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Relation to Libya: a Human
Rights Perspective

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Summary

The European Union is developing a common asylum system. The goal is to create certain minimum standards regulating the reception and procedures regarding asylum seekers and refugees. The Dublin II Regulation is one of the legal instruments created in this process. It determines which state is responsible for any particular asylum seeker and for their asylum application. The member state that allows an asylum seeker to enter the EU is responsible to determine their claim, no matter if the entrance is legal or not. This puts an extra burden on states with external borders, since they receive the majority of those seeking asylum. Italy is one of those states. Its location makes it attractive to migrants and asylum seekers trying to enter Europe from the Northern part of Africa. Specifically the Italian island Lampedusa regularly receives migrants and asylum seekers from Libya, coming in small vessels over the seas.

To receive asylum seekers is costly. The states with external borders have to carry the majority of this cost. In practice this has led to that EU strengthens its external borders, and thereby makes it more unreachable for the asylum seekers. There is a right in International law to seek asylum while in a state, but no right to obtain it, neither is there any right to enter the state to be able to seek asylum. However, when the EU consolidates its borders, the possibility for refugees to enter the state to apply for asylum is diminished.

What is important to know, is whether states with external borders live up to the regional standards and international human rights law when it comes to their refugee politics, or if there are practices of avoiding and even opposing their human rights responsibilities. The focus of this thesis is on Italy and its relation with Libya when it comes to refugees and asylum seekers trying to reach Europe. The purpose is to know whether Italy lives up to regional standards and international human rights law concerning their refugee politics in relation to Libya. The focus is on the principle of non-refoulement as well as on the Italian policy of detention of asylum seekers.

The conclusion is that Italy seems to be more interested in getting rid of the asylum seekers, than actually protecting their human rights. There are several evidences of practice by Italy that contradict their human rights obligations. Even though Italy might live up to regional regulations, these regulations sometimes seem to be in conflict with their overall international human rights obligations. The assessment is that Italy tends to avoid its international human rights obligations by externalizing its responsibility to protect refugees to Libya, a state well known for its dark human rights record.

Preface

I started to write this thesis in the autumn of 2006, but received my beautiful second daughter in December the same year, so I had to stop writing – for almost one year. Even though my intention was to finish it during my time on parental leave, I immediately understood that it would be impossible with two children at home asking for attention. Now, in the middle of May 2008, I can finally say that this thesis has come to an end. I want to thank my beloved husband for his endurance, support and encouragement during this time. Without you, this thesis would not have been finished!

Lena Pommer

Malmö, 24th of May, 2008

Abbreviations

AI	Amnesty International
CAT	Convention Against Torture
CDI	Identification Centers for asylum seekers
CEAS	Common European Asylum System
CPA	Induction Centers
CPTA	Temporary Reception and Assistance Centers
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECRE	European Council on Refugees and Exiles
EU	European Union
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
HLWG	High Level Working Group on Asylum and Migration
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JHA	Justice and Home Affairs
LIBE	The European Parliament Committee on Civil Liberties, Justice and Home Affairs
MS	Member States
NGO	Non-Governmental Organisation
OAU	Organization of African Unity
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees
TEC	Territorial Eligibility Commission
TOA	Treaty of Amsterdam

1 Introduction

1.1 Introduction

There have been several articles written in different newspapers, journals and magazines about the issue of asylum seekers and refugees trying to reach Europe. Articles about how migrants have drowned in small boats outside the shores of nice European beaches, about fences built to hinder the flow of migrants. “Fortress Europe” has become a label the EU politicians try to erase from the human rights rhetoric, but its implication somehow seems verified. In this, the European view is divided. As the internal financial trade prospers, and internal borders and tariffs are eased, the external border consolidates, with large human rights implications.

The EU is working hard to get a functioning common asylum system. All different states within the EU should live up to certain minimum standards and human rights safeguards. The problem is that no one of the member states actually wants to pay the price for a functioning asylum-system that protects the human rights of these persons, as it is expensive. The states with external borders have to pay the main costs for the common asylum system. This is a crucial point. Practices tend to implicate that states with external borders are restrictive in admitting refugees and asylum seekers, and instead try to circumvent the safeguards and main rules and principles put in place.

1.2 Purpose and Aim

This thesis focuses on Italy and its relation with Libya when it comes to refugees and asylum-seekers trying to reach Europe. The purpose is to know whether Italy lives up to regional standards and international human rights law concerning their refugee politics in relation to Libya. The reason why Italy is chosen among other European states is its geographical position and the flow of migrants that thereby continually tries to reach Europe from the northern part of Africa and specifically through Libya. Italy is one of the gateways to Europe, and therefore its laws, regulations and practices are of importance to the whole of Europe. Therefore it is of interest to know how Italy lives up to the European standards set to regulate and harmonise the refugee laws, and what effects its behaviour has on the migrants reaching, or trying to reach, its shores. The overall question this thesis tries to answer is ‘Does Italy live up to regional standards and international human rights law regarding their refugee politics in relation to Libya?’. To answer this question, the focus has been on the Italian and Libyan law and practices regarding two different areas: a) the detention of asylum seekers, b) the conformity to the principle of non-refoulement. The latter is viewed in regard to the expulsions made by Italy and Libya. There is also a final question if Italy outsources, or externalizes, its human rights responsibilities when it comes to migration management and protection of refugees.

1.3 Disposition

The first chapter contains an introduction to the issue. The second chapter deals with the international human rights standards and regional regulations Italy is obliged to comply with. There is a brief introduction to international treaties and conventions concerning human rights in general, and refugee rights specifically. A brief review is given of the EU regulations and functions important to the topic. The Procedure Directive is a bit more elaborated, since the directive is of considerable relevance to the issue. The third chapter deals with Italy. Laws, regulations and practices affecting refugees and asylum-seekers trying to enter its borders have a brief review. The focus is on the detention of migrants and asylum-seekers, the expulsions and deportations, and the complying by Italy to the principle of non-refoulement. The fourth chapter deals with Libya, its laws and practices concerning refugees and asylum-seekers, and its cooperation with Italy on this issue. Finally, the last chapter tries to answer the main question of the thesis with a focus on detentions, expulsions and the principle of non-refoulement.

1.4 Method and Material

To be able to answer the question posed, it is necessary to know the main international human rights standards and regional regulations that Italy, and Libya, has to comply with. In addition, it is necessary to know the national laws concerning asylum-seekers and refugees to be able to determine the compliance. Even though the laws might be in accordance with the international and regional standards, it is necessary to find out the practices by each country. Therefore, I have looked at reports of International NGOs, statistics from UNHCR and other agencies to see whether Italy and Libya has implemented its human rights standards. The main instruments used to be references for the international, regional and national standards, are those issued by the UN, the EU and national laws and regulations.

It has been very hard to find and use Libyan sources of law, since these have not been available in the English language. In the same way, it has been a problem to find relevant Italian legislation in this language. Therefore, I have had to rely largely on reports from NGOs. This has limited my possibility to make a study on primary sources, and instead it has been based on mainly secondary sources.

1.5 Delimitations and Definitions

The question posed to be answered by this thesis is; *does Italy live up to regional standards and international human rights law regarding their refugee politics in relation to Libya?* There is no possibility to go through all the regional regulations and international conventions concerning refugee rights that affect Italy. Therefore, the emphasis has been on Italy in relation to expulsions and deportations of migrants, the continuous detention of

asylum-seekers, and the Italian compliance with the principle of non-refoulement.

The definition of a migrant in this context is a foreign person trying to enter another state, or moving from one state to another.

The definition of a refugee is a foreign person that according to the Refugee Convention is in need of international protection.

The definition of an asylum-seeker is a foreign person asking for protection in a state through filing an application of asylum.

A Maghreb resident is a person living in Morocco, Algeria, Tunisia, Libya or Mauritania.

2 International and Regional Instruments Regulating Refugee Rights

2.1 International Instruments Regulating Refugee Rights and Human Rights

There are important treaties and conventions governing International Human Rights and the rights of refugees in the area of northern Africa and southern Europe. All member states in the EU, including Italy, are parties to the Geneva Convention on the Status of Refugees, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture. Thereby they are accountable to the international bodies set up under these treaties to monitor the compliance with the instruments, most notably, to the European Court of Human Rights. A fundamental principle of international law is that human rights should apply equally. The rights are for all and everyone – no matter sex, age or status. This principle is codified specifically in Article 2 of ICCPR (concerning distinction), and more generally in article 26 of the same instrument (concerning discrimination).

2.1.1 Universal Declaration of Human Rights

This instrument is not legally binding, as it is a declaration. It was passed by the General Assembly in December 1948. The importance of the declaration has grown throughout the years, and some articles are considered to be legally binding through customary law. One article important to refugees and asylum seekers, is article 14(1) and (2):

“1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”¹

This article has been highly debated since the words “the right to seek and enjoy in other countries asylum from persecution” could be interpreted as the right to obtain asylum. But the common understanding of this article is that there is no such right in international law. There is a right to seek asylum, but no automatic right to obtain it. The article is important, since it focuses on everyone’s right to seek and to enjoy asylum in other countries whilst suffering from persecution. The common understanding of this article is that there is a right to seek asylum while in a state, but no right to enter a

¹ *Universal Declaration of Human Rights*, adopted on 10 December 1948, Article 14, <www.unhcr.ch/udhr/lang/eng.htm>, last visited on 22 May 2008.

state to be able to seek asylum. However, there are NGOs and other agencies claiming that there is an implied right for refugees to enter the state to be able to seek asylum.

2.1.2 The 1951 Convention Relating to the Status of Refugees

The most important instrument that establishes and defines basic standards for the treatment of refugees are the 1951 United Nations Convention relating to the Status of Refugees (furthermore referred to as the Refugee Convention), and its 1967 Protocol.² All Member States in the European Union has ratified the Convention and its protocol. The Protocol abolishes the time-frame set by the convention in Article 1. There is a general definition of the term “refugee” in article 1:

“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.³

The Convention sets the basic rights that refugees are entitled to, as well as some minimum standards of treatment. Article 33 prohibits the expulsion or forcible return of people having refugee status:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁴

There is no right to expel or return the refugee to a country where his life or freedom would be threatened. However, the principle of “non-refoulement” does not bar the ratifying states from sending the refugee to a “Safe-third-country”.

According to what was agreed upon in the meeting 2001, organized by the UNHCR and the Lauterpacht Research Centre for International Law, article 33 applies to refugees irregardless of their formal recognition, as well as to asylum seekers. Regarding asylum seekers, the article applies until their status is finally determined in a fair procedure.

“The principle of non-refoulement embodied in Article 33 encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would

² *Geneva Convention relating to the Status of Refugees*, adopted on 28 July 1951, <www.unhcr.ch/html/menu3/b/o_c_ref.htm>, last visited on 22 May 2008.

³ *Ibid.* Article 1(2)

⁴ *Ibid.* 28, Article 33(1)

be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect refoulement”.⁵

According to some researchers, this implies that States, before returning a refugee or asylum-seeker, have to ensure that they get a fair determination procedure.⁶ There should be a documentation office to provide information on the human rights situation in the relevant country. The asylum-seekers should as well have the full opportunity to submit their application – including legal counsel, interpreters and an opportunity to appear personally before the decision-maker. Finally, the information of the right to apply for asylum, should be given in their own language.⁷

Article 31(1) of the Refugee Convention contains an important obligation on States not to penalise refugees who enter the borders “illegally”.

In December 1950, the United Nations General Assembly established The Office of the United Nations High Commissioner for Refugees (UNHCR).⁸ The agency leads and co-ordinate international action to resolve refugee problems and protect refugees all over the world. This includes ensuring that everyone can exercise the right to seek asylum and find refuge in another State, and that refugees should have “the option to return home voluntarily, integrate locally or to resettle in a third country”.⁹ To safeguard the rights and well-being of refugees is one of the primary focuses of the agency.

