in order to prevent irregular entries.²⁶ Since its creation in 2004, Frontex has gained considerable competency among

22 European Commission: Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, COM (2001) 447 final, paragraph 3.1: “Criteria governing responsibility: [...] each Member State is answerable to all the others for its actions concerning the entry and residence of third-country nationals and must bear the consequences thereof in a spirit of solidarity and fair cooperation.”

23 Ibid.

24 Art. 10 Council Regulation [EC] No 343/3004 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, ABI. L50, 25 February 2003, 1–10. The reference is found in the revised Regulation in Art. 13 Council Regulation No 604/2013/EU of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), ABI. L 180, 29 June 2013.

25 In the German system, for example, there exists a quota system for the federal states to host asylum-seekers calculated yearly by tax income and country size, Bundesamt für Migration und Flüchtlinge, see Königsteiner Schlüssel, available online at: <http://www.bamf.de/DE/Migration/AsylFluechtlinge/Asylverfahren/Verteilung/verteilung-node.html> (accessed on 26 February 2014).

26 Frontex (French for *frontières extérieures*, meaning external borders) was established with Regulation 2007/2004, 26 October 2004, OJL 349, pp. 1–11.

which is the legitimate use of force in situations where this is deemed necessary.²⁷ The communitarisation of border control grows simultaneously with the competences and activities of Frontex.²⁸

Additionally to this border protection and control on European level, the member states apply different policy instruments in dealing with the influx of irregular migrants. Since the member states affected by irregular migration have to deal solely with the protection and social needs of irregular arrivals, member states search for policy instruments to reduce irregular migration and the effects thereof. Whereas the tragedies of sinking dinghies in the Mediterranean are a media-transported common image, it is neither part of public knowledge nor debate what happens regularly to irregular migrants when they are intercepted. So firstly, this article provides a clear conception of the occurring policy responses to irregular migration. Those EU states that are particularly challenged by irregular migration – relative to their population and country size and in absolute numbers – are case studies worth of interest with view to their use of means and instruments in dealing with irregular migrants. This article depicts what happens at the Southern European border in response to irregular migration based on sources from different Non-Governmental Organizations (NGOs), international organizations, delegations from EU and Council of Europe institutions. It is the aim of this article to analyse the chosen policy responses as to their lawfulness by subsuming the collected data under European law, international law and jurisprudence. Which obligations are actually imposed on states relating to the respect for human rights and fundamental freedoms of irregular migrants? And what effect do international treaties and case law decisions on either international or European levels have on nation states' policies? Only if we assess and understand whether and to what extent state practices violate international and EU law, can we determine the impact of international and EU law and evaluate whether these obligations actually constrain states' conduct in national irregular migration policies. One way of measuring the impact of law on policies is to investigate policy practices. In order to determine how national irregular migration policies may obstruct international and European law, Italy and Malta are chosen as case study countries to assess and evaluate how two EU member states deal with irregular migrants and deviate from their legal obligations. Italy and Malta were selected because they are the most prominent entry countries for irregular migration from Sub-Saharan Africa transiting through North Africa.²⁹ The

27 Andreas Fischer-Lescano/Timo Tohidipur: Europäisches Grenzkontrollregime. Rechtsrahmen der europäischen Grenzschutzagentur FRONTEX, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 4 (2007), pp. 1219–1276, p. 1234.

28 Frontex: *Beyond the Frontiers. Frontex: The first five years*, Warsaw 2010, pp. 18–23, pp. 68–79.

29 Frontex: *Fran Quarterly* 4 October-December 2012, Warsaw, May 2013, available online at: http://www.frontex.europa.eu/assets/Publications/Risk_Analysis/Fran_Q4_2012.pdf

case studies provide an insight of the national irregular migration policies across the European Mediterranean and highlight commonly occurring challenges of human rights and fundamental freedoms in the EU. There are two conventional policy responses: *return* or readmission – mostly based on bilateral or multilateral agreements with North African states – and *detention*. The aim of this article is to assess the compatibility of these two major policies with international and EU law. Each of these two policies, as implemented by EU member states, may violate internationally guaranteed human rights reaffirmed in EU law. Immediate return is the response at the stage when people have managed to leave their country of origin or transit, but are intercepted on the high sea and sent back immediately. European countries like Italy have readmission agreements with Libya and other North African countries that re-admit third-country nationals after their claim for protection or immigration has been rejected in an EU member state. Immediate return is a novel and aggravated form of readmission since no refugee screening takes place and people are returned without first having the chance to apply for asylum and explain their case. Immediate return challenges the non-refoulement principle not to be sent back to a country where one fears torture or ill-treatment. Detention of irregular migrants is a generally applied practice in dealing with irregular migrants in the Mediterranean. It is used as policy measure when migrants have managed to reach territorial waters or the soil of a European state. Without a legal permit to enter the country, irregular migrants may then be detained. Malta implements mandatory detention of irregular migrants that lasts up to eighteen months which may well violate Malta's international and EU legal obligations.

The case studies focus on Italy's so-called push-back policy – meaning the immediate return policy pursued in 2009 – and the detention policy of Malta in the same year. Although the analysis and data material focus on 2009, the relevance remains: The Council of Europe's Parliamentary Assembly issued a critical report in 2012 on border enforcement missions of the EU Agency Frontex and their adherence to human rights during rescue missions.³⁰ Incidents and reports from the case study countries suggest that the policy practices as analysed for 2009 remain: Malta considered a push-back initiative in July 2013 to immediately return 45 irregular Somali migrants from Malta to Libya without checking their asylum claims.³¹ Concerning detention, Malta contin-

(accessed on 26 February 2014), p. 13.

30 Council of Europe, Parliamentary Assembly: Lives lost in the Mediterranean Sea: who is responsible?, provisional version, 29 March 2012, available online at: http://assembly.coe.int/CommitteeDocs/2012/20120329_mig_RPT.EN.pdf (accessed on 26 February 2014).

31 Miriam Dalli: Strasbourg blocks pushbacks – how it happened, Malta Today, 9 July 2013, available online at: <http://www.maltatoday.com.mt/en/newsdetails/news/national/Government-does-not-exclude-sending-migrants-back-to-Libya-20130709> (accessed on 26 February 2014): In that case, the ECtHR was appealed by non-governmental organisations

ues its mandatory collective detention of irregular migrants.³² An informal agreement signed between Italy and Libya in 2012 to cooperate in curtailing illegal migration, emphasises the on-going although more subtle return and readmission policies possible for Italy.³³ Similar treaties exist for Italy with Egypt and Tunisia, leading to quick procedures and readmission if people transited through these countries; this may well challenge the migrants' effective right to seek asylum.³⁴ These practices underline the topicality of human rights concerns over return and detention of irregular migrants in the Mediterranean.

Immediate Return of Irregular Migrants: the Case of Italy

Since the early 2000s, Italy has increasingly received irregular migrants from Sub-Saharan Africa. The most common states of origin of irregulars are Nigeria, Somalia, Eritrea and Afghanistan.³⁵ This issue became more acute in 2007, when Italy received 19,900 irregular migrants arriving by sea and then 36,000 in 2008.³⁶ In that same year, Italy signed a Treaty on Friendship with Libya.³⁷ Although there is no specific clause on readmission of third-country-nationals, the discourse of Italian policy-makers and the effective policy practice since 2009 suggest that the Treaty is the basis for an informal readmission agreement that Italy can send intercepted migrants at the sea

and issued a prohibition notice of deportation, requiring Malta to explain its procedures and guarantee the individual processing of asylum claims.

- 32 European Union Agency for Fundamental Rights: *Fundamental rights: challenges and achievements in 2012*, Vienna 2013, p. 52.
- 33 International Boundaries Research Unit, Durham University: *Italy and Libya reach agreement on border security and migration*, 5 April 2012, available online at: https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=14308 (accessed on 26 February 2014); Signatories were the Libyan interior minister Fouzi Abdul Aal and the Italian interior minister Anna Maria Cancillieri in April 2012.
- 34 UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy, Rome, 8 October 2012, available online at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12640&LangID=E> (accessed on 26 February 2014).
- 35 UNHCR: *Asylum Levels and trends in industrialized countries 2008, Statistical Overview of Asylum Applications Lodged in Europe and selected Non-European Countries 24 March 2009*, Geneva, Switzerland.
- 36 *Ibid.*
- 37 *The Treaty on Friendship, Partnership and Cooperation (Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista)*, Benghazi 2008.

immediately back to Libya.³⁸ This treaty is just one of several readmission agreements that Italy has signed with North African transit states such as Tunisia, Algeria and Morocco.³⁹ Yet bilateral agreements do not trump international or EU law.⁴⁰ The clause on co-operation in irregular migration in the Treaty on Friendship has raised concern among international organisations and NGOs about ‘the fate of the immigrants turned back’.⁴¹ The parties to the treaty envisage a system of Libyan territorial border control to be established with Italian technological know-how and funded by Italy and the EU.⁴² There is no explicit provision on jointly implementing a return policy, but this is in practice the result, by providing for example patrol boats to control the 1,770km Libyan coastline.⁴³ In 2009, Italy’s Guardia di Finanza and Navy and Libyan coastguards started to jointly patrol Libyan territorial waters and the high sea in order to return intercepted irregular migrants.⁴⁴ The terminology used in relation to migration in this context is *illegal* not *irregular* and migration is mentioned in a context of serious crimes associated with human trafficking.⁴⁵ Though, irregular migration is not synonymous with trafficking or crime. It is in part a response to tough visa requirements, carrier sanctions and immigration laws making it legally impossible for genuine

- 38 Ansamed: Ansa Mediterranean: Immigratoin: 30x fewer arrivals with accord, says Frattini, 1 September 2010.
- 39 Alexander Betts: Towards a Mediterranean Solution? Implications for the Region of Origin, in: *International Journal on Refugee Law* 18:3 (2006), pp. 652–676; Emanuela Paoletti/Ferruccio Pastore: Sharing the dirty job on the southern front? Italian-Libyan relations on migration and their impact on the European Union, *International Migration Institute, University of Oxford, Working Papers* 2010, Paper 29.
- 40 Art. 28 Vienna Convention on the Law of Treaties, Vienna 1969.
- 41 Natalino Ronzitti: The Treaty on friendship, partnership and cooperation between Italy and Libya: New prospects for cooperation in the Mediterranean?, in: *Bulletin of Italian Politics* 1:1 (2009), p. 130.
- 42 Art. 19 [2] The Treaty on Friendship, Partnership and Cooperation (Trattato di amicizia, partenariato e cooperazione tra la Repubblica Italiana e la Grande Giamahiria Araba Libica Popolare Socialista), Benghazi 2008.
- 43 BBC News: Libya given migrant patrol boats, 15 May 2009, available online at: <http://news.bbc.co.uk/1/hi/8051557.stm> (accessed on 26 February 2014); Natalino Ronzitti: The Treaty on friendship, partnership and cooperation between Italy and Libya: New prospects for cooperation in the Mediterranean? in: *Bulletin of Italian Politics* 1:1 (2009), pp. 125–133.
- 44 Silja Kepp: A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea, in: *European Journal of Migration and Law* 12:1 (2010), pp. 1–21; Violeta Moreno-Lax: Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea. *International Journal of Refugee Law* 23:2 (2011), pp. 174–204.
- 45 Reuters Africa: Italy cheers ‘historic’ migrant expulsion to Libya, 7 May 2009, available online at: <http://af.reuters.com/article/topNews/idAFJ0E5460C220090507> (accessed on 26 February 2014).