2.1.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

There is a specific article of interest in the Convention Against Torture (CAT) when it comes to the prohibition of refoulement, and this provision can be found in Article 3 of the Convention.

⁵ Global Consultations on International Protection, Second Track, Cambridge Roundtable, 9-10 July 2001 (Organised by the United Nations High Commissioner for Refugees And the Lauterpacht Research Centre for International Law), *Summary Conclusions on Non-Refoulement*, <www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&page=PROTECT&id=3baf3117f>, last visited on 22 May 2008.

⁶D. Green, Background Paper on the Interception at Borders and at Sea, *Searching for Solutions, Background Papers for the Executive Committee of the UNHCR Programme Annual Meeting 2002*, p. 61, <http://www.crr.unsw.edu.au/documents/Excom%20Papers.pdf>>, last visited on 22 May 2008.

⁷ *Ibid.*

⁸ *Statute of the Office of the United Nations High Commissioner for Refugees*, adopted 14 December 1950, p.4, <www.unhcr.org/protect/PROTECTION/3b66c39e1.pdf>, last visited on 22 May 2008.

⁹ UNHCR, The UN Refugee Agency, *Basic Facts*, <www.unhcr.org/basics.html>, last visited on 22 May 2008.

“No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁰

What is notable in this article is that the right not to be returned is not made dependent on fulfilment of any criteria in the Refugee Convention – that means that the person as such does not have to be a refugee for being protected by the provision.

The Committee against Torture supervises that this convention is followed by the ratifying states. It is necessary that the state has accepted the ability of individuals to make complaints to the committee, for the committee to be able to assess those complaints. This acceptance is made in the Optional Protocol to CAT. However, decisions made by the committee, are not binding towards the state party, only recommendations.

2.1.4 International Covenant on Civil and Political Rights

Article 7 in ICCPR states no one should be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹¹ If a state places a person at risk of such treatment the rights are breached. This is not changed by the fact that it is another country that de facto breaches the rights, if the first country has the knowledge of the risks. The rights are breached just as much as if the first country for example had committed the act of torture itself.

This is emphasised in the UN Human Rights Committee General Comment 20: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement”.¹² Article 7 therefore affords protection both to refugees and non-refugees. The same should be with Article 6 (protection of the right to life) and Article 9 (protection of the right to security of person).

2.2 Regional Instruments in Europe

The European Convention on Human Rights covers important areas concerning refugees and asylum-seekers.¹³ One article of concern is Article 3 that states that no one shall be subjected to torture, inhuman or degrading

¹⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted 10 December 1984, Article 3,

www.unhcr.ch/html/menu3/b/h_cat39.htm, last visited on 22 May 2008.

¹¹ *International Covenant on Civil and Political Rights*, 16 December 1966,

www.unhcr.ch/html/menu3/b/a_ccpr.htm, last visited 14 June 2008.

¹² *General Comment No 20, paragraph 9*, The Human Rights Committee, 44th session (1992),

www.unhcr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument, last visited on 22 May 2008.

¹³ *Convention for the Protection of Human Rights and Fundamental Freedoms* as amended by Protocol No.11, 4 November 1950,

conventions.coe.int/treaty/EN/Treaties/html/005.htm, last visited 14 June 2008.

treatment or punishment. The European Court of Human Rights has held that this provision prohibits the extradition of a person to a country if they are likely to be subjected to torture in that state.¹⁴ The article is also interpreted as to prohibit from extraditing an individual to another country if they are likely to suffer the death penalty in that state.¹⁵ Article 5 in ECHR states that no one shall be deprived of his liberty save some certain cases and in accordance with a procedure prescribed by law, and one example is:

“the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”¹⁶

NGO’s claim that detentions should be the absolute exception and the last resort, and only carried out where other alternatives are insufficient. Non-custodial measures should on individual grounds have been proven not to achieve the legitimate purpose. Detention according to Article 5(1)(f) is only permissible “where action is being taken towards removal with due diligence. A maximum time limit, which should be as short as possible, should be determined by law. When the removal order is not executed in that time period, the detainee shall be released.”¹⁷

2.3 EU and the Common European Asylum System

In the last years, important developments have taken place at a European level with regard to the development of asylum, immigration law and policy. The necessity of a common approach to those issues have become apparent, as political and economical cooperation has developed between the member states of the EU. One goal is to create a Common European Asylum System (CEAS).¹⁸ The following four legal instruments are the foundations of this system: a) the Reception Directive¹⁹ b) the Dublin II Regulation²⁰ c) the Qualification Directive²¹ d) the Procedures Directive²².

¹⁴ The decision of the European Court of Human Rights in *Soering v United Kingdom*, European Court of Human Rights, 1/1989/161/217, judgment of 7 July 1989, <www.worldlii.org/eu/cases/ECHR/1989/14.html>, last visited on 22 May 2008.

¹⁵ *Ibid.*

¹⁶ ECHR, Article 5(f)

¹⁷ Common principles on removal of irregular migrants and rejected asylum seekers, paragraph 4, *Human Rights News*, <hrw.org/english/docs/2005/09/01/eu11676.htm>, last visited on 22 May 2008.

¹⁸ *EU:s asylpolitik - Common European Asylum System (CEAS)*, <www.temaasyl.se/Templates/Page.aspx?id=736>, last visited on 22 May 2008.

¹⁹ *COUNCIL DIRECTIVE 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>, last visited on 14 June 2008

²⁰ *COUNCIL REGULATION (EC) No 343/2003 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*, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:005:0001:0005:EN:PDF>, last visited on 14 June 2008

The European Commission has the exclusive right to initiate immigration and asylum legislation. This right was given to the Commission in May 2004 five years after the Treaty of Amsterdam entered into force, and thereby replaced the inter-governmental procedure for decision-making that was previously in place.²³

The Schengen agreement came into force in 1995, abolishing the internal borders of the signatory states and creating a single external border. Thereby the immigration checks were to be carried out in accordance with a single set of rules.

2.3.1 The Reception Directive

The Reception Directive sets out minimum standards for the reception of asylum seekers while their claim is decided in the host country.²⁴ The directive covers areas such as access to work, education, housing, freedom of movement, healthcare and the reception of unaccompanied children. It was adopted in 2003, and member states had to conform their domestic legislation to the directive by February 2005. One reason for the minimum standards in this area is to uniform the standards of reception so that asylum applicants will not move on to countries where standards are perceived to be higher.

2.3.2 Dublin II Regulation

This instrument is used to determine which state is responsible for an asylum application. The core of the instrument is that the member state that allows an asylum seeker to enter EU – no matter if this is done legally or illegally – is responsible for deciding their claim. However, there are some other factors that also are considered in this assessment (such as the presence of family members in another Member State or prior issuance of a visa or residence permit to another member state.). Dublin II came into force in 2003 and replaced the original Dublin Convention that was not EU law.

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R0343:EN:HTML >, last visited on 14 June 2008.

²¹ *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, <europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>, last visited on 22 May 2008.

²² *COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status* <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>, last visited on 14 June 2008.

²³ European Council on Refugees and Exiles, *Overview of asylum developments in the EU*, <www.ecre.org/policy/eu_developments.shtml>, last visited on 22 May 2008.

²⁴ *Supra* note 19, The Reception Directive

2.3.3 Qualification Directive

The Directive contains a clear set of criteria for qualifying either for refugee or subsidiary protection status. It also sets out what rights are attached to each status. The directive recognises persecution by non-state actors. It allows for the recognition of refugees on the basis that they fear persecution due to their sexual orientation or their gender.

The directive was adopted 2004, and national governments were obliged to ensure that their domestic legislation was in conformity with the directive by October 2006.

2.3.4 The Procedures Directive

The Procedures directive sets minimum standards for procedures on granting and withdrawing refugee status, on issues such as access to legal representation, interviewing procedure, subsequent applications, use of detention, accelerated/manifestly unfounded procedures and effective remedy.²⁵ Circumstances are identified in which the concept of a “safe third country” can be applied.²⁶ The directive seeks to harmonise the concept of a safe third country across the EU, and proposes a list of safe countries of origin. However, it has been controversial to agree upon the countries included on the list, and no final agreements have been reached. The directive was adopted in December 2005, and national governments had to ensure that their policy and practice was not in conflict with the rules by 1 December 2007. The deadline for the implementation of Article 15 of the directive is 1 December 2008 (concerning legal assistance).

The European Parliament and different NGOs have heavily criticized the directive.²⁷ The UNHCR expressed its concerns about the directive, stating that it was “worried that the implementation of the directive may lead to breaches of international refugee law if no additional safeguards are introduced, and make it harder for refugees to have their asylum claims properly heard in Europe.”²⁸

ECRE found the directive disappointing in different ways.

“ECRE believes that this Directive falls well short of the standards conducive to a full and fair examination of an asylum claim.[...] The Directive is unnecessarily overcomplicated, and its purpose as a harmonizing instrument is severely undermined by the confusion surrounding admissibility tests and decision-making

²⁵ *Supra* note 22, The Procedures Directive

²⁶ Article 27 and 35(a) of the Procedures Directive

²⁷ EUROPEAN COUNCIL ON REFUGEES AND EXILES, *ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, IN1/10/2006/EXT/JJ, p. 4, <www.ecre.org/files/Infnotprocdir.pdf>, last visited on 22 May 2008.

²⁸ UNHCR, *EU directive may trigger downgrading of asylum standards*, 2 December 2005, <www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4390253a4>, visited on 22 May 2008.

on the merits of an application, the scope for multiple and different procedures, and the large number of permissible derogations from the 'minimum' standards the Directive is supposed to set."²⁹

The articles that ECRE is particularly concerned with are among others, Article 7, which constitutes a restriction on the right to remain in the state while the application to the first instance is pending to be examined. According to Article 39, there is also a non-suspensive effect of appeals. Article 23(4) is a provision also of severe concern for the ECRE. The article defines several reasons and a wide scope for accelerated procedures for asylum applications. These applications may also be "manifestly unfounded" according to Article 28(2) in situations that are not directly related to the substances on the merits of the claim, which is of grave concern as well. Also there is an absence of adequate safeguards – one example is Article 24 that gives states the possibility to create procedures that derogate from the basic principles defined in Chapter 2.

"ECRE is gravely concerned that these and other provisions do not properly reflect or ensure respect for Member States' obligations under international refugee and human rights law. Although the Directive only provides for minimum standards, a number of these provisions, if interpreted without reference to such obligations, would either require or entail fundamental rights violations."³⁰

Article 18 in the directive states that MS should not hold persons in detention on the sole ground that he is an applicant of asylum, but at the same time it declares that when an asylum applicant is held in detention, there should be a speedy judicial review. Unfortunately, the article does not contain any definition of detention or the permitted reasons for it. Neither are there any guidelines of time limits.

Article 35 defines the border procedures. Asylum applicants subjected to Article 35 (2) cannot rely on the fact that they should not be detained on the sole ground that they are asylum seekers, neither that the detention will be subjected to a specific judicial review, as Article 18 states. There is a possibility that such applicants, according to 35(4) can be confined at the border without judicial review for up to four weeks.

Article 21 states that UNHCR should have access to asylum seekers, and also have access to information on individual applications.

Article 41 states that the MS are bound by the confidentiality principle in relation to the information obtained concerning the asylum seekers.

The legality of some of the Procedures Directive's provisions has been challenged before the European Court of Justice.³¹ The European Parliament wanted some of the provisions annulled. The 6th of May this year, the court made a judgement. The court annulled the articles 29(1) and

²⁹ *Supra* note 27, p. 4.

³⁰ *Ibid*, p. 5.

³¹ European Union - Delegation of the European Commission to the United States, *EU COMMISSION WELCOMES COUNCIL'S AGREEMENT ON COMMON EUROPEAN ASYLUM SYSTEM*, No 69/04, 30 April 2004, <www.eurunion.org/News/press/2004/20040069.htm>, last visited on 22 May 2008.

(2) and 36(3) of the Directive, which concerns the decisions of the lists of safe-third countries.³²

2.3.5 Hague Programme

The Hague Programme was launched by the EU in 2004.³³ It marks the second phase of the process of a common European asylum system by 2010. The program focuses among other things on how to achieve a single EU procedure to determine claims, and the pressure that is on the asylum systems and reception capacities in EU countries with external borders. It also focuses on what is called “Regional Protection Programmes”.³⁴ This concerns the external dimension of the EU asylum policy. A proposal for a directive on “common standards and procedures in Member states for returning illegally staying third country nationals” was presented as part of the Hague Programme in 2005.³⁵ Up to this date, progress has been made in the process.³⁶

2.4 Regional Instruments in Africa

2.4.1 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa

In 1969, the Organization of African Unity adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa.³⁷ This convention was an answer to the growing number of refugees fleeing wars

³² *European Parliament v. Council of the European Union*. C-133/06. European Union: European Court of Justice. 6 May 2008. Online. UNHCR Refworld, available at: www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4832ddb92, Last time visited on 22 May 2008.

³³ COMMISSION OF THE EUROPEAN COMMUNITIES, Brussels, 28.6.2006 COM(2006) 331 final, *COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT Implementing The Hague Programme: the way forward*, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0331:FIN:EN:PDF>, last visited on 14 June 2008.

³⁴ Amnesty International, *EU regional protection programs: Enhancing protection in the region or barring access to the EU territory?* September 2005, <refugeelaw.qeh.ox.ac.uk/pdfs/ai-eu-on-rpps-october-2005.pdf>, last visited on 22 May 2008.

³⁵ COMMISSION OF THE EUROPEAN COMMUNITIES, Brussels, 1.9.2005, COM(2005) 391 final, 2005/0167 (COD), *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on common standards and procedures in Member States for returning illegally staying third-country nationals*, <europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0391en01.pdf>, last visited on 22 May 2008.

³⁶ European Parliament, The Legislative Observatory, <www.europarl.europa.eu/oeil/file.jsp?id=5269672>, last visited on 22 May 2008.

³⁷ *CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA*, 10 September 1969, <www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf>, last visited on 22 May 2008.

and internal conflicts in Africa.³⁸ There is an expanded definition of the term “refugee” in the OAU Convention, compared with the Refugee Convention. According to the OAU, the criterion “well-founded fear of persecution” was not enough to cover all the different refugee situations in Africa. Therefore, a second paragraph was entitled to article 1:

“The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”³⁹

The question of asylum is regulated in Article 2, and there it also says in paragraph 3;

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.”⁴⁰

The OAU Convention complements the Refugee Convention, rather than duplicates it. It entered into force in June 1974, and is now ratified by 45 States.⁴¹ Libya has ratified the Convention.

2.4.2 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' rights is also an important instrument in dealing with refugees.⁴² One article that emphasizes this area in the Charter is Article 12, which states:

“3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. 4) A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. 5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”⁴³

³⁸ *Fact Sheet No. 20, Human Rights and Refugees*, p.5, <www.ohchr.org/Documents/Publications/FactSheet20en.pdf>, last visited on 22 May 2008.

³⁹ *Supra* note 37 Article 1, paragraph 2.

⁴⁰ *Supra* note 37 Article 2, paragraph 3.

⁴¹ List of countries which have signed the African Refugee Convention, <www.africa-union.org/root/au/Documents/Treaties/List/Convention%20on%20Refugees.pdf>, last visited on 22 May 2008.

⁴² *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, University of Minnesota Library, <www1.umn.edu/humanrts/instree/z1afchar.htm>, last visited on 22 May 2008.

⁴³ *Ibid.* Article 12

Libya has ratified the Charter.⁴⁴ There is an African Court on Humans and Peoples Right that is set up to rule on the compliancy of the signatory states to the Charter.

2.5 Assessment and Conclusions

There is an international framework in place protecting refugees, but it only becomes “activated” nationally when a state ratifies the specific conventions and treaties. There is no international right for an asylum seeker to enter another state to be able to get protection and refugee status, but if an entrance is made, the refugee should be protected. There is no international court to overview the compliancy of states in this regard, but there are certain international bodies set up under the treaties to monitor the compliance. The European Court of Human Rights makes rulings and decisions when a state trespasses the rules in the European Convention on Human Rights.

The EU framework is developed with a focus of burden sharing when it comes to the costs of receiving asylum seekers. Minimum standards are set in the directives issued by the EU, and the states can regulate higher standards if desired. However, some of the agreed provisions raise serious issues under International Refugee and Human Rights Law. One example is that the European Parliament has taken the Council before the European Court of Justice for violations of International Human Rights Law in the 2003 Directive on Family Reunification.⁴⁵ There are also concerns about the Procedure Directive. If common minimum standards undermine fundamental human rights law instead of verifying and developing them, the member states of the union should react. The regulations issued by the EU should not constitute a danger to refugees and asylum-seekers by its weak human rights protection.

Africa is also developing a framework safeguarding the protection for refugees. However, there is a gap between the relatively massive European legislation issued in this regard, and the African legislation. Anyway, one should not underestimate the guiding and indicatively importance the African framework has. There is an African Court on Humans and Peoples Rights, but so far, it is hard to put hope to the court if a state trespasses the Charter, due to that the court is still being developed and not yet is accepting matters.⁴⁶

⁴⁴ List of Countries Who Have Signed, Ratified/Adhered to the African Charter On Human And Peoples' Rights, <www1.umn.edu/humanrts/instree/ratz1afchr.htm>, last visited on 22 May 2008.

⁴⁵ M-T Gil-Bazo, *The European Union's external dimension of asylum and migration policies from an International Refugee and Human Rights Law perspective*, <www.fmreview.org/pdf/gilbazo.pdf>, last time visited on 18 January 2008.

⁴⁶ A. Zureick, , *NGOs and the African Court in Humans ans Peoples Rights*, Social Edge <www.socialedge.org/blogs/alyson-in-africa/archive/2008/04/16/ngos-and-the-african-court-on-human-and-peoples-rights>, last visited on 13 June 2008.

3 ITALY

3.1 Introduction

Italy is a part of the European Union, and as such has to implement the laws and directives that are legislated by the Union. It is also a party to the Schengen agreement, but in a different position than many other EU states because of its geographical position. It is located near the African continent, and has 8,000 km of coasts – only the Mediterranean separate the country from Libya. By having external borders, Italy has a responsibility towards the Union as a whole, to be effective in its controlling measures. Lampedusa, the Italian island between Libya and Italy, is well known for attracting migrants and refugees. According to UNHCR, in 2007 nearly 20,000 migrants arrived to Italy by boat from North Africa of which 471 were reported missing or dead.⁴⁷ Of those 20,000, there were 12,000 migrants that arrived to Lampedusa. During only one week in February this year (22-27 Feb) a total of 1,104 people (including 84 children and 87 women) arrived to the island. It is a new record for that time of the year.⁴⁸ In 2007 there were 14,000 persons that applied for asylum in Italy. Asylum applications from those who arrived by sea were approximately 50 %, and of those approximately 57 % were granted some form of protection.⁴⁹

3.2 Italy and International Human Rights Law

Italy is a party to the Refugee Convention. It lifted the geographical reservation in Article 1 only in 1990. Italy is also a party to other core human rights treaties; the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention Against Torture. By this, Italy is accountable to the international bodies set up under these treaties to monitor the compliance with these instruments, most notably, to the European Court of Human Rights.

⁴⁷ Reuters Foundation AlertNet, *EU funds centre to help illegal migrants in Libya*, published 080310, <www.alertnet.org/thenews/newsdesk/L1065919.htm>, last visited on 22 May 2008.

⁴⁸ Reuters Foundation AlertNet, *Italy: Surge in sea arrivals from Libya, 29 February 2008*, <<http://www.alertnet.org/thenews/newsdesk/UNHCR/5ae9da8763b719efaf16635ab4a99da9.htm>>, last visited on 22 May 2008.

⁴⁹ International Organisation for Migration, *Praesidium Strengthening reception capacity in respect of mixed migration flows*, p. 15, <www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/managing_return_migration_042108/presentations_speeches/lampedusa.pdf>, last visited on 22 May 2008.

3.3 Italian Asylum- and Refugee Law

Italy lacks a specific and comprehensive asylum law - there is no organic law on asylum at all.⁵⁰ Instead points dealing with asylum are included in legal texts and regulations that deal with immigration. The right to asylum in Italy is based on article 14 of the Universal Declaration of Human Right as well as article 10.3 of the Italian Constitution.⁵¹ Article 10.3 states:

"A foreigner to whom the practical exercise in his own country of democratic freedoms, guaranteed by the Italian Constitution, is precluded, is entitled to the right of asylum within the territory of the Republic, under conditions laid down by law".⁵²

Since 1990 the asylum procedure has been organized through Article 1 of law 39/90 (known as the "Martelli law").⁵³ This law was partially modified 1998 by law 40/98, known as the "Turco-Napolitano law". The 1998 law implied, with few exceptions, detention of persons who enter or reside irregularly in Italy and are awaiting deportation to their country of origin. It established the use of detention centres, where migrants awaiting removal can be held. Detention in a CPTA must be confirmed by the competent civil judge ("*giudice ordinario*"), who also has competence over appeals against expulsion orders.

Italy has a formal cooperation agreement with UNHCR, and the government is working closely with the organization.

3.3.1 The Bossi-Finni Law

In year 2002 the Martelli law was included as a part of law 189/02 – the "Bossi-Finni law". The Bossi-Finni law strengthens the police controls over borders, as well as fights the illegal immigration at borders more specifically.⁵⁴ The law is also tightening and strengthening the rules about repatriation and expulsion of those found within the nation without legal titles to remain there. Meanwhile, the government studies proposals to modify these rules and measures. The desire is to relax the measures concerning asylum and immigration.⁵⁵

⁵⁰ Amnesty International, *Amnesty International Report 2007 - Italy*, 23 May 2007.

UNHCR Refworld, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46558ed02>, last visited on 23 May 2008.

⁵¹ Report of International Fact-finding Mission, *Italy, Rights of Asylum in Italy: Access to procedures and treatment of asylum seekers*, International Federation for Human Rights, no. 419/2, June 2005, p. 8, <www.fidh.org/IMG/pdf/eu_asylum419a.pdf>, last visited on 22 May 2008.

⁵² Article 10, comma 3, Constitution of Italian Republic, 22 December 1947, <servat.unibe.ch/icl/it00000_.html>, last visited 14 June 2008.

⁵³ *Ibid.*

⁵⁴ A C. Attardo, Legislationonline, *Italy, external borders*,

<www.legislationonline.org/?tid=132&jid=27&less=false>, last visited on 22 May 2008.

⁵⁵ European Parliament, Directorate-General Internal Policies, Policy Department C, Citizens Rights and Constitutional Affairs, *The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a*

The Bossi-Finni law also establishes, within the Ministry of Interior, a Central Directorate on immigration and activities of border police. One main issue of this body is to coordinate the border police activities on illegal immigration. The law entered into force in September 2002, but the asylum norms have only been implemented since April 2005, when the Implementing Regulation 303/04 entered into force. The regulation established a new asylum procedure. There are two different asylum procedures that can be distinguished in the regulation; the simplified- and the ordinary procedure, and seven Territorial Commissions which are responsible for the recognition of refugee status. They are coordinated by a National Commission.

In the simplified procedure the asylum seeker is detained in an Identification Centre. After the asylum seeker has filled in an application of asylum, the head of the local Police Headquarters sends the documents to the Territorial Eligibility Commission (TEC) which shall be done within two days after receiving the application. The TEC then interviews the person within 15 days, and the decision is reached within the next three days.

In the ordinary procedure the TEC has to interview the asylum seeker within 30 days, while the person is free to move around within Italy.