asylum-seekers to find a legal way to Europe, although they would qualify in Europe as refugees and be granted protection if they could actually get there.⁴⁶ Secondary EU law specifically addresses entry at the border in the Schengen Borders Code and allows for the unlawful entry into a state, in case it is for the purpose of seeking asylum.⁴⁷ Hence, there are legal provisions legitimising unlawful passage and entry into a state. People seeking international protection rely on their rights to emigrate⁴⁸ and to seek asylum.⁴⁹ In leaving their country and crossing the Mediterranean, they are effectively seeking to invoke their right not to be sent back, i.e. *non-refoulement*.⁵⁰ The non-refoulement principle is connected to the human rights to life, liberty and security.⁵¹ The ECtHR found in subsequent case law, that the prohibition of torture and ill-treatment includes the prevention thereof and requires states to respect the principle of non-refoulement meaning that nobody should be sent to a country where he/she would potentially be exposed to torture or ill-treatment.⁵² Italy is bound to respect the prohibition of torture and ill-treatment which extends to the respect for the principle of non-refoulement according to ECtHR jurisprudence. Even a potential refugee enjoys the protection from refoulement as it applies “not only to recognised refugees, but also to those who have not had their status formally declared”.⁵³ The Refugee Convention’s protection aim for refugees has become part of the EU *acquis* through the Treaty of Amsterdam,

46 Bente Puntervold Bo: Recent tendencies in immigration control policies in Europe: undermining legal safeguards and refugee protection?, in Heinz Fassmann/Max Haller/David Lane (eds.), *Migration and mobility in Europe: trends, patterns and control*, Cheltenham 2009, pp. 272–296; Cyrus, Norbert Cyrus: Irreguläre Migration – Zum Stand der Diskussion menschenrechtlicher Ansätze in der Bundesrepublik Deutschland, in: *Zeitschrift für Ausländerrecht und Ausländerpolitik* 9 (2010), pp. 317–321.

47 Art. 5 [4] [c], Regulation [EC] No 562/2006, hereafter Schengen Borders Code [SBC]); amended by Regulations [EC] No 296/2008, 10.4.2008, ABI. L 97, 9.4. 2008; Reg. [EC] No 81/2009, 24.2.2009, ABI. L 35, 4.2.2009; Reg. [EC] No 810/2009, 5.10.2009, ABI. L 243, 15.9.2009; Reg. [EC] No. 265/2010, 5.4.2010, ABI. L 85, 31.3.2010.

48 Art. 12 [2] International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 220 A (XXI), U.N.Doc. A/6316 (1966).

49 Art. 14 [1] Universal Declaration of Human Rights (UDHR), General Assembly Resolution 217 A (III), U.N. Doc. A/810 at 71 (1948).

50 Art. 33 [1] Convention Relating to the Status of Refugees (CRSR), Geneva, 28 July 1951; Art. 3 [1] Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), General Assembly Resolution, U.N. Doc A/RES/39/46 (1984).

51 Art. 3 UDHR; Art. 2 [1], Art. 5 [1] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome 1950; Art. 6 [1], 9 [1] ICCPR.

52 *Chahal v UK* (1995), Application no. 22414/93, report of the Commission of 27 June 1995, judgement of the ECtHR no. 70/1995/576/662 of 15 November 1996; *Saadi v. United Kingdom* (2006), Application no. 13229/03, 11 July 2006, ECHR 13229/03.

53 UNHCR: Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, Geneva 2007, Switzerland, p. 2.

which stipulated that the measures on asylum have to be in compliance with the Convention.⁵⁴ It has been substantiated through Art. 78 Treaty on the Functioning of the European Union. Italy ratified the Refugee Convention by Act of Parliament in 1954 and is thus legally bound to respect the principle of non-refoulement. The EU Directives on Procedures and Qualification reaffirm the refugee law provisions in detail.⁵⁵ They have all been incorporated into national law, recognizing the implied commitments.⁵⁶ Hence, Italy has international, European and national obligations to respect the principle of non-refoulement.

Challenging the principle of non-refoulement in international waters

In 2009, Italian Guardia di Finanza, the Navy and Libyan coastguards initialised the push-back operations. Between May and November 2009, 834 migrants were intercepted in nine incidents in the Mediterranean and returned to Libya by joint patrols.⁵⁷ Once a migrant boat is intercepted, the migrants are either surrendered onto the intercepting boat or the migrant boat is towed to the intercepting boat or another Libyan vessel to tow the migrant boat back to a Libyan port.⁵⁸ Because the migrants often refuse to accept orders out of fear of being returned, such a procedure can last several hours and include the violent confrontation between migrants and guard officials who coerce migrants to subdue to Italian-Libyan orders.⁵⁹ Reportedly lack of food, water, blankets and shelter for the migrants are a matter of concern, as

54 Art. 63 [1] Treaty of Amsterdam.

55 Art. 21 [1] Qualification Directive 2004/83/EC of 29 April 2004. The Directive was revised through Directive 2011/95/EU, OJ L 337; December 2011, 9–26, the recognition for non-refoulement remains in Art. 21 [1]; see also: Council Directive 2005/85/EC: On minimum standards on procedures in Member States for granting and withdrawing refugee status, of 1 December 2005, OJ L 326, 13 December 2005, hereafter Procedures Directive, revised by Council Directive 2013/32/EU, references to the non-refoulement principle are now made in Art. 28 (2) (formerly Art. 20 [2]), Art. 38 [1] c (formerly Art. 27 [1] b).

56 Lara Olivetti: Implementation of the Procedures Directive 2005/85 in Italy, in Karin Zwaan (ed.), *The Procedures Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, Wolf Legal Publisher, Nijmegen 2008.

57 UNHCR: *Hirsi and others v. Italy – Submission by the Office of the United Nations High Commissioner for Refugees*, March 2010, available online at: www.unhcr.org/refworld/docid/4b97778d2.html (accessed on 26 February 2014).

58 Council of Europe (2010): *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009*, Strasbourg 28 April 2010.

59 UNHCR (2009): *UNHCR interviews asylum seekers pushed back to Libya*, Briefing Notes, 14 July 2009, available online at: <http://www.unhcr.org/4a5c638b6.html> (accessed on 26 February 2014).

is the use of physical violence, serious beatings and shootings with rifles directed at alleged migrant boats.⁶⁰ Within the first week of joint Italian-Libyan patrols in May 2009, 500 migrants had been intercepted in the Mediterranean and returned to Libya.⁶¹ The first case occurred on 6 May 2009 when more than 200 migrants were rescued in distress and returned to Libya without a refugee screening.⁶² The report of that incident indicates that “physical violence, in particular with kicks, punches and blows with an oar, was allegedly used against a number of migrants by Libyan police at the harbour in Tripoli, to force them to disembark from the two Coast Guard vessels”.⁶³ In the response to the CPT report, the Italian authorities denied “inappropriate use of force” against migrants but confirmed that some use of force was necessary to subdue the migrants.⁶⁴

The forcible return of 227 migrants on 14 May 2009 was considered a success of the improved bilateral relations by Italian minister of the Interior Roberto Maroni who said triumphantly: “Until now, we had to get them, identify them, send them back to their countries of origin [...] For the first time in history, we were able to send illegal immigrants directly back to Libya”.⁶⁵ The forcible return occurred without any Italian officials checking the migrants’ need for international protection or hearing their appeals.⁶⁶ The Italian authorities have affirmed that they do not proceed “with the formal identification of migrants who are intercepted at sea and pushed back”.⁶⁷ The

60 Ibid.

61 Human Rights Watch (2010): Libya: End Live Fire Against Suspected Boat Migrants, 16 September 2010, available online at: <http://www.hrw.org/en/news/2010/09/16/libya-end-live-fire-against-suspected-boat-migrants> (accessed on 26 February 2014).

62 UNHCR: UNHCR deeply concerned over returns from Italy to Libya, 7 May 2009, available online at: <http://www.unhcr.org/4a02d4546.html> (accessed on 26 February 2014).

63 Council of Europe: Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, Strasbourg 28 April 2010, paragraph 18.

64 Ministry of Foreign Affairs Italy: Inter-ministerial Committee of Human Rights, Comitato Interministeriale dei Diritti Umani, Italian Observations on the Report by the Committee for the Prevention of Torture, following ad hoc mission to Italy (July 27 – July 31, 2009), Rome 2010, paragraph 9.

65 Reuters Africa: Italy cheers ‘historic’ migrant expulsion to Libya, 7 May 2009, available online at: <http://af.reuters.com/article/topNews/idAFJJOE5460C220090507> (accessed on 26 February 2014).

66 Human Rights Watch: Italy/Libya: Migrants Describe Forced Returns, Abuse. EU Should Press Italy to Halt Illegal Forced Returns to Libya, 21 September 2009, in: <http://www.hrw.org/en/news/2009/09/17/italylibya-migrants-describe-forced-returns-abuse> [11 Nov 2013]; BBC News: Libya given migrant patrol boats, 15 May 2009, available online at: <http://news.bbc.co.uk/1/hi/8051557.stm> (accessed on 26 February 2014).

67 Council of Europe (2010). Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

Italian Ministry of Foreign Affairs justified this conduct by referring to the operations at sea in which no migrant had communicated the wish to apply for asylum and hence there was no reason to screen people for their need of protection.⁶⁸ From the Italian perspective, collaboration for the prevention of irregular migration conforms to the UN Convention against Transnational Organized Crime, and the Protocol against the Smuggling of Migrants by Land, Sea and Air adopted as General Assembly in 2000.⁶⁹ This does not hold in regards of Art. 19 [1] of the same Convention mentioning expressly that the non-refoulement principle be respected. According to the Italian reading of the situation though, the interceptions constitute a case where migrants are returned “on request by Algeria and Libya”, hence there is no need to identify people.⁷⁰ Yet, the bilateral treaty between Italy and Libya cannot legitimise actions of immediate return on the high sea if these operations violate international human rights and refugee law even if labelled “return of migrants upon request by Algeria and Libya” and “return of migrants not applying for asylum” or “rescue at sea” procedures.⁷¹ The fact that on average more than 50 per cent of irregular migrants crossing from Libya are granted refugee or subsidiary protection status once they are in Europe suggests that many people on these boats may be legitimate protection seekers.⁷² The UNHCR confirmed that many of the people returned to Libya actually qualified for international protection.⁷³

Treatment or Punishment (CPT) from 27 to 31 July 2009, Strasbourg 28 April 2010, para 14.