The purpose is that the simplified procedure should apply to asylum seekers without documents, or with false documents, or if there is a need to evaluate the grounds of their application. In practice, however, many applicants undergo the ordinary procedure since there is a lack of Identification Centers.⁵⁶

There are three different decisions that the TEC can make in both procedures; recognition of refugee status, rejection of refugee status and recognition of subsidiary protection.

When there is a negative decision, the applicant has the possibility to lodge an appeal within five days of notification of the decision. The appeal shall be lodged at the “Integrated Commission” composed of the Territorial Commission joined by one member from the National Commission.

There is also a possibility to lodge judicial appeals before the Civil tribunals, where there is no suspensive effect. Another way is to lodge abroad at Italian Embassies. There is no inadmissible procedure in Italian asylum legislation.

particular focus on provisions and facilities for persons with special needs in the 25 EU member states, Contract : REF IP/C/LIBE/IC/2006-181 – December 2007, p. 104, < http://www.libertysecurity.org/IMG/pdf_eu-ep-detention-centres-report.pdf>, last visited on 22 May 2008.

⁵⁶ European Council on Refugees and Exiles - *Country Report 2005*, p. 173, < www.ecre.org/files/ECRE%20Country%20Report%202005rev.pdf>, last visited on 22 May 2008.

3.3.2 Detention in Italy

The Italian government has implemented a mandatory detention policy for migrants who enter Italian territory without authorization. There are different kinds of closed centers (Supplement A). The management of those centers is outsourced, by the Ministry of Interior, to organizations such as the Italian Red Cross. The police are responsible for supervising the detainees in the centers.⁵⁷

The CPTA (Temporary Reception and Assistance Centers): Maximum duration of detention is 60 days. Arrested foreign nationals that are subjected to a removal or deportation order within the framework of a penal procedure, are detained in these closed centers. The center on Lampedusa is a CPTA.

The CPA (Induction Centers): The migrants who arrive by sea are held in these centers. In theory the duration of residence is limited to “the time required to establish the legitimacy of the foreign national's presence in the country”.⁵⁸ However, in practice the duration of detention is unlimited. It can be prolonged to months, even years. These centers have a hybrid status and have never been subject to clear regulations. In theory they should be semi-open, but in practice foreign nationals are detained in the same way and under the same conditions as in the CPTA.

The CID (Identification Centers for asylum seekers): Asylum seekers are held in these centers during the time of identification. The Bossi-Fini Law allows for generalized detention during the entire asylum procedure of asylum seekers arriving irregularly.⁵⁹ Theoretically the duration of residence is limited to 20 days. However, in practice, the average stay is one month. Different regional bodies run these centers. The conditions depend on the type of centre, sometimes the same as in closed detention centers, sometimes semi-open. The use of CID has become widespread, even though it first was intended to be sporadic. This has led to the systematic detention of asylum seekers. There are specific criteria deciding when an asylum-seeker should be detained, however the decision whether to put them in a CPA or CID is arbitrary. Primarily the decision is determined on the number of available places in the centers.⁶⁰ CIDs are often located in the same buildings as CPTAs, which blur the difference between the two kinds of centers.⁶¹

⁵⁷ *Supra* note 55.

⁵⁸ *Supra* note 55.

⁵⁹ AI Index: EUR 30/001/2006 Amnesty International February 2006, *Italy: Invisible children - The human rights of migrant and asylum-seeking minors detained upon arrival at the maritime border in Italy*, p.7
www.amnesty.org/en/library/asset/EUR30/001/2006/en/dom-EUR300012006en.pdf, last visited on 23 May 2008

⁶⁰ *Supra* note 55.

⁶¹ *Supra* note 59.

All those centers are according to HRW, detention centers “as detainees are not free to leave”.⁶² There are eleven existing holding centers in Italy, most of them are located in the south.⁶³ Rutvica Andrijasevic describes the centers as follows: “CPTAs are instruments for the detention of undocumented migrants pending expulsion and their function is to ensure effective functioning of expulsion procedures. Identified as complementary, detention and expulsion of undocumented migrants are crucial pillars of Italy’s politics towards irregular migration”.⁶⁴

UNHCR’s Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, 1999, state that:

“As a general principle asylum-seekers should not be detained. According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognized as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter a territory illegally. However the position of asylum-seekers differs fundamentally from that of ordinary aliens in that they may not be in a position to comply with the legal formalities for entry. This element, as well as the fact that asylum-seekers have often had traumatic experiences, should be taken into account in determining any restrictions on freedom of movement based on illegal entry or presence.”⁶⁵

There are complaints concerning all these closed centers by various organizations and the LIBE committee. The complaints regards poor living conditions, which even are described as dehumanizing when using “large cages and containers to detain people in some CPTA or precarious structures such as caravans or trailers in some CPA”.⁶⁶ Overcrowding, poor hygiene conditions and severe prison-like detention conditions in the CPTA’s are some of the issues. Among other issues are lack of access to information on detainees’ rights, lack of translators and lack of legal assistance.

The police authorities recently started formally admitting small numbers of asylum seekers to the asylum procedure on Lampedusa.⁶⁷ The majority are

⁶² Human Rights Watch, *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, Volume 18, No 5(E), September 2006, p. 106, <<http://www.hrw.org/reports/2006/libya0906/libya0906webwcover.pdf>>, last visited on 23 May 2008.

⁶³ R. Andrijasevic, *How to Balance Rights and Responsibilities on Asylum at the EU’s Southern Border of Italy and Libya*, Central European University Center for Policy Studies, CPS International Policy Program 2005/2006, p. 4, <www.no-fortezza-europa.eu/uploadFortress/docs/andrijasevic_LibyaLampedusa.pdf>, last visited on 23 May 2008.

⁶⁴ *Ibid.*

⁶⁵ OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES GENEVA, *UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS*, (February 1999) Guideline 2, p. 3, <www.unhcr.org.au/pdfs/detentionguidelines.pdf>, last visited on 23 May 23, 2008.

⁶⁶ *Supra* note 55, p. 105.

⁶⁷ *Supra* note 56, p. 174.

admitted after being transferred to an Identification Centre somewhere else in the country.

3.3.3 The Principle of Non-Refoulement

Italy and Libya has the same legal obligations under the universal human rights instruments (for example; not to arbitrarily detain, collectively refoule or expel). Further on, Italy has obligations under European Human Rights Law. For example, Italy has a non-refoulement obligation both under the European Convention on Human Rights as well as under the Refugee Convention. This obligation is triggered

“... the moment an individual enters Italian waters or is interdicted on the high seas by the Italian navy. Italy therefore shares responsibility for any refoulement resulting from expulsions and for any torture or inhuman or degrading treatment that the expelled individual may suffer in Libya (or if returned by Libya to their country of origin or any other place).”⁶⁸

There is a prohibition of collective expulsions in Article 13 of the ICCPR, Article 19(1) of the EU Charter of Fundamental Rights and Article 4 of Protocol 4 of the European Convention on Human Rights. Collective expulsions has, by the European Court of Human Rights, been interpreted to mean “any measure by which foreigners are forced, as a result of belonging to a group, to leave a country, apart from cases in which this measure is adopted following and based on a reasonable and objective assessment of the specific situation of each of the foreigners who compose the group.”⁶⁹ According to international and regional human rights standards, for an expulsion to be non-discriminatory, it is necessary that the differentiation based on nationality is both legitimate and proportionate. However, it is also necessary that in each case there is an individual assessment of the risk of return.⁷⁰ For an expulsion to be legitimate according to Italian legislation, there are certain safeguards that have to be met. Those are for example “access to UNHCR, legal counsel, competent interpreters and a judge who will confirm the order. Each person must receive written information in a language which he or she understands that they are about to be expelled and must be told of their right to appeal against such an order.”⁷¹ According to HRW there are many expulsions from Lampedusa that have not met those safeguards. HRW claims that in many cases people seem to have been sorted by nationality, where the sub-Saharan Africans have been transferred to other detention centers in Italy (where they were given the possibility to

⁶⁸ *Supra* note 62, p. 114,

<<http://www.hrw.org/reports/2006/libya0906/libya0906webwcover.pdf>>, last visited on 23 May 2008.

⁶⁹ See *Conka v Belgium*, European Court of Human Rights, Judgment 5 February 2002, (Application no. 51564/99), note 59,

<cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Conka%20%7C%20vs.%20%7C%20Belgium&sessionid=7978412&skin=hudoc-en>, last visited on 23 May 2008.

⁷⁰ *Supra* note 62, p. 114

⁷¹ *Ibid.*

apply for asylum), and the Maghreb nationals have been expelled. If discerning people by nationality, the individual right to seek asylum is denied. According to HRW, in those cases, the Maghreb nationals are not even given the chance to require asylum.⁷² To ignore the possibility that a certain group of people may have grounds to seek asylum is against fundamental human rights.

More than 2,800 migrants have been sent back from Lampedusa to Libya, between years 2004-2006.⁷³ Most probably refugees have been among those migrants. Libya, in turn, has sent those people to their countries of origin.⁷⁴ The Italian government says that those people had a chance to apply for asylum at Lampedusa, but there are evidences that large groups have been expelled without an asylum review. In October 2004, the first large-scale returns occurred. Then Italy sent more than 1,100 persons to Libya on eleven different planes. UNHCR was told by Italian officials, that people from Somalia, Ethiopia and Eritrea were admitted to the asylum process, but that other nationalities were sent back to Libya. The identification seemed to have been done by the judgments of two Arabic interpreters. Italian politicians asked for the names of those expelled, but they were never made available.⁷⁵ During a visit to Libya of parliamentarians from the EU, the Libyan authorities confirmed that they in year 2004-2005 had send back hundreds of boat refugees to their countries of origin. Those were expelled to Libya from Italy.⁷⁶ It was also confirmed that Italy had financed the building of a detention center for illegal migrants outside Tripoli.

3.3.4 Interception at Sea

Erica Feller, UNHCR's Assistant High Commissioner for protection said recently: "Rarely a week goes by without some news of an unseaworthy boat that has sunk with its passengers on board, dead bodies being washed ashore on the holiday beaches of southern Europe".⁷⁷ The numbers of those that died during crossings in the Mediterranean year 2007 are estimated to 500 persons by UNHCR. However, NGO's believe it is closer to 1000 people each year. The exact numbers will probably never be known as some boats disappear without trace.⁷⁸

⁷² *Ibid.*

⁷³ HRW, *Libya: Migrants Abused but Europe Turns Blind Eye*, September 13, 2006, <www.hrw.org/english/docs/2006/09/13/libya14158.htm>, last visited 14 June 2008

⁷⁴ *Supra* note 62

⁷⁵ *Supra* note 62, 'Expulsions', p. 107

⁷⁶ P. Björklund, 'Europas "nya Berlinmur" löser inte problemen', *Stockholms Fria Tidning*, 12 January 2007, <www.stockholmsfria.nu/artikel/8510>, last visited 23 May 2008.

⁷⁷ W. Spindler, 'Between the devil and the deep blue sea: mixed migration to Europe', *Reuters Foundation AlertNet*, 5 October 2007, <www.alertnet.org/thenews/newsdesk/UNHCR/e50aa9702a12233dac50bc980bbcb62f.ht>, last visited 23 May 2008.

⁷⁸ *Ibid.*

The Italian Ministry of Interior issued a decree on the 14th of July 2003 that allowed the Italian navy to intercept ships with migrants and asylum seekers. The navy should as well force the ships back to the territorial waters of the nations they came from, if that was possible. There was no consideration in the decree of how to identify asylum seekers. HRW claims that the decree violates the principle, clarified by the UNHCR, as; “The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons.”⁷⁹

For the first time, in year 2007, the numbers of “illegal” migrants coming by boat to Italy, decreased. Approximately 14 000 migrants came by boat to Italy last year – to be compared with 22.000 in year 2006.⁸⁰ The numbers in Spain and Malta has decreased as well – but increased tremendously in Greece. Among those migrants, app. 30 % apply for asylum. Of those who arrived on Lampedusa, app. 33 % applied for asylum in year 2007. That amounts to almost 60 % of all asylum applications in Italy. Generally, 50% of those applying for asylum are recognized as refugees, or are granted subsidiary status.⁸¹

3.4 International and Bilateral Cooperation on Migration

3.4.1 Cooperation Between Italy and Libya

There is a common view in Italy that the asylum seekers are “storming Italy’s shores”, and that the immigration system is breaking down by the invasion of those seeking asylum.⁸² The cooperation arrangements between Italy and Libya on migration and asylum are therefore, as a result of this general view, more developed than the cooperation between Libya and the EU on the same subject. During the last years Italy has a policy of detaining and expelling undocumented foreigners to Libya who reached Italy via this nation. The statistics, however, shows that Italy ranked “eighth among the twenty-five E.U. member states in the number of asylum applications it received (9,500), and eighteenth when that number is per 1,000 inhabitants (0.2)”.⁸³ The undocumented foreigners that have entered Italy illegally by sea, is a quite small percentage in those statistics. Most of those staying illegally in Italy are those that have overstayed their residence permit, or that have stayed after their visa expired.

⁷⁹ UNHCR Excom Conclusion No.97 (2003) on protection safeguards during interception measures, <www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&id=3f93b2894>, last visited 23 May 2008.

⁸⁰ Nationella Temagruppern Asyl&Integration, *Nya uppgifter om ”båtflyktingar” till södra Europa*, 17 October 2007, <temaasyl2.episerverhotell.net/Templates/IntroPage.aspx?id=84&all=true>, last visited 23 May 2008.

⁸¹ *Supra* note 77.

⁸² *Supra* note 62, ‘The Italian Dimension’, p. 99.

⁸³ *Supra* note 62, ‘The Italian Dimension’, p. 100.

One reason for the tough stance of Italy towards asylum seekers and refugees is the Dublin Convention. While other EU states return to Italy asylum seekers that have transited through the latter state, Italy on the other hand, tries to return them back to where they came from – many times the northern part of Africa, and more specifically Libya. So, by the Dublin Convention Italy was transformed from a transit country to a country of destination.

The Human Rights Watch, in its report 'Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees' from year 2006, gives a picture of the cooperation between Italy and Libya.⁸⁴ Italy and Libya reached a general agreement to combat terrorism, organized crime, drug trafficking and illegal immigration on 13th of December, 2000. A permanent liaison with Libya on the same subject was established in February 2003. In June that same year, the Italian Minister of Interior said that they had reached an agreement with Libya on concrete measures for joint control of land borders, as well as counter actions at sea.

HRW further describes in its report, that Italy has spent millions of Euros on cooperation with Libya on immigration matters, and continually provides training and equipment to Libya to stem the illegal immigration. Italy has also financed the construction in Libya of reception centers for undocumented migrants.

According to HRW's report, another bilateral agreement with Libya was established in August 2004 when the Italian Prime Minister met with al-Qadhafi. Italy then agreed to provide equipment, training and technology to help Libya stem irregular immigration. The details of this agreement are unknown. The EU and different Human Rights Organizations have requested to know about the bilateral agreement, but Italy has refused to make it public. The European Parliament supposes that the agreement gives the authorities in Libya the task to supervise the migration, and also to commits them to readmit people that are returned by Italy.

According to HRW, Italy has been funding charter flights in Libya since 2003. Those flights return undocumented immigrants in Libya back to their countries of origin. In the year this started, the amount of those returned by those flights were almost 5700 migrants. This of course requires a substantial economic contribution from Italy.

In the report, it states that the Italian Minister of Interior announced a verbal agreement with Libya in February 2005. This agreement controls clandestine immigration. Though the details of this agreement were not revealed, it seems to include financial support to equip the local Libyan police force to curb illegal immigration.

HRW claims that the two countries in year 2006 were discussing more concrete plans for cooperation to stop the irregular migration to Italy. In January the same year, it was said that the Italian-Libyan cooperation had

⁸⁴ *Supra* note 62

prevented more than 40,000 undocumented persons from leaving Libya in only one year.

According to the report made by HRW, there is no formal readmission agreement signed by Libya and Italy. The readmissions of third-country nationals are only based on a verbal agreement – as is the situation with the oil deals between the two nations. All formal international agreements have to be approved by the parliament – readmission agreements as well. Therefore the lack of formal agreements is important, since they do not trigger any approval. Returns under formal readmission agreements also have to meet certain standards; the government has to supply with evidence of nationality and travel documents. HRW claims that this is a reason for Italy not to have a formal agreement – since that would slow down the expulsion process and make the process considerably more expensive.

3.5 Case-law Concerning Expulsions to Libya

Two Italian lawyers filed an application on the 5th of April 2005, to the European Court of Human Rights on behalf of 79 men that were facing expulsion to Libya (and held at Lampedusa). The Court responded the next day with serious concern over Italy expelling people to Libya. The Court posed certain questions to the Italian Government: a) What identification procedures are being applied? [in Lampedusa]; b) Whether any asylum requests have been presented and, if so, how the procedure is progressing? c) Whether an expulsion procedure is actually in progress? ⁸⁵

On the 6th of May the Italian government responded to the questions. However, the court thought the response to be inadequate. The court ordered the suspension of “any removal action” related to eleven of the 79 applicants, according to art 39 of the procedural rules. The European Parliament passed a resolution following the court’s lead, where it expressed deep concern over Italy’s illegal expulsion of third country nationals to Libya. The Parliament held that the collective expulsion to Libya constituted a violation of the principle of non-refoulement, and in its Resolution on Lampedusa called on Italy to refrain from executing these expulsions. ⁸⁶

A follow-up delegation was sent by the European Parliament to Libya in December 2005. Once in place, the delegation was informed that the people returned from Italy to Libya in 2004 and 2005, had been sent back to their countries of origin by the Libyan Government. ⁸⁷

⁸⁵ *Supra* note 62, footnote 373, Letter from the European Court for Human Rights, regarding application no.11593/05 - Strasbourg, April 6, 2005.

⁸⁶ *European Parliament Resolution on Lampedusa*, <www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=P6-RC-2005-0251&language=BG>, visited 23 May 2008.

⁸⁷ European Parliament, *Report of an ad hoc delegation to Tripoli, Libya on 4 to 6 December 2005*, p. 6,

In Geneva November 2005 during its 85th Session, the UN Human Rights Committee raised different issues concerning its observations on Italy. The committee emphasized the right to international protection and “recalled the right of each person not to be expelled to a country where he/she might face torture or ill-treatment”.⁸⁸

That Libya is a “safe third country” is not an argument put forth by the Italian government, though it focuses that Libya in 2002 was the president of the UN Commission on Human Rights, and also has signed the African Refugee Convention.⁸⁹ Instead the government claims that those expelled never attempted to require asylum. According to HRW, the Italian authority claims that there are no refugees among the people they expel and that the overwhelming majority of those that seek asylum, do not qualify.⁹⁰ Those sent back to Libya are mostly Egyptians. In turn, Libya sends them by bus directly to Egypt. Why those people are not sent directly from Italy to Egypt is unclear.

3.6 Reports from International NGO’s

There is a common view among NGO’s that the Dublin Convention transformed Italy from a transit country to a destination country, and Italy has been trying to transform the next in line: Libya.

The bilateral agreement between Italy and Libya in 2004, led according to NGOs to widespread arrests in Libya. NGOs claim that individuals from sub-Saharan Africa together with 106 migrants lost their lives during repatriations from Libya at the time. Also Italy is accused of improvised identification practices in Lampedusa at the identification centers. This has had the effect that asylum seekers are at risk of being expelled to a country they don’t belong to or has any relationship with.

Amnesty International has in its report from year 2007, some specific issues concerning Italy.⁹¹ One is that Italy still lacks a specific and comprehensive law on asylum. The Bossi-Finni law on migration includes provisions that contravene human rights laws and standards in different ways, which of course is serious according to AI. Another issue of concern to AI, is the detention and expulsion of migrant minors, which is in contravention of human rights and refugee law. Minors who are detained have a right to be kept separate from adults. In many cases this right is not respected by Italy and their right to be given legal aid or information about their rights, has been neglected. In some cases there was an obvious risk for the minors to be

<www.proasyl.de/fileadmin/proasyl/fm_redakteure/Newsletter_Anhaenge/109/Libya_Report_-_finalversion-20060215.pdf>, visited on 23 May 2008.

⁸⁸ *Supra* note 86.

⁸⁹ *Supra* note 62, ‘Italy in Breach of its Human Rights Obligations’, p. 116

⁹⁰ *Ibid.*

⁹¹ Amnesty International, *Amnesty International Report 2007 - Italy*, 23 May 2007.

UNHCR Refworld, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46558ed02>, last visited 23 May 2008.

forcibly returned to their countries of origin – due to inaccurate age assessment. According to the AI, some minors were not granted prompt access to asylum procedures. Another issue to AI, is the corruption and abuses in detention centers. AI, together with other nongovernmental organizations, have never had access to those centers, but the Minister of the Interior has declared that AI should be allowed to visit migrants’ detention centers in the future.

A big question mark to AI is the readmission agreements and joint actions that Italy has with Libya, regardless the fact that Libya has not ratified the UN Refugee Convention and its Protocol. There is no established national asylum procedure in Libya as well. This of course makes AI question how safe it is to readmit people to Libya.⁹² AI has in another report focused the risks that removed asylum seekers and irregular migrants face in Libya.⁹³ AI has evidence that the Libyan State practices unacceptable manners, as:

“incommunicado detention of suspected political opponents, migrants and possible asylum seekers, torture while in detention, unfair trials leading to long-term prison sentences or the death penalty, and ‘disappearance’ and death of political prisoners in custody. Migrants and asylum seekers in particular are often victims of arbitrary detentions, in-existent or unfair trials, killings, and disappearances and torture in the detention camps”.⁹⁴

There is no way for NGOs to assist migrants and asylum seekers when detained in Libya, neither to verify the conditions of detention. The detention centers in Libya are almost inaccessible to human rights groups or international organizations. UNCHR is unable as well to access people returned from Lampedusa to Libya – it cannot operate its protection mandate in Libya.

HRW claims that the Italian government avoids the term for expulsion “expulsion” and instead uses the term “respingimento” which means “pushing back” or “stopping at the border”.⁹⁵ This is done since an expulsion order would trigger a national legal obligation that every expulsion has to be validated by a district judge.⁹⁶ The Italian authorities claims this is not about collective expulsions, but the refusal of entry on individual basis. A refusal of entry is an administrative measure, but an expulsion needs to be decided by the judge. The Italian Government further insists that the majority of migrants reaching Lampedusa are economic migrants rather than refugees. Therefore, according to the Italian authorities, Italy is in no violation of the refoulement principle.⁹⁷

⁹² *Ibid.*

⁹³ Amnesty International, *Libya: time to make human rights a reality*, 2004, AI INDEX MDE 19/002/2004, <www.amnesty.org/en/library/asset/MDE19/002/2004/en/dom-MDE190022004en.html>, last visited 23 May 2008.

⁹⁴ *Ibid.*

⁹⁵ *Supra* note 62, ‘Italy in Breach of its Human Rights Obligations’, p.115

⁹⁶ *Supra* note 51, p. 18-19.

⁹⁷ *Supra* note 62, ‘Italy in Breach of its Human Rights Obligations’, p. 117

4 Libya

4.1 Introduction

Libya is a big country to its size, but with few inhabitants – slightly a bit over 5 million people live in the country. More than 90 percent of the country is covered by the Sahara desert. Most of its people live in the Mediterranean coast. The Italian island of Lampedusa is only 300 km from the Libyan coastline as its closest point. Libya borders on six different nations – Egypt, Chad, Algeria, Tunisia, Sudan and Niger. Most of its land borders are in the desert, and is not marked. Libya has been a country of destination for many migrants, but in recent years turned to become a country of transit to Europe.