68 Ministry of Foreign Affairs Italy (2010): Inter-ministerial Committee of Human Rights, Comitato Interministeriale dei Diritti Umani, Italian Observations on the Report by the Committee for the Prevention of Torture, following ad hoc mission to Italy (July 27 – July 31, 2009).

69 UN: General Assembly Resolution 55/25: Convention against Transnational Organized Crime, 15 November 2000; United Nations, General Assembly Resolution 55/25: Protocol against the Smuggling of Migrants by Land, Sea and Air, UN GA 15 November 2000.

70 Ministry of Foreign Affairs Italy (2010): Inter-ministerial Committee of Human Rights, Comitato Interministeriale dei Diritti Umani, Italian Observations on the Report by the Committee for the Prevention of Torture, following ad hoc mission to Italy (July 27 – July 31, 2009), p. 8.

71 Ibid, pp. 8, 9.

72 Frontex: General Report, Warsaw 2009; UNHCR: UNHCR deeply concerned over returns from Italy to Libya, 7 May 2009, available online at: <http://www.unhcr.org/4a02d4546.html> (accessed on 26 February 2014); Ministry of Justice and Home Affairs Malta: Office of the Refugee Commissioner: Statistical Information, February 2010, in: <http://mhas.gov.mt/en/MHAS-Departments/The%20Office%20of%20the%20Refugee%20Commissioner/Documents/Statistical%20Information.pdf> (accessed on 26 February 2014).

73 UNHCR: UNHCR interviews asylum seekers pushed back to Libya, Briefing Notes, 14 July 2009, available online at: <http://www.unhcr.org/4a5c638b6.html> (accessed on 26 February 2014).

Aside from the operation of international law, the Italian Ministry of Foreign Affairs claims that the Schengen Borders Code (SBC) does not apply in “rescue at sea operations on High Seas” and therefore there is “no obligation to proceed with a minimum check”, as requested by Article 7 of the SBC.⁷⁴ The opposite is actually true: the push-back measures are a form of border surveillance at sea since the main aim is to protect Italy’s and the EU’s external borders. The Code expressly considers methods of border surveillance at sea which might be carried out “in the territory of a third country”.⁷⁵ Hence, the SBC implies a code of conduct even in the extra-territorial control of border: because the Italian-Libyan cooperation in border control activities are effectively border surveillance activities, they fall within the scope of the SBC and Italy is thus bound to respect the non-refoulement principle regardless of whether the border surveillance takes place in territorial or non-territorial waters.⁷⁶

The opinion of the ECtHR on the relevance of territoriality is emphasised in subsequent case law in which the question of effective control and jurisdiction – not territoriality – is key to the assessment of responsibility for actions. In the understanding of the ECtHR, jurisdiction is “not restricted to the national territory of the High Contracting Parties. [...] the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory”.⁷⁷ The Court emphasised that effective control implicates responsibility for state organs to ensure that the fundamental rights of the Convention are “secure[d]”.⁷⁸ According to ECtHR case law, persons are “within the jurisdiction” of a member state, if the state actions have an effect on the people – regardless of the location.⁷⁹ Hence, signatories to the ECHR are responsible and accountable wherever they exercise their authority.⁸⁰ This assessment is confirmed by a widespread scholarly *opinio juris* agreeing that the non-refoulement principle applies extra-territorially if a state has effective control over people

74 Ministry of Foreign Affairs Italy: Inter-ministerial Committee of Human Rights, Comitato Interministeriale dei Diritti Umani, Italian Observations on the Report by the Committee for the Prevention of Torture, following ad hoc mission to Italy (July 27 – July 31, 2009), Rome 2010, p. 9.

75 Annex VI, para 3.1.1., Schengen Borders Code.

76 Art. 12 Schengen Borders Code.

77 *Loizidou v Turkey* (1995), Application no. 15318/89, ECtHR, 23 March 1995, paragraph 62.

78 *Ibid.*

79 *Drozd and Janousek v. France and Spain* (1992), Application No. 12747/87, ECtHR, paragraph 91; see also *Hirsi Jamaa and others v. Italy*, Application no 27765/09, ECtHR 23 February 2012, paragraphs 77, 81.

80 see also: *Cyprus v Turkey* (2001), Application no. 25781/94, ECtHR, 10 May 2001, (2002) 35 E.H.R.R. 30.

and thereby exercises jurisdiction.⁸¹ It would create irreconcilable double standards if state officials were obliged to abide by international law only on the territory of their state – in line with Art. 29 of the Vienna Convention on the Law of Treaties that treaties apply on the entire *territory* of the contracting party – and be allowed to implement policies contradictory to international law when outside their territory.⁸² During push-back operations, Italian officials gain authority over migrants by coercing them to return or taking them on board a vessel that will return them. European case law confirms that effective physical control over a person constitutes effective control equivalent to the exercise of jurisdiction.⁸³ By depriving migrants of their liberty to continue their journey, using measures of force to subdue them and by detaining them on the vessels, Italy exercises extra-territorial jurisdiction through effective control, arguably acting in breach of the non-refoulement principle, responsible for those actions and their consequences.

Returning migrants and deliberately accepting their potential suffering of detention, ill-treatment and torture is in violation of international human rights and refugee law and contrary to guiding case law of the ECtHR: The first case concerning irregular migrants and the interception policy in the Mediterranean was submitted in 2009 and decided in February 2012 by the ECtHR.⁸⁴ The court examined an incident where several Somalian and Eritrean migrants were intercepted in international waters 30 miles off Lampedusa and sent back to Libya. The court confirmed that there was a two-stage violation of the non-refoulement principle: firstly, effective jurisdiction by Italian authorities led to a denial of entry to Italian territory which consequently

81 Elihu Lauterpacht/Daniel Bethlehem: The scope and content of the principle of non-refoulement: Opinon, UNHCR 20 June 2001; Alexander Orakhelashvili: Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the ECtHR, in: *European Journal of International Law* 14:3 (2003), pp. 529–568; Sylvie Da Lomba: The Right to seek Refugee Status in the European Union, Antwerp 2004; Andreas Fischer-Lescano/Tillmann Löhr/Timo Tohidipur: Border Controls at Sea: Requirements under International Human Rights and Refugee Law, in: *International Journal of Refugee Law* 21:2 (2009), pp. 256–296; Alison Kesby: The right to have rights: citizenship, humanity and international law, PhD thesis, University of Cambridge, Cambridge 2009; Violeta Moreno-Lax: Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea, in: *International Journal of Refugee Law* 23:2 (2011), pp. 174–204.

82 Violeta Moreno-Lax: Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea. *International Journal of Refugee Law* 23:2 (2011), pp. 174–204, paragraph 5.

83 *Öcalan v. Turkey* (2003). Application no. 46221/99, ECtHR, paragraph 93; see also Ruth Weinzierl: Human Rights at the EU's common external maritime border. Recommendations to the EU legislature, German Institute for Human Rights, Policy Paper No 8, Berlin 2008.

84 *Hirsi Jamaa and others v. Italy*, Application no 27765/09, ECtHR 23 February 2012.

induced refoulement.⁸⁵ Since the judges understood the claimants as being under the jurisdiction of Italy within the range of Art. 1 ECHR, extra-territoriality was rejected as argument.⁸⁶ By extension, Italy's argument that push-back measures are rescue at sea operations, putting the issue out of the Italian geographic context, does not relieve them of their obligations under the Refugee Convention not to send anybody back to a state where their life and freedom are endangered. The only geographic reference point that matters is to where people are sent. This was the result of the Prague Airport case in which the English Court of Appeal found that it was impermissible to return refugees to their country of origin if they fear ill-treatment in the course.⁸⁷ And the assessment that the consideration for the destination of returnees prevails, is confirmed by scholarly contributions and observations of NGOs.⁸⁸ Lacking to check asylum claims of the irregular migrants in the Mediterranean constitutes refoulement because entry is denied and thereby the effective right to seek asylum is denied.⁸⁹ A further breach of the non-refoulement principle is possible, if the return to Libya exposes the returned to torture, death and chain refoulement. Therefore, the human rights situation in Libya must be examined.

Non-Refoulement due to potential ill-treatment in Libya

In order to evaluate whether Italy breaches its legal obligations to respect the non-refoulement principle by returning migrants to Libya based on the bilateral treaty, it must be determined whether the migrant people face harm to their freedom and lives if sent back to Libya. The existence of "a consistent pattern of gross, flagrant or mass violations of human rights" in Libya would constitute such a risk according to Art. 3 [2] Convention against Torture and other Forms of Degrading or Inhuman Treatment (CAT).

85 Ibid, paragraphs 114f., 198, 205.

86 Ibid, final judgment, paragraph 3.

87 Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants), (2004) UKHL 55.

88 Lauterpacht/Bethlehem: The scope and content of the principle of non-refoulement; Human Rights Watch: Pushed Back, Pushed Around. Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers, New York 2009.

89 Hans Jarass: Charta der Grundrechte der Europäischen Union. Unter Einbeziehung der vom EuGH entwickelten Grundrechte, der Grundrechtsregelungen der Verträge und der EMRK: Kommentar, 2nd edition, Munich: Beck 2013, Art. 18 GRCh, paragraph 12.

A country is deemed *safe*, if it has ratified the Refugee Convention, is a signatory party to the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1984 CAT and if human rights are generally respected.⁹⁰ Libya does not have a developed refugee law system and is not a party to the Refugee Convention. There are laws with constitutional status and treaties at regional level similar to the Refugee Convention.⁹¹ However, the numerous accounts of human rights violations give rise to concern about sending any migrant back to Libya – be it an asylum-seeker or economic migrant. The ECtHR found in the case *Saadi v. Italy* in 2008 that the prohibition of torture and ill-treatment and consequently refoulement have such a priority that an expulsion even for grave national security reasons does not trump the peremptory norm to prevent torture by all means. Saadi was accused of participating in international terrorism and was to be extradited to Tunisia where he would possibly be exposed to ill-treatment. The Court found that:

the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention [ECHR].⁹²

Thus, while Libya has domestic laws and international obligations for refugee protection, states need to consider the actual human rights situation before sending anybody to such a country.⁹³ Sub-Saharan migrants have to deal with serious discrimination, detention and degrading treatment in Libya.⁹⁴ In 2010, UNHCR estimated that

90 Jean Allain: *The Just Cogens Rule of Non-Refoulement*, in: *International Journal of Refugee Law* 3:4 (2002), pp. 533–558.