In 2005, the Libyan authorities claimed that 600,000 legal foreign workers were living within the country, and that there were 1-1.2 million illegal migrants. The government estimates that the country receives between 70,000-100,000 foreigners (both legal and illegal) each year. Libya does not recognise national, ethnical or religious minorities.

The reason to the large rate of foreigners has various reasons. One is that Libya's 4,400 km of desert borders are hard to patrol, which makes it easier for people to enter the country. Another reason is that the economy in the country is quite good, which makes people from poorer countries to come to Libya in search for work. Also, in the past, the Libyan government tried to obtain an open door policy to attract workforce to the country. However, this attitude has now changed, and in many places been replaced by a common xenophobia towards foreigners.

4.2 Libya and International Human Rights Law

Libya has ratified some of the most important international human rights conventions, but not all of their optional protocols.⁹⁸ The conventions ratified that are important when it comes to refugee rights are: The International Covenant on Civil and Political Rights (ICCPR), ratified by Libya in 1976⁹⁹ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by Libya in

⁹⁸ Human Rights Watch, *Libya: Words to Deeds, the Urgent Need for Human Rights Reform*, January 2006 Volume 18, Number 1(E), <hrw.org/reports/2006/libya0106/13.htm#_Toc125268065>, last visited 23 May 2008.

⁹⁹ Ratification History of Libya, <www.bayefsky.com/pdf/libya_t1_ratifications.pdf>, last visited 23 May 23, 2008.

1989.¹⁰⁰ Libya has also ratified the Convention on the Rights of the Child (CRC), where Article 22 is of specific concern to refugees.¹⁰¹

Libya and Algeria are the only two Arab states that have signed the first optional protocol to the ICCPR.¹⁰² That makes it possible for individuals to communicate directly to the committee overseeing the ICCPR whenever there is a breach of the convention. However, Libya has neither signed the second Optional Protocol (that abolishes death penalty) or the Optional Protocol to CAT.¹⁰³ Due to that Libya has not ratified the Refugee Convention,

4.3 Libyan Asylum- and Refugee Law

Libya has not signed the Refugee Convention.¹⁰⁴ Neither does it have any formal cooperation agreement with the United Nations High Commissioner for Refugees. UNHCR has not been given any formal status in the country.¹⁰⁵ All foreigners in Libya are viewed as economic migrants, not refugees. It is not possible to reach refugee status in Libya, since the government does not recognize refugees as a distinct group of people in need of protection. Therefore, Libya continues to deport thousands of foreigners without a valid visa, back to their country of destination despite the fact that some of those people may face persecution or torture in their own nation.

Neither the official rhetoric nor the legal framework in Libya recognizes refugees on the Libyan territory. Refugees and asylum seekers are not sorted out from the category of other migrants in the country. All migrants, no matter if they are refugees under international law, falls under the generalized category of “economic migrants”. Libya does not have a developed national asylum legislation, neither any administrative structures to deal with asylum seekers and refugees. However, some references are made in the Libyan law to refugees. For example in the Libyan Constitution Proclamation, article 11, prohibits the extradition of political refugees.¹⁰⁶ Also Law 20/1991 on the Consolidation of Freedom, article 21 states that:

¹⁰⁰ UNHCR, list of ratifications, <www2.ohchr.org/english/bodies/ratification/9.htm>, last visited 23 May 23, 2008.

¹⁰¹ *Supra* note 99.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Human Rights Watch, *Libya: Words to Deeds, the Urgent Need for Human Rights Reform*, January 2006 Volume 18, Number 1(E), <http://hrw.org/reports/2006/libya0106/1.htm#_Toc125268027>, last visited 23 May 2008.

¹⁰⁵ ECRE, *EU cooperation with Libya open letter to the EU presidency*, 1 June 2005, <<http://www.ecre.org/files/Libya%20open%20letter%20to%20eu%20presidency.pdf>>, last visited 23 May 2008.

¹⁰⁶ International Constitutional Law, *Libya Constitution*, http://www.servat.unibe.ch/icl/ly00000_.html

“the Jamahiriayah supports the oppressed and the defenders on the road to freedom and they should not abandon the refugees and their protection”.¹⁰⁷

Libyan authorities have stated in meetings with European officials, that they have grave concerns of problems that could emerge, if legalizing the status of refugees in the nation. They believe this could lead to an unmanageable situation.¹⁰⁸ However, Libya is a signatory to the OAU Refugee Convention (OAU Convention governing the specific aspects of refugee problems in Africa). This convention obliges state parties to recognize refugees and give them the protection needed. Also the principle of non-refoulement is mentioned in the convention.

Law 6 of 1987 on the organization of entry, residence and exit of foreigners in Libya and recent amendments to this law as laid out in Law 2 of 1372 (2004), is important to foreigners in Libya.¹⁰⁹ This legislation emphasizes the importance of valid visas. A person violating any of the provisions of this law will be liable to a prison sentence (without fixed duration) and has to pay a fee of at least 1000 dinars (app. USD 825).¹¹⁰ A violation of the law might be to overstay the duration of the visa, or to violate the conditions of the visa or not to obtain the correct visa for the staying in the country. Also there is an additional obligation for foreigners who enter the country to carry 500 dinars to cover eventual expenses in the country. If smuggling migrants, supply, create or carry false identification or travel documents, the penalty for those activities is a fine of 1000 dinars as a minimum, and at least one year's imprisonment.¹¹¹ There are reports of that the Libyan government is drafting a law on asylum.¹¹² In the end on 2006, no draft had yet been made public.

4.3.1 The Principle of Non-Refoulement

Libya has not acceded to the 1951 Refugee Convention or its protocol, but it has ratified other international and regional conventions that reflect the principle of non-refoulement; for example CAT, ICCPR and the OAU Convention.

In January 2008, Libya said it had started to deport illegal migrants. Those migrants amount to approximately 2 million in the state and once most of them were welcomed as cheap labour to this oil-exporting country in the

¹⁰⁷ European Commission, *Technical Mission to Libya on Illegal Immigration 27 Nov-6 Dec 2004, Report*, Note 6, p. 13, <www.statewatch.org/news/2005/may/eu-report-libya-ill-imm.pdf>, last visited 24 May 2008.

¹⁰⁸ *Ibid*, p.13, 52

¹⁰⁹ *Ibid*, p. 11-12.

¹¹⁰ S. Hamood, The American University in Cairo Forced Migration and Refugee Studies, *African Transit Migration through Libya to Europe: the Human Cost*, January 2006, p. 20. <www.aucegypt.edu/ResearchatAUC/rc/fmrs/reports/Documents/African_Transit_Migration_through_Libya_-_Jan_2006_000.pdf>, last visited 24 May 2008.

¹¹¹ *Ibid*, Article 19, Law 2 of 1372 (2004)

¹¹² Human Rights Watch, World Report 2008, *Libya – events of 2007*, <hrw.org/englishwr2k8/docs/2008/01/31/libya17612.htm>, last visited 24 May 2008.

1990s. Now they are blamed for taking work from Libyans without jobs.¹¹³ Libya, as a signatory of the African Charter, is compelled not to expel, as it states in Article 12 p 5 in the Charter:

“The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”¹¹⁴

The OAU convention, ratified by Libya, states in Article 2, paragraph 3:

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened”.¹¹⁵

The Libyan authorities have strengthened the border controls due to stem the flow of migrants transiting to Europe. That is a consequence of the agreement Libya has with Italy. Libya has forcibly returned thousands of migrants in recent years. Most probably there are, in an international perspective, refugees and asylum seekers among those that have been returned. There is no possibility for foreigners to seek international protection in the deportation process, since there is no asylum law or asylum procedure. Libya claims that the foreigners expelled are unauthorized economic migrants in no need of protection. However, there is evidence that deportees have been left and died on the way back to their countries of origin. The European Parliament passed a resolution that urged Italy to stop expelling large groups of migrants and refugees back to Libya due to that country’s “recent massive repatriations of foreigners in conditions guaranteeing neither their dignity nor their survival.”¹¹⁶ According to the resolution, 106 deportees had died in those expulsions.

There is an agreement between Libya and Eritrea for the return of Eritrean nationals. This obviously put refugees from that nation at a risk since hundreds of Eritrean nationals have been deported to Eritrea. A well-known deportation took place on 21st of July 2004. At that time 109 Eritrean nationals were forcibly returned on an Italian funded air.¹¹⁷ The deportees were detained upon arrival and brought to a secret prison. In August the same year another group of Eritrean nationals, 69 adults and 6 children, were to be forcibly returned. Some of the men in the group hijacked the plane on their way to Eritrea, and the pilot was forced to land in Sudan. 60 persons in the group applied for asylum in Sudan, and all of them were recognized as refugees by UNHCR.¹¹⁸

¹¹³ Reuters Foundations AlertNet, *EU funds centre to help illegal migrants in Libya*, published 080310, < www.alertnet.org/thenews/newsdesk/L1065919.htm>, last visited 24 May 2008.

¹¹⁴ *Supra* note 42.

¹¹⁵ *Supra* note 37.

¹¹⁶ *Supra* note 86.

¹¹⁷ Human Rights Watch, *Managing Migration Means Potential EU Complicity in Neighboring States’ Abuse of Migrants and Refugees*, October 2006, Number 2, p. 11, <hrw.org/backgrounder/eca/eu1006/eu1006web.pdf>, last visited 24 May 2008..

¹¹⁸ *Ibid.*

4.4 Bodies Concerned with Immigration Issues

4.4.1 UNHCR

UNHCR has an office in Tripoli, the capital of Libya. However Libya has not signed any formal cooperation agreement with UNHCR for its presence in the country.¹¹⁹ AI states that “anyone wishing to present an asylum claim to the UNHCR has little opportunity to do so. In national legislation, there are no procedures which would allow asylum-seekers to present an application for recognition of their refugee status by the Libyan authorities.”¹²⁰ There are reports that Libyan officials grants UNHCR representatives access regularly to detention facilities.¹²¹

UNHCR states in its country report that “since 2004, there has been a significant increase in the numbers of applicants approaching the Office of UNHCR-Tripoli seeking asylum.[...] In 2005, a total of 12,580 Mandate refugees have been registered with UNHCR in Libya, and 579 new asylum seekers”.¹²²

4.5 International and Bilateral Cooperation on Migration

4.5.1 Securization and Readmission Agreements

Libya does not have any formal readmission agreement with Italy, though practices show that there is such an informal agreement. This is described more extensively in section 3.4.1 concerning “Cooperation between Italy and Libya”. EU has no readmission agreement with Libya, due to its unwillingness to ratify the 1951 Refugee Convention and its protocol. However, EU cooperates with Libya on the issue of migration in different ways.

¹¹⁹ Amnesty International, *Libya: Forcible Return/Torture and Ill-treatment*, 13 July 2007, PUBLIC AI Index: MDE 19/010/2007, <asiapacific.amnesty.org/library/Index/ENGMDE190102007?open&of=ENG-LBY>, last visited 24 May 2008.

¹²⁰ *Ibid.*

¹²¹ *Supra* note 112.

¹²² UN High Commissioner for Refugees, *UNHCR Country Operations Plan 2007 - Libyan Arab Jamahiriya*, 1 September 2006. Online. UNHCR Refworld, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45221c0e2>, last visited 24 May 2008.

4.5.2 EU Involved in Libyan Immigration Control

In February 2008, The European Union executive proposed initiating talks on closer political and economic ties with Libya. This would be conducted during the year to boost the relations with Libya that is a key energy supplier to Europe. Europe takes the main part of Libya's oil exports which makes European firms eager to expand energy investment in the country. As a part of stemming the flood of illegal immigrants from Africa, the EU also wants help from Libya in sea patrols. The European Commission has proposed a framework that includes cooperation control of illegal migration, education, transport, environment, culture and in areas including energy.¹²³

During many years the Libyan government had been charged for supporting terrorism, a claim that made the EU ties with Libya to stall. After the Bulgarian nurses being freed by the Libyan government in July 2007, Brussel announced it would boost the relations. The EU held out in the deal that struck to secure the medics, that cooperation on migration and tourism was an important issue.¹²⁴

In March 2008, a center called "The Assisted Voluntary Return and Reintegration Centre" opened in Tripoli. It is part-funded by the government of Italy and the EU. The focus of the centre is to warn migrants aiming to Europe by boat, about the dangers, and offer help to return back home as well as helping migrants to find a new livelihood.¹²⁵

The EU cooperated with Libya on migration issues for years, though it has not resulted in a readmission agreement at this point. The HRW accuses EU for cooperating with Libya on joint naval patrols without prioritizing protection "and with human rights conditionality more rhetorical than real".¹²⁶

The Council of the European Union adopted in 2005 a draft council conclusion for cooperation with Libya in the field of migration. Consultations are being held within this framework to stipulate an agreement on rescue in the desert and at sea, and to adopt a joint action plan for cooperation in the field of migration.¹²⁷ Among other conclusions made, the council invited the commission to engage

¹²³ Reuters Foundation Alert Net, *EU proposes launching talks with Libya this year*, 27 February 2008, <www.alertnet.org/thenews/newsdesk/L27791394.htm>, last visited 24 May 2008.

¹²⁴ *Ibid.*

¹²⁵ Reuters Foundation Alert Net, *EU funds centre to help illegal migrants in Libya*, published 080310, <www.alertnet.org/thenews/newsdesk/L1065919.htm>, last visited 24 May 2008.

¹²⁶ *Supra* note 117, p. 16.

¹²⁷ The European's Commissions Delegations, *The EU's Relation with Libya*, <www.dellby.ec.europa.eu/en/eu_and_country/agreements.htm>, last visited 24 May 2008.

“in exploratory discussions with the Libyan authorities to identify practical measures to tackle illegal migration in areas such as training, reinforcement of institution building, asylum issues and increasing public awareness of the dangers of illegal migration [...] to launch an ad hoc dialogue on migration issues between the EU and Libya and to gradually develop concrete cooperation on such issues with the Libyan authorities. The extent and development of such cooperation will depend on Libya's commitments on asylum and fundamental rights”¹²⁸.

The cooperation with Libya is supposed only to take place on a technical ad hoc basis, and also be limited in its scope. The council wants the cooperation to include “strengthening of the legal framework and promoting administrative coordination (border controls, visas, entry conditions, residence permits, asylum, and document security) with a view to improving migration management.”¹²⁹ The council also wants to strengthen the border control at Tripoli International Airport “to prevent illegal immigration, e.g. by improving training on documentation forgeries, interviewing techniques and upgrading pre-departure checks”.¹³⁰

HRW criticizes some of the statements made at the Justice and Home Affairs Council Meeting in June 2005.

“Among the list of suggestions for these discussions in the short term is how to assist in the repatriation of failed asylum seekers “after an independent asylum procedure in accordance with international standards.” This is a curious short-term discussion item given that Libya has no asylum procedure. The same list of short-term items for discussion also includes intensified cooperation and capacity building for “migration management and protection of refugees” in cooperation with UNHCR, but the EU does not set as a precondition for cooperation either that Libya should sign and implement the 1951 Refugee Convention or that it enter into a formal agreement with UNHCR.”¹³¹

Also HRW criticizes the Council for ambiguousness, since the cooperation was said to be limited in its scope and only took place on an ad hoc basis – but at the same time showed willingness to move ahead on plenty of those measures.

“These measures include reinforcing “systematic operational cooperation” between agencies responsible for enforcing sea borders and developing common Mediterranean Sea operations involving the temporary deployment of EU member states’ vessels and aircraft; sending EU immigration liaison officers to Libyan seaports and Tripoli airport for interception purposes; and training Libyan officials on immigration controls, as well as on asylum issues, and on “best practices” for removal of irregular immigrants.”¹³²

¹²⁸ COUNCIL OF THE EUROPEAN UNION, *Draft Council Conclusions on initiating dialogue and cooperation with Libya on migration issues*, (9413/1/05), Brussels, 27 May 2005, <www.statewatch.org/news/2005/jun/eu-libya-draft-concl.pdf>, last visited 24 May 2008.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Supra* note 117, p. 17-18.

¹³² *Supra* note 117, p. 17.

The resources that the EU asks the Libyan government to devote to migration control are considered to be unreasonably large by the Libyan officials. In mid-2005 HRW was told that the EU had offered Libya €9 million to stem the illegal immigration, which is just a fraction of the total costs involved.¹³³

4.6 Reports from International NGOs

International NGOs are not present in Libya.¹³⁴ Therefore, it is hard to get a full overview of the situation for refugees and asylum-seekers from an international NGO perspective. A few national NGOs have been set up in the last years. However, the national Law 71 prohibits groups founded on a political ideology opposite to the principles of the revolution that brought al-Qadhafi to power 1969. If violating this law, the transgressor may be put to death. This legislation together with other national laws effectively hinders the establishment of genuine independent non-governmental organizations in the country. Law 71 obviously is at odds with the ICCPR, a covenant ratified by Libya.

In its report from 2007, AI was concerned about the treatment of migrants, asylum seekers and refugees. AI stated that foreigners “arrested on suspicion of being irregular migrants reportedly often suffered abuse in detention, such as beatings, and were collectively deported without access to a lawyer or an assessment of their individual cases.”¹³⁵ AI also focuses in an announcement in January 2008 the allegations that asylum-seekers, migrants and refugees are exposed to torture on arrest and in detention centers.¹³⁶

HRW is criticizing Libya heavily in its report “Stemming the Flow”, dated 2006.¹³⁷ The report refers to the visit to Libya made by the HRW in 2005. HRW then made researches and visited migrants and refugees who had fled Libya to Italy. The report focuses the lack of asylum legislation, as well as the lack of a refugee definition. For Libya, being a welcoming nation for foreign workers, it has now, according to HRW, become xenophobic and even dangerous for the same people.¹³⁸ In its report HRW deals with the arrests and forcibly returns of thousands of foreigners who illegally have entered Libya. According to the report, approximately 145,000

¹³³ *Supra* note 62, p. 98.

¹³⁴ *Supra* note 122.

¹³⁵ Amnesty International, *Libya: Socialist People’s Libyan Arab Jamahiriya*, Report 2007, <www.amnesty.org/en/region/middle-east-and-north-africa/north-africa/libya#report>, last visited 24 May 2008.

¹³⁶ Amnesty International, *LIBYA: MASS EXPULSION OF IRREGULAR MIGRANTS WOULD BE A VIOLATION OF HUMAN RIGHTS*, 18 January 2008, <www.amnesty.org/en/for-media/press-releases/libya-mass-expulsion-of-irregular-migrants-would-be-a-violation-of-human-rights>, last visited 24 May 2008.

¹³⁷ Human Rights Watch, *Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees*, Volume 18, No 5(E), September 2006, <<http://www.hrw.org/reports/2006/libya0906/libya0906webwcover.pdf>>, last visited on 23 May 2008.

¹³⁸ *Ibid*, p. 4

undocumented foreigners were repatriated only in the years 2003 to 2005.¹³⁹ Most deportations were by plane, but also overland by truck or bus. There are also evidences of deaths en route. Since the Libyan government does not differentiate between economic migrants, asylum-seekers and refugees, there is no protection available to those who may need it.¹⁴⁰ The mass expulsions of foreigners include arbitrary detention and arrests, physical abuse and forced deportations.¹⁴¹ A common problem the foreigners face while arrested is beatings, no access to a lawyer, overcrowding, bad conditions and a specific threat for women to be sexually abused and raped. Those interviewed by HRW had witnessed how persons even died after physical abuse by guards. Some of the officials stated that Libya do not have to offer asylum since none of the illegal migrants need protection. Others said they feared that if Libya would provide asylum, the asylum-seekers would come like locusts to the country, which is opposite to the government's goal to reduce the amount of foreigners in the country.¹⁴²

HRW is very concerned over Italy collectively expelling groups of migrants back to Libya. Thousands of expulsions have been conducted since 2004, and according to HRW they were done in an indiscriminate and hasty manner.¹⁴³ Many of those expelled did not have an adequate opportunity to present an asylum claim. The Libyan government repatriated those people to their countries of origin, without investigating whether they would face persecution, torture or any other maltreatment at home.¹⁴⁴

In its report 2008, HRW tells about 70 Eritrean men that were arrested on 8th of July, 2007.¹⁴⁵ Some of those men most certainly fled drafting into the Eritrean army. There is no conscientious objector status in the country, which makes the military service compulsory to all men and offenders are often subjected to torture.¹⁴⁶ At the request of Eritrea, the Libyan security photographed the men. The Eritrean men claimed they were threatened with deportation by the guards.¹⁴⁷ HRW claims, that to make it possible for the Eritrean government to identify the men by providing names and photographs, places potentially asylum-seekers and refugees at a great risk, especially in the case of Libya who regularly send Eritreans back due to the countries readmission agreement.

¹³⁹ *Ibid.*, p. 3

¹⁴⁰ *Ibid.*, p. 2

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, p. 3

¹⁴³ *Ibid.*, p. 5

¹⁴⁴ *Ibid.*, p. 52

¹⁴⁵ Human Rights Watch, *World Report 2008 - Libya*, 31 January 2008. UNHCR Refworld, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47a87c0a4b>, last visited 24 May 2008.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

5 Analysis

The main question this thesis emphasizes is whether Italy lives up to regional standards and international Human rights Law regarding their refugee politics in relation to Libya, with a focus on detentions and the principle of non-refoulement. The latter is viewed in regard to the expulsions made by Italy and Libya. In this chapter I will try to answer the question. The research to find out the answer has sometimes been really hard, especially when it comes to find the Italian and Libyan national laws and regulations. It has not been easy to find the laws in the English language, and it has also been hard to find out which are the latest regulations, and to be updated on the newest laws.

Italy has ratified several treaties concerning human rights and refugee rights, however the regulations signed sometimes seems to be more rhetoric than real. The work of international NGOs and of UNHCR shows another picture than the Italian media and politics sometimes tries to show off. What has come to my understanding while doing the research, is that the true picture is much more complicated than what is obvious at a first glance.

First of all Italy does not have a comprehensive and specific asylum regulation. One might ask why, since Italy is a country that receives lots of migrants each year. If there are some states that are in need of a comprehensive asylum law it is those states within the EU that borders to non EU members. It is harder to secure the rights of asylum seekers and refugees if there is no such law in place. And, as a partner to several human rights treaties, it is certainly in the interest of Italy to have such a law in place. Or is it on purpose that the law is still not there - so it might be easier to treat illegal migrants and asylum seekers in a way that fits the state finances and the political agenda? Hopefully this is not the case.

5.1 The Italian Policy of Detentions – Lawful or Not?

Detention of migrants seems to be main pillars of Italy's politics in handling irregular migration. When reading the reports of UNHCR, different NGOs and the work of researchers, it seems to be within the structure of the Italian policy to detain the migrants and then expel them – and to do that as fast as possible. This is totally against fundamental human rights since this undermines the possibilities of the migrants to get an opportunity to apply for asylum and have an individual assessment of their case.