91 Declaration of the People's Authority (1977), The Great Green Charter for Human Rights (1988) and the Law 20, and On Enhancing Freedom (1991). Those laws are stated by law professors and practicing lawyers in Libya during interviews as *de jure* laws but *de facto* not constituting a refugee system; interviews conducted by Human Rights Watch and published in: *Human Rights Watch: Pushed Back, Pushed Around. Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York 2009.

92 *Saadi v Italy*, ECtHR (2008), Application no. 37201/06, (2009) 49 E.H.R.R. 30, paragraph 147.

93 *Ibid.*, paragraphs 143, 147, 149.

94 Rachel Donadio: *Qaddafi Pays a Business Call on Berlusconi*, in: *The New York Times*, 10 June 2009, available online at: <http://www.nytimes.com/2009/06/11/world/europe/11italy.html> (accessed on 26 February 2014); Karl Stagno-Navarra: *Libya's inhumane treatment of asylum seekers – the evidence*, in: *Malta Today*, 6 September 2009, available online at: <http://archive.maltatoday.com.mt/2009/09/06/t11.html> (accessed on 26 February 2014); Amnesty International: *Eritreans at risk of forcible return from Libya after detention*

there were around 9,000 refugees and 3,300 asylum-seekers in Libya from as different countries as Eritrea, Sudan, Somalia, Iraq, Liberia and Sierra Leone.⁹⁵ Some of them have refugee status certificates from the UNHCR, but the Libyan government does not accept them.⁹⁶ Because there is no concept of political asylum in Libya, several hundred Eritreans and other Sub-Saharan Africans seeking for political asylum are held in prison-like establishments up to several years, without a trial, without a hearing and without information about their future.⁹⁷

When returned to a Libyan port after an attempt to migrate to Europe, the detainees are often “crammed into inadequately ventilated vehicles [...] for periods of up to 21 hours, often in extreme temperatures”.⁹⁸ On these vehicles, the people do not have access to sanitary facilities and do not receive food or drinks. Many have allegedly died on such transport.⁹⁹ Once migrants are detained in centres, they may experience “overcrowding, absence of beds, poor hygiene, inadequacy of food, lack of health care and sanitation”.¹⁰⁰ A technical mission of the European Commission described

centre disturbances, 6 July 2010, available online at: <http://www.amnesty.org/en/news-and-updates/eritreans-risk-forcible-return-libya-after-prison-disturbances-2010-07-06> (accessed on 26 February 2014).

95 UNHCR: statistical snapshot January 2010, available online at: <http://www.unhcr.org/pages/49e485f36.html> (accessed on 26 February 2014). Current data shows that many Syrians have entered Libya in 2011 and 2012. Sub-Saharan arrivals remains strong, despite the instable political situation. For 2013, UNHCR estimates roughly 14,000 refugees, asylum-seekers and returned refugees resident in Libya, see: UNHCR (2013): 2013 UNHCR country operations profile – Libya, available online at: <http://www.unhcr.org/pages/49e485f36.html> (accessed on 26 February 2014).

96 United States Committee for Refugees and Immigrants (USCRI): World Refugee Survey 2009 - Libya, 17 June 2009, available online at: <http://www.unhcr.org/refworld/docid/4a40d2acc.html> (accessed on 26 February 2014).

97 Fortress Europe: In 15 pictures the evidence of tortures against refugees in Libya, 1 September 2009, in: <http://fortresseurope.blogspot.com/2009/09/in-15-pictures-evidence-of-tortures.html> (accessed on 26 February 2014); USCRI: United States Committee for Refugees and Immigrants, World Refugee Survey 2009 - Libya, 17 June 2009, in: <http://www.unhcr.org/refworld/docid/4a40d2acc.html> (accessed on 26 February 2014).

98 Council of Europe: Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, Strasbourg 28 April 2010, paragraph 42.

99 Ibid., see also Human Rights Watch: Stemming the flow. Abuses against migrants, asylum seekers and refugees, 2006, available online at: <http://www.hrw.org/en/reports/2006/09/12/stemming-flow> (accessed on 26 February 2014). Human Rights Watch: Pushed Back, Pushed Around. Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers, New York 2009.

100 Council of Europe: Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, Strasbourg 28 April 2010, paragraph 42.

detention centres to be in “appalling states”.¹⁰¹ This assessment was confirmed by a Frontex mission in 2007 affirming that the detention centres are “rudimentary and lacking in basic amenities”.¹⁰² Other forms of ill-treatment taking place are beatings, degrading and torturing punishment and the killing of migrants trying to escape detention centres.¹⁰³ Vulnerable migrants such as women are often sexually assaulted and raped.¹⁰⁴ Interviewees said that they experienced the most serious abuses when they first entered Libya or when they re-entered Libya after an attempted escape to Europe.¹⁰⁵ The absence of a refugee protection system has led to many situations where people were deported back to unsafe countries and their countries of origin based on collective rather than case-by-case decisions.¹⁰⁶ This makes Libya a particularly unsafe country in terms of exposing people to ill-treatment and indirect refoulement through chain refoulement.¹⁰⁷ Given the assessment and reports of the UNHCR, Human Rights Watch, the European Commission and Frontex delegations all confirming that ill-treatment and torture is commonplace in Libya, the conclusion is clear and evident: returning migrants to Libya exposes any person to serious risk of traumatising harmful ill-treatment, torture and chain refoulement.¹⁰⁸ The ECtHR reached a similar conclusion in the case of *Hirsi Jamaa v. Italy* by finding a violation of Article 3 ECHR

- 101 European Commission: Technical Mission to Libya on Illegal Migration 27 Nov – 6 Dec 2004, Report: Council of the European Union 7753/05, p. 5.
- 102 Frontex: FRONTEX-Led EU Illegal Immigration Technical Mission to Libya 2007, 28 May – 5 June 2007, available online at: <http://www.statewatch.org/news/2007/oct/eu-libya-frontex-report.pdf> (accessed on 26 February 2014), paragraph 5.3.
- 103 Jesuit Refugee Service Malta: Becoming Vulnerable in Detention. Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union, The DEVAS Project, National Report 2010, available online at: <http://www.jesuit.org.mt/files/634311314406818750.pdf> (accessed on 26 February 2014).
- 104 Médecins sans Frontières: “Not Criminals”, 2009, p. 7.
- 105 Human Rights Watch: Pushed Back, Pushed Around. Italy’s Forced Return of Boat Migrants and Asylum Seekers, Libya’s Mistreatment of Migrants and Asylum Seekers, New York 2009.
- 106 European Council: Council of European Union 7753/05, Technical Mission to Libya on Illegal Immigration, 4 April 2005; Amnesty International: Eritreans at risk of forcible return from Libya after detention centre disturbances, 6 July 2010, available online at: <http://www.amnesty.org/en/news-and-updates/eritreans-risk-forcible-return-libya-after-prison-disturbances-2010-07-06> (accessed on 26 February 2014).
- 107 Amnesty International EU Office: Immigration Cooperation with Libya: The Human Rights Perspective, 12 April 2005, available online at: http://www.amnesty.eu/static/documents/2005/JHA_Libya_april12.pdf (accessed on 26 February 2014); Alexander Betts: Towards a Mediterranean Solution? Implications for the Region of Origin, in: *International Journal on Refugee Law* 18:3 (2006), pp. 652–676.
- 108 Council of Europe: Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, Strasbourg 28 April 2010, paragraph 47.

“on account of the fact that the applicants were exposed to the risk of being subjected to ill-treatment in Libya”.¹⁰⁹ Hence, the Court assessed Libya as *unsafe* country¹¹⁰ and emphasised the foremost scrutiny required by states when any claimant seeks international protection.¹¹¹ Deliberate return then constitutes the case of refoulement and is thus in breach of international and EU law. This was the first legal case that explicitly addressed the push-back operations in the Mediterranean Sea. With the ruling, the ECtHR strengthened the right of asylum-seekers in an extra-territorial situation as part of an effective right to seek asylum.¹¹² Despite this ruling in February 2012, Libya and Italy confirmed their agreement on cooperation in returning irregular migrants.¹¹³ However, the European jurisprudence on asylum-related policies clearly develops towards consolidating the individual rights and freedoms of asylum-seekers.¹¹⁴ The Hirsi Jamaa decision stands in a row of decisions connected with asylum matters that conclude with reasoning on human rights and freedoms to be guaranteed to asylum-seekers as rights-holders.¹¹⁵ Some of these case law decisions dealt explicitly with the policy measure of detention, which is addressed in the following case study.

Detention of Irregular Migrants: the Case of Malta

Irregular migration to Malta started quite suddenly in 2002. There had been some landings in 2000 and 2001, but only in 2002 did numbers increase so drastically that irregular migration was perceived as a national policy challenge.¹¹⁶ Malta is a

109 Hirsi Jamaa and others v. Italy, Application no 27765/09, ECtHR 23 Feb 2012, final judgment, para 6.

110 Ibid, para 33, 36, 37, 123–129, 137.

111 Ibid, para 198.

112 Albrecht Weber: Menschenrechtlicher Schutz von Bootsflüchtlingen. Bedeutung des Straßburger Hirsi-Jamaa-Urteils für den Flüchtlingsschutz, in: Zeitschrift für Ausländerrecht und Ausländerpolitik 32:8 (2012), pp. 265–270, pp. 265–267.

113 International Boundaries Research Unit, Durham University: Italy and Libya reach agreement on border security and migration, 5 April 2012, available online at: https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=14308 (accessed on 26 February 2014), Signatories were the Libyan interior minister Fouzi Abdul Aal and the Italian interior minister Anna Maria Cancianeri in April 2012.

114 Louled Massoud v Malta, Application no. 24340/08, Strasbourg 27 July 2010; Hirsi Jamaa and others v. Italy, Application no 27765/09, ECtHR 23 February 2012; Aden Ahmed v Malta (2012), Application no. 55352/12, Strasbourg 23 July 2013; Suso Musa v Malta, Application no. 42337/12, Strasbourg 23 July 2013.

115 Ibid.

116 Nicholas De Blouw: Drowning Policies: A Proposal to Modify the Dublin Agreement and Reduce Human Rights Abuses in the Mediterranean. California Western International Law Journal 40 (2010), pp. 335–368.

small country in the Southern Mediterranean, just 180 miles north of Africa and the southernmost island of the EU. With a population of 400,000 (1,200/km²), Malta was challenged by an influx of 14,000 irregular immigrants between 2002 and 2011.¹¹⁷ Maltese policy-makers emphasise that the numbers must be read in relation to the population and country size.¹¹⁸ In relative numbers though, roughly 4,000 of those who arrived as irregular migrants, live in the community now. This represents just one per cent of the population.¹¹⁹ Malta is known for its strict policy to detain every irregular migrant. This policy is examined in light of Malta's international and European human rights law obligations. The analysis is twofold with a view to the lawfulness of detention and the accounts of ill-treatment in detention centres that might amount to inhuman or degrading treatment.

Case for unlawful and arbitrary detention

Malta implements a mandatory and strict detention policy which is unique in Europe. In 2013, it is the "only remaining EU Member State to maintain a mandatory detention policy, allowing for the application of alternatives to detention only when release is considered".¹²⁰ Every migrant without a visa is detained upon arrival and transferred to one of the detention centres.¹²¹ The detention centres are run by the Detention Service under the authority of the Ministry of Justice and Home Affairs.¹²² In 2009, almost 50 per cent of the migrants and asylum-seekers originated from Somalia.¹²³ Others came from Eritrea, Nigeria and Tunisia, with a majority receiving humanitarian

117 Times of Malta: Migrants would rather die at sea than at a detention centre in Libya – JRS, 27 April 2011, available online at: <http://www.timesofmalta.com/articles/view/20110427/local/migrants-would-rather-die-at-sea-than-at-a-detention-centre-in-libya-jrs.362456> (accessed on 26 February 2014).

118 European Parliament, Committee on Civil Liberties, Justice and Home Affairs: Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta, 23–25 March 2006, Rapporteur: Giusto Catania, Brussels 30 March 2006.

119 Derek Lutterbeck: Small Frontier Island: Malta and the Challenge of Irregular Immigration, in: *Mediterranean Quarterly* 20:1 (2009), pp. 119–144.

120 European Union Agency for Fundamental Rights: *Fundamental rights: challenges and achievements in 2012*, Luxembourg 2013, 52.

121 Global Detention Project: Malta Detention Profile. List of Detention Sites, Graduate Institute Geneva 2009, available online at: <http://www.globaldetentionproject.org/countries/europe/malta/list-of-detention-sites.html> (accessed on 26 February 2014).

122 Ministry of Justice and Home Affairs Malta: The Office of the Refugee Commissioner 2011, available online at: <http://mhas.gov.mt/en/MHAS-Departments/Detention-Services/Pages/DS.aspx> (accessed on 26 February 2014).

123 Ministry of Justice and Home Affairs Malta: Office of the Refugee Commissioner: Statistical Information, February 2010, available online at: <http://mhas.gov.mt/en/MHAS-De>

protection.¹²⁴ The high numbers of recognition for protection suggest that at least half of the people crossing the Mediterranean and probably even more have a legitimate claim for asylum under the Geneva Convention definition.¹²⁵

The basis in national law for detention is found in chapter 217 of the Laws of Malta. Art. 16 makes an express provision that any person without a legal permit of entry “may be taken into custody without warrant by the Principal Immigration Officer or by any Police officer”. This status is then the main reason why people are held in detention: because they lack legal documentation to stay in Malta. International and European refugee laws require Malta not to detain asylum-seekers.¹²⁶ The “right to life, liberty and security of person” under Art. 3 Universal Declaration on Human Rights (UDHR) is constituted of a very basic biological right to survival but furthermore extends to everybody’s right to personal freedom and to protection from any actions of the state that would interfere with the individual’s integrity rights.¹²⁷ The integrity of the person is the key element of Art. 3 UDHR and can be interpreted to mean the freedom of body, mind and soul. The idea is that people hold these positive liberty rights against the governmental authority which obliges itself to respect the individual’s freedom. In the literature, the connection is drawn between the framework right of liberty as in Art. 3 UDHR giving respect to individuals’ positive liberty rights and the complementary and correlated human rights of Art. 5 UDHR prohibiting torture and ill-treatment, as well as Art. 9 calling for the protection from arbitrary arrest and detention.¹²⁸ Article 9 [1] ICCPR connects the right of liberty and security of Art. 3 UDHR with the right not to be arbitrarily arrested as codified in Art. 9 UDHR. However, in contrast to the UDHR, the ICCPR allows exceptional circumstances to constrain the individual’s liberty rights by detaining or arresting a person if this is in accordance with national law. The ECHR mentions such specific circumstances by allowing, “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country”.¹²⁹ This is an express authorisation for arrest and detention in cases of irregular immigration. Malta argues that the deprivation of the

partments/The%20Office%20of%20the%20Refugee%20Commissioner/Documents/Statistical%20Information.pdf (accessed on 26 February 2014), p. 9.

124 Ibid, pp. 8–10.

125 Ibid, p. 8.

126 Art. 31 Refugee Convention, UNHCR: UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, available online at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html> (accessed on 26 February 2014).

127 Lars A. Rehof: Article 3, in: Asbjorn Eide et al. (eds.): *The Universal Declaration of Human Rights: A Commentary*, pp. 73–85; Scandinavian University Press, Oslo 1999, pp. 73–85.

128 Johanna Niemi-Kisiläinen: Article 9, in: Asbjorn Eide et al. (eds.): *The Universal Declaration of Human Rights*, pp. 209–221.

129 Art. 5 [1] (f) ECHR.

individuals' right to liberty is in accordance with Art. 5 [1] f ECHR for the reason that migrants cannot demonstrate legal documents to enter the country. If the reason for asylum can only be obtained in detention or if it serves to safeguard national security and public order, then administrative detention can be lawful.¹³⁰ The UNHCR dismisses however the general policy of detention and criticises detention as a widespread response to refugees entering a state in violation of immigration policies.¹³¹ According to UNHCR guidelines, asylum-seekers should generally not be held in custody.¹³² EU secondary law specifically requires that asylum-seekers shall not be detained solely by virtue of applying for asylum.¹³³ Another directive of 2008 limited the use of detention to the situation prior to removal, thereby recognising the proportional use of this coercive measure only if other means are ineffective.¹³⁴ Yet there is an exemption to the rule with reference to the necessity to establish a person's identity.¹³⁵ Detention is legitimate if it is for the purpose of identifying a person's nationality and background. The UNHCR allows detention in situations where asylum-seekers have destroyed their identity papers, have presented fraudulent documents or constitute a threat to national security and public order.¹³⁶ In line with this, the Council of Europe adopted a recommendation on lawful detention for the purpose of establishing the identity

130 Council of Europe: Committee of Ministers: Recommendation (2003)5 of the Committee of the Ministers to member states on measures of detention of asylum seekers, 16 April 2003, paragraph 3.

131 UNHCR/EXCOM: Executive Committee Conclusions 11 October 1996, General Conclusion on International Protection, No. 79 (XLVII).

132 UNHCR: UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999.

133 Art. 18 [1], Council Directive 2005/85/EC, see discussion in Heinrich Neisser: European Migration Policy, in: Belachev Gebrewold (ed.): *Africa and Fortress Europe. Threats and Opportunities*, Farnham 2007, pp. 139–158. The revised Procedures Directive 2013/32/EU requires that States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU (Reception Conditions).

134 Art. 15 [1] Council Directive 2008/115/EC.

135 Malta relies on Art. 5 [1] (f) ECHR that allows for "lawful arrest or detention of a person to prevent his effecting an unauthorised entry into country", Art. 6 (2), Art. 7 (2), (3) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJL 31/18, 6 February 2003 (hereafter: Reception Directive) provide for general exemptions from documentation and freedom of movement rules in case of "legal reasons" or "reasons of public order" that leave a wide margin of interpretation for the member states to use. Compared to this, the Reception Directive of 2013/33/EU is very strict in terms of exemptions from the reception condition standards with new and explicit rules on detention in Art. 8–11.

136 UNHCR/EXCOM: Executive Committee Conclusions 11 October 1996, General Conclusion on International Protection, No. 79 (XLVII).

and nationality of a person in the absence of identity documentation.¹³⁷ Many of the irregular migrants in Malta arrive without any legal documentation, some allegedly in hope for better chances to receive a legal status. Hence, Malta uses the exemption passage on lawful detention with the consequence that there are no clearly codified legal provisions for reception conditions in the national laws. This is not strictly in the sense of the EU Reception, Procedures and Qualification Directives which are supposed to establish safeguards for asylum-seekers and a set of rights for people not yet having their legal status confirmed by an official authority.¹³⁸ Accordingly, minimum standards on reception such as housing would have to be guaranteed.¹³⁹ Though, the Maltese Refugees Act incorporating the Refugee Convention, the 1967 Protocol and the European Directives relating to refugee matters, only effectively applies once an irregular migrant is recognised as refugee.¹⁴⁰ So far, the strict detention policy is backed by political pressure from the Maltese population.¹⁴¹ Yet, the 2013 revision of the Procedures Directive requires that exemptions from the provisions are strictly limited.¹⁴² Hence, there is pressure from the European side with the revision of the Directive and stricter exemption rules to abolish the collective detention policy.

137 Council of Europe: Committee of Ministers: Recommendation Rec (2003)5 of the Committee of the Ministers to member states on measures of detention of asylum seekers, Adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies, paragraph 3.

138 Reception Directive 2003/9/EC (revised by 2013/33/EU), Qualification Directive 2004/83/EC (revised by 2011/95/EU), Procedures Directive 2005/85/EC (revised by 2013/32/EU).

139 Art. 7 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJL 31/18, 6 February 2003 (hereafter: Reception Directive). The Directive was revised by Directive 2013/33/EU, the reference to freedom of movement and housing of asylum-seekers remains in Art. 7.

140 Refugees Act: Laws of Malta: Chapter 420. An Act to make provisions relating to and establishing procedures with regard to refugees and asylum seekers, 1 October 2001; Act XX of 2000, as amended by Act VIII of 2004, Legal Notices of 40 of 2005 and 426 of 2007, and Act VII of 2008; Part 1 [3].

141 European Network Against Racism: Shadow Report 2009–2010, Racism and Discrimination in Malta, by Jeannine Vassallo and Jean Pierre Gauci, March 2011, available online at: <http://cms.horus.be/files/99935/MediaArchive/Malta.pdf> (accessed on 26 February 2014). The report highlights the self-perception as a small ethnic community struggling for survival which is a historical and culturally rooted idea that surfaces in the immigration debate whereby the irregulars are perceived as “intruders” into society. The concept is also adopted by the national media and all over the spectrum of left and right-wing party orientations.