What makes it even more complicated is that the Procedure Directive, which is important in this case since it is a instrument regulating whether a migrant is considered to be a refugee or not and determines the possibilities to seek asylum, seems to be quite liberal when it comes to human rights. Some of

the articles in the directive derogates from principles that, in my view, are important human rights provisions and necessary safeguards to potential asylum seekers. One example of a human right standard in the directive is Article 18, where it clearly states that one should not be detained on the sole ground of being an asylum seeker. However, it is possible to derogate from this article when an applicant is at the border – then there are other procedures available, and detention is allowed (Article 35). According to my understanding, the derogations contravene fundamental human rights when it comes to the liberty and freedom of persons (Article 5 ECHR). Another example of that detention is an exemption, is ICCPR Article 9(1) that also emphasizes that no one shall be arbitrary detained, and that detention is allowed only in accordance with the law. Even though the Italian regulations allow detentions, the law in itself has to be in accordance with international human rights standards. The Italian regulation in this area seem to be in accordance with EU standards (regarding the Procedures Directive), but this does not mean that the directive lives up to international human rights obligations. This thesis is not about the legality of the Procedure Directive when it comes to human rights, but it is important to mention, since Italy in some ways may live up to this directive, but that does not mean it lives up to International Human Rights law. States have an obligation to adhere to their international human rights obligations, even though the community regulations might enable lower standards and less protection to asylum seekers.¹⁴⁸

The question of detention is important, since the procedure of detention of asylum-seekers and migrants, is a routine in Italy. Most asylum-seekers and migrants are put in the closed centers (Supplement A). Since the persons are not free to leave the centers, they constitute detention centers. And if detention centers for asylum-seekers, they constitute derogations from the main Article 18 in the Procedures Directive that claims no one should be detained on the sole ground of being an asylum seeker. According to Article 35 there are lawful exceptions to this rule, but they should be used only at the borders or in the transit zones. The detention centers are situated all over Italy (Supplement A) at the borders and in transit zones. Thereby Italy complies with the Procedures Directive when it comes to the policy of detentions, but as I said earlier, this does not mean the system is in line with international human rights law. I argue that the continuous use of detention as a policy in the migration politics contravenes international human rights law in general. The directive itself also emphasizes that the main rule is Article 18. When Italy continuous uses Article 35 as the general principle in handling asylum seekers, it seems to be a misuse of the system, and a way to elude its human rights obligations.

What are notable are the consequences that will come, if EU issues directives and regulations that are not in line with the common understanding of human rights law. This will in the long run undermine human rights. One should not forget that EU to several nations in the world

¹⁴⁸ *Supra* note 27, p. 5

is a guide and a power in enhancing human rights protection. Therefore it is serious if EU when it comes to its rhetoric safeguards human rights, but in practice undermines them. In this case, concerning detentions, it seems more like the common minimum standards set by the EU undermines, rather than safeguards and enhances, the right not to be arbitrary detained.

5.2 Does Italy Live Up to the Principle of Non-Refoulement?

The large scale expulsions of migrants to Libya are totally against fundamental human rights. Several organizations, the European Council and the UN committee have criticized Italy for its actions. In 2005, the Italian authorities said that they shall quit their large scale expulsions, however the deportation of migrants who are not admitted to a fair asylum procedure continues. The Italian government claims those who are expelled are not refugees or persons in need of protection, but economic migrants. However, there are examples that this is not the case. During a visit to Libya of parliamentarians from the EU, the Libyan authorities confirmed that they in year 2004-2005 had send back hundreds of boat refugees to their countries of origin. Those were expelled to Libya from Italy.¹⁴⁹ The expulsion process also seems to be discriminative towards people from the Maghreb countries, by not allowing them to the asylum procedure. The secret readmission agreements that Italy has with Libya, does not prepossess the safe dimension of the process. The situation has been so urgent, that the European Parliament had to issue a resolution about the Italian expulsions.¹⁵⁰ To me this clearly indicates that Italy is more interested in avoiding their human rights obligations and the costs attached to these obligations, than to realize the right of everyone to seek asylum and get a fair assessment of their claim.

That Italy send people back to a nation as Libya, a state that has not ratified the Refugee Convention, or even admit the status of refugees, is a clear sign of that Italy care more of getting rid of their migrants, than securing their safety. It is clear that the people sent back to Libya do not face secure treatment or have guarantees of human rights. Instead, they will be sent back to their countries of origin – and in many cases those returns are financed by Italy. By this, Italy has made itself guilty of transgressions of the principle of non-refoulement.

This principle, which is a fundament in both International Human Rights law and in regional standards, has been trespassed by Italy several times. There are evidences that Italy do not admit all migrants to the asylum procedure. If so, there is a clear risk of sending people in need of international protection back to their countries of origin, where they are at risk of torture or other ill-treatment. To claim that most of the migrants

¹⁴⁹ *Supra* note 62, p. 107.

¹⁵⁰ *Supra* note 86.

arriving to Italy are not in need of international protection, but economic migrants, is a statement that leads to more serious considerations of the asylum practices in Italy. Libya does not live up to international human rights standards, and whomsoever will be sent back to that country, is in their right of getting a fair asylum procedure, especially when Libya in turn sends most of these returned migrants back to their countries of origin.

That Libya has not signed any formal cooperation with UNHCR is just another evidence of that Libya is not a safe country for refugees. Libya does not recognize the status of refugees, but regards all foreign nationals as economic migrants. There are examples that Libya has sent people, who later were considered refugees by other nations, back to their countries of origin. All those facts together, should be a warning sign to Italy, not to arbitrarily send migrants to Libya. But most of all it is a sign of that the readmission agreements Italy has with Libya is not founded on human rights standards. If Italy would have human rights in focus, there should not be such an agreement.

5.3 Does Italy Outsource its Human Rights Responsibilities Regarding Protection of Refugees?

Four years ago, David Blunket, the Minister of Interior in UK, suggested that applications of asylum should be processed in detention centers outside the borders of the EU. At that time, it was too controversial to be accepted as a formal politics by the EU. However this seems to be the consequence of the efforts by EU and its member states to diminish the immigration. Italy has in different ways according to my understanding, outsourced its migration management and its responsibility to protect refugees. As an example Italy has financed a center outside Tripoli where illegal migrants will be detained.¹⁵¹ Irregular migration into the EU is a challenge to all the member states, and especially to those with external borders. The focus of the EU policy seems to be to keep the asylum-seekers and migrants out of Europe.¹⁵² The rights of protection for refugees are marginalized. Italy is in my view an example of this policy.

That the EU is externalizing its border is another dilemma for refugees and persons in need of international protection. An example of this externalization is that Italy is cooperating with Libya on border enforcement, readmission agreements, is building centers on the territory of Libya to host illegal migrants so they will not be able to come to Europe. Another example is the interdictions at sea to deter migrants and asylum

¹⁵¹ *Supra* note 76.

¹⁵² This becomes evident specifically in the document made by Human Rights Watch, *Managing Migration Means Potential EU Complicity in Neighboring States' Abuse of Migrants and Refugees*, October 2006, Number 2, <hrw.org/backgrounder/eca/eu1006/eu1006web.pdf>, last visited 24 May 2008..

seekers to reach the Italian territory. To me it is strange methods to let a country as Libya act as a border police to the EU in general, and to Italy specifically. Libya is a country that is well known for ignoring human rights, and according to several international and regional declarations, human rights and refugee rights should be protected. To let Libya protect those rights in practice does not seem to be fair. When Italy outsources the control of migration to such a state, it does not safeguard human rights, rather undermines those rights.

5.4 Conclusion and final words

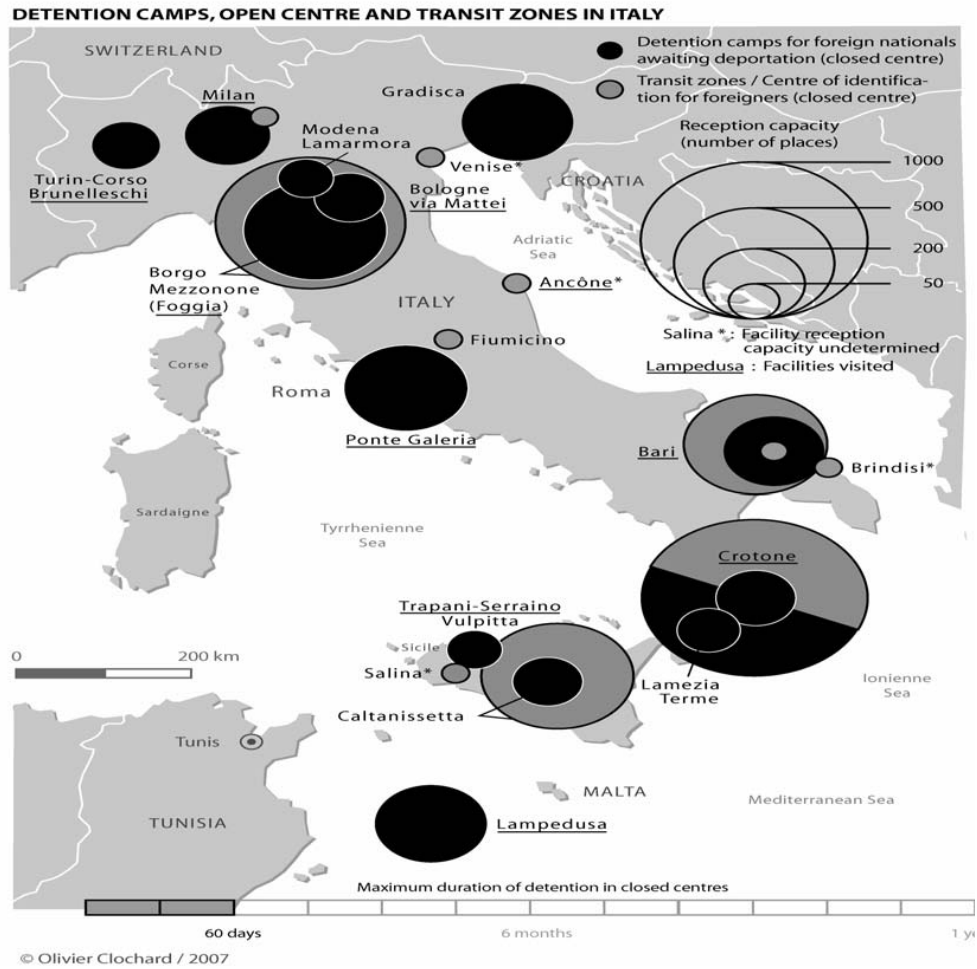
That only 50% of those arriving to Italy by boat actually apply for asylum, is in my view quite remarkable. It would be more realistic that a majority of those coming by boat applied for asylum after putting their lives at risk by crossing the sea. This might be an indication of that Italy does not live up to its international obligations of admitting all migrants to the asylum process.

In 2007 the numbers of those trying to enter Italy illegally declined for the first time in many years. Instead Greece has seen a tremendous influx of migrants last year. So maybe Italy has succeeded to keep the asylum seekers away from its own territory, which has led to a change of the migratory flow.

The conclusion is that Italy seems to be more interested in getting rid of the asylum seekers, than actually protecting their human rights. There are several evidences of practice by Italy that contradict their human rights obligations. Even though Italy might live up to regional regulations, these regulations sometimes seem to be in conflict with their overall international human rights obligations. The assessment is that Italy tends to avoid its international human rights obligations by externalizing its responsibilities to Libya when it comes to migration management and refugee protection, a state well known for its dark human rights record.

There is a dream shared by the states within the EU – that the EU will be as a big family, sharing joy and sadness, profits and burdens - in good times and in bad times. However, the special bonds that keep this family together, is for good for those who are family members, but for bad for those who are not. Some people are viewed as enemies to the family, and if they dare to knock on the family's door, even if they are in need, they will face great problems getting in. The door will not open automatically, but instead the family tries to keep it closed and puts great effort to it. The enemies have to force the door open, and if they succeed, it is no insurance of getting help. If they are lucky, they might get in line to ask for help, if not lucky – maybe due to their looks or breeding, they will be ejected. This is the case for several asylum seekers and refugees trying to reach Italy.

Supplement A – Italian detention camps



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