142 European Union Agency for Fundamental Rights: Fundamental rights: challenges and achievements in 2012, Luxembourg 2013, p. 50–52.

Malta's detention policy potentially challenges the human right to freedom from arbitrary detention and the freedom from inhuman treatment. It must be assessed whether Malta's detention policy meets the criteria established by ECtHR case law to ensure that detention is lawful, necessary and proportionate. Detention must be based on lawful procedures, necessary in the circumstances and proportionate, in order not to be arbitrary. A UN study on the freedom from arbitrary arrest concludes almost tautologically that an arrest or detention is arbitrary if it deviates from lawful procedures.¹⁴³ It is arbitrary if it is established by law, but the purpose of detention is "incompatible with respect for the right to liberty and security of person".¹⁴⁴ This means that detention as reception measure can be fixed in legal provisions and at the same time be illegitimate because the policy lacks the respect for basic human rights law in practice. In this reasoning, it is possible to have a national law – as is the case with Malta – which legalises detention but is nonetheless arbitrary because it violates core rights to liberty and security of person.¹⁴⁵ The risk of arbitrariness of detention has been discussed in several ECtHR cases. In 1986, the Court found that:

any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness. What is at stake here is not only the 'right to liberty' but also the 'right to security of person'.¹⁴⁶

Malta's detention policy allows for detention of anybody without a legal permit to stay in Malta. Apart from this, there are no specific provisions regarding treatment of detained persons. Nor are there any provisions on the conditions of detention or maximum duration of detention, but rather a general provision that the Minister may enact any regulation concerning immigration.¹⁴⁷ In practice, irregular migrants are held in detention until the determination of an asylum application. Hence, there is arguably a lack of legal provisions in national laws concerning the detention policy in Malta.

Another criterion to meet the demands of lawfulness was established by an ECtHR ruling on Art. 5 in 2001, when the Court found that besides complying with national law, detention should be necessary in the individual circumstance:

143 United Nations: Study of the Right of Everyone to be Free from the Arbitrary Arrest, Detention and Exile, UN Publication Sales No 65.XIV.2 (1965).

144 *Ibid.*, p. 7.

145 Katrine Camilleri: Malta, in: Katrine Hailbronner/Imelda Higgins (eds.), *Migration and asylum law and policy in the European Union, FIDE 2004 national reports*, Cambridge University Press, Cambridge 2004, pp. 267–290.

146 *Bozano v France* (1997), Application no 9990/82, 18 December 1986, (1987) 9 E.H.R.R. 297, paragraph 54.

147 Art. 8 [2] Immigration Act, Malta.

The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances.¹⁴⁸

Because of the grave impact of detention on the individual's human rights, the competent authorities must look at each individual case and consider whether there is any alternative to the coercive measure of detention. Recommended alternatives to detention include weekly appointments or interviews, release on bail, reporting in regular intervals and stays in open centres.¹⁴⁹ All major bodies dealing with migration, asylum-seekers and refugees such as the UNHCR, the International Organisation for Migration (IOM), the EU and the Council of Europe recommend that asylum-seekers should not be held in detention if any other less coercive measures are possible.¹⁵⁰ In Malta, necessity is not considered on an individual basis; instead detention is a collective reception measure, which therefore violates the necessity principle for lawfulness of detention according to ECtHR case law.

Moreover, detention must be proportionate in order not to be arbitrary. Proportionality requires that detention should not be a punishment for irregular migrants.¹⁵¹ However, in a meeting with a Council of Europe delegation, Maltese authorities openly declared their detention policy as a "powerful deterrent", aimed at discouraging any

148 *Witold Litwa v Poland*, Application no. 26629/95, 4 April 2000, (2001) 33 E.H.R.R. 53, paragraphs 72, 78.

149 UNWGAD: Human Rights Council, 13th session: Promotion and protection of all human rights, civil, political, economic social and cultural rights, including the right to development: Annex: Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009), A/HRC/13/30/Add.2, 18 January 2010.

150 UNHCR: UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999; Art. 7 [1] Council Directive 2003/9/EC of 27 January 2003, revised in Art. 7 [1] 2011/95/EU; the revised Directive provides for extensive provisions regarding the lawfulness of detention in Art. 8 [1] 2011/95/EU; International Organisation for Migration (2010). *Guidelines for Border Management and Detention Procedures involving Migrants. A Public Health Perspective*, Brussels 2010, available online at: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/health/Guidelines-Border-Management-and-Detention-Procedures-Public-Health-Perspective.pdf> (accessed on 26 February 2014).

151 Council of Europe: Committee of Ministers: Recommendation Rec (2003)5 of the Committee of the Ministers to member states on measures of detention of asylum seekers, Adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies, paragraph 4.

further arrivals of foreign nationals.¹⁵² Detention as deterrence is in violation of the spirit of the Refugee Convention aiming for protection and the well-being of persecuted people.¹⁵³ The UN Working Group against Arbitrary Detention argues that the principle of proportionality requires detention to be the last resort. In Malta however, detention is mandatory for every single irregular migrant. Even vulnerable people such as children, pregnant women and torture victims are detained upon arrival and only once they are in detention can they apply for a fast-track release.¹⁵⁴

Up until 2005, detention in Malta lasted 24 months on average. Minister at the time, Tonio Borg, admitted to an EU delegation that some detainees had spent up to five years in custody, but said that this policy had changed since 2005.¹⁵⁵ Malta is a member state of the EU since 2004 and thereby has acceded to EU legal provisions as such. Since Malta joined the EU it has adopted the Reception Directive and incorporated parts of it in the 2005 Refugees Act amendment. The impact has been that detention was limited to eighteen months in practice. Hence, EU law has made a difference: the reduction of Malta's length of detention can be seen as an improvement of Malta's compliance with international and EU human rights obligations in immigration and asylum policies. Though, full implementation of the EU directive would have required to fully abolishing detention of asylum-seekers. Detention of eighteen months is still excessive and falls short of international and EU requirements not to detain asylum-seekers. The EU immigration and asylum *acquis* requires Malta to give effective possibilities to asylum-seekers to seek protection and to grant them freedom of movement.¹⁵⁶ EU secondary law generally requires freedom of movement for asylum-seekers and confinement only under special and individual circumstances.¹⁵⁷

152 Council of Europe: Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, January 2004, Strasbourg 25 August 2005, p. 8.

153 Art. 1 Refugee Convention.

154 UNWGAD: Human Rights Council, 13th session: Promotion and protection of all human rights, civil, political, economic social and cultural rights, including the right to development: Annex: Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009), A/HRC/13/30/Add.2, 18 January 2010, paragraph 39.

155 European Parliament: Committee on Civil Liberties, Justice and Home Affairs, Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta, 23–25 March 2006, Rapporteur: Giusto Catania, Brussels 30 March 2006, p. 2.

156 Art. 7 Reception Directive 2003/9/EC. The Directive was revised by Directive 2013/33/EU, the reference to freedom of movement of asylum-seekers remains in Art. 7.

157 Art. 7 Reception Directive 2003/9/EC, revised in Art. 7 2013/33/EU.

The ECHR does not provide for a maximum length of detention, but case law suggests that detention “should not exceed a reasonable time” as otherwise it risks being arbitrary.¹⁵⁸ The length of detention can amount to a violation of the human right not to be arbitrarily arrested since Art. 5 [1] f ECHR requires that “immigration authorities [do] not [...] prolong unduly the detention of aliens pending consideration of applications for leave to enter, or for deportation”.¹⁵⁹ In the human rights case of *Louled Massoud v Malta* in 2010, the ECtHR assessed the lawfulness of detention of an Algerian based on the length of his detention in Malta.¹⁶⁰ The Court found that Malta had violated the applicant’s rights to liberty and security as enshrined in Art. 5 [1] and [4]. In the opinion of the Court, the eighteen months that the detainee spent in detention awaiting his asylum claim made him “subject to an indeterminate period of detention” and the “national system failed to protect the applicant from arbitrary detention”.¹⁶¹

Furthermore, the ECHR requires that detainees receive information on their reasons for, and rights in, detention; that they promptly see a judge, have a trial within a “reasonable time”; and are entitled to take proceedings on the lawfulness of detention with a “speedy” review by the Court.¹⁶² Detainees shall “be brought promptly before a judge” or another officer with judicial power according to Art. 9 [3] ICCPR. The European Court has found that this first interview should not be later than “four days” after the custodial measure, anything longer is unacceptable.¹⁶³ In Malta, there are numerous cases where a first interview takes place only after two weeks of detention as revealed by interviews and data of the detention centres.¹⁶⁴ In 2009, the UN Working Group talked to several asylum-seekers who were still waiting for their first interview after six months in detention.¹⁶⁵ This clearly violates international human rights law

158 *Tomasi v France*, Series A, No 241-A, Application No 12850/87, 27 August 1992 (1993), 15 EHRR 1, paragraph 84.

159 *Saadi v. United Kingdom* (2006), Application no. 13229/03, 11 July 2006, ECHR 13229/03, paragraph 43.

160 *Louled Massoud v Malta* (2010), Application no. 24340/08, Strasbourg 27 July 2010.

161 *Louled Massoud v Malta* (2010), Application no. 24340/08, Strasbourg 27 July 2010, paragraphs 71, 73.

162 Art. 5 [2], [3], [4], [5] ECHR.

163 *Brogan and others v the United Kingdom* (1988), Application no 11209/84; 11234/84; 11266/84; 11386/85, Strasbourg 29 November 1988, paragraphs 55, 56; ECtHR, *McKay v United Kingdom* (2006), Application no. 543/03, 44 E.H.R.R. 41.

164 *Jesuit Refugee Service Malta: Becoming Vulnerable in Detention*. Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union, The DEVAS Project, National Report 2010, available online at: <http://www.jesuit.org.mt/files/634311314406818750.pdf> (accessed on 26 February 2014).

165 UNWGAD: Human Rights Council, 13th session: Promotion and protection of all human rights, civil, political, economic social and cultural rights, including the right to

since Art. 5 [4] ECHR requires that a review of the lawfulness of detention has to be undertaken *speedily* by a court.¹⁶⁶ It is also in violation of the Body of Principles for the Protection of all Persons under any form of detention or imprisonment which requires that “a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority”.¹⁶⁷ The ECtHR effectively admonished Malta in the case *Sabeur Ben Ali v. Malta*, when the ECtHR dismissed Maltese reviews of the lawfulness of detention not to qualify as “speedy” under Art. 5 [4] ECHR.¹⁶⁸ In 2010, the ECtHR accused Malta’s authorities in another ruling of “failure [...] to conduct the proceedings with due diligence”.¹⁶⁹ Finally, the practice is in violation of EU secondary law, which requires a prompt hearing and decision, in case asylum-seekers are held in detention.¹⁷⁰ Maltese authorities argue that the lack of staff to deal with asylum procedures is the reason for the delay and hence for prolonged detention.¹⁷¹ It is, however, clearly problematic that people who are arrested for criminal charges receive better treatment than irregular migrants who entered Malta without the necessary documents and thereby committed an administrative offence. As the Catania Report phrases it: “Administrative infringement is punished by a prison sentence which sometimes, as in the case of Malta, is much worse than the normal prison regime”.¹⁷²

Detainees have the right to information about the reasons for being deprived of their liberty and a right to judicial control of detention.¹⁷³ Under EU law, a right to information is reaffirmed by the Reception Directive: information on the asylum procedure, about available reception conditions and about health care assistance should be available,¹⁷⁴ preferably in writing and in a language that the asylum-seekers understand.¹⁷⁵ Similarly, the Procedures Directive requires member states to guarantee information access, legal assistance and communication with NGOs to asylum appli-

development: Annex: Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009), A/HRC/13/30/Add.2, 18 January 2010, paragraph 35.

166 Art. 9 [3] ICCPR.

167 Principle 11.

168 *Sabeur Ben Ali v Malta* (2000), Application no. 35892/97 (2002), 34 E.H.R.R. 26, para 40.

169 *Louled Massoud v Malta*, Application no. 24340/08, Strasbourg 27 July 2010, para 71.

170 Art. 10 [1] d, Art. 18 [2] Procedures Directive 2005/85/EC.

171 European Parliament (2006): Committee on Civil Liberties, Justice and Home Affairs, Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta, 23–25 March 2006, Rapporteur: Giusto Catania, Brussels 30 March 2006, p. 10.

172 *Ibid.*, p. 9.

173 Art. 9 [3] ICPCR; Art. 5 [3] ECHR.

174 Art. 5 [1] ECHR.

175 Art. 5 [2] ECHR.

cants.¹⁷⁶ But interviews with detainees reveal that many remain uninformed about the reasons for their arrest and detention, which breeds uncertainty about their future and frustration.¹⁷⁷

There are only few routes for migrants to challenge the lawfulness or length of detention in general.¹⁷⁸ The only legal way for Maltese detainees to challenge detention is that of addressing the civil courts and the Constitutional Court by claiming Art. 5 [4] ECHR. However, practising lawyers affirm that the procedure is ineffective since it lasts two years or longer.¹⁷⁹ This deficiency was confirmed by the decision of the ECtHR on Louled Massoud, admonishing Malta for its lack of effective remedies to “contest the lawfulness and length of [...] detention”.¹⁸⁰ In the case *Aden Ahmed v. Malta* in 2013, the lack of speedy and effective review possibilities under Maltese domestic law to challenge detention by individuals was assessed by the ECtHR as violation of Art. 5 [4] ECHR.¹⁸¹

Thus, Maltese mandatory detention policy further violates international human rights law since irregulars are “subjected to mandatory detention without genuine recourse to a court of law”.¹⁸² This suggests a lack of efficient rule of law in a sensitive rights field. Detention in Malta may be legitimate in the very beginning, but it becomes arbitrary and therefore illegitimate in the course of time due to the length of detention, administrative delays in promptly reviewing the cases and a lack of remedy options for detainees to have the lawfulness of their detention reviewed. The systematic practice of long-term detention prior to the determination of an asylum application

176 Art. 10 [1] a-c Procedures Directive 2005/85/EC.

177 Council of Europe (2011): Report to the Maltese Government on the visit to Malta carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), May 2008, Strasbourg 17 February 2011.

178 *Aden Ahmed v Malta* (2012), Application no. 55352/12, Strasbourg 23 July 2013, paragraph 123.

179 UNWGAD: Human Rights Council, 13th session: Promotion and protection of all human rights, civil, political, economic social and cultural rights, including the right to development: Annex: Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009), A/HRC/13/30/Add.2, 18 January 2010, paragraph 56.

180 *Louled Massoud v Malta* (2010), Application no. 24340/08, Strasbourg 27 July 2010, paragraph 71.

181 *Aden Ahmed v Malta* (2012), Application no. 55352/12, Strasbourg 23 July 2013, paragraph 123.

182 UNWGAD (2010): Human Rights Council, 13th session: Promotion and protection of all human rights, civil, political, economic social and cultural rights, including the right to development: Annex: Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009), A/HRC/13/30/Add.2, 18 January 2010, paragraph 76.

is arbitrary in the understanding of the jurisprudence of the ECtHR due to lacking necessity, proportionality and deficient remedy options for detainees to challenge their situation.¹⁸³

Case for inhuman treatment

Moreover, the conditions in the detention centres might constitute a case of inhuman treatment, thereby challenging the fundamental right to freedom from torture and inhuman or degrading treatment as codified in Art. 5 UDHR, Art. 7 ICCPR, Art. 2 [1] CAT and Art. 3 ECHR.¹⁸⁴ Once a person is held in detention, the ICCPR requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.¹⁸⁵ A whole set of principles was elaborated in a General Assembly Resolution on the Protection of All Persons under Any Form of Detention or Imprisonment.¹⁸⁶ Detainees are clearly deprived of their liberty, but should not be denied their basic human rights irrespective of for example the nationality of the person concerned.¹⁸⁷

The UNHCR has recommended in subsequent conclusions that reception conditions shall guarantee the respect for human dignity and privacy of asylum-seekers.¹⁸⁸ Secondary EU law requires that asylum-seekers should be housed “in accommodation centres which guarantee an adequate standard of living”.¹⁸⁹ Private and family lives are a priority to be safeguarded in detention according to EU law,¹⁹⁰ as are separate facilities for men and women. Contrary to the EU secondary legal requirements on accommodation of asylum-seekers, the EU delegation reported a case in which two

183 *Aden Ahmed v Malta* (2012), Application no. 55352/12, Strasbourg 23 July 2013, paragraphs 145, 146.

184 The understanding of this principle in practical terms has been further elaborated in non-legally binding instruments such as the Standard Minimum Rules for the Treatment of Prisoners 1955 and was codified by the CAT. EU primary law prohibits torture and inhuman or degrading treatment or punishment (Art. 4, CFR).

185 Art. 10 [1] ICCPR.

186 United Nations General Assembly (1988): General Assembly resolution 43/173, 9 December 1988: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 1.

187 *Ibid*, Principles 3, 5.

188 UNHCR/EXCOM: Executive Committee Conclusions 11 October 1996, General Conclusion on International Protection, No. 79 (XLVII), 1996. UNHCR/EXCOM: Executive Committee Conclusion No. 93 - 2002: Conclusion on reception of asylum-seekers in the context of individual asylum systems, No. 93 (LIII) – 2002, EXCOM Conclusions, 8 October 2002.

189 Art. 14 [1] b Reception Directive 2003/9/EC.

190 *Ibid*, Art. 14 [2] a.

married couples and two single girls shared one room in the Hal Far Closed Centre. Malta's detention centres are "almost permanently overcrowded and characterized by an almost complete lack of privacy".¹⁹¹

Irregular immigrants are detained in facilities which are situated in former army or police barracks, military buildings, factories and schools. Médecins Sans Frontières call them "sub-human living conditions" and describe their observations:

Until February 2009, in Hermes Block zone E, there was only one functioning shower for more than one hundred people. In most areas, living quarters are permanently flooded with water leaking from broken sinks and toilets. In some cases, wastewater escapes from damaged pipes situated on the upper floors leaving residents exposed to excrement and urine, especially those who have to sleep on the floor.¹⁹²

In order to understand whether these conditions constitute ill-treatment, it is necessary to consult case law. Two cases of the ECtHR constitute guiding jurisprudence and are still used as references in understanding what constitutes inhuman treatment as opposed to torture: the Greek case and the Ireland v UK case. The accumulation of poor living conditions of detainees constituted inhuman treatment in the Greek case, namely the overcrowding of cells, the lack of beds, inadequate sanitary facilities and the lack of recreational activities and food.¹⁹³ In another case of Ireland v UK it was found that an action constitutes ill-treatment, if the treatment is more than humiliating. It is not necessary that there is a specific intention in causing pain suffered by the victim, either physically or mentally, but the deliberate harm to mental and/or physical integrity of the person can constitute ill-treatment.¹⁹⁴ Applying these criteria to Maltese detention serves to assess whether inhuman or degrading treatment occurs in European detention centres.

In the Safi Closed Centre, the EU delegation observed that up to 20 people were crowded in dormitories. The mattresses were dirty and without sheets. Food was served in large containers to share and eat without cutlery or plates. There was no heating, no hot water; broken showers and toilets without doors add up to the "appalling conditions".¹⁹⁵ In Safi and Hal Far, detainees could go outside for one hour per day,

191 Derek Lutterbeck: *Small Frontier Island: Malta and the Challenge of Irregular Immigration*, *Mediterranean Quarterly* 20:1 (2009), pp. 119–144, p. 134.

192 Médecins sans Frontières: "Not Criminals", 2009, p. 10.

193 Greek case (1969), Application no. 3321/67, 12 YB, E Com HR.

194 Ireland v UK (1978), Application no. 5310/71, ECtHR, 2 EHRR 25, 1978; see also: *Dougoz v Greece* (2001), Application no. 40907/98, 10 BHRC 306.

195 European Parliament: Committee on Civil Liberties, Justice and Home Affairs, Report by the LIBE Committee delegation on its visit to the administrative detention centres in

whereas in Lyster Barracks it also happened that there was no outside area available for months due to construction works.¹⁹⁶ These conditions amount to prison-like situations even if they are inappropriate for asylum-seekers according to international standards. The overall situation had not changed when the UN Working Group visited the detention centres in 2009: Some detainees even had to live in tents in the Lyster Barracks Closed Centre in the winter months.¹⁹⁷ Basic hygiene is not maintained in the Maltese detention centres.¹⁹⁸ Treatment of detainees is degrading, with food being thrown on the dirty floor as if to feed dogs, so it was reported by a detainee:

Even though the cell is in the toilets area, you must ask the soldiers permission to use the toilet because the cell gate is locked all the time. I shouted and begged for the first three days, but they didn't open the gate. The other unbearable thing for me was the food distribution: the soldiers used to put the food on the floor, even the bread. After ten minutes, it soaked up all the dirty water.¹⁹⁹

Such living conditions seriously challenge the human dignity and integrity. In yet another case on Art. 3 ECHR, the ECtHR found that the lack of health care and medical treatment can also constitute ill-treatment.²⁰⁰ According to EU legislation, asylum-seekers shall “receive the necessary health care which shall include, at least, emergency care and essential treatment of illness”.²⁰¹ It also requires that victims of physical, sexual and psychological violence receive special health care.²⁰² These requirements do not match the situation in Maltese detention centres. The medical assistance in Maltese detention centres relies on very limited resources resulting in poor health care service for thousands of detainees. Furthermore, long-term detention negatively

Malta, 23–25 March 2006, Rapporteur: Giusto Catania, Brussels 30 March 2006, p. 7.

196 *Aden Ahmed v Malta* (2012), Application no. 55352/12, Strasbourg 23 July 2013, paragraph 84.

197 UNWGAD (2010): Human Rights Council, 13th session: Promotion and protection of all human rights, civil, political, economic social and cultural rights, including the right to development: Annex: Report of the Working Group on Arbitrary Detention on its mission to Malta (19 to 23 January 2009), A/HRC/13/30/Add.2, 18 January 2010, paragraph 54.

198 Médecins sans Frontières: “Not Criminals”, 2009, p. 13.

199 *Ibid.*, p. 13.

200 *Hurtado v Switzerland* (1994), Application no. 1754/90, Series A No 280-A., 28 January 1994, paragraph 12.

201 Art. 15 Reception Directive 2003/9/EC, in the revised version: Art. 19 Reception Directive 2013/33/EU.

202 Art. 17, 20 Reception Directive 2003/9/EC, in the revised version: Art. 21, 22 Reception Directive 2013/33/EU.

affects the mental and physical health of detainees.²⁰³ Comparing the health situation of detainees upon arrival in contrast to long-term-detainees shows that detention has an adverse and deteriorating affect on the health of detainees in many cases. Médecins Sans Frontières referred to an exemplary case where out of a group of 60 people who were healthy on arrival, the organisation diagnosed 65 cases of scabies, chicken pox and respiratory tract infections within half a year.²⁰⁴ Apart from the insufficient medical treatment, quarantine conditions are unbearable: “patients frequently report being unable to shower for days at a time and having to urinate or defecate in empty food containers inside their room if unable to contact the guards”, watched by other quarantined inmates.²⁰⁵ Living in a detention centre is an oppressive experience that can create severe psychological problems since detainees often re-live the stress and fear they have experienced on their way fleeing persecution, violence and torture or even the journey itself.²⁰⁶ Many of the migrants coming from Libya have experienced torture and rape in Libyan detention centres. For such vulnerable people, even a short period of time in detention can have a traumatising effect. Being sent into a community of strangers without any privacy, in the absence of family and with uncertainty about the future, grief, anxiety, powerlessness and fear are commonly experienced emotions with effects on the mental integrity of detainees.²⁰⁷ Many cases are reported in which vulnerable people did not receive the necessary assistance but attempted suicide.²⁰⁸ The cumulative effects of bad living conditions, lacking sanitary facilities, poor health care conditions induce the assessment of the treatment of detainees as being degrading. This was confirmed by an individual court case of the ECtHR in 2013, reviewing detention of a Somalian woman in Malta considering the violation of Art. 3, 5 [1] and 5 [4] ECHR.²⁰⁹ The Court found a violation of Art. 3 ECHR in the given individual case due to lack of access to open exercise and fresh air, lack of heating in the sleeping facilities, an inappropriate diet and due to the fragile physical and mental health situation of the detainee.²¹⁰ Given that the applicant was confined for fourteen and a

203 Helen O’Nions: No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience, *European Journal of Migration and Law* 10 (2008), pp. 149–185.

204 Médecins sans Frontières: “Not Criminals”, 2009, p.17.

205 *Ibid.*, p. 11.

206 Fabrizio Gatti: *Bilal, Als Illegaler auf dem Weg nach Europa*, Munich 2010.

207 International Organisation for Migration: *Guidelines for Border Management and Detention Procedures involving Migrants. A Public Health Perspective*, Brussels 2010, available online at: <http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/health/Guidelines-Border-Management-and-Detention-Procedures-Public-Health-Perspective.pdf> (accessed on 26 February 2014).

208 Médecins sans Frontières: “Not Criminals”, 2009, p.21.

209 *Aden Ahmed v. Malta*, Application no. 55352/12, ECtHR, Strasbourg 23 July 2013.

210 *Aden Ahmed v. Malta*, Application no. 55352/12, ECtHR, Strasbourg 23 July 2013, paragraphs 97, 98.

half months, the Court found that the “cumulative effect of the conditions complained of diminished the applicant’s human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance”.²¹¹ Hence, the Court found that in sum the detention conditions amounted to “degrading treatment”,²¹² inducing a violation of Art. 3 of the Convention.²¹³ Despite the judgment, Malta still practices mandatory detention and does not consider changing this policy.

Conclusion

In the last ten years, several organisations, committees and delegations from the EU, the Council of Europe, the UN but also NGOs involved in detention services in Malta have reported about Malta’s detention centres and have all come to similar conclusions: The Maltese policy regarding irregular migrants is in violation of international human rights law that protects individuals from arbitrary detention, protects from inhuman treatment and grants an effective right to seek asylum. As the European Parliament delegation found, the conditions are “unacceptable for a civilised country and untenable in Europe, which claims to be the home of human rights”.²¹⁴ The arbitrariness and length of detention together with the living conditions add up to ill-treatment that will have a sustainable effect on the mental health of the migrants. Moreover, there is a “de facto denial of the right of asylum” due to the living conditions in detention centres.²¹⁵ The assessment for Italy brings a similar result as regards challenges of international and European law: Italy’s push-back policy ignored the non-refoulement principle by immediately returning irregular migrants without screening their need for international protection and without granting an effective right to seek asylum. This is contrary to the object and purpose of the Refugee Convention. Arguing that the denial of entry effectively impedes asylum claims, Italy is held responsible for an infringement of the customary law principle of non-refoulement. Italy violates this principle furthermore by exposing people to torture, ill-treatment and chain refoulement in Libya. This is in breach of the peremptory international norm prohibiting torture and ill-treatment.

211 *Aden Ahmed v. Malta*, Application no. 55352/12, ECtHR, Strasbourg 23 July 2013, paragraph 99.

212 *Ibid.*

213 *Ibid.*, paragraph 100.

214 European Parliament, Committee on Civil Liberties, Justice and Home Affairs: Report by the LIBE Committee delegation on its visit to the administrative detention centres in Malta, 23–25 March 2006, Rapporteur: Giusto Catania, Brussels 30 March 2006, p. 9.

215 *Ibid.*

The political measures that Italy and Malta pursued in answering irregular migration are in contrast to the duties that the states have committed to in the EU and on international level through treaty law. Human rights as constraints on state power aim to protect individuals from actions of a state that are contrary to their integrity and welfare. Individuals are the right-holders, but they have a weak position in claiming their rights when confronted with state power. Giving effect to general human rights depends heavily on actual practices in sensitive policy fields like asylum and migration. In the European case, there is a strong difference between the human rights discourse on the one hand and daily practice of EU member states in dealing with irregular migrants on the other hand. One explanation for this is the contextualisation of migration policy: In the discourse, irregular migration is every so often discussed in a context of justice and internal policy and referred to as *illegal immigration*. The manifold connections of irregular migration to protection needs, human rights and humanitarian aspects are thereby neglected. The distorted discourse on economic migrants dismisses that a majority of migrants reach a well-founded refugee status after tough procedures. In Italy and Malta, positive decisions for either refugee or subsidiary protection status prove continuously above 50 per cent.²¹⁶ This confirms that a majority of these Mediterranean irregulars are legitimate asylum-seekers.

Yet, the case studies also reveal that there is one actor that constantly strengthens the legal position of irregular migrants: the European Court of Human Rights. International law provisions like the Refugee Convention leave margin of interpretation and accordingly display a limited constraint on state conduct in dealing with irregular migrants. European secondary legislation is very specific in determining for example information, documentation requirements and minimum standards for housing arrangements, but it similarly leaves scope for the actual policy practices in member states. This pattern is only really interrupted by the case law decisions of the European Court of Human Rights. The analysed cases disclose that the Court is aware of the human rights dimension of return and detention policies in EU member states. Thus, the Court recognises asylum concerns as inherent to irregular migration and creates a different perception of irregular migrants by acknowledging the nexus of asylum and irregular migration.²¹⁷ Jurisprudence translates the international and European legal

216 Frontex: General Report, Warsaw 2009; Eurostat: Piotr Juchno: Population and social conditions. 75 thousand asylum seekers granted protection status in the EU in 2008, 92/2009, 25 November 2009, available online at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-092/EN/KS-SF-09-092-EN.PDF (accessed on 26 February 2014).

217 Exemplary cases decided in favour of individual rights as analysed in this article, are the cases *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Strasbourg 21 January 2011, paragraphs 229–230; *Louled Massoud v Malta*, Application no. 24340/08, Strasbourg 27 July 2010; *Hirsi Jamaa and others v. Italy*, Application no 27765/09, ECtHR, 23 February

provisions into normative standards that put basic rights and the respect for human rights first in asylum and migration matters. With the increased competence of the Court of Justice based on the Treaty revision of 2009, another Court has the potential to further increase the human rights standards in migration management. A recent decision suggests this prospect, since the Court of Justice of the EU confirmed an earlier decision of the ECtHR on Dublin transfers.²¹⁸ In this exemplary decision, the Court emphasised that systematic deficiencies in asylum systems can lead to serious human rights violations.²¹⁹ Since any action in asylum and migration management has to be in accordance with basic rights, transfers to countries with systematic deficiencies in hosting asylum-seekers and examining asylum applications are not compatible with EU law.²²⁰ It will be worthwhile monitoring how the two Courts contribute to improving policy responses to irregular migration by means of their decisions.

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2012; *Aden Ahmed v Malta* (2012), Application no. 55352/12, Strasbourg 23 July 2013; *Suso Musa v Malta*, Application no. 42337/12, Strasbourg 23 July 2013.

218 Judgement of the Court: Case C-411-10: *N. S. v Secretary of State for the Home Department und M. E. und andere (C-493/10) v Refugee Applications Commissioner und Minister for Justice, Equality and Law Reform*, 21 December 2011, paragraphs 77f, 81, 99. This case is in its substance similar to *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Strasbourg 21 January 2011, paragraphs 229–230. See discussion in: Michael Hoppe: *Aktuelle Rechtsprechung zum Asyl- und Flüchtlingsrecht*, in: *Zeitschrift für Ausländerrecht und Ausländerpolitik* 11–12 (2012), pp. 405–411, p. 411. See particularly Greece, Malta, Italy, Hungary and Romania are affected by „systematic deficiencies“ in their asylum systems.

219 Ibid.

220 Ibid.